

CIVIL SUIT NO: BA-22C-41-10/2020

## BETWEEN

STARFLEX ENERGY (M) SDN. BHD. (Co. No.: 1058126-X) ... PLAINTIFF

## AND

GEMA ANTARA SDN. BHD. (Co. No.: 356589-P) ... DEFENDANT

JUDGMENT

(After trial)

A. Background

1. The defendant company (**Defendant**) had been appointed by TNB Repair and Maintenance Sdn. Bhd. (**TNB**) for a project named as "*Design, Manufacture, Supply, Installation and Commissioning of New Closed Circuit Cooling Water System (CCCWS) & Replacement, Modification of Existing Turbine Shaft Seal and Runner Seal System*" (**Project**) at Sultan Mahmud Power Station, Kenyir, Terengganu Darul Iman (**Site**).
2. By way of an email dated 29.1.2018, on behalf of the plaintiff company (**Plaintiff**), Encik Nik Hafizurahman Bin Nik Ngah (**SP2**) sent a proposal to Encik Faizal Bin Zulkifli (**SD1**), the Defendant's "*Project Manager*", regarding the Plaintiff's provision of manpower, equipment, tools and consumables for the fabrication and installation of CCCWS piping in the Project (**Plaintiff's 1<sup>st</sup> Proposal**).
3. With reference to the Plaintiff's 1<sup>st</sup> Proposal, the Defendant issued a "*Purchase Order*" (**PO**) dated 19.2.2108 with a value of RM2,630,000.00



(**Defendant's 1<sup>st</sup> PO**). The Defendant's 1<sup>st</sup> PO was accepted by the Plaintiff on 27.2.2018.

4. On 1.3.2018, SP2 sent to SD1 a second proposal on behalf of the Plaintiff regarding the supply of materials for CCCWS piping in the Project (**Plaintiff's 2<sup>nd</sup> Proposal**). The Plaintiff's 2<sup>nd</sup> Proposal was accepted when the Defendant issued a PO dated 5.3.2018 with a value of RM735,000.00 (**Defendant's 2<sup>nd</sup> PO**). The Plaintiff accepted the Defendant's 2<sup>nd</sup> PO on 9.4.2018.
5. SP2 sent an email dated 7.9.2018 to SD1 with regard to the Plaintiff's third proposal to the Defendant for the supply of materials (package 2) for the Project (**Plaintiff's 3<sup>rd</sup> Proposal**). Regarding the Plaintiff's 3<sup>rd</sup> Proposal, the Defendant issued a PO dated 4.10.2018 with a value of RM680,000.00 (**Defendant's 3<sup>rd</sup> PO**) which was accepted by the Plaintiff on 10.10.2018.
6. Disputes had arisen between the Plaintiff and Defendant regarding the Plaintiff's supply of materials and works in the Project (**Plaintiff's Supply/Works**).
7. The Plaintiff had alleged as follows, among others:
  - (1) there were additional Plaintiff's Supply/Works as requested by the Defendant (**Plaintiff's Additional Supply/Works**);
  - (2) the Defendant had failed to pay to the Plaintiff a total sum of RM970,434.37 for the Plaintiff's Supply/Works and Plaintiff's Additional Supply/Works [**Plaintiff's Total Claim Sum (Supply/Works)**];



- (3) due to the Defendant's failure to pay the Plaintiff's Total Claim Sum (Supply/Works), on 10.7.2019, the Plaintiff ceased works in the Project (**Works**) and demobilized its manpower and equipment from the Site [**Plaintiff's Demobilization (10.7.2019)**];
- (4) by way of a letter dated 5.2.2020 [**Defendant's Letter (5.2.2020)**], the Defendant had unlawfully terminated the appointment of the Plaintiff as the Defendant's sub-contractor [**Defendant's Termination (Plaintiff's Appointment)**]; and
- (5) as a result of the unlawful Defendant's Termination (Plaintiff's Appointment), the Plaintiff suffered a total loss of RM402,323.13 [**Plaintiff's Total Loss (Remaining Works)**] which consisted of the following two sums -
- (a) an amount of RM164,375.00, the value of remaining Works pursuant to the 1<sup>st</sup> PO which would have been performed by the Plaintiff if not for the unlawful Defendant's Termination (Plaintiff's Appointment); and
- (b) a sum of RM237,948,13 as the value for the remaining Plaintiff's Additional Supply/Works which would have been completed but for the unlawful Defendant's Termination (Plaintiff's Appointment).

8. The following averments, among others, had been made by the Defendant in this case:



- (1) there was delay in the performance of the Works by the Plaintiff **[Alleged Plaintiff's Delay (Works)]**;
- (2) the Defendant refused to pay the Plaintiff's Additional Supply/Works on the following grounds -
  - (a) the Plaintiff's Additional Supply/Works were actually part of the scope of the Defendant's 1<sup>st</sup> PO; and
  - (b) the Defendant had not agreed to the Plaintiff's Additional Supply/Works;
- (3) the Plaintiff's Demobilization (10.7.2019) was unlawful because the Plaintiff had abandoned the Works on 10.7.2019;
- (4) the Plaintiff had only completed 60% of the Works but the Defendant had overpaid a sum of RM263,000.00 (**Defendant's Alleged Overpayment Sum**); and
- (5) due to the Plaintiff's failure to complete the Works, the Defendant had to appoint various third parties (**Replacement Sub-Contractors**) to complete the Works at a total cost of RM934,870.30 [**Defendant's Total Loss (Plaintiff's Non-Completion of Works)**]. One of the Replacement Sub-Contractors was Mega Nilam Sdn. Bhd. (**MNSB**).

## **B. Legal proceedings**

9. In this case -



(1) in the original action filed by the Plaintiff against the Defendant (**Original Action**), the Plaintiff claimed for, among others, a total sum of RM1,372,757.50 which consisted of the following amounts -

(a) the Plaintiff's Total Claim Sum (Supply/Works); and

(b) the Plaintiff's Total Loss (Remaining Works); and

(2) the Defendant counterclaimed from the Plaintiff for the following relief, among others (**Counterclaim**) -

(a) general damages to be paid by the Plaintiff to the Defendant due to the Plaintiff's repudiatory breach of the contract between the Plaintiff and Defendant in the form of the Plaintiff's Demobilization (10.7.2019); and

(b) special damages totaling RM1,197,870.30 as follows -

(i) the Defendant's Alleged Overpayment Sum; and

(ii) the Defendant's Total Loss (Plaintiff's Non-Completion of Works).

10. By consent of parties, I have ordered a joint trial of the Original Action and Counterclaim (**Trial**).

11. The following witnesses testified at the Trial:

(1) the Plaintiff had called four witnesses to give evidence in this case, namely -



- (a) Encik Muhammad Nur Bin Osman (**SP1**), the former Project Engineer and Site Engineer for the Defendant who was involved in the Project;
  - (b) SP2, the Plaintiff's former Project Manager;
  - (c) Encik Mohd. Azrin Bin Mohd. Radin (**SP3**), the Project Engineer for the Plaintiff; and
  - (d) Puan Azzazila Bt. Abdul Aziz (**SP4**), the Plaintiff's director; and
- (2) besides SD1 who testified for the Defendant, Puan Ayuzia Bt. Ahmad (**SD2**) gave evidence in this case. SD2 is a director and shareholder of the Defendant.

**B(1). Admissibility of documents attached to SD2's witness statement (WSSD2)**

12. When SD2 was called by Mr. Nadesh A/L Ganabaskaran (Defendant's learned counsel) to testify on 4.3.2022, Puan Juliana Bt. Abu Bakar (learned counsel for the Plaintiff) objected to the admissibility of Attachment 1 to WSSD2 [**Attachment 1 (WSSD2)**]. Attachment 1 (WSSD2) contained the following documents regarding certain claims of the Defendant's Total Loss (Plaintiff's Non-Completion of Works):

- (1) the Defendant's Payment Voucher to MNSB;
- (2) the Defendant's cheques issued to MNSB; and
- (3) MNSB's invoice issued to the Defendant.



I will discuss the admissibility of Attachment 1 (WSSD2) in Part D below.

**B(2). Plaintiff's case**

13. SP1 testified as follows, among others:

- (1) as the Project Engineer and Site Engineer for the Project, SP1 was present at the Site and supervised the Works;
- (2) on 20.6.2019, there was a joint inspection of the Works at the Site **[Joint Inspection (20.6.2019)]** by -
  - (a) SP1 and SD1 (both represented the Defendant); and
  - (b) SP2 and SP3 (who acted on the Plaintiff's behalf);
- (3) with regard to the Joint Inspection (20.6.2019) -
  - (a) SP3 prepared a "*Services Completion Acceptance Note*" (**SCAN**) which stated that the Plaintiff had completed 95% of the Works **[Plaintiff's Completed Works (95%)]**; and
  - (b) on behalf of the Defendant, as the Project Engineer for the Works, SP1 approved the contents of SCAN on 29.6.2019. Prior to SP1's approval of SCAN, SP1 had also approved Works which had been completed by the Plaintiff **[Previous SP1's Approvals (Plaintiff's Works)]** and the Defendant had paid the Plaintiff based on Previous SP1's Approvals (Plaintiff's Works) **[Defendant's Prior Payments (Previous SP1's Approvals)]**;



- (4) the Plaintiff could not complete the Project because the Defendant did not give instructions regarding the Plaintiff's Additional Supply/Works [**Defendant's Delay (Plaintiff's Additional Supply/Works)**]; and
- (5) due to the Defendant's Delay (Plaintiff's Additional Supply/Works), the Plaintiff's Demobilization (10.7.2019) had to be carried out so as to prevent the Plaintiff from incurring "*idling cost*".

14. According to SP2, among others -

- (1) on 4.9.2019, the Plaintiff had issued the following three invoices to the Defendant for a total sum of RM970,434.37 (**3 Invoices**) which was due from the Defendant for the Plaintiff's Supply/Works and Plaintiff's Additional Supply/Works -
  - (a) invoice no. S00092 for a sum of RM624,625.00 (**1<sup>st</sup> Invoice**);
  - (b) invoice no. S00110 for an amount of RM130,800.00 (**2<sup>nd</sup> Invoice**); and
  - (c) invoice no. S000117 for a sum of RM215,009.37 (**3<sup>rd</sup> Invoice**);
- (2) the Project could not be completed because -
  - (a) there was no instruction by the Defendant regarding the Plaintiff's Additional Supply/Works; and
  - (b) notwithstanding many reminders by the Plaintiff, the Defendant failed to pay the 3 Invoices to the Plaintiff.





15. SP3 gave evidence which corroborated the testimonies of SP1 and SP2.
16. SP4 testified as follows, among others:
- (1) in respect of the 2<sup>nd</sup> and 3<sup>rd</sup> POs, although there were delays in the Defendant's payments to the Plaintiff, the Defendant had paid in full the 2<sup>nd</sup> and 3<sup>rd</sup> POs;
  - (2) with regard to the 1<sup>st</sup> PO, despite the Plaintiff's Completed Works (95%), the Defendant had only paid to the Plaintiff for about 70% of the Works completed by the Plaintiff. Hence, the 1<sup>st</sup> Invoice was issued by the Plaintiff to the Defendant; and
  - (3) the 2<sup>nd</sup> and 3<sup>rd</sup> Invoices concerned the Plaintiff's Additional Supply/Works.

**B(3). Case for the Defendant**

17. SD1 alleged as follows, among others:
- (1) TNB requested three additional pumps (**3 Additional Pumps**) for the Project. Hence, the Defendant requested for the Plaintiff to supply the 3 Additional Pumps with a "*mark-up*" of not more than 10% from the cost as stated in the 1<sup>st</sup> PO;
  - (2) the Alleged Plaintiff's Delay (Works) had occurred despite many warnings given by the Defendant to the Plaintiff;
  - (3) the Plaintiff's Additional Supply/Works were actually part of the scope of the Defendant's 1<sup>st</sup> PO;



(4) with regard to SCAN -

(a) the Defendant did not receive SCAN during the progress of the Works. The Defendant only received SCAN during the exchange of documents between the parties' solicitors for the purpose of compiling "*Common Bundles of Documents*" (**CBD**) to be used at the Trial;

(b) the contents of SCAN were erroneous;

(c) SD1 believed that SCAN had been fabricated by the Plaintiff's representatives and SP1. A police report, ie. Kuala Berang Police Report No. 4517/20 (**Defendant's Police Report**) had been lodged on 16.11.2020 by the Defendant's former "*Document Controller*", Encik Mohamad Shukri Bin Shaid (**Encik Shukri**); and

(d) SP1 reported to SD1 regarding the progress of the Works. SD1 supervised the Works and was the only person who could verify and/or certify the Works performed by the Plaintiff. SD1 had no authority to verify and/or certify the Works completed by the Plaintiff. Consequently, SD1 had no authority to sign the SCAN on behalf of the Defendant;

(5) the Project had not been completed by the Plaintiff. Only 60% of the Works had been performed by the Plaintiff [**Defendant's Alleged 60% Completion (Works)**]. Furthermore, the Works done by the Plaintiff were defective (**Defendant's Alleged Defective Works**); and



(6) the Plaintiff's Demobilization (10.7.2019) was unlawful because the Plaintiff had abandoned the Works on 10.7.2019. As a result of the Plaintiff's Demobilization (10.7.2019), Replacement Sub-Contractors had to be appointed by the Defendant to complete the Project. Consequently, the Defendant's Total Loss (Plaintiff's Non-Completion of Works) was incurred.

18. SD2 gave the following testimony, among others:

- (1) when the Defendant received the Plaintiff's invoice for the Works, SD1 would verify the Plaintiff's claim for payment for the Works. After SD1 had verified the Plaintiff's claim, SD1 would advise SD2 to authorise the Defendant to pay to the Plaintiff for the Works. SD2 would then "*counter check*" the documents submitted by the Plaintiff and the Defendant would only pay to the Plaintiff if SD2 was satisfied that the Plaintiff had indeed performed the Works in question;
- (2) the Defendant had paid in full to the Plaintiff with regard to the 2<sup>nd</sup> and 3<sup>rd</sup> POs;
- (3) as the Plaintiff had only completed 60% of the Works and did not achieve paragraph (e) of the 1<sup>st</sup> PO [**Milestone (e)**], the Defendant was not bound to pay to the Plaintiff for the 1<sup>st</sup> Invoice;
- (4) in view of the Defendant's Alleged 60% Completion (Works), the Defendant's Alleged Overpayment Sum had been made; and
- (5) as a result of the unlawful Plaintiff's Demobilization (10.7.2019), the Defendant's Termination (Plaintiff's Appointment) was made.



### C. Issues

19. The following questions arise in this case:

- (1) can the Defendant adduce Attachment 1 (WSSD2) as evidence without complying with O 34 r 2(2)(c) to (e) and (i) of the Rules of Court 2012 (**RC**)?;
- (2) with regard to the Plaintiff's 1<sup>st</sup> Proposal to Plaintiff's 3<sup>rd</sup> Proposal (referred collectively in this judgment as the "**Plaintiff's 3 Proposals**") and Defendant's 1<sup>st</sup> PO to the Defendant's 3<sup>rd</sup> PO (referred collectively in this judgment as the "**Defendant's 3 POs**")
  - 
  - (a) whether the Plaintiff's 3 Proposals **or** the Defendant's 3 POs constitute "*proposals*" (offers) within the meaning of s 2(a) of the Contracts Act 1950 (**CA**);
  - (b) did the Plaintiff's acceptance of a PO from the Defendant amount to a "*promise*" under s 2(b) read with s 7(a) CA which is enforceable as a contract?; and
  - (c) whether the Plaintiff's acceptance of one PO from the Defendant constituted an agreement which is separate from the Plaintiff's acceptance of another PO from the Defendant;
- (3) in the construction of an agreement -
  - (a) whether there a rule of law that the "*final acceptance document*" shall prevail over all previous documents; and



- (b) is there an “*inclusive price principle*” that the price of the contract includes all ancillary work?;
- (4) in respect of SCAN -
  - (a) whether SP1 had forged or fabricated SCAN;
  - (b) did SP1 have authority to sign SCAN on behalf of the Defendant? This issue discusses whether SP1 had express actual authority, implied actual authority and/or ostensible (or apparent) authority to act for the Defendant in the Project; and
  - (c) should court attach weight to the contents of SCAN, especially the Plaintiff’s Completed Works (95%)? The answer to this question will also determine whether the court can accept the Defendant’s Alleged 60% Completion (Works);
- (5) with regard to the agreement contained in the 1<sup>st</sup> PO [**Agreement (1<sup>st</sup> PO)**] -
  - (a) whether Milestone (e) bars the claim for the Plaintiff’s Completed Works (95%). This entails a discussion of the commercial purpose of Milestone (e); and
  - (b) can the court imply a contractual obligation for the Defendant to pay for the Plaintiff’s Completed Works (95%)?;



- (6) was the Plaintiff's Demobilization (10.7.2019) lawful? The issue also concerns the legality of the Defendant's Termination (Plaintiff's Appointment);
- (7) if the Plaintiff's Demobilization (10.7.2019) was valid, whether the Defendant had breached the Agreement (1<sup>st</sup> PO) by not paying for the Plaintiff's Completed Works (95%);
- (8) was there any basis for the Defendant's Alleged Overpayment Sum?;
- (9) was there Alleged Plaintiff's Delay (Works)?;
- (10) can the court accept the Defendant's Alleged Defective Works?;
- (11) whether the Plaintiff can recover from the Defendant for the Plaintiff's Additional Supply/Works. In this regard -
  - (a) were the Plaintiff's Additional Supply/Works actually part of the 1<sup>st</sup> PO?;
  - (b) was there a bilateral variation of the Agreement (1<sup>st</sup> PO) by the Plaintiff and Defendant in respect of the Plaintiff's Additional Supply/Works (**Bilateral Variation**)?;
  - (c) whether a PO had to be issued by the Defendant to the Plaintiff to evidence a Bilateral Variation; and
  - (d) did "QC-PL-100 (PUNCHLIST)" (**Punchlist**) evidence a Bilateral Variation?;



- (12) whether the Plaintiff can claim for the Plaintiff's Total Loss (Remaining Works); and
- (13) can the Defendant counterclaim for Defendant's Total Loss (Plaintiff's Non-Completion of Works)?

**D. Whether court could admit Attachment 1 (WSSD2) as evidence**

20. I reproduce below the relevant parts of O 34 r 2(2)(c) to (e), (i) and (m) RC:

*"O 34 r 2            Pre-trial case management when directed by the Court*

*...  
(2)            At a pre-trial case management, the Court may consider any matter including the possibility of settlement of all or any of the issues in the action or proceedings and require the parties to furnish the Court with such information as it thinks fit, and the appropriate orders and directions that should be made to secure the just, expeditious and economical disposal of the action or proceedings, including -*

*...  
(c)    the period within which the parties are to file a bundle of all documents that will be relied on or referred to in the course of the trial by any party, including documents referred to in the witness statement of a witness;*

*(d)    the contents of the bundle of the documents referred to in subparagraph (c) shall be agreed on between all parties as far as possible and this bundle of agreed documents shall be filed by the plaintiff and marked as Part A;*

*(e)    if the parties are unable to agree on certain documents, those documents on which agreement cannot be reached shall be*



*included in separate bundles and each such bundle shall be filed by the plaintiff and marked as follows:*

- (i) Part B - documents where the authenticity is not disputed but the contents are disputed;*
- (ii) Part C - documents where the authenticity and contents are disputed;*
- ...*
- (i) any party may apply at any time to the Court for directions as to the filing, bundling and organization of documents intended to be used at the trial of the action, and, on such application, the Court may make such order or give such direction as is necessary to achieve the just, expeditious and economical conduct of the trial of the action;*
- ...*
- (m) the period within which the parties have to exchange and file witness statements of all witnesses who may give evidence at the trial; ...”*

(emphasis added).

21. Before the commencement of the Trial, the following pre-trial directions (**PTDs**), among others, are given by me:

- (1) all parties shall exchange documents to be used at the Trial (**Trial Documents**). In this judgment, I shall refer to this PTD as “**PTD (Exchange of Trial Documents)**”. It is clear from O 34 r 2(2)(c) RC that PTD (Exchange of Trial Documents) applies to “*all documents that will be relied on or referred to in the course of the trial by any party, including documents referred to in the witness statement of a witness*”. Hence, the PTD (Exchange of Trial Documents) shall apply to Attachment 1 (WSSD2);





- (2) in accordance with O 34 r 2(d), (e)(i) and (ii) RC, parties shall classify all Trial Documents as “*Part A*”, “*Part B*” or “*Part C*” Trial Documents [**PTD (Classification of Trial Documents)**]. In **KTL Sdn Bhd & Anor v Leong Oow Lai and another case** [2014] MLJU 1405, at [23] to [37], I have explained the admissibility of Part A, Part B and Part C Trial Documents;
- (3) if any party (**X**) fails to comply with PTD (Exchange of Trial Documents) and/or PTD (Classification of Trial Documents) in respect of a Trial Document (**X’s Additional Trial Document**), by reason of O 34 r 2(2)(i) RC, X may apply to the trial court for “*directions as to the filing, bundling and organization of documents intended to be used at the trial of the action*” and the court “*may make such order or give such direction as is necessary to achieve the just, expeditious and economical conduct of the trial of the action*” with regard to X’s Additional Trial Document; and
- (4) by virtue of O 34 r 2(2)(m) RC, the court must issue a PTD for all parties to file and serve their witness statements before the commencement of trial [**PTD (Filing and Service of Witness Statements)**]. The importance of PTD (Filing and Service of Witness Statements) cannot be overemphasized because PTD (Filing and Service of Witness Statements) ensures that parties’ learned counsel have sufficient time to prepare cross-examination of adverse witnesses. In other words, PTD (Filing and Service of Witness Statements) prevents a trial by ambush.



22. When Puan Juliana objected to the admissibility of Attachment 1 (WSSD2), I expressed the following view to Mr. Nadesh:

(1) Attachment 1 (WSSD2) has breached the following two PTDs -

(a) PTD (Exchange of Trial Documents) pursuant to O 34 r 2(2)(c) RC; and

(b) PTD (Classification of Trial Documents) under O 34 r 2(d), (e)(i) and (ii) RC;

(2) in compliance with PTD (Filing and Service of Witness Statements), the Plaintiff had filed and served four witness statements in this case. When the Plaintiff's solicitors received Attachment 1 (WSSD2) from the Defendant's solicitors, there was an injustice to the Plaintiff. This was because to rebut the contents of Attachment 1 (WSSD2), the Plaintiff had to apply for leave of court to -

(a) to tender an additional witness statement to reply to Attachment 1 (WSSD2); and

(b) to adduce additional Trial Documents to answer Attachment 1 (WSSD2) - please refer to O 34 r 2(2)(i) RC; and

(3) Attachment 1 (WSSD2) had been filed and served by the Defendant in breach of O 34 r 2(2)(i) RC.

23. Upon hearing my oral view as stated in the above paragraph 22, Mr. Nadesh applied for leave of court to stand down the Trial so as to seek his client's instruction regarding the admissibility of Attachment 1 (WSSD2).



24. When the Trial resumed, Mr. Nadesh informed the court that he had the Defendant's instruction to withdraw Attachment 1 (WSSD2) as evidence and consequently, he applied to do so. I then expunged Attachment 1 (WSSD2) as evidence in this case.
25. I should state that even if Mr. Nadesh had not applied for leave of court to withdraw Attachment 1 (WSSD2) as evidence, premised on the reasons expressed in the above paragraph 22, I have no hesitation to uphold Puan Juliana's objection to the admissibility of Attachment 1 (WSSD2).
26. Before I proceed to the next matter, this judgment sends a clear message that parties and solicitors cannot circumvent PTD (Exchange of Trial Documents), PTD (Classification of Trial Documents) and O 34 r 2(2)(i) RC by tendering Trial Documents attached to witness statements without having previously served those Trial Documents on solicitors of opposing parties as directed in PTD (Exchange of Trial Documents). If otherwise, as explained in the above paragraph 22, there will be an injustice to opposing parties.

#### **E. Credibility of witnesses**

27. I find as a fact that SP1 is a witness of truth. This factual finding is supported by the following evidence and reasons:

(1) SP1's testimony, especially regarding the Joint Inspection (20.6.2019) and contents of SCAN, was supported by Previous SP1's Approvals (Plaintiff's Works) and Defendant's Prior Payments (Previous SP1's Approvals). In this regard, the conduct of -



- (a) SP1 [by way of Previous SP1's Approvals (Plaintiff's Works)];  
and
- (b) the Defendant [in the form of the Defendant's Prior Payments  
(Previous SP1's Approvals)]
- was relevant under s 8(1) of the Evidence Act 1950 (**EA**).

I reproduce below s 8(2) EA -

***“The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.”***

(emphasis added).

It is not to be noted that the Defendant had previously paid to the Plaintiff for approximately 70% of the Works completed by the Plaintiff. In other words, SP1's Approvals (Plaintiff's Works) and Defendant's Prior Payments (Previous SP1's Approvals) involved substantial amounts of money which had already been paid by the Defendant to the Plaintiff;

- (2) the Defendant did not adduce any evidence that SP1's Approvals (Plaintiff's Works) and Defendant's Prior Payments (Previous SP1's



Approvals) had been made without any actual authority, express or implied, by the Defendant;

- (3) if SP1 had no express actual authority or implied actual authority from the Defendant to approve the contents of SCAN -
- (a) the Defendant and/or its solicitors would have issued a demand to SP1 to explain why SP1 approved the contents of SCAN without any express actual authority or implied actual authority by the Defendant. No such demand was ever made by the Defendant and/or its solicitors on SP1; and
- (b) the Defendant would have commenced third party proceedings in this case against SP1 for an indemnity or contribution under O 16 r 1(1)(a) RC for any liability which may be incurred by the Defendant towards the Plaintiff regarding the contents of SCAN. The relevant part of O 16 r 1(1)(a) states as follows -

***“Third party notice***

O 16 r 1(1) ***Where in any action a defendant who has entered an appearance -***

***(a) claims against a person not already a party to the action any contribution or indemnity;***

***...  
then, subject to paragraph (2), the defendant may issue a notice in Form 18 or 19, whichever is appropriate (which is referred to as a “third party notice” in this Order), containing a statement of the nature of the claim made against him and, as the case may be, either of the nature and grounds of the claim made by him or of the question or issue required to be determined.”***



(emphasis added); and

- (4) no evidence had been adduced by the Defendant to prove that SP1 had forged or fabricated SCAN. In fact, the Defendant had not even lodged a police report against SP1 for forging SCAN, an offence under ss 463 and 464(a) of the Penal Code (**PC**) which is punishable pursuant to s 465 PC. I reproduce below ss 463 and 465 PC -

***“Forgery***

463. ***Whoever makes any false document or part of a document with intent to cause damage or injury to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.***

464. ***Making a false document***  
***A person is said to make a false document -***

- (a) ***who dishonestly or fraudulently makes, signs, seals or executes a document or part of a document, or makes any mark denoting the execution of a document, with the intention of causing it to be believed that such document or part of a document was made, signed, sealed or executed by, or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed or executed, or at a time at which he knows that it was not made, signed, sealed or executed; ...***



***Whoever commits forgery shall be punished with imprisonment for a term which may extend to two years or with fine or with both."***

(emphasis added).

In this regard, the court cannot attach any weight to the Defendant's Police Report because -

- (i) the contents of the Defendant's Police Report did not allege the commission of any offence by SP1. Nor did the Defendant's Police Report aver that SP1 had signed SCAN without any express actual authority or implied actual authority from the Defendant;
- (ii) Encik Shukri was not called by the Defendant to testify regarding the truth of the contents of the Defendant's Police Report. As such, the Plaintiff's learned counsel did not have an opportunity to cross-examine Encik Shukri regarding the veracity of the Defendant's Police Report made by Encik Shukri; and
- (iii) the Defendant did not adduce any evidence on why the Defendant could not have called Encik Shukri as a witness to give evidence at the Trial. Nor was there any application by the Defendant to court to issue a subpoena to compel Encik Shukri to testify in this case. Hence, this court has no hesitation to draw an adverse inference under s 114(g) EA against the Defendant for suppression of the material evidence from Encik



Shukri in respect of the truth of the contents of the Defendant's Police Report. Section 114(g) EA states as follows -

***“Court may presume existence of certain fact***

***114. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.***

#### **ILLUSTRATIONS**

***The court may presume -***

***...  
(g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it.”***

(emphasis added).

**In NGV Tech Sdn Bhd (Receiver and Manager Appointed) (In liquidation) & Anor v Ramsstech Ltd & Ors [2015] MLJU 671, at [178], I have explained that the court may invoke an adverse inference pursuant to s 114(g) EA against a defendant in a civil case -**

***“[178] In civil cases, generally, a defendant has no legal onus to prove his or her defence. Nonetheless, the court has a discretion to draw an adverse inference against a defendant for his or her failure to call a relevant witness to support the defence. This is clear from the following cases:***





- (a) *the Supreme Court's judgment given by Hashim Yeop Sani CJ (Malaya) in Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd [1991] 1 MLJ 33, at 34-35;*
- (b) *Haidar JCA's (as His Lordship then was) judgment in the Court of Appeal case of Chan Yoke Lain v Pacific & Orient Insurance Co Sdn Bhd [1999] 1 MLJ 303, at 308-309; and*
- (c) *Gopal Sri Ram's (as His Lordship then was) judgment in the Court of Appeal in Subry bin Hamid v Husaini bin Tan Sri Ikhwan [2006] 5 AMR 644, at 652-653."*

(emphasis added);

- (5) SP1's testimony was corroborated in material particulars by the oral evidence of SP2 and SP3;
- (6) as the former Project Engineer and Site Engineer for the Defendant in the Project, SP1 had personal knowledge of the Works performed by the Plaintiff;
- (7) there was no financial incentive for SP1, a professional engineer, to give false testimony in favour of the Plaintiff against the Defendant.

I have considered the following evidence -

- (a) SP1 had complained to the Labour Office (*Jabatan Tenaga Kerja*) against the Defendant for not paying SP1's mileage claims (**SP1's Complaint**); and



(b) no action on SP1's Complaint was taken by Labour Office against the Defendant.

This court is not persuaded that the SP1 would forge or fabricate SCAN merely because no action was taken by Labour Office on SP1's Complaint; and

(8) the vigorous cross-examination of SP1 by Mr. Nadesh did not reveal any reason to disbelieve SP1's oral testimony.

28. I make a finding of fact that SP2, SP3 and SP4 are credible witnesses due to the following evidence and reasons:

(1) the testimonies of SP2, SP3 and SP4 regarding the Defendant's failure to pay for the Works completed by the Plaintiff were supported by the following evidence and reasons -

(a) the Plaintiff's emails to the Defendant dated 11.7.2018, 15.7.2018, 17.7.2018, 19.7.2018, 8.8.2018, 10.8.2018, 1.10.2018, 19.9.2018, 26.9.2018, 3.10.2018, 5.10.2018, 9.10.2018, 5.11.2018, 7.11.2018, 9.11.2018, 21.11.2018 and 12.3.2019 had repeatedly asked for payment from the Defendant in this case; and

(b) the Defendant did not send any email or letter to deny the emails stated in the above sub-paragraph (1)(a) regarding the Defendant's indebtedness to the Plaintiff in this case;

(2) as testified by SP2, SP3 and SP4, the delay in the completion of the Project was not caused by the Plaintiff. In other words, there was no



Alleged Plaintiff's Delay (Works). This is clear from the following evidence and reasons (in chronological order) -

- (a) the Plaintiff's emails to the Defendant dated 7.12.2018, 23.7.2019 18.3.2019 and 11.4.2019 requested for the Defendant's instructions regarding the Project;
- (b) the Plaintiff's email to the Defendant dated 4.4.2019 stated that the Defendant's drawings for the Project were incomplete and consequently, the Plaintiff could not "*guarantee*" the completion date on 17.4.2019;
- (c) on behalf of the Defendant, SD1 sent an email to the Plaintiff dated 29.4.2018 which extended the completion date of the Project (**Completion Date**) to 6.5.2019 [**Defendant's Email (29.4.2019)**];
- (d) the Defendant's email to the Plaintiff dated 1.5.2019 [**Defendant's Email (1.5.2019)**] stated that the Defendant would instruct the Plaintiff once the Defendant had obtained a "*reply from the station*". It was clear from the Defendant's Email (1.5.2019) that the Plaintiff was still waiting for the Defendant's instruction to complete the Project;
- (e) the Defendant's two emails to the Plaintiff, both dated 27.5.2019, requested from the Plaintiff for the cost of the Plaintiff's Additional Supply/Works [**Defendant's 2 Emails (27.5.2019)**]. The Defendant's 2 Emails (27.5.2019) would extend the Completion Date beyond 6.5.2019 [the Completion



Date which was previously stated in the Defendant's Email (29.4.2019)];

- (f) the Defendant sent an email to the Plaintiff dated 12.6.2019 which alleged that there was delay in the completion of the Project by the Plaintiff [**Defendant's Email (12.6.2019)**]. The contents of the Defendant's Email (12.6.2019) were superseded by the Joint Inspection (20.6.2019) and SCAN (approved by SP1 on 29.6.2019) which proved the Plaintiff's Completed Works (95%); and
- (g) the Plaintiff's emails to the Defendant dated 2.7.2019, 3.7.2019, 4.7.2019 and 8.7.2019 stated that the Plaintiff was still waiting for the Defendant's acceptance or clarification regarding the Plaintiff's Additional Supply/Works;

(3) with regard to the Plaintiff's Demobilization (10.7.2019) -

- (a) before the Plaintiff's Demobilization (10.7.2019), the Plaintiff sent an email to the Defendant dated 18.3.2019 which stated that the Plaintiff planned to demobilize from the Site due to the Defendant's failure to pay the sum of money due to the Plaintiff in this case; and
- (b) the Plaintiff's Demobilization (10.7.2019) was conveyed to the Defendant by the Plaintiff's email dated 10.7.2019 [**Plaintiff's Email (10.7.2019)**]. The Defendant did not object to the Plaintiff's Demobilization (10.7.2019). Instead, the Defendant's email to the Plaintiff dated 10.7.2019 [in response to the Plaintiff's Email (10.7.2019)] informed the Plaintiff that the



Plaintiff could only remove “*surplus*” from the Site and not materials which were related to the completion of the Project [Defendant’s Email (10.7.2019)]; and

(4) after the Plaintiff’s Demobilization (10.7.2019) -

- (a) the Plaintiff sent emails to the Defendant dated 10.9.2019, 20.9.2019, 8.10.2019, 18.11.2019 and 25.11.2018 regarding payments due from the Defendant to the Plaintiff;
- (b) on 25.11.2019, on behalf of the Defendant, SD1 sent the following email to the Plaintiff [Defendant’s Email (25.11.2019)]

-

*“Dear [SP3],*

*We noted [sic] on your email. However our team are not able to finalise this issue at this moment. We take note on your proposal for commercial settlement.*

*We will revert once we internally finalised it.”*

(emphasis added); and

- (c) the Plaintiff’s emails to the Defendant dated 4.12.2019 and 13.12.2019 stated that the Project was almost complete save for the “*additional valve*”.

29. This court decides as a matter of fact that the oral testimonies of SD1 and SD2 cannot be believed due to the following evidence and reasons:



- (1) the credibility of SD1 and SD2 was severely undermined by documentary evidence referred to in the above sub-paragraphs 28(1)(a), (2)(a) to (g), (3)(a), (b) and (4)(a) to (c). When there is a conflict between self-serving testimonies of SD1 and SD2 on the one part and documentary evidence on the other part, the court should accept documentary evidence - please refer to the judgment of Chang Min Tat FJ in the Federal Court case of **Tindok Besar Estate Sdn Bhd v Tinjar Co** [1979] 2 MLJ 229, at 234;
- (2) if SD1's allegations against the Plaintiff were true, SD1 would have stated all these allegations in the Defendant's Email (25.11.2019 (sent by SD1 himself); and
- (3) as a director of the Defendant, SD2 signed the Defendant's Termination (Plaintiff's Appointment) on 5.2.2020. According to the Defendant's Termination (Plaintiff's Appointment), among others -

“ ...

*We would like to refer specifically to [Plaintiff's] email dated on 18<sup>th</sup> November 2019 by highlighting that [Plaintiff] has on its own accord ceased to execute the contract that was awarded to [Plaintiff] for the project. Based on that, we consider that [Plaintiff's] contracts with [Defendant] has been terminated.*

*The following are the brief status of the contracts between [Plaintiff] and [Defendant] prior to contract termination:*



<b>No</b>	<b>[PO] No.</b>	<b>Contract Value Awarded</b>	<b>Amount invoiced by [Plaintiff]</b>	<b>Amount paid by [Defendant]</b>
1.	000280	RM2,630,000	RM1,841,000	RM1,841,000
2.	000287	RM735,000	RM735,000	RM735,000
3.	000339	RM680,000	RM680,000	RM680,000

***Based on the above, [Defendant] has carried out its contractual obligation of honoring all invoices issued by [Plaintiff]. Therefore, there are no outstanding payment due to [Plaintiff] from [Defendant].***

***However, considering [Defendant] has to engage other subcontractors to carry out rectification of [Plaintiff's] works, we [Defendant] reserve the right to recover the cost of rectification works from [Plaintiff] as [Plaintiff] is responsible for warranty for [Plaintiff's] works and materials supply as per contract terms and conditions in [Defendant's] PO."***

(emphasis added).

The contents of the Defendant's Termination (Plaintiff's Appointment) are not true because -

- (a) the Plaintiff's email to the Defendant dated on 18.11.2019 did not state that the Plaintiff had ceased to perform the Project on its own accord;



(b) the Plaintiff's Demobilization (10.7.2019) was due to the following four reasons [**4 Reasons (Plaintiff's Demobilization)**]

-

- (i) the Defendant's failure to pay to the Plaintiff for Works performed by the Plaintiff;
- (ii) the Defendant did not give instruction for the Plaintiff's Additional Supply/Works. Hence, the Plaintiff could not complete the Project;
- (iii) the Plaintiff did not wish to incur idling cost by remaining on the Site without doing any Works. Idling cost is a sum which is recoverable under the first limb of s 74(1) CA by a contractor/sub-contractor from the employer/main contractor in question - please refer to **Era Kemuncak Jaya (M) Sdn Bhd v Tenaga Switchgear Sdn Bhd** [2022] 1 MLRH 208, at [66]. Section 74(1) CA provides as follows

-

***"Compensation for loss or damage caused by breach of contract***

***74(1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it."***





(emphasis added); and

- (iv) when a party to a contract (**Y**) has breached the contract, the innocent party (**Z**) has a duty to take reasonable steps to mitigate Z's loss due to Y's breach of the contract - please refer to the Supreme Court's judgment delivered by Mohd. Dzaidin SCJ (as he then was) in **Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd** [1994] 3 MLJ 569, at 578.

The Plaintiff's Demobilization (10.7.2019) was clearly an exercise of the Plaintiff's duty to take reasonable steps to mitigate the Plaintiff's loss due to the Defendant's breach of the Agreement (1<sup>st</sup> PO) when the Defendant did not pay the Plaintiff for the Works - please refer to Part K below; and

- (c) SD2 was less than honest in stating in the the Defendant's Termination (Plaintiff's Appointment) that the Defendant "*has carried out its contractual obligation of honoring all invoices issued by [Plaintiff]. Therefore, there are no outstanding payment due to [Plaintiff] from [Defendant]*". This was because the Defendant had yet to pay for the 1<sup>st</sup> Invoice issued by the Plaintiff to the Defendant; and

- (4) the Defendant's Termination (Plaintiff's Appointment) only alleged that the Defendant reserved its right to claim from the Plaintiff the cost to rectify defects in the Works performed by the Plaintiff. The



Defendant's Termination (Plaintiff's Appointment) did not aver regarding -

- (a) the Alleged Plaintiff's Delay (Works);
- (b) the Defendant's Alleged Overpayment Sum; and
- (c) the Defendant's Total Loss (Plaintiff's Non-Completion of Works).

**F. Effect of Plaintiff's 3 Proposals, Defendant's 3 POs and Plaintiff's acceptance of Defendant's 3 POs**

30. I reproduce below the relevant parts of ss 2 and 7(a) CA:

***s 2 Interpretation***

***In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:***

- (a) ***when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to the act or abstinence, he is said to make a proposal;***
- (b) ***when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted: a proposal, when accepted, becomes a promise; ...***

***s 7 Acceptance must be absolute.***

***In order to convert a proposal into a promise the acceptance must -***

- (a) ***be absolute and unqualified; ...***



(emphasis added).

31. I am of the following view regarding formation of contracts between the Plaintiff and Defendant in this case:

- (1) the Plaintiff's 3 Proposals did not fall within the meaning of "*proposals*" (contractual offers) in s 2(a) CA. This was because irrespective of the contents of the Plaintiff's 3 Proposals, the Defendant had the right to issue a PO on terms and conditions as the Defendant deemed fit. In other words, the contents of the Defendant's 3 POs need not be based on, let alone confined by, the contents of the Plaintiff's 3 Proposals;
- (2) when the Plaintiff accepted a PO from the Defendant in an absolute and unqualified manner under s 7(a) CA, there is a "*promise*" within the meaning of s 2(b) CA which is enforceable as an agreement; and
- (3) the Plaintiff's three acceptances of the Defendant's 3 POs gave rise to three different contracts between the Plaintiff and Defendant. This case only concerned the Agreement (1<sup>st</sup> PO).

#### **G. Interpretation of agreements**

32. With regard to the construction of the Defendant's 1<sup>st</sup> PO, Mr. Nadesh has advanced the following two contentions on behalf of the Defendant:

- (1) in commercial contracts entered into by way of an exchange of documents, the "*final acceptance document*" shall prevail over



previous documents [**Priority Principle (Final Acceptance Document)**]; and

- (2) there is an “*inclusive price principle*”, ie., if a contractor is engaged to perform a specific kind of works, the contractor’s obligation to do the specific works includes all ancillary works to complete the specific works (**Inclusive Price Principle**).

33. With respect to Mr. Nadesh, I am of the following view:

- (1) the contents of the Defendant’s 1<sup>st</sup> PO was a commercial contract which should be construed by the court in a commercially sensible manner so as to enable the court to ascertain the manifest intention of the Plaintiff and Defendant. I rely on two Federal Court judgments as follows -
  - (a) Gopal Sri Ram FCJ’s judgment in **Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd** [2010] 1 MLJ 597, at [10]; and
  - (b) the decision of Zainun Ali FCJ in **SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor** [2016] 1 MLJ 464, at [78];
- (2) with regard to previous cases on the construction of agreements, I have decided as follows in **High Rise Millenium Sdn Bhd v Pelangi Hartajaya Sdn Bhd**, at [20] -

*“[20] Firstly, each written judgment of a previous case regarding the interpretation of an agreement depends on the particular wording of the agreement in question. In other words, from the view point of the doctrine of stare decisis, a case on*



*the construction of a particular contractual provision, is only a binding precedent in respect of the court's construction of that contractual provision. ..."*

(emphasis added); and

- (3) the Priority Principle (Final Acceptance Document) and Inclusive Price Principle are not rules of law but are merely rules regarding interpretation of contracts which **may** assist the court to ascertain the manifest intention of the contracting parties as expressed in the contracts. The application of the Priority Principle (Final Acceptance Document) and Inclusive Price Principle must necessarily depend on the particular wording of the agreement in question.

## H. SCAN

### H(1). Whether SP1 had forged or fabricated SCAN

34. Mr. Nadesh has made a far-reaching submission, namely, SCAN was forged or fabricated by SP1, a disgruntled former employee of the Defendant (due to SP1's Complaint). I cannot accept this submission - please refer to the above sub-paragraph 27(4).

### H(2). Did SP1 have actual authority from Defendant to approve SCAN?

35. According to Mr. Nadesh, SP1 had no authority from the Defendant to approve the contents of SCAN. I unhesitatingly reject this submission. This court finds as a fact that SP1 had express actual authority to sign SCAN on behalf of the Defendant. The evidence and reasons to support this finding of fact have been expressed in the above sub-paragraphs 27(1) to (3). Furthermore, the Defendant did not tender as evidence in



this case SP1's employment contract with the Defendant (**SP1's Employment Contract**) to show that SP1 had no express actual authority to approve the contents of SCAN on behalf of the Defendant. Nor did the Defendant give any evidence regarding the reason why SP1's Employment Contract could not have been adduced as evidence at the Trial. In view of the Defendant's suppression of SP1's Employment Contract in this case, I draw an adverse inference pursuant to s 114(g) EA against the Defendant - please refer to the Supreme Court's judgment delivered by Hashim Yeop Sani CJ (Malaya) in **Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd** [1991] 1 MLJ 33, at 34-35.

36. As an alternative to the court's decision in the above paragraph 35, even if it is assumed that SP1 had no express actual authority to approve SCAN on behalf of the Defendant, I am of the view that SP1 had express implied authority to approve the contents of SCAN on behalf of the Defendant (**SP1's Implied Authority**). SP1's Implied Authority is clear from the following evidence and reasons:

- (1) SP1's position as the Defendant's Project Engineer and Site Engineer at the time SP1 approved the contents of SCAN;
- (2) Previous SP1's Approvals (Plaintiff's Works) and Defendant's Prior Payments (Previous SP1's Approvals) had been made without any complaint or reservation from the Defendant; and
- (3) SP1 had sent many emails on behalf of the Defendant to the Plaintiff regarding the Project.



**H(3). Whether SP1 had apparent authority from Defendant to approve SCAN**

37. The difference between actual authority and ostensible (or apparent) authority has been explained by Syed Agil Barakbah FJ in the Federal Court case of **Chew Hock San & Ors v Connaught Housing Development Sdn Bhd** [1985] 1 MLJ 350, at 353, as follows:

*“Now, the difference between an actual and an apparent or ostensible authority and the principles applicable thereto are adequately explained by Diplock L.J. in Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480, 502-504 from page 502 to page 504 as follows:*

*“It is necessary at the outset to distinguish between an “actual” authority of an agent on the one hand, and an “apparent” or “ostensible” authority on the other. Actual authority and apparent authority are quite independent of one another. Generally they co-exist and coincide, but either may exist without the other and their respective scopes may be different. As I shall endeavour to show, it is upon the apparent authority of the agent that the contractor normally relies in the ordinary course of business when entering into contracts.*

*An “actual” authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties. To this agreement the contractor is a stranger; he may be totally ignorant of the*



*existence of any authority on the part of the agent. Nevertheless, if the agent does enter into a contract pursuant to the "actual" authority, it does create contractual rights and liabilities between the principal and the contractor ...*

*An "apparent" or "ostensible" authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.*

*In ordinary business dealings the contractor at the time of entering into the contract can in the nature of things hardly ever rely on the "actual" authority of the agent. His information as to the authority must be derived either from the principal or from the agent or from both, for they alone know what the agent's actual authority is. All that the contractor can know is what they tell him, which may or may not be true. In the ultimate analysis he relies either*





*upon the representation of the principal, that is, apparent authority, or upon the representation of the agent, that is, warranty of authority." "*

(emphasis added).

38. Even it is assumed that SP1 did not have express actual authority and express implied authority to sign SCAN, this court decides that SP1 had ostensible or apparent authority from the Defendant to approve the contents of SCAN. As explained in the above sub-paragraphs 36(1) to (3), with regard to the Project, the Plaintiff was entitled to assume in the ordinary course of dealings with the Defendant and SP1, that SP1 had ostensible or apparent authority to sign SCAN on behalf of the Defendant.

**H(4). Should court attach weight to contents of SCAN**

39. I give weight to the contents of SCAN because -

- (1) SP1, SP2 and SP3 gave mutually corroborative testimonies regarding the contents of SCAN;
- (2) as explained in the above paragraphs 27 and 28, SP1, SP2 and SP3 are witnesses of truth; and
- (3) SD1 (who gave evidence on the contents of SCAN contrary to the testimonies of SP1, SP2 and SP3) is not a credible witness - please refer to the above sub-paragraphs 29(1) and (2).

40. Premised on the reasons stated in the above sub-paragraphs 39(1) to (3)  
-



(1) this court finds as a fact that the Plaintiff's Completed Works (95%) has been proven by the Plaintiff on a balance of probabilities; and

(2) I reject the Defendant's Alleged 60% Completion (Works).

41. I have not overlooked the Defendant's averment that the Plaintiff did not attend the inspection of the Works on 24.7.2019. The answer to this allegation is obvious - the Plaintiff was entitled to rely on the earlier Joint Inspection (20.6.2019) and contents of SCAN which had been approved by SP1 on behalf of the Defendant on 29.6.2019.

**I. Interpretation of Agreement (1<sup>st</sup> PO)**

42. I reproduce below the relevant parts of the Agreement (1<sup>st</sup> PO):

“

<i>Description</i>	<i>Total RM</i>
<i>Provision of Facility, Manpower, Equipment, Tools and Consumables For the Fabrication and Installation of CCCWS Pipings at TNB, Kenyir</i>	<i>2,630,000.00</i>

...

**PRICE: The total contract price is fixed and firm at RM2,630,000.00 ...**

**TERMS AND CONDITIONS:**

**Payment Terms as follows:**

...

**e) 25% payment to be paid 30 days upon 100% completion of work.”**



(emphasis added).

**I(1). Effect of Milestone (e)**

43. As the Defendant had only paid to the Plaintiff for about 70% of the Works completed by the Plaintiff and in view of the Plaintiff's Completed Works (95%) [please refer to the above Part H(4)], the 1<sup>st</sup> Invoice claimed for a sum of RM624,625.00 [**Sum (1<sup>st</sup> Invoice)**], ie., value of the balance of the Plaintiff's Completed Works (95%) which had yet to be paid by the Defendant to the Plaintiff.
44. Mr. Nadesh has contended that as the Plaintiff did not complete 100% of the Works as required by Milestone (e), the Plaintiff was not entitled to claim for the Sum (1<sup>st</sup> Invoice).
45. My interpretation of Milestone (e) is as follows:
- (1) Milestone (e) did not provide, either expressly or impliedly, that if the Plaintiff had not completed 100% of the Works, the Plaintiff could not claim for the Plaintiff's Completed Works (95%) or any part of the Plaintiff's Completed Works (95%) [which included the Sum (1<sup>st</sup> Invoice)]. In this judgment, I shall refer to this construction of Milestone (e) as the "**1<sup>st</sup> Interpretation [Milestone (e)]**";
  - (2) the 1<sup>st</sup> Interpretation [Milestone (e)] is in consonance with the commercial purpose of a milestone in a construction agreement (**Contractual Milestone**). The commercial objective of a Contractual Milestone, including Milestone (e), is to specify a particular time period for one party (**R**) to pay another party (**S**) when S has



performed a specified stage of construction work [**S's Specified Performance (Works)**].

If S's Specified Performance (Works) had not been achieved due to any reason [**S's Non-Completion (Works)**], S is still entitled to claim from R for actual works which have been performed by S (**S's Actual Works**). If S's Non-Completion (Works) amounts to a breach of the contract between R and S (**S's Contractual Breach**), R can claim for damages from S regarding S's Contractual Breach. Having said that, neither Contractual Milestone [including Milestone (e)] nor S's Contractual Breach can bar S's claim against R for S's Actual Works;

- (3) if the court does not adopt the 1<sup>st</sup> Interpretation [Milestone (e)], a Contractual Milestone, including Milestone (e), can be abused by R to cause an injustice in the following manner -
  - (a) there will be an injustice to S because R can unlawfully evade liability to pay for S's Actual Works; and
  - (b) R will be unjustly enriched by S's Actual Works; and
- (4) in this judgment, I will refer to Mr. Nadesh's interpretation of Milestone (e) as the "**2<sup>nd</sup> Interpretation [Milestone (e)]**". According to the 2<sup>nd</sup> Interpretation [Milestone (e)], the Plaintiff cannot claim for 95% of the Works completed by the Plaintiff merely because the Plaintiff has failed to complete 100% of the Works.

The Agreement (1<sup>st</sup> PO) was drafted by the Defendant. In accordance with the *contra proferentem* rule of construction, if there



is any ambiguity in the Agreement (1<sup>st</sup> PO), the ambiguity should be resolved in favour of the Plaintiff against the Defendant. The *contra proferentem* rule of construction has been applied by Gill FJ (as he then was) in the Federal Court case of **Thambipillai v Borneo Motors (M) Ltd** [1970] 1 MLJ 70, at 72, as follows:

*“The four grounds of appeal were taken together and the points argued by counsel for the appellant are (a) that there is a distinction between "termination of hiring" and "termination of the agreement and the hiring thereby created", (b) that the hire-purchase document, and in particular clause 9 thereof, must be read as a whole, and (c) that if there is any ambiguity in the wording of clause 9 of the agreement it must be construed against the owner on the doctrine of verba cartarum fortius accipiuntur contra proferentem, since it is the owner who frames the agreement and proffers it to the hirer.”*

(emphasis added).

Even if it is assumed that there are two possible interpretations of Milestone (e), namely the 1<sup>st</sup> Interpretation [Milestone (e)] and 2<sup>nd</sup> Interpretation [Milestone (e)], in accordance with the *contra proferentem* rule of construction -

- (a) the court should resolve any ambiguity regarding Milestone (e) in favour of the Plaintiff against the Defendant [who drafted the Agreement (1<sup>st</sup> PO)]; and
- (b) 1<sup>st</sup> Interpretation [Milestone (e)] should be preferred to the 2<sup>nd</sup> Interpretation [Milestone (e)].



46. Premised on the 1<sup>st</sup> Interpretation [Milestone (e)], the Defendant cannot rely on Milestone (e) to resist the Plaintiff's claim for the Sum (1<sup>st</sup> Invoice).

**I(2). Whether court can imply contractual obligation for Defendant to pay for Plaintiff's Completed Works (95%)**

47. In the Federal Court case of **Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong** [1998] 3 MLJ 151, at 169-170, Peh Swee Chin FCJ has explained that the court can imply a term in a contract if the following two tests (**2 Tests**) are resolved cumulatively in favour of the term:

- (1) if an "*officious bystander*" is asked regarding the term, the officious bystander would answer in the affirmative (**Officious Bystander Test**); and
- (2) it is necessary for the term to give business efficacy to the contract (**Business Efficacy Test**).

The application of the 2 Tests in **Sababumi** has been affirmed by the Federal Court in a judgment delivered by Zulkefli Ahmad Makinudin PCA in **See Leong Chye @ Sze Leong Chye & Anor v United Overseas Bank Bhd & another appeal** [2019] 1 MLJ 25, at [74]-[76].

48. I am of the view that there is an implied term in the Agreement (1<sup>st</sup> PO) that the Defendant is obliged to pay for the Plaintiff's Completed Works (95%) (**Defendant's Implied Contractual Obligation**). This view is premised on the cumulative application of the 2 Tests as follows:

- (1) the Officious Bystander Test is satisfied in this case because if an officious bystander is asked whether the Defendant's Implied



Contractual Obligation existed under the Agreement (1<sup>st</sup> PO), the officious bystander would have unhesitatingly answered “*of course*”; and

- (2) the Business Efficacy Test is fulfilled as it is necessary to give business efficacy to the Agreement (1<sup>st</sup> PO) for the Defendant's Implied Contractual Obligation to be implied by court in this case.

**J. Validity of Plaintiff's Demobilization (10.7.2019) and Defendant's Termination (Plaintiff's Appointment)**

49. I find as a fact that the 4 Reasons (Plaintiff's Demobilization) [please refer to the above sub-paragraphs 29(3)(b)(i) to (iv)] are true because the 4 Reasons (Plaintiff's Demobilization) are supported by contemporaneous emails referred to in the above sub-paragraphs 28(1)(a), (2)(a) to (g), (3)(a) and (b).
50. In view of the 4 Reasons (Plaintiff's Demobilization), I am constrained to decide that the Plaintiff's Demobilization (10.7.2019) was valid. Furthermore, the Defendant's Email (10.7.2019) did not even object to the Plaintiff's Demobilization (10.7.2019), let alone allege that the Plaintiff's Demobilization (10.7.2019) was unlawful.
51. As stated in the above paragraphs 49 and 50, the Plaintiff did not abandon Works at the Site on 10.7.2019. In fact, after the Plaintiff's Demobilization (10.7.2019), there was no email or letter from the Defendant to the Plaintiff which alleged that the Plaintiff had abandoned Works at the Site on 10.7.2019 [**Defendant's Averment (Plaintiff's Works Abandonment)**]. Accordingly, it is clear that the Defendant's



Averment (Plaintiff's Works Abandonment) is a mere afterthought to stifle unlawfully the Plaintiff's claim for the Sum (1<sup>st</sup> Invoice).

52. As the Plaintiff's Demobilization (10.7.2019) was lawful, there was no legal basis for the Defendant's Termination (Plaintiff's Appointment). In fact, this court has found as a fact that the contents of the Defendant's Termination (Plaintiff's Appointment) are not true - please refer to the above sub-paragraphs 29(3)(a) to (c). The Defendant's Termination (Plaintiff's Appointment) was indeed contrived to frustrate the Plaintiff's lawful claim for the Sum (1<sup>st</sup> Invoice).

**K. Did Defendant breach Agreement (1<sup>st</sup> PO)?**

53. I am of the view that the Defendant had breached the Defendant's Implied Contractual Obligation (please refer to the above paragraph 48) when the Defendant failed to pay the Sum (1<sup>st</sup> Invoice) to the Plaintiff [Defendant's Breach (1<sup>st</sup> PO)].

**L. Can Defendant recover Defendant's Alleged Overpayment Sum?**

54. In view of the proof of the Plaintiff's Completed Works (95%) [please refer to the above Part H(4)], I cannot allow the Defendant to recover the Defendant's Alleged Overpayment Sum.

**M. Was there Alleged Plaintiff's Delay (Works)?**

55. In the above sub-paragraphs 28(2)(a) to (g), I have referred to various emails which clearly proved that there was no basis for the Alleged Plaintiff's Delay (Works).

**N. Defendant's Alleged Defective Works**





56. With regard to when a party in a construction contract may claim for cost of rectification of defective works, it is decided in **Lianmark Sdn Bhd v Al-Ambia Sdn** [2020] AMEJ 279, at [51], as follows:

*“[51] When a party (S) alleges defective construction works by another party (T), the following steps should be taken by S to ensure that S is able to claim successfully from T regarding the defects:*

*(1) S should give notice to T which should contain the following matters -*

- (a) a list of defects - please refer to Iso Technic Electrical. As explained by Lim Chong Fong JC (as he then was) in the High Court in KC Leong Holdings Sdn Bhd v Datin Moh Bee Ling [2015] 7 MLJ 10, at [64], preferably, S should provide photographs (which contain the dates the photographs are taken) depicting the defects in question; and*
- (b) T should be given a reasonable period of time to remedy the defects [Time Period (Rectification)];*

*(2) if -*

- (a) T fails to rectify the defects; or*
- (b) T's rectification works do not comply with the agreement*

*S has a duty to mitigate S's loss due to the defects (S's Duty To Mitigate) by taking reasonable steps -*

- (i) to appoint “rectification contractors” by eg. calling tenders or alternative quotations - please see KC Leong Holdings, at [65]. Exorbitant rectification contractors should be avoided by S; and*



- (ii) *to ensure that rectification works are done in accordance with the contract (Agreed Works) and should not be an “improvement”, “addition” or “modification” of the Agreed Works (Improvement/Addition/Modification). In other words, S should not exploit the defects by attempting to get an Improvement/Addition/Modification; and*
- (3) *if the rectification works include any Improvement/Addition/Modification, S should make the necessary deduction or adjustment regarding the value of the rectification works to be claimed from T.”*

(emphasis added).

57. I am not able to accept the Defendant’s Alleged Defective Works. This decision is based on the following evidence and reasons:

- (1) the Defendant did not provide in writing to the Plaintiff a list detailing the Defendant’s Alleged Defective Works;
- (2) the Plaintiff was not given a right by the Defendant to rectify the Defendant’s Alleged Defective Works (**Rectification Works**);
- (3) there was no evidence that before the Defendant appointed third party contractors to perform Rectification Works, the Defendant had called for tenders or quotations from prospective third party contractors regarding Rectification Works. It is thus clear that the Defendant had failed to take reasonable steps to mitigate the Defendant’s loss due to the Defendant’s Alleged Defective Works; and



- (4) there was no proof that the Rectification Works did not include any improvement, addition or modification of the Works. It is to be noted that TNB had requested for the 3 Additional Pumps in the Project and such a request had been conveyed by the Defendant to the Plaintiff. In other words, it was probable that the Rectification Works in this case by the Defendant had included the 3 Additional Pumps. Consequently, it would be unjust for the Defendant to counterclaim from the Plaintiff in full for the cost of the Rectification Works.

**O. Whether court can allow Plaintiff's Additional Supply/Works**

58. According to Mr. Nadesh, among others -

- (1) clause (b) under the title "*Tie-In & Commissioning*" in the Agreement (1<sup>st</sup> PO) had provided that the Plaintiff was "*responsible for any modification required during tie-in stage to achieve successful testing and commissioning*" [**Clause (b)**]. In view of Clause (b), the Plaintiff's Additional Supply/Works had no basis; and
- (2) the Defendant did not issue any PO to the Plaintiff with regard to the Plaintiff's Additional Supply/Works. In this regard, the Punchlist could not be a substitute for the Defendant's PO for a variation of the Works.

59. Firstly, all agreements, including the Agreement (1<sup>st</sup> PO), can be varied by mutual consent of the parties - please refer to the judgment of the Supreme Court delivered by Peh Swee Chin FCJ in **Paul Murugesu s/o Ponnusamy (as representative of Nalamah d/o Sangapillay, deceased) v Cheek Teoh Gong & Ors** [1996] 1 MLJ 843, at 853. Indeed, a Bilateral Variation is a manifestation of the parties' freedom to



contract. Consequently, Clause (b) cannot restrain the right of the Plaintiff and Defendant to agree to a Bilateral Variation.

60. Secondly, contrary to Mr. Nadesh's contention, there is no legal requirement that a Bilateral Variation has be in the form of a PO which has to be issued by the Defendant and has to be accepted by the Plaintiff. Contracting parties have a right to a Bilateral Variation in any form as they deem fit.

61. Thirdly, the Plaintiff has the legal and evidential burden to satisfy the court on a balance of probabilities that -

(1) the Plaintiff's Additional Supply/Works did not fall within the scope of the Agreement (1<sup>st</sup> PO); and

(2) both the Plaintiff and Defendant had consented to the Plaintiff's Additional Supply/Works.

62. Fourthly, except for the 3 Additional Pumps, I accept Mr. Nadesh's submission as follows:

(1) the Plaintiff's Additional Supply/Works fell within the scope of the Agreement (1<sup>st</sup> PO); and

(2) there was no evidence that the Defendant had agreed to the Plaintiff's Additional Supply/Works.

63. Fifthly, this court is not satisfied that the Plaintiff has discharged legal and evidential burden to persuade the court regarding the existence of the two matters stated in the above sub-paragraphs 61(1) and (2).



64. With regard to the Plaintiff's Additional Supply/Works, in view of the reasons explained in the above paragraphs 61 to 63, the court can only allow the Plaintiff to claim for the 3 Additional Pumps from the Defendant.
65. Mr. Nadesh has sought to persuade me that in respect of the 3 Additional Pumps, the Plaintiff is only entitled to their cost of fabrication [**Fabrication Cost (3 Additional Pumps)**] and not their installation cost [**Installation Cost (3 Additional Pumps)**]. According to Mr. Nadesh, the 3 Additional Pumps have not been installed in the Site. I cannot accede to this contention because the 3 Additional Pumps had been custom-made by the Plaintiff at the Defendant's request. More importantly, the Installation Cost (3 Additional Pumps) can be recovered by the Plaintiff from the Defendant as follows:
- (1) the Installation Cost (3 Additional Pumps) constituted "*loss or damage caused to [the Plaintiff], which naturally arose in the usual course of things*" from the Defendant's Breach (1<sup>st</sup> PO) as understood in the first limb of s 74(1) CA; and/or
  - (2) both the Plaintiff and Defendant "*knew, when they made the [Agreement (1<sup>st</sup> PO) that the Installation Cost (3 Additional Pumps) would] be likely to result*" from the Defendant's Breach (1<sup>st</sup> PO) within the meaning of the second limb of s 74(1) CA.
66. Premised on the reasons stated in the above paragraph 65, the court awards a sum of RM93,876.00 [**Sum (3 Additional Pumps)**] to be paid by the Defendant to the Plaintiff in respect of the Fabrication Cost (3 Additional Pumps) and Installation Cost (3 Additional Pumps).

**P. Can Plaintiff claim for Plaintiff's Total Loss (Remaining Works)?**



67. I am not able to allow the claim for the Plaintiff's Total Loss (Remaining Works). This was because by reason of the Plaintiff's Demobilization (10.7.2019), the Plaintiff had already mitigated its loss due to the Defendant's Breach (1<sup>st</sup> PO). If this court allows the claim for the Plaintiff's Total Loss (Remaining Works), this will be tantamount to an unjust enrichment of the Plaintiff at the Defendant's expense.

**Q. Whether Defendant can counterclaim for Defendant's Total Loss (Plaintiff's Non-Completion of Works)**

68. This court decides that the Counterclaim for Defendant's Total Loss (Plaintiff's Non-Completion of Works) is untenable due to the following evidence and reasons:

- (1) in view of the documentary evidence referred to in the above subparagraphs 28(2)(a) to (g), the non-completion of the Works [**Non-Completion (Works)**] was not due to the Plaintiff's fault. On the contrary, the Non-Completion (Works) was caused by the Defendant who failed to give instructions for the Plaintiff to complete the Project. Furthermore, there was the Defendant's Delay (Plaintiff's Additional Supply/Works) with regard to the 3 Additional Pumps;
- (2) as explained in the above paragraphs 49 and 50, the Plaintiff's Demobilization (10.7.2019) was lawfully made. Hence, the Plaintiff's Demobilization (10.7.2019) constituted a lawful excuse for the Non-Completion (Works); and
- (3) the Defendant's Termination (Plaintiff's Appointment) was unlawful - please refer to the above paragraph 52.



**R. Is Plaintiff entitled to pre-judgment interest?**

69. Section 11 of Civil Law Act 1956 (**CLA**) and O 42 r 12 RC are reproduced below:

***“s 11 CLA      Power of Courts to award interest on debts and damages***

***In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:***

*Provided that nothing in this section -*

- (a) shall authorize the giving of interest upon interest;*
- (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or*
- (c) shall affect the damages recoverable for the dishonour of a bill of exchange.*

***O 42 r 12 RC      Interest on judgment debts***

***Subject to rule 12A, except when it has been otherwise agreed between the parties, every judgment debt shall carry interest at such rate as the Chief Justice may from time to time determine or at such other rate not exceeding the rate aforesaid as the Court determines, such interest to be calculated from the date of judgment until the judgment is satisfied.”***

(emphasis added).



70. Mr. Nadesh has objected to any pre-judgment interest to be awarded on the Sum (1<sup>st</sup> Invoice) and Sum (3 Additional Pumps) (**Pre-Judgment Interest**). This is because, according to Mr. Nadesh, the Plaintiff's Statement of Claim (**SOC**) had not expressly prayed for Pre-Judgment Interest.
71. In sub-paragraph 31(d) SOC, the Plaintiff had prayed for further relief as the court deems just, appropriate and/or proper (**Plaintiff's General Prayer For Relief**). I am of the view that the court may award Pre-Judgment Interest pursuant to the Plaintiff's General Prayer For Relief. I rely on the following judgment in **Syarikat Faiza Sdn Bhd & Anor v Faiz Rice Sdn Bhd & Anor and another case** [2019] 7 MLJ 175, at [128]:

*"[128] Firstly, the 2 SOC's have prayed for "further and/or other relief" as the court deems fit and proper (General Prayer For Relief). The following appellate cases have decided that the court may grant any remedy in the interest of justice pursuant to a General Prayer For Relief:*

- (1) Salleh Abas FJ's (as he then was) judgment in the Federal Court case of Lim Eng Kay v Jaafar Mohamed Said [1982] CLJ (Rep) 190, at 198;*
- (2) the Court of Appeal's decision delivered by Gopal Sri Ram JCA (as he then was) in Tan Tek Seng @ Tan Chee Meng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771, at 814-815;*
- (3) the majority judgment in the Court of Appeal given by Zainun Ali JCA (as she then was) in Pentadbir Tanah Daerah Pontian & Ors v Ossons Ventures Sdn Bhd [2009] 6 CLJ 713, at 723-724; and*





- (4) ***Abdul Aziz Abd. Rahim JCA's judgment in the Court of Appeal case of Zulkiflee bin SM Anwar Ulhaque & Anor v Arikrishna Apparau & Ors [2014] 3 MLJ 553, at paragraph 64.***

(emphasis added).

72. The court has a discretion pursuant to s 11 CLA to award Pre-Judgment Interest "*at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period ... between the date when the cause of action arose and the date of judgment*" - please refer to the judgment by Raja Azlan Shah FJ (as His Majesty then was) in the Federal Court case of **Lim Kar Bee v Abdul Latif bin Ismail** [1978] 1 MLJ 109, at 120.
73. In the interest of justice, I exercise my discretion under s 11 CLA to grant Pre-Judgment Interest as follows:
- (1) the date on the 1<sup>st</sup> Invoice [in respect of the Sum (1<sup>st</sup> Invoice)] and 3<sup>rd</sup> Invoice [with regard to the Sum (3 Additional Pumps)] was 3.9.2019;
  - (2) according to the 1<sup>st</sup> Invoice and 3<sup>rd</sup> Invoice, the Defendant had 30 days to pay the Sum (1<sup>st</sup> Invoice) and Sum (3 Additional Pumps) from 3.9.2019. As such, the Defendant was obliged to pay to the Plaintiff the Sum (1<sup>st</sup> Invoice) and Sum (3 Additional Pumps) on 4.10.2019; and
  - (3) by reason of s 11 CLA, Pre-Judgment Interest is awarded at the rate of 5% per annum (**pa**) on the Sum (1<sup>st</sup> Invoice) and Sum (3



Additional Pumps) from 4.10.2019 until the date of judgment of this case (**Judgment Date**).

74. By virtue of O 42 r 12 RC, the Defendant shall pay to the Plaintiff interest at the rate of 5% pa on the Sum (1<sup>st</sup> Invoice) and Sum (3 Additional Pumps) from the Judgment Date until full payment of both sums.

**S. Court's decision**

75. Premised on the above evidence and reasons, the following matters are adjudged, among others:

(1) the Original Action is allowed wherein the Defendant shall pay to the Plaintiff the Sum (1<sup>st</sup> Invoice) and Sum (3 Additional Pumps) with interest as stated in the above paragraphs 73 and 74;

(2) the Counterclaim is dismissed; and

(3) the Defendant shall pay to the Plaintiff one set of costs for the Original Action and Counterclaim as the Original Action and Counterclaim are tried together.





**WONG KIAN KHEONG**

Judge

Court of Appeal, Malaysia

Putrajaya

**DATE: 31 JANUARY 2023**

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