IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 39

Suit 126 of 2021

Between

(1) Dialectic PR LLC
(2) Dialectic Distribution LLC

… *Plaintiffs*

And

(1) Brilliante Resources International Pte Limited
(2) Woon Joon Foong, Jerrel (Yun Junfeng, Jerrel)

… *Defendants*

JUDGMENT

[Contract — Breach]
[Companies — Incorporation of companies — Lifting corporate veil]
[Tort — Inducement of breach of contract]

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Dialectic PR LLC and another
v
Brilliante Resources International and another

[2023] SGHC 39

General Division of the High Court — Suit No 126 of 2021
Andrew Ang SJ
7–10 June 2022

17 February 2023

Andrew Ang SJ:

Introduction

1 At the height of the COVID-19 pandemic, the demand for essential goods went through the roof. Amongst such essential goods were medical grade face masks. There was, therefore, business to be done among the manufacturers, suppliers and middlemen. The present dispute arises out of one such transaction for the supply of face masks. The Plaintiffs had entered into this transaction with the Defendants for the supply of KN95 face masks. Instead of making a profit from this, the Plaintiffs were saddled with a nightmare when the masks were detained by the US customs for failure to meet the "KN95 standard". The Plaintiffs eventually had to cut their losses by destroying the masks so as to avoid having to incur additional storage fees on goods which, by that point, they could not sell.

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The background

Facts

2 Both Plaintiffs are part of the Dialectic Distribution Group of companies. The 1st Plaintiff, Dialectic PR LLC, is incorporated in Puerto Rico and manages the operations of the Dialectic Distribution Group, including the sale and purchase of goods and related banking transactions. The 2nd Plaintiff, Dialectic Distribution LLC, is incorporated in New Jersey, USA. It handles commercial day-to-day transactions for the Dialectic Distribution Group, including warehousing and logistics.[1] One Mr Zachary Marlen Zeltzer ("Mr Zeltzer") was the Chief Executive Officer of the Plaintiffs. As he had negotiated the contract at the core of this dispute, he gave evidence on behalf of the Plaintiffs at trial.

3 The 1st Defendant, Brilliante Resources International Pte Ltd ("Brilliante Singapore"), is an entity in the Brilliante Group of companies (the "Brilliante Group") which is wholly owned and operated by the 2nd Defendant, Mr Woon Joon Foong, Jerrel ("Mr Woon"). The Brilliante Group comprises the following three separate entities, of each of which Mr Woon was the sole shareholder and director:[2]

(a) The 1st Defendant, Brilliante Singapore;

(b) Brilliante Resources (HK) Ltd ("Brilliante HK"), a company incorporated in Hong Kong; and

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1 Plaintiffs' Closing Submissions at para 9.

2 Plaintiffs' Closing Submissions at para 10.

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(c) Brilliant Testing and Inspection Technical Shenzhen Pte Ltd,[3] a company incorporated in the People's Republic of China.

4 Prior to the transaction which is at the heart of the dispute in the present suit (referred to as the "Disputed Transaction"), there were three transactions which had taken place between the 1st Defendant and the Plaintiffs for the supply of face masks. The first transaction was concluded sometime around 6 April 2020. The Plaintiffs purchased 250,000 KN95 face masks and 100,000 three-ply surgical face masks from Brilliante Singapore for the sum of US$338,500.00.

5 The second transaction was concluded sometime around 7 April 2020. The Plaintiffs purchased 250,000 KN95 face masks from Brilliante Singapore for the sum of US$312,500.00. The third transaction was concluded sometime around 9 April 2020. The Plaintiffs purchased 500,000 KN95 face masks from Brilliante Singapore for the sum of US$625,000.00.[4]

6 Thereafter, on or about 23 April 2020, the Plaintiffs and the 1st Defendant entered into the contract which formed the core of this dispute (the "Contract"). The terms of the Contract are found in a quotation sent by the 1st Defendant to the 2nd Plaintiff, and are not disputed by the Defendants. It provided as follows:

(a) Brilliante Singapore was to supply "KN95 face masks".

(b) The face masks would be "CE & FDA approved".

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[3] This is a translation of the company's name which is in Chinese: 卓测检验技术（深圳）有限公司.

[4] Plaintiffs' Closing Submissions at para 16.

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(c) The purchase price of US$1,265,000.00 was to be paid in full to Brilliante Singapore's bank account before any shipment of the face masks.

(d) The face masks would be sent to the Plaintiffs' nominated logistics provider in Hong Kong by the week of 27 April 2020 to 3 May 2020.

(e) Brilliante Singapore was responsible for the cost, insurance and freight up to the point that the face masks were delivered in Hong Kong.[5]

7 It was also undisputed that prior to the Contract being entered into, Mr Zeltzer had forwarded to Mr Woon, the details of the requirements which the Plaintiffs required the face masks to meet. These details had been provided to Mr Zeltzer by the Plaintiffs' end customers (to whom the Plaintiffs had intended to supply the face masks).[6]

8 Mr Woon followed up on the request and sent to Mr Zeltzer various certificates which suggested that the face masks were manufactured by CTT, and that they met all the necessary requirements of being "CE & FDA approved". Those documents were sent to the Plaintiff on 20 April 2020 by way of WhatsApp and email.[7]

9 On 24 April 2020, the Plaintiffs paid US$1,265,000.00 to the 1st Defendant by way of telegraphic transfer. Brilliante Singapore arranged for the face masks to be delivered to Hong Kong. On or about 29 April 2020, the face

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5 Plaintiffs' Closing Submissions at para 17(a).

6 Plaintiffs' Closing Submissions at para 18(a)(i).

7 Plaintiffs' Closing Submissions at para 18(a)(ii).

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masks were received by the Plaintiffs' nominated logistics provider, Kintetsu World Express ("KWE"). The Plaintiffs had also used KWE as their logistics provider in their three previous transactions with the Defendants. KWE arranged for the face masks to be transported from Hong Kong to the Dialectic Group in Oakland, New Jersey.[8]

10 Upon arrival in the United States of America ("US"), however, the face masks were detained by the US Customs and Border Protection. As part of the customs requirements in force for imported face masks, on 21 May 2020, the National Institute for Occupational Safety and Health's ("NIOSH") National Personal Protective Technology Laboratory tested a sample group of the face masks. All masks in this sample group failed to meet the "KN95 standard" – they measured significantly less than 95% filter efficiency. Specifically, the test results showed that the masks in the sample group were found to have a minimum filter efficiency of 24.5% and a maximum filter efficiency of 85.8%.[9] Because of this, the face masks were temporarily confiscated by US authorities and barred from entry into the US on grounds that they were unlawful and unfit for distribution in the US market.[10]

11 The face masks were subsequently shipped back to Hong Kong at the suggestion of Mr Woon, who had asked for the Plaintiffs' assistance in having the face masks returned and in obtaining a refund from the manufacturers of the masks.[11] This was done so that the masks could be sent back to the manufacturer in China. The Plaintiffs shipped the goods back to Hong Kong at their own

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8 Plaintiffs' Closing Submissions at paras 18(b) – (d).

9 Statement of Claim (Amendment No. 1) at para 13(c).

10 Plaintiffs' Closing Submissions at para 19; Statement of Claim (Amendment No. 1) at para 13(d).

11 Plaintiffs' Closing Submissions at para 28.

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expense. Unfortunately, the masks could not be sent to China from Hong Kong; left with little choice, the Plaintiffs stored the masks with Captains Freight Services (HK Limited) ("Captains Freight") and incurred storage costs. On 22 June 2021, the masks were discarded so as to prevent any further loss or damage to the Plaintiffs.[12]

12 Thereafter, the Plaintiffs commenced the present suit against the Defendants. The Plaintiffs' claim against the 1st Defendant is for breach of the Contract.[13] As against the 2nd Defendant, the Plaintiffs seek to hold him personally liable for their loss. To that end, the Plaintiffs argue that the corporate veil should be lifted to make the 2nd Defendant personally liable for the loss and damage suffered by them in respect of the Contract.[14] In the alternative, the Plaintiffs have also pleaded that the 2nd Defendant had wrongfully induced and procured the 1st Defendant to breach the Contract.[15]

Preliminary issue: whether the 1st Defendant was acting as agent for the Plaintiffs

13 I turn now to deal with one preliminary issue. While the Plaintiffs say that the alleged Contract was for the sale of face masks by the Defendants to the Plaintiffs, the Defendants have a very different characterisation of the Contract. They plead, in their defence, that the agreement between the 1st Defendant and the 2nd Plaintiff in respect of the Contract was one where the 2nd Plaintiff had

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12 Affidavit of Evidence in Chief of Zachary Marlen Zeltzer dated 29 March 2022 ("Zeltzer AEIC") at p 307.

13 Statement of Claim (Amendment No. 1) at paras 13 – 17.

14 Statement of Claim (Amendment No. 1) at paras 18 – 20.

15 Statement of Claim (Amendment No. 1) at para 21.

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agreed to employ the 1st Defendant, and the 1st Defendant had agreed to sell the KN95 face masks and receive payment for the same as the 2nd Plaintiff's agent.[16]

14 However, as the Plaintiffs point out, Mr Woon had informed the court during the course of his cross-examination that the Defendants were no longer taking the position that they were acting as the Plaintiffs' agents,[17] nor were they claiming that the Plaintiffs had contracted directly with Androidlink (a company which the 2nd Defendant had allegedly sourced the masks from).[18] Notwithstanding the abandonment of their pleaded position, the Defendants have once again, sought to resurrect this argument in their closing submissions.[19] They say that the 1st Defendant had the actual authority, either express or implied, to act on the 2nd Plaintiff's behalf. The Defendants point to the terms of the Contract as evidence that there was express actual authority;[20] and in so far as implied actual authority was concerned, evidence for that can be found in the 2nd Plaintiff's conduct and the fact that the acts of the 1st Defendant in relation to the Contract were incidental to the fulfilment of the tasks which they were expressly authorised to do.[21]

15 In my view, there is no factual basis on which it could be said that there was actual authority, whether express or implied. As neatly summarised by Professor Tan Cheng Han, express actual authority arises where the principal has expressly conferred authority on an agent such as where the board of directors of a company passes a resolution expressly giving consent for another to act on

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16 Defence (Amendment No. 3) at para 5A.

17 Transcript dated 9 June 2022 at p 120, lines 8 – 22.

18 Plaintiffs' Closing Submissions at para 52(b).

19 Defendants' Joint Closing Submissions at paras 35 – 54.

20 Defendants' Joint Closing Submissions at para 41.

21 Defendants' Joint Closing Submissions at para 42.

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the company's behalf in negotiating and entering into a contract; as for implied actual authority, that is to be inferred from the conduct of parties and the circumstances of the case: *The Law of Agency* (Academy Publishing, 2nd Ed, 2016) ("*The Law of Agency*") at [03.014] and [03.027]. While the Defendants claim that there was express actual authority, this is but a bare assertion considering that they have not shown any concrete evidence of the same. In so far as the Defendants rely on the quotation provided by the 1st Defendant to the 2nd Plaintiff as proof of such express actual authority,[22] such reliance is misplaced. Nowhere in the quotation does it state that the 2nd Plaintiff was employing the 1st Defendant as its agent to source and supply face masks.

16 I would further add that even *if* the Defendants sought to rely on the WhatsApp exchanges between Mr Woon and Mr Zeltzer, this would not take their argument on express actual authority very far. While the WhatsApp messages would lend themselves to the impression that the 2nd Defendant was acting *qua* agent given his role in sourcing the masks from the various vendors, those messages must be read in their proper context, *viz*, that Mr Zeltzer was simply liaising with Mr Woon who was offering to sell him masks sourced from various places. The following message which Mr Zeltzer sent to Mr Woon sometime after the masks were detained in the US is telling of the true relationship between the parties:[23]

> "First and foremost I want to tell you I think your (*sic*) a great person. I do need you to understand my side. I trust you as being me on the ground over there in china/hkg. We barley (*sic*) have ever done any business besides inspections and some cosplay stuff. I sent you well over $2 million dollars. I trusted as an inspector you knew these people which I did ask you numerous times if you did. Today I had to inform my bank and everyone I'm in jepoardy of collopasing because of this. I don't want to go

[22] Defendants' Joint Closing Submissions at para 41.

[23] Zeltzer AEIC at pp 206 – 207.

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> in circles with you. As I mentioned above it doesn't meet US standards when they put KN95 on the box. The goods are detained. The goods are detained because of a check. If the goods passed inspection it would of been released no problem 4 weeks ago. But instead, the government is doing an investigation if I was in on this. Now I am out $1,265,000.00 + roughly $125,000.00 in shipping. This is serious money, and I am a small company. **I need you give me a resolution in a couple days because I paid you not them. I don't have a contract with them.** But I can't walk away without. I am willing to take a loss of some type to get this over with but I can not be out this type of month. I do not want more masks at a cheaper price.
>
> [emphasis added]

Clearly, while the Defendants played the role of a middleman, it was clear that the Plaintiffs only had a contractual relationship with the Defendants, and not the vendor of the face masks.

17 As for the Defendants' argument that there was implied actual authority, that too is fatally misconceived. They have argued that the acts of the 1st Defendant were incidental to the fulfilment of the tasks that they were expressly authorised to do.[24] This argument, however, is premised on the fact that there was express actual authority granted in the first place. For example, if a principal grants his agent express actual authority to carry out [X], the law recognises that the agent must have the implied authority to carry out all such other acts which are necessary and incidental to performing [X]: *The Law of Agency* at [03.029]. However, as I have already found, there was no express actual authority to speak of in this case. Finally, I note that while the Defendants assert that the "1st Defendant was implicitly allowed to do what they did by the 2nd Plaintiff",[25] this is merely another bare assertion; the Defendants have not pointed me to any concrete evidence in support of their assertion.

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24 Defendants' Joint Closing Submissions at para 42(a).

25 Defendants' Joint Closing Submissions at para 42(b).

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18 I therefore find that the 1st Defendant was not acting as the 2nd Plaintiff's agent.

Issues to be determined

19 Having determined that the 1st Defendant was not acting as the 2nd Plaintiff's agent, it follows that the Contract was for the sale of face masks as opposed to one which created a principal-agent relationship between the parties. Accordingly, these were the issues which arose for my determination:

(a) Whether the 1st Defendant had breached the terms of the Contract.

(b) Whether the 1st Defendant's corporate veil should be lifted so as to hold the 2nd Defendant liable.

(c) Whether the 2nd Defendant was liable for inducing the 1st Defendant to breach the Contract.

20 I turn now to consider these issues *seriatim*.

Issue 1: Whether the 1st Defendant had breached the terms of the Contract

21 The Plaintiffs have framed their claim as one based on breach of contract. At the outset, it is important to note that parties have not reduced their entire agreement to written form. It therefore comes as no surprise that the Plaintiffs and the Defendants dispute the terms of the Contract arising out of the Disputed Transaction. On the one hand, the Plaintiffs have pleaded that the Contract contained an express condition that the KN95 face masks would be "of the KN95 standard type and comply with each and all requirements of the KN95 standard in the United States and in Europe, and would be manufactured by an FDA

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approved and CE approved manufacturer".[26] In addition, the Plaintiffs have also pleaded that the Sale of Goods Act (Cap 393) applies such that there is an implied term that: (a**)** the KN95 face masks would correspond with the description; and (b**)** the KN95 face masks would be of satisfactory quality.[27]

22 On the other hand, the Defendants' case was that the face masks sourced would be of the KN95 standard type and comply with the GB 2626-2006 standard (which was the China National Mandatory Standard applicable at the material time), with a filtration efficiency of 0.3 μm.[28] The Defendants' alternative case was that they were asked to source for face masks which appeared to be of the KN95 standard type – these would be masks which were manufactured by a company registered with the US Food and Drug Administration, or masks which bore the CE mark.

23 From the parties' pleaded cases, it is clear that they agree that the masks to be sourced would be of the KN95 standard type – what they dispute is the *quality* these masks had to meet. The Plaintiffs' main case is that the Contract provided that the masks had to meet US and European standards for the KN95 standard type; the Defendants' case is that the Contract merely provided that the masks meet the GB 2626-2006 standard. It is therefore necessary, bearing in mind the parties' pleaded cases, to objectively ascertain from the relevant evidence what the terms of that Contract were before determining whether the 1st Defendant had indeed breached those terms: *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 at [7] and [86]; *OCBC Capital Investment Asia Ltd v Wong Hua Choon* [2012] 4 SLR 1206 at [41];

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[26] Statement of Claim (Amendment No. 1) at para 8.

[27] Statement of Claim (Amendment No. 1) at para 9.

[28] Defence (Amendment No. 3) at para 5(e).

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Naughty G Pte Ltd v Fortune Marketing Pte Ltd [2018] 5 SLR 1208 at [55]–[57]; Hugh G. Beale (Gen ed) *Chitty on Contracts* (Vol 1) (Sweet & Maxwell, 34th Ed, 2021) at [15-004]; Andrew Phang Boon Leong (gen ed) *The Law of Contract in Singapore* (Academy Publishing, 2nd Ed, 2022) at [06.001] – [06.002].

24 I start with the Defendants' argument that it was "disingenuous" of the Plaintiffs to allege that parties had agreed that the face masks would be "CE" or "FDA" approved. They say that the Plaintiffs were fully aware that the certifications relating to CE and FDA from the Chinese companies which manufactured the masks were fake. The Plaintiffs only cared about making a quick buck, and did not care about the authenticity of the masks so long as they could be sold.[29] According to the Defendants, the Plaintiffs believed that the masks could be sold in Europe so long as they bore the CE stamp, and in the United States, provided that there was documentation showing that they were manufactured by a company on the FDA list. In support of this, the Defendants rely on the following exchange in cross-examination of Mr Zeltzer where certain questions had been put to Mr Zeltzer about the WhatsApp texts he had exchanged with the 2nd Defendant on 20 April 2020:

> Q: It just means that there were discussions for CE marks, FDA marks and packaging for all four transactions. Correct?
>
> A: Correct.
>
> Q: This was despite the fact that, from as early as 3 April, Jerrel had warned you about the dangers of getting masks from China. Correct?
>
> A: Correct.

[29] Defendants' Joint Closing Submissions at para 15.

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> Q: This was despite the fact that Jerrel had talked about the fact that CE marks were fake from as early as 14 April. Correct?
>
> A: Yes, that's what it says.
>
> Q: I'll just correct myself, it's 12 April instead. And this is despite the fact that Jerrel had cautioned you against getting goods with FDA markings from China. Correct?
>
> A: Correct.
>
> Q: So despite these warnings, you still went ahead; you placed orders for the four transactions for face masks from China. Correct?
>
> A: Yes…
>
> …
>
> Q: This is a discussion between you and Jerrel on 20 April… before you made the transaction for the disputed order on 23 April. Correct?
>
> A: Correct.
>
> Q: …Then you go on to say: "**Between me and u and this is on our friendship, I personally believe everything is fake but its just China right? … I just want to sell mask I don't give a shit**." … "U think those rr real… I [honestly don't] care… I'm just asking"
>
> Q: …You say:
>
> "Listen at this point if we can't get goods to kwe China or [Hong Kong] with ce mark, and print at least on package drop. It's not worth for both of us."
>
> [emphasis added]

25 Notwithstanding what Mr Zeltzer had testified during cross-examination, it is perhaps useful to take a closer look at the WhatsApp messages between Mr Zeltzer and the 2nd Defendant in order to appreciate the context in which those messages were exchanged. I would also add that, in reading these messages, it is important to not parse them with the sort of linguistic precision that lawyers are accustomed to. Both Mr Zeltzer and the 2nd Defendant were men of commerce who were keen on doing business; what was foremost on their minds was getting the deal through. Bearing this in mind, I turn now to examine the relevant

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extracts from their WhatsApp conversation on 20 April 2020 which are reproduced below:[30]

Z:	bro
Z:	why is the cetificate from italy?
Z:	german army wants to know
Z:	http://entecerma.it/news/report-of-improper-use-of-our-notified-body-no-1282?fbclid=IwAR2YNiiYATiZtt0LGHEsLKqChiGE6mnHzpYb-_S-J0Nxl6LJU7CDOLIapiY
Jerryl Asia:	I don't know what to say but that your German customer is well.. behaving as Germans do.
Jerryl Asia:	Let me show you certs by vendor 1
Jerryl Asia:	image omitted
Jerryl Asia:	image omitted
Jerryl Asia:	And by vendor 3
Jerryl Asia:	image omitted
Jerryl Asia:	So is he saying that all 3 of by vendors are problem because ALL my vendor's ECM certs are from Italy?
Jerryl Asia:	😆
Z:	Venfdor #2 is only going to one customer
Z:	so i didn't send him anything else
Z:	he was saying that why is the ce certification from italy ?
Z:	**between me and u and this is on our friendship, i perrsonally believe everything fake but its jkust china right?**
Z:	**i just want to sell mask i dont igve a shit**
Z:	**but germans r germans**
Z:	**u and i both know that**

[30] Zeltzer AEIC at p 122.

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Jerryl Asia:	I showed you CE from all 3 vendors! All form Italy!!
Z:	true
Z:	u think those rr real
Z:	?
Z:	i dont honestly care
Z:	im just asking
Jerryl Asia:	Exactly bro!! Wtf man.. if they want serious stuff to protect themselves the need to look at procuring the 3M/honeywell/ Kimberley Clark they cost according to your competitor on the article your showed $4 bucks to NY stage govt… they are paying 1-2buck and expect these to pass standards and all thst shit.. lol I dunno what to say?
Jerryl Asia:	Of cos all this is bullshit bro! I don't you or any of your friends to use this shit.. I means seriously wtf is kn95? And this same champion is asking for FFP2 KN95? This guy is seriously delirious
Z:	Lol
Z:	I know
Z:	It's nuts
Z:	How much Is Honeywell
Jerryl Asia:	Well said bro.. if it's bulls hit they want we give it them make a buck and that's that! They want all the certs the factories can buy we give it to them.. but if they are asking for guarantees lol! That's just nuts
Jerryl Asia:	I'll check the stock and quote you. Through be said my medical group side said that the honeywell I supplied is better than 3M

[emphasis added]

26 In the set of texts reproduced above, Mr Zeltzer and the 2nd Defendant were discussing one of their previous transactions where a shipment of masks which Mr Zeltzer was attempting to sell to a customer in Germany ran into problems. Reading the above extract of the WhatsApp messages between Mr

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Zeltzer and the 2nd Defendant, one might draw two possible interpretations. The first is that Mr Zeltzer's hunger for profits was tempered by hard reality, and while he may have had *personal* doubts about the efficacy of the KN95 face mask, he was still concerned about whether the masks which he was purchasing could meet the standard imposed by the countries to which he was exporting the face masks to. The second is that Mr Zeltzer's hunger for profits overrode all other considerations, and that he did not care whether the masks were legitimate so long as he was able to sell them at a profit. To that end, he was willing to pass off what he knew were clearly fake masks which would not clear any and all safety standards imposed by the country of import with the appropriate labels from either the FDA or CE to give the masks a stamp of legitimacy.

27 I find that the first interpretation is the more likely version. It is apparent that while Mr Zeltzer had indeed said that he personally knew that the masks made in China were fake, and that he did not care because all he wanted to do was to sell masks, he was also alive to the fact that the countries he was exporting to had certain standards when it came to the import of face masks. That much is clear when Mr Zeltzer goes on to say "but germans r germans". To my mind, it was clear that Mr Zeltzer was a hard-nosed pragmatist when it came to making money. While he may have had doubts about the efficacy of the masks, he was alive to the fact that the masks had to pass inspection otherwise they would not be accepted by the end-buyer, thus ending any and all hopes of making a quick buck.

28 Evidence to support this conclusion can be found in several WhatsApp texts dated 23 April 2020 between Mr Zeltzer and the 2nd Defendant. These texts were exchanged shortly before the 2nd Defendant sent Mr Zeltzer the

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quotation for the Disputed Transaction. I reproduce the relevant extracts of the said WhatsApp conversation below:[31]

Z:	**Need goods ASAP and must pass quality**
Z:	**Germany t[expletive] guys hired like a legit company to do a test**
Z:	**The brand protection company**
Z:	That passes or fails
Jerryl Asia:	**Mask/gloves??**
Z:	**Masks**
Jerryl Asia:	**Don't worry**
Z:	They have the e u company does a test
Z:	Vendor 1 sucked by the way
Jerryl Asia:	What you mean?? The quantity of the 400k??
Z:	No he just an [expletive]
Z:	$45000 shipping
Jerryl Asia:	Ya. So stop dealing with him.
Z:	For sure
Z:	Everyone else did it for
Jerryl Asia:	We deal with vendor 2
Z:	Ok
Jerryl Asia:	And I have 3rd vendor as well

[emphasis added]

29 It is therefore clear from these series of messages that Mr Zeltzer had recalled his previous experience where his German customer raised issues concerning the quality of the masks he was supplying. He was therefore keen to avoid any problems with the current batch of masks which he was sourcing from the Defendants, and had, to that end, reminded the 2nd Defendant that the masks

[31] Zeltzer AEIC at p 130.

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had to pass quality control. It is also clear that the 2nd Defendant understood that Mr Zeltzer wanted the masks to be of a certain quality as he told Mr Zeltzer to "not worry". The inference which I draw from this is that parties had agreed that the masks supplied in the Disputed Transaction had to be of a certain quality. The more important question which I had to decide was what was the standard which parties had agreed had to be met. The only common ground in the Plaintiffs' and Defendants' pleadings is that the masks would be of the KN95 standard type. The Plaintiffs say that this means that the masks had to satisfy each and all requirements of the KN95 standard in the US and in Europe, and would be manufactured by an FDA approved and CE approved manufacturer. The Defendants, on the other hand, disagree. They say that the masks only had to comply with the GB 2626-2006 standard (which was the China National Mandatory Standard applicable at the material time).

30 It is clear from the evidence that neither party's position is supportable. In particular, the WhatsApp conversation between Mr Zeltzer and Mr Woon showed that neither side had explicitly stipulated the precise standard that the KN95 masks were to meet, be it the prevailing standards in either the US or Europe or the GB 2626-2006 standard. There was, therefore, no express condition as to the precise standard which the KN95 masks had to meet. The Plaintiff, however, had one other string to their legal bow – that of terms implied in law. They pleaded that pursuant to s 13(1) of the Sale of Goods Act (Cap 393) ("SOGA"), the Agreement contained an "implied condition that the KN95 [f]acemasks would correspond with the description".[32] The Plaintiff also pleaded that pursuant to ss 14(2), 14(2A) and 14(2B) of the SOGA, the Agreement

[32] Statement of Claim (Amendment No. 1) at para 9.

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contained an implied condition that the KN95 face masks would be of satisfactory quality.[33]

31 For ease of analysis, the relevant provisions of ss 13 and 14 of the SOGA state:

> **Sale by description**
>
> 13.—(1) Where there is a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description.
>
> (2) If the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.
>
> (3) A sale of goods is not prevented from being a sale by description by reason only that, being exposed for sale or hire, they are selected by the buyer.
>
> (4) Paragraph 4 of the Schedule applies in relation to a contract made before 18 May 1973.
>
> **Implied terms about quality or fitness**
>
> 14.—(1) Except as provided by this section and section 15 and subject to any other enactment, there is no implied condition or warranty about the quality or fitness for any particular purpose of goods supplied under a contract of sale.
>
> (2) Where the seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of satisfactory quality.
>
> (2A) For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.
>
> (2B) For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods:

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[33] Statement of Claim (Amendment No. 1) at para 9.

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> (a) fitness for all the purposes for which goods of the kind in question are commonly supplied;
>
> (b) appearance and finish;
>
> (c) freedom from minor defects;
>
> (d) safety;
>
> (e) durability.

32 In relation to ss 13 and 14 of the SOGA, it bears remembering that these are implied conditions as to the description and the quality of the goods, and so being classified as a "condition", it must be strictly complied with and a breach will entitle the innocent party to treat the contract concerned as discharged: *Chai Cher Watt (trading as Chuang Aik Engineering Works) v SDL Technologies Pte Ltd and another appeal* [2012] 1 SLR 152 ("*Chai Cher Watt*") at [19]. This is, of course, subject to s 15A of the SOGA which limits the right to reject goods for breach of condition where the breach is slight and/or technical: *Chai Cher Watt* at [22].

33 I begin the analysis with the Plaintiffs' assertion that there had been a breach of the implied condition under s 13. In *Chai Cher Watt*, the appellant and respondent had entered into a contract for the sale and purchase of a drilling and boring machine (the "Drilling Machine") as well as a contract for the sale and purchase of a lathe machine. A dispute arose when the appellant conducted checks on the Drilling Machine and discovered a discrepancy in its length, and that it was refurbished. The appellant sued, claiming that it was either an express or implied term that the Drilling Machine was to be newly manufactured and that the respondent was in breach for having delivered a refurbished machine. In the alternative, the appellant claimed that the respondent was in breach for failing to deliver a Drilling Machine which conformed to the specifications set out in the contract. When the case reached the Court of Appeal, the court found that the contract referred to the length of the Drilling Machine as 11 metres, and that

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the stipulation as to length was an "integral and important ingredient of the identity of the Drilling Machine" under the contract: *Chai Cher Watt* at [24]. The fact that the Drilling Machine which was supplied was 13.5 metres in length meant that there was *prima facie* a breach of the condition under s 13. The discrepancy of some 2.5m could not be said to be *de minimis*.

34 In the present case, the KN95 face masks were described as being "CE & FDA approved".[34] The question therefore was whether the KN95 face masks fit the description of being CE and FDA approved. Here, the Plaintiffs had adduced the evidence of one Mr Dale Pfriem ("Mr Pfriem"), an expert in the field of respiratory protective equipment. The Defendants did not dispute that Mr Pfriem had the technical expertise to give expert evidence as to the quality of the KN95 face masks. In any case, it was clear to me that Mr Pfriem had such technical expertise judging from his resume which demonstrated that he had experience relating to the performance testing of respiratory protective equipment.[35]

35 Mr Pfriem began his report by sketching out the regulatory requirements in the US. There were three US organisations which were relevant: the Occupational Safety and Health Administration ("OSHA"), the Food and Drug Administration ("FDA") and the National Institute for Occupational Safety and Health ("NIOSH"). Mr Pfriem highlighted that OSHA mandated that any and all respiratory equipment used in the workplace had to be formally approved by NIOSH. Because of the COVID-19 pandemic, the FDA promulgated certain Emergency Use Authorisations ("EUAs") to allow for the use of non-NIOSH

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34 Zeltzer AEIC at p 251.

35 Affidavit of Evidence in Chief of Dale Pfriem dated 26 March 2022 ("Dale Pfriem AEIC") at pp 311 – 312.

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approved Respiratory Protective Devices for US healthcare workers. While CTT Co Ltd (the company which had allegedly produced the masks in question) was included in the FDA's EUA of 3 April which authorised the use of certain non-NIOSH approved disposable filtering facepiece respirators manufactured in China, Mr Pfriem explained that this did not amount to being FDA "registered, established, listed or approved".[36]

36 As to whether the KN95 masks were FDA approved, Mr Pfriem took the view that they were not.[37] He explained that in order for the KN95 face masks to be recognised by the FDA, it had to first obtain approval from NIOSH. In so far as the Defendants attempted to rely on the grant of the Certificate of Registration to CTT Co Ltd, Mr Pfriem took the view that this did not mean that the KN95 masks were FDA approved. This certificate was granted after completion of the FDA Establishment Registration which was different from the FDA 510K Device Approval Process. The former did not have any independent performance testing and quality assurance system monitoring.

37 Mr Pfriem also sketched out the European regulatory landscape in explaining the process behind obtaining the Community Europe ("CE") mark. The key piece of legislation was the Personal Protective Equipment (PPE) – Regulation (EU) 2016/425 ("Reg 2016/425) which set out the requirements for marking PPE with the CE mark. For a piece of PPE to bear the CE mark, it had to be certified by an approved and authorised EU Notified Body. In his report, Mr Pfriem took the view that the KN95 masks were not CE approved.[38] He arrived at this conclusion on the basis that the two pieces of evidence the

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36 Dale Pfriem AEIC at p 107.

37 Dale Pfriem AEIC at p 116.

38 Dale Pfriem AEIC at p 115.

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Defendants relied on in showing that the KN95 masks were CE approved were "baseless and meaningless". The first piece of evidence was a Certificate of Compliance which was issued to the mask manufacturer, CTT Co Ltd ("CTT"). That certificate had been issued by an Italian entity, Ente Certificazione Macchine SRL ("Ente"). Mr Pfriem looked into Ente's background and discovered that they were not an "EU authorised Notified Body" under Reg 2016/425 and was therefore not authorised or empowered to grant the CE certification, or to authorise a manufacturer to place the CE mark on any product or packaging. The second piece of evidence was the Declaration of Conformity from Global Testing Services ("GTS"). Mr Pfriem also found that GTS was not an "EU authorised Notified Body" under Reg 2016/425.

38 Mr Pfriem's findings on this point were not seriously challenged by counsel for the 1st Defendant. Instead, the main issue the Defendants had with Mr Pfriem's report was the finding he had made that the Defendants had defrauded the Plaintiff and that the masks were counterfeit and had not been manufactured by CTT.[39] Leaving aside the issue which the Defendants took with that aspect of Mr Pfriem's report, I saw no reason why Mr Pfriem's opinion that the KN95 masks were not CE or FDA approved should be disregarded. For one, the Defendants had not adduced any evidence to challenge Mr Pfriem's findings on this point. Further, I found that there was indeed a basis for Mr Pfriem's findings in relation to the CE mark. A perusal of the list of EU authorised Notified Bodies under Reg 2016/425 shows that neither Ente nor GTS were on that list. This suggested to me that the KN95 masks were not CE approved. I therefore found that there had been a breach of the implied condition under s 13 of the SOGA.

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[39] Defendants' Joint Closing Submissions at paras 137 – 147.

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39 I turn now to examine whether there was a breach of the implied term as to quality under s 14 of the SOGA. In assessing whether the goods are of "satisfactory quality", the inquiry is an objective one, to be undertaken from the viewpoint of a reasonable person. Such a reasonable person is one who is placed in the position of the buyer and armed with his knowledge of the transaction and its background rather than one who is not so acquainted. The question is whether this reasonable person, in the position of the buyer, would regard the quality of the goods in question as satisfactory. The Plaintiff, being the one who asserts that the goods are not of satisfactory quality, bears the burden of proof: *National Foods Ltd v Pars Ram Brothers (Pte) Ltd* [2007] 2 SLR(R) 1048 ("*National Foods Ltd*") at [58] citing *Compact Metal Industries Ltd v PPG Industries (Singapore) Ltd* [2006] SGHC 242 at [102]. Also of relevance is s 14(2B) which provides a list of non-exhaustive factors for the court to consider in determining the quality of goods.

40 In *National Foods Ltd*, the respondent, a locally-incorporated company, had entered into four identical contracts to sell dried ginger slices of Chinese origin to the appellant, a company incorporated in Pakistan. When the ginger slices were delivered, the appellant discovered that they were heavily contaminated with mould, had high moisture levels, and were full of dust. Efforts to clean the ginger to make it fit for use failed. The appellant sued. It argued that there had been a breach of the implied conditions of quality and fitness under ss 14(2) and 14(3) of the SOGA. It also argued that there was a breach of an implied term of the contract that the ash content of the ginger slices should not exceed 7%. The trial judge dismissed the appellant's claim.

41 On appeal, the Court of Appeal held that the appellant had discharged its burden of proving that the ginger slices were of unsatisfactory quality and that there had been a breach of s 14(2) of the SOGA. Central to the Court of Appeal's

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reasoning were sub-ss (*a*) and (*d*) of s 14(2B) which dealt with fitness for purpose and safety respectively. In finding that the ginger slices were not fit for purpose of being used as a food product and that they were unsafe for consumption, the court held that the key criterion was Reg 227 of the Food Regulations (Cap 283, Rg 1, 2005 Rev Ed) which stipulated that ginger could contain sulphur dioxide as a preservative and must not contain more than 7% total ash. Reg 227 operated as a "benchmark or standard by which to assess quality" and did not operate, in and of itself, as an implied term of the contracts. This was because where the contract was silent as to the standard to be expected of the goods, a good gauge of quality would be the standards prescribed by the relevant statutes.

42 In the present case, parties took differing views as to the standard the KN95 masks had to meet. The Defendants, for instance, claimed that the masks only had to comply with the GB 2626-2006 standard. It was, however, clear from Mr Pfriem's evidence that there was no substantial difference between the GB 2626-2006 standard or the modified NIOSH test.[40] Having analysed both the GB 2626-2006 standard and the modified NIOSH test, Mr Pfriem noted that both tests specified the exact same aerosol particle specification of 0.075 ± 0.020 μm and a Standard Deviation not exceeding 1.86. He therefore concluded that if the masks were unable to pass the NIOSH test, they would similarly fail under GB 2626-2006 standard.

43 Again, the Defendants did not challenge Mr Pfriem's evidence on this point in cross-examination, nor did they call their own expert witness to dispute Mr Pfriem's findings. I accept Mr Pfriem's opinion that the GB 2626-2006 standard was substantially the same as the modified NIOSH test, and that the

[40] Dale Pfriem AEIC at p 103.

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masks, having failed the modified NIOSH test, would not have passed the GB 2626-2006 standard either. Therefore, taking the Defendants' case at its highest, and assuming that the KN95 masks were only required to comply with the GB 2626-2006 standard, it is clear that the masks were not of the stipulated quality. I therefore find that there had been a breach of the implied term of quality under s 14 of the SOGA.

44 In summary, I find that the 1st Defendant is liable for breach of the Contract. As to the quantum of damages for which the 1st Defendant is liable, the only point which the Defendants have disputed is that the Plaintiffs had failed to reasonably mitigate their losses given that they could have sold the defective masks as three-ply masks elsewhere but did not do so.[41]

45 I reject this argument. The burden of proving that the aggrieved party had failed to mitigate its loss falls on the defaulting party (*Tractors Singapore Ltd v Pacific Ocean Engineering & Trading Pte Ltd* [2021] 4 SLR 44 at [144]). It bears remembering that the reasonableness inquiry in assessing whether damages had been mitigated "amounts to nothing more than the common law's attempt to reflect commercial and fact-sensitive fairness at the remedial stage": *Denka Advantech Pte Ltd and another v Seraya Energy Pte Ltd and another and other appeals* [2021] 1 SLR 631 at [315], citing *The Asia Star* [2010] 2 SLR 1154 at [31]–[32]. The Defendants have not discharged their burden of showing that the Plaintiffs could have sold the masks as three-ply masks which, according to them, the Plaintiffs could have done as a means of mitigating their loss. In any event, given that the masks had already been rejected by the US authorities, it was unlikely that the Plaintiffs would have been able to sell them elsewhere, even assuming that those masks could be sold as three-ply masks. As a matter of

41 Defendants' Joint Closing Submissions at para 67.

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prudence, the Plaintiffs would have had to come clean and disclose to any potential buyer, the issues with the masks (such as the deceptive labelling and that the masks had failed the NIOSH testing).

46 Leaving aside the Defendants' arguments, I find that the Plaintiffs had taken reasonable steps to mitigate their damage by working with the 2nd Defendant to arrange for the masks to be sent back so as to secure a partial refund.[42] In the circumstances, this was the most reasonable cause of action for them to take given that the 2nd Defendant had communicated to Mr Zeltzer that the vendor was willing to issue a partial refund provided the masks were returned. In so far as the Plaintiffs had suffered loss in arranging to have the masks transported back to Hong Kong, and securely stored whilst attempting to obtain the refund – they are entitled to claim for these sums too: *The Asia Star* at [24] (see also *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp* [2013] 3 SLR 1017 at [56]).

47 I therefore find that the 1st Defendant was liable to the Plaintiffs for the sum of US$3,254,673.28 which comprised the following:

(a) US$1,265,000 being the purchase price of the KN95 masks;

(b) US$604,673.28, being the storage, air freight, testing and insurance costs which the Plaintiffs had incurred; and

(c) US$1,385,000, being loss of profits the Plaintiffs had suffered.

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[42] Zeltzer AEIC at p 215.

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Issue 2: Whether the 1st Defendant's corporate veil should be lifted so as to hold the 2nd Defendant liable

48 Having found the 1st Defendant liable for breach of the Contract, I turn now to consider the Plaintiffs' argument that the corporate veil should be lifted so as to hold the 2nd Defendant liable. It should be remembered that the corporate veil, being an exception to the general rule that a company is a separate legal entity, will only be lifted in very narrow circumstances (see *Commodities Intelligence Centre Pte Ltd v Mako International Trd Pte Ltd and others* [2022] SGHC 131 at [142]). The Plaintiff argues that the corporate veil should be pierced on the ground that the 1st Defendant was the alter ego of the 2nd Defendant, or on that of fraud. I will deal with each argument in turn, beginning with the Plaintiffs' argument that the 1st Defendant was the 2nd Defendant's alter ego.

49 As noted by the Court of Appeal in *Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 ("*Alwie*") at [96], citing *NEC Asia Pte Ltd v Picket & Rail Asia Pacific Pte Ltd* [2011] 2 SLR 565 at [31] and *Zim Integrated Shipping Services Ltd v Dafni Igal* [2010] 2 SLR 426 at [86]–[88], the "ground of alter ego is distinct from that based on a façade or sham", and the key question that must be asked whenever an argument of alter ego is raised is whether the company is carrying on the business of its controller. In *Alwie*, the Court of Appeal affirmed the trial judge's decision to pierce the corporate veil on the ground of alter ego. The court found that the first appellant, Alwie, had admitted under cross-examination that he had incorporated the company, OAFL, for the purposes of receiving payment under the first Sale and Purchase ("SPA") agreement. But that was not all. Alwie had also appointed himself as the sole director and shareholder of OAFL, and admitted that OAFL was controlled by him and that he was the directing mind and will of OAFL.

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Apart from Alwie's admissions, the manner in which Alwie procured the payments suggested that Alwie made no distinction between himself and OAFL.

50 Apart from *Alwie*, the Plaintiffs have also relied on the High Court decision in *Singapore Tourism Board v Children's Media Ltd and others* [2008] 3 SLR(R) 981 ("*Singapore Tourism Board*") (which was affirmed on appeal – see *Children's Media Ltd and others v Singapore Tourism Board* [2009] 1 SLR(R) 524). While the true *ratio* of that case is somewhat debatable, it did not appear to me that the court, in that case, had lifted the corporate veil on the grounds of alter ego. In that case, the plaintiff was the Singapore Tourism Board ("STB"). STB had entered into a series of agreements with the first defendant, a UK company, to stage a musical event in Singapore. The second defendant was another UK company that was the shareholder of the first defendant. The third defendant was, at all material times, the director and chief executive officer of the first and second defendants, as well as the sole shareholder of the second defendant. STB entered into an agreement with the first defendant, which the third defendant said was a special purpose vehicle which had been specially created to hold the rights to the artistes, to ensure that such rights could not be exploited for other events.

51 The first defendant failed to carry out its obligations pursuant to this first agreement. In an attempt to get the event off the ground, STB signed another two agreements with the first defendant. The situation, however, did not improve and the defendants purported to terminate the third and final agreement as between STB and the first defendant after claiming that the first defendant was unable to meet its contractual obligations. STB brought a suit against the defendants, seeking *inter alia*, to recover sponsorship sums which had been paid to the first defendant under the agreements. STB argued that the corporate veil should be pierced so as to hold either the second or third defendants liable. The court held

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(at [110]) that it was clear on the facts that the first defendant was merely the conduit to receive the sponsorship sums. The third defendant then proceeded to milk the first defendant dry by withdrawing the money to pay himself, the second defendant, his friends, and third parties before transferring the remaining sums to the second defendant's account. The first defendant was then made to bear all the expenses and liabilities of the second defendant as well as that of third parties. Having perused the judgment, it did not appear to me that the court in that case had lifted the corporate veil on the ground of alter ego. Indeed, in a local textbook on corporate law, the learned authors take the view that this case was best rationalised as one "where the controller was personally liable because he had used the companies for fraudulent or dishonest ends…despite the trial judge's explicit references to the sham and evasion principles": Hans Tjio, Pearlie Koh and Lee Pey Woan, *Corporate Law* (Academy Publishing, 2016) ("*Corporate Law*") at [06.046].

52 In the present case, the Plaintiffs raised the following points in support of their argument that the 1st Defendant was the alter ego of the 2nd Defendant. First, they pointed to the fact that the 2nd Defendant was the sole shareholder and director of all the entities in the Brilliante Group. This meant that he had free rein to manipulate the actions of the 1st Defendant in the way he did. Second, the 2nd Defendant's account of how he used the companies in the Brilliante Group interchangeably demonstrated that he did not distinguish between the rights and obligations of the entities in the Brilliante Group and himself. The Plaintiffs further say that this was supported by the clear lack of corporate governance of the entities in the Brilliante Group.

53 I cannot accept the Plaintiffs' arguments. As was noted by Judith Prakash J (as she then was) in *Sitt Tatt Bhd v Goh Tai Hock* [2009] 2 SLR(R) 44 at [79], it is a general proposition of law that parties are entitled to protect themselves by

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creating companies even if these are effectively one-man companies. To this proposition, I would add that parties are also entitled to manage a group of companies, even if they are all one-man companies, as they see fit (see also *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543 at [41]–[42]).

54 This may, at times, give rise to the impression that the company in question was merely an alter ego because of the manner in which the companies in the group are managed. For example, in the present case, the 2nd Defendant gave an account of how he had used the 1st Defendant to pay for sums owed by Brilliante HK.[43] The Plaintiffs pointed to this as evidence that the 2nd Defendant had made the "entities in the Brilliante Group to assume each other's obligations" and that payment was made *via* the 1st Defendant simply because it was more convenient to do so.[44] It was, however, apparent to me from the evidence that the 2nd Defendant had not done so out of mere convenience, but because the money had to be urgently transferred. Given the circumstances, one could see why the 2nd Defendant had arranged for the transfer to be made *via* the 1st Defendant instead of Brilliante HK. I would add that the story might have been different had the Plaintiffs been able to demonstrate a consistent pattern in which the 2nd Defendant made the companies in the Brilliante Group assume each others' obligations. But there was no such evidence on the facts before me.

55 I would also add that the Plaintiffs' argument that the 2nd Defendant would choose which "entity in the Brilliante Group would enter into contractual obligations with third parties, when these third parties were dealing directly with him personally" did not take their case very far. As I have mentioned above (at [53]), parties are entitled to shield themselves from commercial risk through the

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43 Transcript dated 10 June 2022 at p 5, lines 2 – 17.

44 Plaintiffs' Closing Submissions at para 64(b)(i)(A).

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corporate form, be it a single company or a group of companies owned and controlled by a single person. However, care would have to be taken to specify who exactly is the proper party to the contract: see *B High House International Pte Ltd v MCDP Phoenix Services Pte Ltd* [2023] SGHC 12 at [108]–[109], citing *Diane Lumley v Foster & Co Group Ltd and ors* [2022] EWHC 54 (TCC) at [6] and [22].

56 As for the fact that the 2nd Defendant had sought to amend details in the documents to allow him to prosecute an action against the supplier of the KN-95 masks using Brilliante HK or Brilliante China,[45] I did not think that this pointed to the conclusion that the 1st Defendant was the alter ego of the 2nd Defendant either. Rather, it showed the 2nd Defendant's willingness to appropriate the corporate forms of Brilliante HK and Brilliante China to his own ends. But this did not necessarily mean that the 2nd Defendant had done the same in relation to the 1st Defendant. It could not be inferred, from this, that the 1st Defendant was indeed carrying on the 2nd Defendant's business.

57 In conclusion, the fact that the 2nd Defendant was the sole shareholder and director of all entities in the Brilliante Group, coupled with this incident of using the 1st Defendant to pay for sums owed by Brilliante HK, as well as the 2nd Defendant having considered using Brilliante HK or Brilliante China to sue the mask manufacturer, did not necessarily mean, without more, that the 1st Defendant was the 2nd Defendant's alter ego. It bears repeating that the threshold for veil piercing is a high one which was, in my view, not met.

58 As for the other prong of the Plaintiffs' argument, that there was a lack of corporate governance which pointed to the fact that the 1st Defendant was the

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45 Plaintiffs' Closing Submissions at para 64(b)(ii).

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alter ego of the 2nd Defendant, I did not find that this was established on the evidence before me. To support their argument, the Plaintiffs pointed to the fact that the 2nd Defendant "simply could not or chose not to say whether Brilliante Singapore had paid a sum of S$463,634.00 (recorded in its financial statements as related party transactions) to himself, a family member, or another entity in the Brilliante Group".[46] During the trial, I expressed surprise when the 2nd Defendant stated that he had no recollection as to whom this sum of money had been transferred to.[47] It also appeared to me that the 2nd Defendant was evasive in his answers. Even though counsel for the Plaintiffs had explored the various possibilities as to where the money had gone, he did not reach a conclusion as the 2nd Defendant's reply in each case was that he did not know. Given the state of the evidence, I did not think it was open to me to infer that the 2nd Defendant must have taken the money.[48] Unlike *Alwie* where the court had found that Alwie had treated the company's bank accounts as though they were his own, there was no evidence in the present case to establish that the 2nd Defendant had done the same.

59 I therefore find that the Plaintiffs have not made out a case for the corporate veil to be lifted on the grounds that the 1st Defendant was the 2nd Defendant's alter ego. I turn now to consider the Plaintiffs' arguments for lifting the corporate veil on the ground of fraud.

60 While our courts appear to have accepted that fraud is a ground for lifting the corporate veil (see *Lim Chee Twang v Chan Shuk Kuen Helina and others* [2010] 2 SLR 209 at [86]; *Sri Jaya (Sendirian) Bhd v RHB Bank Bhd* [2000] 3

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46 Plaintiffs' Closing Submissions at para 64(b)(i)(B); Transcript dated 9 June 2022 at p 141, line 13 to p 142 line 13.

47 Transcript dated 9 June 2022 at p 142, line 25.

48 Transcript dated 9 June 2022 at p 142, lines 1 – 11.

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SLR(R) 365 at [63], citing *In re Darby* [1911] 1 KB 95; *Jhaveri Darsan Jitendra and others v Salgaocar Anil Vassudeva and others* [2018] 5 SLR 689 at [79]; *Epoch Minerals Pte Ltd v Raffles Asset Management (S) Pte Ltd and others* [2021] SGHC 288 at [20]), one problem is that this ground may be too broad, and if liberally applied, would have the effect of overreaching other liability rules (*eg*, in tort, contract and equity): *Corporate Law* at [06.044]. This observation is usefully illustrated by the Plaintiffs' argument that the court will lift the corporate veil on grounds of fraud where the controller of the company has made "fraudulent misrepresentations to induce a party into entering a contract with the company he controls".[49] If it was the Plaintiffs' complaint that the 2nd Defendant had made fraudulent representations which had caused them loss, they could very well have brought an action against him for the same (see Stephen Bull, "Piercing the Corporate Veil – In England And Singapore" (2014) Singapore Journal of Legal Studies 24 at p 31).

61 Leaving aside the points of law, I find that there is no evidence to support the Plaintiffs' allegation that they were the unwitting victims of the 2nd Defendant's fraudulent scheme. The fraud which the Plaintiffs alleged to have been victims to in the present case was that the 2nd Defendant had represented to them that the masks would be procured directly from CTT, when in actual fact, they were procured from other sources.[50] This showed that the 2nd Defendant never intended for the 1st Defendant to comply with its contractual obligations, and as a result, the Plaintiffs ended up with masks which were either fake, or simply defective. To that end, the Plaintiffs say that the 2nd Defendant had intentionally concealed from the Plaintiffs the true source of the KN95 masks in that he had told Mr Zeltzer that the masks were procured directly from

49 Plaintiffs' Closing Submissions at para 67(a).

50 Plaintiffs' Closing Submissions at para 68(a)(i).

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the factory when in actual fact, they were procured from one "Ringo" who was another middleman.

62 While the 2nd Defendant had conceded in cross-examination that he did not give the Plaintiffs the complete picture and the true source of the masks as he wanted to get the Plaintiffs to buy the masks from the 1st Defendant, this did not, in my view, amount to evidence of fraud which the Plaintiffs allege. I did not think there was anything which suggested that the 2nd Defendant had cooked up a scheme to defraud the Plaintiffs. The 2nd Defendant's explanation that he did this to close the deal between the parties and that there was nothing more to it was, in my view, part of but not the entire reason as to why he was not totally forthcoming about the source of the masks. While the 2nd Defendant did expressly admit to this, I was of the view that he concealed the true source of the masks to prevent Mr Zeltzer from bypassing him and directly dealing with the source. After all, it was clear from their dealings that the 2nd Defendant's role in the transaction was that of a middleman. The 2nd Defendant would risk losing Mr Zelter's business if he disclosed the true source of the masks. Any omission on the 2nd Defendant's part, therefore, was likely done with a view to protecting his own legitimate business interest.

63 In so far as the Plaintiffs had attempted to discredit the 2nd Defendant's testimony, this did not take their case very far. The onus was on them to put forth evidence demonstrating fraud, and having examined the evidence before me, I found that there was none. While the Plaintiffs' expert witness, Mr Pfriem, had opined that the masks did not come from CTT, I would not place any reliance on

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his opinion. I accept the Defendants' argument that there was no real basis for him to arrive at this conclusion.[51]

64 For the above reasons, I did not find that the 1st Defendant's corporate veil should be lifted so as to hold the 2nd Defendant personally liable.

Issue 3: Whether the 2nd Defendant was liable for inducing the 1st Defendant to breach the Contract

65 Apart from their arguments on lifting the corporate veil, the Plaintiffs have also argued that the 2nd Defendant should be held personally liable for the tort of inducing breach of contract. For the Plaintiffs to establish their case, the following elements of the tort must be shown: that the tortfeasor knew of the existence of the contract, that the tortfeasor had intended to interfere with the plaintiff's contractual rights and had directly procured or induced a third party to breach the contract, that the contract was breached and the plaintiff suffered injury as a result of the breach: *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 at [311], citing *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 at [17]–[18]; *BGC Partners (Singapore) Ltd v Yap Yuk Hee and others* [2021] SGHC 279 at [61]; *Clearlab SG Pte Ltd v Ting Chong Chai and others* [2015] 1 SLR 163 at [285]; Gary Chan, *The Law of Torts in Singapore* (2nd Ed, Academy Publishing, 2016) at [15.005] – [15.026].

66 Also of relevance is the rule in *Said v Butt* [1920] 2 KB 497 (the "*Said v Butt* principle") which the Defendants have relied on in support of their argument that the 2nd Defendant should not be held personally liable for the tort of inducing breach of contract. As the Court of Appeal in *PT Sandipala Arthaputra*

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[51] Defendants' Joint Closing Submissions at paras 139 – 144.

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and others v STMicroelectronics Asia Pacific Pte Ltd and others [2018] 1 SLR 818 ("*PT Sandipala*") at [62] noted, the *Said v Butt* principle should "be interpreted to exempt directors from personal liability for the contractual breaches of their company (whether through the tort of inducement of breach of contract or unlawful means conspiracy) if their acts, in their capacity as directors, are not in themselves in breach of any fiduciary or other personal legal duties owed to the company". That being said, it bears noting that the *Said v Butt* principle, as interpreted in *PT Sandipala*, operates as a requirement of liability and not a defence: *PT Sandipala* at [65]; see also Jarret Huang "Reformulating the Rules on Director Liability Exclusions in *Said v Butt*" (2018) 30 SAcLJ 1110 at [14]. As the court in *PT Sandipala* noted (at [65]), the onus is therefore on the plaintiff to "prove that the defendant-directors' acts were in breach of their personal legal duties to the company – [s]uch breach may be a breach of a fiduciary duty to act in the best interests of the company, or it may be a breach of his contractual duty towards the company to act within the scope of his authority as granted by the company".

67 In this connection, the Defendants have argued that the Plaintiffs have failed to plead that the "2nd Defendant [had] breached any of his duties owed to the 1st Defendant".[52] Given what the Court of Appeal had said in *PT Sandipala*, there is merit to the Defendants' submissions on this point. Care should be taken to plead with specificity as to which personal legal duty to the company the director is said to be in breach of.

68 Beyond the technical issue of pleadings, however, I did not find that the 2nd Defendant should be personally liable for the tort of inducing breach of contract. Key to establishing this tort is that the 2nd Defendant must have

[52] Defendants' Joint Closing Submissions at para [171(b)].

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intended the breach of contract. As was noted in *Zim Integrated Shipping Services Ltd and others v Dafni Igal and others* [2010] 2 SLR 426 at [19], citing *OBG v Allan* [2008] 1 AC 1 at [39]:

> Useful clarification as to what the second element of intention relates to can be found in the following observations of Lord Hoffman in *OBG v Allan* [2008] 1 AC 1 ("OBG") at [39]:
>
> > **To be liable for inducing breach of contract, you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realize that it will have this effect.** Nor does it matter that you ought reasonably to have done so. This proposition is most strikingly illustrated by the decision of this House in British Industrial Plastics Ltd v Ferguson [1940] 1 All ER 479, in which the plaintiff's former employee offered the defendant information about one of the plaintiff's secret processes which he, as an employee, had invented. The defendant knew that the employee had a contractual obligation not to reveal trade secrets but held the eccentric opinion that if the process was patentable, it would be the exclusive property of the employee. He took the information in the honest belief that the employee would not be in breach of contract. In the Court of Appeal [1938] 4 All ER 504, 513, MacKinnon LJ observed tartly that in accepting this evidence the judge had 'vindicated his honesty … at the expense of his intelligence' but he and the House of Lords agreed that he could not be held liable for inducing a breach of contract. [emphasis added]
>
> It is therefore clear that the plaintiffs must show that the defendant(s) in question knew that it was procuring a breach of Captain Dafni's Employment Agreement. It would not be sufficient merely to show that the acts committed by the defendant had the effect of doing so.
>
> [emphasis added]

69 I find that, on the evidence, the Plaintiffs had not proven that the 2nd Defendant had intended to procure the 1st Defendant's breach of contract. The Plaintiffs have tried to argue that the 2nd Defendant knew that it was a term of the Contract that the masks were to be procured directly from CTT, and that the

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2nd Defendant had intended to procure the 1st Defendant's breach of contract by not directly purchasing the masks from CTT, but from a middleman called "Ringo" instead. The problem with the Plaintiffs' argument is that they did not appear to have pleaded that it was a term of the Contract that the masks were to be procured directly from CTT. All that was alleged in their statement of claim, in so far as the source of the KN95 masks was concerned, was that the masks were to be "manufactured by a manufacturer registered" with the US FDA.[53] Even with such a pleading, I did not find on the evidence that it was a term of the Contract that the masks were to be directly procured from CTT. As I had explained above (at [27]), while Mr Zeltzer was only interested in making a quick buck, he was at the very least, concerned enough to stipulate that they had to be of a certain quality to clear the import checks, although he certainly did not go so far as to specifically state that the masks were to be purchased from CTT. Indeed, the inference which I drew from the evidence was that the 2nd Defendant was keen on continuing to do business with Mr Zeltzer. The WhatsApp messages between both men showed that the 2nd Defendant was not only responsive to Mr Zeltzer's requests, but was also eager to sell other products to Mr Zeltzer. It was difficult to imagine that the 2nd Defendant would have wished deliberately to jeopardise what, at the time, appeared to be a rather lucrative business relationship by deliberately inducing the 1st Defendant to breach the Contract with the Plaintiffs.

70 In summary, I find that the Plaintiffs' claim against the 2nd Defendant for inducing the 1st Defendant's breach of contract, must fail.

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53 Statement of Claim (Amendment No. 1) at para 5(b).

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Conclusion

71 In the circumstances, I allowed the Plaintiffs' claim against the 1st Defendant for breach of contract, and dismissed the Plaintiffs' claim against the 2nd Defendant. The 1st Defendant is to pay the Plaintiffs the sum of US$3,254,673.28. The 1st Defendant shall also pay interest at 5.33% on this sum of US$3,254,673.28, and interest shall run from 22 June 2021 (being the date the masks were discarded)[54] till the date full payment is made.

72 I shall hear parties on costs.

Andrew Ang
Senior Judge

Reuben Tan Wei Jer and Nadine Victoria Neo Su Hui (Quahe Woo & Palmer LLC) for the plaintiffs.
Luke Anton Netto (Netto & Magin LLC) for the 1st defendant.
Lee Weiming Andrew and Kieran Martin Singh Dhaliwal (PDLegal LLC) for the 2nd defendant.

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[54] Zeltzer AEIC at p 307.

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