Bing Integrated Construction Pte Ltd *v* Eco Special Waste Management Pte Ltd (Chua Hui Khim (personal representative of the estate of Chua Tiong Guan, deceased) and another, third parties) and another suit
[2010] SGHC 310

Case Number : Suit No 605 of 2006/X consolidated with Suit No 606 of 2006/B

Decision Date : 25 October 2010

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : Mr Peter Gabriel and Mr Kelvin David Tan Sia Khoon (Gabriel Law Corporation) for the Defendants; Mr Tan Teng Muan (Mallal & Namazie) for the 1st Third Party.

Parties : Bing Integrated Construction Pte Ltd — Eco Special Waste Management Pte Ltd (Chua Hui Khim (personal representative of the estate of Chua Tiong Guan, deceased) and another, third parties)

Companies

25 October 2010 Judgment reserved

Chan Seng Onn J:

Introduction

1 In these proceedings, Eco Special Waste Management Pte Ltd ("Eco SWM") and Eco Resource Recovery Centre Pte Ltd ("Eco RRC"), the Defendants in the consolidated main actions brought against them by the Plaintiff, Bing Integrated Construction Pte Ltd ("Bing Integrated"), instituted third party actions against the estate of the 1st Third Party, Colonel Chua Tiong Guan ("Colonel Chua") and Chua Chin Giap, the 2nd Third Party. At the hearing of the Plaintiff's actions, the Defendants withdrew their counterclaims against Bing Integrated as well as their claims against the 2nd Third Party. However, they continued their claims against the 1st Third Party. This judgment is in relation to the Defendants' claims in Suit No 605 of 2006/X and Suit No 606 of 2006/B against the 1st Third Party.

2 The Defendants alleged, *inter alia*, that Colonel Chua breached his fiduciary duties as their director by acting fraudulently against their interest and in favour of Bing Integrated and the 2nd Third Party, and that Colonel Chua unlawfully conspired with them to injure or cause loss to the Defendants. [note: 1] The Defendants thus claimed for an indemnity from the 1st Third Party against all claims brought by Bing Integrated against them.

Factual Background

3 The Defendants are subsidiary companies of ECO Industrial Environmental Engineering Pte Ltd ("ECO IEE") and they are in the business of waste management and recycling. [note: 2] ECO IEE was incorporated on 30 December 1995 with 3 shareholders, namely Tan Keow Chong ("KC Tan"), Goh Seng Nam ("Goh SN") and Colonel Chua. The three of them held one share each in ECO IEE at the time of incorporation and all three were directors, [note: 3] with Colonel Chua being the Managing Director.

4 Colonel Chua was the elder brother of the 2nd Third Party, who is the majority shareholder and effective owner of Bing Integrated. Eco RRC was incorporated on 28 May 1997 and Eco SWM was incorporated on 14 July 1997. [note: 4]

5 The shareholdings of ECO IEE changed over time pursuant to new members of the company being added and restructuring exercises. At the material time in July 1996, the shareholders were: [note: 5]

(a) Chua Bing

(b) Chua Kim Hua

(c) Colonel Chua

(d) Goh SN

(e) James Ow

(f) James Traazil

(g) KC Tan

(h) Wong TY

(i) Wang Zhaoyong

At that time, Chua Kim Hua ("Chua KH") was the Chairman of ECO IEE. KC Tan was the vice-Chairman of ECO IEE and as mentioned, Colonel Chua was the managing director. The company secretary was Liew Keng Loong. I should point out that Chua KH is not related to Colonel Chua and Chua Bing is the elder brother of Colonel Chua. However, nothing in these proceedings turned on Colonel Chua's relationship with Chua Bing.

6 On 9 July 1996, Colonel Chua sent out a notice to the shareholders of ECO IEE calling for an extraordinary shareholders' meeting to be held on the next day (the "EGM notice") for the purpose of discussing, *inter alia*, the issue of the "methodology in handling the factory construction". [note: 6]

7 The shareholders' meeting on 10 July 1996 (the "10 July 1996 meeting") was the crucial event forming the bedrock of the Defendants' claims against Colonel Chua. The Defendants alleged that the shareholders of ECO IEE decided at the 10 July 1996 meeting that the proposed development of the factory plants to carry out their waste management and recycling business was to be constructed on a "cost plus" basis. [note: 7] Further, as the managing director of ECO IEE, Colonel Chua assumed responsibility for the proposed developments. [note: 8]

8 Due to a land re-zoning development by Jurong Town Corporation ("JTC"), ECO IEE could not proceed with its initial plan to carry out both hazardous and non-hazardous waste management on the same plot of land. Thus it had to acquire another plot of land so that the hazardous and non-hazardous activity could be carried out on the respective zoned land. ECO IEE then decided to incorporate two subsidiary companies, *i.e.* the Defendants, to manage the different aspects of ECO IEE's business, with Eco SWM managing the hazardous waste business and Eco RRC managing the

non-hazardous waste business. [note: 9]

9 In addition, in order to ascertain how the waste processes would work, it was decided by the shareholders that a temporary shed for trial operations should be constructed first. This would allow them to understand how to design and construct the main plant for the Eco RRC project. [note: 10] In this regard, KC Tan (testifying for the Defendants) relied on a letter of award dated 6 June 1997 ("6 June 1997 LOA"), which presumably was the contract awarded for the construction of the temporary shed. The 6 June 1997 LOA stated in clause 1 that the temporary shed would be constructed on a cost plus basis. [note: 11] The Defendants alleged that by awarding the construction of the temporary shed on a cost plus basis, the shareholders of ECO IEE had agreed to construct the factory plants on a cost plus basis. On the other hand, the 1st Third Party relied on a letter of award dated 15 April 1997 ("15 April 1997 LOA") to show that the temporary shed was constructed on a measurement basis. [note: 12]

10 On 3 November 1997, Eco SWM awarded the main contract to Bing Integrated to erect a factory at Lot 2158PT SL (2258) MK 7 at Tuas South Avenue 3. [note: 13] Similarly, on 19 November 1997, Eco RRC employed Bing Construction to erect a factory at Lots 2497A and 2498K (Plot Al7477) MK 7 at Tuas West Road/Tuas Avenue 20. [note: 14] The 3 November 1997 and 19 November 1997 contracts shall collectively be referred to as the "Main Contracts". The Main Contracts incorporated the 1997 Edition of the Articles and Conditions of Building Contract (Measurement Contract) issued by the Singapore Institute of Architects. The architect for both of the Main Contracts was Ms Tan Meow Hwa of M/s AC Partnership ("Ms Tan") who was subpoenaed by the Defendants to give evidence in court.

11 The Defendants alleged that the shareholders of the Defendants [note: 15] were not given copies of the Main Contracts and that prior to the awards, Colonel Chua orally informed KC Tan and Goh SN that Bing Integrated would be the main contractor and would charge the Defendants on a "cost plus" basis. [note: 16] By awarding the Main Contracts on a measurement basis with Bing Integrated, Colonel Chua had caused the Defendants to incur higher costs than that which would have been incurred if the Main Contracts had been awarded on a cost plus basis.

12 To establish their claims, the Defendants relied on the EGM notice, the minutes of the 10 July 1996 meeting as well as the 6 June 1997 LOA. KC Tan, Goh SN and Wong TY were also called to give evidence to support the Defendants' claim that an agreement was reached during the 10 July 1996 meeting that the Main Contracts would be awarded on a cost plus basis. The witnesses, in particular, KC Tan, stated repeatedly that they trusted Colonel Chua to manage the Defendants but in breach of this trust, Colonel Chua had preferred the interests of the 2nd Third Party by awarding the Main Contracts to Bing Integrated on a measurement basis instead of a cost plus basis.

13 The particulars of the Defendants' pleadings were as follows:

> 2(h) Sometime in 1997, the Defendant wanted to erect buildings on Lot 2158T SL (2158) ML 7 at Tuas South Avenue 3 ("the Project"). The 1st Third Party acting on behalf of the Defendant was responsible for the Project.
>
> 2(i) The 1st Third Party had orally informed the other directors of the Defendant that the 2nd Third Party owned a construction company, namely the Plaintiff. The 1st Third Party also orally informed the other directors of the Defendant that:

(i) The Plaintiff would be willing to be the main contractor for the Project and would charge the Defendants on a "cost plus" basis (i.e. cost of construction PLUS fixed amount and/or a fixed percentage of the costs of the construction *to be agreed* as profit); and/or

(ii) A "cost plus" basis contract would be cheaper than calling for a tender for the Project on a traditional costing basis, i.e. remeasurement or lump sum; and/or

(iii) Under such a contract, the Plaintiff would obtain the best quotes for supplies, services and all other items needed under the contract and present the quotes to the Defendants together with a mark-up as a fee (i.e. the "cost plus") *to be agreed* as between the Plaintiff and the Defendant.

[emphasis added in italics]

14 Paragraph 2(i) of the statement of claim merely stated that the "plus" element was "to be agreed", which suggests that no firm figure or markup percentage had in fact been agreed upon as at the 10 July 1996 meeting or at any later time. There is also no mention in [2(i)] either that there was an agreement to use the market norm figure for the markup percentage, which according to the Defendants was between 3 to 5% at that period of time. I note at this point that KC Tan's Affidavit of Evidence-in-Chief ("AEIC") filed on 29 December 2009 provided at [15] that the shareholders agreed at the 10 July 1996 meeting that the cost plus basis would be used and what was *meant* as cost plus at the meeting was that "if the percentage was not agreed upon it would have followed the market norm, which [he] understood to be 3 to 5% at that time." [note: 17] I will refer to this part of his AEIC at a later part of this judgment (see [31] below). It would appear that it was KC Tan's own understanding of the meaning of "cost plus" and not that the members at the 10 July 1996 meeting had further resolved or agreed that in the event that the markup percentage for the "cost plus" could not be agreed, then the market norm was to be used and the actual markup percentage to be adopted had to fall within the established range of 3 to 5% for the market norm.

15 In their statement of claim against the 1st Third Party, the Defendants further alleged that throughout the course of the Main Contracts, up till his termination as a director of both ECO IEE and the Defendants, Colonel Chua was solely in charge of determining when and how much payment was made by the Defendants to Bing Integrated and that he had made excessive and unauthorised payments to Bing Integrated, in contravention of the terms of the Main Contracts. [note: 18] In the main hearing, I noted that the complaint was not that Bing Integrated was paid excessively or overpaid for the construction of the factory plants, but that payments to Bing Integrated were allegedly made before the architect's interim certificates were issued. In fact, Mr Gabriel accepted that Bing Integrated "did the job" and "is to be paid". [note: 19] For greater clarity, I shall refer to this head of claim as the "early payment claim" instead.

16 On the other hand, in his defence, Colonel Chua averred that: [note: 20]

3. Paragraph 2(i) and (j) of the Statement of Claim (Amendment No. 1) are denied. The directors to the Defendant knew one another and were aware on their own that the 2nd Third Party owned the Plaintiff. The Defendant engaged the Plaintiff as the main contractor with full knowledge of the board of directors of the Defendant and the shareholders. The directors of the Defendant were at all material times fully aware of the terms of the contract to be entered with the Plaintiff. The 1st Third Party will say that it was Tan Keaw Chong ("KC Tan"), the chairman of ECO Industrial Environment Engineering Pte Ltd ("ECO IEE") and also a director of the Defendant

who was the prime mover of the contract between the Plaintiff and Defendant. It was also understood that the Defendant would employ as sub-contractors companies which were owned by other directors of the Defendant or companies in which they had interests in.

...

6. With respect to paragraph 2(n) and (o) of the Statement of Claim (Amendment No. 1) the Defendant was aware at all times of the payments made as alleged and the reasons for the same. It is denied that the 1st Third Party had made or caused to be made or procured the Defendant to make payments to the Plaintiffs without any basis. It is denied that there was any excessive and/or authorised payments made to the Plaintiff as alleged and the Defendant is to put to strict proof of the same.

17 In essence, the 1st Third Party's case was that there was no agreement that the Main Contracts were to be awarded on a cost plus basis at the 10 July 1996 meeting. I note that this 10 July 1996 meeting was not a meeting of the shareholders or board of directors of the Defendants as the Defendants were not yet incorporated as of the date of this meeting, but it was an extraordinary general meeting of the shareholders of ECO IEE. It was thus very early days yet in so far as these two waste management and recycling projects were concerned. All that had transpired was a discussion on the methodology to be employed without any firm decision. [note: 21] With regard to the claim of unauthorised and excessive payment, the 1st Third Party averred that the Main Contracts were undertaken with a high degree of informality and payments to Bing Integrated were made with the directors' knowledge and authority.

18 Subsequently, on 8 October 2004, Colonel Chua was removed from his office as the managing director of ECO IEE. He passed away before filing an AEIC for the trial. KC Tan is currently the managing director of ECO IEE.

The evidence at trial

19 Before I consider the evidence, I note that the relevant events happened more than 10 years from the commencement of these proceedings. In this regard, the recent Court of Appeal decision of *Ng Chee Chuan v Ng Ai Tee (administratrix of the estate of Yap Yoon Moi, deceased)* [2009] 2 SLR(R) 918 ("*Ng Chee Chuan*") is instructive. Chao JA compared the relative evidentiary value of contemporaneous documents with oral testimony and stated as follows:

16 While it is no doubt necessary to ascertain the credibility of witnesses in most cases where the oral evidence of the parties conflict, it is not always appropriate to rely primarily on credibility (determined on the basis of inconsistent testimony) as a basis for drawing factual inferences, especially where the events in question have taken place many years ago and there are undisputed objective facts. Imperfect memories and uncertain recollections should not necessarily be treated as impinging on the credibility of a witness. These are but afflictions which the passage of time will, in varying degree, bring to bear on all individuals.

17 In this case, the question of the credibility of witnesses should have played a smaller role in the overall assessment as to where the truth lay given the presence of contemporaneous documents and undisputed facts. The trial judge, in our view, should have drawn inferences from these pieces of objective evidence instead of reaching conclusions influenced heavily by what was believed to be the credibility of the parties.

...

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

...

53 We appreciated that the trial judge had considered the facts extensively, and also had the occasion to observe the demeanour of the witnesses at trial. We did not have this benefit. However, given the nature of the case, and the objective evidence on record, we were persuaded that the trial judge had put excessive emphasis on the credibility of the witnesses, when greater reliance should have been placed on the contemporaneous documents and objective facts. It was the inherent probabilities, in the light of the objective evidence, that should have been decisive. With a lapse of some 14 years between the date of the executions of the deeds and the commencement of the trial, it was hardly surprising that memories would fade. In the circumstances, we were convinced that we were in as good a position as the trial judge to draw the necessary inferences from the objective facts...

20 *Ng Chee Chuan* was relied upon by the Defendants in their closing submission to emphasise the importance of the minutes of the 10 July 1996 meeting, and that this document, together with the EGM notice and the 6 June 1997 LOA, "must be given full weight". [note: 22]

The EGM notice

21 The relevant portion of the EGM notice sent by Colonel Chua to the shareholders of ECO IEE stated as follows:

AGENDA FOR BOARD MEETING ON 10 JULY 96 AT 1500HRS

1. Their [*sic*] is a need to have the ad hoc meeting to discuss on the final proposal submitted by the various suppliers on incinerator construction and also other relevant issues. The meeting will be held on 10 July '96 at 1500 hrs in the conference room. The agenda for the meeting is as follows:

...

n. Methodology in handling factory construction.

22 As can be seen, it is unclear from the EGM notice whether the 10 July 1996 meeting in fact turned out to be a shareholders' meeting or a board meeting (as the agenda enclosed in the EGM notice apparently was for a board meeting). However, nothing in these proceedings turns upon this ambiguity. On the EGM notice, there is a handwritten note beside para 1(n) of the notice which says "on percentage". These words were presumably written by Colonel Chua (counsel for the 1st Third Party, Mr Tan, did not dispute this point). [note: 23] The Defendants submitted that by this notation, Colonel Chua acknowledged at the 10 July 1996 meeting that it was agreed by all present that the construction was to be carried out on a cost plus basis. KC Tan stated in his AEIC that he believed

that Colonel Chua had inserted the notation at or after the 10 July 1996 meeting [note: 24] and this showed that he acknowledged that the construction would have to be carried out on a cost plus basis.

23 In my view, the simple notation of "on percentage" beside the sentence "methodology in handling factory construction" does not show that there was an agreement reached to construct the factory plants on a cost plus basis. First, it is unclear whether that notation was written prior to, during or at the conclusion of the discussion on the "methodology in handling factory construction". Second, it is not exactly clear what "on percentage" means. KC Tan's belief is just an assertion unsupported by any personal knowledge on the matter. Even if "on percentage" was indeed written in reference to the cost plus basis, the highest that the Defendants can pitch is that the notation shows that the cost plus basis would be or was discussed during the 10 July 1996 meeting. Without more, the EGM notice with the notation "on percentage" is insufficient to prove that those present at the meeting had in fact *agreed* to enter into the Main Contracts only on a cost plus basis and on no other basis.

The minutes of the 10 July 1996 meeting of ECO IEE

24 Another document heavily relied upon by both the Defendants and the 1st Third Party was the minutes of the 10 July 1996 meeting of ECO IEE, the material part of which provided that:

> *Discussion* on methodology in handling factory construction
>
> 9.1 Mr Chua *mentioned* on the cost-plus method. He *said* that for the cost-plus method, we can open an account and use the money from there. For tender, if there is a change in design, we will meet with the problem of price negotiation. Mr Chua *mentioned* that ECO can ask Col (NS) Chua's brother to open an account in his company and then work out the cost-plus method from there. Col (NS) Chua *said* that the quality of the construction will be assured through one person. Mr Ow *said* that we need a reliable person to tend to the cost-plus method. Mr Goh *said* that Col (NS) Chua's brother has the experience and is reliable. Mr Chua *said* that through tender, it is time-consuming as we have to negotiate the pricing. He *said* that the cost-plus method will save us 1 to 2 million. [emphasis added].

25 The "Mr Chua" mentioned above refers to Chua KH and not to Colonel Chua. The minutes of the 10 July 1996 meeting only recorded a *discussion* about the advantages of the cost plus basis *e.g.* the quality assurance and possible savings of $1 to $2 million. The meeting also touched on the disadvantages of awarding the Main Contracts by a tender process. The minutes as drafted only recorded what was "said" or "mentioned" and there was nothing recorded on what was "decided", "agreed" or "approved". More importantly, there was no record of any resolution passed to the effect that the board of directors and/or the shareholders had *agreed*, *decided*, *approved* or *resolved* that the Main Contracts would be awarded only on a cost plus basis and on no other basis. This omission is, in my view, glaring. The company secretary would have recorded such an agreement as alleged by the Defendants if there had been one. In minute writing, the most important matters to record would normally be the agreements reached and the decisions made at the meeting and much less so, the contents of the actual discussion which may or may not eventually lead to an agreement or a decision. I find it hard to accept that the secretary who had meticulously recorded the contents of the discussion in the minutes would have left out recording such an important matter as an agreement that had been reached as alleged by the Defendants, unless of course no such agreement was in fact reached at the conclusion of the discussion. On the basis of the minutes, which as submitted by the Defendants ought to be given "full weight", there is insufficient proof in my view of an agreement or a decision to enter into the Main Contracts solely on a cost plus basis.

26 At the beginning of his cross-examination, Goh SN was read the quoted minutes and he confirmed that paragraph 9.1 was a complete and accurate record of what happened at the 10 July 1996 meeting. [note: 25] Goh SN stated that the shareholders had agreed on the cost plus basis at the meeting. However, when it was pointed out that paragraph 9.1 did not record such an agreement, he could only insist, without any substantive proof, that it was not just a discussion; the shareholders had made a decision to grant the Main Contracts on a cost plus basis because it could save ECO IEE up to $1 to $2 million. [note: 26] This led to a series of questions regarding the importance of recording such a decision, at the end of which Goh SN had no choice but to concede that no resolution was passed: [note: 27]

Q: Mr Goh, can you look at paragraph 9 itself entitled: "Discussion on Methodology in Handling Factory Construction." Do you agree? So this is just a discussion?

A: It is not just a discussion; it is also our decision because we could save up to 1 to $2 million.

Q: That is a substantial sum to save, right?

A: Yes.

Q: And this would have been a very important decision that the company would be making, correct?

A: Yes.

Q: You are a director of many companies?

A: Yes.

Q: You would appreciate that when a company makes an important decision, there would be proper resolutions passed? "Yes" or "no". Mr Goh, please answer the question. Don't give me your explanation. Yes?

A: Yes.

...

Q: Mr Goh, can you answer my question?

Since I've pointed out to you that the company was already incorporated at the time of the meeting, you agree with me that there should be proper resolutions; right? "Yes" or "no"?

A: Yes.

Q: Where is the resolution then? There is none; correct?

A: That's right.

Q: If that's right, then there was never any resolution on the methodology of cost plus contract being adopted; correct?

A: That's right.

27 Wong TY, who gave evidence in Hokkien, also testified that the shareholders decided at the 10 July 1996 meeting that the factory plants would be built on a cost-plus basis. His evidence was as follows: [note: 28]

Q: Mr Wong, do you recall telling the lawyer that at the meeting it was decided that the construction was to be on a cost plus basis – do you recall that?

A: Yes.

Q: This is based on your recollection of what you said took place at the meeting in 1996; right?

A: I can't remember clearly but it was some time in 1996.

...

Q: Do you remember who was present at the meeting?

A: Goh Seng Nam, Tan Keaw Chong, Chua Tiong Guan, Chua Hai Kuey. These people were present.

Q: Can you name them again, Mr Wong?

A: Tan Keow Chong, Goh Seng Nam, Chua Hai Kuey, Chua Tiong Guan and myself. I think only these people were present.

Q: I counted five people at the meeting, including yourself.

A: Five or maybe six or seven. I cannot remember.

Q: Who is this Chua Hai Kuey?

A: It is Chua Kim Hua.

Q: There was no Chua Hai Kuey at the meeting?

A: Mr Chua Kim Hua. I can't even remember his name.

Q: Your recollection is quite bad; do you agree with me, Mr Wong?

A: Yes.

Q: You can't recall what meeting you attended in what year but all you can recall is that there was a meeting that decided that construction was to be on a cost plus basis?

A: Yes.

28 When asked to describe how the shareholders arrived at the decision, Wong YT initially stated that Chua KH proposed to construct the factory plants on a cost plus basis and the shareholders said that they agreed to it without voting and none of them said no: [note: 29]

Court: Tell me, at the meeting, how did you all come to that decision?

A: Chua Kim Hua proposed to construct it … on a cost plus basis and we agreed to it.

Court: So one person proposed and the rest agreed. How did the rest agree, by saying "we all agree", or nobody said anything and the chairman rattled on?

A: We said that we agreed to it at the meeting. We did not vote.

Court: You did not vote. Everybody agreed, either nodding their head or keeping silent and somebody said "yes" to it, is it?

A: Yes.

Court: Can you remember how many nodded their heads, how many said "yes", who did what to agree, so I know whether everyone agreed or not. You seem to suggest to me that everybody agreed so…

A: I cannot remember how many nodded their heads or how many said that they agree.

Court: How many shook their heads?

A: No.

Court: You were very observant as to what they were doing?

A: At that point in time nobody said "no" to it.

Court: So how did the chairman propose this cost plus method? Can you remember his words? How did he propose it?

A: I cannot remember.

29 Upon further questioning from the court, Wong TY added that Chua KH said that the "cost plus method will save us a lot of money" and *he did not say anything else*. [note: 30] Yet when reminded of the obvious, *ie* that the cost plus basis need not necessarily result in lower cost because much will depend on the percentage to be added to the "plus" element, Wong TY added a new piece of evidence. He testified that KC Tan stated that the "plus" element was 5 to 10%. [note: 31] To ensure that his recollection was accurate, Wong TY was asked to think very carefully whether anyone at the 10 July 1996 meeting said that the "plus" element was 3%, he confirmed that KC Tan said the Main Contracts would be cost plus 5 to 10% (a point I shall return to shortly). [note: 32] It bears mentioning that the minutes did not reflect any discussion or agreement on the percentage markup for the cost plus element, and Wong TY's AEIC also did not mention anything about the percentage as can be seen below: [note: 33]

> I remember a shareholders' meeting in 1996... I recall to the best of my ability that at this meeting, Mr Chua Kim Hua raised the issue that the construction of the factory plants for the waste management business could be done on a "cost-plus" basis. I also recall that the 1st Third Party agreed with Mr Chua Kim Hua that as "cost plus" gave a substantial saving, the construction should proceed on a "cost plus" basis. I recall that at the meeting it was decided that the construction was to be on a "cost-plus" basis.

30 When cross-examined on the issue of percentage, Goh SN testified that this was not discussed

during the meeting. Accordingly to Goh SN, the market percentage at that time was 3 to 5 %. [note: 34] More interestingly, KC Tan was referred to Goh SN's evidence on this point and his response was: [note: 35]

Q: You would agree with me that there was in fact no discussion of what should be the surcharge, the "plus" element for the cost plus at this meeting; correct?

A: No, I do not agree.

...

Q: You now claim that there was a discussion on what the surcharge, is it?

A: Yes.

Q: The "plus" element?

A: Yes.

Q: If there was a discussion, can you explain why is it not recorded at paragraph 9.1 – why would Mr Goh Seng Nam say there was no discussion on percentage at the meeting?

A: Counsel, you see, very simple. Everything that has been discussed, it cannot be 100 per cent recorded accordingly – ok?

But we have touched base on is why I say that there is a percentage. We say based on market, based on market norm at that present moment. So, at that present moment, the market norm was 3 to 5 percent, but the person that took the minutes is not me but if he want – do not want to put this in, all 100 per cent in, I cannot do anything about it.

...

Q: Mr Goh does not even recall it being discussed –

A: Yeah.

Q: Why is it also not stated anywhere in your AEIC now that you challenge Mr Chua Kim Hua on this proposal for cost plus – why is it not stated in your AEIC?

A: No, but I did put in that it should be between 3 to 5 per cent.

Q: No, Mr Tan, answer my question.

A: Yes.

Q: Why did you not say this now in your AEIC and you're only saying it for the first time in the witness box?

A: Mm-hmm.

...

Q: You have also not stated anywhere in your affidavit that the percentage was discussed at this meeting of 10 July 1996; agree?

A: No, but the AEIC states that.

Q: Where in your AEIC did you say at this meeting the percentage was discussed, or the surcharge? I can't find it, Mr Tan.

A: No, but there is a percentage there. It should be between 3 to 5 percent.

…

Q: Nowhere in your affidavit did you say that the percentage was discussed at this meeting on 10 July 1996; correct?

A: Yes.

31 KC Tan's AEIC at [15] merely stated that:

> It was clear that what was meant as "cost plus" in the meeting was that the contractor was to be paid a percentage of the cost, if that percentage was not agreed upon it would have followed the market norm, which I understood it to be 3-5 per cent at that time. This fact of a percentage to be paid was specifically noted by the 1st Third Party in his letter of 9th July 1996 (ie on the agenda for the meeting). The notation "on percentage" was handwritten by the 1st Third Party against Item (n) "Methodology in handling factory contract". I believe he had inserted this notation at or after the meeting. Thus by this notation the 1st Third Party himself acknowledged that the construction was to be carried out on a "cost-plus" basis. Further the 1st Third Party's knowledge of the agreement on the cost-plus basis is confirmed from the said minutes of the meeting where he stated that "the quality of the construction will be assured through one person."

32 KC Tan's AEIC clearly contained nothing about a discussion about the percentage of the "plus" element, much less an agreement to follow the market norm for the "plus" element. What was stated was KC Tan's own understanding of the meaning of "cost plus" that "if the percentage was not agreed upon it would have followed the market norm" (a point which I have already alluded to above at [14]). This only meant that if no figure was agreed upon, KC Tan himself understood that the market norm would be adopted, not that there was an agreement by all those present at the meeting that the market norm was to be followed if no agreement could be reached on the actual markup percentage. He tried to explain that [15] of his AEIC did not describe what happened at the 10 July 1996 meeting [note: 36] and that in fact, the shareholders had said that they would follow market norm and the percentage was 3 to 5%. [note: 37] I am unable to accept this explanation. The AEIC was drafted with legal advice and the 10 July 1996 meeting is the single most important event upon which the Defendants' case rests. With the absence of any documentary record of the discussion of the percentage markup and the outcome, if any, of that discussion during the meeting, it would have been of greater significance for KC Tan to deal with the omission in his AEIC. Yet he chose not to.

33 What was in evidence is Wong TY's testimony that KC Tan had stated at the 10 July 1996 meeting that the "plus" element would be 5 to 10%. However, KC Tan only testified that he questioned Chua KH on why the construction should be "cost plus but not something else" [note: 38]

and that his *understanding* was that the percentage would be the market norm *i.e*. 3 to 5%. There was no evidence, either from KC Tan's AEIC or his oral testimony in court, that KC Tan had personally proposed any particular figure for the "plus" element during the meeting.

34 I acknowledge that the passage of time would inevitably lead to the fading of memories. But faced with these inconsistent accounts by the Defendants' principal witnesses about the events that transpired at the 10 July 1996 meeting, I am hard-pressed to find as a fact that there was an agreement or a mandate granted to Colonel Chua to award the Main Contracts only on a cost plus basis (and on no other basis), especially in the face of contemporaneous documents which undermine their own case. In my judgment, the minutes of the 10 July 1996 meeting merely disclosed a *discussion* of the methodology to be employed. The reliance by the Defendants on this document, rather than aiding their case, only served to suggest that during that meeting, no agreement was eventually reached on the issue at the end of the *discussion*.

The 6 June 1997 LOA

35 The other documentary evidence referred to during trial was the 6 June 1997 LOA (see above at [9]) which allegedly showed that the position taken by the shareholders in the 10 July 1996 meeting was carried out by Colonel Chua for the start of the construction projects. [note: 39] KC Tan's AEIC stated that: [note: 40]

> It was decided that a temporary shed for trial operations should be constructed first to ascertain how the waste processes would work so that we can understand how to design and construct the main plant for the RRC Project. The construction of the temporary shed for trial operations was awarded to the Plaintiff on a "cost-plus" basis. This is evidenced by the letter of award dated 6 June 1997 signed by the 1st Third Party and duly accepted by the Plaintiff...

36 However, during cross-examination, Mr Tan referred to another document, the 15 April 1997 LOA (see above at [9]). The 15 April 1997 LOA was purportedly awarded by AC Partnership on ECO IEE's behalf to Bing Integrated to construct the temporary shed on a measurement basis. Clause 2 of the 15 April 1997 LOA provided that: [note: 41]

> Contract Documents
>
> The following folio of documents listed hereunder shall form part of the Contract Documents:-
>
> 2.1 This Letter of Award dated 15th April 1997.
>
> 2.2 The Articles and Conditions of Building Contract (Measurement Contract) Reprint 1997 Edition issued by the Singapore Institute of Architects.
>
> 2.3 The Schedule of Rates shall be based on the current copy of fixed schedule of rates published by the PWD – March 1997 Issue No. 27.

37 KC Tan was asked whether the 6 June 1997 LOA or the 15 April 1997 LOA was the operative or "real" contract for the construction of the temporary shed. He understandably said that the 6 June 1997 LOA was the one that he relied upon and that it was the "real" contract. [note: 42]

38 When asked to provide the basis for his opinion, KC Tan referred to a progress payment claim from Bing Integrated for the construction of the temporary shed where it was stated that the "profit

attendance" was 3%. [note: 43] KC Tan claimed that this reflected that the cost plus was 3% [note: 44] and confirmed that this was the only document relied upon to establish that the "plus" element for the Main Contracts was agreed between Colonel Chua and Bing Integrated (and the 2nd Third Party) to be 3%. [note: 45] However, he admitted that he was not present when they allegedly made the agreement and he had no personal knowledge of the agreement. Apart from being based on KC Tan's unsupported opinion, this evidence went against his own case that there was no agreed fixed number for the "plus" element. [note: 46]

39 On the other hand, the 2nd Third Party had admitted during the main trial that he drafted the progress payment claim by inflating the sum by 3%, which was the then-existing GST rate, so that he could obtain more banking facilities: [note: 47]

Mr Gabriel: If you turn to the next page, you see the whole lot put there, the total amount, 1.092. You see 3 per cent profit attendance.

A: Yes.

Q: Mr Chua, this relates to the temporary shed, cost plus that we are talking about.

A: No.

Q: Can you, please, explain to the court what it is?

A: This one, do you can see the bidder? I cancel and write a wording with a signature. This one is to show to the bank. They get an invoice, go and factor – that is called factoring...

Q: Yes, so?

A: So it is not using the project – invoice go and –

Court: Wait. Let him finish the answer.

A: He's not using the project invoice to go and factor. He have to ask me to send what roughly the factoring, what kind of work done on site, is not due to any project.

Court: Do you mean he asked you to just produce something so that they could use to go to the bank and factor?

A: Yes, during the –

Court: This is not the real job?

A: No.

Court: This is not the real costing?

A: It's not the real costing. It is the estimate costing. Because during that time, Eco owe me a lot of money.

Court: Do you mean that he told you to produce this document for him?

A: Yeah, because it's – the actual amount from this contract is very huge. This is a capital – Sembawang Capital – you know, they no allowed to – what you call it – release that sum of money.

Court: And so?

A: So they have to call ... factoring, i think something like loan.

Court: I know it's factoring, but the point is was this the way that you operated this contract, on this basis of a 3 per cent profit attendance after putting all the other costs inside.

A: No, 3 profit – yeah, actually, for this 3 per cent profit is the time – at the time the GST is 3 per cent.

Normally, for a bank loan, cannot get the GST – cannot loan the GST.

Court: So you inflated the figure to put it in as though it is a cost part of it, to put in the 3 per cent attendance for the thing – actually, it is the GST cost?

A: Yes.

40 Whether the 6 June 1997 LOA or the 15 April 1997 LOA was the operative contract for the temporary shed, in my view, does not matter. KC Tan conceded that it was just his *assumption* that because the temporary shed was (according to the Defendants) constructed on a cost plus basis, the construction for the factory plants under the Main Contracts must likewise be on the same basis. [note: 48] Assuming that the 6 June 1997 LOA was indeed the operative contract for the construction of the temporary shed (for which I make no finding of), there was no documentary evidence to prove that the Main Contracts would be awarded on the same basis as that for the temporary shed. In the circumstances, the reliance by the Defendants on the 6 June 1997 LOA to establish a breach of fiduciary duty on the part of Colonel Chua was again, unfounded.

The Architect's Evidence

41 Ms Tan's evidence at trial was relied upon by both parties in their closing submissions to prove whether Colonel Chua only had the authority to award the Main Contracts on a cost plus basis. Ms Tan recalled having many meetings with the consultants, the quantity surveyor Mr Chng Swee Ling, and ECO IEE's representatives to discuss the construction of the factory plants. Initially, she could not remember which of ECO IEE's shareholders or directors were present at the meetings, apart from Colonel Chua. However, when provided with a list of names, she was able to recall seeing KC Tan and Goh SN at some of the meetings and that they were both subcontractors. [note: 49]

42 Ms Tan confirmed that in the beginning the Defendants wanted to award the Main Contracts on a cost plus basis and not have a tender selection process because they wanted the projects to "move very fast". [note: 50] Basically the Defendants did not want to adopt the tender process which would take too much time. The quantity surveyor had during the meetings advised on the advantages and disadvantages of the cost plus basis. As cost was hard to establish due to price fluctuations, Ms Tan did not encourage using the cost plus basis. [note: 51] She had advised them that for industrial buildings, most contracts would be awarded on a lump sum basis. The advantages and disadvantages of the measurement basis were also discussed. [note: 52] Ms Tan emphasised that at this stage (which I note was well past the 10 July 1996 meeting), there were still ongoing discussions and no decision was "firmed up" on the cost plus basis [note: 53] and it was only later that Colonel Chua told her that they have evaluated and have decided to use the measurement basis. [note: 54] However, she had no idea on how the evaluation took place.

43 Ms Tan further testified that the shareholders of ECO IEE were able to "make the project fast"

because most of them were in the construction industry and thus no tendering was required. [note: 55] No tender or invitation to quote was called because the individual subcontractors were all "firmed up" *before* the Main Contracts were finalised. [note: 56] In fact, the subcontractors started on their works even *before* they signed the contracts. Mr Gabriel during cross-examination asked Ms Tan for her impression on whether the works were progressing on a cost plus basis since the cost plus basis was still being discussed at that time. Ms Tan's answer was "my impression is I think they haven't firmed up the price, but they are eagerly [*sic*] to get the work done – I think they trust each other at that time – our impression". [note: 57] The relevant part of Ms Tan's evidence was as follows: [note: 58]

Mr Gabriel: You said tender contract.

A: No I mean document is – actually, we prepared is – okay, is one contractor is one document for contractor to fill. If, like owner want to invite six tenderers. I give six copies for six persons to fill. So for this case, is measurement contract, is straightforward – actually BQ. So actually – I mean, we prepared and for – because is more or less that time they already firm up the contractor –

Court: The contractor was firmed up already?

A: More or less.

Court: At that stage, even before the quotations –

A: Because this job – I mean, they – is not – is a negotiate, did not go into tender.

Court: So they already had fixed parties – fixed nominated subcontractors?

A: No tender was called. You asking me – no tender was called.

Court: Not even quotations for a few persons to call for the job?

A: No.

Court: Because a tender can be official, a public tender.

A: Yes, yes.

Court: Another way of tendering is to ask for –

A: I send invitation –

Court: It is an invitation to quote to a few people?

A: Yes, yes.

Court: So even that was not done?

A: Yes.

Court: So everybody knows, you will be doing it, this one will be doing it, all firmed up already, before the contract was so-called –

A: That's my understanding.

Court: Even before of the contract was finalised?

A: Yes.

Court: That's your understanding, is it? They had all firmed up the separate subcontractors already?

A: Yes, yes.

44 Hence, it is clear that up till the stage at which works started, the basis of the contract was not at the forefront of the Defendants' concern. The shareholders were concerned more with the progress of the projects which they wanted to "move very fast". KC Tan himself admitted that there was no agreement by the Defendants to award the Main Contracts on cost plus basis: [note: 59]

Q: Okay. You agree with me it is a fact that you never communicated to the architect that you already actually firm up on lump sum contract; correct?

A: No.

Court: "No" means what?

A: Means we did not agree on lump sum or remeasurement. My point until today is still a cost plus basis.

Court: The question is: was there an agreement on cost plus?

A: As the architect already mentioned there, Your Honour, many meetings go on. There is nothing ---

Court: I know people can talk and talk and talk. Finally after all the talking, everything is done, everyone has said everything that needs to be said, was there a decision made amongst the shareholders or the board that this will be a cost plus contract and not a lump sum and not a remeasurement contract?

A: Your Honour, I will – allow me to move the step a little bit.

Court: No, you have to answer that first.

A: No.

Court: Or is this all talk?

A: No. all this was talking?

Court: The question is: was there a decision finally made that it has to be cost plus? Was that the first decision made?

A: Your Honour, I want to make it that there was no decision made on remeasurement and lump sum, and there was also no decision or conclusion they made on cost plus.

45 In my judgment, Colonel Chua being the Managing Director was in charge of the daily operations of ECO IEE (and the Defendants). He had the authority to award the Main Contracts on a basis which he honestly and reasonably believed to be in the Defendants' best interest unless the board of directors at a board meeting and/or the shareholders at a shareholders' meeting had earlier stipulated, agreed or decided that the Main Contracts were to be awarded only on a cost plus basis, which was not the case as is clear from the evidence. Colonel Chua was advised on the positives and negatives of the different bases for construction and eventually decided on the measurement basis by incorporating the SIA Articles and Conditions of Building Contract (Measurement Contract). Even if this decision subsequently turned out to be a poor one, it is clear law that so long as a management decision was taken *bona fide*, there would be no breach of fiduciary duties. See *Intraco v Multi-Pak Singapore* [1994] 3 SLR(R) 1064 at [30]. As stated by V K Rajah JC in *Vita Health Laboratories Pte Ltd*

v Pang Seng Meng [2004] 4 SLR(R) 162 at [15] to [17]:

> 15 A director who by action or inaction causes losses to a company may find his conduct being questioned. Without evidence of a lack of bona fides however, it cannot properly be contended that directors are invariably liable for all losses sustained by a company.
>
> 16 In ECRC Land Pte Ltd v Ho Wing On Christopher [2004] 1 SLR(R) 105, Tay Yong Kwang J rightly opined at [49]:
>
> > The court should be slow to interfere with commercial decisions taken by directors (see Intraco Ltd v Multi-Pak Singapore Pte Ltd [1994] 3 SLR(R) 1064). It should not, with the advantage of hindsight, substitute its own decisions in place of those made by directors in the honest and reasonable belief that they were for the best interests of the company, even if those decisions turned out subsequently to be money-losing ones.
>
> 17 This judicial endorsement of the sanctity of business judgment is underpinned by strong policy considerations. It is the role of the marketplace and not the function of the court to punish and censure directors who have in good faith, made incorrect commercial decisions. Directors should not be coerced into exercising defensive commercial judgment, motivated largely by anxiety over legal accountability and consequences. Bona fide entrepreneurs and honest commercial men should not fear that business failure entails legal liability. A company provides a vehicle for limited liability and facilitates the assumption and distribution of commercial risk. Undue legal interference will dampen, if not stifle, the appetite for commercial risk and entrepreneurship.
>
> [emphasis added]

46 Accordingly, the Defendants' claim that Colonel Chua had breached his fiduciary duties by entering into the Main Contracts on a measurement basis on behalf of the Defendants is dismissed. This brings me to the claim that Colonel Chua should have asked for tenders or quotations for the Main Contracts in order to obtain the best price instead of awarding them to Bing Integrated and thereby preferring the interest of the 2nd Third Party. [note: 60] By failing to obtain a best price, Colonel Chua was in breach of his fiduciary duties: see *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 3 SLR(R) 109 at [155].

Letter to members of EXCO of ECO IEE

47 In a document dated 10 February 1999 (the "10 February 1999 letter"), the manner in which the Main Contracts were awarded to Bing Integrated was described in the following manner: [note: 61]

> 1. Eco was established by a close group of friends and relatives who see the potential in waste management in Singapore and in the region. The promoter group has limited financial capability, thus we have to be very prudent in our budget. In the area of construction and infrastructure development, the approach adopted was to capitalise on the group's strength in construction (most of the shareholders are dealing with construction) to get the best value for money. The arrangement was for shareholders to handle the construction ourselves and the direct sourcing of specialised subcontractors to handle the various portions of the projects. In that, we reduce unnecessary commissions/margins applied.
>
> 2. On documentation and procedures, we followed the Singapore Institute of Architect's Articles and Conditions of Building Contracts. The contract is based on Measurement Contract or

BQ...

3. The main contract was directly awarded to [Bing Integrated]. Mr Chua Chin Giap, the owner of Bing Integrated is one of the shareholders. *The sanitation works were carried out by Mr Tan Keaw Chong (Chairman) and sewerage works were done by Mr Goh Seng Nam (Director). All these were aimed at trying to reduce cost by having the shareholders to help out in expertise area and to ensure value for money*.

4. It was a blessing to ECO that we had this arrangement for the construction project, otherwise we may not be what we are today. The reasons are:-

(a) The pace of construction was time and again disrupted by funding problems. SWM construction project was delayed by 4 months, and RRC actual sorting centre was delayed by a year. If the contract was given out to an outside contractor, the situation will be totally different. The amount of liquidated damages and so on will be unthinkable.

(b) The long delay in equity partnership finalisation that led to financial difficulty in meeting with the progress claims. Lots of goodwill and friendship were involved for the long delay in settling construction claims. Had any of them try to sue us for payment due, it would have been very nasty for us.

5. In terms of cost, we managed to save quite a bit in view of the owner-direct negotiation with the various main sub-contractors. *Take for example, the total BQ contract for the RRC trial shed and facilities was more than S$2.4million and the actual cost was S$2.1 million*...

Chua Tiong Guan

Managing Director

ECO Industrial Environmental Engineering

[emphasis added]

48 The letter was discovered by the Defendants [note: 62] and was purportedly written by Colonel Chua in his capacity as the Managing Director of ECO IEE. The letter was addressed to the Exco members of ECO IEE, setting out in detail the surrounding circumstances of the projects, including the cost savings as well as the causes for the delay in completing the projects.

49 Mr Gabriel objected to the admissibility of this document on the ground that it was hearsay and that the document was not signed by Colonel Chua and hence the identity of the author was uncertain. [note: 63] However, at the trial stage, Mr Gabriel indicated that he did not question the authenticity of the 10 February 1999 letter. [note: 64] Section 32(b) of the Evidence Act (Cap 97, 1997 Rev Ed) provides that:

Cases in which statement of relevant fact by person who is dead or cannot be found etc., is relevant

32. Statements, written or verbal, of relevant facts made by a person who is dead... are themselves relevant facts in the following cases:

(b) when the statement was made by such person in the ordinary course of business, and in

particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of professional duty, or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind, or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him.

50 I am of the view that the letter was one made in the "ordinary course of business". Since it is not challenged that the document (although not signed) was in existence as far back as 1999 well before this litigation commenced and no specific allegation is made that it is a document fabricated recently for the purpose of bringing false evidence before the court, I accept on its face that it was a statement made by the deceased Colonel Chua. Had there been a clear challenge that it is not an authentic document, then evidence could well be adduced on how the document was discovered and whether the intended recipients of the letter had in fact received the letter and if so, then when had they seen the letter. Having accepted that it was not a statement made by some unknown person but by Colonel Chua, who was unfortunately no longer present to testify in court, it is strictly speaking still a hearsay document unless it can come within one of the hearsay exceptions such as s 32(b) of the Evidence Act. On a plain reading of s 32(b), it is not necessary that the written statement of the deceased Colonel Chua be signed. The 10 February 1999 letter is thus admissible and I overruled Mr Gabriel's objection.

51 During cross-examination, KC Tan was asked whether [1] of the 10 February 1999 letter described how the Plaintiff became appointed as the Main Contractor and how his own plumbing company and Goh SN's company came to be appointed sub-contractors of the same project: [note: 65]

Q: That is how the plaintiff was appointed, how your company became a subcontractor, together with the companies of Mr Goh Seng Nam; correct?

A: Mm, mm-hmm.

Q: Do you agree?

A: Yes.

Q: This paragraph actually captures truly what happened at the material time for this close group of friends who came together to set up this waste management business.

A: Yes.

52 KC Tan then denied that the financial difficulties faced by ECO IEE as stated in the 10 February 1999 letter was true. [note: 66] Nonetheless, KC Tan had to concede that the shareholders of ECO IEE obtained their individual sub-contracts because of their specialised expertise: [note: 67]

Court: As far as this contract is concerned, every shareholder got the job?

A: Mm-hmm.

Court: Whoever is the contractor, he got the job for that part of contract which is specialist, this one is a fact; correct?

Mr Tan: Please answer the question.

Court: That is a fact, right?

A: Yes, Your Honour.

Court: So whatever you want to infer from that. Everybody who is a shareholder and who is a contractor got a job in his area of expertise, that is for sure. That happened as a fact.

A: But it happened as a fact – if I'm right, we must be the lowest.

Court: No, no, it must be just speculation. It must be just speculation. The fact is that every shareholder who is an expert in that area got the job – finished; correct?

A: Your Honour, I mean, if you say it that way, then I have no choice.

Court: No. I want to know only facts. I don't want to know what is to be, supposed to be, I am supposed to be the lowest quote. You have no idea whether he asked for more quotes; you cannot say.

A: Obviously.

Court: Unless you know, "oh, he did ask for a few quotes and therefore I got the job", then you say, "Ah, it must be mine is the lowest", at least you have some basis to say that.But you don't even know whether he asked for more quotes. You cannot say yours is the lowest quote which assumes he got more than one quote. You don't even know whether he got more than one quote. He asked you to quote and you got the job.

So I am saying the evidence is, all you can tell me, is that every subcontractor who is a shareholder got the job because of his expertise. That is all you can say, that's all, correct?

A: Yes. Your Honour.

53 Similarly, Goh SN's own company was awarded a subcontract for Bing Construction in respect of the Main Contract for works on the sewerage system. Although he similarly tried to say that his quotation for the subcontract must have been the lowest price, he was unable to prove that a few companies were invited to quote for the job or that a tender was indeed called: [note: 68]

Mr Tan: Mr Goh, you are one of the subcontractors of Bing Integrated Construction; correct?

Court: When you say "you" you mean his company?

A: Yes.

Q: Now think again. What's the name of this company?

A: Hock Lian Huat

Q: Hock Lian Huat Pte Ltd?

A: Hock Lian Huat Construction Limited.

Court: Just for information, you were subcontracting for Bing for what sort of works?

A: For sewerage system.

Court: Did you have to compete for the tender awarded by Bing or did Bing just give you that contract?

A: I submitted a quotation.

Court: Do you know whether Bing got other quotations andyours was the cheapest, or yours was the only quotation?

A: Mine should be the lowest, or else why should i be –

Court: We're not guessing. You cannot say "mine should be the lowest". I want to know whether you know for a fact that Bing gave you or obtained – the only quotation was obtained from you, and then you got the job, that means he didn't tender, he didn't ask for three quotes, and neither was yours the lowest. Unless you know for a fact he obtained three quotes and yours was the lowest and then you can tell me. Don't tell me "there should be". I can also tell a lot of "should be's". I'm not interested in the "should be's".

A: I do not know whether he – tender. I was asked to put up a quotation, so I put up the quotation.

...

Court: Then, come to the Hock Lian Huat job. What sort of job is that? That's your job?

A: Hock Lian Huat was mine.

Court: That's a sewage job?

A: Yes.

Court: Do you know whether Bing sent out more than one invitation to quote, apart from the invitation to quote that you received? Do you know whether he invited other contractors to quote?

A: I did not ask.

Court: So you do not know?

A: I don't know.

54 The Defendants' claim against the 1st Third Party rested upon the absence of tenders or quotations for the projects. Yet, the undeniable fact is that KC Tan and Goh SN were awarded subcontracts based on their own expertise. They could not prove that these subcontracts were secured by them following a tender exercise or an invitation to quote. The assertion that their own price quotes "must have been the lowest" appeared rather hollow and self-serving. Goh SN had admitted that he did not know whether there had been any quotation called for in respect of his sewage subcontract works. [note: 69]

55 On the evidence, the shareholders of ECO IEE had clearly decided to capitalise on their individual expertise to administer the projects in order to kick start their investment in the waste management and recovery business. As a consequence, they also benefitted themselves as shareholders by having the subcontracts awarded to themselves in their respective areas of expertise. The reliance on the principle in *Bristol and West Building Society v Mothew* [1998] 1 Ch 1 that a fiduciary may not act for his own benefit or the benefit of a third person without the informed consent of the principal was therefore unmerited. It was clearly their intention to construct the

factory plants without inviting quotations or tenders which would be a relatively longer process. It was only for specialist subcontract works where the shareholders of ECO IEE themselves had no expertise that tenders were called. KC Tan himself acknowledged that tenders were called for such specialist subcontracts. In my judgment, KC Tan was aware that tender exercises were carried out only in respect of specialist subcontracts in which the shareholders had no expertise in. For subcontract works which the shareholders had expertise in, no tenders or quotations would have been necessary since they would be getting the subcontracts and benefitting themselves. This view accords with the evidence of Ms Tan that the subcontract works secured by the shareholders' own companies started even before the contracts were signed. Accordingly, the Defendants' claim that the Colonel Chua had breached his fiduciary duties in failing to obtain the best possible price by calling for tenders or quotations is without merit.

Conclusion

56 For the foregoing reasons, I dismiss the Defendants' claims in Suit No 605 of 2006/X and Suit No 606 of 2006/B against the 1st Third Party for breach of fiduciary duties by Colonel Chua. The consequential allegations of conspiracy between Colonel Chua, Bing Integrated and 2nd Third Party are also dismissed. In respect of the early payment claim and the reimbursement claim, suffice it to say that the allegations were not made out on the evidence. Accordingly, I dismiss the Defendants' claims. Unless the parties wish to be heard on costs, I award costs to the 1st Third Party, which are to be taxed if not agreed.

[note: 1] 1st Defendant's statement of claim at [2]-[3] and [10].

[note: 2] KC Tan's AEIC filed on 9 December 2009 at [5].

[note: 3] Defendants' BOD vol 1 pp 8-9.

[note: 4] KC Tan's AEIC vol 1 at pp 34, 37.

[note: 5] Plaintiff's Core Bundle of Documents vol 1 at p 76.

[note: 6] Plaintiff's Core Bundle vol 1 at pp 74-75.

[note: 7] Defendants' Closing Submission at [79].

[note: 8] KC Tan's AEIC at [10].

[note: 9] KC Tan's AEIC at [8].

[note: 10] KC Tan's AEIC at [20].

[note: 11] Defendants' Bundle of Documents vol 1 at p 53.

[note: 12] Plaintiff's Core Bundle of Documents at p 815.

[note: 13] Defendants' Bundle of Documents vol 3 at p 998.

[note: 14] Defendants' Bundle of Documents vol 2 at p 427.

[note: 15] Defendants' Statement of Claim at [2(o)].

[note: 16] KC Tan's AEIC at [22].

[note: 17] KC Tan's AEIC at [15].

[note: 18] Defendant's Statement of Claim at [2(l)] to [2(o)].

[note: 19] NE 13/01/10 at pp 91-92.

[note: 20] Defendants' Bundle of Pleading Tab 3 at [3].

[note: 21] 1st Third Party's closing submission at [47].

[note: 22] Defendants' closing submission at [109].

[note: 23] NE 20/01/10 at p 12.

[note: 24] KC Tan's AEIC at [15].

[note: 25] NE 21/0110 at p 67.

[note: 26] NE 19/01/10 at pp 70-74.

[note: 27] NE 19/01/10 at pp 73-76.

[note: 28] NE 21/01/10 at pp 14-16.

[note: 29] NE 21/01/10 at pp 18-19.

[note: 30] NE 21/01/10 at pp 19-20.

[note: 31] NE 21/01/10 at pp 20-21.

[note: 32] NE 21/01/10 at p 23.

[note: 33] Wong TY AEIC filed on 9December 2009 at [9].

[note: 34] NE 19/01/10 at p 80.

[note: 35] NE 04/05/10 at pp 38- 43.

[note: 36] NE 04/05/10 at pp 44.

[note: 37] NE 04/05/10 at p 44-47.

[note: 38] NE 04/05/10 at p 40.

[note: 39] Defendants' closing submission at [110].

[note: 40] KC Tan's AEIC at [20].

[note: 41] Plaintiff's Core Bundle of Document vol 3 at p 815.

[note: 42] NE 04/05/10 at p 111.

[note: 43] Defendants' Bundle of Document vol 4 at pp 1126-1127.

[note: 44] NE 04/05/10 at p 112.

[note: 45] NE 04/05/10 at p 113.

[note: 46] NE 04/05/10 at p 122.

[note: 47] NE 12/01/10 at pp 131 to 133.

[note: 48] NE 04/05/10 at pp 128-129.

[note: 49] NE 22/01/10 at pp 7-9.

[note: 50] NE 22/01/10 at p 10.

[note: 51] NE 22/01/10 at p 11.

[note: 52] NE 22/01/10 at p 11.

[note: 53] NE 22/01/10 at p 23.

[note: 54] NE 22/01/10 at p 13.

[note: 55] NE 22/01/10 at p 10.

[note: 56] NE 22/01/10 at p 25.

[note: 57] NE 22/01/10 at p 36.

[note: 58] NE 22/01/10 at pp 25-26.

[note: 59] NE 06/06/10 at pp 53 to 54.

[note: 60] Defendants' closing submission at [307].

[note: 61] Plaintiff Core Bundle of Documents at pp 193-194.

[note: 62] NE 05/04/10 at p 134.

[note: 63] NE 04/05/10 at p 136; see Defendants' reply submission at [6]; [119].

[note: 64] NE 04/05/10 at p 136.

[note: 65] NE 04/05/10 at p 136.

[note: 66] NE 04/05/10 at p 149.

[note: 67] NE 06/05/10 at pp 64-66.

[note: 68] NE 20/01/10 at pp 27-29; pp 90-91.

[note: 69] NE 20/01/10 at p 92.