ARS *v* ART and another
[2015] SGHC 78

Case Number : Suit No [AA]

Decision Date : 08 April 2015

Tribunal/Court : High Court

Coram : Quentin Loh J

Counsel Name(s) : Paul Wong Por Luk, Daniel Tay and Tang Jin Sheng (Rodyk & Davidson LLP) for the plaintiff; Dinesh Dhillon, Paul Ong and Cai Chengying (Allen & Gledhill LLP) for the first defendant.

Parties : ARS — ART and another

Contract – Formation

Tort – Inducement of breach of contract

Tort – Conspiracy

Restitution

8 April 2015 Judgment reserved.

Quentin Loh J:

Introduction

1 The gravamen of the plaintiff's claim lies in the alleged involvement of the first defendant in the replacement of the plaintiff as the close-circuit television ("CCTV") supplier for the Integrated Security System ("ISS") in the redevelopment of a specific project.

2 A significant portion of the case revolves around the numerous disputes of fact between the parties. This judgment will be unfortunately lengthy to deal with the numerous factual allegations made by the parties. This is not helped by the fact that these disputes arose from events that took place in 2001–2002 and for various reasons, which I shall come to, the trial in Singapore only came to be held some 12 years later. Given the best of intentions, witnesses' evidence of events that occurred so long ago may not be most reliable. They may have well been coloured by the onset of subsequent events and the disputes that have arisen. To compound matters, unlike other cases where the documentary evidence becomes an important aid to witnesses' recollection and oral evidence, the objective evidence by way of relevant contemporaneous documents is very limited in this case. Another factor that hampered the fact-finding process is that some relevant witnesses were not called to give evidence; perhaps not without some excuse, as there were multiple proceedings in various jurisdictions, and because of conflicting interests.

3 Before I delve into the minutiae, I should state my conclusion at the outset. Having considered the matter and the evidence before me, I find that there is insufficient evidence to support the plaintiff's claims. The plaintiff has failed to discharge its burden of proof and I accordingly dismiss its claims against the first defendant.

Background facts

The parties

4 The plaintiff is [ARS], a corporation incorporated under the laws of Japan. It manufactures a whole range of CCTV products since 1975. [note: 1] [Saul] is the major shareholder, director and the President of the plaintiff. [note: 2] He is the "brains" of the operations of the plaintiff and its related companies, and makes all the major decisions for them. [note: 3]

5 The first defendant is [ART], a corporation incorporated under Swiss law. [note: 4] It is the ultimate holding company of a group of companies (referred to as [Z]) which provides electronic security products and services, fire protection products and services, valves and controls, and other industrial products. [note: 5] [BA] is a business division and major segment of the [Z] group of companies, comprising the subsidiaries owned directly and indirectly by the first defendant (as the ultimate holding company), [note: 6] carrying on the business of designing, manufacturing, installing and servicing of electronic security systems, fire protection, detection and suppression systems, sprinklers and fire extinguishers, among others. [note: 7] To be clear, it is not disputed that [BA] is *not* a legal entity. [note: 8]

6 The second defendant, [ARU], is the Singapore branch of [BB] which is a wholly owned subsidiary of the first defendant. [note: 9] The second defendant owns and operates under the business name of [BC], even though its operations are not confined to the fire and security-related businesses which operate under [BC]. [note: 10] The plaintiff's claims against the second defendant were struck out as they were time-barred under the Limitation Act (Cap 163, 1996 Rev Ed).

Facts leading up to the replacement of the plaintiff as the CCTV supplier for the [Project]

7 The redevelopment of the specific project started in or around late 1999. [note: 11] It encompassed the construction of [xxx] of [xxx], [xxx] and [xxx], which were to be implemented in five separate phases. [note: 12] The disputes comprised in this action are in relation to the first phase of the project (henceforth referred to as "the [Project]"). [XA] and [XB] were the employers and the clients in the [Project]. [note: 13] The main consultant for the [Project] was [XC], which was succeeded by [XD] during the course of the [Project], and the security consultant was [XF]. [note: 14]

8 In or around 2000, [XG] won a tender issued by [XB] for the consulting, design, engineering and project management of security, communication and computerised systems for the initial phase of the [Project]. [note: 15] [XG] is a company incorporated in Israel in 1977 as a consulting and engineering firm in the field of security and communication. [note: 16] At that time, [XG]'s credentials included the design and supervision of the [overseas project] in Israel. [note: 17] The plaintiff's Israeli affiliate, [ARS (Israel)], a company incorporated in Israel, is a CCTV supplier and had actively cooperated with [XG] on many projects for which [XG] was the consultant, including the [overseas project]. [note: 18] [Saul] is also the major shareholder and director of [ARS (Israel)], which is under the charge of his son-in-law, [Abel].

9 [Saul] claims that he learnt about the [Project] from [Michael], the principal of [XG]. [note: 19] What happened next is one of the points of contention between the parties. The plaintiff claims that [ARS (Israel)] entered into discussions with another company, [KA], with a view to collaborate and pursue the ISS package of the [Project] ("the ISS sub-contract"). [note: 20] [KA] is a system integrator/designer, distributor and installer of access control, alarms and integrated systems, CCTV and digital CCTV recording systems in Israel. [note: 21] [KA] had previously worked with [ARS (Israel)] for the supply and installation of security systems in several of the [projects] in Israel, including the [overseas project]. [note: 22] As a result of the discussions with [KA], the plaintiff and [ARS (Israel)] allegedly reached an oral agreement with [KA] to cooperate to pursue the ISS sub-contract ("the [First] Agreement"). [note: 23] The alleged terms of the [First] Agreement are set out below at [16]. The first defendant does not admit the existence of the [First] Agreement. [note: 24]

10 In due course, [XA] issued the Request for Information and Pre-Qualification for Design, Installation, Integration, Commissioning and Management of Integrated Security System for the Redevelopment of the [Project] in Singapore ("the RFI"). [note: 25] The submission date for the RFI was 10 May 2001. [note: 26] The parties who were interested in submitting a tender for the ISS sub-contract had to meet the pre-qualification requirements set out in the RFI, namely:

(a) the tenderer had to be either a Singapore company or an entity (either a foreign company or a joint venture) which included a Singapore company that will provide the support, commissioning and management of the ISS during the defects liability period and the warranty period; [note: 27] and

(b) the tenderer had to have experience and a track record in [projects] of significant value and at least one project involving video transmission and camera control of [xxx] cameras through decentralized system of [xxx] video matrices to [xxx] monitors in [xxx] separate control centres. [note: 28]

11 The parties who were shortlisted at the RFI stage would be nominated as the final bidders for the Request for Proposal ("the RFP"), which was the final and closed stage of the tender for the ISS sub-contract. [note: 29] The successful party at the RFP stage would then be nominated as the sub-contractor. [note: 30]

12 One of the parties interested in the ISS sub-contract was [BD], a company incorporated under the laws of Singapore and in the business of trading, installing and maintaining fire safety devices and apparatuses, among others. [note: 31] The first defendant is the ultimate holding company of [BD]. [note: 32] As alluded to earlier (see [9] above), [KA] had plans to secure the ISS sub-contract. [Saul] introduced [BD] and [KA] to each other, and this eventually resulted in the formation of the joint venture company known as [JVC] on or around 8 May 2001. [note: 33] [KB], which is a part of the same group of companies as [KA] with common offices and directors, was added to the joint venture in order to meet the minimum capital and financial requirements under the RFI which [KA], by itself, would not have met. [note: 34]

13 [JVC] eventually won the bid for the ISS sub-contract on 21 February 2002. [note: 35]

14 The circumstances preceding the formation of [JVC], apart from the introduction by [Saul], are

heavily contested by the parties. The plaintiff's contention, essentially, is that there was an oral agreement between the plaintiff, [ARS (Israel)] and [BD] to the effect that it would only offer the plaintiff's CCTV products if [BD] manages to enter into a joint venture to bid for the ISS sub-contract as a result of [Saul]'s introduction ("the [Second] Agreement"). [note: 36] The alleged terms of the [Second] Agreement is set out below at [17]. The plaintiff asserts that [Saul] introduced [BD] and [KA] to each other after having been assured by [BD] and [KA] that they would abide by the [First] Agreement and [Second] Agreement ("the [Two] Agreements"). [note: 37] The first defendant denies the existence of both agreements.

15 At the RFI and RFP stages, the plaintiff was [JVC]'s proposed CCTV supplier. However, the plaintiff was subsequently replaced by [PT]. [note: 38] The parties dispute the circumstances surrounding the replacement of the plaintiff as the CCTV supplier for the ISS sub-contract. The plaintiff contends that notwithstanding the existence of the [Two] Agreements, the plaintiff was replaced with [PT] on the pretext that the plaintiff's CCTV sub-system did not comply with the RFP specifications and the requirements of [XA]. This is denied by the first defendant. The plaintiff submits that it is the circumstances under which the plaintiff was replaced as the CCTV supplier for the ISS sub-contract and the involvement of the first defendant which gave rise to the claims. The plaintiff's case is that the first defendant was involved in the replacement of the plaintiff through certain key personnel in [BC] who were representatives of the first defendant and/or acted for and on behalf of the first defendant, namely:

(a) [Paul], the managing director of [BC]; [note: 39]

(b) [Amos], the vice president of [BC]; [note: 40] and

(c) [Ben], the director of finance for [BC]. [note: 41]

The alleged terms of the [Two] Agreements

16 According to the plaintiff, the [First] Agreement was concluded between the plaintiff, [ARS (Israel)] and [KA] on the following terms: [note: 42]

(a) [KA] will participate in the tender as an integrator for the ISS sub-contract;

(b) [ARS (Israel)] will provide full support to [KA] in the tender process for the ISS sub-contract;

(c) the plaintiff will supply all the CCTV and the digital recording equipment for the ISS sub-contract which would be shipped directly out of Japan; and

(d) the plaintiff (given its extensive experience in the Singapore market through the operations of its Singapore affiliate, [ARS (Singapore)]) would assist [KA] in setting itself up in Singapore for the tender and if necessary, assist [KA] in finding a suitable local joint venture partner.

17 As for the [Second] Agreement, the plaintiff asserts that it was concluded between the plaintiff, [ARS (Israel)] and [BD] on the following terms: [note: 43]

(a) the plaintiff will introduce to [BD] a suitable joint venture partner to participate in the tender (RFI process) and bid for the ISS sub-contract;

(b) [BD] will accept the prices that [ARS (Israel)] had agreed with the other (intended) joint venture party [*ie*, [KA]] for the plaintiff's CCTV equipment to be supplied for the tender and the ISS sub-contract, if successful; and

(c) [BD] will leave all negotiations on pricing, equipment selection, payment for the plaintiff's CCTV equipment to the other joint venture party [*ie*, [KA]] and [BD] would abide by any agreement reached between the plaintiff, [ARS (Israel)] and the other joint venture party [*ie*, [KA]] on these issues.

18 At this juncture, I pause to note that it was stated in the plaintiff's closing submissions that one of the terms of the [Second] Agreement provides that: [note: 44]

> If the joint venture was successful in its bid for the RFI/RFP, [BD] will offer for the following phases only [Y] CCTV equipment, and will never introduce other non [Y] CCTV product [for the Project].

[Y] is the common name in [ARS], [ARS (Israel)] and [ARS (Singapore)].

19 While this term is based on [Saul]'s Affidavit of Evidence-in-Chief ("AEIC"), [note: 45] it was never pleaded in the Statement of Claim. [note: 46] It is trite law that the court cannot make a finding based on facts which have not been pleaded: *Ong Seow Pheng and others v Lotus Development Corp and another* [1997] 2 SLR(R) 113 at [41]. I will not make any finding or decision based on the term which had not been pleaded. This, of course, would become immaterial if I find that the [Second] Agreement does not exist.

The foreign proceedings preceding Suit No [AA]

20 As a result of the replacement of the plaintiff as the CCTV supplier for the ISS sub-contract, several actions were commenced in a few jurisdictions over a number of years.

21 In June 2003, the plaintiff instituted proceedings against the first defendant in the United States District Court for the Southern District of New York ("US District Court (SDNY)"), where it alleged that the first defendant was liable for interfering with an alleged agreement between [ARS (Israel)] and [KA] and an alleged agreement between [ARS (Israel)] and [JVC]. [note: 47] The Court refused to exercise its jurisdiction over the claim and dismissed the action on 24 January 2005. [note: 48]

22 In August 2003, [ARS (Israel)] commenced proceedings against [BD] and [KA] in the Israeli courts, alleging that they were liable for, among other things, breach of the [Two] Agreements. The Court stayed proceedings in favour of arbitration in Singapore. [ARS (Israel)] claims that it had never signed the agreement containing the arbitration clause. The plaintiff, in the current proceedings, takes the same position. Be that as it may, [ARS (Israel)], on 25 April 2011, commenced arbitration proceedings against [BD] and [KA] in the Singapore International Arbitration Centre ("SIAC"). [note: 49] On 6 September 2012, [ARS (Israel)] tried to go back to the Israeli courts on the basis that [BD] and [KA] had pleaded the defence of limitation in the arbitration proceedings. [note: 50] On [BD]'s application, the District Court of Tel-Aviv-Yaffo struck out [ARS (Israel)]'s claim on the basis of estoppel on 5 June 2014. [note: 51] The first defendant tries to rely on the observations made by the Court in the Israeli proceedings here, but this has been challenged by the plaintiff. I will address this

point below (at [26]–[27]).

23 In October 2006, after the US District Court (SDNY) dismissed the action, the plaintiff brought fresh proceedings against the first defendant in the United States District Court for the District of New Jersey ("US District Court (NJ)"), alleging that the first defendant had, among other things, induced [JVC] and [KA] to breach the [Two] Agreements. [note: 52] The Court dismissed the claims for lack of jurisdiction on 9 April 2008. [note: 53]

24 In November 2008, the plaintiff commenced proceedings against the first defendant in the United States Superior Court of New Jersey, alleging that the first defendant was liable for inducing the breach of the [Two] Agreements. [note: 54] On 3 August 2009, the Court stayed the proceedings on the ground of *forum non conveniens* in favour of the dispute being litigated in Singapore and on the first defendant's undertaking not to raise the defence of limitation before the Singapore courts. [note: 55] As a result, the plaintiff commenced the present action on 1 October 2009.

25 The foreign proceedings are raised by the first defendant for two reasons. First, the first defendant seeks to rely on these proceedings to show the frivolous and vexatious nature of the plaintiff and [ARS (Israel)]. [note: 56] The significance of this argument, however, has not been made apparent by the first defendant. I earlier refused to grant the first defendant's application to strike out the action. I do not think that the first defendant has provided any basis for me to revisit this issue (at least in relation to the merits of the case), and accordingly, I will refrain from doing so. Secondly, the first defendant relies on the differences in the descriptions of the [Two] Agreements in the pleadings filed in these foreign proceedings to support its submission that the [Two] Agreements do not exist. I will deal with this point when I address the issue concerning the existence of the [Two] Agreements ([114]–[130] below).

26 I should also deal with the first defendant's attempt to rely on the observations made by the District Court of Tel-Aviv-Yaffo on 5 June 2014. The first defendant essentially relied on certain paragraphs in the judgment to argue that [ARS (Israel)] allegedly acted in a manner "which constitutes abuse of legal procedure" and also questioned if [ARS (Israel)] had acted in "good faith". [note: 57] The plaintiff contends that this is irrelevant as [ARS (Israel)] is not a party to the present case. [note: 58] The plaintiff submits in the alternative that the first defendant was adducing fresh evidence without leave to do so since the decision of the District Court of Tel-Aviv-Yaffo was released only after the conclusion of the hearing in the present case. [note: 59] In any event, the plaintiff states that [ARS (Israel)] disputes the decision on the basis that [BD] and [KA] had tendered false evidence to the District Court of Tel-Aviv-Yaffo, and [ARS (Israel)] is preparing to appeal against the decision. [note: 60]

27 I do not think that the first defendant should be entitled to rely on the observations made by the District Court of Tel-Aviv-Yaffo. I note that the judgment was not properly adduced or admitted into evidence by the Court. It was merely tendered as part of the first defendant's Supplementary Bundle of Documents after the hearing was over. Moreover, I have doubts on the relevance of the judgment. The judgment does not fall within ss 42–44 of the Evidence Act (Cap 97, 1997 Rev Ed) ("the EA"). Neither has the first defendant shown that the existence of the judgment is a fact in issue or is relevant under s 45 of the EA. I would therefore not take into account the observations of the District Court of Tel-Aviv-Yaffo in deciding the merits of this case.

The plaintiff's claims in Suit No [AA]

28 In the present case, the plaintiff's claims against the first defendant can be summarised as follows:

(a) the first defendant induced and/or procured [KA] and/or [BD] to breach the [First] and [Second] Agreements respectively; [note: 61]

(b) the first defendant conspired with [KA] and/or [BD] to breach the [Two] Agreements with intention of injuring the plaintiff; [note: 62]

(c) the first defendant conspired with [KA] and/or [BD] to maliciously publish false words about the design/business of [Y] by way of three letters dated 4 October 2002, 25 October 2002 and 12 December 2002 with intention of injuring the plaintiff; [note: 63] and

(d) the plaintiff is entitled to a claim in unjust enrichment as the first defendant have been "unjustly enriched" at the expense of the plaintiff by reason of the first defendant's "tortious conduct". [note: 64]

First claim: Inducement of a breach of contract

29 The plaintiff's first claim is that the first defendant had induced or procured [KA] and [BD] to breach the [First] Agreement and [Second] Agreement respectively. To establish its claim, the plaintiff must show, apart from the act of inducement and the breach of the contract, that:

(a) the defendant acted with the requisite knowledge of the existence of the contract; and

(b) the defendant intended to interfere with the performance of the contract.

30 This is the "two-fold requirement" set out by the Court of Appeal in *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 ("*Tribune Investment*") at [17]. As a prerequisite, the plaintiff must also prove the existence of a valid and binding contract that was capable of being breached by the other contracting party at the instigation of a third party (at [22]–[24] of *Tribune Investment*).

Whether the [Two] Agreements had been concluded by the relevant parties?

31 As briefly alluded to earlier (see [9] and [12] above), the plaintiff's claims rest on the existence of the [Two] Agreements, while the first defendant alleges they do not exist. This is a point of significant dispute between the parties and a large part of the parties' submissions has been devoted to this issue.

32 For the reasons set out below, I find that the plaintiff has failed to prove on the balance of probabilities that the [Two] Agreements exist. Given that the plaintiff cannot prove the existence of the [Two] Agreements, he accordingly cannot establish the breach of the [Two] Agreements and it follows that the plaintiff's claim in inducement of a breach of contract must fail.

The plaintiff's case

33 The plaintiff's case, in relation to the [First] Agreement, is that [ARS (Israel)] and [KA] entered into discussions around late 2000 with a view to collaborate for the ISS sub-contract. [note: 65] At these discussions, the plaintiff and [ARS (Israel)] were represented by [Saul] and [Abel] respectively,

and [KA] was represented by [Gabriel] and [Ian]. [note: 66] [Ian] was the Managing Director and General Manager of [KA] at that point in time. [note: 67] According to the plaintiff, the discussions concluded with an oral agreement (*ie*, the [First] Agreement) between the plaintiff, [ARS (Israel)] and [KA]. [note: 68]

34 As for the [Second] Agreement, the plaintiff's case is that the first defendant and [BC] came to know about a large [xxx] project in Asia around early April 2001, and [Paul], the Managing Director of [BC] and the director of [BD] at the material time wanted the first defendant, [BC] or one of the first defendant's affiliate companies to be involved in the [Project]. [note: 69] [Paul] sent an email dated 13 April 2001 to the regional managers of [BC] to enquire if any of them were working on a large [project] in Asia. [note: 70] In response, [Jacob], the General Manager of [BD], stated in his email dated 15 April 2001 that [BD] was teaming up with other parties for the RFI stage of the [Project]. [note: 71] The plaintiff asserts that at the end of April 2001, which was less than two weeks before the submission date for the RFI, [BD] had no chance of getting nominated as one of the final bidders for the RFP stage as they had "no or little products to offer, little or no design on hand to submit, and no partner with sufficient experience or expertise in ISS in [xxx] to enter into a joint venture with". [note: 72] Around the same time, which was around late April 2001, [Zachary], sales manager of [BD], contacted [Tobias] of [ARS (Singapore)] to propose a joint venture for the ISS sub-contract. [note: 73] This was the second time, according to the plaintiff, that [Zachary] had approached [ARS (Singapore)]. [note: 74] At around the same time, [Gabriel] informed [Saul] that [KA] was no longer proceeding with their intended joint venture partner in Singapore. [note: 75] At this point in time, [Saul] decided that he would try to pair [BD] with [KA] for the ISS sub-contract. [note: 76]

35 The plaintiff asserts that [Saul], acting on behalf of the plaintiff and [ARS (Israel)], entered into discussions with [BD] and [KA] around late April 2001 with a view of having them enter into a joint venture to bid for the ISS sub-contract. [note: 77] In particular, the plaintiff alleges that during the telephone discussions between [Saul] and [Zachary] on or around 27 and 30 April 2001, [Zachary] agreed on behalf of [BD] to the terms of the alleged [Second] Agreement. [note: 78] The plaintiff adds that [Zachary] was informed of the material terms of the [First] Agreement, and had confirmed that he was authorised by [Jacob] to commit [BD] and to agree to the plaintiff's terms. [note: 79] The plaintiff also alleges that a few days after the discussions between [Saul] and [Zachary], [Saul] told [Jacob] over the telephone about the material terms of the [First] Agreement, and [Jacob] re-confirmed his agreement to the terms of the [Second] Agreement "with full knowledge and understanding" that the plaintiff was assisting [BD] in setting up the joint venture so as to benefit from eventually being able to supply them with the plaintiff's CCTV sub-system for the ISS sub-contract. [note: 80] Thereafter, [Saul] informed [Gabriel] that he had found [KA] a suitable joint venture partner. According to the plaintiff, [Gabriel] agreed to abide by the [First] Agreement if the joint venture was successful. [note: 81] [Gabriel] also agreed to protect the plaintiff's interest when [Saul] told him about the terms of the [Second] Agreement. [note: 82] The plaintiff's case was that [Saul] introduced [BD] to [KA] only after the [First] Agreement and [Second] Agreement had been concluded. As a result of [Saul]'s efforts, [JVC] was formed one or two days before the closing date for the submission of the RFI. [note: 83]

36 Pursuant to the [Two] Agreements, the plaintiff and [ARS (Israel)] provided [JVC] with the CCTV sub-system solution during the RFI/RFP tender stages and supported [JVC] throughout the tender process.

37 On or around October 2001, the plaintiff claims that [ARS (Israel)] and [KA] agreed that the price of the CCTV sub-system to be supplied to [JVC] for the ISS sub-contract will be US$2,692,060.00. [note: 84] This would be in accordance with the [Two] Agreements, that is, [KA] would negotiate with [ARS (Israel)] on pricing, equipment selection and payment for the plaintiff's CCTV, and [BD] would abide by any agreement reached between [KA] and [ARS (Israel)]. [note: 85] The plaintiff explained that the negotiation on the pricing was done by [ARS (Israel)] (instead of the plaintiff) because the parties to the [First] Agreement agreed that [ARS (Israel)] would sell to [KA] the CCTV sub-system and the plaintiff, as the supplier of the CCTV sub-system, would then bill [ARS (Israel)] for it. [note: 86]

38 As noted above, on 21 February 2002, [JVC] was awarded the ISS sub-contract.

39 Around May 2002, [BD] requested for suppliers to reduce their prices. [note: 87] According to the plaintiff, [Ian] and [Saul] negotiated and agreed to a 2.5% special discount for the plaintiff's CCTV sub-system for the ISS sub-contract. [note: 88] This reduced the price to US$2,624,758.50.

40 On or around 13 August 2002, [ARS (Israel)] received a purchase order dated 12 July 2002 from [JVC] through [KA] for the sum of S$4,619,575.84 (based on the discounted price of US$2,624,758.50) ("the Purchase Order"). [note: 89] However, the Purchase Order required [ARS (Israel)] to not only supply (as previously agreed) but also to install, test and commission the CCTV sub-system. [note: 90] Further, the Purchase Order was subject to the approval of the Critical Design Review ("CDR") submission by [XA], in accordance with what the plaintiff alleges to be a "fictitious subcontract agreement" ("the CCTV sub-contract"). [note: 91] The plaintiff disputes the terms of the Purchase Order as they were not in accordance with the [Two] Agreements which the plaintiff says were known to [JVC] through [KA] and [BD]. [note: 92] The plaintiff also asserts that the CCTV sub-contract was fictitious as it was never discussed, made known or signed between the plaintiff, [ARS (Israel)], [KA], [BD] or [JVC]. [note: 93] The plaintiff says that [Saul] complained to [Ian] about the Purchase Order and CCTV sub-contract. [note: 94] As the CDR meeting was scheduled for the next day, they agreed that [Ian] would get [JVC] to eliminate all the unilateral terms raised by [BD] at a later stage and that they will first concentrate on obtaining the necessary approval. [note: 95]

The first defendant's case

41 On the other hand, the first defendant's case is that it was not privy to the alleged discussions between the plaintiff, [ARS (Israel)] and [KA] and it does not accept that the [First] Agreement was concluded by the parties. [note: 96] The first defendant denies that there was any representation or promise by [Zachary] (or any representative of [BD]) to [Saul] and/or any agreement between them that [BD], as part of [JVC], would only offer the plaintiff's CCTV sub-system in the tender and/or the bid for the ISS sub-contract. [note: 97] The first defendant also asserts that [Zachary] had no actual or apparent authority to enter into any such alleged agreements on behalf of [BD], and that [Zachary] had not represented to [Saul] that he was authorised by [Jacob] to commit [BD] to any such agreements. [note: 98]

42 The first defendant accepts that [Saul] introduced [BD] to [KA] for the purpose of tendering for the ISS sub-contract, and that [JVC] was formed shortly before the submission date for the RFI. [note: 99] The first defendant further accepts that a 2.5% discount was *offered* for the plaintiff's

CCTV sub-system in or around May 2002, [note: 100] but denies that it was ever accepted by [JVC].

43 The first defendant claims that the Purchase Order was issued by [BD] in July 2002 prior to [JVC]'s discovery in or around August or September 2002 that the plaintiff's CCTV sub-system did not fully comply with the RFP specifications and/or [XA]'s requirements for the CCTV sub-system. [note: 101] The first defendant asserts that, contrary to the plaintiff's case, [XA] had not approved the plaintiff's CCTV sub-system design at the material time. [note: 102]

My decision: The [Two] Agreements do not exist

44 I will now set out my detailed findings and reasons for my conclusion that on a balance of probabilities, the plaintiff has failed to prove the existence of the [Two] Agreements by considering the following:

(a) the written correspondence;

(b) the oral evidence;

(c) the conduct of the parties;

(d) the inconsistency with the terms of the Joint Venture Agreement;

(e) the inconsistency with the pleadings in the foreign proceedings;

(f) the failure to call certain witnesses; and

(g) the uncertainty in the terms of the [First] Agreement.

45 I start with a discussion on the burden of proof and the guiding principles in order to ascertain the existence of an oral agreement.

(1) Burden of proof

46 The first defendant submits that the burden of proof is on the plaintiff to show that the [Two] Agreements exist. [note: 103] The plaintiff, on the other hand, appears to be suggesting otherwise (citing s 105 of the EA). [note: 104]

47 In my judgment, the burden of proof lies squarely with the plaintiff. It is the plaintiff's case that the first defendant induced [KA] and [BD] to breach the [Two] Agreements. The burden is on the plaintiff to establish, on the balance of probabilities, every element of its claim. This includes the very basis of its claim, *ie*, the existence of the [Two] Agreements. This was the position taken by the Court of Appeal in *Tribune Investment* at [22]–[24] and I have no basis or reason to depart from it.

48 For completeness, I should add that s 105 of the EA does not support the plaintiff's contention that the first defendant has the burden of proving that the [Two] Agreements do not exist. In *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 ("*Rabobank*") at [31], the Court of Appeal accepted that "the *legal* burden of proving a pleaded defence rests on the proponent of the defence, unless the defence is a bare denial of the claim", and went on to explain that the rule is consistent with the general principle underlying ss 103 and 105 of the EA, *viz*, that he who asserts must prove.

Unlike the defendant in *Rabobank* (at [34]), the first defendant does not admit to the existence of the [First] Agreement, [note: 105] and denies having concluded the [Second] Agreement. [note: 106] Further, it is the evidential burden, which is not expressly provided for in the EA, that may shift from one party to the other: *Rabobank* at [30], citing *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [58]–[59]. Accordingly, there is no doubt that the plaintiff is the party who bears the legal burden of proof to show, among other things, that the [Two] Agreements had been validly concluded by the relevant parties.

(2) Guiding principles

49 Having dealt with the burden of proof, I should set out the guiding principles that I adopt in order to ascertain the existence of an oral agreement. The Court of Appeal in *Tribune Investment* stated at [39] that in a situation where no formal written agreement was entered into or signed by the parties, the existence of any contract "must thus be culled from the written correspondence and contemporaneous conduct of the parties at the material time". At [40], the Court of Appeal reiterated that "the test of agreement or of inferring *consensus ad idem* is objective".

50 In ascertaining the existence of an oral agreement, the courts have emphasised the significance of the relevant documentary evidence. In *OCBC Capital Investment Asia Ltd v Wong Hua Choon* [2012] 4 SLR 1206 ("*Wong Hua Choon*") at [41], the Court of Appeal explained that:

> ... the first port of call for any court in determining the existence of an alleged contract and/or its terms would be the relevant *documentary* evidence. Where (as in the present case) the issue is whether or not a binding contract *exists* between the parties, a contemporaneous written record of the evidence is obviously more reliable than a witness's oral testimony given well after the fact, recollecting what has transpired. Such evidence may be coloured by the onset of subsequent events and the very factual dispute between the parties. In this regard, *subjective* statements of witnesses *alone* are, in the nature of things, often unhelpful. Further, where the witnesses themselves are not legally trained, counsel ought not - as the Respondent's counsel sought to do in oral submissions before this court - to forensically parse the words they use as if they were words in a statute. This is not to state that oral testimony should, *ipso facto*, be discounted. On the contrary, *credible* oral testimony can be helpful to the court, especially where (as we shall see below in relation to supporting the Appellant's case) such testimony is given for the purpose of *clarifying the existing documentary evidence*. There is, however, no magic formula in determining the appropriate weight that should be given to witness testimony. Much would depend on the precise factual matrix before the court. However, it bears reiterating that the court would always look first to the most reliable and objective evidence as to whether or not a binding contract was entered into between the parties and such evidence would tend to be *documentary* in nature. [emphasis in original]

51 In the same vein, the Court of Appeal in *Ng Chee Chuan v Ng Ai Tee (administratrix of the estate of Yap Yoon Moi, deceased)* [2009] 2 SLR(R) 918 at [19] opined that:

> As we perceived it, the availability of contemporaneous documents in this case reduced the need to rely on the testimony of the witnesses on the stand as much of the evidence was, in fact, not disputed, *eg*, the amount of payments made, the dates of the payments, the signing of the deeds, *etc*. The crucial question of whether the oral agreement alleged by the respondent existed depended as much, if not more, on the inferences which could reasonably be drawn from the available objective evidence than the apparent credibility of the witnesses *per se*.

52 Notwithstanding that, the Court of Appeal in *Gay Choon Ing v Loh Sze Ti Terence Peter and*

another appeal [2009] 2 SLR(R) 332 ("*Gay Choon Ing*") at [60] acknowledged that there may be cases with little or no documentary evidence:

> ... although the objective test is adopted (and is, indeed, necessary in order to enable the courts to administer legal criteria that are not inherently arbitrary), the *practical reality* is that much will depend on the precise facts before the court concerned. In particular, the court will, wherever possible, rely on relevant documents. Where, however, there is a dearth of objective criteria (such as documents), the court will nevertheless attempt its level best by examining closely (and in particular) the precise factual matrix. [emphasis in original]

53 I distil the following guiding principles on the proper approach for determining the existence of an oral agreement as set out in the cases cited above:

(a) in ascertaining the existence of an oral agreement, the court will consider the relevant documentary evidence (such as written correspondence) and contemporaneous conduct of the parties at the material time;

(b) where possible, the court should look first at the relevant documentary evidence;

(c) the availability of relevant documentary evidence reduces the need to rely solely on the credibility of witnesses in order to ascertain if an oral agreement exists;

(d) oral testimony may be less reliable as it is based on the witness' recollection and it may be affected by subsequent events (such as the dispute between the parties);

(e) credible oral testimony may clarify the existing documentary evidence;

(f) where the witness is not legally trained, the court should not place undue emphasis on the choice of words; and

(g) if there is little or no documentary evidence, the court will nevertheless examine the precise factual matrix to ascertain if there is an oral agreement concluded between the parties.

54 I would add to [53(d)] above that, in the present case, *a fortiori*, where some 12 or more years have passed since the disputed events took place, oral testimony may become even less reliable.

55 Bearing in mind the burden of proof and the principles set out above, I now turn to evaluate the evidence before me.

(3) Written correspondence

56 I first note that the alleged [Two] Agreements were not reduced into writing. Neither was there any written record of the discussions which allegedly led to the conclusion of the [Two] Agreements. The first defendant submits that given the value of the deal and the sophistication of the parties involved, the lack of documentary evidence would suggest that the [Two] Agreements were never actually concluded. [note: 107] While it may have been advisable for parties to reduce their agreement into writing (see *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 at [86]), I do not think that the failure to do so would necessarily be fatal to the plaintiff's case as an oral agreement is still an agreement (save for the excepted categories). The crucial question is then whether the existence of the agreement can be ascertained from the evidence available, including written correspondence and contemporaneous conduct of the parties at the material time.

57 The plaintiff submits that there is email correspondence which incontrovertibly shows that the [Two] Agreements exist. [note: 108] In this respect, the plaintiff relies on the email correspondence between [KA] and [BD] in March 2002. In response to [Jacob]'s proposal in an email to [Ian] dated 12 March 2002 for [JVC] to "seriously consider alternatives" notwithstanding that they have presented the names of the preferred vendors, [note: 109] [Aaron] from [KA] (signing off as "[Ian] and [Aaron]") stated in his email to [Jacob] dated 18 March 2002: [note: 110]

> 1. Please feel free to enter into negotiations and ask for additional quotations from any one [*sic*] who can assist us. It is also important for prices comparison.
>
> 2. Please bear in mind that *we do have obligations for 2 suppliers: Lenel and [Y] as we have obligated ourselves for synchronization*. This was also clarified after questions were sent from the minister.
>
> [emphasis added]

58 The same was repeated by [KA] a few months later, in the email from [Joseph] (on behalf of [Ian]) to [Zachary], dated 3 June 2002: [note: 111]

> ... because vendors such as [Y] and LENEL helped us through the tender stage, we promised to use their equipment.

59 The plaintiff also refers to a chain of email correspondence between [Zachary], [Amos] (Vice President for Fire and Services of [BC] as at June 2002 [note: 112]), and [James] (Procurement Manager for [BD] [note: 113]) which suggests the existence of a "handshake" agreement:

(a) Email from [James] to [Zachary], copied to [Amos] among others, dated 1 April 2002: [note: 114]

> At the moment there is very little visibility on this project, unlike C414. This was evident during the meeting this week, when we were informed by [Y] (Camera Supplier) that "he has shook [*sic*] hands on the order" and that we are not getting any more discount. Please immediately give me a copy of their latest quotation for review. NO commitments should be given to suppliers unless a joint agreement has been made with [BD] & [KA].

(b) Email from [Amos] to [James] and [Zachary], copied to [Jacob] among others, dated 3 April 2002: [note: 115]

> Please confirm that we are not "shacking hands on orders"

(c) Email from [Jacob] to [Amos], [James] and [Zachary], dated 8 April 2002: [note: 116]

> Do not understand what you mean by shacking hands on orders?

(d) Email from [Amos] to [Jacob], [James] and [Zachary], dated 8 April 2002: [note: 117]

> As for the reference to "hand shake on orders" it refers to the point 3 in [P's] original email, regarding the [Y] order. I would like to confirm that the policy of the company will be properly applied, JV or not.

60 At the hearing, [Zachary] agreed during cross-examination that the emails showed that [James] was concerned about [Saul]'s assertion that there was an agreement concluded by handshake between [BD] and the plaintiff. [note: 118] [Zachary] also agreed that he and [Jacob] did not, in those emails, deny that there was an agreement by handshake. [note: 119]

61 The first defendant argues, in relation to the email correspondence between [KA] and [BD] in March 2002 (see [57] above), that it is unclear what [KA] meant when it said that [KA] and [BD] have obligated themselves "for synchronization". [note: 120] Moreover, the first defendant says that this set of email correspondence also does not shed light on the existence of the [Second] Agreement. [note: 121] As for the email correspondence between [James], [Zachary] and [Jacob] (see [59] above), the first defendant points out that they do not show [Zachary] or [Jacob] acknowledging or confirming the existence of an agreement by handshake. [note: 122]

62 I agree with the first defendant that the email correspondence does not incontrovertibly show that the [Two] Agreements exist.

63 It should be noted that [Aaron]'s email to [Jacob] dated 18 March 2002 (see [57] above) was in response to [Jacob]'s email of 12 March 2002. [Jacob] was asking [KA] to "seriously consider alternatives" notwithstanding that they have presented the name of preferred vendors. If the [Two] Agreements were in existence and binding on both [KA] and [BD], it is strange that [Jacob] would ask [KA] to seriously consider "alternatives" as that would have entailed breaching the [Two] Agreements. Further, [Jacob] used the word "preferred" vendor, which does not indicate a firm commitment to use a particular vendor.

64 [Aaron]'s response to [Jacob] was *not* to say, *eg*, "we cannot use alternatives as we are under a contractual obligation", or "we have agreed", or "we are bound to use [Y]'s CCTVs"; instead [Aaron] states that [Jacob] should "feel free to enter into negotiations" and ask for quotations "from anyone who can assist us". [Aaron] then adds that "[i]t is *also* important for prices comparison" [emphasis added], which underlies the independence of the first sentence from the second. This first paragraph is then followed by a second paragraph where [Aaron] states that "we do have obligations for 2 suppliers … as we have obligated ourselves for synchronization." Again, [Aaron] does not use the words like "we have agreed" or "we have an agreement to use" or "we are contractually bound to use". Instead, [Aaron] explains the obligation in the context of having "obligated [themselves] for synchronization" which seems to refer to a technical obligation arising from "synchronization" of [JVC]'s proposal to [XA] with the CCTV equipment and systems of the plaintiff which points to compatibility or well-matched or well-meshed equipment with a proposed system or process. Indeed, the use of the word "synchronization" appears to be consistent with [Zachary]'s evidence that he (as well as [BD]) was under the impression at the start that "the tender [was] fully written based on [the plaintiff's] specifications" which, as it turned out, was not true. [note: 123]

65 I accept that in [Joseph]'s email to [Zachary] dated 3 June 2002 (see [58] above), the statement –"we promised to use their equipment" –may be read as "we agreed" to use their equipment, but it could equally be read to mean a *moral*, not legal, obligation. Further, read in context, the promise arose because these vendors helped them through the tender stage, and that points to a moral obligation.

66 In my view, these emails should be read in their entirety and in context. Having done so, I find that they point to a moral obligation and not a legal obligation to use the plaintiff's equipment.

67 It is also noteworthy that no email, note or letter has been produced which states or refers to an obligation to use the plaintiff's CCTV equipment because of an "agreement" to do so. Also, in none of the emails produced did [BD] acknowledge that the [Two] Agreements exist.

68 Taken together, this runs contrary to plaintiff's suggestion that [KA] acknowledged the existence of the [First] Agreement in the email correspondence to [BD], let alone show incontrovertibly that the [Two] Agreements exist.

(4) Oral evidence

69 I now turn to the oral evidence of the key witnesses in the present case, namely [Saul] and [Zachary]. [Zachary]'s evidence, in a nutshell, is that he did not enter into the [Second] Agreement on behalf of [BD], [note: 124] and he had no knowledge of the [First] Agreement. [note: 125] [Saul], on the other hand, testified to the contrary.

(A) My assessment of [Saul]'s evidence

70 The only witness for the plaintiff was [Saul]. His son-in-law, [note: 126] [Abel] was not called as a witness. [Abel]'s absence was conspicuous given that he was in charge of [ARS (Israel)],was a director of the plaintiff, and had also dealt with [KA] in Israel together with [Saul]. [Saul]'s excuse was that [Abel] did not have much knowledge of what happened in Singapore as he was only "handling the case in Israel" [note: 127] whereas [Saul] was the one handling this case in Singapore. [note: 128] [Tobias] of [ARS (Singapore)] was also not called. [Saul] stated under cross-examination that he closed [ARS (Singapore)] a few months before the hearing but was still in touch with [Tobias]. [note: 129] [Saul] also did not attempt to get any evidence from [KA]'s [Gabriel] and [Ian] as witnesses. [note: 130] [Saul] stated under cross-examination that he knows [KA] well:

(a) notes of evidence, 26 May 2014, page 27, lines 22–25: [note: 131]

> We signed contracts. With [KA], we do not sign contracts; that was a human relation running for many, many years: shake hands, it's good enough.

(b) notes of evidence, 26 May 2014, page 40, lines 2–3: [note: 132]

> [KA] knows me so well. We are friends for many years. We are – work together for many years.

71 [Saul] claims he and [KA] have worked on many projects together over the years, but the evidence on the existence of the alleged [First] Agreement comes only from [Saul]. Having said this, I do recognise that the plaintiff is also in litigation with [KA] in Israel and in arbitration with them in Singapore. Be that as it may, this consideration does not apply to [Abel] and [Tobias] who were involved in the material events and would have been able to give evidence for the plaintiff in these proceedings. It was put to [Saul] that these witnesses were not called because he knew they would give adverse evidence to his case. [Saul] denied this but did not offer any reason other than that the documentary evidence is sufficient to prove its case. [note: 133]

72 It is also convenient at this stage to record my assessment of [Saul]'s oral evidence. He was 76 years of age and quite hard of hearing. A computer screen had to be set before him to enable him to read the questions put to him. I found [Saul] to be a witness who only wanted to tell "his story"

and was unfortunately not willing to concede or acknowledge much else. This was so even when the few contemporaneous documents were read and questions were put to him. I need only to raise one example. At the hearing, an email dated 6 September 2002 from [Jason] of the technology branch of [XA] to [John], who was also from [XA], was read to [Saul]. The content reads: [note: 134]

> Arising from the discussion with Cluster Mgt, Tech Branch and Ops Planning, the CCTV solution by [JVC] is not able to meet our Operations requirement and the Technical Specification. This was surfaced during our review of the PDR Doc. I wish to highlight the following non-compliances (major) which we have identified during our meeting.

73 The email was clearly inconsistent with his AEIC, in which [Saul] claimed it was [JVC] that raised issues to [XA] and "poisoned" [XA] against the plaintiff. [Saul]'s response was first, "[t]hat's what you say" and then "I disagree". [note: 135] He also tended to refuse to answer questions or answered before the question was completed. Even if I gave him appropriate latitude due to his hearing problem, it did not account for the frequent recurrence of such behaviour. I therefore do not place much reliance on his oral evidence.

(B) My assessment of [Zachary]'s evidence

74 The plaintiff says that [Zachary]'s evidence on the discussion that he had with [Saul] which, according to the plaintiff, led to the conclusion of the [Second] Agreement in April 2001 should be treated with caution because he gave conflicting evidence. [note: 136] At one point during the cross-examination, when [Zachary] was asked if he agrees that he had concluded the [Second] Agreement on behalf of [BD], he said that: [note: 137]

> *I---I may have agreed that we will submit [Y]'s proposal if the product is of full compliance and the price is of a correct price level*. But in no position will I be able to commit to him on *all the terms* that is going to be laid down, because I was only a sales manager at that point in time, and I still have bosses on top of me which [*sic*] will make all the final decision. [emphasis added]

75 Later in the day, when asked the same question albeit in a slightly different manner, [Zachary] testified twice that he cannot recall the details of the discussion. [note: 138] The plaintiff's point is that [Zachary] could not possibly disagree with [Saul] on whether there was a valid agreement concluded between the plaintiff and [BD] in April 2001 if he could not recall the details of the discussions. [note: 139]

76 Apart from that, the plaintiff points to three other instances where it submits that [Zachary] had given inconsistent evidence. The first instance is when [Zachary] was asked if he was present at the 28 March 2002 meeting between the plaintiff and [BD] during which [Saul] allegedly informed [James] about the [First] Agreement and [Second] Agreement. [note: 140] This was the meeting which led to the chain of email correspondence within [BD] on the alleged "handshake" agreement (see [59] above). [Zachary]'s evidence during cross-examination was that he does not recall such a meeting, and even if there was one, he was "definitely not there". [note: 141] This was contradicted by the evidence of [Saul] and [James]. Both of them testified that [Zachary] was present at the meeting of 28 March 2002. [note: 142]

77 The second instance occurred when [Zachary] was asked if he was present at the meeting with [XA] during which the alleged non-compliances of the plaintiff's CCTV sub-system were raised. [note: 143] He initially insisted that he was not there, but subsequently conceded that he was present

at the meeting. [note: 144] In particular, the plaintiff cites the following extract from the notes of evidence and asserts that it shows [Zachary] interrupting counsel for the plaintiff, Mr Paul Wong ("Mr Wong"), and saying that he was not present at the meeting with [XA]:

> Q: ... Would you mind going to the third volume of the agreed bundle of documents. Please turn to page 1498. This is an e-mail dated 6 September 2002 in which Mr [Jason] of [XA] writes to Mr [John] of [XA] to say:
>
> "Sir.
>
> Arising from the discussion with [cluster management], [tech branch] and [ops planning], the CCTV solution by [JVC] is not able to meet our Operations requirement and the Technical Specification. This was surfaced during our review on the PDR Doc.
>
> I wish to highlight the following non-compliances (major) which we have identified during our meeting."
>
> Then he goes on to list some -- what he refers to as major non-compliances. Do you see that?
>
> A: Yes.
>
> Q: In fact, what we are seeing from documents -- *I wasn't there at that point in time, Mr [Zachary]* -- but what we are seeing from the documents is that this is the first time non-compliance is being raised on the CCTV issue. Okay?
>
> A: Right.
>
> [emphasis added]

78 I do not agree that it was [Zachary] who said the words "I wasn't there at that point in time". To my mind, it was clearly a part of the question by Mr Wong. It certainly appears so on the face of the record. In particular, I note that the alleged interruption ended with "..., Mr [Zachary]" and in my view, it would be highly unusual for [Zachary] to speak this manner. Accordingly, there is no real basis to allege that [Zachary] had given inconsistent evidence on this point.

79 The third instance is when [Zachary], in his affidavit filed for the Israeli proceedings, stated that the CCTV sub-contract (which gave rise to the allegedly fictitious Purchase Order) mandates that any dispute between the plaintiff and [JVC] must be referred to arbitration. [note: 145] The plaintiff asserts that this is inconsistent with [JVC]'s letter faxed to the plaintiff on 9 October 2002, which stated that the CCTV sub-contract was null and void in light of the cancellation of the Purchase Order for the plaintiff's CCTV sub-system. [note: 146] In fact, the plaintiff's position was that the CCTV sub-contract was never signed. [Zachary] could not explain for the inconsistency when asked during cross-examination. [note: 147] The plaintiff submits that [Zachary] knew, at the time when he signed the affidavit in 2004, that the contents of the affidavit were false. This is because [Zachary] was the one who had asked [KA] to forward the CCTV sub-contract to the plaintiff and it would follow that he must have been the one to receive the signed copy of the CCTV sub-contract. Be that as it may, [Zachary] could not answer when asked during cross-examination if the plaintiff had signed the CCTV sub-contract. [note: 148]

80 In light of the various inconsistencies, the plaintiff submits, therefore, that [Zachary] is not a credible witness and that [Saul]'s evidence in relation to the discussion which allegedly led to the conclusion of the [Second] Agreement should be preferred.

81 The first defendant submits that [Zachary]'s credibility cannot be questioned simply because he cannot recall certain specific events which occurred more than ten years ago. [note: 149] The first defendant further argues that while [Zachary] does not recall the time and exact details of the discussion, he testified that he was certain he did not conclude any agreement with [Saul]. [note: 150] The first defendant also tries to rely on the fact that [Zachary] was not a willing witness and had to be compelled to testify by way of a subpoena to argue that [Zachary]'s evidence is reliable and should be given significant weight. [note: 151]

82 My assessment of [Zachary] is that he is a truthful witness. He was direct in his answers, did not try to evade questions and frankly admitted he could not remember certain facts. I note that [Zachary] joined [BD] around 2000. [note: 152] He left in 2003 [note: 153] and gave evidence in court around 11 years after he left [BD] of events that took place some 12 years earlier. He had no reason to be partial to [BD]. He was subpoenaed as he had declined to give any AEIC for [BD]. Whilst I disagree with the first defendant's submission that this fact alone means greater weight should be accorded to [Zachary]'s evidence, his evidence has to be assessed in all its facets and this is certainly one facet that I take into account. It does show that he did not come forward as a willing supporter of [BD] and the evidence he gave was consistent with someone who was neutral.

83 In my assessment of witnesses' credibility, I would prefer [Zachary]'s evidence over [Saul]'s. There was no suggestion that [Zachary] had the time and opportunity to peruse documents before he gave his evidence. As noted earlier, these events took place some 12 years ago and he had left [BD] since 2003. His answers many a time that he could not remember appeared to me to be truthful and not evasive. I also observed him reading the document when a question was put to him on that document; he certainly did not show any signs of familiarity with its contents nor was he able to rebut any suggestion by counsel by referring to other emails or documents.

84 I do not agree with the plaintiff's submission that [Zachary] cannot deny the existence of the [Second] Agreement since he cannot recall the details of the discussions with [Saul]. In my view, it is quite possible for [Zachary] to say that he does not recall the details of the discussions with [Saul] and at the same time reject the suggestion that the alleged [Second] Agreement was concluded. I accept [Zachary]'s evidence that he was a sales manager in [BD], which was a relatively junior appointment that would not give him the authority to commit his company to a contract. [note: 154] [Zachary] would have had to report to his superior, [Jacob], the general manager of [BD]. So whilst [Zachary] could not remember the details of his discussion with [Saul], it is perfectly consonant with the truth and his assertion that he would not have entered into a commitment or contract with [Saul] because of his limited authority. It was not disputed that this was a large contract for [BD] and although it only involved Phase 1, if all went well, there were four other phases to be separately tendered where [XA] and its consultants would be favourably disposed to awarding them to [BD]. I also accept [Zachary]'s evidence that the discussions were still in their early stages. Given the lack of authority on his part to commit [BD], [Zachary] would not have entered into such an agreement. It is also worth noting that this was not a simple contractor-supplier arrangement. It was a large contract, involving a sensitive project with prospects of further contracts and a relatively sophisticated system was being called for. Further, [BD] was entering into a joint venture with a company that it had not previously dealt with.

85 I need to also comment on the fact that parts of certain documents were read out to

[Zachary], the contents of which were clearly not something he was very familiar with, and questions were then put to him in cross-examination for his agreement with certain propositions. Whilst I hasten to add that Mr Wong was not doing anything improper, and that his cross-examination was fair and within the bounds of propriety, it was evident that when [Zachary] was being read something he had not seen for more than ten years (or that he may not even have read at the material time). He could only answer from what he had just read. Some of the questions, however, posited a fact as their basis extrapolated from the text and concerned something that happened some 12 years ago. To illustrate the point, I reproduce an extract from the notes of evidence below: [note: 155]

Q: … turn to page 1502, you will see that there is an email from Mr [John] [from [XA]] to someone whose e-mail address is [xxx]. We can see from the text of the e-mail, he says:

"Hi [xxx] & [xxx] [from [XF]]

…

During the course of discussion with [JVC] regarding the design of the CCTV sub-system, we realised that the [Y] system does not meet our operational requirements. Over & above this, these are non-compliant to the RFP. Specific instances of this are listed in the table below.

Our view is that whatever system is ultimately chosen must meet our fundamental operational requirements. Since [Y] does not do this, please inform/instruct [JVC] to counter-propose alternative systems for our consideration."

Do you see that?

A: Yes.

Q This is September 2002. The email I showed you earlier about [PT] is July 2002. Okay?

A: Right.

Q: This is why I said to you that even before anything happened, when the POs were being settled, you were already looking at [PT], correct?

A: Right.

…

Q: [XA] are not CCTV experts, right?

A: Their tech branch is pretty technically sound.

Q: But they are definitely not experts in the [Y] equipment, right?

A: No.

Q: It seems to me that although they don't have specific knowledge of the [Y] system, they seem to have – here – obtained information that the [Y] system cannot do certain things right?

A: Right.

The email Mr Wong was referring to was an email from [John] to its security consultant, [XF], in September 2002. It was not apparent whether [Zachary] had seen it at the material time or whether he had read it recently, *ie*, before the trial, to refresh his memory. The latter was unlikely given the way he read the document whilst on the witness stand. The last question contained a number of propositions, taken as fact. First, it presumes that [XA] does not have "specific knowledge" of the plaintiff's CCTV sub-system. That is not really true because [Zachary]'s earlier answer is that their technology branch is "pretty technically sound" and they would have come to possess specific knowledge of the plaintiff's CCTV sub-system as they had to evaluate the same. Secondly, another proposition works itself into the question, *viz*, [XA] seems to have obtained information that the plaintiff's CCTV sub-system cannot do certain things. That too is incorrect. [XA] was evaluating the plaintiff's CCTV sub-system, and it certainly could have acquired that information from their evaluation. It also ignores what was just read out from the email from [John] to [XF]: "[d]uring the course of discussion with [JVC] regarding the design of the CCTV sus-system, *we realised* that …" [emphasis added]. This line of cross-examination cannot found a submission therefore that someone had "poisoned" the ear of [XA] that the plaintiff's CCTV sub-system was inadequate or did not meet the RFP requirements.

86 Having considered the oral evidence of [Zachary], I accept his evidence and make the following findings:

(a) It was [ARS (Singapore)]'s [Tobias], an acquaintance, who first contacted [Zachary] about the [Project] and asked him to consider partnering with someone else, not local, who was interested in the tender. [note: 156]

(b) [Zachary] did not come to any agreement or understanding with [Saul] that the joint venture, if entered into, would only use the plaintiff's CCTV sub-system and no other CCTV sub-systems. [note: 157]

(c) He probably agreed that [BD] will submit the plaintiff's proposal but qualified it by saying: "if the product is of full compliance and the price is of a correct price level", [note: 158] because he would be in no position to have the authority to commit on all the terms that were going to be laid down. He was only a sales manager at that point in time, and was not the one who would make the "final decision". [note: 159] Also, at that point in time when he spoke to [Saul], it was at an early stage, and "it is not possible that [he] will go into such detailed agreement with a vendor at that stage". [note: 160]

(d) To the proposition that the plaintiff was replaced because of its price, there is some truth in that. It is also a fact that [PT] entered the picture at an earlier stage, around April 2002, and despite [PT]'s price being some $1.9m lower than the plaintiff's price, [note: 161] [JVC] continued with the plaintiff's equipment as part of its proposal to [XA].

(e) However, [Zachary] was very clear in his mind that there was a technical non-compliance issue with the plaintiff's CCTV as far as [XA] was concerned. Notably, the [XA]'s "ground people" were not happy with the [Y] solution. [note: 162] Furthermore, when the tender was called, [BD] was under the impression that the tender was fully written on the plaintiff's specification, but after [JVC] secured the contract, when [BD] was working with [XA]'s "ground people", that assumption turned out to be untrue because a lot of the specifications "has been changed" and it

was not a "[Y] solution". [note: 163]

(f) [Saul]'s evidence that at the last meeting, [XA] was very impressed by his cameras, which they thought were state-of-the-art and could pick up things very clearly from afar, and had said "[p]lease, we want your system", is not true. [note: 164]

87 I also do not think that it is fair to doubt [Zachary]'s credibility just because he could not explain why he stated in his affidavit filed in the Israeli proceedings that the arbitration clause in the CCTV sub-contract would apply. While he had testified that he cannot remember if the CCTV sub-contract was signed by the plaintiff, [note: 165] and I appreciate that the plaintiff's position is that it was never signed, it does not follow that [Zachary] must have been lying when he stated in his affidavit that the arbitration clause would apply. It is possible that at that point in time he might have seen a signed copy of the CCTV sub-contract (if there was one) or he might have been told by someone that it was duly signed (even if it was not). His evidence is that he cannot remember now. It is also possible that he might have been advised that the arbitration clause incorporated in the CCTV sub-contract remains effective despite termination (see *Heyman v Darwins Ltd* [1942] AC 356). Hence, I do not think that it can be said that [Zachary] would have in all likelihood been lying in his affidavit filed in the Israeli proceedings.

88 The plaintiff submits, in the alternative, that [Saul] had spoken to [Jacob] about the terms of the [First] Agreement, and that [Jacob] had also agreed to the terms of the [Second] Agreement. [note: 166] The plaintiff says that [Saul]'s evidence on this point had not been challenged, [note: 167] and [Jacob] had not been called as a witness to rebut [Saul]'s evidence. [note: 168] I do not consider that [Saul]'s assertion alone would suffice. As the Court of Appeal in *Wong Hua Choon* observed at [40], the "*subjective* statements of witnesses *alone* are, in the nature of things, often unhelpful" [emphasis in original]. Accordingly, I would hesitate to put much weight on [Saul]'s evidence on its own. As noted above, [Saul] did not call [Abel] or [Tobias]. Whilst counsel for the first defendant, Mr Dhillon Dinesh ("Mr Dhillon"), challenged [Saul] on the absence of these witnesses, Mr Wong did not challenge [Jacob]'s absence from the first defendant's witnesses. As [Gabriel] and [Ian] were also not called as witnesses, I am left with the evidence of [Saul] and [Zachary]. On balance, and bearing in mind that the reliability of his evidence would have suffered from the considerable passage of time, I accept the evidence of [Zachary] on the main points mentioned above.

(4) Conduct of the parties

89 Apart from the written correspondence and the oral evidence of the witnesses, the plaintiff submits that the conduct of the parties also suggests that the [Two] Agreements exist. The plaintiff raises two points: first, the plaintiff assisted [BD] and [KA] in the tender for the ISS sub-contract and became the preferred vendor for the supply of the CCTV sub-system; [note: 169] secondly, [JVC] issued the Purchase Order for the plaintiff's CCTV sub-system without going through the usual procedure (which requires three quotations) and despite there being a cheaper quotation. [note: 170]

90 I have my reservations about using the conduct of parties to prove the existence of a contract. There may be some cases where there is clear conduct which points one way and not to another, but given the complex relationships between human beings, more often than not, conduct can be explained by a number of reasons which does not have only one explanation or there may be varying degrees of weight pointing to one conclusion. For this reason, the Court of Appeal stated in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029, in the context of construction of a contractual term, at [132(d)] that:

> ... Further, where extrinsic evidence in the form of prior negotiations and subsequent conduct is concerned, we find the views expressed in [Gerard McMeel, "Prior Negotiations and Subsequent Conduct - The Next Step Forward for Contractual Interpretation?" (2003) 119 LQR 272] persuasive. For this reason, there should be no absolute or rigid prohibition against evidence of previous negotiations or subsequent conduct, although, in the normal case, such evidence is likely to be inadmissible for non-compliance with the requirements set out at [125] and [128] – [129] above. (We should add that the relevance of subsequent conduct remains a controversial and evolving topic that will require more extensive scrutiny by this court at a more appropriate juncture.) …

91 The plaintiff submits that, since the first defendant did not proffer any explanation for [Saul]'s assisting [JVC], it is inconceivable that the plaintiff would have acted as such without an arrangement in place to protect its interest and it follows that the parties must have concluded the [Two] Agreements. [note: 171]

92 The first defendant's response is that even though [James] was informed that the plaintiff was regarded as the preferred vendor for the CCTV sub-system, it does not necessarily follow that there must have been an oral agreement to that effect. [note: 172] The first defendant argues that there is a fundamental difference between having a *preference* for a certain vendor because its equipment was commercially attractive and technically suitable for the project and having an *obligation* to use the vendor because of a legally binding agreement with the vendor. [note: 173]

93 I agree with the first defendant's submission in this point. There is no doubt of the following facts, and I so find. On its own, [BD] would not qualify to tender for this project. On its own, [KA] (whether it lost its Singapore partner as alleged by [Saul], and on which I make no finding as to its truth since no one from [KA] came to give evidence) would not have qualified to tender for this project (see [10(a)] above). [KA] and [Saul] had co-operated on other projects in Israel before and had a business relationship (see [9] above). [KA] and [Saul] had the requisite track record having taken part in the construction of the [overseas project] in Israel (see [9] above), which was visited by [XA]. It is not denied that the [JVC] came to be set up because of [Saul]'s introduction. [note: 174] Neither does the first defendant appear to be contesting [James]'s evidence that the plaintiff was selected by [JVC] at the pre-tender stage as the "most commercially attractive" vendor with the "most technically suitable" solution for the CCTV sub-system. [note: 175] This would make sense because [Saul]'s track record of having been a vendor of the CCTV system for the [overseas project] would only add to its attractiveness to [XA] when [XA] evaluated the tenders. Further, [XA] had an Israeli consultant, [Michael], who was acquainted with [Saul] and [KA] (see [8]–[9] above). The introduction of [BD] and [KA] to each other and the setting up of the [JVC] was rushed because the looming deadline for the RFI was on 10 May 2001 (see [10] above) and it was only on 8 May 2001 that [Jacob] emailed [Amos], referring to a meeting with "[Gabriel] and [Ian]" and recommending the signing of the Memorandum of Understanding without delay.

94 It is also a fact that [Saul] was not in a position, on his own, to supply the plaintiff's CCTV sub-system to [XA] as this came as a part of the Phase 1 contract. There is some evidence that the whole contract was worth about $28m to $29m and the CCTV sub-contract was around $4.855m with the CCTV component at US$2,692,060.00 (which was subsequently reduced by 2.5% to US$2,624,758.50). From [Saul]'s perspective, putting [KA] and [BD] together would have earned him their gratitude. Putting them together would also serve his purpose as the plaintiff could be their "preferred vendor". I find that this was what happened here. There is a specific meaning of the phrase "preferred vendor" in the context of a construction contract. A "preferred vendor" or supplier

of some particular equipment by a contractor means just that, *ie*, the contractor would prefer to use this supplier's equipment. However, that would invariably be subject to the approval of the employer or its consultants. That cannot be guaranteed. A contractor could therefore never be absolutely certain (except perhaps in a very small percentage of cases where the supplier of such equipment is extremely reputable and is about the only one making reliable equipment or machinery that is used worldwide) that its preferred vendor would be endorsed; committing itself to the preferred vendor or supplier at that stage would not have made any business sense. It is therefore of some significance when the evidence shows the plaintiff being referred to as a "preferred vendor", and it makes sense for [Zachary] to say that, at the early stage, all he could agree to, if at all he could, was to use the plaintiff's CCTV sub-system provided that it "is of full compliance and the price is of a correct price level". [Saul], [KA] and [BD] felt then that putting forward the plaintiff's CCTV sub-system for [JVC]'s tender would carry weight and give comfort to [XA] because of their prior collaboration on what [Saul] claimed was a "model" modern [project] which [XA] had visited through their facilitation. Furthermore, [Michael], another Israeli known to [Saul], was one of the consultants of [XA] who was also involved in the [overseas project] in Israel (see [8] above). That assumption must have worked in part because the tender was awarded to [JVC] in February 2002. I therefore do not accept that the plaintiff would not have acted as it did but for the existence of the [Two] Agreements.

95 The plaintiff also submits that the fact that [JVC] issued the Purchase Order for the plaintiff's CCTV sub-system without going through the usual procedure (which requires three quotations) and notwithstanding that there was a cheaper quotation clearly supports its contention that the [Two] Agreements exist. [note: 176] At the hearing, [Zachary] accepted that the other quotation for the CCTV sub-system was $1.9m cheaper than the plaintiff, [note: 177] and going with the plaintiff's CCTV sub-system would have reduced the first defendant's profit margin by at least 5%. The plaintiff argues that the first defendant decided to go with the plaintiff's CCTV sub-system despite the lower profit margin because of the [Two] Agreements.

96 This submission fails to recognise that there may be other reasons why this was done. [KA] and [BD] may very well have felt gratitude to [Saul], as I so find, and felt a *moral* obligation to try their best to use the plaintiff's CCTV sub-system for the [Project]. As [Zachary] candidly admitted, he was grateful to [Saul] for introducing [KA] to [BD], and that he was under the impression that the plaintiff's CCTV sub-system was in full compliance with the technical requirements (which obviates the need to make changes later). [note: 178] Hence, despite the significantly lower price of [PT]'s CCTV sub-system at an early stage, [JVC] continued to go along with the plaintiff. Also, as noted above, the Israeli connection was a perceived advantage with [XA] and there was the reputational factor; there was no evidence that [PT] had a similar track record of supplying CCTV sub-system for such projects. Accordingly, I disagree with the plaintiff that these two points amounted to conduct that proved the existence of the [Two] Agreements.

97 The first defendant also raises four points in respect of the conduct of the parties which it argues would show that the [Two] Agreements were never concluded. First, the plaintiff and [JVC] were still negotiating on the price even after the [Two] Agreement was allegedly concluded. Secondly, [JVC] issued two requests for quotation even after the March 2002 meeting during which [Saul] was said to have informed [James] about the [Two] Agreements. Thirdly, the plaintiff and [ARS (Israel)] did not appear to have objected to the Purchase Order and the CCTV sub-contract. Fourthly, the plaintiff did not write to [BD] to allege that there was a breach of the alleged [Second] Agreement when [JVC] decided to replace the CCTV supplier with [PT]. I will deal with each point in turn.

98 As to the first point, the first defendant argues this is contrary to the plaintiff's position that

there was an initial agreement for US$2,692,060.00 which was subsequently reduced by 2.5% to US$2,624,758.50 (see [39] above). The first defendant highlights the fact that [ARS (Israel)], in its letters to [KA] dated 20 May 2002 and 2 June 2002, [note: 179] consistently used the term "offer" to refer to the initial quotation dated 18 October 2001 sent by [ARS (Israel)] to [KA] and the subsequent discounted price. [note: 180] According to the first defendant, this would have led a reasonable person in the place of the promisee (*ie*, [JVC]) to think that it was a mere offer. The first defendant also claims that the plaintiff was cognizant of the fact that there was no binding agreement until a purchase order was issued by [JVC]. [note: 181] The first defendant argues that this was why [Saul] had to demand for the Purchase Order to be issued immediately to [ARS (Israel)] in early August 2002. [note: 182]

99 However, I do not agree that this shows that the [Two] Agreements do not exist. The terms of the [Two] Agreements, as alleged by the plaintiff, do not require [JVC] to agree with the price of the plaintiff's CCTV equipment. Instead, the [Second] Agreement provides that [BD] would leave the negotiations on the pricing, among other things, to [KA] and accept the prices agreed between the plaintiff and [KA]. [note: 183] Hence, the fact that [JVC] never agreed on the price for the plaintiff's CCTV equipment would not necessarily militate against a finding that the [Two] Agreements exist. In fact, the conduct of the plaintiff in negotiating with [KA] solely rather than [JVC] or [BD] would appear to be consistent with the alleged terms of the [Two] Agreements.

100 As to the second point, [Saul]'s evidence was that he informed [James] about the [Two] Agreements during their meeting in March 2002. [note: 184] Even then, [James] still issued the two requests for quotation dated 12 and 19 April 2002. [note: 185] [Saul]'s evidence was that he ignored them as it was in breach of the [Second] Agreement. [note: 186] The first defendant submits that the conduct of [James] shows that [BD] did not see itself as having reached an agreement *on price* with the plaintiff. [note: 187] The inference to be drawn, according to the first defendant, is that the [Second] Agreement does not exist. For the same reason above, I do not agree. Another explanation, which is equally plausible, is that [James] is acting in breach of the [Second] Agreement.

101 As to the third point, the first defendant submits that the plaintiff and [ARS (Israel)] did not appear to have objected to the Purchase Order and the CCTV sub-contract despite the serious allegations raised by the plaintiff at the trial (see [40] above). [note: 188] The first defendant highlights that the plaintiff did not produce any documentary evidence to show that [Ian] told [Saul] to disregard the Purchase Order as he would get [JVC] to eliminate all the terms raised by [BD] unilaterally. [note: 189] Further, the first defendant claims that the contemporaneous documents show that the issuance of the Purchase Order was not a unilateral act on the part of [BD], and [KA] actually agreed to it: [note: 190]

(a) Email from [James] to [Zachary], dated 11 July 2002: [note: 191]

> 1) Excluding the Order to ITS, all order should be subject [to [Z]'s] Sub-contract Terms & Conditions. I've explained to Amnon, and will state this on the PO cover & attach a blank copy for him to take back to Israel.

(b) Email from [Zachary] to [James] and others, dated 11 July 2002: [note: 192]

> Amnon told me about the sub-contract T&C that you've mentioned to him and he is

agreeable to this arrangement in item 1.

102 The first defendant submits that these emails reveal that [Gabriel], who was working for [KA], agreed that the Purchase Order should be issued with the CCTV sub-contract.

103 The first defendant further asserts that the chain of correspondence between [BD], [KA], [ARS (Israel)] and the plaintiff would show that the plaintiff believed that the Purchase Order and CCTV sub-contract were "valid and existing": [note: 193]

(a) Email from [Zachary] to [Joseph], dated 12 August 2002, with subject "Sub-Contract Agreement for [Y]": [note: 194]

> Please insert the Schedule of Unit Rates from [Y] as Appendix 1.0 and the detail[ed] scope of work as Appendix 2.0. With these, you may send it to [Y] for review. If [Y] do not have problems with these, we will then send them a signed copy.

(b) Email from [Joseph] to [Zachary], dated 12 August 2002: [note: 195]

> [Ian] pointed out that [Y] will have to supply only equipment and not work like [xxx], so he wonders if it is necessary to send [Y] the sub contract agreement.
>
> Please advise.

(c) Email from [Zachary] to [Joseph], dated 12 August 2002 was forwarded by [Joseph] to [Abel] on 13 August 2002. [note: 196]

(d) Email from [Abel] to [Saul], dated 13 August 2002: [note: 197]

> Att. Mr [Saul]
>
> Enclosed is the actual order + contract from [KA] + [BD] / We are still waiting for the "terms of payment" and the confirmation on the L/C that [Ian] will provide after his visit to Singapore – some attachments to this contract I will [send] by Fax. In any case nothing is to be [provided] before we all get an O.K on the CDR.

104 The first defendant points out that there was not a single reference to the [First] Agreement, and that [Abel] did not object to the Purchase Order and CCTV sub-contract on the basis that they were inconsistent with the alleged [First] Agreement. [note: 198] Accordingly, the first defendant submits that this set of emails shows that the [Two] Agreements do not exist.

105 In response, the plaintiff argues that, first, the "Amnon" in the email refers to [Robert] of [JVC], who is an Israeli working with [JVC] on the [Project] and is the "main person communicating with the design team in Israel". [note: 199] The plaintiff adds that this is consistent with the fact that [KA] was not copied in the emails and that, according to [Saul]'s evidence, [Gabriel] had no knowledge of the Purchase Order and CCTV sub-contract when [Saul] asked him. [note: 200] Next, the plaintiff submits that the email from [Joseph] to [Zachary] dated 12 August 2002 clearly showed that [KA] did not agree with [BD] that the CCTV sub-contract should be sent to the plaintiff. [note: 201] The plaintiff also explains that it had not written to [JVC] or [BD] to object on the Purchase Order and the CCTV sub-contract because there was a shortage of time. [note: 202] On the other hand,

[Saul] says that he checked with [Gabriel] who said he did not know and directed [Saul] to talk with [Ian] who was also in Singapore for the CDR meeting. [note: 203] As mentioned earlier (see [40] above), [Saul] claims [Ian] told him that it was [BD]'s unilateral act to which [KA] did not agree. Lastly, the plaintiff argues that [Abel] did not object to the Purchase Order and CCTV sub-contract when he forwarded it to [Saul] as the main purpose of the email was simply to inform [Saul] not to begin production of the CCTV equipment. [note: 204]

106 In my view, the conduct of the parties in relation to the issuance of the Purchase Order and the CCTV sub-contract does not support the first defendant's case that the [Two] Agreements do not exist. For clarity, I should add that it also does not show that the [Two] Agreements exist. My reasons are two-fold.

107 I do not agree that the emails between [James] and [Zachary] (see [101] above) indicate that [KA] had agreed with [BD] on the issuance of the Purchase Order and the CCTV sub-contract. In fact, the email from [Joseph] to [Zachary] dated 12 August 2002 (see [103(b)] above) would suggest that [KA] had doubts on whether it was necessary to send the plaintiff the CCTV sub-contract because they were only supplying equipment. It is unclear if [Zachary] responded to [Joseph]. In any event, [Joseph] forwarded the Purchase Order and CCTV sub-contract to [Abel]. It is also unclear if [Joseph] did so on his own accord or with the approval of [Ian]. As it stands, the evidence would appear to be more consistent with [Saul]'s testimony that [Ian] had told him that the issuance of the Purchase Order and the CCTV sub-contract was the unilateral act of [BD].

108 Furthermore, I disagree that the chain of correspondence between [BD], [KA], [ARS (Israel)] and the plaintiff (see [103] above) shows that the plaintiff believed that the Purchase Order and CCTV sub-contract were "valid and existing". I accept that there was no reference to the [First] Agreement, and that [Abel] did not appear to object to the terms of the Purchase Order and CCTV sub-contract on the face of the email. I also note that [Saul] had not written to [JVC] or [BD] to raise his objections on the Purchase Order and CCTV sub-contract. However, it does not follow that the plaintiff must have agreed with the contents of the Purchase Order and CCTV sub-contract (which therefore, implies that the [Two] Agreements do not exist). It may well be that the plaintiff had raised its objections with [KA] directly, and as noted earlier, [Saul]'s evidence (on [Ian]'s response) appears to be corroborated by [Joseph]'s email to [Zachary] dated 12 August 2002. Even though [Abel] did not object to the Purchase Order and CCTV sub-contract when he forwarded it to [Saul], I do not think that much weight should be placed on that. As [Saul] mentioned during the hearing, it was not the job of [Abel] to scrutinise. [note: 205] This was consistent with [Abel]'s email, which appeared to only be informing [Saul] not to commence production until the issues of payment and CDR have been settled. [note: 206] I find the evidence on this point to be equivocal and inconclusive.

109 Fourthly, the first defendant submits that the plaintiff did not write to [BD] to say that there was a breach of the alleged [Second] Agreement when [JVC] decided to replace the CCTV supplier with [PT], and that this suggests that there was no [Second] Agreement. [note: 207] It is not disputed that the plaintiff wrote to [KA] but not to [BD]. [Saul]'s explanation was that he had called [Jacob] and asked him out to talk. [note: 208] According to [Saul], [Jacob] told him that there was nothing he can do and that it was up to his "bosses". [note: 209] The first defendant asserts that [Saul]'s evidence that he had called [Jacob] should not be accepted as it contradicts the email from [Jacob] to [Gabriel] dated 27 November 2002 and the relevant part reads: [note: 210]

> To prove our sincerity, [JVC] did sent [*sic*] the order to [Y] but subject to CDR approval. *You and*

I cancelled the order since their product was rejected by the client. [emphasis added]

110 I do not agree with the first defendant that [Saul]'s evidence necessarily contradicts the email from [Jacob] to [Gabriel]. The apparent inconsistency does not invariably mean that [Saul]'s evidence is flawed and should not be accepted. There are possible explanations that can reconcile [Saul]'s evidence with the email from [Jacob] to [Gabriel]. One possibility is that [Jacob] cancelled the order under the strict instructions of his "bosses". In fact, this appears to be consistent with the plaintiff's case. Another possibility is that [Jacob] was trying to downplay his role and avoid any confrontation with [Saul]. Hence, I do not agree that the email from [Jacob] to [Gabriel] would show that [Saul] did not call [Jacob] over the alleged breach of the [Second] Agreement. Having said that, I should make it clear that, in my view, it is the absence of any form of communication to protest about the alleged breach of the [Two] Agreements that might possibly cast a doubt on the existence of the [Two] Agreements. Hence, the real question should be whether the plaintiff had communicated, directly or otherwise, with [BD] over the alleged breach of the [Second] Agreement. It does not matter whether the protest was done through letter or telephone call. In any event, I do not think that much weight should be placed on the point that the plaintiff had not communicated *directly* with [BD] on the alleged breach of the [Second] Agreement since it is clear from [Saul]'s evidence that he had preferred to communicate with [BD] through [KA]. [note: 211] For avoidance of doubt, however, I should add that the fact that [Saul] might have communicated, directly or indirectly, with [KA] or [BD] over the alleged breach of the [Second] Agreement is inconclusive – [Saul] could well have done the same even if the [Second] Agreement does *not* actually exist.

111 Accordingly, I do not agree with both the plaintiff and the first defendant that the conduct of the parties is clear evidence that the [Two] Agreements exist or do not exist.

(5) Inconsistency with terms of the Joint Venture Agreement

112 The first defendant submits that the terms of the Joint Venture Agreement ("JVA") for [JVC] puts in doubt the existence of the [Two] Agreements. Under the JVA, the power to approve sub-contracts and supply contracts lies with the management committee of [JVC]. [note: 212] Put differently, [KA] or [BD] could not unilaterally agree on the price with a supplier and bind [JVC] to such an agreement. The first defendant argues that this casts a doubt on the existence of the [Second] Agreement, which states that [BD] agree to be bound by the price agreed upon by [KA], the plaintiff and [ARS (Israel)] (see [17] above).

113 I accept that there appears to be an inconsistency between the alleged terms of the [Two] Agreements and the JVA. Be that as it may, I do not agree that the inconsistency necessarily means that the [Two] Agreements do not exist. To suggest that the [Two] Agreements do not exist because the first defendant would not have entered into the JVA with terms that are inconsistent with the [Two] Agreements presupposes that [KA] and [BD] would always act in accordance with their prior legal obligations, if any. The first defendant cannot rule out the possibility that [KA] and [BD] might, deliberately or otherwise, enter into the JVA with terms that are inconsistent with the [Two] Agreements. What little it does show (and I accept that it does, since none of the [KA]'s officers gave evidence) is that, as between the plaintiff and the first defendant, it tips the scale ever so slightly against the plaintiff's assertion that the [First] Agreement exists. This tipping of the scale also ties in with the position taken by [KA] in the SIAC arbitration and the 2012 proceedings before the Israeli courts that the [First] Agreement does not exist. [note: 213] In particular, I note that [KA] averred in the SIAC arbitration that: [note: 214]

1.3 The 1st Respondent denies all the Claimant's allegations with regard to the existence of the

alleged "[First] [A]greement".

1.4 The 1st Respondent['s] position is that the alleged "[First] [A]greement" was never made and is completely fictitious.

(6) Inconsistency with pleadings in foreign proceedings

114 The first defendant submits that the parties and terms of the [Two] Agreements, as pleaded in this case, are described and/or pleaded differently in the foreign proceedings commenced by the plaintiff and [ARS (Israel)], and this inconsistency casts doubt on the existence of the [Two] Agreements.

115 In the 2003 proceedings in Israel, commenced by [ARS (Israel)] against [BD] and [KA] (see [22] above), the [First] Agreement was described as: [note: 215]

> Accordingly, the parties concluded that [KA] would bid for the tender as installer of low-voltage security systems and that in connection with the CCTV, the Plaintiff would serve as the supplier of the equipment. It was further agreed that the Plaintiff would also be able to offer its products to the other potential bidders in the tender, however, at higher prices than those offered to [KA], in order to give priority to the joint proposal.

116 As the first defendant submits, this is different from the terms of the [First] Agreement as pleaded in the Statement of Claim and described in [Saul]'s AEIC in the present case (see [16] above). [note: 216] The term that "the Plaintiff would also be able to offer its products to the other potential bidders in the tender ..." was neither pleaded nor included in [Saul]'s AEIC. Furthermore, the Statement of Claim filed by [ARS (Israel)] did not name the plaintiff as a party to the [First] Agreement. [note: 217] This is contrary to the plaintiff's position in the present case, where the plaintiff and [ARS (Israel)] are *both* purported to be parties to the [First] Agreement. It bears noting that the plaintiff and [ARS (Israel)] are different corporate entities incorporated in different countries (see [4] and [8] above).

117 Next, in the 2012 proceedings in Israel, which was commenced by [ARS (Israel)] against [BD] and [KA], the [First] Agreement was described as: [note: 218]

> In the case in question, the parties acted in the abovementioned manner and as will be extensively described below. The respondents agreed with the petitioner on the prices to be included in the tender, and even agreed that if they won the tender they would purchase its products at the tender prices, and more specifically, at the prices they agreed upon with the petitioner, which included a discount on the agreed upon tender rates.

118 Notably, the description of the [First] Agreement in the 2012 proceedings in Israel is also different from the [First] Agreement as pleaded in the present case and stated in [Saul]'s AEIC (see [16] above). The first defendant further highlights that, like the 2003 proceedings, the Statement of Claim filed by [ARS (Israel)] in the Israeli courts in 2012 did not name the plaintiff as a party to the [First] Agreement. [note: 219] As mentioned earlier, this is inconsistent with the plaintiff's position in the present case.

119 In the 2003 proceedings before the US District Court (SDNY) commenced by the plaintiff against the first defendant, the [Two] Agreements were described as: [note: 220]

> At all relevant times, Plaintiff's sister company, [ARS (Israel)], an Israeli corporation [xxx], had an agreement with [KA], as well as an agreement with [JVC], to perform services for the new [Project]. Specifically, [ARS (Israel)] agreed to supply certain CCTV cameras and related equipment purchased from [the plaintiff], and [JVC] was obligated to purchase such cameras and equipment from [ARS (Israel)] for use in the installation of a security system for the new [Project].

120 As with the 2003 and 2012 proceedings before the Israeli courts, the Statement of Claim filed by the plaintiff in the US District Court (SDNY) in 2003 did not name the plaintiff as a party to the [First] Agreement. The plaintiff also alleged in the 2003 proceedings before the US District Court (SDNY) that the alleged [Second] Agreement was concluded between [ARS (Israel)] and [JVC] (instead of [BD]). [note: 221] Both of these are inconsistent with the plaintiff's position in the present case (see [16]–[17] above). It is also pertinent to note that the plaintiff's case before the US District Court (SDNY) in 2003 was that the first defendant, through [BD], induced [JVC] to breach its agreement with [ARS (Israel)]. [note: 222] This is starkly different from the plaintiff's position in the present case, which is that the first defendant induced [BD] to breach the [Second] Agreement. [note: 223]

121 At the hearing, [Saul] accepted that the description of the [Two] Agreements in the present case is different from the description in the 2003 proceedings before the US District Court (SDNY). [note: 224] His explanation was that his lawyers for the proceedings before the US District Court (SDNY) might have made a mistake. [note: 225] Nonetheless, as the first defendant highlights, the same "mistake" was made in the 2006 proceedings before the US District Court (NJ). As noted above, the Complaint filed in the proceedings before the US District Court (NJ) also alleged that the [Second] Agreement was concluded between the [ARS (Israel)] and [JVC] (instead of [BD]). [note: 226]

122 The first defendant submits that in light of the inconsistencies between the pleadings in the present case and the foreign proceedings, the proper inference to be drawn is that the [Two] Agreements do not exist. [note: 227]

123 There are two limbs to the plaintiff's response. First, the plaintiff submits that the inconsistencies in the pleadings filed in the foreign proceedings carry little probative value as they have not been tested at trial and the pleadings in the foreign proceedings could have been amended if the proceedings had went on further. [note: 228] Furthermore, [Saul] had explained that the pleadings in the proceedings before the US District Court (SDNY) were wrong. [note: 229] Secondly, the plaintiff argues that the first defendant should not be entitled to rely on the evidence that was never put to [Saul] during the trial. The plaintiff highlights that [Saul] had only been cross-examined during the trial on the inconsistencies on the parties to the [Two] Agreements, [note: 230] and that he had not been cross-examined on the pleadings filed in the US District Court (NJ). [note: 231] The plaintiff submits that, pursuant to the rule in *Browne v Dunn* (1893) 6 R 67 ("*Browne v Dunn*"), the first defendant is not entitled to submit on the nature of the [Second] Agreements or rely on the pleadings filed in the US District Court (NJ). [note: 232]

124 I do not agree with the first limb in the plaintiff's response. Even though the pleadings filed in the foreign proceedings have not been tested at trial and could have been amended if the proceedings had continued, I do not see how these would change the fact that the plaintiff and [ARS (Israel)] had pleaded something quite inconsistent with the plaintiff's position in the present case. This is a basic or fundamental fact on which the plaintiff's causes of action are built. As noted earlier

(see [115]–[120] above), the inconsistencies relate to the parties and the material terms of the [Two] Agreements. These are not inconsequential facts that one could have inadvertently mixed up or forgotten. I appreciate that [Saul] tried to explain that it was a mistake made by his lawyers in the United States proceedings (see [121] above). However, this explanation does not really hold water as the inconsistencies appear in most, if not all, of the foreign proceedings. In addition, there does not appear to be any indication that the inconsistencies were genuine mistakes. For instance, there were no attempts to amend the pleadings to rectify the alleged mistakes. To my mind, these inconsistencies cast a grave doubt on the existence of the [Two] Agreements. I cannot agree with the plaintiff that the inconsistencies in the pleadings filed in the foreign proceedings should carry little probative value.

125 This leads me to the second limb of the plaintiff's response, which is that the first defendant cannot submit on the nature of the [Second] Agreements or rely on the pleadings filed in the US District Court (NJ) as it violates the rule in *Browne v Dunn*. Again, I am unable to agree with the plaintiff.

126 The rule in *Browne v Dunn* is most often explained as "any matter upon which it is proposed to contradict the evidence-in-chief given by a witness must generally be put to him so that he may have an opportunity to explain the contradiction": *Ong Jane Rebecca v Lim Lie Hoa and others* [2005] SGCA 4 ("*Ong Jane Rebecca*") at [49]. In *Hong Leong Singapore Finance Ltd v United Overseas Bank Ltd* [2007] 1 SLR(R) 292 ("*Hong Leong*"), Sundaresh Menon JC (as he then was) observed at [42] that:

> … *Browne v Dunn* is a case of some vintage and it lays down a rule of fairness. The effect of that rule is that *where a submission is going to be made about a witness or the evidence given by the witness which is of such a nature and of such importance that it ought fairly to have been put to the witness to give him the opportunity to meet that submission, to counter it or to explain himself, then if it has not been so put, the party concerned will not be allowed to make that submission*. It is not a rigid, technical rule. Nor is it necessarily satisfied by a formulaic recitation of a party's case to a witness, with an invitation merely to agree or disagree. In *Chan Emily v Kang Hock Chai Joachim* [2005] 2 SLR(R) 236 at [15], Choo Han Teck J noted that the rule which is derived from a case more than a century old must be applied with due regard to the realities of modern litigation and in evaluating any given objection, consideration should be given to the totality of the evidence in the case. I think that is correct. In *Lo Sook Ling Adela v Au Mei Yin Christina* [2002] 1 SLR(R) 326 the Court of Appeal noted (at [40]) that the rule is not rigid and *does not require every point to be put to the witness but this would generally be required where the submission was "at the very heart of the matter".* This was approved by the Court of Appeal in *Ong Jane Rebecca v Lim Lie Hoa* [2005] SGCA 4 at [49]-[50]. [emphasis added]

127 In *Chan Emily v Kang Hock Chai Joachim* [2005] 2 SLR(R) 236, which was cited with approval in *Hong Leong*, Choo Han Teck J noted (at [15]) that:

> … *Browne v Dunn* is a very old case, decided during a time when the evidence of the opposing parties was not disclosed to each other. The exchange of affidavits of evidence-in-chief in the modern civil trial ameliorates the mischief described by Lord Herschell LC in *Browne v Dunn*, at 70. *That case may still be relevant where a litigant wishes to rely on a hitherto undisclosed fact that is crucial and might on its own swing the favour of the court one way or the other*. ... [emphasis added]

128 I agree with the observation of Menon JC in *Hong Leong* (at [42]) that the rule in *Browne v Dunn* is ultimately one of fairness. That rule does not require every point to be put to the witness but

where the submission was "at the very heart of the matter" (see *Ong Jane Rebecca* at [49]–[50]; *Hong Leong* at [42]). In my view, it would not be unfair for the first defendant to submit that the proper inference to be drawn from the inconsistencies between the pleadings in the foreign proceedings and the plaintiff's position in the present case is that the [Two] Agreements do not exist. The contents of the pleadings in the foreign proceedings, and hence, the inconsistencies with the plaintiff's position in the present case, are known to the plaintiff. It is undisputed that [Saul] is the major shareholder and director in both the plaintiff and [ARS (Israel)]. It is also not the first time that the first defendant had sought to rely on the foreign proceedings in this case; it was prominently raised during the first defendant's application to strike out the action as well as in the opening statement. In other words, it cannot be said that the inconsistencies between the pleadings in the foreign proceedings and the plaintiff's position in the present case came as a surprise to the plaintiff. Moreover, Mr Dhillon had questioned [Saul] on the [First] Agreement, but [Saul] kept wanting to talk about why "this entire thing fell apart, why the damage was done to everybody concerned, including [XA], including everybody, including their own subsidiary [BD] et cetera, why all this happened, because of single instruction by [the first defendant] not to obey the agreement they made with [Y]". [note: 233] Mr Dhillon then put to [Saul] that the alleged [First] Agreement as set out in his AEIC did not exist. [note: 234] [Saul] asked and was specifically referred to the relevant paragraphs in his AEIC which he read to himself; then his answer was deliberate, *viz*, that paras 41 and 42 "are precisely representing what happened". [note: 235] Mr Dhillon finally put to [Saul] that the plaintiff and [ARS (Israel)] changed their allegations, *ie*, the differences between the pleadings in the foreign proceedings and the position taken by the plaintiff in the present case, to suit their needs in different legal proceedings: [note: 236]

> Q: I put it to you that [the plaintiff] and [ARS (Israel)] just changed their allegations to suit their needs in different legal proceedings. Do you agree or disagree?
>
> A: I completely disagree, of course.

129 This question was put to [Saul] after Mr Dhillon had questioned him on some of the inconsistencies in the foreign proceedings. [note: 237] Taken together, I do not see how the plaintiff could allege that it was taken by surprise by either the fact that the inconsistencies exist or the submission made by the first defendant in respect of the inconsistencies. [Saul] could have offered his explanation (if any) as he did for the pleadings in the proceedings before the US District Court (SDNY), but he did not do so.

130 In my view, the inconsistencies in the parties and the material terms in the different proceedings commenced by the plaintiff and/or [ARS (Israel)] strongly suggests that the [Two] Agreements do not exist either in the manner pleaded in the Statement of Claim or at all. [Saul] is the major shareholder and director in both the plaintiff and [ARS (Israel)] (see [4] and [8] above) and would, in all likelihood, have to read and approve the contents of the pleadings before they can be filed. Apart from the unlikely situation in which the lawyers representing the plaintiff and/or [ARS (Israel)] in the foreign proceedings made mistakes in the pleadings (for which I have expressed my doubts earlier at [124]), I am of the view that the plaintiff and/or [ARS (Israel)] must have agreed to (or at least approved) the manner in which their cases were pleaded in the foreign proceedings. This, in turn, casts a serious doubt on the existence of the [Two] Agreements given the shifting positions.

(7) Adverse inference for failure to call certain witnesses

131 Both parties argue that an adverse inference should be drawn against the other party for failure to call certain material witnesses.

132 The first defendant submits that an adverse inference should be drawn against the plaintiff for failing to call witnesses from [ARS (Israel)], [ARS (Singapore)] and [KA] to prove the existence of the [Two] Agreements. The first defendant submits that the plaintiff's case is that the [First] Agreement was concluded after discussions between individuals such as [Abel], [Gabriel] and [Ian]. [note: 238] As for the [Second] Agreement, the plaintiff's case was that [Zachary] had first contacted [ARS (Singapore)] to propose a joint venture for the ISS sub-contract. [note: 239] Hence, the plaintiff should have called these witnesses to prove its case. Furthermore, the first defendant states that it was possible for the plaintiff to secure the attendance of these individuals. [note: 240] For example, [Abel] is the son-in-law of [Saul], and remains an employee and director of [ARS (Israel)] as well as a director of the plaintiff. [note: 241] Further, [Saul] testified that he closed down [ARS (Singapore)] only a few months ago and remains in contact with [Tobias] even though he is no longer an employee of [ARS (Singapore)]. [note: 242] [Saul] also testified that he has a long working relationship with [KA] since the 1970s, and had been friends with [Gabriel] for "years and years". [note: 243] Therefore, the first defendant suggests that the real reason for the plaintiff's failure to call witnesses from [ARS (Israel)], [ARS (Singapore)] and [KA] was because it knew that their evidence would be adverse to the plaintiff's case. [note: 244] In this regard, the first defendant points to the position taken by [KA] in the foreign proceedings. The first defendant argues that a perusal of the pleadings filed by [KA] in the foreign proceedings would reveal that [KA] unequivocally took the position that the [Two] Agreements do not exist. [note: 245]

133 The plaintiff contends that there is no reason to draw an adverse inference against it given that its primary witness, [Saul], was a material and relevant witness to the proceedings who was involved in the events at the material time. [note: 246] The plaintiff further submits that an adverse inference should be drawn against the first defendant for its failure to call [Jacob] to give evidence. [note: 247] The plaintiff's point, as I understand it, is that since the plaintiff had produced some evidence which suggests the existence of the [First] Agreement and [Zachary]'s evidence on this issue is not credible, [Jacob]'s evidence would be highly crucial to prove the first defendant's case that the [Two] Agreements do not exist. [note: 248]

134 Based on the circumstances before me, I consider that there is sufficient basis to draw an adverse inference against the plaintiff for the failure to call [Abel] and [Tobias] as witnesses in the present case. I would not, however, draw an adverse inference against the first defendant for failing to call [Jacob] as a witness.

135 On the issue of whether an adverse inference should be drawn for the failure to call material witnesses, the Court of Appeal in *Tribune Investment* at [50] observed that:

> ... The regime for drawing adverse inferences is derived from s 116(*g*) of the Evidence Act (Cap 97). Whether or not in each case an adverse inference should be drawn depends on all the evidence adduced and the circumstances of the case. There is no fixed and immutable rule of law for drawing such inference. *Where, as was the case here, the trial judge is of the view that the plaintiffs themselves had not made out their claim to the requisite standard, then no drawing of an adverse inference against the defendants is necessary*. The drawing of an adverse inference, at least in civil cases, should not be used as a mechanism to shore up glaring deficiencies in the opposite party's case, which on its own is unable to meet up to the requisite burden of proof. Rather, the procedure exists in order to render the case of the party against whom the inference is drawn weaker and thus less credible of belief. [emphasis added]

136 Having said that, the Court of Appeal noted at [51] that the trial judge had no doubt that the plaintiffs in *Tribune Investment* had failed to make out even a *prima facie* case and there was no reason for the trial judge to draw an adverse inference against the defendants. The Court of Appeal observed at [51] that, in any event, there was nothing to show that the defendants' primary witness was not a material or relevant witness to the proceedings.

137 The observations of V K Rajah JC (as he then was) in *Cheong Ghim Fah and another v Murugian s/o Rangasamy* [2004] 1 SLR(R) 628 at [39] and [42]–[43] are also helpful:

> 39 I note that s 116(*g*) has received considerable attention in the area of criminal law. Its boundaries in civil matters have not been clearly defined, though there is an overlap. Section 116(*g*) encapsulates a common sense rule. *In the scheme of our adversarial litigation procedures, it is perfectly permissible for a party not to call witnesses or adduce evidence on any material point in issue*. Section 116(*g*) mirrors the common law approach that a party cannot take issue with the raising of inferences about matters that the party has chosen to consciously conceal or hold back. The inference must, it has to be emphasised, be reasonably drawn from the matrix of established facts. *Satisfying the court as to the availability and materiality of the evidence is a necessary prerequisite to any application of s 116(g).* For example, it has often been said if there is a reasonable explanation why a witness, who is out of the jurisdiction, cannot give evidence, the inference may not be raised. Having said that, in today's advanced technological context, replete with video-conferencing facilities and the like, older authorities on this point may need reconsideration.
>
> ...
>
> 42 The English Court of Appeal in *Wisniewski v Central Manchester Health Authority* [1998] 5 PIQR P324 at P340, very helpfully reviewed these and other authorities and distilled the relevant principles to be considered in drawing adverse inferences:
>
> > (1) In certain circumstances a court may be entitled to draw adverse inferences from the *absence or silence of a witness who might be expected to have material evidence to give on an issue* in an action.
> >
> > (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
> >
> > (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
> >
> > (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."
> >
> > [*per* Brooke LJ]
>
> 43 I am of the view that this correctly sums up the principles that ought to apply to absentee witnesses, pursuant to s 116(*g*). Care should be taken, by parties intending to raise such an inference, to "put" across the reasons for a witness's absence in the course of cross-

examination. This is to give the opposing party an opportunity to explain the absence of a witness. Of course, if no witnesses are called or the reason(s) for a witness's absence is undisputed, then the procedure of "putting" the issue does not arise. ...

[emphasis added]

138 In my view, I find that an adverse inference should be drawn against the plaintiff for having failed to call [Abel] and [Tobias] as witnesses. Mr Dhillon suggested to [Saul] that the reason for his failure to call them as witnesses was because he knew that their evidence would be adverse to the plaintiff's case. [Saul] disagreed, but explained that their attendance would have been either unhelpful or unnecessary in light of the documentary evidence. [note: 249] It was not the plaintiff's position, and there was no evidence to suggest, that they were unavailable. As for the materiality of their evidence, I am of the view that the evidence of [Abel], and perhaps to a lesser extent, [Tobias], would have been material to the issue of whether the [Two] Agreements exist. There is limited documentary evidence to show that the [Two] Agreements had been validly concluded. It follows that the evidence of [Abel] and [Tobias], being individuals involved in the discussion leading to the alleged [First] Agreement, would have been crucial to the plaintiff's case that the [Two] Agreements exist. It was the plaintiff's own case that [Abel] was one of the parties present at the discussions which led to the [First] Agreement (see [33] above). It would have been most logical for the plaintiff to call [Abel] to testify as a witness in these proceedings. This was not done. As matters stand, I only had the benefit of the evidence of [Saul] on this contested issue. [Saul] could certainly have arranged for [Abel], his son-in-law, to give evidence. So too in the case of [Tobias] as to the initial approach and discussions between [Tobias] and [Zachary]. When I asked [Saul] why [Tobias] was not called as a witness, [Saul] gave an evasive answer, something he tended to do when he did not have an answer: [note: 250]

Court:	…Is Mr [Tobias] still working for you?
A:	No, we closed the office in Singapore.
Court:	When did you close the office?
A:	A few months ago.
Court:	Are you still in touch with Mr [Tobias]?
A:	Yes.
Court:	Why didn't you call him to be your witness?
A:	There was no -- in the documentation that we have, there was no disagreement about the compliance and non-compliance.

139 I accept that there is some indication (see [113] and [132] above) that [Ian] and [Gabriel], if called as witnesses, are likely to take a position that is adverse to the plaintiff on the issue of whether the [Two] Agreements exist. However, it is not without some plausible reason that the plaintiff decided not to call [Gabriel] and [Ian], given that there are multiple proceedings in various jurisdictions and conflicting interests. In this regard, I have adequately taken into account [KA]'s position in those foreign proceedings (see [113] above), and having done so, I do not think that it would have been fair to draw an adverse inference against the plaintiff for its failure to call [Gabriel] and [Ian] as witnesses. However the plaintiff runs its case without their evidence on its side of the balance.

140 Accordingly, I will only draw an adverse inference against the plaintiff in relation to the existence of the [Two] Agreements for the failure to call [Abel] and [Tobias] as witnesses.

141 As for the first defendant's failure to call [Jacob] as witness, I am not persuaded that the plaintiff has sufficiently proved that [Jacob], acting on behalf of [BD], had agreed to the terms of the [Second] Agreement. I also note that, unlike the questions put to [Saul] on the absence of these witnesses, the plaintiffs did not do likewise to any witness of the first defendant (see [88] above). It only appeared belatedly in their submissions. Hence, like in *Tribune Investment* at [51], there is no reason to draw an adverse inference against the first defendant for not having called [Jacob] as witness.

(8) Uncertainty in the material terms of the [First] Agreement

142 Finally, the first defendant submits that [Saul]'s oral evidence reveals that the terms of the [First] Agreement (even if it exists) were uncertain and would not be enforceable. [note: 251] I do not think that there is any merit in this argument. The issue is not with the uncertainty of the terms, but with the inconsistency of [Saul]'s evidence and whether the agreement exists.

143 I agree that there is an apparent inconsistency in [Saul]'s evidence on whether the plaintiff had agreed to assist [KA] to find a suitable local joint venture partner. [note: 252] At the hearing, [Saul] testified that it was *not* a term of the [First] Agreement that the plaintiff would assist [KA] to find a suitable local joint venture partner. [note: 253] This contradicts the plaintiff's own pleaded case on the alleged terms of the [First] Agreement (see [16(d)] above). [Saul]'s explanation was that what he wrote in his affidavit was "not accurate". [note: 254] However, [Saul]'s evidence appears to change later, when it was put to him that the [First] Agreement "as defined in [his] affidavit" does not exist. [note: 255] In response, [Saul] insisted that the [First] Agreement included *all* the terms as listed in his affidavit. [note: 256]

144 At this juncture, I recall that the plaintiff, in its closing submissions, sought to argue that the [Second] Agreement included a term that was not pleaded in the Statement of Claim (see [18]–[19] above).

145 The fact that the plaintiff appears to be unsure of the material terms of the [Two] Agreements in the present case strongly suggests that the [Two] Agreements do not exist either in the manner pleaded in the Statement of Claim or at all.

(9) Summary

146 In light of the findings of fact made above, the main conclusions can be summarised as follows:

(a) the email correspondence between [KA] and [BD] in March 2002 does not show that the [Two] Agreements exist;

(b) the oral evidence of [Saul], which is contradicted by the oral evidence of [Zachary], does not show that the [Two] Agreements exist;

(c) the conduct of the parties raised by the plaintiff and the first defendant does not show that the [Two] Agreements exist;

(d) the fact that the terms of the JVA are inconsistent with the [Two] Agreements does not

show whether the [Two] Agreements exist or not;

(e) the fact that the plaintiff and [ARS (Israel)] described and/or pleaded the parties and material terms of the [Two] Agreements in a manner inconsistent with the position taken in the present proceedings strongly suggests that the [Two] Agreements, as pleaded by the plaintiff, do not exist;

(f) the plaintiff's failure to call [Abel] and [Tobias] as witnesses warrants an adverse inference against the plaintiff in relation to the existence of the [Two] Agreements; and

(g) the fact that the plaintiff is unsure of the terms of the [Two] Agreements in the present case strongly suggests that the [Two] Agreements, as pleaded by the plaintiff, do not exist.

147 After considering the evidence as a whole, I conclude that the plaintiff failed to prove, on the balance of probabilities, that the [Two] Agreements exist. It follows that the plaintiff's claim in the inducement of the breach of the [Two] Agreements must fail.

Whether it is a term of the [Two] Agreements that the plaintiff's CCTV equipment must comply with the RFP specifications and the requirements of [XA]?

148 In the event that I am wrong that the [Two] Agreements do not exist, I should also consider if the [Two] Agreements had been breached. To do so, I must first examine if it is a term of the [Two] Agreements that the plaintiff's CCTV equipment must comply with the RFP specifications and the requirements of [XA].

149 At the onset, I should highlight that the [Two] Agreements, as pleaded by the plaintiff, did not include such a term. However, there is clear indication that the [Two] Agreements, if they exist, would include a term that the plaintiff's CCTV equipment would only be supplied for the ISS sub-contract if it complied with the RFP specifications and the requirements of [XA]. In this regard, [Saul]'s evidence during cross-examination is pertinent: [note: 257]

Q: I put it to you that even if there was an agreement to use [the plaintiff's] equipment, it would have been on the basis that the equipment must comply with the request for proposal and the requirements of [XA]; do you agree or disagree?

A: [...] There is no question that any equipment that has to go to the [Project] has to be approved by [XA]. This -- this question is not even a question. It's obviously clear.

Q: So you agree?

A: Without a question.

150 Moreover, [Zachary]'s evidence is consistent with [Saul] on this point: [note: 258]

I---I may have agreed that we will submit [Y]'s proposal if the product is of full compliance and the price is of a correct price level. But in no position will I be able to commit to him on *all the terms* that is going to be laid down, because I was only a sales manager at that point in time, and I still have bosses on top of me who will make all the final decision. [emphasis added]

151 Accordingly, I find that it is a term of the [Two] Agreements that the plaintiff's CCTV equipment must comply with the RFP specifications and the requirements of [XA]. I would only add

that to say otherwise would be completely at odds with building and construction law and practice. This finding is, as I have mentioned earlier, premised upon the assumption that the [Two] Agreements exist. The question that follows, therefore, is whether the term has been met such that [JVC] was obliged to use the plaintiff's CCTV sub-system.

Whether the plaintiff's CCTV equipment was in compliance with the RFP specifications and the requirements of [XA]?

152 Like the other factual disputes discussed earlier, the parties do not agree on whether the plaintiff's CCTV equipment complied with the RFP specifications and the requirements of [XA]. I should reiterate that the burden of proof lies with the plaintiff (see [47] above), and if the plaintiff cannot show on the balance of probabilities that the CCTV equipment was in compliance with the RFP specifications and the requirements of [XA], then its claim fails.

153 In my view, the plaintiff failed to establish on the balance of probabilities that its CCTV sub-system fully compiled with the RFP specifications and the requirements of [XA]. As a result, there can be no breach of the [Two] Agreements, and consequently, the plaintiff's claim must also fail on this ground.

The plaintiff's case

154 According to the plaintiff, [Saul] travelled to Singapore to attend meetings with [JVC] and [XA] in relation to the CDR from 19 to 21 August 2002 to ensure that all the technical issues relating to the CCTV sub-system were properly and satisfactorily dealt with. [note: 259] The plaintiff claims that by around 20 August 2002, all the technical issues were closed except for the request from [XA] for a backup power supply to the matrix. [note: 260] Later, at a meeting in Israel between [ARS (Israel)] and [KA], [ARS (Israel)] proposed a backup power supply solution at US$20,000. [note: 261] However, [KA] agreed that [JVC] would offer this solution to [XA] at no additional costs. [note: 262] The plaintiff takes the position that consequently, all technical issues arising at the CDR meetings in August 2002 in relation to the CCTV sub-system had been resolved and the plaintiff's CCTV equipment was fully compliant with the requirements of [XA]. [note: 263]

155 On or around 5 September 2002, the plaintiff alleges that [JVC] raised new issues in relation to the design of the CCTV sub-system with [Jason]. [note: 264] In essence, these issues relate to the ability of the plaintiff's CCTV sub-system to transmit the same images from [Location 1] onto [xxx] monitors in the [Location 2] simultaneously. [note: 265] The plaintiff rejects the first defendant's claim that the plaintiff's CCTV sub-system was not compliant with the RFP specifications on the basis that the technical issues had been raised and cleared during the August CDR meetings. [note: 266] The plaintiff says that [XA] accepted [JVC]'s allegations because it did not realise that this issue had been discussed and dealt with previously. The plaintiff further claims that [JVC], through [KA], preferred the cheaper option of a disperse matrix system when it was offered both the combined matrix system (which had the ability to transmit [xxx] identical pictures from [Location 1] to [Location 2]) and the disperse matrix system. [note: 267] This was notwithstanding that the plaintiff had, at all material times, the standard products to provide the combined matrix system albeit at a significantly higher price (*ie*, an additional sum of US$400,000 to US$600,000). [note: 268] The plaintiff claims that, in any event, [XA] and [JVC] accepted the plaintiff's proposal during the CDR meeting on or around 20 August 2002 to use a 2+1 connecting cables system, which would allow up to [xxx] images to be transmitted from [Location 1] to [Location 2]. [note: 269]

156 The plaintiff claims that in order to "meet the *further* requirements raised by [XA]", it proposed, among other options, a further addition to the matrix at the sum of US$107,800. [note: 270] The plaintiff says that [Saul] and [Gabriel] agreed on 24 September 2002 over the phone that in view of the urgency to obtain the CDR approval for the CCTV sub-system, the proposed solutions will be submitted for CDR approval without any request for additional payment from [XA]. [note: 271] The plan was to address the issue of additional costs later, and if there was no way to get [XA] to pay more, then the plaintiff and [JVC] would share the costs. [note: 272]

157 The plaintiff claims that [JVC] had written a letter dated 4 October 2002 to [XD] to inform them that the plaintiff was requesting a variation order amounting to US$500,000 to US$600,000 to comply with the tender requirements. [note: 273] The plaintiff claims that [JVC] knew that the contents of the letter were false. [note: 274] On 7 October 2002, [Saul] called [Gabriel] regarding the contents of the letter, and was told by [Gabriel] that he had no knowledge of it. [note: 275] On the same day, [XD] rejected the request for a variation order and instructed [JVC] to re-submit the proposed CCTV solutions, without qualifications, for [XF] to review and approve. [note: 276] [XD] also stated to [JVC] that if it did not wish to submit the plaintiff's CCTV sub-system, it should submit another system that fully complies. [note: 277]

158 According to the plaintiff, [KA] and [BD] submitted the CCTV sub-system design prepared by [PT] to [XA] for CDR approval on 3 October 2002. [note: 278] The plaintiff asserts that this was because [PT] was prepared to offer its CCTV sub-system at a substantially lower price. [note: 279]

159 On 8 October 2002, the plaintiff wrote directly to the Director of [XA] to explain that it was not demanding for an additional sum of US$600,000 to provide the solutions to the outstanding technical issues, and that it would do its best to ensure full compliance with the requirement of [XA]. [note: 280]

160 On 9 October 2002, [JVC] issued an undated letter to the plaintiff stating that they were cancelling the order for the plaintiff's CCTV equipment, and cited the reason that [XA] had rejected the CCTV proposal by the plaintiff. [note: 281] The plaintiff claims that the contents of this letter was false as [BD] and [KA] knew that they had not submitted the plaintiff's revised proposal to [XA] and that the plaintiff had not demanded for additional money to comply with the RFP specifications. [note: 282] [Michael] then wrote an email to [KA] and [BD] on 10 October 2002 with regard to [JVC]'s request for US$500,000 to US$600,000 in order for the CCTV sub-system to comply with the RFP specifications even though it had earlier declared full compliance at the RFI and RFP stages. [note: 283] On the same day, the plaintiff wrote an email to [XA] and [XD] to inform them that it was prepared to provide the proposed solutions to the outstanding technical issues at no additional costs to [XA]. [note: 284] [XA] replied to say that a meeting for all the parties would be organised. [note: 285]

161 On 25 October 2002 and 12 December 2002, [JVC] wrote to [XF] and explained its decision to replace the plaintiff as the supplier for the CCTV equipment, namely because: [note: 286]

(a) the plaintiff's design was not in full compliance with the requirement of [XA]; and

(b) substantial re-designing was required to ensure full compliance.

162 The plaintiff claims that the contents of the two letters to [XF] were false as the plaintiff claims that it had provided the technical solutions to the issues that were raised by [XA] in October 2002 without asking for payment at that time, and had clarified all the technicalities and any outstanding issues with the CCTV sub-system at the meeting arranged by [XA] on 11 November 2002. [note: 287] The plaintiff further asserts that [XA] and [Michael] were both satisfied with the solution offered by the plaintiff during the meeting, and had left it to [JVC] to liaise with the plaintiff regarding the implementation of the CCTV sub-system, given that the plaintiff was a supplier to [JVC]. [note: 288]

163 The plaintiff further claims that [BD] or [JVC] tried to prevent a full and frank discussion between the plaintiff and [XA] with regard to the issue of whether the plaintiff's CCTV sub-system complied with the RFP specifications and the requirements of [XA]. [note: 289]

The first defendant's case

164 Apart from the ability of the plaintiff's CCTV sub-system to transmit the same images from [Location 1] onto [xxx] monitors in [Location 2] simultaneously, the first defendant claims that there were other distinct problems with the plaintiff's CCTV sub-system which rendered it non-compliant with the RFP specifications and/or the requirements of [XA]. [note: 290] According to the first defendant, [XA] had not approved the plaintiff's CCTV sub-system design in August 2002. [note: 291]

165 The first defendant admits that the plaintiff had proposed modifications to its CCTV sub-system at the cost of US$107,800, but denies that it would render the sub-system fully compliant with the requirements of [XA]. [note: 292] In response, [KA] sent a letter to the plaintiff stating that [BD] was not prepared to fund the proposed modification. [note: 293] The first defendant claims that [BD]'s position was that the proposed modifications ought to have been incorporated by the plaintiff in its original design in order to comply with the RFP specifications and/or the requirements of [XA]. [note: 294]

166 The first defendant claims that: [note: 295]

(a) [XA] rejected the plaintiff's CCTV sub-system because the plaintiff's CCTV sub-system did not comply with the RFP specifications and/or the requirements of [XA]; and

(b) [XA] rejected the proposed modifications by the plaintiff because they necessitated additional costs and involved implementing technical and/or design features which ought to have been incorporated by the plaintiff in the original design of the plaintiff's CCTV sub-system in order to comply with the RFP specifications and/or the requirement of [XA].

167 Further, the first defendant denies that [BD] requested, induced and/or caused [XA] to reject the plaintiff's CCTV sub-system in favour of an alternative CCTV sub-system for the ISS sub-contract. [note: 296] The first defendant claims that [JVC] cancelled the order for the plaintiff's CCTV sub-system after [XA] rejected it by way of [XD]'s letter to [JVC] dated 7 October 2002. [note: 297] The first defendant further asserts that it was not involved in or privy to any decision taken by [BD] and/or [JVC] to replace the plaintiff's CCTV sub-system. [note: 298] At the time when [BD] and/or [JVC] took steps to replace the plaintiff with [PT] as the CCTV supplier, [XA] had rejected the plaintiff's CCTV sub-system for non-compliance and had directed [JVC] to submit an alternative CCTV

sub-system solution for the ISS sub-contract. [note: 299] Thereafter, [XA] accepted the [PT]'s CCTV sub-system as a replacement for the plaintiff's CCTV sub-system. [note: 300]

My decision: The plaintiff's CCTV sub-system did not comply

168 I find that the plaintiff had failed to prove on a balance of probabilities that the CCTV sub-system complied with the RFP specifications and the requirements of [XA]. On the contrary, and I so find, the objective documentary evidence clearly shows otherwise.

169 The plaintiff's two-pronged argument can be summarised as follows: [note: 301]

(a) the first defendant had not adduced expert evidence to contradict [Saul]'s evidence that the plaintiff's CCTV sub-system complied with the RFP specifications and the requirements of [XA]; and

(b) [Saul]'s evidence is supported by contemporaneous evidence which shows that the plaintiff was replaced by [PT] because the latter was substantially cheaper, and not because the plaintiff's CCTV sub-system could not comply with the RFP specifications and the operational requirements of [XA].

170 The plaintiff argues that this would suffice to dispose of the first defendant's submission that the plaintiff was replaced because its CCTV equipment was non-compliant. I do not agree. The plaintiff submits that [Saul]'s evidence should be accepted as he was the only witness with the relevant technical knowledge of the CCTV sub-system, and that his technical expertise was not challenged. [note: 302] However, [Saul] appears to have conceded at various points during the hearing that the CCTV sub-system does not comply. More importantly, the objective documentary evidence indicates that [XA] had considered that the plaintiff's CCTV sub-system did not comply with the RFP specifications and the requirements of [XA].

171 At this juncture, I pause to note that the correspondence between various parties on the issue of whether the plaintiff's CCTV sub-system complied with the RFP specifications and the requirements of [XA] was not brought to [Saul]'s attention during his cross-examination. In this regard, the plaintiff objects based on the rule in *Browne v Dunn*. During the trial, I specifically highlighted to Mr Wong that the compliance of the CCTV sub-system is likely to be a crucial issue. [note: 303] However, Mr Wong took the position that "[t]he documents are clear". [note: 304] I also note that [Saul] accepted that the correspondence would prove that the plaintiff's CCTV sub-system complied with the RFP specifications and the requirements of [XA], [note: 305] and some of them were brought up during re-examination. [note: 306] The plaintiff clearly knew that the correspondence would be relevant to the issue, and had even relied on some of them to support its case. In my view, there is no element of surprise or unfairness here. Hence, it would not be inappropriate to allow the first defendant to make submissions based on the correspondence that were not specifically brought to [Saul]'s attention. I will, however, bear in mind that some of the correspondence were not put to [Saul] for him to explain or rebut when deciding on the appropriate weight to be accorded to it.

(1) [Saul]'s evidence

172 The plaintiff relies heavily on the evidence of [Saul] to argue that the plaintiff's CCTV sub-system could have fully complied with the RFP specifications and the requirements of [XA]. However, I note that [Saul] had admitted during the hearing that the plaintiff's CCTV sub-system did not

comply and would require some modification in order to comply with the RFP specifications and the requirements of the [XA].

173 First, [Saul] acknowledged that the *system* was non-compliant, even though he insisted that [XA] had never complained about the CCTV *equipment*: [note: 307]

> *Compliance is the system, not the individual items*. Instead of two lines, put eight lines, that's all. There was no question of equipment defective, equipment do not comply. *The question was, the system does not comply. [JVC] do not comply.* They never said [Y] equipment do not comply. [emphasis added]

I found [Saul] frequently resorted to answers that were obfuscating. The plaintiff's scope was clearly not just the supply of CCTV cameras. It had to be linked up to a system that allowed the cameras to be operated from monitors and other controls and linkages, in a way that [XA] wanted to use it. To insist no one said his CCTV equipment did not comply is to evade the question. There is no doubt, as I will come to below, that there was non-compliance and [Saul] himself said in his email of 8 October 2002 to the Director of [XA] ([176] below) that he communicated immediately with his engineering department in Japan and "instructed them to re-study again all the newly raised items and to immediately come up with a proper solution". There was a clear acknowledgement by [Saul] that he knows the complaints of non-compliance were "about the interconnection of the matrixes and the displays on all monitors". [note: 308]

174 Secondly, [Saul] testified that additional costs were required to modify the plaintiff's CCTV sub-system in order to make it comply: [note: 309]

> ... *the error made on the system is not [Y]'s error. It's the design error that is combination, a culmination of how [XA] wanted the system and how [JVC] actually made the system or designed and constructed the system. So there was nothing wrong with the equipment*. What [BD] request -- not [BD] -- what [XA] requested later was to have more vision or more monitors for this thing to do the way they want it now that was not specified before. It should have cost some $107,000, which we, I was offering to share half-half. *So the entire thing, to make all these system compliance* [*sic*]*, went down to $60,000 -- to 50-some thousand dollars, anyhow.* [emphasis added]

175 In fact, [Saul]'s evidence appears to be that the plaintiff's CCTV sub-system is not connected in the way that was specified in the RFP: [note: 310]

> Court: ... You say: "This was one issue, and for some unexplained reason they specified they want the cables between the floors to be fibre-optic ..." Who is "they"?
>
> A: "They", [XA]. The one who issued the RFP is [XA].
>
> Court: All right.
>
> A: Or the consultant [XF] or [XD]. Anyhow, "they" is those who issued the RFP. When I discussed with [Michael] the many items of this specification, he said "That's the requirement. I can do nothing about it. That's what they want".
>
> Court: All right.
>
> A: So -- that's the requirement, that's the requirement. *But we do not connect it that way. ...*

[emphasis added]

176 This is consistent with the correspondence between [Saul] and [XA]:

(a) Email from [Saul] to [Chris], Director of [XA], dated 8 October 2002: [note: 311]

> On 9th Sep. I have attended a security trade show (Asis) in Philadelphia and have met Mr. [Michael] at our booth. To my surprise, *Mr. [Michael] informed me that he just got a message that [Y] system is rejected, because it is non-compliant on many items of the RFP*, most of which are about the interconnection of the matrixes and the displays on all monitors.
>
> Mr. [Michael] detailed the RFP items and asked us to study and come with a solution. I did communicate immediately with our engineering dept in Japan, and *instructed them to re-study again all the newly raised items and to immediately come with a proper solution*.
>
> [emphasis added]

(b) Letter from the plaintiff to [Mark] of [XA] and [William] of [XD] dated 8 October 2002: [note: 312]

> On the other hand, I have received last evening a copy of Mr. [John], summarizing a long list of few items of non-compliance and/or unacceptable solutions to [XA].
>
> *For example the summary that the way we offered to connect the matrixes is not acceptable to [XA]*.
>
> *We, on our side, could not agree with [XA] on this item at all. We have discussed this internally at [Y] many times. Our engineer did not allow us to proceed with connections as suggested by [XA]*, as they too believed that it is our duty to offer you the best we know.
>
> We also believe that [XA] can only benefit from our advice, being one of the oldest CCTV manufacturers in the field. We are committed to give [XA] the best there is, but it needs reciprocity on [XA] part as well, *and not simply rely on words of the RFP only*.
>
> [emphasis added]

177 Notwithstanding [Saul]'s repeated assertions that the plaintiff was capable of complying with the RFP specifications and the requirements of [XA], it is apparent that he acknowledged that the plaintiff's CCTV sub-system did not comply and would require some modification in order to comply. Further, the objective documentary evidence does not support the plaintiff's submission that the plaintiff's CCTV sub-system complied with the RFP specifications and the requirements of [XA].

(2) Objective documentary evidence

178 In my view, as noted above, the objective documentary evidence clearly shows that the plaintiff's CCTV sub-system did not comply with the RFP specifications and the requirements of [XA]I will approach the documentary evidence in a chronological manner, starting from the CDR meeting in August 2002.

(a) At the CDR meeting in August 2002

179 As mentioned earlier (see [154] above), the plaintiff claims that all the technical issues, except for the backup power supply, had been addressed during the CDR meeting in August 2002. However, the first defendant highlights that the plaintiff's assertion is contradicted by the email from [Justin] of [XA] to [Michael] and others dated 9 September 2002, which reads:

> CCTV Sub-system
>
> 5 . *We have made a number of compromises and surfaced some non-compliances in this subsystem recently*. Please let us know [XF] position on this matter. As our Tech Branch had indicated *during the Aug PDR meetings*, we would like [JVC] to consider a change to another make/brand of CCTV *if the proposed [Y] cannot comply to [XA] requirements*. [emphasis added]

180 The plaintiff points out that the email is factually inaccurate as the Preliminary Design Review ("PDR") meeting was held in June 2002 and not August 2002. [note: 313] I do not think that this error negates the evidential value of the email. It is quite apparent that the email dated 9 September 2002 was referring to the CDR meeting in August 2002 instead of the PDR meeting in June 2002. In any event, the rest of the paragraph (especially the first line) is not affected by the factual inaccuracy.

181 The plaintiff further objects to the first defendant's reliance on this email as it claims that [Saul] was not cross-examined on whether this email contradicted his evidence that all outstanding issues on the CCTV sub-system was resolved during the CDR meeting in August 2002 (save for the backup power supply). [note: 314] Again, I cannot agree with the plaintiff. [Saul] had explained during cross-examination, albeit not in response to counsel's question, that the email dated 9 September 2002 does not contradict his evidence: [note: 315]

> Q: My question is: do you agree that this e-mail shows that [XA] wanted [JVC] to change the CCTV supplier if [the plaintiff] could not comply with the requirements?
>
> A: You understand the question that you have asked?
>
> Q: Yes.
>
> A: "If [the plaintiff] cannot", that's the question?
>
> Q: Yes.
>
> A: So if [the plaintiff] cannot, and they say that it's not compliant and [the plaintiff] cannot do anything to make it comply, then they need to find another solution --
>
> Q: So you agree --
>
> A: -- it's very clear. But that's not the end of the story, because this question is a little bit more complex than that.
>
> ...
>
> Q: Just to confirm, you do agree that that's what this e-mail shows? I realise that it's not your opinion --

A: It's not. It's not.

Q: -- what this e-mail shows --

A: That's the point. You just asked the question and you are now asking it again, so now you raise the point again. *The point is, they do not say that* [*the plaintiff's*] *equipment does not make it.*

Q: That's not the question.

A: They say they have found non-complying items. "If [the plaintiff] cannot do". "If [the plaintiff] cannot do", but [the plaintiff] can do, this is a different, different story.

[emphasis added]

182 To my mind, [Justin]'s email dated 9 September 2002 does contradict [Saul]'s evidence that [XA] had accepted the plaintiff's CCTV equipment and that all the technical issues, except one, were resolved by August 2002. I note that [Justin] pointed out that some compromises had been made with respect to the CCTV sub-system. However, [Justin] also mentioned that [XA] "surfaced some non-compliances" that appear to be separate and distinct from the compromises made. Hence, it does appear to me that [Justin]'s email would suggest that the plaintiff's CCTV equipment was not in full compliance as of August 2002. [Saul]'s explanation, regrettably, was a result of his fixation on the phrase "if the proposed [Y] cannot comply" and does not offer much assistance. Moreover, it appears that [Saul] might have mistaken [XA] as having accepted the plaintiff's CCTV sub-system when [XA] was merely expressing its gratitude to [Saul] for the presentation at the CDR meeting: [note: 316]

Court: Yes. If you had given a 2-line system, would that have complied with [XA]'s requirements, [XA]'s requirements?

A: When I attended the CDR meeting, the 2-line were *totally discussed*. This was on the subject of discussion. They had a not very -- they felt that the 2-line will be missing some information for [Location 3] of the future. And in the interim, to [Location 4]. And we offered them to have a third line at no cost, we, [Y], offered to add one more line at our cost to alleviate their concern. *And they closed that discussion with "Thank you, Mr [Saul]."*

Court: Yes. So you offered to give them a 3-line system.

A: I offered to add one line in the CDR meeting, because they raised an issue, they are a little bit not hundred per cent confident; *I'll give them another line at our cost, and they say "thank you". They were smiling and in this strangers' meeting they were smiling and saying "thank you".*

[emphasis added]

183 Accordingly, I am not persuaded that the [XA] accepted that the plaintiff's CCTV equipment were compliant with the RFP specifications and the requirements of [XA] as of August 2002.

(b) After the CDR meeting in August 2002

184 The documentary evidence further shows that [XA] considered that the plaintiff's CCTV sub-

system was not in compliance with the RFP specifications and its operational requirements after the CDR meeting in August 2002. I start with the correspondence after the CDR meeting in August 2002 but before the plaintiff's revised solutions were submitted in October 2002:

(a) Email from [Jason] to [John], dated 6 September 2002, with subject "[JVC] CCTV solution does not meet our requirement (Ops/Tech)": [note: 317]

> Arising from the discussion with Cluster Mgt, Tech Branch and Ops Planning, the CCTV solution by [JVC] is not able to meet our Operations requirement and the Technical Specifications. This was surfaced during our review on the PDR doc.
>
> I wish to highlight the following non-compliances (major) which we have identified during our meeting.
>
> [JVC] CCTV proposal does not comply with the following in the RFP:
>
> ...
>
> There will be future implications if we stick to this design. If all [xxx] uses the same design, we will require 4 times more CCTV monitors and keyboards, which will imply that we need more consoles also.
>
> *To conclude*, ***the CCTV design by [JVC] is no good for our operations and future expansion*** . As the above are *major non-compliances to our RFP*, [JVC] should give us alternative solution(s) to meet our requirement stated in the RFP, before approval of the PDR and CDR.
>
> [emphasis added in bold and bold italics]

The first sentence in the last paragraph of the above email, emphasised in bold italics, is a telling piece of evidence and says it all. Further, the email included a table setting out what was in the RFP and what [JVC]'s proposal was, which clearly showed problems with the plaintiff's CCTV sub-system. To quote three examples of the eight in the table:

In RFP	[JVC] Proposal
Each [Location] shall include a dedicated matrix. The matrixes shall be connected in … hierarchical structure with dedicated multimode fiber optic cables. The [Location 1] Matrix will be connected to the [Location 2] Matrix which shall in turn connected, via underground infrastructure, with dedicated multimode fibre optic cables to the [Location 4] Matrix in order to establish a CCTV video network in the [xxx].	In [JVC] CCTV solution, the [Location 1] matrixes are not connected to the [Location 2] & [Location 4] matrixes. The [Location 2] are not connected to the [Location 4] matrices. The [Location 1] Matrixes are connected to Keyboard at [Location 2] and [Location 4].

The [Location 2] matrix shall be able to view any camera [xxx]. The number of required video channels between [Location 1] & [Location 2] matrixes is at least 8 to allow simultaneous viewing of at least 8 [xxx] video images at the same time on the [Location 2] Monitor.	There are 2 monitors connected to each [Location 1] matrix (Not Matrix to Matrix) in [Location 2]. Therefore, [Location 2] can see 8 simultaneous video on the 2 monitors (one monitor with 4 videos <Quad Split>. We cannot view the 8 [in manuscript: "images"] videos from [Location 1] on all the [Location 2] monitors at the same time.
The hierarchical structure of video matrixes connected together will establish at the [xxx] one integrated video switching system that will provide the possibility to connect every camera installed in the field to every monitor in every [Location].	The Matrixes are not connected together, therefore one integrated video switching system cannot be achieved. For that we are not able to connect (view) every camera in the field to every monitor in every [Location].

(b) Email from [John] to [XF], dated 6 September 2002 with subject "[JVC] CCTV solution does not meet our requirement (Ops/Tech)": [note: 318]

During the course of discussion with [JVC] regarding the design of the CCTV sub-system, we realized that the *[Y] system does not meet our operational requirements. Over & above this, these are non-compliant to the RFP*. ...

Our view is that whatever system is ultimately chosen must meet our fundamental operating requirements. Since [Y] does not do this, please inform/instruct [JVC] to counter-propose alternative systems for our consideration.

[emphasis added]

(c) Email from [Michael] to [XA] and [XD], dated 11 September 2002: [note: 319]

3. **CCTV**

...

b. I declared very strongly that we are not going to compromise on the design of the CCTV subsystem and all requirements of the RFP must be fulfilled.

c. *I think that [Saul] understands the seriousness of the problem. He must go back to Japan and resolve it with his technical teams.* [JVC] will receive his response only next week.

d. On the CCTV issue there are no gaps between [XA] and us. *All the problems mentioned in [XA] letter were detected by us too and raised at our last visit in Singapore. [JVC] has only one choice: full comply with the RFP or replacement of the [Y] system to another one.*

e. Actually we discussed already this possibility with Mr. [Ian]. He understands this issue and [JVC] will be co-operative to solve it. He declared that if a decision to replace [Y] with other CCTV system would be taken within the next few weeks it may not have an effect on the timetable of the Project.

[emphasis added]

185 These emails show that [XA] did not consider the plaintiff's CCTV sub-system to be compliant in September 2002, and this was communicated and made known to the plaintiff.

186 The plaintiff's position, as set out earlier (see [154] above), is that its CCTV sub-system was in full compliance at the time when the CDR meeting was held in August 2002 but it proposed solutions in order to "meet the *further* requirements raised by [XA]". [note: 320] For reasons that I do not have to elaborate upon here, the plaintiff was given until 3 October 2002 to ensure that its CCTV sub-system complied with the RFP specifications and the requirements of [XA]. [note: 321] However, the correspondence suggests that even after 3 October 2002, the plaintiff's CCTV sub-system still did not comply with the RFP specifications and the requirements of [XA]:

(a) Email from [JVC] to [XD], dated 4 October 2002: [note: 322]

> To fulfil the compliance, [the plaintiff] is requesting for a variation order amounting to 500 to 600 thousand US dollars. Part of which is meant for developing new equipment to fulfil the tender requirements.

(b) Email from [John] to [Jacob], dated 7 October 2002, with subject "latest [Y] CCTV system submission": [note: 323]

> We note, with profound regret, that *this system still does not meet our requirements*. Our main grounds for this are as follows:
>
> - having stated up-front that their solution compiles, it makes no sense to then ask us for an additional US$600,000/- in order for them to comply with our requirements
>
> - *the fundamental requirement of being able to see any camera on any monitor is still not addressed*
>
> - as far as we know, *the products mentioned in their compliance letter have never been tested before. We agree with our Security Consultant that whatever is deployed in [the Project] must be off-the-shelf, and tried & tested.* We fully agree with him that to do otherwise is to commit professional suicide.
>
> The full grounds of our rejection of the latest [Y] solution are as follows:
>
> ...
>
> - for [Y]'s design, we will have a problem connecting [Location 4] matrix to [Location 3] matrix ...
>
> ...
>
> - *we did ask for off-the-shelf solution. The [Y]'s solution, to our knowledge, includes new modules that are not found in their product line yet*. We may be the first using these products, which are not proven yet. *As mentioned by our consultant, this will be "professional suicide" if we use these new/modified products. This will complicate the project and future development*.

Kindly propose another alternative for our consideration, ensuring that all our operational requirements are fully catered for.

[emphasis added]

(c) Email from [Michael] to [John], dated 7 October 2002: [note: 324]

... *You know that we did all the efforts to give [JVC] the chance to comply with [Y] equipment to the RFP requirements*. When we received yesterday and today the revised CCTV solutions we were more [than] surprised by the ridiculous and unacceptable request to be paid for the full compliance with the RFP.

[XA] invested a lot of time and effort to evaluate the revised solutions. We received it only today and had not yet the possibility to investigate it deeply but *from what we can distinguish immediately is that the solution is not really able "to establish at the [xxx] one integrated video switching system that will provide the possibility to connect every camera installed in the field to every monitor in every [Location]" (paragraph 8.2.7 of the RFP). The existing solution is not efficient and not satisfactory from the operational point of view*. ...

[emphasis added]

(d) Email from [Saul] to [Chris], Director of [XA], dated 8 October 2002: [note: 325]

On 9th Sep. I have attended a security trade show (Asis) in Philadelphia and have met Mr. [Michael] at our booth. To my surprise, *Mr. [Michael] informed me that he just got a message that [Y] system is rejected, because it is non-compliant on many items of the RFP*, most of which are about the interconnection of the matrixes and the displays on all monitors.

Mr. [Michael] detailed the RFP items and asked us to study and come with a solution. I did communicate immediately with our engineering dept in Japan, and *instructed them to re-study again all the newly raised items and to immediately come up with a proper solution*.

…

[emphasis added]

(e) Email from the plaintiff to [Mark] and [William], dated 8 October 2002: [note: 326]

On the other hand, I have received last evening a copy of Mr [John], summarising a *long list of few items of non-compliance and/or unacceptable solutions to [XA]*.

For example, the summary that the way we offered to connect the matrixes is not acceptable to [XA].

We, on our side, could not agree with [XA] on this item at all. We have discussed this issue internally at [Y] many times. Our engineers did not allow us to proceed with connections as suggested by [XA], as they too believe that it is our duty to offer you the best we know.

We also believe that [XA] can only benefit from our advice, being one of the oldest CCTV manufacturers in the field. We are committed to give [XA] the best there is, but it needs

reciprocity on [XA] part as well, and *not simply rely on words of the RFP only*.

...

If [XA] needs more direct lines why not suggest a reasonable realistic figure. We believe that we offered something that you did not really understand, because if you did, we cannot understand how could you reject it?

It may be our fault for not explaining better, but we were given the feeling that you preferred to talk to [JVC], your contractor, so we did not interfere. May be we were wrong. *What ever the case is, common sense and off the shelf tradition should not apply in the design of your sub CCTV system for the new [Project] because your system is not common*.

[emphasis added]

(f) Email from [Mark] to [William] and [Michael], dated 9 October 2002: [note: 327]

Hi [William], I suppose you will respond on our behalf ref the contractual issue. Whatever transpire[s] between [Y] and [JVC] is none of our business. We are not oblige[d] to talk to [Y]. We talk only to [JVC] and [XF]. The deadline is today, we have to take a stand and no more extension is allowed. Got to move on.

Hi [Michael], I suppose you will respond on our behalf ref the RFP issue. It is with your blessing that the RFP issued out, with the input from [XA] Ops Planning and Tech Branch. *The spec is written to support the way [XA] (not Israel [xxx] or [xxx]) is going to operate and it is clear enough for the tender to comply and follow. Tenderer may propose alternative but it is up to client to accept or otherwise.* Allow me to be direct again, can you somehow hint to the [Y] boss not to forget who the client is, and force anything down our throat if it is not what we want. Not only my boss is angry, after seeing the letter below, more people are angry now.

[emphasis added]

(g) Email from [JVC] to the plaintiff, undated but fax line shows 9 October 2002: [note: 328]

We regret to inform you that our client has rejected the CCTV proposal made by [Y], as such we will have to cancel our intention to purchase this system from you.

187 In my view, the correspondence set out above shows quite clearly that the plaintiff's CCTV equipment was not in compliance with the RFP specifications and the requirements of [XA] after the CDR meeting in August 2002 and up to the time that the plaintiff was informed that their CCTV sub-system has been rejected by [JVC].

(c) At the meeting on 11 November 2002

188 According to the plaintiff, it clarified all the technicalities and outstanding issues with the CCTV sub-system with [XA] during a meeting held on 11 November 2002. [note: 329] This meeting was triggered by [Saul]'s letter to [Mark] and [William] dated 10 October 2002, in which he stated that the plaintiff will do whatever it takes to comply with the RFP specifications (*ie*, having eight lines

instead of two) at no additional cost to [XA]. [note: 330] I pause to note that this indicates that [Saul] agrees, at least at the time of the letter, that the plaintiff's CCTV sub-system was not in full compliance. This is consistent with the purpose of the meeting which, according to [Mark]'s email to [William], was to resolve the issues with the CCTV sub-system:

> ... [JVC] is to liaise with [Y] boss to get him down personally to clarify issues to us. Issues such as *in what ways [Y] soln is better than our RFP spec., where are the non-compliance? Can [Y] find a solution to comply? If not can we live with these non-compliances* (i.e. is our ops gravely affected by them? Do our infra-structure provided for it or if there is addn work need to be done in order to enable [Y] to comply? etc.) [emphasis added]

189 [Saul]'s evidence was that [XA] and [XF] were satisfied with the solution offered by the plaintiff during the meeting. [note: 331] In support of this, the plaintiff relies on the letter from [Chris] of [XA] to [Saul] dated 19 November 2002 which states that [XA] had facilitated the meeting on 11 November 2002 which allowed the plaintiff to clarify the issues with the CCTV sub-system. It goes on to say:

> Henceforth, *please liaise and resolve directly with [JVC] on any matter relating to the CCTV System*, which is a subsystem of the Integrated Security System for [xxx]. This is in order given the nature of the contract terms and conditions awarded to [JVC], for the Integrated Security System.
>
> [emphasis added]

190 Pursuant to this letter, [Abel] wrote to [Gabriel] on the same day claiming that [XA] had confirmed that the plaintiff's CCTV sub-system is in compliance with the RFP specifications and the requirements of [XA]. [note: 332]

191 While I note that [XA] did not expressly state that it did not like what it saw at the meeting on 11 November 2002, [note: 333] I do not agree that the letter is evidence that [XA] was satisfied with the plaintiff's proposal. It certainly does not state that [XA] accepted that the plaintiff's CCTV sub-system is in compliance with the RFP specifications and requirements of [XA]. The stand [XA] took in the email was entirely what I would expect an employer to take with regard to its contractor's equipment provided by a domestic supplier. As problems of equipment non-compliance with the RFP had arisen, [XA] and its consultants had meetings with the domestic supplier to try and resolve these technical issues. [XA] and its consultants were not satisfied with RFP compliance, and that being the case, a switch in equipment with time and cost consequences were likely to arise. [XA] wanted to make sure that it remained the contractor's problem, and [XA] did not want to be accused of having been the cause of (or contributory to) any delay because it was entertaining the domestic supplier's representations. [XA] wanted to retreat behind the walls of its contract which laid the contractual obligation of RFP compliance squarely on the contractor. Indeed, there is some support for this (see [186(f)] above). [XA] therefore stated, after the meeting, that the plaintiff should "liaise and resolve directly with [JVC] on any matter relating to the CCTV System", which to my mind clearly suggests that there might still be technical issues to be resolved. I therefore find that there is no evidence to support the plaintiff's case that its CCTV equipment was in full compliance as of 11 November 2002. On the contrary, it showed non-compliance and unhappiness on the part of [XA] as to the non-compliance and the solutions being forced on them by the plaintiff.

(d) [Michael]'s letters in November and December 2002

192 The plaintiff argues that that [Michael] was of the view that the plaintiff's CCTV sub-system was in full compliance with the RFP specifications and the requirements of [XA]. In this respect, the plaintiff refers to two emails sent by [Michael]:

(a) Email from [Michael] to [William], dated 25 November 2002, with subject "Compliance of [Y] CCTV with the RFP requirements": [note: 334]

> ...
>
> 2. … As I interpret the present situation [Y] is out of the picture, due to [JVC] decisions, already from October 2002, much before our last meetings in Singapore, and from [JVC] point of view it is totally irrelevant if [Y's] proposal complies or not with RFP requirements.
>
> 3. We don't know of course the real motive for this. It may be due to commercial reasons between the suppliers or due to personal bad relationships between Mr. [Saul] and [JVC] or any other cause, *but for sure it is not because of disqualification of [Y] by the Client ([XA] and [XF]). They know very well that at the end we evaluated (the direct [Y] proposal) and approved it as fully comply with the RFP*.
>
> ...
>
> 5. I want to remind every party that when we arrived to Singapore for the last CDR meetings we declared on our first gathering that we have in our hands a copy of letter sent by [Y] to [[XA]. *According to this letter and following letters from [Y] their updated proposal fully complies with the RFP requirements* ...
>
> *6. We didn't received* [*sic*] *from [XA] or [XD] any response about Mr. [Saul] last visit in Singapore and his presentations to [XA] and [JVC]* but, I fully believe that his presentations didn't change our judgment that [Y's] last written submission fully complies with RFP requirements.
>
> ...
>
> [emphasis added]

(b) Email from [Michael] to [Brandon] of [XF], dated 22 December 2002: [note: 335]

> …
>
> ... I saw your letter to [William] that you ... thank [JVC] for the letter of changing [Y] to [PT]. [JVC] letter is attached to you ... and *in this letter they claim again that [Y] system doesn't comply with the RFP ... big lie. [Y] solution fully complies with the RFP*. [JVC] just don't want to work with [Y] and they are looking for excuses for this. If you can try not to be involved. [Y] plans to sue [JVC] in Singapore and I prefer that [XF] will not approve fabrication and lies.
>
> …
>
> [emphasis added]

193 I am not persuaded that the two emails show that the plaintiff's CCTV sub-system was in full

compliance with the RFP specifications and the requirements of [XA].

194 First, the emails do not actually show that [XA] had decided that the plaintiff's CCTV sub-system complied with the RFP specifications and the requirements of [XA]. I note that [Michael] said in his email to [William] that "we" (*ie*, [XG] and [XD]) as opposed to "the Client" (*ie*, [XA] and [XF]) approved the plaintiff's CCTV sub-system. There is no evidence that [XA] or [XF] agreed with the contents of the emails, and there is no way to tell if [XA] and [XF] actually shared the view that the plaintiff's CCTV sub-system fully complied. On the contrary, the evidence I have referred to above suggest otherwise.

195 Secondly, and more importantly, the two emails by [Michael] are quite inconsistent with the tone and content of his two earlier emails (*ie*, email to [XD] dated 11 September 2002 (see [184(c)] above) and email to [John] dated 7 October 2002 (see [186(c)] above)). Whilst these emails pre-date [Michael]'s emails dated 25 November and 22 December 2002, I note that the later emails also appear to be inconsistent with the email from [Chris] of [XA] to [Saul] dated 19 November 2002 which, as I have mentioned earlier (see [189] and [191] above), suggests that there might be technical issues left to be resolved. As [Michael] admitted in his email to [William] (see [192(a)] above), he was not updated by [XA] or [XD] on their views of the plaintiff's CCTV sub-system after the meeting of 11 November 2002. This indicates that the view expressed by [Michael] in the two emails may not be accurate.

196 In addition, I note that [XA] had been concerned with matters apart from compliance with the RFP specifications. For instance, [John] in his email to [Jacob] dated 7 October 2002 (see [186(b)] above) pointed out that it is "professional suicide" to use a system like the plaintiff's CCTV sub-system which is *not* an "off-the-self solution" but includes "new/modified products". [note: 336] He recognised that to use the plaintiff's CCTV system would "complicate the project and future development". [note: 337] Indeed, it appears to me that [XA] did not want to be tied down to the plaintiff's system – this creates problems in more ways than one. It might allow the plaintiff to have a greater leverage over prices of its products and spare parts, or prevent [XA] from going to any other vendors or suppliers for its future expansion plans, if any. As mentioned earlier (see [173]–[176] above), [Saul] had admitted that modification is necessary in order for the plaintiff's CCTV sub-system to comply. Therefore, even if [Michael] was right to say that the plaintiff's CCTV sub-system complies with the RFP specifications (which I do not accept), the plaintiff still has not shown that its CCTV sub-system complies with the other requirements of [XA]. I am not convinced by the two emails from [Michael], bearing in mind all of the other evidence that I have considered thus far, that [XA] was satisfied with the plaintiff's CCTV sub-system.

197 Pertinently, [Michael] did not give evidence at the trial. [Saul] claims he knows [Michael] and they are about the same age. There is evidence that [Michael], [KA] and [ARS (Israel)] had worked together on several projects, including the [overseas project] (see [8]–[9] above). [Saul] said initially that [Michael] could not fly to Singapore but yet, with his next breath, said, "he does not want to fly from Israel to Singapore". [note: 338] As [Michael] would have been a witness who could give important evidence, it is, to say the least, strange that the plaintiff did not make any effort to get [Michael]'s evidence at the very least by deposition or video-link.

(3) The plaintiff's explanations

198 The plaintiff offered several explanations why it was wrong to say that the plaintiff's CCTV sub-system was not in compliance with the RFP specifications and/or the requirements of [XA]. These explanations include:

(a) first, that the [XA] was told by someone else that the plaintiff's CCTV equipment did not comply with the RFP specifications and/or the requirements of the [XA];

(b) secondly, that it was not the plaintiff's CCTV equipment but the system and/or the set-up of the CCTV sub-system that did not comply with the RFP specifications and/or the requirements of [XA]; and

(c) thirdly, that the circumstances show that [JVC] wanted to replace the plaintiff's CCTV sub-system because it was cheaper.

199 I am not convinced by these explanations, and I will explain why.

(a) [XA] was influenced by "ear poison"

200 The plaintiff's first explanation is that [XA] is dissatisfied with the plaintiff's CCTV sub-system only because someone had poured the "poison" in the ear of [XA]. [note: 339] During cross-examination, [Saul] repeatedly insisted that [XA] did not know what the plaintiff could or could not have done, and therefore could not have arrived at the conclusion that the plaintiff's CCTV equipment did not comply with the RFP specifications or its operational requirements. [note: 340] In this regard, the plaintiff sought to refer to the two emails between [XA] and [Michael] dated 25 September 2002:

(a) Email from [Mark] to [Michael], dated 25 September 2002: [note: 341]

...

… [John]'s e-mail below has already clearly stated that *as a result of our discussion with [JVC], [Y] has not met many spec.*, and the proposal to look into another system early is necessary so that [JVC] is able to save some time. It is very sad that this is not being done. You can certify this with [Zachary], [Charles] and [Robert] of [JVC]. …

...

[emphasis added]

(b) Email from [Mark] to [Michael], dated 25 September 2002: [note: 342]

…

Just to clarify, the non-compliance as highlighted in red below is *referred to and as a result of the discussion with [JVC] reps ([Zachary], [Charles], [Robert]) on 5 Sept 02. [JVC] rep also agreed that there are non-compliances.* This was e-mailed to [XF] the next day. ...

…

[emphasis added]

201 The plaintiff points out that [Zachary] could not explain why the "[JVC] reps" readily agreed that there was non-compliance even though none of them were experts in the plaintiff's CCTV equipment. [note: 343]

202 I do not agree with the plaintiff's submission. In my view, the same emails suggest that [XA] came to their own realisation that the plaintiff's CCTV sub-system did not comply with the RFP specifications and its requirements. I do not think that the words "as a result of" used in the emails dated 25 September 2002 meant that it was [JVC] who first raised the issue of non-compliance of the plaintiff's CCTV equipment. In this regard, I note that [Mark] mentioned in his second email that "[JVC] rep also agreed that there are non-compliances". Contrary to the plaintiff's submission, this suggests that [JVC] did *not* point out the non-compliance to [XA] but it was the other way around. I accept [Zachary]'s evidence that [XA]'s technology branch is "pretty technically sound" and, by implication, would be capable of advising [XA] on whether the plaintiff's CCTV sub-system complies with the RFP specifications. [note: 344] This is consistent with [Jason]'s email to [John] dated 6 September 2002 (see [184(a)] above). I also do not agree that the "[JVC] reps" were in no position to agree that the plaintiff's CCTV equipment does not comply with the RFP specifications and the requirements of [XA]. As [Zachary] explained during the hearing, [Charles] was in charge of engineers who were looking into the CCTV sub-system, [note: 345] and [Robert] was "the main person communicating with the design team in Israel" so he would have to feedback the information and non-compliance to them. [note: 346] This would have allowed the "[JVC] reps" to understand and take a position on whether the plaintiff's CCTV equipment complied with the RFP specifications. In any event, I do not consider that it makes a significant difference whether [XA] actually came to realise about the non-compliance on its own or after discussions with its consultants and/or [JVC]. Even if it was [JVC] who first identified the non-compliance, the fact remains that the plaintiff's CCTV sub-system, as it was presented to [XA], did not comply with the RFP specifications and the operational requirements of [XA].

(b) CCTV equipment was in compliance

203 The second explanation by the plaintiff was that the plaintiff's CCTV equipment was in compliance but it was "the system that [did] not comply" and "[i]t was the set-up that was wrong". [note: 347] In fact, [Saul] admitted during cross-examination that "the system did not comply and it had to be [compliant] in accordance with what [XA] wanted". [note: 348] [Saul]'s evidence was that the plaintiff had offered both the combined matrix system (eight-line system) and the disperse matrix system (two-line system), but [JVC] (through [KA]) chose the cheaper disperse matrix system. [note: 349] At one point in the hearing, [Saul] said that both systems complied with the RFP specifications. [note: 350] However, [Saul] accepted that [XA] had concerns with the two-line system which, as I have discussed earlier, might not have been satisfactorily dealt with by the plaintiff. [note: 351] Moreover, he admitted later in the hearing that the manner in which the various matrixes were connected for the plaintiff's CCTV sub-system did not comply with the RFP specifications: [note: 352]

> A: ... When I discussed with [Michael] the many items of this specification, he said "That's the requirement. I can do nothing about it. That's what they want."
>
> ...
>
> A: So – that's the requirement, that's the requirement. *But we do not connect it that way*. ...
>
> [emphasis added]

204 [Saul] also explained that the plaintiff had not asked for an additional sum of US$400,000 to US$600,000 from [XA] in order to change from the two-line system to the eight-line system; it was

merely explaining to [KA] the costs involved for changing to the eight-line system. [note: 353] Instead, the plaintiff proposed a "basic" addition to the CCTV sub-system at the cost of US$107,800, and if [KA] refuses to pay, then [JVC] and the plaintiff will share the costs equally. [note: 354] [Saul]'s evidence was that [BD] refused to pay, [note: 355] but [Gabriel] agreed with him that [JVC] and the plaintiff would share the costs if [XA] refuses to pay. [note: 356] However, the handwritten note dated 24 September 2002 by [Saul] pursuant to the discussion between [Saul] and [KA] only shows that [Saul] had "offered" to share the costs equally with [JVC]. [note: 357] It does not record that [JVC] (through [KA]) had accepted the offer. This is corroborated by the correspondence between [BD] and [KA] where [Gabriel] clearly stated that he did *not* agree with [Saul] to bear the additional costs equally. [note: 358]

205 Be that as it may, [JVC] forwarded [Saul]'s letter detailing its proposal (with the prices redacted) to [XF] on 24 September 2002. [note: 359] The plaintiff's proposal was rejected by [William] on behalf of [XA] and [XF], and one of the reasons given was that it did not fully comply with the RFP. [note: 360] [JVC] was asked to resubmit their proposal in compliance with the RFP by 4 October 2002. [note: 361] On 4 October 2002, [Jacob] on behalf of [JVC] replied [William] to say that the plaintiff was asking for a variation order amounting to US$500,000 to US$600,000 in order to comply with the RFP specifications. [note: 362] As mentioned earlier, [Saul] admitted that the two-line system was not in accordance with the RFP specifications (see [203] above) and that it would require additional costs to change from the two-line system to the eight-line system, for which [JVC] had not agreed to share (see [204] above). The plaintiff claims that it would have been "commercial suicide" to ask [XA] for more money to comply, [note: 363] but this was precisely what the plaintiff had in effect told [JVC] (through [KA]), *ie*, that the additional sum of money is necessary to change it into the eight-line system. .It is immaterial that the plaintiff had proposed a cheaper alternative at $107,800 that did not strictly comply with the RFP specifications. On 7 October 2002, [William] wrote to [Jacob] to inform that they do not accept the variation order. [note: 364] It is wrong to say that [XA] (and [XD] as its consultant) was "just quarrelling over the request for additional payment". [note: 365] The letter shows that [JVC] was asked to re-submit the plaintiff's CCTV sub-system without any qualifications for [XF] to "review and approve". [note: 366] In any event, this was not done, and could not have been done unless the plaintiff was willing to absorb the additional costs on its own (since [JVC] did not agree to split the additional costs equally). There is nothing to suggest that the plaintiff was willing to do so. Two days later, [JVC] informed the plaintiff that [XA] had rejected their CCTV sub-system. At no point did [XA] accept that the plaintiff's CCTV sub-system fully compiled with the RFP specifications and the requirements of [XA].

206 It is also pertinent to note that [Saul] had stated that the problem does not lie with the plaintiff or its equipment, but "a culmination of how [XA] wanted the system and how [JVC] actually made the system or designed and construed the system". [note: 367] Specifically, [Saul]'s evidence suggested that the plaintiff's CCTV sub-system was unique such that modification was required in order for it to comply with the RFP specifications. [note: 368] However, the objective documentary evidence is clear that [XA] wanted an "off-the-shelf" solution that is tried and tested, [note: 369] and the use of a unique system like the plaintiff's CCTV sub-system "will complicate the project and future development" (see [186(b)] above). [note: 370] Indeed, [Mark] told [Michael] in the email dated 25 September 2002 that "if the proposed revised solution is the result of customisation to the exten[t] that it become[s] another unrecognisable monster, then we may have our reservation[s]". [note: 371] In other words, even if the plaintiff was able to comply with the RFP specifications at no additional

costs, it has not been proven that the plaintiff will be able to provide [XA] with the "off-the-shelf" solution that [XA] wanted.

(c) [JVC] replaced the Plaintiff because of the price

207 The plaintiff's last explanation was that [JVC] wanted to replace the plaintiff with [PT] for reasons other than the non-compliance with the RFP specifications and requirements of [XA]. In this regard, the plaintiff highlights several facts, including: [note: 372]

(a) [JVC]'s act of looking for alternative suppliers in July 2002;

(b) [XA]'s reluctance to accept [JVC]'s decision to replace the plaintiff's CCTV sub-system with [PT] in October 2002;

(c) [JVC]'s attempt to delay and/or prevent the meeting between [XA] and the plaintiff in November 2002; and

(d) [JVC]'s delay in issuing the letter explaining the reason for replacing the plaintiff with [PT] despite [XA]'s repeated requests in December 2002.

208 I am not convinced that these facts would lead me to the inference that the plaintiff's CCTV sub-system was in full compliance with the RFP specifications and the requirements of [XA]. This is particularly so given that I found earlier that the objective documentary evidence does not show that the plaintiff's CCTV sub-system complies, but rather, suggests that it does not.

209 For a start, I should state that even if [JVC] was partly motivated by the fact that [PT] is substantially cheaper than the plaintiff, it does not alter my finding that the plaintiff's CCTV sub-system did not comply with the RFP specifications and/or the requirements of [XA]. Indeed, I do not think the [JVC] and [BD] denied that one of the reasons for choosing [PT] over the plaintiff was the costs involved. On 21 October 2002, a meeting was held between [XA], [XD], [XF], [JVC] and others to discuss the non-compliance of the plaintiff's CCTV sub-system and the possible replacement with [PT]'s CCTV sub-system. [note: 373] The minutes of the meeting shows that [JVC] proposed the replacement of the plaintiff's CCTV sub-system due to, among other things, the non-compliance with the RFP specifications and the operational requirements of [XA]: [note: 374]

> [JVC] presented the following non conformity of [Y] solution:
>
> ...
>
> [JVC] decided not to offer [Y] equipment due to the following reasons:
>
> 1. [Y] non-compliance with the RFP as described above
>
> 2. High risk for [JVC] due to the following factors:
>
> a. Need for development.
>
> b. Uncertainty that the proposed modification will work properly.
>
> c. Time delay for [Y] to develop the new keyboard and for [JVC] to test it.

3. Additional costs.

210 This is consistent with the evidence of [Zachary] at the hearing: [note: 375]

Court: ... If I said to you, "Mr [Zachary], look, [Y] was chucked out because of price", what do you think of that statement? Is it true, not true, some truth?

A: Some truth.

Court: If I said to you, [Y] was chucked out because there was a question of non-compliance, true, not true, some truth?

A: To me it's true.

Court: It's true.

A: Yes.

Court: To the best of your recollection, was [XA] really unhappy about the non-compliance, or was it something that was engineered by [JVC] because of price?

...

A: And, yes, the ground people, the working level people, yes, [XA], they are not happy with [Y] solution.

211 I do not think that there is evidence to support the plaintiff's assertion that [JVC] rejected the plaintiff's CCTV sub-system *solely* because of the price. As mentioned earlier, this is the only conclusion that can be reached given the earlier finding that the plaintiff's CCTV sub-system did not comply with the RFP specifications and the requirements of [XA].

212 In any event, I will go on to explain why the facts highlighted by the plaintiff do not necessarily justify the inference that the plaintiff's CCTV sub-system was in full compliance with the RFP specifications and the requirements of [XA].

213 First, the plaintiff argues that [BD] was looking to replace the plaintiff in July 2002, before any non-compliance was surfaced, and this shows that [BD] was planning to replace the plaintiff for reasons other than non-compliance with the RFP specifications and the requirements of [XA]. [note: 376] I do not agree. The email from [PT] to [BD] dated 31 July 2002 would, at best, show that [BD] was considering [PT] as an alternative supplier for the CCTV sub-system. It does not show that [BD] (or [JVC]) had decided to replace the plaintiff with [PT] regardless of whether the plaintiff's CCTV sub-system was compliant or not. More importantly, even if [BD] had decided in July 2002 to replace the plaintiff for reasons other than non-compliance with the RFP specifications and the requirements of [XA] (which I do not agree), this says nothing about whether the plaintiff's CCTV sub-system actually complies or not.

214 Secondly, the plaintiff argues that [XA] was reluctant to accept [JVC]'s decision to switch from the plaintiff to [PT] in October 2002. [note: 377] For this, the plaintiff cites two emails:

(a) Email from [Justin] to [William] and [Michael] dated 14 October 2002: [note: 378]

We should really keep the option of having the [Y] System open, at least up to week of 21

October 02. ... Up till now, [XA] would like to consider a further review of the [Y] System. As indicated in earlier mails by my colleagues, [XA] would like [JVC] to present their revised [Y] System proposal, to show compliance to the RFP. ...

(b) Email from [XE] to [Jacob] dated 17 October 2002: [note: 379]

Currently we would still prefer not to approve [PT] products until other matters are made clearer on next weeks [*sic*] meetings.

215 However, I am not persuaded that the emails show that [XA] is satisfied that the plaintiff's CCTV sub-system is compliant. In my view, the emails must be read in light of the earlier email from [Matthew] of [XA] to [Justin] dated 10 October 2002: [note: 380]

This is to update everyone regarding [Chris]'s latest instruction re this problematic issue.

2. [Y] had [written] to Director to say that they are willing to do their very best to comply with [XA] requirement and that [Y] boss was troubled by various miscommunication re their position to [XA] by [JVC].

3. ... [Chris] is concerned that if we change CCTV subsystem halfway, there may be more issues as a new vendor now needs to come in and there is a learning curve. There may be NEW issues which we have not had with [Y] which may arise with the new vendor etc. [Charlie] had pointed possible infrastructural modifications which we cannot afford at this point in time.

4. As such, [Chris] has instructed that we, [JVC] and [Y] (boss and technical people) all sit down at a face to face meeting to sort out all the technical details once and for all. If at this meeting [Y] really fall seriously short of our requirements then we will have to go to alternate vendor. ...

5. My bottom line is : We will not pay more. Our critical requirements must be complied with. We must stick with the schedule.

216 This clearly shows that any reluctance on the part of [XA] and its consultants, before the meeting of 11 November 2002, was not because [XA] was of the view that the plaintiff's CCTV sub-system was in compliance. Rather, it was out of the concern that the new system might have more issues. As I have noted earlier (see [191] above), there is no evidence to show that [XA] was satisfied with the plaintiff's CCTV sub-system at the meeting of 11 November 2002.

217 Thirdly, the plaintiff argues that [JVC]'s attempt to delay the meeting between [XA] and the plaintiff, which was arranged to discuss the plaintiff's non-compliance with the RFP specifications and requirements of [XA], demonstrates that [JVC] "may have something to hide and/or its own reasons for not wanting the meeting to go ahead". [note: 381] Again, this does not justify the inference that the plaintiff's CCTV sub-system must have been compliant. The meeting did occur eventually (on 11 November 2002), and as I have stated earlier (at [191]), there appeared to be issues with the plaintiff's CCTV sub-system that were unresolved even after the meeting.

218 Fourthly, the plaintiff argues that [JVC] was reluctant to provide [XA] with a written letter to justify its reasons for replacing the plaintiff with [PT] in December 2002, and this suggests that [JVC] was not acting *bona fide* when it rejected the plaintiff on the basis of non-compliance. [note: 382] However, it is undisputed that [JVC] did issue the letter on 12 December 2002 to say unequivocally

that the plaintiff's CCTV sub-system was replaced because it did not comply with the RFP specifications and the "critical operational requirement" of [XA]. [note: 383] The fact that there was a delay could have been for a number of reasons, and without more, I do not think that it is appropriate to draw an inference that it must have been because the plaintiff's CCTV sub-system was compliant.

219 In my view, these facts do not justify the inference that the plaintiff's CCTV sub-system was in full compliance with the RFP specifications and the requirements of [XA].

220 Accordingly, I am not persuaded by the plaintiff's explanations for saying that the plaintiff's CCTV sub-system was in compliance.

(4) Summary

221 The findings on this issue can be summarised as follows:

(a) [Saul] admitted that the plaintiff's CCTV sub-system did not comply and would require some modification in order to comply with the RFP specifications and the requirements of [XA];

(b) the objective documentary evidence shows that the plaintiff's CCTV sub-system did not comply with the RFP specifications and the requirements of [XA]; and

(c) the plaintiff's explanations for why it was wrong to say that the plaintiff's CCTV sub-system was not in compliance with the RFP specifications and/or the requirements of [XA] are not persuasive.

222 Based on the above, it is my view that the plaintiff has failed to prove on the balance of probabilities that its CCTV sub-system was in full compliance with the RFP specifications and the requirements of [XA]. On the contrary, as set out above, the evidence shows that it did not comply with the RFP specifications and the requirements of [XA].

223 Given that it is a term of the [Two] Agreements, if they do exist, that the plaintiff's CCTV equipment must comply with the RFP specifications and the requirements of [XA], and that the plaintiff cannot prove that its CCTV sub-system was in compliance, I find that the plaintiff had not proved on the balance of probabilities that there was a breach of the [Two] Agreements.

Whether the first defendant induced the breach with the knowledge of the [Two] Agreements and the intention to interfere with their performance?

224 Even if I am wrong to find that the [Two] Agreements do not exist and that the [Two] Agreements had not been breached, I am of the view that the plaintiff had not proved on the balance of probabilities that the first defendant had induced the breach with the knowledge of the [Two] Agreements and with the intention to interfere with their performance.

The plaintiff's case

225 For a start, I note that the plaintiff concedes that [Paul], [Ben] and [Amos] are not employed by the first defendant. [note: 384] Instead, the plaintiff's case is based on the premise that [Paul], [Ben] and [Amos] are representatives and/or acting for and on behalf of the first defendant. On this basis, the plaintiff argues that the first defendant had induced the breach with the knowledge of the [Two] Agreements and the intention to interfere with their performance.

226 The plaintiff claims that the first defendant knew about the [Two] Agreements through [Paul], [Ben] and [Amos]. The plaintiff points out, *inter alia*, that the first defendant, through [BA] and [BC], had direct control and involvement in the business of [BD]. [note: 385] Further, [Jacob] as the general manager of [BD] reported directly to [Amos] who in turn reported to [Paul]. [note: 386] Therefore, the plaintiff claims that [Paul] and [Amos] were regularly updated on the progress of the [Project]. [note: 387] In addition, the plaintiff asserts that the first defendant controlled the "purse strings" of all the entities under [BC], including [BD], by virtue of the [Z] procurement procedure. For [BC], it requires purchases above $850,000 to be approved by the Regional Financial Director (*ie*, [Ben]), the Regional Purchasing Manager / Regional General Manager (*ie*, [Amos]) and President of [BC] (*ie*, [Paul]). [note: 388] The plaintiff also claims that the first defendant and [BC] had direct control over the operations of [JVC] because [BD] is the lead company in [JVC] and [Amos] (who reported to [Paul]) was a member of the [JVC] management committee. [note: 389] According to the plaintiff, the first defendant must have been aware of the [Two] Agreements given that [Amos] was a part of the [JVC] management committee and that the first defendant had the "final say" in the approval of purchase orders above $850,000. [note: 390]

227 The plaintiff further claims that the first defendant must have induced the breach of the [Two] Agreements because:

(a) [Amos] was directly involved in the management of [JVC] and the decision to replace the plaintiff as the CCTV supplier had to come from the [JVC] management committee; [note: 391]

(b) [BD] was the lead company in [JVC] and the [Z] procurement procedures were applied to the [Project]; [note: 392] and

(c) [Paul], [Amos] and/or [Ben] approved the appointment of [PT] to replace the plaintiff as the CCTV supplier. [note: 393]

228 In this respect, the plaintiff asserts that the first defendant induced the breach of the [Two] Agreements because [KA] would not have been able to unilaterally act without [BD], and [BD] would not have been able to act without the approval of the first defendant and [BC]. [note: 394]

The first defendant's case

229 The first defendant denies that [Paul], [Ben] and [Amos] were employees, officers, agents or representatives of the first defendant or acting for and on behalf of the first defendant at the material time. [note: 395] In light of this, the first defendant denies that it had induced the breach of the [Two] Agreements or that it had the requisite knowledge and intention to do so. [note: 396] The first defendant also specifically denies the allegations made by the plaintiff as set out at [226]–[228] above. [note: 397]

My decision: The first defendant did not act with the knowledge of the [Two] Agreements or with the intention to interfere with their performance

230 As mentioned earlier, I am of the view that the defendant did not act with the knowledge of the [Two] Agreement or with the intention to interfere with their performance.

(1) Attribution of knowledge and acts

(1) Attribution of knowledge and acts

231 In my judgment, the knowledge and acts of [Paul], [Amos] and [Ben] should not be attributed to the first defendant. The difficulty here is two-fold:

(a) first, [Paul], [Amos] and [Ben], whose acts and knowledge the plaintiff seeks to attribute to the first defendant, are neither employees nor directors of the first defendant; and

(b) second, [Paul], [Amos] and [Ben] do not manage or control the business of the first defendant (which is a holding company) but the business of [BC].

232 The plaintiff argues that [Paul], [Amos] and [Ben] are "high ranking officers within the hierarchy of the [Z] group of companies, whose appointments were authorised by [the first defendant]", [note: 398] and when they perform their duties and functions within [BC], their actions are "for the benefit of [the first defendant], who was the ultimate parent company of all the subsidiaries". [note: 399] According to the plaintiff, this is supported by two points: [note: 400]

(a) first, the appointments of [Paul], [Ben] and [Amos] to their respective positions within [BC] were authorised by the first defendant; and

(b) second, [Paul], [Ben] and [Amos] were acting for the benefit of the first defendant (as the ultimate parent company of all the subsidiaries) when they performed their duties and functions within [BC].

233 Therefore, the plaintiff submits that [Paul], [Amos] and [Ben] were the "directing mind and will of [the first defendant] in respect of the [Project]". [note: 401]

234 On the other hand, the first defendant submits, *inter alia*, that: [note: 402]

(a) [Paul], [Ben] and [Amos] were not the directing mind and will of the first defendant;

(b) [Paul], [Ben] and [Amos] were not the first defendant's employees, agents, representatives and/or individuals acting for and on behalf of the first defendant; and

(c) the first defendant is a holding company, which is not involved in the day-to-day management or conduct of the businesses or affairs of its subsidiaries within the [Z] group of companies.

235 In my view, the plaintiff is, in effect, asking for the entire [Z] group of companies (of which the first defendant is the holding company) to be treated as though it is the same as the first defendant, and for the acts and knowledge of certain individuals within the [Z] group of companies to be attributed to the first defendant. I do not think that the plaintiff has shown why this can, and should, be done in the present case.

236 First, the plaintiff's argument ignores the fundamental principle of company law that a company is a separate legal entity. It presupposes that the entire [Z] group of companies and the first defendant (as the holding company) are one and the same. However, the plaintiff did not provide reasons to explain why such a view is justified. In *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell, Rev 3rd Ed, 2009) at para 2.36, the learned author states that:

There is often a temptation in the case of a group of companies to run the group as if it was one

super entity encompassing all the companies. This temptation is especially strong where the group consists of wholly-owned subsidiaries of a holding company. The temptation should be stoutly resisted. *Although a group of companies may be run as one business in an operational sense, in law each company within the group has a distinct personality*. ... [emphasis added]

237 The plaintiff has *not* argued that the corporate veil should be pierced. Even if it had, I do not think that the corporate veil should be pierced in the circumstances of the present case. In this regard, I note that Lee Kim Shin JC in *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832 at [89]–[136] undertook a careful analysis of the local and foreign authorities on the issue of whether the "single economic entity" concept is, or should be recognised as, law in Singapore. He concluded that it was not, and should not be, recognised. I endorse Lee JC's views on the issue.

238 In addition, the plaintiff has not cited a single case where the acts or knowledge of an individual, who is neither an employee nor director of the company and does not purport to act on behalf of the company, can be attributed to the company. A survey of the Singapore cases on this issue would reveal that there is no basis, as the law currently stands, for such an argument.

239 The plaintiff appears to rely on Hoffmann LJ's (as he then was) views in the case of *El Ajou v Dollar Land Holdings plc and another* [1994] 2 All ER 685 ("*El Ajou*") for the proposition that the "directing mind and will" of a company may be found in different persons in respect of different activities such that the "directing mind and will" may be the person who had management and control in relation to the act or omission in point. [note: 403] However, I do not think that *El Ajou* advances the plaintiff's case. In *El Ajou*, the question was whether a director described as a "nominee director with non-executive responsibility" was the company's directing mind and will for the purpose of establishing the liability of a company under a constructive trust. The Court of Appeal held that it was sufficient that the director had management and control so far as the receipt of the fraud was concerned, having made arrangements for the receipt and disposal of the money, even though he had no general managerial responsibility in the company (at 696–697 and 699–700, 706). I do not think that *El Ajou* stands for the proposition that the acts and knowledge of any person, whether part of the holding company or not, who manages and controls the business of the group of companies can be attributed to the ultimate holding company. The Court of Appeal in *El Ajou* was dealing with the issue of whether the acts and knowledge of the "nominee director with non-executive responsibility" can be attributed to the company. Moreover, the director was held to be the "directing mind and will" (this case was decided before *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 ("*Meridian*"); see [241] below) in relation to certain acts of the company, *ie*, the receipt of assets representing the monies fraudulently misapplied. This is quite different from the present case, where [Paul], [Amos] and [Ben] (neither employees nor directors of the first defendant) were purportedly managing and controlling the business of [BC]. The plaintiff's reliance on *El Ajou* clearly illustrates that it had mistakenly proceeded on the basis that the entire [Z] group of companies can and should be treated as though it was one company.

240 Secondly, the plaintiff assumed (without making any submissions) that the knowledge of [Paul], [Amos] and [Ben] can be aggregated and attributed to the first defendant. I am not prepared to accept that the knowledge of individuals within a group of companies can, in all cases, be attributed to the holding company. Even if I ignore for a moment that [Paul], [Amos] and [Ben] were not employed by the first defendant, the issue of whether it is permissible, when determining the state of mind of a company, to aggregate the knowledge of a number of different employees within a company is already a difficult one. It has not been specifically addressed in Singapore, and there is no consensus in the approaches taken by the other jurisdictions, like England, Australia and the United States: see Andrew Eastwood, "Corporations and the Aggregation of Knowledge" (2013) 87 Australian

Law Journal 553. The difficulty with the plaintiff's argument is compounded by the fact that it requires the aggregation of the knowledge of a number of different individuals who are not part of the company, but part of a company within the group of companies. As noted above, it is undisputed that [Paul], [Amos] and [Ben] were not employed by the first defendant, [note: 404] but were employed by other companies within the [Z] group of companies. [note: 405]

241 Thirdly, the plaintiff has not submitted on the appropriate rules of attribution that should be applied in the present case. To determine when and which person's acts and knowledge is to be treated as the company's own, the court must look at the rules of attribution: *Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)* [2014] 3 SLR 329 ("*Scintronix*") at [47]–[50]; *The "Dolphina"* [2012] 1 SLR 992 ("*The Dolphina*") at [237]. In *Scintronix* at [49], the Court of Appeal accepted Lord Hoffmann's observations in *Meridian* at 511 that the term "directing mind and will" was a mere description of the person identified as the one whose knowledge and acts are to be attributed to the company under the rules of attribution, and is not a rule of attribution in itself. The Court of Appeal went on to observe at [50] that the appellant's argument that the knowledge of certain individuals could be attributed to the company so long as it could be shown that they were the directing mind and will of the company "evidenced a lack of appreciation of the rules of attribution". In the present case, the plaintiff argues that the test should be "whether [Paul], [Amos] and [Ben] were the directing mind and will of [the first defendant] in respect of the [Project]". [note: 406] There was no mention on the rules of attribution that should be applicable. In any event, I do not consider that the plaintiff can satisfy any of the rules of attribution. For completeness, I should point out that the plaintiff's reliance on the by-laws of the first defendant to say that powers of the first defendant are vested in "top management personnel like [Paul], [Ben] and [Amos]" [note: 407] is clearly misconceived. The by-law clearly states that "[t]he business of [the first defendant] shall be managed outside the United Kingdom *by the Directors* ...". It is undisputed that [Paul], [Ben] and [Amos] were not directors of the first defendant. The first defendant has its own directors and officers. In addition, it is not the plaintiff's case that [Paul], [Ben] and [Amos] were acting as agents of the first defendant. [note: 408] As Belinda Ang J noted in *The Dolphina* at [231], the identification doctrine (*ie*, the "directing mind and will" argument) is a different means of attribution from the doctrine of agency. In any event, there is nothing on the facts to suggest that [Paul], [Ben] and [Amos] were agents of the first defendant.

242 For completeness, I should add that on the facts I do not find that [Paul], [Ben] and [Amos] were representatives and/or acting for and on behalf of the first defendant. First, [Paul], [Ben] and [Amos] were appointed to their positions in [BC] by the first defendant because it was entitled as the sole shareholder of the second defendant to do so. [note: 409] Hence, the appointments were done on behalf of the first defendant insofar as it was entitled to do so. However, it does not follow that [Paul], [Ben] and [Amos] would therefore have to be representatives of the first defendant in the performance of their duties in [BC]. Secondly, and this is related to the first point, the letters of appointment for [Paul], [Ben] and [Amos] do not show that they were appointed as representatives of the first defendant. For instance, the letter of appointment for [Paul] stated that the appointment was made "on behalf of" the second defendant, and not the first defendant. [note: 410] Thirdly, it is incorrect to suggest that [Paul], [Ben] and [Amos] must have been the representatives and/or acting for and on behalf of the first defendant because their bonuses were approved by the Board of Directors of the first defendant and they were awarded stock options in the first defendant. It is apparent from the Statement of Terms and Conditions of Award for the Employee Stock Option Scheme as of 5 February 2002 that the Employee Stock Option Scheme extends to the employees of the first defendant and its subsidiaries. [note: 411] Moreover, the evidence is clear that the bonuses and stock options were awarded for services provided to the subsidiaries (*ie*, [BC]) rather than to the

first defendant. [note: 412] As a whole, I am not persuaded by the plaintiff that [Paul], [Ben] and [Amos] were actually representatives and/or acting for and on behalf of the first defendant in the performance of their duties within [BC].

243 Accordingly, I do not think that there is any basis to conclude that the knowledge and acts of [Paul], [Amos] and [Ben] should be attributed to the first defendant.

(2) Inducement of a breach

244 I also do not consider that there was any inducement on the facts of the present case. For the avoidance of doubt, I should clarify that this finding is premised on the assumption that I am wrong to find that (a) the [Two] Agreements do not exist, (b) the [Two] Agreements had not been breached, and (c) that the knowledge and acts of [Paul], [Amos] and [Ben] cannot be attributed to the first defendant.

245 The plaintiff argues that the first defendant induced the breach of the [Two] Agreements because:

(a) [Amos] gave clear instructions to [BD] and/or [JVC] to obtain alternative proposals and disregard the [Two] Agreements; [note: 413] and

(b) [Paul], among other people, approved the [PT] order as required by the [Z] procurement procedure. [note: 414]

246 The plaintiff submits that the following emails constituted "clear instructions" for [BD] and/or [JVC] to "disregard" the [Two] Agreements: [note: 415]

(a) the email from [Amos] to [James] dated 23 April 2002, where [Amos] stated that all vendors should give a price reduction of "minimum 15%" so as to drive the costs down "for the good of the JV"; [note: 416]

(b) the email from [Amos] to [James], [Jacob] and [Zachary] dated 8 April 2002, where [Amos] asked that "the policy of the company will be properly applied, JV or not". [note: 417]

247 The plaintiff contends that since [JVC] can only act with the concurrence of [BD], which must have acted with the approval of the first defendant, it follows that the plaintiff could not have been replaced unless the first defendant approved. [note: 418] The plaintiff submits that this would suffice to show that the first defendant had induced the breach of the [Two] Agreements. In this regard, the plaintiff submits that it is not always necessary to adduce direct evidence to establish inducement, and that relevant circumstantial evidence may constitute sufficient proof where direct evidence is not available (citing *Abani Trading Pte Ltd v PT Delta Karina Mandiri and another* [2001] 3 SLR(R) 404 ("*Abani*")). [note: 419]

248 On the other hand, the first defendant put forward two arguments. First, the first defendant did not induce the breach (if any) by concurring with the decision of [JVC] to replace the plaintiff. [note: 420] Secondly, the first defendant did not induce the breach (if any) by virtue of its control over its subsidiaries. [note: 421]

249 I find that the first defendant had not induced the breach of the [Two] Agreements by [BD] or

[JVC] for three reasons.

250 First, there is insufficient evidence to show that the first defendant had induced [BD] and/or [JVC] to breach of the [Two] Agreements. In *Abani*, Kan Ting Chiu J found that, apart from the fact that the plaintiff and the second defendant were potential competitors, there was evidence to show that the second defendant was involved in the termination of the contract by "supplying the money for the refund [of the advance payment made under the charterparty] and by taking over the charterparty as well as the loaded cement" (at [33] and [37]). Unlike the facts in *Abani*, I am not prepared to draw an inference, based on all the relevant facts and circumstances and in particular, the points highlighted by the plaintiff, that the first defendant had induced [BD] or [JVC] to breach the [Two] Agreements. In my view, the emails from [Amos] do not constitute "clear instructions for [BD] and/or [JVC] to obtain alternative proposals and to disregard existing oral or shake-hand agreements". [note: 422] If the emails from [Amos] in April 2002 were "clear instructions" to [BD] or [JVC] as alleged by the plaintiff, then it would be illogical for [JVC] to issue the Purchase Order to the plaintiff in July 2002 before cancelling it on 9 October 2002. This suggests that the emails from [Amos] had no effect on [BD] and/or [JVC]. In this respect, I agree with the suggestion in Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2011) at para 15.012 that "[t]he inducer's words or conduct must be shown to have been a direct and effective cause of the contracting party's decision to default on his contractual obligation". Moreover, the fact that [Paul] had to approve the decision of [JVC] to order the CCTV sub-system from [PT] could not possibly support the plaintiff's contention that the first defendant played an active role in subverting the [Two] Agreements. The decision to approve the [PT] CCTV sub-system came after the alleged breach of the [Two] Agreements and could not, logically speaking, constitute the act of inducement. In any event, I accept the evidence of [James] that it was not necessary to obtain the approval of [Paul] for the cancellation (as opposed to approval) of a purchase order. [note: 423] This was corroborated by [Jacob]'s email to [Gabriel] dated 27 November 2002, in which [Jacob] stated that the plaintiff's order was cancelled by [Gabriel] and himself. [note: 424]

251 Secondly, the first defendant's concurrence with the decision made by [JVC] to replace the plaintiff would not suffice to constitute inducement. In *Lines International Holdings (S) Pte Ltd v Singapore Tourist Promotion Board and another* [1997] 1 SLR(R) 52, the plaintiff in that case argued, *inter alia*, that the Singapore Tourist Promotion Board ("STPB") knew about the contract between the plaintiff in that case and the Port of Singapore Authority ("PSA"), and induced PSA, in breach of the contract, to deny berthing facilities which otherwise would have been allocated to the plaintiff in that case. Judith Prakash J held that there was no inducement on the part of STPB. She explained at [145] that the decision to deny the plaintiff of a berth was made by PSA and "the fact that it had STPB's concurrence in the decision does not change the reality that PSA was the deciding body". The same reasoning applies here. As stated earlier, I accept the evidence of [James] that it was not necessary to obtain the approval of [Paul] for the cancellation (as opposed to approval) of a purchase order. [note: 425] Instead, the evidence indicates that it was [Jacob] and [Gabriel] who cancelled the Purchase Order issued for the plaintiff's CCTV sub-system. Hence, the fact that the first defendant (through [Paul]) might have concurred with the decision of [JVC] to replace the plaintiff with [PT] would not suffice to prove that the first defendant had induced the breach.

252 Thirdly, the fact that [BD] was one of the subsidiaries controlled by the first defendant would not, without more, suffice to constitute inducement. I agree with the view of Thomas J in *Stocznia Gdanska SA v Latvian Shipping Co, Latreefer Inc and others* [2001] 1 Lloyd's Rep 537 ("*Stocznia*") at [233] that the mere fact that a company is a wholly owned subsidiary controlled by the parent company does not enable the court to draw the inference that the directors of the subsidiary treated the requests of the parent company as if they were instructions to be executed. Such an inference

ignores the fact that the subsidiary is, unless proven otherwise, a separate legal entity. On the facts, Thomas J held that there was no basis to find that the subsidiary in question was a sham company or that the directors treated the requests of the parent company as if they were instructions simply to be carried out (at [235]–[236]). Thomas J's decision in *Stocznia* was upheld on appeal by the Court of Appeal (see *Stocznia Gdanska SA v Latvian Shipping Co, Latreefer Inc and others* [2002] 2 Lloyd's Rep 436). In the present case, the plaintiff neither pleaded nor proved that [BD] was a sham company or that the directors and/or officers of [BD] acted as they were told by the first defendant. The plaintiff submitted that the first defendant was the "directing mind of [BD]" because the first defendant "controlled how [BD] manages its business operations" through individuals like [Paul], [Ben] and [Amos], and [BD] must adhere to [Z] procurement policies. [note: 426] This argument is clearly misconceived. I am not persuaded that the first defendant, as a company, can be the directing mind and will of [BD]. In any event, the fact that [BD], as a subsidiary, generally complies with policies that apply to the entire [Z] group of companies does not prove that [BD] is a sham company. I also do not agree with the plaintiff that [BD] "would have to adhere to [Z] procurement policies even if it meant breaching [the [Two] Agreements]". [note: 427] If it was true that the directors of [BD] were simply acting as they were told by the first defendant (*eg*, complying with [Z] procurement policies even if it meant breaching the [Two] Agreements), then it would be most unlikely for [BD] to have entered into the alleged [Two] agreements in the first place since it would have equally been a violation of the [Z] procurement policies. I also do not agree with the plaintiff that [Zachary] was saying that the decisions for the [Project] were made by the top management of the [Z] group of companies when he said that "these are all top management decision, top management politics". [note: 428] It is apparent, when considered in light of the context, that [Zachary] was merely saying that, given his minor role in the [Project], he was not involved in many of the meetings between [JVC], [XA] and the plaintiff. By "top management", [Zachary] was referring to the relevant persons in [JVC], [XA] (as opposed to the first defendant).

253 The plaintiff submits, in the alternative, that the first defendant's act of approving the Purchase Order for [PT] (through [Paul]) constituted "indirect interference" with the [Two] Agreements as the act of approving the [PT] order was inconsistent with the [Two] Agreements. [note: 429] I find that this argument is wholly unmeritorious. As mentioned earlier (see [250] above), the decision to approve the Purchase Order for the [PT]'s CCTV sub-system came after the alleged breach of the [Two] Agreements and could not, logically speaking, have induced the breach of the [Two] Agreements. In any event, it has not been accepted in Singapore that the tort of inducement of a breach of contract extends to cover situations of indirect interference, and I do not think that such a development would be appropriate. I note that the House of Lords in *OBG Ltd and another v Allan and others* [2008] 1 AC 1 unequivocally characterised indirect interference as falling within the tort of causing loss by unlawful means which (as Lord Hoffmann explained at [8]) is distinct from the tort of inducement of a breach of contract. A similar view appears to have been expressed by the Court of Appeal in *Tribune Investment* at [15]:

> This action for "unlawful interference" is different in substance from and should not be confused with a claim for inducement of a breach of contract. The elements required to satisfy both causes of action are separate and distinct. In other words, they are two substantively different torts and should be treated as such.

254 For completeness, I should state that even though the plaintiff pleaded that the first defendant had induced [KA] to breach the [First] Agreement, [note: 430] the plaintiff did not make any submissions on this. [note: 431] Be that as it may, I am of the view that there is insufficient evidence to show that the first defendant had induced [KA] to breach of the [First] Agreement.

(4) Summary

255 The findings on the issue of whether the first defendant had induced the breach of the [Two] Agreements can be summarised as follows:

(a) the knowledge and acts of [Paul], [Amos] and [Ben] cannot be attributed to the first defendant; and

(b) there is insufficient evidence to show that [BD] (or [KA]) was induced by the first defendant to breach the [Two] Agreements.

256 For the reasons above, I conclude that the plaintiff had not proved on the balance of probabilities that the first defendant had induced the breach of the [Two] Agreements. Accordingly, the plaintiff's claim in inducement of a breach of contract must fail.

Second claim: Conspiracy to injure by breach of contract

257 The plaintiff's second claim is that the first defendant had conspired with [BD] and/or [KA] to injure the plaintiff by the breach of the [Two] Agreements. The elements for a claim in unlawful means conspiracy were set out by the Court of Appeal in *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 ("*EFT Holdings*") at [112] as follows:

(a) there was a combination of two or more persons to do certain acts;

(b) the alleged conspirators had the intention to cause damage or injury to the plaintiff by those acts;

(c) the acts were unlawful;

(d) the acts were performed in furtherance of the agreement; and

(e) the plaintiff suffered loss as a result of the conspiracy.

258 The plaintiff's second claim cannot succeed given that I earlier found that the [Two] Agreements do not exist and even if they do exist, they have not been breached. In other words, the alleged unlawful act cannot be established. This sufficiently disposes of the matter. Nevertheless, I shall go on to consider the plaintiff's claim for conspiracy to injure by breach of contract on the assumption that my earlier findings are wrong. The contention in this case, leaving aside the existence and breach of the [Two] Agreements, is whether there was an agreement or a combination to breach the [Two] Agreements.

259 The plaintiff must show that there was an agreement or a combination between the first defendant, [BD] and/or [KA] to breach the [Two] Agreements, and acts were performed in furtherance of the agreement or combination (see *EFT Holdings* at [113]). According to the Court of Appeal in *EFT Holdings* at [113]:

> ... The existence of a combination is often inferred from the circumstances and acts of the alleged conspirators (*Kuwait Oil Tanker Co SAK v Al Bader* [2000] 2 All ER (Comm) 271 ("*Kuwait Oil Tanker*") at [110]; *Asian Corporate Services (SEA) Pte Ltd v Eastwest Management Ltd (Singapore Branch)* [2006] 1 SLR(R) 901 at [19]; *The Dolphina* [2012] 1 SLR 992 ("*Dolphina*") at [262]-[264]). It is also accepted that the parties must be "sufficiently aware of the surrounding

circumstances and share the object for it properly to be said that they were acting in concert at the time of the acts complained of" (*Kuwait Oil Tanker* at [111]).

260 In my judgment, the plaintiff has failed to prove on the balance of probabilities that there is an agreement or a combination between the first defendant, [BD] and/or [KA]. For a start, I note that the plaintiff is unable to provide particulars of how or when the alleged conspiracy was conceived. [note: 432] The plaintiff merely asserts that the circumstances are "consistent only with a dishonest scheme" perpetrated by the first defendant, [BD] and/or [KA]. [note: 433] Specifically, the plaintiff relies on the email from [Amos] to [James] dated 23 April 2002 as the evidence of the conspiracy, and it reads: [note: 434]

> ...
>
> In my opinion all vendors should be tasked with a price reduction of a minimum 15%, this would reflect the margin cuts we had make to get the order, and the price of being a preferred vendor going forward. The vendors do not have the certainty that we will go with them, and even though they are preferred, there is the threat, that we may choose to go with their competitors.
>
> *I am sure I have everyone's agreement that we have to drive the costs down for the good of the JV and to keep the vendors honest.*
>
> ...
>
> [emphasis added]

261 In addition, the plaintiff points out that [James] acknowledged during cross-examination that [Amos]'s instruction was to obtain 15% discount from all vendors, including the plaintiff, despite the existence of the alleged "handshake" agreement on price. [note: 435]

262 However, I am unable to agree with the plaintiff.

263 First of all, I note that the plaintiff had assumed, without making any submission, that the knowledge and acts of [Amos] can be attributed to the first defendant for the purpose of establishing its claim in conspiracy to breach the [Two] Agreements. For the same reasons that I have stated earlier in relation to the plaintiff's claim for inducement of a breach of contract (see [231]–[243] above), I do not agree that the knowledge and acts of [Amos] can be attributed to the first defendant.

264 In any event, I do not think that the email from [Amos] to [James] dated 23 April 2002 shows that there was an agreement or combination between the first defendant, [BD] and/or [KA] for [JVC] to replace the plaintiff as the CCTV supplier if it was unwilling to give a 15% discount. In my view, the email would, taken at its highest, indicate that [Amos] wanted to get a bigger discount from the suppliers with the threat of replacing them. It is also significant that the email does not show that there was a consensus between the first defendant, [BD] and/or [KA] on the issue. In particular, I note that [James] did not say that [BD] (or [KA]) agreed with [Amos] that the plaintiff must be replaced if it refused to give a 15% discount. To be exact, [James]'s evidence was simply that the policy of the company does not recognise any "handshake" agreements. [note: 436]

265 Moreover, the plaintiff's argument is severely undermined by the fact that [JVC] went ahead to issue the Purchase Order to the plaintiff in July 2002. It is also telling that the decision to cancel the

Purchase Order was made after the email from [XA] on 7 October 2002 communicating its rejection of the plaintiff's CCTV sub-system (see [186(b)] above), and without any reference to [Amos]'s emails in April 2002. In my view, the circumstances do not support the plaintiff's case that there was an agreement or a combination between the first defendant, [BD] and/or [KA] to breach the [Two] Agreements. I see no reason for [JVC] to issue the Purchase Order in July 2002 if there was an agreement or a combination between the first defendant, [BD] and/or [KA] to breach the [Two] Agreements in April 2002.

266 Accordingly, the plaintiff's claim in conspiracy to injure by breach of contract must fail.

Third claim: Conspiracy to injure by malicious falsehood

267 The plaintiff's third claim is that the first defendant conspired with [KA] and/or [BD] to maliciously publish false words about the plaintiff's design or business by way of three letters dated 4 October 2002, 25 October 2002 and 12 December 2002 with the intention to injure the plaintiff. The alleged false statements in the letters are as follows:

(a) Letter from [JVC] to [XD] dated 4 October 2002: [note: 437]

> To fulfil the compliance, [Y] is requesting for a variation order amounting to 500 to 600 thousand US dollars. Part of which is meant for developing new equipment to fulfil the tender requirements.

(b) Letter from [JVC] to [XF] dated 25 October 2002: [note: 438]

> In order for the existing CCTV sub-system to fully comply with tender specification and most importantly meeting the client's critical operational requirement, the original CCTV matrices, keyboard selectors and switching equipment etc. need to be modified extensively, redesigned and retested.
>
> This modifications [*sic*] will invariably envisage longer lead time for gearing up manufacturing, reliability testing and system configuration acceptability clearance which is too risky for [JVC] and hampering our contractual obligation with the client and project authority.

(c) Letter from [JVC] to [XF] dated 12 December 2002: [note: 439]

> As the CCTV proposal from [Y] do not comply with fully to the RFP, [JVC] has submitted an alternative solution for client's evaluation.
>
> In order for the existing CCTV sub-system to fully comply with tender specification and most importantly meeting the client's critical operational requirement, the original CCTV matrices, keyboard selectors and switching equipment etc. need to be modified extensively, redesigned and retested.
>
> This modifications [*sic*] will invariably envisage longer lead time for gearing up manufacturing, reliability testing and system configuration acceptability clearance which is too risky for [JVC] and hampering our contractual obligation with the client and project authority.

268 As part of establishing the elements of unlawful means conspiracy (see [257] above), the plaintiff must prove the unlawful act, *ie*, that malicious falsehood took place in furtherance of the agreement or combination. In *WBG Network (Singapore) Pte Ltd v Meridian Life International Pte Ltd*

and others [2008] 4 SLR(R) 727 at [68], Andrew Ang J observed that, for a claim in malicious falsehood, the plaintiff must prove the following:

(a) the defendant published to third parties words which are false;

(b) the words refer to the plaintiff, his property or business;

(c) the words were published maliciously; and

(d) special damage has followed as a direct and natural result of the publication (but see s 6(1)(*b*) of the Defamation Act (Cap 75, 2014 Rev Ed).

269 I do not think that the plaintiff has proved its claim for two reasons. First, the plaintiff has not shown that the contents of the letters dated 4 October 2002, 25 October 2002 and 12 December 2002 are false. Secondly, the plaintiff has not justified why the first defendant should be liable for the acts of [JVC]. I will address both points in turn.

270 In my judgment, the plaintiff has not proved that the contents of the letters are false. In essence, the plaintiff's claim is premised upon the fact that the plaintiff's CCTV sub-system was compliant with the RFP specifications and the requirements of [XA]. This was not proved (see [152]–[222] above). Therefore, the plaintiff's case must fail. For completeness, however, I would specifically show why the statements in the letters are not false.

271 The plaintiff argues that the contents of the letter dated 4 October 2002 are false because the plaintiff agreed with [KA] that it would not ask for more money in respect of the proposed solution to the alleged non-compliance. [note: 440] However, this is not borne out by the evidence. On 20 September 2002, [Saul] wrote to [Gabriel] to discuss the issue of non-compliance. At this point in time, the issue of non-compliance by the plaintiff's CCTV sub-system had already been raised by [XA] and other parties. In the letter, [Saul] wrote:

> *To change the system to 8 lines between [Location 1] and [Location 2] and to [Location 4] (without split) will increase the price by some US$400,000- and to do so with split screens will be around US$600,000.-*
>
> It is our opinion that to answer their insistence at this stage you should offer only the basic additions. This by quoting to the user a price of US$107,800.- plus your margin.
>
> [emphasis added]

272 [Saul]'s explanation was that the plaintiff was not asking for an additional sum of US$400,000 to US$600,000 from [XA] in order to change from the two-line system to the eight-line system, but was explaining to [KA] the costs involved to change to the eight-line system. [note: 441] I do not agree. The two-line system (or, for that matter, the three-line system) would not comply with the RFP specifications and the requirements of [XA]. As I have earlier found (see [204] above), there was no agreement between the plaintiff, [BD] and [KA] (or [JVC]) to bear the additional sum of US$400,000 to US$600,000 which was required to change the plaintiff's CCTV sub-system from two-line to eight-line. I have also explained earlier (see [205] above) that it is immaterial that the plaintiff had proposed a cheaper alternative at $107,800 given that it did not strictly comply with the RFP specifications. Hence, the only way for the plaintiff's CCTV sub-system to meet the requirement for an eight-line system was for [XA] to pay US$400,000 to US$600,000. There is no doubt that the plaintiff was, in effect, asking for US$400,000 to US$600,000 to make the change. In my view, the

letter dated 4 October 2002 was correctly based on [Saul]'s position stated in his letter dated 20 September 2002. Furthermore, I do not agree that the volte-face by the plaintiff in his letter to [XA] on 10 October 2002 stating that the plaintiff's CCTV sub-system will be rendered compliant "at no additional cost to [XA]" is relevant for the purpose of ascertaining if the contents of the letter dated 4 October 2002 are false.

273 I now move on to address the letters dated 25 October 2002 and 12 December 2002. I will deal with both letters together given that they are substantially similar for the present purpose. The plaintiff argues that the contents of the letters were false because [Michael] stated twice in his emails that the plaintiff's CCTV sub-system was fully compliant with the RFP specification. [note: 442] I have discussed in great detail earlier (see [152]–[222] above) why the plaintiff's CCTV sub-system was not in compliance with the RFP specifications and the requirements of [XA]. In particular, I have explained my difficulties with the two emails from [Michael] (see [192]–[195] above). Further, the evidence clearly shows that modification was required for the plaintiff's CCTV sub-system to comply (see [173]–[177] above). In fact, this was reflected in the two emails from [Saul] to [XA] dated 8 October 2002, in which he said that the engineering department in Japan had to "re-study" the issue, and that the engineers did not allow the plaintiff to proceed in accordance with [XA]'s specifications even after multiple internal discussions (see [176] above).

274 Accordingly, there is no factual basis for the plaintiff to assert that the letters dated 4 October 2002, 25 October 2002 and 12 December 2002 are false. For this reason alone, the plaintiff's claim for conspiracy to injure by malicious falsehood must fail.

275 Even if the contents of the letters were false, the plaintiff had not shown why the first defendant should be liable for the letters written by [JVC]. The plaintiff argues that the letters could not have been issued without the approval of the first defendant given that the decision to proceed with the [PT] order had to be approved by [Paul] pursuant to the [Z] procurement procedure. [note: 443] The argument is incomplete insofar as it assumes that the acts and knowledge of [Paul] can be attributed to the first defendant. I do not think so. Further, even if the acts and knowledge of [Paul] were attributable to the first defendant, I do not think that the plaintiff had proved that the letters were issued with the approval of [Paul]. These letters dealt with the cancellation of the plaintiff's Purchase Order, and as I have stated earlier (see [250] above), the evidence shows that it was not necessary to obtain the approval of [Paul] for the cancellation (as opposed to approval) of a purchase order. [note: 444] It follows that [Paul]'s approval would not have been necessary for [JVC] to issue the letters as well. Accordingly, the plaintiff's claim cannot succeed even if the contents of the letters are false.

Fourth Claim: Unjust enrichment

276 Apart from the claims addressed above, the plaintiff submits that it has a claim in unjust enrichment against the first defendant. [note: 445] However, the plaintiff's argument is puzzling. In its submissions, the plaintiff started by setting out the requirements for a claim in unjust enrichment discussed in the Court of Appeal decision in *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 ("*Wee Anna*"). [note: 446] The plaintiff then proceeds to examine the cases on restitution for wrongs, like *Wrotham Park Estate Co Ltd v Parkside Homes Ltd and others* [1974] 1 WLR 798 and *Attorney General v Blake* [2001] 1 AC 268, before concluding that the present case "is a suitable case for awarding *Wrotham Park* damages" as there was a deliberate breach of the [Two] Agreements by [BD] upon the instructions of the first defendant to follow [Z] procurement policies. [note: 447] Further, the plaintiff

had only pleaded that the first defendant had been "unjustly enriched" at the expense of the plaintiff by reason of the first defendant's tortious conduct. [note: 448]

277 In my view, the plaintiff failed to draw the fundamental distinction between restitution for unjust enrichment and restitution for wrongs. This distinction is well-recognised in academic writings (see Andrew Burrows, *The Law of Restitution* (Oxford University Press: 3rd Ed, 2011) ("*Burrows*") at pp 9–10 and Goff & Jones, *The Law of Unjust Enrichment* (Charles Mitchell, Paul Mitchell and Stephen Watterson eds) (Sweet & Maxwell, 8th Ed, 2011) ("*Goff & Jones*") at p 4).

278 According to *Burrows* (at pp 9–10):

> It has become widely recognised in recent years that there is a fundamental distinction in the law of restitution between restitution of an unjust enrichment and restitution for wrongs. ...
>
> The two parts are distinguishable by the cause of action (or event) triggering the response of restitution. The first and main part is where the cause of action to which restitution responds is an unjust enrichment of the defendant at the claimant's expense. The second part is where the cause of action to which restitution responds is the commission of a civil wrong by the defendant against the claimant (such as a breach of contract or tort or breach of fiduciary duty).
>
> ...
>
> Restitution for wrongs has a different focus. The starting point is that the claimant can establish that the defendant has committed a civil wrong against it. The essential question at issue is not whether there is a cause of action but rather the purely remedial question of whether, instead of claiming compensation for the civil wrong, the claimant is entitled to restitution for that civil wrong to strip away all, or some, of the wrongdoer's wrongful profits. Put another way, the enrichment of the defendant does not go to establish an element of the cause of action. Rather it is simply of relevance to a possible remedy that the claimant may be entitled to for the cause of action constituted by the wrong.

279 A similar view is expressed in *Goff & Jones* (at p 4):

> ... A right to restitution is one possible response to the event of unjust enrichment. When one person is unjustly enriched at the expense of another, that other may acquire a right to restitution of that enrichment—a right that that enrichment be returned to him.
>
> ... a right to restitution may arise from events other than unjust enrichment. Most notably, restitution is a possible response to acquisitive wrongs. Suppose, for example, that a defendant commits the tort of conversion by selling a claimant's asset to a third party. His conversion of the assert gives rise to more than one remedial right. Founding on the tort, the claimant can claim either compensation of his own loss or restitution of the sale proceeds that constitute the defendant's gain. This restitutionary right arises from the wrong, not from unjust enrichment.
>
> Restitution as a response to wrongdoing is therefore a different topic from restitution as a response to unjust enrichment. It concerns such questions as when gain-based remedies should be awarded for breach of contract, tort, and equitable wrongdoing, whether there is more than one measure of gain-based relief for the victims of wrongs, and how gain-based remedies for wrongs are quantified.

280 Such a distinction was also acknowledged by Andrew Ang J in *Chip Hup Hup Kee Construction*

Pte Ltd v Yeow Chern Lean [2010] 3 SLR 213 at [9].

281 In light of the manner in which the pleadings and submissions were drafted, it would be impossible to ascertain if the plaintiff had intended to advance a claim in unjust enrichment or seek restitutionary damages for its other claims. Be that as it may, it would not be necessary for me to decipher this since I am of the view that both alternatives would fail. I do not think that the plaintiff can succeed with a claim in unjust enrichment. There is no "unjust factor" in this case. The plaintiff refers to *Wee Anna* at [132]–[133], where the Court of Appeal reproduced a list of "unjust factors" catalogued in academic treaties, like *Burrows* and *Goff & Jones*, but the plaintiff has not singled out any one of the unjust factors. The alleged "tortious conduct" of the first defendant (which the plaintiff failed to prove) does not appear to be one of the unjust factors identified in *Burrows* or *Goff & Jones*. Accordingly, I find that the plaintiff's claim in unjust enrichment must necessarily fail. I also do not see how the plaintiff can ask for restitutionary damages given that it failed to establish all of its claims.

Conclusion

282 For the reasons set out above, I dismiss the plaintiff's claims in their entirety. The first defendant is entitled to costs, to be taxed if not agreed.

[note: 1] SOC at para 1; [Saul]'s AEIC at para 4.

[note: 2] SOC at para 9A; [Saul]'s AEIC at para 1.

[note: 3] SOC at para 9A.

[note: 4] SOC at para 2; Defence at para 4; [Saul]'s AEIC at para 5; [Elsa]'s AEIC at para 5.

[note: 5] SOC at para 3; Defence at para 4; [Saul]'s AEIC at para 6.

[note: 6] NE, 29.5.14, 64/5; 11/22.

[note: 7] SOC at para 4; Defence at para 4C; [Saul]'s AEIC at para 10.

[note: 8] SOC at para 4; [Saul]'s AEIC at para 10.

[note: 9] SOC at para 5B(a); Defence at 5B(b); [Saul]'s AEIC at para 11.

[note: 10] SOC at para 5; Defence at para 5(a); [Saul]'s AEIC at para 11.

[note: 11] SOC at para 11; Defence at para 10; [Saul]'s AEIC at para 35.

[note: 12] SOC at para 11; Defence at para 10; [Saul]'s AEIC at para 35.

[note: 13] SOC at para 13; Defence at para 10; [Saul]'s AEIC at para 37.

[note: 14] SOC at para 15; Defence at para 12; [Saul]'s AEIC at para 39.

[note: 15] SOC at para 14; [Saul]'s AEIC at para 38.

[note: 16] SOC at para 7; Defence at para 7; [Saul]'s AEIC at para 13.

[note: 17] SOC at paras 10 and 14; [Saul]'s AEIC at para 16.

[note: 18] SOC at para 10; [Saul]'s AEIC at para 16.

[note: 19] SOC at para 16; [Saul]'s AEIC at para 40.

[note: 20] SOC at para 17; [Saul]'s AEIC at para 41.

[note: 21] SOC at para 8; Defence at para 8; [Saul]'s AEIC at para 14.

[note: 22] SOC at paras 10 and 17; [Saul]'s AEIC at paras 15–16.

[note: 23] SOC at para 18; [Saul]'s AEIC at para 41.

[note: 24] Defence at para 14.

[note: 25] SOC at para 23; [Saul]'s AEIC at para 44.

[note: 26] SOC at para 23; [Saul]'s AEIC at para 44.

[note: 27] SOC at para 24; Defence at para 17; [Saul]'s AEIC at para 45.

[note: 28] SOC at para 25; Defence at para 17; [Saul]'s AEIC at para 46.

[note: 29] SOC at para 25; Defence at para 17; [Saul]'s AEIC at para 46.

[note: 30] SOC at para 25; Defence at para 17; [Saul]'s AEIC at para 46.

[note: 31] SOC at para 6; Defence at para 6(a); [Saul]'s AEIC at para 12. See also SOC at para 29; Defence at para 20.

[note: 32] [Elsa]'s AEIC at para 5 and p 18; [Saul]'s AEIC at para 12.

[note: 33] SOC at para 38; Defence at para 29(c); [Saul]'s AEIC at para 58.

[note: 34] SOC at para 38; [Saul]'s AEIC at para 58.

[note: 35] SOC at para 41; Defence at 32; [Saul]'s AEIC at para 61.

[note: 36] SOC at paras 34–36; [Saul]'s AEIC at para 54.

[note: 37] SOC at paras 34–38; [Saul]'s AEIC at paras 53–58.

[note: 38] SOC at para 76; Defence at para 60.

[note: 39] 2 AB 757; [Saul]'s AEIC at paras 19–23.

[note: 40] NE, 29.05.14, 53/3; [Saul]'s AEIC at paras 28–31.

[note: 41] NE, 29.05.14, 52/21; [Saul]'s AEIC at paras 24–27.

[note: 42] SOC at para 18; [Saul]'s AEIC at para 42.

[note: 43] SOC at para 35; [Saul]'s AEIC at para 55.

[note: 44] Plaintiff's closing submissions at para 31(d).

[note: 45] [Saul]'s AEIC at para 55.

[note: 46] See SOC at para 35.

[note: 47] 9 AB 5387.

[note: 48] 9 AB 5393.

[note: 49] 9 AB 5593.

[note: 50] 9 AB 5478.

[note: 51] First defendant's supplementary bundle of documents, Tab 2.

[note: 52] 9 AB 5395.

[note: 53] 9 AB 5415.

[note: 54] 9 AB 5416.

[note: 55] 9 AB 5442.

[note: 56] First defendant's closing submissions at para 43.

[note: 57] First defendant's closing submissions at para 43.

[note: 58] Plaintiff's reply submissions at para 10.

[note: 59] Plaintiff's reply submissions at para 10.

[note: 60] Plaintiff's reply submissions at paras 11–12.

[note: 61] SOC at para 77; Plaintiff's closing submissions at para 25(a).

[note: 62] SOC at para 79; Plaintiff's closing submissions at para 25(b).

[note: 63] SOC at para 79; Plaintiff's closing submissions at para 25(c).

[note: 64] SOC at para 82; Plaintiff's closing submissions at paras 210–221.

[note: 65] SOC at para 17.

[note: 66] SOC at para 18.

[note: 67] SOC at para 18.

[note: 68] SOC at para 18.

[note: 69] SOC at para 28.

[note: 70] SOC at para 29.

[note: 71] SOC at para 29.

[note: 72] SOC at para 31.

[note: 73] SOC at para 32. See also Defence at para 25.

[note: 74] SOC at paras 32 and 27.

[note: 75] SOC at para 32.

[note: 76] SOC at para 33.

[note: 77] SOC at para 33.

[note: 78] SOC at para 34.

[note: 79] SOC at para 34.

[note: 80] SOC at para 36.

[note: 81] SOC at para 37.

[note: 82] SOC at para 37.

[note: 83] SOC at para 38.

[note: 84] SOC at para 40.

[note: 85] SOC at para 35.

[note: 86] SOC at para 19.

[note: 87] SOC at para 44.

[note: 88] SOC at para 44.

[note: 89] SOC at para 46.

[note: 90] SOC at para 46.

[note: 91] SOC at para 46.

[note: 92] SOC at para 47.

[note: 93] SOC at para 47.

[note: 94] SOC at para 48.

[note: 95] SOC at para 49.

[note: 96] Defence at para 27.

[note: 97] Defence at para 27.

[note: 98] Defence at para 27.

[note: 99] Defence at para 29(c).

[note: 100] Defence at para 35.

[note: 101] Defence at para 37(a).

[note: 102] Defence at para 41.

[note: 103] First defendant’s closing submissions at para 45(1).

[note: 104] Plaintiff’s closing submissions at para 81.

[note: 105] Defence at para 14.

[note: 106] Defence at para 27.

[note: 107] First defendant’s closing submissions at para 92.

[note: 108] Plaintiff’s closing submissions at paras 55–63.

[note: 109] 2 AB 1126.

[note: 110] 2 AB 1125– 1126.

[note: 111] 2 AB 1340.

[note: 112] SOC at para 30; Defence at para 21.

[note: 113] [P]’s AEIC at para 2.

[note: 114] 2 AB 1202.

[note: 115] 2 AB 1202.

[note: 116] 2 AB 1201.

[note: 117] 2 AB 1201.

[note: 118] NE, 27.05.14, 129/15.

[note: 119] NE, 27.05.14, 130/15.

[note: 120] First defendant’s reply submissions at para 17(3).

[note: 121] First defendant’s reply submissions at para 17(3).

[note: 122] First defendant’s reply submissions at para 17(2).

[note: 123] NE, 28.5.14, 105/22; 106/12.

[note: 124] NE, 27.05.14, 53/5.

[note: 125] NE, 27.05.14, 50/20.

[note: 126] NE, 26.5,14, 43/17.

[note: 127] NE, 26.5.14, 44/7.

[note: 128] NE, 26.5.14, 44/7.

[note: 129] NE, 27.5.14, 27/23.

[note: 130] NE, 26.5.14, 44/16.

[note: 131] NE, 26.5.14, 27/22

[note: 132] NE, 26.5.14, 40/2

[note: 133] See, *eg*, NE, 26.5.14, 44/16; 45/13.

[note: 134] NE, 26.5.14, 89/10.

[note: 135] NE, 26.5.14, 90/3–90/5

[note: 136] Plaintiff's closing submissions at paras 37–39.

[note: 137] NE, 27.05.14, 52/2.

[note: 138] NE, 27.05.14, 85/5.

[note: 139] NE, 27.05.14, 86/2.

[note: 140] Plaintiff's closing submissions at para 41.

[note: 141] NE, 27.05.14, 128/23.

[note: 142] [Saul]'s AEIC at para 69; NE, 29.05.14, 84/6.

[note: 143] Plaintiff's closing submissions at para 43.

[note: 144] Plaintiff's closing submissions at paras 43–44.

[note: 145] Exhibit P1 at para 3c.

[note: 146] Plaintiff's closing submissions at para 46.

[note: 147] NE, 28.05.14, 26/25.

[note: 148] NE, 28.05.14, 21/11; 23/2.

[note: 149] First defendant's reply submissions at para 10(1).

[note: 150] First defendant's reply submissions at para 12.

[note: 151] First defendant's closing submissions at para 62; first defendant's reply submissions at para 10(2).

[note: 152] NE, 27.5.14, 47/25.

[note: 153] NE, 27.5.14, 48/2.

[note: 154] NE, 27.5.14, 53/16.

[note: 155] NE, 28.5.14, 37/6.

[note: 156] NE, 27.5.14, 49/18; 50/5.

[note: 157] NE, 27.5.14, 52/2.

[note: 158] NE, 27.5.14, 52/2.

[note: 159] NE, 27.5.14, 52/2

[note: 160] NE, 27.5.14, 53/14

[note: 161] NE, 28.5.14, 10/2.

[note: 162] NE, 28.5.14, 105/1

[note: 163] NE, 28.5.14, 105/22.

[note: 164] NE, 28.5.14, 105/12.

[note: 165] NE, 28.05.14, 21/11; 23/2.

[note: 166] Plaintiff's closing submissions at para 49; [Saul]'s AEIC at 56.

[note: 167] Plaintiff's closing submissions at para 50; NE, 26.05.14, 52/6.

[note: 168] Plaintiff's closing submissions at para 50.

[note: 169] Plaintiff's closing submissions at paras 34–39, 80.

[note: 170] Plaintiff's closing submissions at para 64.

[note: 171] Plaintiff's closing submissions at para 80.

[note: 172] First defendant's reply submissions at para 8.

[note: 173] First defendant's reply submissions at para 8.

[note: 174] SOC at para 38; Defence at para 29(c).

[note: 175] [P]'s AEIC at para 9.

[note: 176] Plaintiff's closing submissions at para 64; NE, 28.05.14, 30/15.

[note: 177] NE, 28.5.14, 10/2.

[note: 178] NE, 28.05.14, 31/5.

[note: 179] 1.1 DCB 101 and 103.

[note: 180] First defendant's closing submissions at paras 68–70.

[note: 181] First defendant's closing submissions at para 71.

[note: 182] First defendant's closing submissions at para 71, citing [Saul]'s AEIC at para 73.

[note: 183] SOC at para 35.

[note: 184] [Saul]'s AEIC at [69].

[note: 185] [Saul]'s AEIC at para 70; 1.1 DCB 96–97.

[note: 186] [Saul]'s AEIC at para 70; NE, 26.05.14, 69/14.

[note: 187] First defendant's closing submissions at para 80.

[note: 188] First defendant's closing submissions at paras 82–87.

[note: 189] First defendant's closing submissions at para 84.

[note: 190] First defendant's closing submissions at para 84.

[note: 191] 1.1 DCB 126.

[note: 192] 1.1 DCB 125.

[note: 193] First defendant's closing submissions at para 86.

[note: 194] 1.1 DCB 127

[note: 195] 1.1 DCB 127.

[note: 196] 1.1 DCB 128.

[note: 197] 1.1 DCB 128.

[note: 198] First defendant's closing submissions at para 87.

[note: 199] Plaintiff's reply submissions at para 48; NE, 28.05.14, 49/16.

[note: 200] Plaintiff's reply submissions at para 48; NE, 26.06.14, 82/8.

[note: 201] Plaintiff's reply submissions at para 49.

[note: 202] Plaintiff's reply submissions at para 51.

[note: 203] Plaintiff's reply submissions at para 51.

[note: 204] Plaintiff's reply submissions at para 54.

[note: 205] NE, 26.05.14, 84/20.

[note: 206] 1.1 DCB 128.

[note: 207] First defendant's closing submissions at paras 88–91.

[note: 208] NE, 26.05.14, 133/2.

[note: 209] NE, 26.05.14, 133/2

[note: 210] First defendant's closing submissions at paras 89–90.

[note: 211] See, *eg*, NE, 26.05.14, 132/17.

[note: 212] 1.1 DCB 40.

[note: 213] 9 AB 5598-8; First defendant's supplementary bundle of documents ("1DSBOD") Tab 1, para 36; 9 AB 5485–5486.

[note: 214] 9 AB 5598-8.

[note: 215] 9 AB 5350.

[note: 216] First defendant's closing submissions at para 102.

[note: 217] First defendant's closing submissions at para 102.

[note: 218] 9 AB 5486.

[note: 219] First defendant's closing submissions at para 104.

[note: 220] 9 AB 5389.

[note: 221] 9 AB 5389.

[note: 222] 9 AB 5389.

[note: 223] SOC at para 77.

[note: 224] NE, 26.05.14, 60/13.

[note: 225] NE, 26.05.14, 60/18; 63/1; 63/15.

[note: 226] 9 AB 5405–5406.

[note: 227] First defendant's closing submissions at para 110.

[note: 228] Plaintiff's closing submissions at para 67.

[note: 229] NE, 26.05.14, 60/13; 63/11.

[note: 230] Plaintiff's reply submissions at para 66; NE, 26.05.14, 28/6; 59/20.

[note: 231] Plaintiff's reply submissions at para 72.

[note: 232] Plaintiff's reply submissions at paras 71–73.

[note: 233] NE, 26.5.14,38/24.

[note: 234] NE, 26.5.14, 41/4.

[note: 235] NE, 26.5.14, 41/16.

[note: 236] NE, 26.05.14, 41/20.

[note: 237] NE, 26.05.14, 28/6; 59/20.

[note: 238] First defendant's closing submissions at para 47; SOC at para 18.

[note: 239] First defendant's closing submissions at para 47; SOC at para 32.

[note: 240] First defendant's closing submissions at para 49.

[note: 241] NE, 26.05.14, 43/17.

[note: 242] NE, 27.05.14, 27/23.

[note: 243] [Saul]'s AEIC at para 15; NE, 26.05.14, 31/12; 40/2.

[note: 244] First defendant's closing submissions at para 51.

[note: 245] First defendant’s closing submissions at para 51.

[note: 246] Plaintiff’s closing submissions at paras 77–78.

[note: 247] Plaintiff’s closing submissions at para 79.

[note: 248] Plaintiff’s closing submissions at para 79.

[note: 249] NE, 26.05.14, 44/3; 45/17.

[note: 250] NE, 27.5.14, 27/24.

[note: 251] First defendant’s closing submissions at para 63.

[note: 252] First defendant’s closing submissions at paras 64–65.

[note: 253] NE, 26.05.14, 24/4.

[note: 254] NE, 26.05.14, 24/24.

[note: 255] NE, 26.05.14, 41/4.

[note: 256] NE, 26.05.14, 41/16.

[note: 257] NE, 26.05.14, 41/24.

[note: 258] NE, 27.05.14, 51/20.

[note: 259] SOC at para 48.

[note: 260] SOC at para 48.

[note: 261] SOC at para 50.

[note: 262] SOC at para 50.

[note: 263] SOC at para 50.

[note: 264] SOC at para 51.

[note: 265] SOC at para 51.

[note: 266] SOC at para 51.

[note: 267] SOC at para 51.

[note: 268] SOC at para 53.

[note: 269] SOC at para 54.

[note: 270] SOC at para 55

[note: 271] SOC at para 58.

[note: 272] SOC at para 58.

[note: 273] SOC at para 64.

[note: 274] SOC at para 64.

[note: 275] SOC at para 64A.

[note: 276] SOC at para 65

[note: 277] SOC at para 65.

[note: 278] SOC at para 68.

[note: 279] SOC at para 68.

[note: 280] SOC at para 69.

[note: 281] SOC at para 70.

[note: 282] SOC at para 70.

[note: 283] SOC at para 71.

[note: 284] SOC at para 71.

[note: 285] SOC at para 71.

[note: 286] SOC at para 72.

[note: 287] SOC at para 73.

[note: 288] SOC at para 73.

[note: 289] SOC at para 75.

[note: 290] Defence at para 40.

[note: 291] Defence at para 41.

[note: 292] Defence at para 43.

[note: 293] Defence at para 45.

[note: 294] Defence at para 45.

[note: 295] Defence at para 52.

[note: 296] Defence at para 52.

[note: 297] Defence at para 55.

[note: 298] Defence at para 57.

[note: 299] Defence at para 57.

[note: 300] Defence at para 60.

[note: 301] Plaintiff's reply submissions at para 85.

[note: 302] Plaintiff's reply submissions at para 77.

[note: 303] NE, 27.05.14, 24/23.

[note: 304] NE, 27.05.14, 25/3.

[note: 305] NE, 26.05.14, 117/5.

[note: 306] NE, 27.05.14, 39/23.

[note: 307] NE, 26.05.14, 129/24.

[note: 308] 1.1 DCB 195–197.

[note: 309] NE, 26.05.14, 103/12.

[note: 310] NE, 27.05.14, 35/23.

[note: 311] 1.1 DCB 195–197; NE, 26.05.14, 101/14.

[note: 312] 1.1 DCB 199.

[note: 313] Plaintiff's reply submissions at para 92.

[note: 314] Plaintiff's reply submissions at para 91.

[note: 315] NE, 26.05.14, 94/22.

[note: 316] NE, 27.05.14, 28/23.

[note: 317] 1.1 DCB 131–134; NE, 26.05.14, 89/10.

[note: 318] [Saul]'s AEIC at DE-1, p 216.

[note: 319] 1.1 DCB 144–145, NE, 26.05.14, 98/6.

[note: 320] SOC at para 55.

[note: 321] [Saul]'s AEIC at DE-1, p 243.

[note: 322] 1.1 DCB 185; NE, 26.05.14, 102/15.

[note: 323] 1.1 DCB 189; NE, 26.05.14, 117/12.

[note: 324] 1.1 DCB 188; NE, 26.05.14, 116/4.

[note: 325] 1.1 DCB 195–197; NE, 26.05.14, 101/14.

[note: 326] 1.1 DCB 198–200; NE, 26.05.14, 121/19.

[note: 327] 1.1 DCB 141; NE, 26.05.14, 126/13.

[note: 328] 1.1 DCB 211; NE, 26.05.14, 128/5.

[note: 329] [Saul]'s AEIC at para 117.

[note: 330] 1.1 DCB 214.

[note: 331] [Saul]'s AEIC at para 117; NE, 27.05.14, 27/17.

[note: 332] 3 AB 2096.

[note: 333] 28.05.14, 86/4.

[note: 334] 3 AB 2125.

[note: 335] 3 AB 2168.

[note: 336] 1.1 DCB 189.

[note: 337] 1.1 DCB 189.

[note: 338] NE, 27.5.14, 28

[note: 339] NE, 26.05.14, 91/4.

[note: 340] NE, 26.05.14, 90/16; 100/15; 119/12.

[note: 341] 3 AB 1617.

[note: 342] 3 AB 1624.

[note: 343] Plaintiff's closing submissions at para 151; NE, 28.05.14, 49/11.

[note: 344] NE, 28.05.14, 38/25.

[note: 345] NE, 28.05.14, 48/13.

[note: 346] NE, 28.05.14, 49/16.

[note: 347] NE, 26.05.14, 130/1; 92/1.

[note: 348] NE, 26.05.14, 91/22.

[note: 349] [Saul]'s AEIC at para 86.

[note: 350] NE, 26.05.14, 101/7.

[note: 351] NE, 27.05.14, 29/1.

[note: 352] NE, 27.05.14, 36/7.

[note: 353] 3 AB 1568; [Saul]'s AEIC at para 89.

[note: 354] [Saul]'s AEIC at para 91.

[note: 355] [Saul]'s AEIC at para 90; 3 AB 1580.

[note: 356] [Saul]'s AEIC at para 91.

[note: 357] 1.1 DCB 152; NE, 26.05.14, 114/10.

[note: 358] 1.1 DCB 239; 1.2 DCB 241, 268.

[note: 359] 3 AB 1597.

[note: 360] 3 AB 1666.

[note: 361] 3 AB 1666.

[note: 362] 3 AB 1698.

[note: 363] NE, 28.05.14, 59/9.

[note: 364] 3 AB 1739.

[note: 365] NE, 28.05.14, 63/7.

[note: 366] 3 AB 1739.

[note: 367] NE, 26.05.14, 103/12.

[note: 368] NE, 26.05.14, 124/25; NE, 27.05.14, 33/8.

[note: 369] 1.1 DCB 189.

[note: 370] 1.1 DCB 189.

[note: 371] 3 AB 1617.

[note: 372] Plaintiff's reply submissions at para 85; Plaintiff's closing submissions at paras 141–182.

[note: 373] 1.1 DCB 231.

[note: 374] 1.1 DCB 236; NE, 26.05.14, 128/22.

[note: 375] NE, 28.05.14, 104/4.

[note: 376] Plaintiff's reply submissions at para 85; Plaintiff's closing submissions at para 141.

[note: 377] Plaintiff's reply submissions at para 85; Plaintiff's closing submissions at para 167.

[note: 378] 3 AB 1841.

[note: 379] 3 AB 1900.

[note: 380] 3 AB 1822.

[note: 381] Plaintiff's reply submissions at para 85; Plaintiff's closing submissions at para 171.

[note: 382] Plaintiff's reply submissions at para 85; Plaintiff's closing submissions at para 175.

[note: 383] 3 AB 2153.

[note: 384] Plaintiff's closing submissions at paras 91–92.

[note: 385] SOC at para 77(a).

[note: 386] SOC at para 77(a).

[note: 387] SOC at para 77(d).

[note: 388] SOC at para 77(b).

[note: 389] SOC at para 77(e).

[note: 390] SOC at para 77(g).

[note: 391] SOC at para 77(cc).

[note: 392] SOC at para 77(dd).

[note: 393] SOC at paras 77(ff) and (hh).

[note: 394] SOC at para 77(ii).

[note: 395] Defence at paras 64 and 65.

[note: 396] Defence at paras 64 and 65.

[note: 397] Defence at paras 64 and 65.

[note: 398] Plaintiff's reply submissions at para 149.

[note: 399] Plaintiff's reply submissions at para 149.

[note: 400] Plaintiff's closing submissions at para 92.

[note: 401] Plaintiff's reply submissions at para 136.

[note: 402] First defendant's closing submissions at paras 165–205.

[note: 403] Plaintiff's reply submissions at para 140.

[note: 404] Plaintiff's closing submissions at para 92.

[note: 405] [Elsa]'s AEIC at p 43; NE, 29.5.14, 56/10.

[note: 406] Plaintiff's reply submissions at para 136.

[note: 407] Plaintiff's reply submissions at paras 150–151.

[note: 408] Plaintiff's reply submissions at paras 136–148.

[note: 409] NE, 29.05.14, 40/24.

[note: 410] 2 AB 757.

[note: 411] [Elsa]'s AEIC at para 12.

[note: 412] [Saul]'s AEIC at pp 384–386; NE, 29.05.14, 61/9.

[note: 413] Plaintiff's closing submissions at para 188

[note: 414] Plaintiff's closing submissions at para 189; SOC at para 77(hh).

[note: 415] Plaintiff's closing submissions at paras 187–188.

[note: 416] 2 AB 1294.

[note: 417] 2 AB 1201.

[note: 418] SOC at para 77(ii).

[note: 419] Plaintiff's closing submissions at para 185.

[note: 420] First defendant's closing submissions at paras 207–209.

[note: 421] First defendant's closing submissions at paras 210–214.

[note: 422] Plaintiff's closing submissions at para 188.

[note: 423] NE, 29.05.14, 98/18.

[note: 424] 1.2 DCB 250.

[note: 425] NE, 29.05.14, 98/18.

[note: 426] Plaintiff's reply submissions at para 158.

[note: 427] Plaintiff's reply submissions at para 159.

[note: 428] Plaintiff's reply submissions at para 158; NE, 28.05.14, 81/3.

[note: 429] Plaintiff's reply submissions at para 160.

[note: 430] SOC at para 77(ii).

[note: 431] Plaintiff's closing submissions at paras 184–190; Plaintiff's reply submissions at paras 133–160.

[note: 432] SOC at para 79(c)(i).

[note: 433] SOC at para 79(c)(iv).

[note: 434] Plaintiff's closing submissions at para 197.

[note: 435] Plaintiff's closing submissions at para 198; NE, 29.05.14, 90/23.

[note: 436] NE, 29.05.14, 91/6; 92/9.

[note: 437] 3 AB 1698.

[note: 438] 3 AB 2076.

[note: 439] 3 AB 2153.

[note: 440] Plaintiff's closing submissions at para 206.

[note: 441] 3 AB 1568; [Saul]'s AEIC at para 89.

[note: 442] Plaintiff's closing submissions at para 208.

[note: 443] Plaintiff's closing submissions at para 209.

[note: 444] NE, 29.05.14, 98/18.

[note: 445] Plaintiff's opening statement at para 25; Plaintiff's closing submissions at paras 210–212.

[note: 446] Plaintiff's closing submissions at paras 210–212.

[note: 447] Plaintiff's closing submissions at para 221.

[note: 448] SOC at para 82.