Excalibur Land (S) Pte Ltd *v* Win-Win Aluminium Systems Pte Ltd and another [2013] SGHC 112

Case Number	: Suit No 538 of 2001
Decision Date	: 22 May 2013
Tribunal/Court	: High Court
Coram	: Lai Siu Chiu J
Counsel Name(s)	: Marina Chin and Kang Zhi Ni (Tan Kok Quan Partnership) for the plaintiff; Edwin Lee Peng Khoon, Lawrence Tan and Lai Yin Ting (Eldan Law LLP) for the defendants
Parties	: Excalibur Land (S) Pte Ltd — Win-Win Aluminium Systems Pte Ltd and another

Contract – breach – damages

22 May 2013 Judgment reserved.

Lai Siu Chiu J:

Introduction

1 In these protracted proceedings, a developer Excalibur Land (S) Pte Ltd ("the plaintiff") engaged Win-Win Aluminium Systems Pte Ltd ("the first defendant") as a subcontractor to carry out aluminium cladding and curtain wall works ("the works") for an industrial building that was constructed by the plaintiff at Ubi Avenue 1, Singapore known as "The Excalibur" ("the project") in 1998. Leck Kim Koon ("the second defendant") was a director of the first defendant.

2 The dispute between the parties centred on the first defendant's purchase of a unit #08-13 ("the unit") in the project. The first defendant alleged that it was required to purchase a unit in the project in order to secure the subcontract for the works from the plaintiff. The first defendant further alleged that the plaintiff inflated the price of the unit in order to report a higher transaction sale price for units in the project and had promised the first defendant that it would correspondingly increase the subcontract sum for the works, which would then be set off against the inflated price of the unit. However, (again according to the first defendant), the plaintiff subsequently reneged on its promise of a set off; hence this suit. This suit has taken twelve years to come on for trial due to numerous supervening events.

The chronology of events

3 The *dramatis personae* involved in the project and/or in these proceedings were/are the following:

(a) Tavica Design Pte Ltd ("Tavica") now known as Crescendas Pte Ltd, which was the main contractor of the project;

(b) Lawrence Leow Chin Hin ("Lawrence"), who was a shareholder of the plaintiff as well as of Tavica at the material time and his brother Michael Leow Chin Huat ("Michael") who was the general manager of both companies;

(c) Loh Kum Yin William ("William"), the former general manager of the first defendant;

(d) Sim Piak How ("Sim"), the managing director of the first defendant;

(e) Dennis Yeo ("Dennis") and Tan Boon Leong ("Boon Leong"), the managing-director and senior manager respectively, of Colliers Jardine ("Colliers"), who at the material time was the plaintiff's marketing agent for the project; and

(f) The second defendant.

4 The first defendant was invited to tender for the works in July 1998 and it submitted its quotation on 31 July 1998. Between August and September 1998, the first defendant through William was engaged in on-going negotiations with Lawrence and Michael for the subcontract for the works.

5 According to the first defendant, at a meeting held on 2 October 1998 between the parties, the plaintiff agreed to award the subcontract for the works to the first defendant on condition that the latter purchased a unit in the project. The first defendant selected the unit and its purchase price was agreed at $300 per sq ft for the unit's enclosed area and $70 per sq ft for the unit's open balcony area, so that the unit's total sale price was $509,250. At the same meeting, it was further agreed that payments due to the first defendant under the subcontract for carrying out the works would be set off against progress payments due under the sale and purchase agreement for the unit.

6 It was the first defendant's case that between 4 and 8 October 1998, Lawrence requested that the sale price of the unit be inflated by $89,000 ("the sum") to $598,250 so that the plaintiff could report a higher selling price. Lawrence assured the first defendant that the first defendant would not be affected as the sum would be incorporated as a design fee in the subcontract for the works awarded to the first defendant. Once payment was due for the unit, the first defendant could raise an invoice for the sum as the design fee, to offset the same amount due for the unit.

7 On 3 October 1998, the first defendant wrote to the plaintiff to confirm what transpired at the parties' meeting in [5], that the first defendant's final price for the works would be $1,713,711.89, and that the first defendant would purchase the unit based on $300 and $70 per sq ft respectively for the enclosed and open balcony areas.

8 The first defendant was given and accordingly exercised an Option to Purchase dated 8 October 1998 ("the Option") for the unit by paying 5% ($29,912.50) of the purchase price and subsequently signed the sale and purchase agreement dated 6 November 1998 ("the SPA") with the plaintiff. On 8 October 1998, Boon Leong on behalf of Colliers, sent a fax to the first defendant stating that the price of $509,250 for the unit would be replaced by a new price of $598,250, *ie* an increase of $89,000.

9 The first defendant also wrote to the plaintiff on the same day, recording what had transpired at a meeting that took place a day earlier on 7 October 1998. The letter signed by William and the first defendant's executive director Anne Neo was countersigned by Michael on behalf of the plaintiff. The relevant paragraphs state:

> We refer to the meeting of yesterday at your office between Mr Michael Leow, Mr KK Leck and William with regard to the above captioned tender, we hereby confirm our acceptance of your offer to reduce our quoted price by S$200,000.
>
> Henceforth, the final price for the aluminium works as per our quotation ref: Q/0138/EXC(B) dated

11/9/98 will be S$1,802,711.89 (Singapore dollars One Million Eight Hundred Two Thousand Seven Hundred Eleven and Eighty Nine Cents only).

Since this is a nominated sub contract which will be entered directly between Excalibur Land (S) Pte Ltd and Win-Win Aluminium Systems Pte Ltd, this letter will serve as an agreement basing on your offer and our acceptance of the final contract price.

...

As for the unit #08-13 which we have agree [*sic*] to purchase, the total purchase price will be S$598,250.00 (Singapore dollars: Five Hundred Ninety Eight Thousand Two Hundred Fifty only)…

10 The first defendant had applied to Keppel Bank ("the Bank") for a loan for its purchase of the unit. It received a letter of offer from the Bank dated 7 December 1998 of a term loan for $448,000 ("the loan").

11 On 8 March 1999, the first defendant lodged caveat no CV/79809G against the unit ("the caveat"). This was followed by the Bank's caveat no CV/90007G as mortgagee on 28 April 1999. Both caveats have since lapsed although at the material time, when the plaintiff demanded that the same be removed, the first defendant refused.

12 It was the first defendant's contention that the set off arrangement in [5] was evidenced by a letter from the plaintiff to the first defendant dated 9 March 1999 ("the 9 March letter") which text is set out at [57] below.

13 The plaintiff requested of the second defendant and was given a guarantee ("the guarantee") on 17 March 1999 to the effect that the second defendant would take over and complete the purchase of the unit on the same price and terms in the event the first defendant failed to do so.

14 On 19 March 1999, the letter of award ("the letter of award") for the works was finally signed by the first defendant with Tavica, not with the plaintiff, the reason being (according to the plaintiff), that the first defendant was a nominated subcontractor of Tavica, the main contractor. Between 29 October 1998 (when Tavica first sent the draft letter of award to the first defendant) and 9 March 1999, the parties were continually in negotiations on the terms of the letter of award. Essentially, it was the first defendant that repeatedly requested amendments to the document.

15 On 24 March 1999, the first defendant raised an invoice to Tavica ("the invoice") in the sum as the design fee. At the same time, it gave an authorisation letter to Tavica to pay the sum to the plaintiff to set off the purchase price of the unit.

16 The first defendant alleged that the plaintiff did not abide by the set off arrangement that had been agreed between the parties as, on 23 April 1999, the plaintiff's solicitors issued a 21 day notice pursuant to the terms of the SPA, stating that if the progress claim amount that was due was not paid, the plaintiff would be entitled to treat the SPA as repudiated.

17 On 27 April 1999, Tavica replied to the first defendant's authorisation letter in [15] refusing to forward the sum (which inclusive of GST totalled $91,670) and contended that payment to the first defendant would only be made for actual work carried out.

18 On 5 May 1999, the Bank's solicitors wrote to the first defendant's conveyancing solicitors Hee Theng Fong & Co ("HTF") to advise that the Bank would not release the loan monies until they had

received confirmation that the first defendant had *inter alia* settled the late payment interest due on the outstanding progress claim due.

19 On 6 May 1999, HTF wrote to the plaintiff's solicitors to inform the latter that it had been agreed between the plaintiff, Tavica and the first defendant that the plaintiff would accept the first defendant's authorisation to Tavica to pay progress payments due under the subcontract as payment due under the SPA.

20 The plaintiff's solicitors replied on 12 May 1999 to say that the invoice could not be considered for payment, enclosing a letter dated 11 May 1999 from the project's architects Strategic Design International ("the architects") rejecting the invoice and stating that only installed materials would be considered for interim progress payment claims.

21 On 17 May 1999, the plaintiff's solicitors served on HTF a repudiation notice and demanded payment of the amount owed under the SPA. On 24 May 1999, HTF replied stating that the amount in the invoice was to be set off against the amount due under the SPA.

22 According to the first defendant (but denied by the plaintiff), at a meeting held on 15 June 1999 that was attended by Lawrence, Sim, William, Dennis and Boon Leong, Lawrence assured Sim not to worry about the SPA but to focus on the works as the parties had a set off arrangement. Lawrence requested Sim for confirmation from the first defendant that it would not withdraw from the purchase of the unit. Sim duly sent Lawrence the confirmation requested on 28 June 1999, stating the first defendant would complete its purchase and had informed its solicitors accordingly.

23 The first defendant carried out the works until completion. In mid-2000, after the project had been completed, disputes arose between the first defendant and Tavica over the subcontract works with the former claiming that it was owed $1.8m by the latter.

24 On 16 November 2000, the plaintiff's (current) solicitors sent a letter to the second defendant as the first defendant's guarantor, demanding payment of the sum of $94,107.05 (inclusive of interest) then owed by the first defendant. Failing receipt of payment from the second defendant by 22 November 2000, the plaintiff's solicitors gave notice that legal proceedings would be commenced against him.

25 On 20 November 2000, the second defendant replied to the plaintiff's solicitors' letter of demand stating he was willing to purchase the unit "at the net purchase price" should the first defendant not do so.

26 On 22 December 2000, HTF wrote on the first defendant's behalf maintaining the first defendant still wanted the unit and would pay the amount demanded less the invoice amount. Separately, HTF wrote to the plaintiff's solicitors contending that the plaintiff was obliged to sell the unit to the second defendant on the same terms as given to the first defendant. After several reminders from HTF, the plaintiff's solicitors replied to HTF's letter to say that as neither the first nor the second defendant had paid the sum demanded of $94,107.50, the plaintiff would be commencing action against them, including removing the two caveats in [11] above. They added that the plaintiff was not obliged to sell the unit to the second defendant.

27 On 12 February 2001, the first defendant gave notice it would commence arbitration proceedings against Tavica ("the arbitration proceedings") under cl 14.1 of the subcontract, to recover the unpaid sum of $1.8m. The plaintiff (according to the first defendant) responded by filing this suit on 4 May 2001, claiming the sum of $94,107.05, being the balance due after the sale and

purchase had been rescinded.

28 On 4 November 2009, the plaintiff filed an application in this suit for the following preliminary issues to be determined:

(a) Whether the findings of the arbitrator in the interim award were to bind the parties pursuant to the Order of Court dated 26 November 2001;

(b) Whether the findings in the interim award were to be applied to the questions of fact and/or law raised in this suit; and

(c) If the findings in the interim award were binding on the parties and/or applying the findings in the interim award to the questions of fact and/or law raised in this suit, whether judgment may be entered for the plaintiff against the two defendants.

29 On 19 May 2009, the arbitrator Johnny Tan ("the arbitrator") finally issued an interim award ("the interim award") and decided the following issues in favour of Tavica:

(a) There was no agreement on 2 October 1998 that the award of the subcontract to the first defendant was conditional upon the first defendant agreeing to buy a unit in the project;

(b) There was no set off agreement reached on 2 October 1998 that payments due under the SPA between the first defendant and the plaintiff were to be set off against the progress payments due to the first defendant from Tavica under the subcontract;

(c) The first defendant was not entitled to withhold payments to the plaintiff under the SPA until the letter of award was signed;

(d) The first defendant was not entitled to be paid upfront $89,000 plus GST under the subcontract.

30 It should be noted that attendant with these proceedings, both defendants had sued William in Suit No 13 of 2006 on 16 January 2006 for breach of fiduciary duties as an employee. The claim was subsequently transferred to the subordinate courts as DC Suit 829 of 2011 ("the DC Suit").

31 One of the allegations in the defendants' statement of claim in the DC Suit was that William had 'doctored' the terms of the first defendant's letter dated 8 October 1998 in [9] after the draft had been approved by the second defendant, without the price of the unit being stated as $598,250. The first defendant contended that after William had procured the second defendant's signature approving the draft letter with amendments in red ink, he produced a photocopy of that draft when he presented the engrossed letter for signature to Anne Neo and had added the price of $598,250 therein. The defendants accused William of assisting the plaintiff in inserting the price for the unit.

32 The DC Suit was heard over several days in 2011-2012. On 18 May 2012, the district court dismissed both defendants' claim against William. As no grounds of judgment were issued following the dismissal of the defendants' claim, this court is none the wiser as to what the district judge made of the defendants' allegation against William in [31].

33 By an order dated 17 October 2008, the arbitrator (despite the objections of the first defendant), bifurcated the arbitration proceedings at the request of Tavica so that the issues in common with this suit would be decided first.

34 After the interim award in [29] was issued, the first defendant applied in OS 687 of 2009 for leave to appeal against the same; the application was dismissed. When the first defendant did not pay the arbitration costs awarded to the plaintiff, the latter presented a petition in CWU No 94 of 2010 to wind up the first defendant. Naturally the proceedings were opposed and were adjourned by another court on 23 February 2011 pending the outcome of the DC Suit. No further steps have been taken in the winding up proceedings despite the dismissal of the DC Suit because of this pending Suit.

35 This suit then came on for hearing before Justice Kan Ting Chiu ("Kan J") on 26 November 2001. Kan J stayed the proceedings pending the resolution of the arbitration proceedings and held that the plaintiff and the defendants were to abide by the decision of the arbitrator.

36 On 17 March 2010, at the hearing of the preliminary issues in [28] before Kan J, judgment was entered against the defendants ("the 17 March 2010 order"). The defendants appealed against the 17 March 2010 order to the Court of Appeal which appeal was allowed on 28 July 2011 resulting in the 17 March 2010 order being set aside.

The pleadings

(i) The statement of claim

37 In the statement of claim, the plaintiff relied on cl 5.1.1 of the SPA for its claim for the progress payment that was due on 3 December 1998, that being 8 weeks from the date when the Option was exercised on 8 October 1998. The instalment under cl 5.1.2 of the SPA for $61,619.75 was due on 20 November 1998. The plaintiff alleged that the first defendant was in breach of contract as it only paid $30,809.86.

38 The plaintiff then relied on cll 7.1, 7.2 and 7.3 of the SPA to say that the first defendant's failure to pay the outstanding balance due of $154,049.39 entitled it to treat the SPA as repudiated. The plaintiff further relied on cl 7.4 to contend that it had the right to recover all interest due and unpaid as well as to forfeit 20% of the purchase price, from instalments previously paid by the first defendant. Clauses 7.1, 7.2, 7.3 and 7.4 of the SPA read as follows:

> 7.1 The [plaintiff] has the right to treat this Agreement as having been repudiated by the [first defendant] if:-
>
> (a) any instalment of the purchase price (not being an instalment to be paid by the stakeholder) and interest remains unpaid for more than 14 days after its due date; or
>
> (b) the [first defendant] has not served the Certificate of Statutory Completion or the certified copy thereof on the stakeholder at the end of 18 days after receiving that Certificate or certified copy from the [plaintiff].
>
> 7.2 To treat this Agreement as repudiated, the [plaintiff] must give to the first defendant not less than 21 days' notice in writing of the [plaintiff's] intention to treat this Agreement as having been repudiated by the [first defendant]
>
> 7.3 This Agreement is to be treated as annulled after the notice period referred to in clause 7.2 has expired unless the unpaid instalments and interest have been paid or the requisite document has been served before the expiry of that notice period.
>
> 7.4 Once this Agreement is annulled, the Vendor has the right to –

(a) resell or otherwise dispose of the Unit as if this Agreement had not been entered into;

(b) recover from the instalments (excluding interest) previously paid by the Purchaser all interest owing and unpaid at the date of annulment; and

(c) forfeit and keep 20% of the Purchase Price from the instalments (excluding interest) previously paid by the Purchaser.

39 The breakdown for the plaintiff's claim for $94,107.05 is as follows:

Interest on $92,429.64 from 4 Dec 1998 to 14 May 1999	$3,051.76
Interest on $61,619.75 from 21 Nov 1998 to 14 May 1999	$2,215.15
20% of the purchase price	$119,650.00
Total due:	$124,916.91
Less: Paid by the first defendant	$30,809.86
	$94,107.05

40 The plaintiff relied on the guarantee of the second defendant at [13] for its claim against him as guarantor of the first defendant's obligations.

41 The plaintiff claimed: (i) a declaration against the first defendant that the SPA was repudiated; (ii) a mandatory injunction for the withdrawal of the caveat at [11] that the first defendant filed on 8 March 1998; (iii) an order restraining the first defendant from lodging any other caveat(s) against the unit; (iv) the sum of $94,107.05 from both defendants and (v) damages or compensation under s 128 of the Land Titles Act (Cap 157, 2004 Rev Ed) from both defendants.

(ii) The defence

42 In the common defence (Amendment No 3) of the defendants, they contended that at a meeting held on or about 2 October 1998, it was agreed between the parties that the award of the subcontract for the works to the first defendant would be conditional upon the first defendant purchasing a unit in the project from the plaintiff. In consideration of the award of the subcontract and at the plaintiff's request, the first defendant agreed to purchase the unit at a price of $509,250. The defendants further alleged that on the same day, the plaintiff had agreed to set off any sum due to the first defendant under the subcontract against the purchase price of the unit and that the plaintiff would be responsible for drafting the set off agreement.

43 The defendants averred that the price of the subcontract was reduced by $200,000 from $1,913,711.89 to $1,713,711.89.

44 On or about 4 October 1998, Lawrence requested William to increase the price of the unit by the sum of $89,000 to $598,250 and that the sum would then be added to the price of the works so that the subcontract price would be increased to $1,802,711.89; William agreed.

45 The defendants contended that it was agreed between the parties that the subcontract and the purchase of the unit would be a package deal. It was also alleged that a condition precedent to any liability on the part of the first defendant to make payment under the SPA was that the

subcontract should first be signed. However, the condition precedent was not performed until 19 March 1999 when the letter of award was signed. The plaintiff had suggested, which the first defendant accepted, that the latter could raise an invoice for the sum as design fee at such time when the first defendant was required to make payment under the SPA. It was further agreed that the plaintiff would immediately set off the invoice amount of $89,000 against the amount payable by the first defendant and that the first defendant would only have to make payment of the balance amount due under the SPA by way of set off, using the sums due to the first defendant under the subcontract.

46 The first defendant relied on William's testimony in the DC Suit as proof of the set off arrangement claiming William had admitted in the subordinate courts to the relationship between the subcontract and the SPA, as well as to the set off arrangement, thereby proving that Lawrence and Michael had lied in these proceedings.

47 As the subcontract for the works was not made between the plaintiff and the first defendant but with Tavica which only had a paid-up capital of $40,000 at the material time, the first defendant requested and the plaintiff provided, a guarantee dated 18 January 1999, for payment of the progress payments due to the first defendant.

48 The first defendant averred that by its conduct and/or the set off arrangement and/or the promise made to the first defendant, the plaintiff was estopped and precluded from alleging that the instalments due under the SPA were payable according to cl 5.1. The first defendant alleged that it relied on the plaintiff's conduct and/or the set off arrangement by not making direct payments to the plaintiff under the SPA.

49 In the alternative, the first defendant pleaded that its obligations to pay the instalment payments under the SPA were dependent upon the willingness and readiness of the plaintiff to simultaneously perform its obligations to set off. Further, the second defendant was at all material times ready, willing and able to take over the purchase of the property. However, in breach of the terms contained in the guarantee at [13], the plaintiff refused to sell the unit to the second defendant.

(iii) The plaintiff's reply

50 In its reply (Amendment No 2), the plaintiff relied on and quoted from, the arbitrator's interim award *in extenso* to support its denial of a set off arrangement as alleged by the first defendant. The plaintiff asserted that the award of the subcontract could not have been in consideration of the SPA because on 2 October 1998, only the subcontract had been awarded; the Option to Purchase was issued to the first defendant or about 8 October 1998 while the letter of award was signed on or about 19 March 1999. Further, there being no mutuality of parties, the plaintiff did not and could not have agreed to set off sums due from Tavica to the first defendant under the subcontract against sums due from the first defendant to the plaintiff under the SPA.

51 The plaintiff averred that by March 1999, the first defendant still owed the plaintiff $154,049.39 for instalment payments due under the SPA. The first defendant had irrevocably authorised Tavica to pay the plaintiff any sums due from Tavica to the first defendant under the subcontract but as at 9 March 1999 or even until the SPA was repudiated (on and after 15 May 1999), no sums were due to the first defendant under the subcontract.

52 The plaintiff disputed the first defendant's contention that William had in the DC Suit admitted to the conditionality of the subcontract. The plaintiff asserted that what transpired in the DC Suit

was irrelevant as the plaintiff was not a party to the same whereas the plaintiff and the first defendant were both bound by the interim award. In addition the plaintiff contended that it was an abuse of process for the defendants to plead any matters which were inconsistent with any of the findings in the interim award and/or to raise issues that were already decided by the arbitrator as set out in the interim award.

The evidence

53 Seven witnesses testified during the seven day trial. The plaintiff's witnesses were Lawrence and Michael (collectively "the Leow brothers"), Dennis and Boon Leong while the second defendant, Sim and William testified for the defendants. I should point out that William gave his evidence-in-chief *viva voce* and not by an affidavit of evidence-in-chief ("AEIC") as he was a subpoenaed as well as a reluctant witness.

(i) The plaintiff's case

54 Lawrence's version of events was a repeat of the plaintiff's pleadings, *viz* that the award of the subcontract to the first defendant for the works was not conditional on the latter's purchase of the unit as the timing for the two transactions was different. He denied there was any discussion between the parties on the SPA being conditional or on any term in the SPA being conditional, upon the signing of the subcontract or any term in the subcontract. Lawrence explained that the increase in the sale price of the unit and in the subcontract price by the sum was a compromise on the plaintiff's part. He pointed out that the first plaintiff's last quotation of $1,713,711.89 was low as compared with the prices of other contractors and it was still the lowest even with the addition of $89,000.

55 Lawrence referred to the minutes (recorded by the architects) of a meeting on 12 February 1999 which he and Michael attended together with the second defendant, William, Dennis and Boon Leong, to disprove the first defendant's allegation that the award and the SPA were inter-related. However, Lawrence did not deny the reason why the price was added to the subcontract. In his AEIC, he deposed that in lieu of the design fee alleged by the first defendant and which the plaintiff denied, he had suggested that payment of the $89,000 added to the subcontract be made to the first defendant progressively in each progress claim when certified, just as the first defendant's reduction of $200,000 in its original quotation would be spread over the whole project. The two figures meant a net reduction of $111,000 ($200,000 less $89,000) in the subcontract price.

56 At this juncture, it would be appropriate to refer to the 9 March letter referred to at [12].

57 The 9 March letter written on the plaintiff's letterhead was addressed to the first defendant and it reads as follows:

> In consideration of you purchasing a unit, unit no. #08-13 (hereinafter the "Unit") in the Proposed Development from us whereby a sale and purchase agreement (hereinafter the "Sale and Purchase Agreement") between us has been executed, we have procured our main contractor, Tavica Design Pte Ltd (hereinafter "the Main Contractor") to award you the subcontract for the aluminium and glazing works (hereinafter the "Subcontract") relating to the Proposed Development.
>
> Pursuant thereto, you are obliged to complete the purchase of the Unit in accordance to the terms of the Sale & Purchase Agreement. In relation thereto, if you shall fail refuse or neglect to observe your payment obligations, you irrevocably authorise the Main Contractor to set off or

deduct such sums from any money due and payable to you under the Subcontract and use the same to satisfy or fulfil your said payment obligations, whether in part or full, without any reference to you.

If for whatever reasons you shall fail, refuse or neglect to complete the purchase of the Unit, the Contract Sum of the Subcontract between you and the Main Contractor shall be reduced by $89,000 without prejudice to any other rights entitled to the Main Contractor or us at law or in equity or under the Subcontract or the Sale & Purchase Agreement.

58 The 9 March letter was signed by William as confirmation by the first defendant and countersigned by the second defendant as well as by Michael on behalf of Tavica. I should point out that it was the plaintiff who had prepared the initial draft of the 9 March letter. The wording in the draft was eventually revised to that set out in [57] at the first defendant's behest. It is noteworthy that the set off arrangement stated in the 9 March letter was not restricted to the $89,000 but extended to all progress claims due to the first defendant from Tavica should the first defendant fail to pay sums due to the plaintiff under the SPA.

59 Lawrence (and Michael) did not mention the first paragraph of the 9 March letter in his AEIC (although the Leow brothers referred to the other two paragraphs in [57]) as it appeared to support the first defendant's position of the linkage between the subcontract and the SPA. In cross-examination (at N/E 90), Lawrence sought to explain the first paragraph of the 9 March letter. He described it as a letter of comfort to the first defendant that it had purchased the unit at the higher price and it would be awarded the subcontract, which letter of award was not yet issued. Lawrence said he had hoped that with the letter of comfort, the first defendant would be prompted to order materials for the works to be carried. Both parties would then be happy. As he and Michael were not legally trained, Lawrence did not think that one should read too much into such a letter of comfort as it was meant to address the situation then. However, he did not disagree with the last paragraph of the 9 March letter.

60 Lawrence denied that para 1 of the 9 March letter at [57], supported the first defendant's defence – that the SPA and the subcontract were linked and conditional upon one another. He pointed out that up to five months after the 9 March letter was signed, the parties were still in negotiations on the terms of the subcontract and the letter of award. The plaintiff on its part was anxious for the letter of award to be issued as it was concerned that the first defendant had not ordered materials for the subcontract while the plaintiff was contractually obliged to deliver units to purchasers by 30 June 2000, *viz* within 18 months from the time of their purchase. The first defendant however caused delay by amending ("in dribs and drabs" according to Lawrence) the terms of the letter of award however minor (and even after four sets of the engrossed letter of award had been given to the first defendant for execution around mid-January 1999 and again on 25 February 1999). This prolonged the process of issuing the letter of award by almost a year. Lawrence added that once the letter of award was given to the first defendant, the latter had no excuse not to pay the outstanding progress claim under the SPA; yet, it failed to pay.

61 Before the letter of comfort was issued on 9 March 1999, there was a letter dated 8 March 1999 from the first defendant to Tavica (co-signed by William) that stated:

With reference to the above and as per your request, we hereby confirm and agree that in the event Win-Win Aluminium Systems Pte Ltd failed to make progressive payments to Excalibur Land (S) Pte Ltd for the purchase of one (1) unit at No. 71 Ubi Crescent, Excalibur Centre (Unit #08-13) as per the conditions set out in the Sales and Purchase agreement, Excalibur Land (S) Pte Ltd shall instruct Tavica Design Pte Ltd (the main Contractor) to deduct the amount due and

owing from our progress payment for the aluminium works Subcontract as being progressive payment on the purchase of the said unit for and on our behalf.

The validity of this letter is subject to the letter of award given to us and accepted by us before the 10th Mar 1999.

As the letter of award was dated 19 March 1999, it is arguable that the above letter has no effect.

62 Notwithstanding the plaintiff's denial of any linkage between the subcontract and the SPA and Tavica's rejection of the first defendant's invoice for the design fee at [17], it appeared that the first defendant did incorporate the sum into its progress claims and it was paid by the plaintiff. Lawrence's attention was drawn to the first defendant's progress claim no 2 dated 22 September 1999 which incorporated the design fee in its preliminaries of $99,500. Lawrence admitted that the plaintiff's payment was probably an "oversight" which it only discovered subsequently. However, he could not recall whether the architect was informed of the payment. The court pointed out to Lawrence that since the architect's letter dated 11 May 1999 (see [20]) had rejected the invoice, the former must have known. It was more likely than not that the project's quantity surveyor CS Lee and Associates ("CS Lee") was not informed of the architects' rejection of the invoice when CS Lee certified payment on progress claim No 2 and later claims.

63 I should point out that (in re-examination) Lawrence clarified that not the entire invoice amount was paid by the plaintiff in progress claim No 2. Of the $99,500 claimed by the first defendant as preliminaries in that claim, CS Lee approved and certified $9,000 for payment on 12 October 1999. The extent of the payments that the plaintiff made on the invoice emerged during the testimony of Sim, as will be seen later in this judgment.

64 In his AEIC, Lawrence had referred to a meeting held on 15 June 1999, after the plaintiff had purportedly annulled the SPA due to the first defendant's failure to pay the outstanding instalment. Lawrence denied Sim's allegation (see [22]) that he had assured Sim at that meeting not to worry about the SPA as there was a set off arrangement. He pointed out that Sim was not even present; only William attended the meeting. Neither did Lawrence ask Sim for the confirmation letter from the first defendant dated 28 June 1999. At the meeting, Lawrence informed William that the SPA was already repudiated and Tavica was therefore entitled to reduce the subcontract sum by $89,000, William responded that the first defendant was still prepared to purchase the unit and inquired how the first defendant could claim back the sum. Lawrence suggested that the first defendant could be paid progressively when progress claims were certified; William said he would have to discuss Lawrence's proposal with the second defendant and Sim. However, Lawrence indicated that the plaintiff would have to first agree to reinstate the SPA and decide what amount was payable by the first defendant for the reinstatement.

65 It was drawn to Lawrence's attention that even as of 16 June 2000, HTF was still writing to the plaintiff's solicitors asking for confirmation that the invoice amount had been deducted from the progress claim due under cll 5.1.1 and 5.1.2(a) of the SPA. Lawrence pointed out that by that date, the first defendant had collected numerous (certified) progress payments from the plaintiff which included the invoice amount. There was no further need for the set off arrangement; the first defendant could have but it did not tender payment as demanded by the plaintiff's solicitors. The manner and extent of the plaintiff's payment of the sum will be addressed in greater detail when I deal with Sim's evidence below (at [108]-[111]).

66 Lawrence (who was then a nominated Member of Parliament), complained he was defamed by Sim in a letter which Sim wrote to the Prime Minister on 27 December 2004 (and to banks) alleging

that Lawrence was not fit to be a Member of Parliament as he had committed criminal offences, (siphoning $2.8m from Tavica) deceived purchasers, cheated Sim and that there had been a price inflation for the unit. Lawrence instructed solicitors who wrote to Sim to demand a withdrawal and an apology of the defamatory letter. Subsequently, he decided not to pursue legal action after having a meal with Sim as the publicity attendant with such action would have adversely affected his family.

67 In re-examination Lawrence explained that due to the downturn in the property market in 1998 (resulting from the Asian financial crisis) he was forced to give substantial discounts (ranging from 16% to 23%) to purchasers in order to move the project, as the plaintiff's bankers (who had extended a construction loan) had given him an ultimatum to sell 50% of the units by end 1999. The price of $598,250 was equivalent to almost 2% discount on the net price (already discounted) of $609,940 on the unit. Because of the plaintiff's bank's pressure, Lawrence slashed selling prices and that enabled the plaintiff to sell more units quicker. Even so, Lawrence said he could not accept the first defendant's offer of $509,250 on Collier's advice, as doing so would affect the sale prices of the remaining unsold units.

68 Boon Leong of Colliers was cross-examined on his letter dated 8 October 2008 (see [8]). It would be useful at this juncture to set out the full text of that letter; it reads:

> We refer to your interest to purchase unit #08-13 of the above captioned development and are pleased to confirm on the following purchase price:
>
> Agreed purchase price on covered area @$300 psf x 1,582 sq ft - $474,600
>
> Agreed purchase price on terraced area @$70 psf x 495 sq ft - $34,650
>
> Total purchase price - $509,250
>
> As discussed, the new purchase price will be $598,250 and the difference of $89,000 will be added to your contracted pricing of aluminium works in the Excalibur Centre.
>
> Please prepare a cheque of amount $30,809.86 (GST included) to Excalibur Land (S) Pte Ltd being five (5) per cent deposit in exchange for the option to purchase.

69 Questioned by the court, Boon Leong clarified that when he said "as discussed" in his letter, he meant his discussion with William, not Michael. He admitted he had used words "agreed purchase price" wrongly and his choice of words was unfortunate – he only meant to record that William/the first defendant had agreed to buy the unit at $598,250, not that the plaintiff had accepted the first defendant's offer of that price. I should add that Boon Leong confirmed Lawrence's evidence of what transpired at the meetings held on 12 February 1999 and 15 June 1999 with the first defendant's representatives, including the fact that Sim was not present at the June meeting.

70 I turn next to Michael's evidence. Michael revealed that the first defendant's contact with the plaintiff was established through Dennis who informed him that William (an acquaintance of Dennis) on behalf of the first defendant was interested in submitting a tender for the works for the project.

71 Michael's AEIC mirrored that of Lawrence on what transpired at meetings with the first defendant's representatives and what the plaintiff had agreed to. With regard to events or meetings in which Lawrence was not involved, Michael's version differed from the first defendant's. In particular, Michael testified that at the 2 October 1998 meeting he had with William and the second defendant, the only agreement reached was that the first defendant's price for the works would be

reduced by $200,000. While there was indeed a discussion on the price of the unit, no agreement was reached as Michael rejected the first defendant's offer of $509,250 for the reason that the low price would adversely affect the sale prices of the other unsold units.

72 Michael testified he had another meeting with William and the second defendant on 7 October 1998 (see [9]) where he again rejected the first defendant's offer of $509,250 for the unit. He then counter-proposed an increase in the first defendant's subcontract price by $89,000 with a similar increase in the price of the unit; the proposal was accepted by the second defendant. There was no discussion that the SPA was conditional on the signing of the subcontract or any terms in the subcontract. Hence, he countersigned the first defendant's letter dated 8 October 1998 at [9] above which set out correctly what had been discussed. The Option to Purchase was given to the first defendant that same day.

73 Michael confirmed that apart from the initial 5% deposit of $30,809.86, the first defendant did not pay the instalments due under cll 5.1.1 and 5.1.2(a) of $123,239.50 and $61,619.75 respectively. The total amount due from the first defendant was $154,049.38 ($123,239.50 + $61,619.75 less $30,809.86) as claimed in the statement of claim.

74 In his AEIC, Michael deposed he received a handwritten note from Sim (which Sim disavowed) appended to Tavica's letter dated 28 June 1999 to the first defendant. The subject of the letter was the invoice. Tavica's letter (with the handwritten note) states:

> We refer to the meeting on 15/6/1999 at our office between your Mr William Loh, Mr Tan Boon Leong and M Dennis Yeo of Colliers' Jardine and our Mr Lawrence Leow on the above subject.
>
> In the meeting, both of us, Win Win Aluminium Systems Pte Ltd (Win Win) and Tavica Design Pte Ltd (Tavica) has agreed that Tavica will pay the above outstanding invoice together with your progress claims according to the percentage of claim to the total contract value.
>
> For example:
>
> 1Assuming WinWin's 1st progress claim for work done is S$311,393.04/S$1,556,965.25 = 20%
>
> we will pay you 20% of the outstanding invoice of $89,000 i.e. S$89,000 X 20% = S$17,800.
>
> 2Therefore, the total payment payable to you will be:S$17,800 + S$311,393.04 = S$329,193.04.
>
> Yours faithfully, Confirmed by:
>
> for Tavica Design Pte Ltd Win-Win Aluminium Systems Pte Ltd
>
> To: Mr Michael Leow
>
> From: Sim PH
>
> As discussed with our William Loh we can claim the $89,000 together with our progress claim. Enclose [*sic*] is a draft for your perusal and comments.
>
> Will appreciate your reply asap.
>
> Thanks
>
> (Signed)

75 In cross-examination, Michael denied he was responsible for broaching the subject of the first defendant's buying a unit in the project as a pre-condition to securing the subcontract for the works. He said Dennis told him that the second defendant was a property investor and had owned a few

investment properties and the latter would invest in property if he saw a good opportunity to do so. In fact, the second defendant initially intended to buy the unit in his personal name, according to Colliers. Michael pointed out that he did not countersign the first defendant's letter dated 3 October 1998 in [7] when William brought it to him because he did not agree with the contents – that the price for the unit would be $300 and $70 respectively for the enclosed and open balcony areas making a total purchase price of $509,250. Michael denied Sim's allegation that he had on 4 October 1998 told William the plaintiff would inflate the price of the unit by the sum and add the same amount to the subcontract price. He pointed out he did not even meet William that day. He never communicated with Sim and only dealt with William for this matter.

76 Nothing much turns on the evidence of Dennis who was the plaintiff's last witness. Essentially, he corroborated the evidence of Boon Leong as well as the Leow brothers on what took place at the meetings held on 12 February 1999 and 15 June 1999.

77 The significance of Dennis' testimony was his disagreement with para 8 of an affidavit previously filed by William personally (on 24 January 2007) in the DC Suit, that at a lunch meeting in August 1998 (which he could not recall), Dennis had suggested that the first defendant purchase a unit in the project to increase the first defendant's chances of securing the subcontract. Questioned by the court, Dennis categorically denied he had suggested that the first defendant offer such a "sweetener" to the plaintiff. He pointed out that he was/is not a contractor and knew nothing about the construction industry or aluminium works. Being an experienced property marketing agent, it was never his business and he would not try to influence a buyer to sweeten the contract for another job. Neither would he do it, as a matter of pride. Dennis asserted he would not jeopardise his relationship with his client just for the few thousand dollars that Colliers could earn as commission for a sale. Further, it was Boon Leong's responsibility as head of Colliers' sales department, to market the project although Dennis remained in overall charge as the managing director.

(ii) The defendants' case

78 I turn now to review the evidence presented for the defendants' case, starting with the testimony of William who, without a subpoena, would not have willingly come to court to testify, having left the first defendant's employment in April 2000 after two years' service (from June 1998).

79 William explained that in business culture, it was very normal to apply the "you scratch my back and I scratch your back" practice. Consequently during negotiations on the subcontract between the parties, the topic of the first and/or second defendant buying a unit came up for discussion. Although William did not name the plaintiff or the defendants, such a suggestion could have come from either party. The plaintiff well knew that the first defendant was very keen to secure the subcontract for the works and conversely, the first defendant in its eagerness to secure the subcontract, may well have offered "the sweetener" of purchasing a unit. In discussing both matters, William said he would take a backseat whenever the issue of the first defendant's purchase of a unit came up as his role was only to negotiate the subcontract for the award.

80 William was repeatedly asked by counsel for the defendants to confirm that the evidence he gave in court in the DC Suit was correct. He was also referred to his affidavits filed in this suit on 24 January 2007 and on 21 November 2011. Where the evidence was unfavourable or his statements were unhelpful to the defendants' case, it was suggested to him by their counsel that the same was incorrect.

81 To elaborate, in his affidavit filed in this suit on 21 November 2001 ("his first affidavit"), William deposed:

…

7 A meeting was held on 2 October 1998 amongst Michael, Leck Kim Koon ("Leck") and myself (Leck is a director of Win-Win). It was agreed that the lump sum contract price for the works would be reduced by $200,000 to $1,713,711.89.

8 At the meeting, there was also discussion on Win-Win's intended purchase of the said property. Michael repeated that Excalibur was selling it for $598,250.00. The offer was rejected. Michael said that the project had not even been launched, and a lower price for the said property would affect the sale price of the other unsold units.

9 Thus, at the 2 October 1998 meeting, agreement was reached on the contract price for the Works but not the price for the said property.

82 However, in his AEIC filed on 24 January 2007 in this suit, William said:

…

13 In consequence thereof, a meeting between all relevant parties was held on 2nd October 1998. I attended the meeting at Excalibur's office, with the [the second defendant] leading the negotiations on behalf of the first defendant]. At the end of the meeting, the [second defendant] and Excalibur agreed on the following:

(a) the [first defendant] would reduce the Sub-Contract price by $200,000 from $1,913,711.89 to $1,713,711.89;

(b) Excalibur made it clear that it would award the Sub-Contract to the [first defendant] on condition that they purchase a unit from Excalibur. A few units were identified but no specified unit was chosen. Only the per square foot rate was agreed upon. i.e. $300 per sq ft for enclosed space and $70 per sq ft for open balcony area. At that said meeting, Excalibur was unable to confirm what were the sizes on the enclosed and balcony areas, as amongst other things, the Architect (Mr Philip Lee of Strategic Design International) was still making changes to the layout on the 8th storey of Excalibur Centre.

83 In court for the trial of DC Suit, William had said (during cross-examination by the same counsel for the defendants that his para 8 at [81] was incorrect.

84 Hence, counsel suggested to William that the extracts from his affidavit in [81] were incorrect whilst those in [82] extracted from his AEIC were accurate.

85 In cross-examination by counsel for the plaintiff however, William confirmed that his first affidavit was correct when he affirmed and filed it voluntarily. His attention was drawn to para 13 of his first affidavit where he said (after referring to the first defendant's letter dated 8 October 1998):

> Thus, during the negotiations, the only so-called link between the Agreement and the Subcontract is as explained in paragraph 11 above i.e that the purchase price for the Agreement led to the Subcontract price being agreed at $1,802.711.89. Apart from that, there was never any discussion about the Agreement being conditional on any term in the Agreement being conditional upon the signing of the Subcontract or any term in the Subcontract.

In the DC Suit, William had affirmed the truth of the above para 13 in court during cross-examination

and disagreed with para 13 of his AEIC set out at [82]. William opined that his first affidavit did not differ much from his affidavit filed in the DC Suit.

86 William revealed that after he had filed his first affidavit supporting Lawrence Leow, he received 'an abundance of trouble' from the first defendant. He was then a bankrupt and was called up by the Official Assignee on allegations that he had made non-disclosures, by the income tax authorities for under declaration of tax and his family was harassed. He felt intimidated and lodged police reports as a result.

87 In the course of cross-examination, William revealed he was not even privy to the negotiation process between the parties on the sale and purchase of the unit. He only came to know of the matter much later when Dennis inquired of him why the first defendant did not honour the purchase of the unit even though it was awarded the subcontract for the works. Further, all the letters that he wrote on the first defendant's behalf were on the instructions of his management and were vetted by the second defendant. In addition, his letters on the first defendant's behalf required countersigning by a director of the company before they could be sent out. William said he could not recall any document from the plaintiff to the first defendant or *vice versa*, that stated that the first defendant would only be awarded the subcontract if it purchased the unit. As far as William was aware, in all the meetings that he attended with the plaintiff's representatives, there was never any discussion that the first defendant could withhold payment under the SPA while waiting for the letter of award to be issued. Neither was there a discussion that the first defendant could issue the invoice for design fees of $89,000.

88 William was referred to another affidavit that he had filed in the DC Suit (on 20 June 2006), where he had said in para 4(b):

> After a series of negotiations, it was agreed that the award of the Contract to Win-Win was subject to Win-Win purchasing a unit of the Excalibur Centre ("the unit"). In other words, the Contract and the sale of the unit to Win-Win were intrinsically linked.

He clarified that by the words "intrinsically linked" he meant if the first defendant paid $89,000 more for the unit, then the subcontract price would be similarly increased. The linkage was also because both items were negotiated at the same time. Finally, William confirmed the accuracy of the minutes (as recorded by the architect) of the meeting held on 12 February 1999.

89 There was no re-examination of William by counsel for the defendants.

90 I turn next to the testimony of the second defendant and in particular to his cross-examination. The second defendant ceased to be a shareholder of the company sometime after 1999, when he sold his shares to the brother of the executive director Anne Neo. He ceased to be a director of the first defendant on 30 December 2001. However, the second defendant remains a creditor of the first defendant for a substantial sum exceeding $1m for loans that he had advanced to the company essentially to fund legal fees for this litigation and the pending arbitration proceedings with the plaintiff.

91 Notwithstanding the clear wording of the first defendant's letter dated 3 October 1998 at [9] to the plaintiff, the second defendant disagreed that the letter served as an agreement between the parties pending the issuance of the letter of award; the second defendant insisted it was only an agreement on the contract price. The second defendant further insisted that as of 2 October 1998, there was no confirmation of the price the first defendant would pay for the unit even though this was a departure from para 2(v) of the first defendant's amended defence (filed on 6 June 2001)

where it was pleaded that the first defendant offered $509,250 that day for the unit. The second defendant opined that the defence had been wrongly drafted. It was drawn to his attention that the wrong drafting was not corrected in the subsequent and further amended defences filed by the first defendant on 26 June 2001 and 30 October 2001.

92 It was the plaintiff's case (which was put to the second defendant but denied) that the error in the amended defence was only corrected in the re-amended defence (Amendment No 3) filed on 9 April 2012, after the second defendant had been cross-examined in the arbitration proceedings on the meeting of 2 October 1998 (which the second defendant said he could not recall) and he wanted the first defendant's case in this suit to be consistent with his evidence in the arbitration. In the arbitration proceedings, the second defendant had said he did not know of the actual purchase price of the unit on 2 October 1998, only the square foot price.

93 Further, even though the alleged set off was the *gravamen* of the first defendant's defence, this was only pleaded for the first time in the re-amended defence filed on 30 October 2001. It is also noteworthy that the second defendant did not think it was important enough to record it in the first defendant's letters dated 3 October 1998 or 8 October 1998 to the plaintiff. He denied counsel's contention that there was no set off. In court the second defendant claimed there was a verbal agreement reached with the plaintiff on 2 October 1998 that the letter of award from the plaintiff and the first defendant's purchase of the unit was a "package deal" and no payment needed to be made under the SPA until the letter of award was signed (as pleaded in the defendant's re-amended defence Amendment No. 3).

94 Cross-examined on the cheque that the first defendant issued for the 5% deposit which he had signed, the second defendant claimed he signed 'blindly' without looking or checking the amount. Had he done so as the court pointed out to him, a simple calculation would have revealed that 5% amounting to $29,912.50 (before 4% GST) equated to a purchase price of $598,250. The second defendant further claimed he never saw the Option or the SPA stating the purchase price as $598,250.

95 The second defendant's attention was drawn to the Bank's letter of offer in [10] which he had accepted with Sim on the first defendant's behalf. Paragraph 9 therein stated;

> Special condition: This offer is subject to a formal valuation of the mortgaged property showing a value of not less than $598,000.

The second defendant explained that he thought the figure $598,000 was the sum total of the figure being divided by $300, multiplied by the enclosed area and $70 multiplied by the open area. He could not remember seeing paragraph 9 in the Bank's letter of offer. Questioned why he and the first defendant had sued William in the DC Suit for being tricked into paying a higher price by $89,000 for the unit, the second defendant said he found out much later about the inflated price.

96 In the same vein, the second defendant said he did not notice the last paragraph of the 9 March letter at [57] which he had countersigned, where it was clearly stated that the subcontract sum would be reduced by $89,000 in the event the purchase of the unit was not completed. Neither was he aware of the various letters of demand sent by the plaintiff's solicitors for amounts due under the SPA including the 21 days' notice, nor that the SPA had been treated as annulled by 14 May 1999, as no one in the first defendant told him. The second defendant claimed that the purchase of the unit was left entirely to Sim as the first defendant's managing director to handle.

97 The second defendant repeatedly answered "I can't remember" to countless questions put to

him in cross-examination on whether he had seen correspondence from or with the plaintiff's solicitors. He shifted the responsibility to William as the first defendant's then general manager even though William's responsibilities did not extend to the purchase of the unit. Although the second defendant signed and/or countersigned all letters written by the first defendant, he claimed he was not familiar with some of the correspondence between the first defendant and the plaintiff. He was equally ignorant of the invoice claiming he was not aware when it was issued. As for letters to the plaintiff that he signed chasing alleged outstanding progress claims, the second defendant said he left it to Sim or the project manager of the first defendant to check whether the amounts certified by CS Lee had or had not been paid as he did not know the details.

98 I turn next to the second defendant's guarantee dated 17 March 1999 in [13]. It would be apposite at this stage to set out its terms as the document is the basis of the plaintiff's suit against him; it states:

> In consideration of you agreeing at my request to proceed with the sale of the Unit notwithstanding a breach by the Company of the terms thereunder, I hereby unconditionally and irrevocably warrant the performance of the Company and guarantee the payment of all sums due under the Sale and Purchase Agreement relating thereto and if for whatever reasons, the Company shall fail, neglect or refuse to complete the purchase of the Unit, I undertake to purchase the Unit at the same price and on the same terms and shall be liable for all costs and expenses arising thereof.

99 It would also be appropriate at this juncture to set out the text of the second defendant's reply dated 20 November 2000 at [25] in response to the plaintiff's solicitors' letter of demand dated 16 November 2000; he had said:

> Dear Sirs,
>
> Your ref: MC. ter. 1191.00
>
> Purchase of #08-13 EXCALIBUR CENTRE
>
> I refer to your letter dated 16 Nov 2000 which is the first letter received by me on 20 Nov 2000 on the abovementioned.
>
> Please be informed that in the event that M/s Win-Win Aluminium Systems Pte Ltd is not keen to purchase the said unit, I am definitely interested to purchase the said unit at the nett purchase price from your clients
>
> Please let me know as soon as possible when Win-Win has rejected their purchase of the said unit.
>
> I would appreciate it if you could forward me a copy of the guarantee which you mentioned that I have signed as "Guarantor".

100 The reply from the plaintiff's solicitors to the second defendants' request only came much later, in a letter dated 20 April 2001 which relevant extract said:

> ...
>
> Please also note that our client disagrees that they are obliged to sell the property to your other

client Leck Kim Koon.

101 During cross-examination, the second defendant clarified that by "nett purchase price" in his letter he meant 95% less 5% deposit or whatever payment that had been made by the first defendant. The second defendant explained he did not press or sue the plaintiff for specific performance to take over the purchase of the unit from the first defendant because Sim had told him the purchase by the first defendant was still on. To that comment, counsel for the plaintiff told the second defendant that it was the plaintiff's prerogative to decide and it did not wish to sell to him, notwithstanding the terms of the guarantee in [98].

102 Questioned on the minutes of the meeting held on 12 February 1999, the second defendant contended they were not correct. He said (as he did at the arbitration proceedings) that he only stayed until the discussion on corporate guarantee (as recorded at item 2 of the minutes) and was not present when item 4 was discussed, relating to the purchase of the unit (where the minutes recorded that Boon Leong had highlighted that the first defendant had failed to pay the balance 20% payment and progress payments due). It was pointed out by counsel for the plaintiff that the second defendant had not in the arbitration proceedings, said he disagreed with those minutes, when he referred to them in his first affidavit filed on 24 Sep 2002.

103 I turn now to the testimony of Sim, who was the last witness for the first defendant. As with the second defendant's testimony, it would not be necessary to consider Sim's AEIC. What matters for this court's consideration is the evidence that was adduced from Sim during cross-examination.

104 Sim revealed that as the first defendant's managing director, he decided to purchase a unit in the project when William told him before 2 October 1998 that the plaintiff wanted the first defendant to purchase a unit in order for the company to be awarded the subcontract. He clarified that he looked at a brochure of the project that had been given to William by Boon Leong. He then decided that the first defendant would buy a unit on the 8th floor but did not choose any particular unit. The second defendant was not involved in his decision making. Sim did not attend the meeting on 2 October 1998 but it was after that date that the unit was selected. He was told by William/the second defendant that on 2 October 1998, the plaintiff gave the price as $300 per sq ft for the covered area and $70 per sq ft for the open area. The price was only crystallised at $509,250 in the letter dated 8 October 1998 to the first defendant from Colliers at [66]. Sim claimed that prior to receipt of Colliers' letter, William told him the price for the unit was agreed at $509,250 but that the plaintiff wanted to charge an additional $89,000 so as to report a higher purchase price for the unit. He did not ask the second defendant on the price increase as he was told by William that the plaintiff had provided a method to set the amount off by way of a design fee to the first defendant. He assumed the second defendant had approved of the set off method.

105 Sim's attention was drawn to the defendants' pleadings. In the original defence that was filed on 6 June 2001, no mention was made of an alleged set off on 2 October 1998, nor in the second defence filed on 26 June 2001. The allegation of a set off first appeared in the re-amended defence filed on 30 October 2001. Sim's explanation was that the third defence was filed to give a "clearer" picture to the court.

106 He denied there was a meeting with the plaintiff on 7 October 1998 as stated in the first defendant's letters (drafted by William) to the plaintiff. Sim said William had made a mistake and the correct reference should have been to the 2 October 1998 meeting. I should point out that the issue of the correct date was never clarified with William when he testified. Further, the first defendant's solicitors also referred to a meeting on 7 October 1998 in their letters to the plaintiff's solicitors. It therefore did not lie in Sim's mouth to deny the existence of a meeting on 7 October 1998.

107 Earlier (at [62]-[63]), I had alluded to the evidence of Lawrence where he said the design fee of the first defendant had been paid progressively by the plaintiff.

108 Counsel for the plaintiff Marina Chin ("Ms Chin") returned to this topic in the course of Sim's cross-examination. She pointed out that in progress claim no 2 submitted on 20 September 1999, the first defendant's claim under Preliminaries of $99,500 included the sum as design fee. On 12 October 1999, CS Lee certified $9,000 as payment for the Preliminaries. The other items that the first defendant claimed as Preliminaries were:

(a) Shop drawings and as-built drawings	$2,000.00
(b) Insurance	$3,500.00
	$5,500.00

Assuming (a) and (b) items were allowed in full, it meant that the difference of $3,500 ($9,000 - $5,500) was attributable to the design fee.

109 Subsequently, the first defendant's progress claim no 7 for $161,627 was submitted on 18 February 2000. Included therein again as part of Preliminaries was the design fee, with the same breakdown as above for the two items with the following additional item:

(a) PE & AC endorsement including BSL submission $5,000.00

110 In his certificate dated 25 February 2000, CS Lee certified $57,700 as payable for Preliminaries in progress claim no 7. Assuming for argument's sake that the two items in [108] and the item in [109] totalling $10,500 were paid in full, that meant that the balance of $47,200 paid to the first defendant on 9 March 2000 was attributable to the design fee. Therefore $50,700 ($3,500 + $47,200) of $89,000 had been paid leaving a balance of $38,300 outstanding on the invoice.

111 It was drawn to Sim's further attention by Ms Chin that by 31 October 2000, the first defendant had confirmed it had received $935,967.84 from the plaintiff, which included the progress claims nos 2 and 7. She said there was no basis for the first defendant to insist on a set off and deduction of $89,000 under the SPA when it had progressively received the sum under the subcontract; it was tantamount to double-claiming.

112 Initially, Sim disagreed there was double-claiming by his company. After being pressed by the court, Sim conceded that perhaps there had been a 'mistake' as he did not tell his lawyer very clearly what the latter should do. I am sceptical of the veracity of Sim's explanation which I shall elaborate on below in my assessment of his testimony.

113 Sim prevaricated when asked whether anyone had told him that payment under the SPA need not be made until the letter of award was signed. Ms Chin pointed out that Sim's AEIC made no mention of this fact. Eventually, Sim claimed he was told by William. He disagreed when Ms Chin pointed out that the first defendant's letter dated 3 October 1998 ("the 3 October letter") at [7] evidenced that the subcontract had been awarded to the former by the plaintiff.

114 It would be helpful at this stage to set out the text of the 3 October letter. The relevant extracts read as follows:

We refer to the meeting of yesterday at your office between Mr Michael Leow, Mr KK Leck and

> William Loh with regard to the above captioned tender, we hereby confirm our acceptance of your offer to reduce our quoted price by S$200,000.
>
> Henceforth, the final price for the aluminium works as per our quotation ref: Q/0138/EXC(B) dated 11/9/98 will be adjusted accordingly from S$1,913,711.89 to S$1,713,711.89…
>
> Since this is a nominated sub contract which will be entered directly between Excalibur Land (S) Pte Ltd and Win-Win Aluminium Systems Pte Ltd, this letter will serve as an agreement basing on your offer and our acceptance of the final contract price.
>
> While you will be shortly instructing the Architect to issue a nomination letter for our appointment and a formal nominated sub contract and contract agreement being prepared, please kindly endorse on this letter to serve as our agreement and confirmation and return one copy duly signed for our retention.

The plaintiff did not countersign the above letter as the first defendant had requested. I should point out that the contents of the 3 October letter were repeated in the first defendant's letter dated 15 October 1998 ("the 15 October letter") to the plaintiff.

115 Sim contended that the terms of the subcontract were not incorporated into the 3 October letter so as to make it a binding agreement. As for the 15 October letter, he said it was to enable the architect to prepare the letter of award. It was drawn to Sim's attention that in the 17 November 1998 letter from the architect to the first defendant, it was recorded that the latter had already collected the architectural and structural plans from the former. Why would the first defendant do that if it had not already been awarded the subcontract? Further, by its own letter dated 2 December 1998 to the plaintiff, the first defendant stated that it had completed 75% of the shop drawings that were to be submitted to the architect for approval, suggesting that it had commenced doing the works. Sim's lame explanation was that the drawings works were done internally as preparatory work and contended that the plaintiff could still back out because the letter of award had not been issued. This evidence however contradicted Sim's earlier testimony that he had signed the Option because he knew the first defendant would be awarded the subcontract.

116 It bears noting that before the date of the letter of award (19 March 2000), the first defendant's representative(s) (usually William) had attended no less than six site meetings (on 21 January, 11 March, 12 May, 10 June, 15 July and 21 July 1999). Why would William attend site meetings if the first defendant was not a subcontractor of the project?

117 Ms Chin even accused the first defendant of fabricating a bill of quantities dated 15 October 1998 ("the 15 October B/Q") during her cross-examination of Sim. She said the plaintiff never received the 15 October B/Q. The most current bill of quantities that the plaintiff had was that dated 11 September 1998 which was for $1.9m, and unlike the 15 October B/Q, it did not include an item called "design fee". She alleged the 15 October B/Q was the first defendant's attempt to slip the disputed design fee into the subcontract.

118 As for the first defendant's repeated refrain that the plaintiff had delayed the issuance of the letter of award and therefore the project, it was suggested to Sim (who denied it) that his company's numerous and repeated amendments (however minor and/or trivial) of the draft (as well as the engrossed) letter of award were a delaying tactic as the later the letter of award was issued, the later would be the completion date for the works. She said the first defendant's ploy was evident from the first defendant's request to the plaintiff in its letter dated 25 January 1999 that the completion date should not be 31 October 1999 as the plaintiff stipulated, but should be eleven (11) months from

the date of the letter of award. This request was made two weeks after the first defendant had already collected four sets of the engrossed letter of award for execution.

119 Finally, when he was confronted with the evidence of the plaintiff's witnesses that he was not present at the 15 June 1999 meeting, Sim insisted he met Lawrence at the site but the discussion was only between the two of them and he did not attend the site meeting referred to by all the other witnesses.

120 As for his letter (at [66]) dated 27 December 2004 to the Prime Minister containing all manner of accusations again Lawrence, Sim justified it on the basis that the government should be made aware, if a nominated Member of Parliament (who was also the president of the Small and Medium Enterprises Association of Singapore), was not fit to hold office.

The issues

121 The two issues this court has to determine are:

(a) Was the SPA repudiated by the first defendant by its failure and/or refusal to pay the progress claims when they fell due?

(b) Is the second defendant liable under the guarantee to pay damages for the first defendant's breach of the SPA?

122 It bears repeating at this juncture that the interim award of the arbitrator had determined four main issues that were set out earlier at [29] as of a specific date *viz* 2 October 1998. The first defendant had failed in its application (at [33]) for leave to appeal against the interim award. As such, the interim award binds the first defendant in these proceedings pursuant to the order of court dated 26 November 2001 in [35] against which there was no appeal. Consequently, the first defendant cannot (as it sought do in its closing submissions and in cross-examination by its counsel) resurrect *inter alia* its argument that on 2 October 1998, the parties had agreed that the award of the subcontract to the first defendant was conditional upon the first defendant purchasing a unit in the project. I accept the plaintiff's submission that allowing the first defendant to raise fresh arguments that contradict the arbitrator's interim award and findings would be an abuse of process under the extended doctrine of *res judicata*, as enunciated in *Johnson v Gore Wood & Co* [2002] 2 AC 1 and followed by our High Court in *Goh Nellie v Goh Lian Teck* [2007] 1 SLR(R) 453 and the Court of Appeal in *Lai Swee Lin Linda v Attorney-General* [2006] 2 SLR(R) 565.

123 The defendants are not allowed to have a second bite of the cherry by presenting evidence and submissions in these proceedings that contradict the findings made by the arbitrator in the interim award which binds both parties. Doing so is tantamount to a collateral attack on the findings of the arbitrator and/or the interim award (see *Kwa Ban Cheong v Kuah Boon Sek* [2003] 3 SLR(R) 644).

The findings

124 I start by referring to the evidence that was adduced in court from the various witnesses. There is little doubt in my mind that the testimony of the plaintiff's witnesses is more credible than that of the defendants' witnesses and is to be preferred. Other than the Leow brothers, the other three witnesses who testified for the plaintiff were independent and impartial including William who came across as truthful and candid, notwithstanding that the defendants sued him in the DC Suit and attempted to coerce and intimidate him by all manner and means (see [86]). In the case of Boon

Leong and Dennis, there was no reason for them not to speak the truth and they corroborated the testimony of Lawrence and Michael on crucial events including what transpired at the meeting held on 15 June 1999 (at [64]).

125 The same assessment cannot be made of the defendants' witnesses. Neither the testimony of the second defendant nor Sim was credible. Indeed, Sim was a witness who had no compunctions about lying on oath and even less compunction about (i) resorting to underhand tactics to threaten William when William affirmed his first affidavit in these proceedings that favoured the plaintiff (at [79]) and (ii) writing a scurrilous letter to the Prime Minister regarding Lawrence at [66] when the relationship between the plaintiff and the first defendant soured. I have no doubt that Sim fabricated the last B/Q purportedly dated 15 October 1998 which the plaintiff never received and para 32 of his AEIC in that regard was false. If indeed that B/Q was an attachment to the first defendant's letter dated 15 October 1998 (which contents mirrored those contained in its earlier letters dated 3 and 7 October 1998 (at [9]), one wonders why there was no mention of the B/Q at all in the text of the letter. I am equally certain that Sim made the handwritten note on Tavica's letter dated 28 June 1999 referred to at [74] despite his denial.

126 Their constant prevarication and shifts in position rendered the testimony of both Sim and the second defendant wholly unreliable and unbelievable.

127 In their pleadings, in cross-examination of Lawrence and William by their counsel as well as in their closing submissions, the two defendants made much of the fact that the Leow brothers had supposedly lied in their affidavits filed in these proceedings, based on William's testimony in the DC Suit. However, as the Leow brothers pointed out, the plaintiff was not a party to the DC Suit which claim of the defendants did not concern them or the plaintiff. Moreover, it bears noting that in dismissing the defendants' claim against William, the district judge must have found that the defendants had no case against William. Equally significant was the fact that the defendants did not appeal against the dismissal of their claim. Earlier, I had observed at [89] that there was no re-examination of William by counsel for the defendants. Consequently, William's testimony in cross-examination remained intact under the principle in *Browne v Dunn* (1893) 6 R 67.

128 Based on the oral and documentary evidence adduced in court, I find in the case of the first defendant that:

a even after 2 October 1998, the four issues found in favour of the plaintiff by the arbitrator at [29] equally applied;

b although the letter of award was only signed on 19 March 1999, the plaintiff had agreed to award the subcontract for the works to the first defendant as far back as 3 October 1998 by way of the first defendant's letter of that date. Although the plaintiff did not countersign the letter as requested by William, its subsequent conduct amounted to acceptance of that letter and its terms. Had the plaintiff repudiated the subcontract, the first defendant would have had no difficulty convincing any court that there was a binding contract between itself and the plaintiff;

c notwithstanding the architect's rejection of the invoice, the plaintiff had inadvertently paid part or all of the alleged design fee of $89,000 progressively by periodic progress payments certified by CS Lee. Consequently, even if I accept the first defendant's defence (which I do not) that the parties had agreed to a set off arrangement, the first defendant was no longer entitled to any further set off as it would amount to double claiming. The periodic payment of the $89,000 was wholly consistent with the evidence of Lawrence that he had told William that payment of

the sum would be made to the first defendant in progress payments certified by CS Lee.

d despite Sim's denial to counsel for the plaintiff and to this court that the first defendant had delayed the issuance of the letter of award, I entertain no doubts whatsoever that the first defendant used the excuse of amendments to the letter of award to delay the contractual completion date of the subcontract in order to buy itself more time and in order not to make the payments called for under the SPA; and

e the first defendant's financial difficulties was the primary reason for its continued refusal to meet the plaintiff's solicitors demands to settle the progress claims outstanding under the SPA.

129 To elaborate on [128(e)], I refer to documents which suggest that the first defendant was indeed in financial difficulties notwithstanding Sim's denial to the contrary. The first defendant had in its letters to the plaintiff dated 3 January 2000, 5 May 2000, 31 July 2000 and 10 March 2001 repeatedly referred to being in financial difficulties if the plaintiff did not pay the claims that were certified by CS Lee and/or it had submitted. When he was confronted with those letters, Leck's explanation was that it was merely to chase for payment in a polite fashion; I disagree. I accept the plaintiff's submission that they were pleas for financial help. I am reinforced in my view by Sim's affidavit filed in CWU No 94 of 2010 (on 24 June 2010) that Tavica's failure to pay the first defendant for the project was the cause of the first defendant's impecuniosity.

130 Furthermore, as late as 22 December 2000, HTF was still writing to the plaintiff's solicitors to reiterate the set off arrangement. HTF added that the first defendant was willing to pay the outstanding progress claims due under the SPA less the design fee. HTF's calculations (incorrectly) stated the balance payable was $62,379.38. However, instead of forwarding a cheque for $62,379.38, HTF inexplicably enclosed a photocopy of a cashier's order for $32,277.63, a cheque for $876.75 and indicated that the Bank would disburse the shortfall of $29,225.

131 It bears noting that by 22 December 2000, 57% of the design fee had been paid by the plaintiff, as pointed out in [108] to [111] earlier. Even as of that date, the first defendant was still paying lip service to the set off arrangement it claimed existed as HTF did not at any time state that the first defendant would set off the first defendant's then outstanding claim (of $1.8m) against the $94,107.05 demanded by the plaintiff's solicitors in their letter dated 16 November 2000. The first defendant's conduct showed either a lack of sincerity in its offer or more likely, that it could not afford the progress claims under the SPA.

132 As for the second defendant, it is noteworthy that his letter to the plaintiff's solicitors dated 20 November 2000 at [99] did not unequivocally state that he agreed to pay the outstanding progress claims due and owing by the first defendant under the SPA to take over the unit. Instead he couched his offer as a willingness to pay the "net purchase price" to the plaintiff.

133 Even more telling was the second defendant's defence (see [49]). Although he averred that the plaintiff was in breach of the terms of the guarantee in not selling the unit to him, in none of the various versions of his pleadings did the second defendant (and for that matter the first defendant) counterclaim for breach of contract and specific performance from the plaintiff. The second defendant's omission casts grave doubts on the *bona fides* of his offer to take over the unit from the first defendant. It could well be that the first defendant's financial constraints in 1998 equally applied to the second defendant and he could not afford to take over the purchase of the unit from the former.

134 The plaintiff premised its claim against the first defendant on cl 7 of the SPA set out at [38]. In

the light of my earlier findings, I find that the plaintiff has made out its case based on cll 7.2 to 7.4 of the SPA.

135 As for the plaintiff's claim against the second defendant, the terms of the guarantee at [98] that he furnished are clear and unambiguous. To paraphrase the wording of the guarantee, as the first defendant had "failed neglected or refused to complete the purchase of the Unit" the second defendant should have but failed to honour his undertaking to purchase the Unit at the same price and on the same terms as the first defendant. He is also liable for all costs and expenses arising therefrom.

136 Consequently, I find that the first defendant did repudiate the SPA when it failed to pay the sum of $154,049.39 after the expiry of the 21 day notice issued by the plaintiff on 16 November 2000. Accordingly, a declaratory judgment is awarded to the plaintiff against the first defendant that the SPA has been repudiated. Further, the plaintiff shall have, at its option, final judgment against the first and second defendants in the sum of $94,107.05 with interest (from the date of the writ) and two sets of costs to be taxed on a standard basis unless otherwise agreed. Alternatively, the plaintiff shall have interlocutory judgment (with costs) against both defendants with damages to be assessed by the Registrar with the issue of costs and interest reserved to the Registrar.

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