Ley Choon Constructions and Engineering Pte Ltd *v* Tan Koon Huee Adrian [2017] SGMC 56

Case Number : MC/Magistrate's Court Suit No 5192 of 2015 (MC/Assessment of Damages No 582 of 2016)

Decision Date : 09 October 2017

Tribunal/Court : Magistrates Court

Coram : Chua Wei Yuan

Counsel Name(s) : Yap Hiang Hwa Michael (JusEquity Law Corporation) for the plaintiff; and Lim Hui Ying (KhattarWong LLP) for the defendant.

Parties : Ley Choon Constructions and Engineering Pte Ltd — Tan Koon Huee Adrian

Damages - Assessment

Civil procedure - Simplified process - Interrogatories

9 October 2017

Judgment reserved.

Deputy Registrar Chua Wei Yuan:

1 This is an assessment of damages in an action concerning property damage caused by a non-injury motor accident, in respect of which interlocutory judgment was entered at 100%.

Facts

2 On 29 May 2013, the defendant's motor car collided into the rear of the plaintiff's truck, which had been parked on the middle lane of an expressway.[note: 1] This damaged a piece of safety equipment mounted on its rear known as a truck-mounted attenuator ("TMA") or a rear anti-crash system. Loosely speaking, it is designed to deform and collapse when a large, fast-moving object (*eg*, a vehicle) collides with it. This way, it attenuates the impact by absorbing the energy of that vehicle, and accordingly mitigates the injuries done to persons in the vehicles involved in the collision.

3 The plaintiff's truck was sent to Lian Hong Seng Motor Works ("the Repairer"),[note: 2] where the damaged TMA was replaced with a brand new one. Repairing the TMA was not viable because the TMA was, as a piece of safety equipment, subject to certification by the Land Transport Authority of Singapore ("LTA") and the LTA would not allow the use of a TMA that had been damaged and subsequently repaired.[note: 3]

4 Prior to repairs, Mr Dennis Yap Teck Wee of PAL's Appraiser Pte Ltd ("the Surveyor") inspected the truck on 1 June 2013.[note: 4] He recommended that $51,830 be charged for the repairs, which should last four days.[note: 5] This sum comprised:

(a) $48,000, being the cost of a new TMA;

(b) $3,800, being the cost to remove and replace the damaged parts, straighten, knock out, realign and repair (including cutting and welding) body panels, and to re-adjust the TMA to its original position ("replacement works"); and

(c) $30, being the cost to remove and refit the electrical wiring, replace the damaged lamps and test their functionality ("electrical works").

The latter two figures had been revised downward from $4,500 and $50, which the Repairer had originally proposed.[note: 6] The repairs were carried out over approximately four days and, on 1 December 2014, the Repairer invoiced the plaintiff for $51,830, being the sum recommended by the Surveyor.[note: 7]

The claim in this action

5 In this action, the plaintiff claimed $53,630, comprising $51,830 being the cost of supplying and installing a new TMA and $1,800 being damages for the loss of use of the TMA or the truck for six days (*ie*, two days for the pre-repair inspections and four days for the repairs).

My decision

6 I will address the issue of the losses flowing from the replacement of the destroyed TMA, and then the issue of the loss flowing from the plaintiff's loss of use of the truck or TMA.

Main issue 1: Loss in replacing the destroyed TMA

7 Before the hearing, there was some confusion as to whether the TMA was repaired or replaced. Mr Tok Cheng Sim (the Repairer's manager), Mr Loh Swee Huat (the plaintiff's representative) and Mr Victor Fong Whye Phoy ("the SJE"), the single joint expert appointed pursuant to O 108 r 5(3)(*a*) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"), clarified in oral evidence that the TMA had been replaced because it had been so badly damaged that the LTA would not have allowed it to be repaired and used again.[note: 8] The hearing thus proceeded on the footing that the actual repairs involved the provision and installation of a new TMA.

Issue 1A: Is the value of the destroyed TMA at the time and place of destruction relevant?

8 The central issue here is the plaintiff's loss when it suffers a constructive total loss of the TMA — a piece of used specialised equipment — for which there was no active market. Specifically, the question is whether the defendant is liable for the *full cost of replacing the destroyed TMA with a new one* or the *value of the TMA at its time and place of destruction*. In my view, the latter (broadly speaking) represents the plaintiff's loss.

9 I will address the plaintiff's main arguments which focused on *precedent* and (to some extent) *principle*, before disposing of a minor argument based on *practice*.

(1a) The plaintiff's argument from precedent/principle: the approach in Singapore

10 Where a chattel is damaged beyond repair, damages are measured by the *replacement cost* of the damaged chattel, which is taken as a *fair approximation of the* ***present market value of the destroyed chattel at the time and place of destruction*** (*Singapore Bus Service (1978) Ltd v Gwee Sok Ai (trading as Chuan Bok Wong Trading* [1996] 3 SLR(R) 307 ("*SBS*") at [15] and [20]). In that case, where a double-decker bus was destroyed and replaced with a new one some time after the accident, the correct approach to determine the replacement cost (and, therefore, the present market value) was to depreciate the cost of a new bus at the time the old one was destroyed on a straight-line basis over the number of years it was in use having regard to the number of years its use was permitted, less the scrap value of the destroyed bus (at [16] and [21]). M Karthigesu JA, delivering the judgment for the Court of Appeal, explained:

> 15 We now turn to the double-decker. The principle is well established. **Where a chattel is damaged beyond repair and there is no market value for such chattel** which is the proper measure for the award of damages **then damages are measured by the replacement cost of the damaged chattel, which is taken as a fair approximation of the market value of the destroyed chattel at the time and place of destruction**. The principle is correctly stated at para 1283 of *McGregor on Damages* (15th Ed) to which the learned judge referred at [11] of her judgment. The question is how such replacement cost is to be determined.
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> 16 It was submitted by both parties and accepted by the learned judge that **in the circumstances of this case it would be correct to depreciate the cost on a straight line basis over the number of years the chattel was in use having regard to the number of years its use was permitted.** We agree. Applying that to this case it was agreed that the permitted or statutory period a public transport vehicle, such as the double-decker, could be used for profit on the roads was 12 years (144 months) and that this double-decker had 46 months of use left. The burning question is whether the cost to be depreciated is the present day cost of a Leyland (later renamed Volvo) Olympian which is $242,135, the make of the double-decker, a Leyland Atlantean having gone out of production or the historical cost of the double-decker which was said to be $170,000.
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> 17 Respondent's counsel sought to persuade us, as he had already persuaded the learned judge below, that there was authority that where there was absence of evidence of market value of the destroyed chattel, the court could rely on the original or historical cost of the destroyed chattel. …
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> …
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> 20 In our judgment there can **be no justification in this case for taking the historical cost of the double-decker**. To do so is to take a price of eight years before the date of accident and this overlooks the fluctuations of currency and the variations in interest rates over the years. It would not be placing the appellants in the same position as they would have been had the double-decker not been destroyed as it would not **allow them to buy a replacement at the prices available at the time of the destruction of the double-decker**, *ie* at 1993 prices. We also see no merit in the learned judge having opted for the historical price of the double-decker on the grounds that the appellants had not placed their order for a new double-decker bus immediately following the destruction of the double-decker but had waited for the outcome of their claim before doing so. This cannot be a material consideration and seems illogical for she says that had the appellants placed the order for a new double-decker bus immediately following the destruction of the double-decker, she would have been inclined to compute the replacement costs on the current price of a new double-decker bus. (See [13] of her judgment.)

21 In the result we disagree with the learned judge and agree with the learned assistant registrar. We would therefore set aside the learned judge's award of $56,666 for this item and reinstate the learned assistant registrar's award of $77,349, that is to say the **depreciated cost of a new double-decker bus and deduct therefrom $500 for the scrap value of the double-decker.**

[emphasis added in bold and underlined bold]

11 Ultimately, market value is but one of many ways that the court seeks to ascertain the ***value* of the chattel at the *time and place* of its destruction**. Even if the *market value* cannot be determined or will be inadequate because of the special or unique nature of the chattel, the court will still to the best of its ability seek to establish or estimate the *value* of the chattel. (*Yip Holdings Pte Ltd v Asia Link Marine Industries Pte Ltd* [2012] 1 SLR 131 ("*Yip Holdings*") at [36]–[41]). In *Yip Holdings*, what was destroyed was a 40-year-old, 150-ton crane, which was no longer in production and whose manufacturer was no longer in business. It would ordinarily have become obsolete when it reached 30 years of age, but it was at that time given a new lease of life through refurbishment. Thus, the court relied on expert opinion corroborated by a *bona fide* offer to arrive at the value of the crane, being the price at which such it could have been sold to third parties if undamaged. Belinda Ang Saw Ean J explained:

Value of the Crane: pre-breach

36 The Crane was manufactured in 1967. It was an old and second-hand crane that was no longer in production as its manufacturers were no longer in business. The market was unable to supply any close replica or suitable replacement of what had been lost. Damages were awarded for the loss of the Crane. In other words, the loss was *prima facie* the value of the Crane. A question for consideration is how is the value of the Crane to be assessed?

37 One way of putting a monetary figure on the value of the chattel is to use "market value". Market value is looked upon as the fairest way to objectively assess the **value of a chattel destroyed at the place and the time of the wrong**. The function of an available market as the basis upon which to determine compensation in damages in a case involving negligent damage to goods was explained by Coleman J in *Derby Resources AG v Blue Corinth Marine Co Ltd* [1998] 2 Lloyd's Rep 410 ("*Derby Resources*"). Colman J's explanation (which is of general application) states (at 416):

> The relevance of an available market in this exercise is thus simply to provide evidence of the monetary value of the goods, both in their sound condition and in their damaged condition.

Thus, in cases where the chattel can be replaced in the market, evidence to assess compensation to the owner for the destroyed or lost chattel is easily available. It is not disputed that expert evidence may be given of the market value of the chattel as it was at the time and place of destruction (see *The Harmonides* [1903] P 1 at 5–6).

38 However, **if the market value cannot be determined or will be inadequate because of the special or unique nature of the chattel, the value of the chattel must still be ascertained**, and the **court has to do the best it can on the available evidence.** This is **because the exercise required to quantify the damages would involve the same objective and principle: the value of the chattel at the time and place of destruction.**

39 I now come to what evidence the court can take into consideration if there is no meaningful market value. The commentary in para 14.11, *Butterworth's Law of Damages* ([13] *supra*) is instructive:

> … [W]here there is otherwise no meaningful market value, the **court must** attempt as best it can to **value what was lost**, or rather to determine **what it was worth to the claimant**. For these purposes the **admissible evidence ranges widely**. Courts have taken into **account original cost less depreciation, evidence of earnings (in the case of a chattel such as a ship), insurance appraisals, bona fide offers, sales of similar chattels or agreed resale prices**.

40 Another suggestion that is instructive is gathered from Coleman J's observations in *Derby Resources* (at 416–417):

> There may be cases where the probative value of market prices at different place or at different dates is weak but where the monetary value of the goods indicated by that evidence can be corroborated by other evidence from the place of delivery at the time of delivery with the result that on the whole of the evidence the court can reach a conclusion. It is, however, important to keep in mind that the purpose of the exercise is to ascertain the **objective monetary value of the goods, not their utility to the receiver in the circumstances peculiar to him**.

41 Finally as stated, the value of the Crane is assessed at the place and time of the wrong. This is the general rule that damages for tort or breach of contract are assessed as at the date of the breach. It is recognised in the cases that such an inquiry may be factually difficult, and should not be applied mechanistically in circumstances where assessment at another date may more accurately reflect the compensatory principle (see *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 WLR 433). Thus, events occurring between the date of damage and the date of trial may fall to be taken into account (see Scrutton LJ in *The Kingsway* [1918] P 344 at 362).

> [emphasis in bold and underlined bold added]

Considering Ang J's comments, and the passage at para 14.11 from *Butterworth's Common Law Series, The Law of Damages* (*Andrew Tettenborn gen ed*) (LexisNexis, 2nd Ed, 2010) ("*Butterworth's Damages*") cited at [39] of her judgment, I reject the plaintiff's submission that *Yip Holdings* is distinguishable on the ground that the court had the advantage of considering a *bona fide* offer in the absence of market value.[note: 9]

(1b) The plaintiff's argument from precedent/principle: whether the English exception applies

12 The English position is broadly similar to the local position. The plaintiff concedes that para 14.11 of *Butterworth's Damages* (albeit an earlier edition) represents the starting point in English law as well.[note: 10] Essentially, where there is no ready market for a used chattel that has been destroyed, the court may use other various methods (including depreciated cost) to determine the *value* of what was lost.

13 Nonetheless, the plaintiff argues that it is entitled to the full cost of replacing a destroyed chattel with a new one. It attempts to distinguish *SBS* and *Yip Holdings* on three grounds, namely, that: (i) the plaintiff intended to and did in fact replace the TMA; (ii) it had no choice but to replace the TMA with a new one; and (iii) there was no active market for a used TMA.[note: 11] In doing so, it seeks to locate this case within what it says is an exception in English law (supposedly demonstrated by three decisions cited to me), to the effect that a plaintiff may recover the full cost of replacing a destroyed chattel with a new one if he intends to do so and if doing so is not unreasonable (presumably, the paradigm case is one where the only way to replace a damaged chattel is to buy a new one).[note: 12] The defendant's riposte, essentially, is the problem of "betterment", of over-compensating the plaintiff by giving new for old.

14 The parties' disagreement is reflected in *Butterworth's Damages* in the following way:[note: 13]

Cost of replacement

14.12 The basic measure of damages for destruction of a chattel, it was suggested above, was its value to the claimant: ie the amount the claimant could have sold it for had he been minded to do so. If, however, the claimant (a) intends to replace the chattel and (b) would not be acting unreasonably in so doing, then it is suggested he can recover the cost of doing so. Take the case, for example, where a classic car is destroyed and an equivalent, or very near equivalent, model can be procured in the market. Here it is suggested that the owner who intends to replace it can recover the cost of doing so. Property held for commercial purposes may be similarly treated: thus when a unique photographic and pictorial archive was destroyed by a flood, the Court of Appeal – admittedly with a little hesitation – gave the owners the cost of replacing it so far as was possible.

14.13 The above example concerns replacement with a second-hand equivalent. But **replacement cost may be available even though the only practical means of replacing the lost asset so is by buying an entirely new one or having an equivalent custom-made. This may happen, for example, with rare or specialised goods such as individually-configured machine tools, for which second-hand substitutes are not readily available.** An instance is *Dominion Mosaics and Tile Co Ltd and another v Trafalgar Trucking Co Ltd*, where printing machines were destroyed by fire. There being no ready market in used machines of the same type, the Court of Appeal awarded the owners the cost of buying in new ones.

14.14 In such a case there may of course be a problem of betterment, in that the claimant ends up with new goods for old. This [is] dealt with … below.

14.15 However, it must be noted that the 'new for old' measure is subject to restrictions similar to the replacement measure. **Firstly, the claimant must genuinely intend to renew: absent such an intent, there is no reason to give him anything more than the market value of what he has lost. Secondly, the decision to reinstate is subject to a test of reasonableness.** As Taylor LJ said in *Dominion Mosaics and Tile Co Ltd and another v Trafalgar Trucking Co Ltd*:

> Where … the only way the owner of destroyed chattels can replace them is by buying new ones, the measure of damages is the cost of doing that, *unless the result would be absurd*.

…

Betterment

14.18 In so far a claimant reasonably replaces a used item with a brand new one, a possibility clearly arises that he may be over-compensated by getting new for old. Normally, this is not regarded as something in respect of which a deduction ought to be made. This is no doubt because the betterment was, as it were, forced on the claimant by the defendant's wrong and the claimant's cash-flow might well be adversely affected were he required to give credit for it in any award. So in the real property case of *Harbutt's Plasticine Ltd v Wanye Tank & Pump Co Ltd*, a Victorian factory was destroyed and had to be rebuilt in a more modern and commodious style which would potentially sell for more. The Court of Appeal refused to make any allowance for the element of betterment.

14.19 It is submitted, however, that **there is one exception to this rule; namely, when the replacement item will last appreciably longer than the old one would have, and there is therefore an inevitable and genuine cost saving when the old one would have expired**. Here the element of betterment can be readily, if crudely, stripped out by taking the likely life of the replacement and then awarding the proportion of its cost represented by the would-be useful life of the item replaced. The point

> arose in *The Baltic Surveyor*, where a pontoon with a useful life of eight years was sunk and would have to be replaced with a new one costing £60,000 and likely to last 30 years. Colman J awarded £16,000, being 8/30 of £60,000, and the Court of Appeal declined to interfere. A similar means of reckoning loss would seem right where (say) a claimant's entire wardrobe is destroyed in a fire and will have to be replaced new. **Awarding the claimant the cost of doing this, suitably discounted, seems much fairer than giving him a free sartorial make-over courtesy of the defendant's insurers on the one hand, or limiting him to the negligible second-hand value of his old clothes on the other.**
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> [emphasis added in bold]

15 In brief, my view is that the grounds on which the plaintiff seeks to distinguish *SBS* and *Yip Holdings* are either legally irrelevant or factually untrue and, correspondingly, that the three English decisions represent principles that are factually distinguishable and, to the extent that they are not, are either inconsistent in principle with *SBS* and *Yip Holdings (ie,* decisions that bind me) or unpersuasive and should therefore not be followed here. I now address these points in detail.

(I) The "replacement" measure as an exception to the usual "value" measure

16 This point does not turn my decision, but I observe that the requirement that the plaintiff must have an "intention to renew" (also the first ground on which the plaintiff sought to distinguish *SBS* and *Yip Holdings*) seems thinly supported in authority. In *SBS* (cited above at [10]), the model of the bus destroyed had gone out of production and there was no evidence that a second-hand replacement (whether of the old model or a new model) was available. Yet, the plaintiff received damages based on the depreciated cost of the bus (as opposed to the full cost) despite having replaced the destroyed bus with a brand new one. The appellate court clarified at [20] that it was irrelevant that the plaintiff chose to replace the bus after the outcome of the claim rather than immediately following the accident. In contrast, in *Dominion Mosaics and Tile Co Ltd and another v Trafalgar Trucking Co Ltd and another* [1990] 2 All ER 246 ("*Dominion Mosaics*"), the comment of Taylor LJ (with whom Stocker and Fox LJJ agreed) at 255A, that the plaintiff had no obligation in principle to deploy damages awarded for loss of a chattel in replacing it, suggests that the lack of intent might not have precluded the plaintiff from recovering the full cost of replacing old with new. The plaintiff's intent or decision to renew therefore seems to be irrelevant to whether the plaintiff is entitled to claim the cost of replacing the old TMA with a new one.

17 More important are the second and third grounds on which the plaintiff sought to distinguish *SBS* and *Yip Holdings*. They are evidential and *in substance* describe the same situation, namely, that the plaintiff supposedly had to replace the TMA with a new one because there was no active market for a second-hand TMA. However, I find that this was not the case. In my view, the fact that there was no *active* market for a second-hand did not necessarily mean that the plaintiff had no choice but to replace the TMA with a new one. In this case, the SJE explained that there was a market for second-hand TMAs, albeit an *ad hoc* one.[note: 14] Although the SJE said that it *might not* be cost-effective to bring a second-hand TMA from the international market,[note: 15] he never said that second-hand TMAs could not be sourced from the local market and nothing else makes me think this way either. Also, the SJE neither said that importing a second-hand TMA was *necessarily* cost-ineffective, nor opined on when and to what extent it would be make more economic sense to replace a TMA with a brand new one instead of a used one. The plaintiff further highlights that the LTA would not permit the use of a TMA that had been damaged and later repaired,[note: 16] presumably to emphasise the point that it could not have bought a second-hand TMA. However, nothing suggests that the LTA prohibits the use of second-hand but otherwise *undamaged* TMAs. Accordingly, I proceed on the basis that the plaintiff could have gotten a second-hand TMA from an *ad hoc* market, whether local or international.

18 Correspondingly, the three English decisions cited to me may be distinguished on the basis that that the plaintiff in those cases had no choice (or, in the words of Cross LJ in the first of these cases, no choice "*in practice*") but to replace the thing destroyed with a new one. Another basis on which to distinguish these decisions

was suggested by Rix LJ (with whom Lady Hale and Schiemann LJ agreed) in *Voaden v Champion, The "Baltic Surveyor" and "Timbuktu"* [2002] 1 Lloyd's Rep 623 ("*Baltic Surveyor (CA)*") at [85] — that in each case the betterment conferred no corresponding advantage on the plaintiff. Here, replacing a used TMA with a new one means that the plaintiff would enjoy the advantage of deferring the time that the TMA is to be renewed. With these two bases in mind, I turn to address the three decisions.

19 The **first** decision is *Harbutt's "Plasticine" Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447 ("*Harbutt's Plasticine*"). There, the plaintiff factory owner was awarded the full cost of the new factory that he had to build, after the defendant's negligence had caused his old factory to be burned to the ground. However, I accept the defendant's submission that the court drew a critical distinction between the destruction of a chattel and the destruction of a building, on the premise that the plaintiff could buy a second-hand chattel but would have no (practical) choice but to rebuild a new building from scratch.[note: 17] This was a finding of *fact*. Indeed, I think it would be absurd to speak of erecting a second-hand building. I also tend to agree with the observation that buildings "are such potentially long-lived objects that the mere newness of a building may be entirely by the way" (*Baltic Surveyor (CA)* at [85] *per* Rix LJ) and the betterment, therefore, conferred no real corresponding advantage on the plaintiff — it was not the case that the plaintiffs had, for example, improved the new building through extra accommodation. Lord Denning MR explained at 467F–468C:

> *Replacement or Indemnity*
>
> A question was raised on the measure of damages. The plasticine company were not allowed to rebuild the old mill (which was five storeys high) for use as a factory. They had to put up a new factory of two storeys. But it had no more accommodation. Are they entitled to the actual cost of replacement? Or are they limited to the difference in value of the old mill before and after the fire?
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> …
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> The defendants said it should be the difference in value before and after the fire, relying on *Philips v. Ward* [1956] 1 W.L.R. 471. The plaintiffs said it should be the cost of replacement, relying on *Hollebone v. Midhurst & Fernhurst Builders Ltd*. [1968] 1 Lloyd's Rep. 38.
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> *The* ***destruction of a building is different from the destruction of a chattel*** . If a second-hand car is destroyed, the owner only gets its value; because he can go into the market and get another second-hand car to replace it. He cannot charge the other party with the cost of replacing it with a new car. But when this mill was destroyed, *the* ***plasticine company had no choice****. They were bound to replace it as soon as they could, not only to keep their business going, but also to mitigate the loss of profit* (for which they would be able to charge the defendants). ***They replaced it in the only possible way, without adding any extras.*** I think they should be allowed the cost of replacement. True it is that *they got new for old; but I do not think the wrongdoer can diminish the claim on that account.* ***If they had added extra accommodation or made extra improvements, they would have to give credit. But that is not this case.*** I think the judge was right on this point.
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> [emphasis added in italics and bold italics]

Widgery LJ held at 472H–473D:

> I must now turn to the issues raised as to the measure of damage. The distinction between those cases in which the measure of damage is the cost of repair of the damaged article, and those in which it is the diminution in value of the article, is not clearly defined. In my opinion *each case depends on its own facts*, it being remembered, first, that *the purpose of the award of damages is to restore the plaintiff to his position*

> *before the loss occurred*, and secondly, that *the plaintiff must act reasonably to mitigate his loss*. If the article damaged is a motor car of popular make, the plaintiff cannot charge the defendant with the cost of repair when it is cheaper to buy a similar car on the market. On the other hand, if no substitute for the damaged article is available and no reasonable alternative can be provided, the plaintiff should be entitled to the cost of repair. *It was clear in the present case that it was reasonable for the plaintiffs to rebuild their factory, because* ***there was no other way in which they could carry on their business and retain their labour force****. The plaintiffs rebuilt their factory to a substantially different design, and* ***if this had involved expenditure beyond the cost of replacing the old, the difference might not have been recoverable, but there is no suggestion of this here****. Nor do I accept that the plaintiffs must give* ***credit under the heading of "betterment"*** *for the fact that their new factory is modern in design and materials. To do so* ***would be the equivalent of forcing the plaintiffs to invest their money in the modernising of their plant*** *which might be highly inconvenient for them.* Accordingly I agree with the sum allowed by the trial judge as the cost of replacement. [emphasis added in italics and bold italics]

Cross LJ held at 475F–476C:

> The third question to be determined is the measure of damages. The judge awarded the plaintiffs £146,581 made up of (a) cost of reinstatement of the building £67,973 … (c) plant and machinery £40,284 … the defendants say, truly, that the plaintiffs in rebuilding and reequipping their factory departed widely from the old lay-out and claim that a sum should be deducted from items (a) and (c) for what they describe as "betterment." In this connection they rely on the figures of £42,538 for the building and £35,923 for plant and machinery which were apparently agreed by the insurers as representing the value of these items immediately before the fire. If one were to take these figures, then the total would be £116,785, not £146,581; but in my judgment the value of the building and of the plant and machinery before the fire throws no light on the true measure of damage in a case like this where *it was obviously right for the plaintiffs to rebuild and re-equip their factory and start business again as soon as possible*. Further, I do not think that the defendants are entitled to claim any deduction from the actual cost of rebuilding and re-equipping simply on the ground that the plaintiffs have got new for old. ***It is not in practice possible to rebuild and re-equip a factory with old and worn materials and plant corresponding to what was there before****, and such benefit as the plaintiffs may get by having a new building and new plant in place of an old building and old plant is something in respect of which the defendants are not, as I see it, entitled to any allowance*. I can well understand that ***if the plaintiffs in rebuilding the factory with a different and more convenient lay-out had spent more money than they would have spent had they rebuilt it according to the old plan, the defendants would have been entitled to claim that the excess should be deducted in calculating the damages****.* ***But the defendants did not call any evidence to make out a case of betterment on these lines*** *and we were told that in fact the planning authorities would not have allowed the factory to be rebuilt on the old lines*. Accordingly, in my judgment, the capital sum awarded by the judge was right. [emphasis added in italics and bold italics]

20 The **next** decision is *Bacon v Cooper (Metals) Ltd* [1982] 1 All ER 397 ("*Bacon*"). The plaintiff acquired on hire-purchase a scrap metal fragmentiser containing a rotor which, if properly maintained, would last seven years on average. However, the defendant sent the plaintiff a consignment of steel that did not conform to specifications. That caused the rotor, then 3¼ years old, to be damaged beyond repair. To continue its business, the plaintiff obtained a new rotor under a further hire-purchase arrangement at a high interest rate. The court awarded damages based on the full cost of the rotor. However, this case is distinguishable ***first*** on the ground that the court made a finding of *fact* that it was impossible to obtain a second-hand rotor. And, ***secondly (and relatedly)***, the court in *Bacon* thought that buying a new rotor was justifiable on the basis that the case was best characterised as involving the repair of a chattel that required a new part. Cases characterised as involving the repair of chattels have been treated as one *exception* to the general rule that a deduction be given on account of betterment (see, *eg*, *The Gazelle* (1844) 2 Wm Rob (Adm) 279 ("*The Gazelle*"), *The Pactolus* (1856) Sw 173, *Liverpool, Brazil and River Plate Steam Navigation Co Ltd v Benham, The Halley* (1868) LR 2 PC 193, *The Bernina (No 3)* (1886) 6 AspMC 5, *The Star of India* (1876) 1 PD 466 at 471). Indeed, as Rix LJ observed in *Baltic Surveyor (CA)* at [85], when replacing a machine part, "the betterment is likely to be purely nominal: for unless it can be posited that the

machine will outlast the life left in the damaged part just before it was damaged, the betterment gives the claimant no advantage; and in most cases any such benefit is likely to be entirely speculative". The result in *Bacon* may have been justifiable along these lines because the plaintiff — in fact, the industry — would have been less than likely to continue using the fragmentiser beyond that time. In this regard, the court went to the extent of citing the *defendant's director's* disapproval of the fragmentiser. Presumably, the court thought that the rotor would be worthless at the end of this 3¾ years (as would the fragmentiser) and a plaintiff could not reasonably have been expected to sell it off to recover part of the purchase price. Cantley J explained at 400D–402A:

> I deal next with the cost of the replacement rotor. The defendants say that they ought not to be made to pay the whole cost of that. A rotor wears out in the end and has to be replaced. How long it lasts depends on the extent to which it is used and also on the amount and quality of regular maintenance which is done on it. I accept, as did the defendants' witnesses, that a rotor used and maintained as the plaintiff used and maintained his would last for 7 years, after which it would have to be replaced for the fragmentiser to work efficiently. The rotor which had been smashed in the accident had been in use for 3¼ years and had an expectation of 3¾ years of further useful life.
>
> Counsel for the defendants, in his attractive argument, submitted that the new rotor would have a useful life of 7 years and therefore the plaintiff ought to give credit for 3¼ extra years of rotor life. Taking the total capital cost of £41,500 and a useful life of 7 years, the proportionate value of 3¼ years is £19,268 and counsel says that amount ought to be deducted from the plaintiff's claim, leaving the defendants to pay the balance of £22,232.
>
> Counsel for the plaintiff contends that the plaintiff is entitled to the whole £41,500 which it was necessary to spend in order to put the fragmentiser back into working order. He relies on the decision in [*Harbutt's Plasticine*]. Counsel for the defendants says that that was a case about the replacement of a building and the present case is about the replacement of a chattel which is a wasting asset. That may be so, although I think ***it is more correct to describe this case as a case about the repair of a chattel****, namely a fragmentiser, the repair* ***necessarily involving****, as repairs often do*, ***the incorporation of a new part***. Counsel for the defendants says that, if counsel's submission for the plaintiff is correct, the defendants would be liable for the cost of a new rotor even if the damaged one had had only a few days of remaining useful life. He says that that would be an absurd result. I think it would be. *The application of any general principle is inappropriate at the point where it would produce an absurdity. Each case should depend on its own facts.* What are the facts here? But for the defendants' breach of contract, the plaintiff would not have had to lay out any money at all on buying a new rotor for nearly four years. At the expiration of that time he might reasonably be expected to have to buy a new one on hire purchase. It is not, of course, a complete certainty that he would buy a new one because all sorts of things might happen by the end of 1983. One can speculate on what might then have happened if there had been no accident. At the end of 3¾ years this early type of fragmentiser may be out of date and superseded by a machine or process which is more efficient and profitable. The plaintiff, who will long ago have paid off his original hire-purchase agreement for the fragmentiser, might decide to change the machine, or the process, for producing scrap for steelmakers, particularly if he is faced with the heavy cost of a new rotor. Fragmentisers have only been use in this country since 1975 and already there have been some modifications.
>
> Mr Wallace, the defendants' commercial director, thoroughly disapproves of this type of fragmentiser. He says it is self-destructive and not an economic proposition. He told me that already a new system is being developed which makes the scrap metal extremely brittle before it is put into a machine to be broken up. There are other possibilities, of course, because life is uncertain. At the expiration of 3¾ years the plaintiff might radically change the nature of his scrap metal business, or start a completely different business, or retire from business altogether, or he might die, but, whatever it is supposed might otherwise happen in 1983, ***the plaintiff****, even though he may continue to use his present fragmentiser for seven years or more*,

> ***is bound, if counsel for the defendants is correct, to incur the financial burden of spending £19,268 now, from his own strained resources and without recourse to the defendants who caused this very considerable burden to fall on him***.
>
> In his argument counsel for the defendants assumed that at the end of 3¾ years the plaintiff would have entered into a new hire-purchase agreement to purchase a new rotor, and I think that is a reasonable assumption on the basis that the plaintiff would continue to operate this fragmentiser after that period, for he has not much ready money to spare. Entering into the new and burdensome hire-purchase agreement at the end of 1983 is very different from having to pay out £19,268 years before he would have to pay anything at all. It is not the plaintiff's fault that he had to buy a new rotor for his machine; it is entirely the fault of the defendants. *When they suddenly put him in that situation* ***there was nothing else he could do. He could not have gone out and bought a rotor with only 3¾ years of life; it had to be a new one.***
>
> …
>
> In my view the law will not place this burden on the plaintiff to relieve the defendants from some of the unavoidable consequences of their wrong. I consider the plaintiff is entitled to recover the whole cost of the replacement rotor. …
>
> [emphasis added in italics and bold italics]

The present case is, in my view, different; it should be characterised as one involving the *replacement* of a destroyed chattel in itself (rather than a *repair*). Unlike *Bacon*, I consider that the plaintiff here could have replaced the damaged TMA with a second-hand TMA. To be sure, I regard it as immaterial that the TMA must be mounted on the rear of a truck to serve its intended purpose. Many computer parts or peripherals, for example, are frequently traded second-hand even though they serve their intended function only when connected to a computer or processing unit. In this way, the TMA in my judgment bears a closer analogy to a distinct piece of equipment (or, at the least, a computer part or peripheral) than a rotor in a fragmentiser.

21 The **final** decision is *Dominion Mosaics*. One issue engaged by the Court was the appropriate measure of damages for machinery destroyed by fire, but which was ultimately not replaced by the plaintiffs. The Court of Appeal awarded the plaintiff damages in the sum of the full value of machinery that would have been brand new. It held that the judge below was wrong to have taken account of the fact that the plaintiffs had not replaced the machines by the date of trial. ***First***, the case turned on a point of evidence rather than a general point of law that the measure of loss for a destroyed chattel should be the cost of a new replacement.[note: 18] It is clear from the speech of Taylor LJ's (with whom Stocker and Fox LJJ agreed) that the reason that the full value (as opposed to the depreciated value) of the machinery was awarded was the *lack of submissions and evidence from the parties* rather than a matter of principle. Had such submissions been placed before the court, it would have "merited consideration". That is not the situation in the present case, in which expert opinion has been introduced on the value of the TMA at the time and place of its destruction and in which submissions have been made. ***Secondly***, and in any event, the Court found that the *only* way to replace the damaged machinery was to buy new ones. ***Further***, any betterment from replacing the damaged machinery with new machinery would presumably have been nominal given that the machines "were nearly new" (see *Baltic Surveyor (CA)* at [89] *per* Rix LJ). Taylor LJ explained at 254J–255G:

> … counsel for the respondents submits the judge was wrong to take account of the fact that the respondents had not replaced the machines even by the date of the trial. Their evidence that they would have done had they been in funds was expressly accepted by the judge. In any event, there is no obligation in principle on a plaintiff to deploy damages awarded for loss of a chattel in replacing it. He is free to do whatever he wishes with his damages.

In my judgment, both of counsel's criticisms of the judge's approach are well founded in principle. He began, in the passage I have quoted, by accepting that the starting point was the replacement value, which he had already accepted in his judgment was £65,000. He then rightly directed himself that the full replacement value should not be awarded if it would result in absurdity, giving the example of a machine on its last legs. This was not, as he observed, such a case. **The machines were nearly new (not very old)**. However, the judge then said that the machines 'were certainly worth no more than that [ie £13,500] when they were destroyed…' and proceeded to award that figure. For my part I do not follow why they were worth no more than this unique bargain price, despite being only about six months' old and despite replacement cost being £65,000, which the judge accepted was the starting point.

Counsel's arguments both before the judge and before us were based solely on the alternative awards of £13,500 or £65,000. No intermediate figure was canvassed. ***It was not suggested by the appellants, either in evidence or by submission, that there was any secondhand source of paternoster machines. The respondents' evidence was that no such source existed to their knowledge.*** **Where this is the case and the *only* way the owner of destroyed chattels can replace them is by buying new ones , the measure of damages is the cost of doing that, unless the result would be absurd** (see 12 Halsbury's Laws (4th edn) para 1163: '…the cost of replacement in an available market…' and *Bacon v Cooper (Metals) Ltd* [1982] 1 All ER 397).

Accordingly the proper figure here was prima facie £65,000. The judge himself accepted that as (in his phrase) 'the starting point'. That figure could not, in regard to such recently new machines, be called absurd as in the example given in *Bacon's* case.

Had it been argued that in fairness to the appellants some discount from £65,000 should have been allowed to reflect the depreciation of the machines in their few months of service, the point would have merited consideration. **But no such submission was made, nor was there any evidence on which to base an appropriate assessment of an appropriate discount. In these circumstances I consider that, of the two alternatives contended for, £65,000 was the proper sum.**

I would accordingly vary the judge's award to the respondents under this head of damage by substituting that figure for the figure of £13,500. It follows that there must also be an adjustment in the award of interest made by the judge. In these respects I would allow the cross-appeal.

[emphasis added in bold and bold italics]

(II) The problem of "forced investment"

22 The judgments in *Bacon* (and *Harbutt's Plasticine*) present a further difficulty. They throw the problem arising from betterment — I will call it "forced investment" — into particularly sharp relief. It appears important to the court's decision in *Bacon* that the plaintiff would have had to spend £41,500 (instead of just the depreciated cost of £22,232) for a replacement rotor to make the fragmentiser operable, approximately 3¾ years before it would have had to spend anything at all. If the court had ordered damages based on depreciated cost, the plaintiff would have been made to contribute an extra £19,268 towards the cost of the replacement. Similarly, in *Harbutt's Plasticine* at 473C, Widgery LJ stated that giving credit under the heading of "betterment" would be tantamount to forcing the plaintiffs to invest their money in modernising their plant. Indeed, as early as in *The Gazelle* at 281, the court held that the defendant was bound to make restitution "without calling upon the party injured to assist him in any way whatsoever". The plaintiff makes a similar point: to give a deduction on account of betterment is to force the plaintiff to contribute to the cost of a new TMA.[note: 19]

23 This submission seems forceful, but I ultimately cannot accept it.

24 ***First***, this objection fails as a matter of fact because that the plaintiff *could have* gotten a second-hand TMA from an *ad hoc* market (as discussed above at [17]). The plaintiff was not forced to invest in a new TMA. However, I will continue the analysis on the assumption that it was reasonable for the plaintiff to have bought a new TMA instead of a used one.

25 ***Next***, as a matter of authority, the conclusion in *SBS* contradicts the proposition that, as a general principle, a plaintiff who is made to invest a sum of money in replacing a destroyed chattel with a new chattel is entitled to that full sum. Although the judgment in *SBS* does not show that this argument was made, the court agreed with both parties' position that damages should be based on the depreciated cost of the bus even though a new bus had been bought. Accordingly, I consider that I am bound not to recognise such a principle.

26 But, in the first place, the English decisions do not speak with one voice; *Bacon* appears to be the exception rather than the norm. In *Voaden v Champion, The "Baltic Surveyor" and "Timbuktu"* [2001] 1 Lloyd's Rep 739, a pontoon with a remaining life expectancy of 8 years was sunk and had to be replaced with a new one deemed to have had a 30-year useful life. Colman J awarded damages at 8/30 of the price of the new pontoon and the Court of Appeal upheld the award. In particular, Colman J held at [106] that where there was no market value for an old chattel, "the relevant notional value may have to be arrived at by inference and extrapolation from the value of similar new [chattels]" and the Court of Appeal agreed (*Baltic Surveyor (CA)* at [89]). I find it difficult to understand why the court discounted the award on account of betterment, if the core of the supposed principle is that it was *necessary* for the plaintiff to spend a certain amount towards replacing the thing destroyed in the *only* way possible. If there were no second-hand pontoons available and the only available pontoon had a 30-year useful life, then this principle should have entitled the plaintiff in *Baltic Surveyor* to the full price of replacement. I fail to see the distinction in *principle* between *Baltic Surveyor* and *Bacon*; the only way the divergent results in these two cases can be understood is to distinguish *Bacon* on the bases proposed above at [20]. In fact, *Butterworth's Damages* even remarked that the "older case of [*Bacon*], where Cantley J awarded the cost of replacement and entirely disregarded the relative lives of new and old, must (it is submitted) be regarded as doubtful" (at para 14.20, n 1). In the same vein, they commented that there was also no reason to treat the "repair" cases involving replacement parts (cited above at [20]) any differently from the cases involving replacement of destroyed parts (at para 14.57, n 2).

27 ***Third*** and in any further event, even as a matter of principle, the loss inflicted upon a plaintiff made to spend money in advance is not the loss of *money*; it is the loss of *use of money*. Thus, the plaintiff would be entitled *not* to the difference between the full cost and the depreciated cost of the new chattel, but simply the cost of losing interest on (or borrowing) that sum for the duration for which the plaintiff otherwise would not have had to spend it. *SBS* appears silent on whether a plaintiff suffers a loss by being compelled to spend money earlier than it would have to and I consider that, in principle, an award on this basis will address the problem of "forced investment" in a new chattel. Alternatively, where the plaintiff not unreasonably replaces a destroyed chattel with a second-hand from an *ad hoc* market, it might incur transaction costs (as understood by the field of economics) in the sense that it may have to locate a willing seller, offer a premium to persuade him to sell the used chattel, and (in the case of a TMA) arrange for the TMA to be transported and mounted onto its vehicle. This would justify an award that may otherwise appear overly large when compared with the depreciated cost of a new chattel.

28 On such an analysis, the ordinary legal response in *Bacon* should *not* have been to add the full £19,268 to the amount of damages awarded. It should have been to add the cost of spending that sum 3¾ years in advance (in other words, the *cost of losing interest on (or borrowing)* £19,268 *for 3¾ years*). Otherwise, the defendant would be overcompensated; it would apparently still have something notionally worth £19,268 in another 3¾ years' time. But, as explained above at [20], the result in *Bacon* is justifiable on its special facts. Similarly, the result in *Harbutt's Plasticine* would be justifiable on the basis that what was destroyed was not a chattel with a

limited lifespan but a building with a long — perhaps even indefinite — lifespan, and it would not have been meaningful to speak in terms of the loss of *use of money* for an indefinite period. The minimum possible legal response, therefore, would have been to award the plaintiff the full cost of erecting a new building.

29 The situation here is quite different; there is no suggestion that TMAs are falling out of use and would therefore soon become worthless. Neither does a TMA have an indefinite lifespan. The plaintiff would either enjoy cost savings in the sense it can defer the time the TMA is due for renewal, or be able to recover a substantial part of its purchase price (*ie*, more than scrap value) should it sell the TMA before it has reached the end of its useful life. Even if the truck on which the TMA is due to expire before the TMA, the TMA can be re-mounted on another truck (although this never happened because the TMA was damaged again not long after – more on this below). The facts do not justify awarding the plaintiff the full cost of replacing the destroyed TMA with a new one. I make no adjustment to the award on account of transaction costs because the plaintiff chose to replace the destroyed TMA with a new one. But, neither would I make any award on account of loss of use of money because the plaintiff makes no claim under such a heading.

30 In summary, I take the view that the three English decisions cited to me (*Harbutt's Plasticine*, *Bacon* and *Dominion Mosaics*) do *not* establish an exception in English law that the plaintiff is generally entitled to the full cost of replacing a destroyed chattel with a new one if the plaintiff not unreasonably does so or intends to do so. That position is not only unsatisfactory in principle but also inconsistent with the position in *SBS* (which binds me), *Baltic Surveyor (CA)* and Taylor LJ's dicta in *Dominion Mosaics*. At best, the results in these three cases are justifiable on the facts (in particular, on the bases that in each case the plaintiff had no choice but to buy a new one and (as suggested by Rix LJ in *Baltic Surveyor (CA)*) that any betterment in those cases was nominal) or on the state of the evidence and submissions before the respective courts. However, I reject the grounds on which the plaintiff sought to distinguish this case from *SBS* and *Yip Holdings* (namely, that the lack of an active market gave the plaintiff no choice but to buy a new TMA) because there is no evidence that second-hand TMAs were completely unavailable. Nor did the betterment confer it a merely nominal advantage.

(2) The plaintiff's argument from "practice"

31 I now briefly dispose of the plaintiff's last argument that, in the case of some other accidents involving trucks mounted with TMAs, the matters were settled with the potential defendant paying the full price on what appears to be a quotation from a workshop (the title reads "Estimate Repair Cost"). If the settlement had been based on the depreciated price, then it would have been stated in the invoice.[note: 20] The plaintiff relies on an excerpt of the SJE's testimony as follows:

> Ct: [The quotation at] BA111 is [an] estimate?
>
> Witness: BA111 was invoiced for the same price and settled.

32 This argument has no merit. ***First***, it is difficult to conclude from the SJE's testimony that the matter was settled *at the invoice price*. The SJE simply said "settled" instead of, for example, "settled at that price". Also, depreciation would not have been reflected in the quotation or invoice, because that is what the *workshop* charges a plaintiff for the repairs it has done whereas depreciation arises in the settlement between plaintiff and *defendant* on account of the betterment that the plaintiff enjoys. The plaintiff submits that depreciation would be stated in the invoice as a matter of "commercial practice"[note: 21] but I see no evidence of this. ***Second***, the sum paid by a (potential) defendant in settlement of an action may have been arrived at by considerations other than his legal liability should the matter have come to court; generally the court neither is privy to nor interferes with this. I therefore see no reason to award the plaintiff the full cost of replacement on account of how other actions appear to have been settled.

33 Ultimately, I consider that the plaintiff is entitled to recover only the ***value of the TMA at its time and place of destruction***, which is to be assessed by reference to its depreciated cost. I now turn to the method with which the value of the TMA at the time and place of its destruction determined is calculated.

Issue 1B: How is the value of the TMA at the time and place of its destruction determined?

34 The SJE, who was appointed on 13 July 2016, was unable to conduct a physical re-inspection of the truck as the plaintiff had sold it for $3,500 on 13 January 2016.[note: 22] His view was essentially that the value of the TMA should be calculated on the basis of its depreciated value.

35 In his opinion, $48,000 far exceeded the price that should have been charged for providing and installing a similar TMA, which would have been around $40,000.[note: 23] The value of the plaintiff's TMA at the time of the incident would be $16,500, being the cost of an attenuator costing $40,000 having depreciated (on a straight-line basis) by 50% (*ie*, $20,000), less the scrap value of $3,500 derived from the sale of the *truck* which could defray the loss.[note: 24] The depreciation of 50% was an assumption by the SJE, chosen as the midpoint between 0% and 100% because the plaintiff did not disclose the serial number and year of manufacture of the damaged TMA.[note: 25] The SJE also opined that an additional $2,000 was an appropriate sum for the replacement works, being the prevailing market rate for dismounting the damaged attenuator from the truck; the works were restricted to dismounting the damaged TMA and fitting the new TMA, and would not include repair works to a damaged TMA.[note: 26] Finally, nothing should be charged for the electrical works, as the TMA should be replaced rather than repaired.[note: 27] In support of his opinion on the cost of a TMA and of replacement works, he produced three other quotations or invoices for similar repairs, which I will mention at the relevant juncture. In sum, the SJE opined that the plaintiff's loss was $18,500.

(1) Whether the SJE correctly understood the scope of the Repairer's work

36 The defendant generally urged me to accept the SJE's method of calculating the depreciated cost and assess the plaintiff's loss at $18,500, while the plaintiff made no submission on *how* depreciated cost was to be calculated. Its submission was that the SJE should not have calculated depreciated cost[note: 28] (this I have rejected above) and that his calculations were unhelpful because he had misunderstood the scope of the Repairer's work and had used the words "repair" and "replace" interchangeably.[note: 29]

37 The SJE explained that "replacement" meant substituting an entire piece of equipment for another, whereas "repair" meant part-by-part substitution.[note: 30] The SJE may not have been clear as to whether he understood the Repairer's invoice for $51,830 to mean "repair" works or "replacement" works. He said that the TMA had been damaged "beyond economic repair" because the cost of purported rectification works far exceeded the price to supply and install a new one.[note: 31] Yet, he tried to say that he took $51,830 to pertain to the cost of replacement.[note: 32] However, the confusion appears to have stemmed from the fact that the claim as pleaded was for repair costs , and that the Surveyor's estimate (which included the cost of electrical works and replacement works described at [4(b)] and [4(c)] above) and description of the works were more consistent with a repair than a replacement. Otherwise, there would be no need to perform electrical works or to "straighten, knock out, realign and repair" body panels.

38 However, these doubts are immaterial. The SJE clearly thought that *if repairs* cost $51,830, the TMA would not have been worth repairing (and should have been replaced with a new one)[note: 33] whereas *if a replacement* cost $51,830, it would have been overpriced.[note: 34] In either case, the SJE said that the TMA should have been replaced with a new one for $40,000. Save for the price, that was precisely what the Repairer did.

(2) The method of computation

39 I turn to the method of computation. There are two features of the SJE's calculations that are problematic and which I cannot accept.

40 The ***first*** is that the sale value (or scrap value) of the *truck* (*ie*, $3,500) was set off against the value of the *TMA*. I disagree with this because this does not reflect the value of the TMA. The defendant conceded for essentially the same reason that the SJE's calculation could be modified on this point. In this regard, I will instead use the scrap value of the *TMA* in my calculations.

41 The ***second*** is the SJE's method of computing the depreciated value of the TMA and subtracting the scrap value of the truck. The depreciated value of the TMA was based on the notional *cost price* (and not just the *depreciable value*) and therefore would have included the scrap value. To then subtract the scrap value from such a depreciated cost is to partially double-count the scrap value and therefore undervalue the TMA on the basis of the purchase price. This could even lead to absurd results — consider, for example, a chattel costing $10,000 and having a remaining useful life of 2 out of 10 years and a scrap value of $3,000. According to the SJE's formula, the defendant would be liable for a *negative* sum calculated as follows:

	$	$
Value of chattel		
Cost	10,000	
Less: Depreciation (8/10 × $10,000)	(8,000)	2,000
Less: Scrap value		(3,000)
Value of chattel		**(1,000)**

This result must be wrong. Since the scrap value may be recovered by a plaintiff acting reasonably, it is not part of the loss for which the defendant is liable.

42 The plaintiff's compensable loss should therefore be computed on the basis of the TMA's *depreciable value*, as follows:

	$	$	$
Depreciated cost of the TMA:			
Depreciable value of TMA			
Cost	X		
Less: Scrap value of destroyed TMA	(X)	X	
Less: *Depreciation (age/useful life x cost)*		(X)	X
Add: ***Labour for replacement works***			X
Loss for which defendant must compensate			**X**

Issue 1C: What was the value of the TMA at the time and place of its destruction?

(1) Cost of the TMA

43 The Repairer invoiced the plaintiff $48,000 for the replacement TMA. This was a figure to which the Surveyor assented. In the SJE's opinion, $40,000 would have been a reasonable figure.

44 In my view, both these figures are excessive, and the price of a replacement TMA should be $33,820.

(I) WHETHER THE INVOICE SUM SHOULD BE CONSIDERED

45 In my view, the price of the TMA on the Repairer's invoice may be safely disregarded for two broad reasons: $48,000 is neither a price that a plaintiff acting reasonably would have been required to pay nor a sum for which the plaintiff was necessarily liable to the Repairer. Five lines of inquiry led me to this conclusion.

46 **First**, the sum of $48,000 is not properly supported by the Surveyor's opinion, which I found to be unsubstantiated and unreliable.

47 Practically speaking, this moving force behind this claim was the Repairer. The sum on its invoice was based on the recommendation of the Surveyor whom it had appointed; the plaintiff played no part in that appointment. In fact, the plaintiff did not know what the repairs entailed, the cost of repairs, and who the Surveyor was. It seems that the first time the plaintiff saw the Surveyor's report was at the lawyer's office,[note: 35] which would have been long after repairs had been completed. This can be seen from the cross-examination of Mr Loh Swee Huat, the plaintiff's representative:

Q: … You left appointment of surveyor and cost of repairs all to [the Repairer]?

A: Yes.

Q: [The Repairer] will decide which surveyor to appoint?

A: Yes.

Q: You have no knowledge of the cost of repairs as agreed between [the Surveyor] and [the Repairer]?

A: Yes.

Q: Did [the Repairer] inform you of what the works entailed?

A: No.

Q: All they do is, after a certain amount of days, they will send the vehicle back to your place, and will arrange to make this claim from the Defendant?

A: Yes.

Q: Have you seen [the Surveyor's survey report] before?

A: I have seen it before at the lawyer's office.

This is consistent with the cross-examination of Mr Tok Cheng Sim, the Repairer's manager, who admitted that he was in charge of "arranging and making third-party claims" such as the present claim:

Q: As manager at [the Repairer], are you also in charge of arranging and making third-party claims?

A: Yes. When the things come, we will do it.

Q: You arranged for the current claim to be made on behalf of the Plaintiff against the Defendant?

A: Yes.

Q: … Prior to repairs, [the truck] was surveyed by PAL's Appraiser Pte Ltd?

A: Yes.

Q: The surveyor's name is Mr Dennis Yap?

A: Yes.

Q: You arranged for [the Surveyor] to survey the vehicle?

A: Yes.

48 Accordingly, the Repairer would have had the twin incentives of making the largest estimate possible and then selecting a surveyor who would defer to that estimate to the largest extent while cloaking it with a veil of legitimacy. The evidence is, in my view, consistent with this. In particular, I find that the long-standing relationship between Mr Tok and the Surveyor was a significant reason for the latter's appointment. In particular, I had the impression that Mr Tok was on the one hand trying to avoid drawing too much attention to that relationship by suggesting that the Surveyor was to him hardly different from other surveyors, and on the other relying on knowledge borne of that relationship to show that the Surveyor was qualified enough to survey the damage to the TMA. The cross-examination of Mr Tok continued this way:

Q: Are you very familiar with [the Surveyor]?

A: *Mediocre.*

Q: Are you very familiar with [the Surveyor's] qualifications and expertise?

A: Yes, I know. Because he came from LKK.

Ct: What is LKK?

Witness: LKK is another surveying company. **It has been a long time.**

Q: [The Surveyor] is a vehicle assessor and [he] is qualified as a trained mechanic?

A: Because he came from there.

…

Q: [The Surveyor], as a general mechanic and vehicle assessor, may not have been familiar with this specialised piece of equipment?

A: Disagree, because **in the past he has seen a lot in our workshop**. *As to his things, I do not know* but he came from LKK and he had started doing that then.

Q: Would it have been more appropriate for you to have engaged a surveyor who is more specialised in his knowledge of such plant and machinery to more accurately assess how much this piece of equipment would cost in the open market?

A: *In this market, they are more or less the same.* **We used [the Surveyor] because he has conducted the survey before.** We are not using new people. If it's Kelvin Quek (?), it will be very expensive because he is highly qualified.

Q: To sum up, you had engaged [the Surveyor's] services because, for the purposes of making a third party claim, you needed an assessor to survey the damage and not so much because he was qualified for the job?

A: **I used him because he came from LKK and had been doing this for a long time and has already started looking at our cars.** Because I have been in this industry for 30 over years.

[emphasis added in italics and bold]

Also, when Mr Tok was cross-examined later on the Surveyor's opinion that $3,800 (instead of $4,550 as estimated by the Repairer) be charged for labour, the way he answered suggested that the Surveyor had, instead of arriving at a figure uninfluenced by any given estimate, deferred to Mr Tok's original estimate to the largest extent he could.

Q: For labour charges, you have quoted $4,550. Is this based on any price list?

A: This is according to my estimate, how much my labour costs. Because labour costs have been high for the past few years. This is reasonable . Then Dennis told me that he ***can only quote $3,800***.

[emphasis added]

49 The Surveyor, whether in his report or his affidavit of evidence-in-chief, gave no reason for affirming the Repairer's estimate of $48,000. In fact, as mentioned at [37], his estimate of labour costs presupposed that the TMA should be *repaired* rather than *replaced*. If so, there would be no need to recommend spending $48,000 on a new TMA in the first place. The Surveyor's assessment is internally inconsistent and partly at odds with the Repairer and the SJE's account of the work which was required. This reinforces my view that the Surveyor was chosen not on the basis of his qualifications or experience but on the basis of a long-standing relationship with the Repairer, and that the Surveyor's report is unreliable.

50 The Surveyor's report contrasts with the SJE's opinion, which forms my **second** line of inquiry. The SJE opined that $48,000 was excessive, and that $40,000 should have been the price of a new TMA. In support of his opinion, he enclosed in his report three quotations or invoices from repairers involving the same model of TMA as

that in this case. (For convenience, I will call them invoices.) The second involved repairs and I will return to it later at [61] and [78]–[80]. Both the first and third involved the supply and installation of a TMA. In the first, a lump sum of $40,000 was charged; in the third, the charge was $36,320 (comprising $33,820 for the TMA parts and $2,500 for labour). The first invoice was the sole basis of the SJE's opinion,[note: 36] but the third invoice is particularly significant because it involved the same Repairer, the same customer (*ie*, the plaintiff) and the same truck — the same truck met with another accident some 17 months later and had to have its TMA replaced again. These two invoices clearly show that the price of a TMA was nowhere near $48,000.

51 The plaintiff seems to suggest that the first invoice actually did not involve the replacement of a new TMA because "repair" (instead of, say, "replacement") was featured in the title of the invoice. It submits that the defendant was "playing with words" and that there was no conclusive proof that $40,000 was the cost of a new replacement.[note: 37] In my view, this argument has no merit. What matters is the substance, not the form, of the invoice. In my view, the SJE clearly explained that $40,000 was the cost "to supply and install" an SJE, and the price of $40,000 would have meant that the customer must have expected the works to involve a replacement rather than a mere repair.[note: 38]

52 This leads to my **third** line of inquiry — the Repairer's explanation as to why it charged $48,000. Although Mr Tok claimed that a new TMA cost $48,000, he produced no documentary evidence (*eg*, receipts from suppliers). He insisted that he had asked for several TMAs in the course of the Repairer's business and they were "more or less" the same price.[note: 39] When questioned on the discrepancy between the prices on present invoice and on the invoice dated October 2014 (*ie*, the third invoice exhibited by the SJE), Mr Tok answered clearly that $48,000 was the only price of TMAs on the market in June 2013, whereas there was another supplier which sold the attenuator more cheaply in October 2014.[note: 40] I was not fully satisfied with this answer because Mr Tok, when asked where he had gotten the price of $48,000 from, was in fact unsure of the supplier from whom he had bought the TMA because this truck had been involved in a few accidents and because Mr Tok sourced TMAs from various suppliers in Malaysia and Singapore. Even if I gave Mr Tok some allowance for not being able to remember exactly which supplier he had gotten his TMA from, I am unable to accept Mr Tok's testimony that the TMAs cost "more or less" the same price when his own workshop could vary the price by some 30% over the course of one and a half years.

53 I turn to my **fourth** line of inquiry — the evidence of the plaintiff's representative on the price of a new TMA. During cross-examination, when Mr Loh was presented with the third invoice exhibited by the SJE, he conceded that it would ordinarily cost less than $51,830 to supply and install a brand new TMA on a lorry, and was unable to say whether the plaintiff's claim was excessive and unreasonable.[note: 41] Although he tried to say in re-examination that the first invoice involved repairs rather than a replacement,[note: 42] this question has been adequately addressed by the SJE in my discussion above at [51]. In any event, it seems that Mr Loh possibly saw the first invoice for the first time during the hearing, as it had to be pointed out to him that the invoice was addressed to the plaintiff.[note: 43]

54 This leads me to my **fifth** line of inquiry, which concerns what the plaintiff would have had to pay the Repairer.

55 The plaintiff has not paid the invoice because, according to Mr Tok, "[the plaintiff] is [the Repairer's] long-term customer. [They] are waiting for this to end. If it is not enough, then [it] will pay [the Repairer]." I take this to mean that the plaintiff and the Repairer are waiting for the outcome of this litigation before the invoice is settled. However, to the extent that this means that the plaintiff will be liable for the shortfall between the damages for which the defendant is adjudged to be liable and the invoice price, I find it hard to believe that this was the true arrangement between the plaintiff and the Repairer.

56 I have discussed above at [48] why I think Mr Tok's testimony is not convincing. I have also mentioned at [47] that Mr Loh left the appointment of the motor surveyor, the scope of repair works, and the cost of repairs to the Repairer[note: 44] and therefore did not know any of these details. What he *did* know was that, after a few days, the Repairer would return the truck to the plaintiff, and arrange to make a claim from the defendant.[note: 45] At any rate, no reasonable person would have thought that the TMA would come cheap. The point is that if the plaintiff was to be responsible for any shortfall, then it would only have been natural for it to find out how much the works would cost. It would also have been in Mr Loh's interest to play a part in appointing the surveyor or reviewing his recommendation to ensure that the proposed repair costs were assessed fairly. If Mr Loh was content to leave the appointment of the surveyor to the Repairer out of trust borne of a long-term relationship, this did not emerge in the evidence before me. In fact, considering that this was by any standard going to be a costly repair, the plaintiff would have been (all other things being equal) less likely to have been satisfied with entrusting the Repairer with the entire survey and repair process if it was to be liable for the sum on the invoice.

57 It appears to me that the plaintiff did not at all care what the repairs would cost, and the only reason I can infer is that the plaintiff did not think it needed to. In my view, the more likely arrangement was that the plaintiff had assigned its claim to the Repairer, or that the plaintiff would not be liable to the Repairer any more damages under this head of loss than what was assessed by the court, on the basis of the plaintiff's (and the Repairer's) expectation — or hope — that the defendant be liable for the full cost of replacing the TMA. Any excess would be waived. My view is buttressed by the way the claim has been brought (although my view does not turn on this) — in particular, the attempt to make the defendant responsible for the full cost (rather than the depreciated cost) of a TMA despite the fact that the authorities, evidence and arguments were not in the plaintiff's favour, as discussed above at [10]–[33].

58 To sum up, I consider the sum on the Repairer's invoice to be a poor basis by which to assess the plaintiff's true compensable loss. It is unreliable, given the self-serving way it was arrived at. The Repairer gave no cogent explanation of why he had invoiced the plaintiff for $48,000, and the Surveyor's opinion was internally inconsistent and appears to have been procured in a bid put the Repairer's estimate out of question by professional fiat. On the other hand, the SJE's opinion that $48,000 was excessive was supported by other invoices. Further, the plaintiff conceded that $48,000 was not the usual price of a TMA. If this is true, I also consider that the plaintiff would not have been liable to pay $48,000 for a new TMA. In my view, $48,000 is not a sum that a plaintiff acting reasonably would have been required to pay. In this case, where the moving force behind the claim is the Repairer, he cannot claim from the defendant any more than what the market could reasonably charge the plaintiff. Any amount beyond such sum would conceptually speaking represent a loss that the plaintiff could reasonably have avoided and, therefore, a loss for which the defendant is not liable.

(II) What a TMA would reasonably have cost

59 How much could the market reasonably charge the plaintiff at the time and place of repairs? I return to the first and third invoices that the SJE produced, in support of his opinion that the price of a TMA was $40,000.

60 It will be recalled that the SJE's opinion that $40,000 should be charged for a new TMA was based solely on the first invoice. No reason was given for preferring it over the third invoice (in which $33,820 was charged) — as far as the evidence goes, the SJE's preference for one invoice over the other is arbitrary. Neither did the SJE state that $40,000 was, in his professional experience, the prevailing market price or value of a TMA *at the time and place of the repairs*.

61 As this is what I must determine, I find the third invoice far more helpful and relevant. ***First***, the third invoice (which was dated 30 October 2014) is considerably nearer in time to the accident than the first invoice (which was dated 6 December 2016) and, all things being equal, will be more reflective of the market value of the TMA at the time of the repairs in the present case. ***Second***, in the third invoice, the repairer *and* the customer were the same as those in the present case. This is strong evidence that the Repairer was able to supply and

install a TMA for a sum at $33,820. ***Third***, the $40,000 charge in the first invoice was a lump sum charge that did not apportion the cost of supplying and the cost of installing the TMA, whereas the charges in the third invoice were itemised and allows me to verify, as against the items in the second invoice (which was dated May 2015), that the prices on the third invoice were reasonable .

62 On the evidence before me, there is little basis for the Repairer to be charging any amount higher than $33,820 (*ie*, the cost of supplying all the parts of a TMA). I therefore proceed on this basis.

63 In this regard, with respect, I do not consider that I must defer to the SJE's opinion because the sole basis for his opinion was *not* "outside the learning of the court" (see, *eg*, *Saeng-Un Udom v Public Prosecutor* [2001] 2 SLR(R) 1 at [25] *per* L P Thean JA, citing *Halsbury's Laws of Singapore* vol 10 (Butterworths, 2000) at para 120.257). In any event, the price of $33,820 is consistent with the SJE's general opinion (given near the start of cross-examination) that the TMA of "this particular brand and model" would cost "more than in the region of $30,000 or thereabout".[note: 46] The plaintiff also accepts that the works described in the first and third invoices were comparable to the works done in the present case, and in submissions did not express a view as to which was a more appropriate basis for comparison.[note: 47] While the defendant submitted that the SJE's computation should stand and that plaintiff should not be allowed to dispute the SJE's calculations, not having contested them,[note: 48] he also pointed out that the Repairer was able to offer a brand new TMA for $33,820 within one and a half years after the accident.[note: 49]

64 In any event, if I were wrong in preferring the third invoice, I would not have found that the TMA cost $40,000 because that was a lump sum charge for the *supply and installation* of a new TMA. If the labour cost was at least $2,000 (which in the SJE's opinion was a reasonable charge for repairs) or $2,500 (as was charged in the third invoice), I would have found that the TMA itself would have cost no more than $37,500 to $38,000.

(2) Total useful life

65 The SJE assumed that the TMA would have a 10-year useful life because the models would change after 10 years, and spare parts would not be available or cost-effective. Neither party challenged this.

66 I therefore accept this basis on which the SJE proceeded.

(3) Age (or remaining useful life)

67 The age of the TMA was not in evidence, as the plaintiff neither stated it in any of the court papers nor responded to the defendant's interrogatories on this issue. The SJE thus assumed that the TMA had depreciated by 50%, being the midpoint between 0% and 100%. On his assumption of a 10-year useful life (as elicited at the hearing), he would have considered the TMA to have a remaining useful life of 5 years.

68 Mr Loh candidly admitted in cross-examination that there was no evidence on the age of the TMA, whether in the form of a serial number (or a date of production) possibly printed on the TMA or of the depreciation ascribed to the TMA in the plaintiff's accounts.[note: 50] I agree with the defendant that no cogent or accurate assessment of the depreciation could be made.[note: 51] Despite this, the defendant submits that an adverse inference should be drawn against the plaintiff by holding it to the SJE's calculations, the assumptions in which it failed to challenge and which it must be deemed to have accepted.[note: 52] It also submits that the SJE's calculations should stand.[note: 53] The defendant has essentially conceded that the TMA was 5 years old when it was destroyed.

69 I need not consider whether the TMA had less than 5 years of useful life remaining, even though I would have been prepared to consider such a submission. Indeed, I was not convinced by the various reasons proffered by the plaintiff for its failure to produce this information.

70 The plaintiff says that the defendant was not entitled to this information, having requested for it through interrogatories answers to which it was not entitled to receive. In any event, counsel for the plaintiff stated that the plaintiff believed the SJE's method of valuation to be wrong and did not want to further complicate matters by providing information which it thought irrelevant.[note: 54]

71 In my view, the real problem is that the burden of proving the age of the TMA lies with the plaintiff. This information would have been especially within the plaintiff's knowledge, as the defendant never physically inspected the truck or TMA (s 108 of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA")). If there is no evidence on the age of the TMA, the plaintiff cannot overcome the problem by saying that this was the subject of an interrogatory the answer to which the defendant was not entitled to receive.

72 In any event, I also consider that I am entitled to draw an adverse inference against the plaintiff for failing to disclose the age of the TMA. Although my tentative conclusion below is that the defendant was not entitled to answers to the interrogatories it had served the plaintiff, s 116 illustrations (*g*) and (*h*) of the EA allows me to presume, respectively, that evidence that the plaintiff could have produced but withheld would be unfavourable to it and that an answer (if given) to a question that the plaintiff is *not* compelled by law to answer would be unfavourable to it. In my view, the drawing of adverse inferences under s 116 of the EA is not necessarily limited to matters arising in oral examination itself.

73 In my view, the plaintiff cannot simply brush off the interrogatory simply because it is not under an obligation to furnish an answer. Neither am I satisfied with the explanation as given by the plaintiff (or counsel). It is apparent from my discussion above (at [10]–[30]) that the authorities on depreciation, if not settled in favour of the defendant, at least do not clearly point in the plaintiff's favour. In particular, if the plaintiff was to succeed in holding the defendant liable for the full cost of a new TMA, it would have had to distinguish the two otherwise binding decisions (*SBS* and *Yip Holdings*), and persuade me that *Harbutt's Plasticine*, *Bacon* and *Dominion Mosaics* were persuasive and applicable despite the comments in *Baltic Surveyor (CA)* and *Butterworth's Damages*. In this regard, I note that one fact heavily relied on by the plaintiff in closing—the fact that there was no active second-hand market for the TMA—was not even elicited by plaintiff's counsel in evidence. It is also clear from the interrogatories served by the defendant in early December 2016 that he took issue with the age of the TMA. I expressed the same concerns during the hearing, before the cross-examination of the plaintiff's representative was concluded. The plaintiff must have known that the age of the TMA would be relevant—indeed, critical—should I decide that only the depreciated value of the TMA be awarded as damages. Yet, even by the end of the hearing, there was no attempt to put the age of the TMA in evidence or even engage the SJE's almost arbitrary assumption that the TMA had 5 years of remaining useful life, even though evidence on the TMA's age could have been adduced with little effort and in my judgment would not have complicated matters. I would therefore infer that the plaintiff did not volunteer this information because the truth was no more favourable than the SJE's assumption.

74 Given the defendant's position that I should adopt the SJE's assumption that the TMA had 5 years of remaining useful life, and that no alternatives were presented to me, I proceed on this basis.

(4) Scrap value

75 The SJE opined that the damaged TMA, as scrap metal, would be worth $100 to $200.[note: 55] Neither party disputed this.

76 Absent other evidence and a more precise estimate, I will take $150 as the scrap value of the TMA, being the average of $100 and $200.

(5) Labour (for replacement works)

77 The Surveyor opined that the labour was worth $3,800 whereas the SJE opined that labour was worth $2,000 only.

78 In my view, $3,800 is too high. I explained above at [47]–[49] why I found the Surveyor not to be fully independent. When Mr Tok was asked whether his original quote of $4,550 was based on any price list, he said that this was his estimate based on the high labour costs that had been prevailing; he added that "Dennis [*ie*, the Surveyor] told me that he can only quote $3,800". In my view, this sum may well have been at the high end of what the Surveyor thought could have been said to be reasonable, because it far outstrips the sum that was charged the second and third invoices that the SJE placed before this court (and which I mentioned above at [50]). Further, I concluded that the labour works as described in the Surveyor's report included works that would not have been required in the supply and installation of a new TMA.

79 It will be recalled that the third invoice was issued by the Repairer to the plaintiff in October 2014 for a subsequent accident in which the same truck was involved. There, only $2,500 was charged for labour in replacing the TMA. The only explanation given — that labour costs have been high for the past few years — does not in my view satisfactorily account for the differences between $2,500 and $3,800. Further, this invoice was also for the purposes of a third-party claim[note: 56] and may itself have been inflated.

80 Indeed, the second invoice (which included the repairs of several components in the TMA) included a charge of $1,950 for "labour, installation & fixing charges" for certain components and "dismantling charges from old unit". Those components included the Section B cartridge, the impact frame plate, the hydraulic pump assembly, and breakaway cable bolts. In my judgment, the amount of work done there would have been comparable to the replacement of a new TMA. *Qualitatively speaking*, the work done not too dissimilar. According to the SJE, the TMA comprises two cartridges (called the "Section A cartridge" and the "Section B cartridge") which are held in place by a collapsible frame and which can be moved using a hydraulic assembly, an impact frame reflective plate, lamp fittings and electrical wiring.[note: 57] The main difference between the second and third invoices is that the hydraulic pump assembly (instead of the Section A cartridge and the collapsible frame) is being installed. Similarly, the third invoice also stated that the charge was for labour "to assemble the [collapsible frame], [Section A and B cartridges], lamps & reflective sticker" on "the whole assembly". *Quantitatively speaking*, the duration of work done is comparable, too. The second invoice shows that 5 days lapsed between the payment of the deposit and the collection of the vehicle. The most probable outcome is that the repairs took 5 days. In this case, Mr Tok produced no documentary evidence to show the duration for which the truck had been in the workshop. He twice stated that the truck was in the workshop for about one week. In my view, this was an overstatement. the Surveyor had recommended that repairs would take four days, and Mr Tok did not take issue with that. Further, the SJE opined that the labour involved in dismounting and re-mounting a working TMA would take "not more than 6 days" and should be worth $2,000.[note: 58]

81 Further, the plaintiff did not challenge the SJE's opinion that $2,000 was a reasonable charge for labour works. In these circumstances, I accept the SJE's opinion that $2,000 is a sum the plaintiff could reasonably have paid for the labour charges, and I make that award.

82 The parties did not take issue with the SJE's opinion that the $30 for electrical works should not be allowed because the TMA was replaced rather than repaired. Accordingly, I make no award for electrical works.

Total computation

83 Based on the formula at [42], the damages flowing from the replacement of the destroyed TMA are assessed at $18,835, as follows:

	$	$	$
Depreciated cost of the TMA:			
Depreciable value of TMA			
Cost	33,820		
Less: Scrap value of TMA	(150)	33,670	
Less: *Depreciation (5 years/10 years x cost of $33,820)*		(16,835)	16,835
Add: ***Labour for replacement works***			2,000
Loss for which defendant must compensate			**18,835**

Main issue 2: Loss of use of the truck or TMA

84 The plaintiff claims loss of use for 6 days at $300 per day.[note: 59]

85 The damages awarded for loss of use depends on whether the damaged item was "generating profit or capable of providing some form of service to the owner before the casualty" (*SBS* at [7]). I am not satisfied on a balance of probabilities that the plaintiff suffered any real loss. Nothing was given to justify the figure of $300 per day. In my view, losses from the loss of use are not necessarily, as the plaintiff submits, "a natural consequence" of the defendant's wrong.[note: 60] The plaintiff simply pleaded and deposed that it had been "put to inconvenience", [note: 61] with no further detail, but this is too vague. It would only have been natural for the plaintiff to say that it had lost profits (or some other form of utility) as a result of the loss of use of the truck, if this were the case. Instead, the plaintiff's representative candidly admitted in cross-examination that there was no evidence to support its claim; nothing showed that the truck (or the TMA) was due to be hired out for the time it was in the workshop or that the plaintiff would have earned a profit of $300 per day for leasing the truck (or the TMA).[note: 62] The plaintiff did not even aver that it had to either rent a separate truck or deploy a standby truck to fulfil any obligations it had, or that it was prevented from doing something it was intended to do. Yet, these are all assertions that can easily be made and proven by documentary evidence. Indeed, Mr Loh even admitted that the plaintiff had a fleet of over 200 trucks, of which eight were mounted with TMAs. I therefore do not infer that it was probable that the plaintiff suffered any losses or was deprived of any gains for the period of repairs. All these contradict the plaintiff's claim in its closing submissions that it was in the midst of construction work and had therefore acted reasonably in replacing the TMA with a new one;[note: 63] this position was neither pleaded or deposed earlier and I cannot accept it.

86 For completeness, it is true that there are benchmark rates for damages for loss of use of various types of vehicles, as set out in Appendix F to the State Courts Practice Directions. However, Practice Direction 37(3), which refers to Appendix F, only directs parties to have regard to the benchmark rates, which may be departed from in the circumstances of the case:

> **37. Non-injury Motor Accident (NIMA) Claims**
>
> ...
>
> (**3**) **Benchmark rates for cost of rental and loss of use**

(a) Where the dispute involves a claim for damages in respect of a motor accident for cost of rental of a replacement vehicle and/or loss of use, *parties shall have regard to* the Benchmark Rates for Cost of Rental and Loss of Use at Appendix F of these Practice Directions.

(b) The Benchmark Rates are meant to serve as a starting point and *adjustments may be made according to the circumstances of each case*.

Further, it is implicit that the benchmark rates presuppose that the plaintiff has reasonably suffered substantial loss and it is apparent that such rates are meant to guide parties in quantifying such loss, especially in the absence of evidence. However, this cannot bypass the fundamental problem faced by the plaintiff — that, on the state of the evidence, I have not been satisfied on a balance of probabilities that the plaintiff has suffered any substantial (as opposed to nominal) loss in terms of loss of use of its truck or TMA.

87 Accordingly, I make no award of damages under this head of claim.

Conclusion

88 For the reasons above, I assess damages at $18,835.

89 I will hear parties on costs.

90 I have two final observations in the form of the postscripts below.

Postscript 1: The plaintiff's conduct of the litigation

91 The first is that the plaintiff made its submissions in an unsatisfactory manner.

92 The plaintiff in its closing submissions thrice alleged that the SJE was biased — first, because he suggested that the TMA could "more equitably" be valued at its depreciated cost instead of using objective means to determine its market value at the time of loss;[note: 64] second, because he thought that he had been appointed by the defendant's insurers;[note: 65] and third, because he "without proof, also attempted to drive the cost of a new TMA to $30,000".[note: 66] He even suggested that the SJE tried to "get a better deal for the Defendant".[note: 67]

93 Although strictly speaking the SJE may have stepped outside his remit by suggesting that the depreciated cost of replacement formed a more equitable basis of assessing damages than the full cost of replacement, that was in practical terms the legal conclusion I drew (although I did not rely on the SJE's opinion in arriving at it). More importantly, the SJE did not try to put forth an opinion in the defendant's favour by, for example, relying on the comparable invoice for $36,320 instead of the one for $40,000 even though, in my view, $33,830 was a better indication of the cost. Indeed, as between these two invoices, the contrary might even be suggested — that the SJE's choice was arbitrary *in the plaintiff's favour*. As for the fact that he computed the depreciated cost of the TMA, I consider that he was not only *entitled* but also *duty-bound* to give his opinion on how the depreciated cost was to be computed, since this was one of the contending measures of damages.

94 Although the SJE, under cross-examination by the plaintiff's counsel, said that he thought he had been appointed by the defendant's counsel, he confirmed immediately thereafter that his duty was owed to the court. The plaintiff's counsel did not ask further questions and, most crucially, never at any time put it to the SJE that he

had been biased. I consider that, under the rule in *Browne v Dunn* (1893) 6 R 67 (HL), the plaintiff is not entitled to submit as such. An allegation of bias should not be lightly made and, certainly, not in an almost cavalier way as the plaintiff has done.

Postscript 2: Interrogatories in simplified civil proceedings

95 This next postscript arises from arguments made during the hearing and in closing submissions as to the consequences that attend interrogatories served without leave in a simplified civil action before the Magistrates' Court (*ie*, one to which O 108 applies). The defendant submitted that he was entitled to serve interrogatories twice without leave under O 26 r 1(1) read with r 3(1), because this did not require an application under O 26, which was all that O 108 r 4(*c*) prohibited.[note: 68] The plaintiff, relying on the same provisions, submitted that the defendant was not entitled to the information asked for in the interrogatories.[note: 69]

96 My starting point is this: based on a strict, literal reading of the rules, a party is entitled to *serve* interrogatories without leave of court because O 108 r 4 stipulates only that no *application* shall be made under O 14, O 24 and O 26:

> **Excluded interlocutory applications (O. 108, r. 4)**
>
> 4. Notwithstanding any other provision in these Rules, no application under any of the following Orders shall be made in any case to which this Order applies:
>
> (*a*) Order 14 (summary judgment and disposal of case on point of law);
>
> (*b*) Order 24 (discovery and inspection of documents);
>
> (*c*) Order 26 (interrogatories).

97 But, the *right to* ***serve interrogatories*** is not the issue. For this reason, the defendant possibly is at cross-purposes with the plaintiff. In my view, the real issue is whether the plaintiff is *obligated to* ***furnish answers*** (or whether the defendant is correspondingly entitled to the answers). In the usual case, the answer seems to be "yes", and this can be gleaned from at least four lines of reasoning. ***First***, it seems to me that Party A may obligate Party B to answer interrogatories served on him as an entitlement afforded the civil process generally. This, I suggest, is borne out by the language of O 26 rr 5(3) and 6(1), which provides the following:

> **Objections and insufficient answers (O. 26, r. 5)**
>
> **5.**—…
>
> (3) Where any person, on whom interrogatories without order have been served, answers any of them insufficiently, the party serving the interrogatories may ask for further and better particulars of the answer given and any such request shall not be treated as service of further interrogatories for the purposes of Rule 3(1).
>
> **Failure to comply with Order (O. 26, r. 6)**

> **6.—(1)** If a party *fails to answer interrogatories* or to comply with an order made under Rule 5(2) or a request made under Rule 5(3), the Court may make such order as it thinks just *including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly*.
>
> [emphasis added in italics]

The point is that when Party B fails to answer interrogatories or satisfy a request for further and better particulars of answers, O 26 r 6(1) allows the court not merely to order that Party B furnish the answers or particulars, but to impose what are in substance sanctions for a failure. This power is similar to that found in O 24 r 16(1) in the context of discovery, which provides that a court may dismiss an action or enter judgment (as the case may be) against a party who fails to give discovery as required by the ROC or a court order made thereunder. This suggests that, ordinarily, a prior obligation exists on Party B by virtue of the interrogatories served. This contrasts with, for example, the procedure by which further and better particulars are sought — in particular, O 18 r 12(3), which gives the court precisely the power to order a party to serve particulars on the other party, and O 18 r 12(6), which provides that a prior request by letter is a consideration in deciding whether to order particulars. ***Second***, if Party A is successful in an application to serve interrogatories for the third time, what he obtains from the court at the first instance is not an order that Party B answers the interrogatories, but an order giving Party A leave to serve the interrogatories. This suggests that the source of Party B's obligation is the *interrogatories* themselves. Indeed, it is only when Party B fails to answer sufficiently that the court orders a further answer (O 26 r 5(2)). (At this juncture, I accept that one might retort that the usual relief at first instance is not what would be regarded as a sanction but an order that Party B furnish answers to Party A. However, the remaining two reasons still point to the existence of an obligation by virtue of the interrogatories served.) ***Third***, O 26 r 3(2) provides that Party B should apply to court if it wishes to have the interrogatories varied or withdrawn. The existence of such a mechanism suggests that a prior obligation to answer those interrogatories exists. ***Fourth***, it seems otiose to suggest that Party A may serve interrogatories without leave of court if this carries no legal consequence, and I should prefer an interpretation of a provision which does not render it redundant. In this sense, Party A's entitlement may be likened to a party's entitlement to amend a pleading without leave of court under O 20 r 1 (which has the effect of overriding a previous pleading filed, and not being there only for its own sake).

98 Does this analysis apply to cases to which O 108 applies? On its face, O 108 r 4(*c*) might not appear to upset my analysis above. In fact, one might suggest that this view is reinforced by the fact that this rule could have stated (but did not state), for example, that O 26 r 3(1) did not operate in simplified civil actions. One might even criticise the opposite interpretation as adding to the words of, or rewriting, O 108 r 4(*c*).

99 However, the proposition that Party A is entitled to answers meets three broad difficulties which, in my view, *necessitate* the opposite conclusion.

100 The ***first*** is a general one. It may be said that allowing service of interrogatories without leave offends the spirit, focus or underlying principles of O 108, which are proportionality, simplicity of procedure and facilitating early dispute resolution ("Chiah Kok Khun, "A Primer on the Simplified Civil Process for Magistrate's Court Cases" *Singapore Law Gazette* (April 2016) 23 ("*A Primer on O 108*") at p 24, col 1"). This essentially is the view expressed in Jeffrey Pinsler *SC*, *Singapore Court Practice 2017* (LexisNexis, 2017), vol 2, para 108/4/1, namely, that interrogatories tend to draw out proceedings and thus have no place in actions to which O 108 applies:

> **108/4/1. Excluded processes.** *These processes are excluded as they tend to draw out proceedings.* The summary judgment process, which is often prolonged by the affidavit process and applications relating to pleadings, is inconsistent with the priority of expedition which underlies O 108. Moreover, the general summary procedure under O 14 is unnecessary as the court is empowered under O 108 r 3 read with O 108 r 1(4) to give summary judgment when it is appropriate to do so. If necessary, the court may direct that the case be adjudicated at a summary trial (see O 108 r 5). With regard to the exclusion of applications made

> under O 24, the court has sufficient powers under O 108 r 2 and r 1(4) to make any appropriate orders relating to the disclosure and production of documentation. *Interrogatories have no place in the simplified process under O 108 as the parties would be expected to cooperate with each other in providing necessary information under the supervision of the court*. [emphasis added in italics]

Similarly, it was stated in *A Primer on O 108* at p 25, col 1 that the core idea behind curtailing interlocutory applications was the lack of necessity and the saving of resources (in particular, the filing of summons and affidavits — and, it presumably follows, the wait and preparation for a hearing):

> **Key features of the Simplified Process**
>
> …
>
> The last feature of the simplified process is curtailed interlocutories. As discussed above, the Court manages all interlocutory matters at the [Case Management Conference ("CMC")]. *Issues relating to the disclosure of documents under the List of Documents are also sorted out at the CMC.* The Court hears the parties and directs the disclosure of any relevant documents omitted in the List of Documents. *Applications for specific discovery are, therefore*, ***not necessary*** *and are disallowed. Other interlocutory applications are also dealt with in a summary manner at the CMC*, without the need to file summonses and affidavits unless directed by the Court. *There is a need to be robust in dealing with interlocutory matters so that they do not take on a life of their own with* ***numerous and lengthy applications being filed****.* As for *summary judgment* applications, which *tend to be drawn out by parties through sequential filing of affidavits*, they are not allowed under the simplified process. Where a defendant persists with a clearly unmeritorious defence, in appropriate cases, the Court strikes out the defence at the CMC. *In other cases, the Court directs an expedited simplified trial.* This achieves a quicker resolution for the parties.
>
> A significant number of MC cases involve claims for personal injuries and property damage arising from motor accidents ("PIPD cases"). The pre-action protocols for PIPD cases continue to apply. These cases are routed for [court dispute resolution] at an early stage under the protocols. As such, CMC is not held for PIPD cases. If a case is not settled, directions are given for a simplified trial.
>
> [emphasis added in italics and bold italics]

101 In my view, it is not *doubtlessly* clear which way the principles of expediency, proportionality and simplicity of procedure point. The interrogatory process generally facilitates early settlement by allowing parties to "evaluate each other's cases with a view to minimising the issues, expediting the litigation process and resolving the dispute" (Jeffrey Pinsler *SC*, *Principles of Civil Procedure* (Academy Publishing, 2013) ("*Principles of Civil Procedure*") at para 183). To that extent, interrogatories are capable of furthering the aims of O 108. The bar on applications under O 26 appears to have been motivated by a judgment that in simple low-value claims the interrogatory process wastes more time and costs than it saves. However, it is not immediately clear whether this judgment call applies to *all* interrogatories (because, for example, *every* interrogatory served without the court's sanction is expected to be a net waste of time and costs), or to interrogatories *beyond the first two sets* (because, for example, interrogatories *beyond the first two sets* are expected to be a net waste of time and costs).

102 One clue may be found in the case management conference ("CMC") convened under O 34A and pursuant to O 108 r 3. This is the key case management tool used to achieve expediency, proportionality and simplicity of procedure. CMCs are convened early in the life cycle of a case — this is not only implied under O 108 r 3(1), which provides that the CMC is convened "within such time as the Court thinks appropriate after the filing of the

defence", but is also the practice. The CMC is intended to be a robust, judge-led process during which the court may make any order it deems fit. On balance, it may well be more likely that allowing time for two rounds of interrogatories will waste more time than it saves.

103 Clues might also be found by examining which applications are prohibited by O 108 r 4 and why. Applications under O 24 were prohibited by O 108 r 4(*b*) because the need for general discovery is met by rules for upfront discovery in O 108 r 2 and because directions for specific discovery may be given at a CMC (or, in the case of actions for personal injury or non-injury motor accident, at a judge-led alternative dispute resolution session). The latter strongly suggests that all issues relating to interrogatories should likewise be dealt with by the court, considering that interrogatories — like discovery — concern the production of evidence. That said, two reasons might suggest that it is *not* a *necessary* conclusion that all interrogatories are exclusively the domain of court orders. The civil process (putting aside O 108) treats applications for specific discovery and applications for leave to serve interrogatories differently in the first place. It may well be said that, all things being equal, the discovery process is more intrusive and onerous than the interrogatory process — this may explain why there is no provision in O 24 that allows a party to serve a request to discover documents on the threat of sanctions. This might upset the analogy that would otherwise be drawn between O 24 and O 26 applications. Also, the mechanism of specific discovery has not been simply abrogated; it has been *supplanted* by a mechanism under O 108 r 2(7) which allows the court to order the production of any document that in its opinion is necessary either for fairly disposing of the case or for saving costs. In contrast, there is no specific power under O 108 relating to the production of information that supplants the interrogatory mechanism. Neither of these reasons, however, seem particularly compelling.

104 On balance, it seems that the spirit behind O 108 suggests that Party B is not obligated to answer interrogatories served without leave.

105 The ***second*** difficulty is that there is no way for Party *A* to *enforce* any obligation to answer interrogatories served on Party B. The principle engaged in this argument is that the law does not give a party a right that he cannot vindicate.

106 It might be argued that consequences *can* follow a failure to reply interrogatories satisfactorily or at all under O 26 rr 5(3) and 6(1). In the former case, Party A is entitled to ask for further and better particulars of the answer, which will not be treated as interrogatories. In the latter case and in the case where Party B fails to give adequate particulars upon request, sanctions may be imposed, including the dismissal of the action or the striking out of the defence and entry of judgment (as the case may be). *A fortiori*, the court could also order Party B to answer the interrogatories. The notable point here is that the language of O 26 r 6(1) does not seem to require an *application under O 26* to be brought. However, the court might not take cognisance of any supposed failure to furnish answers unless Party A invites it to *exercise powers conferred on it by O 26 r 6(1)*. But, to this extent, Party A would be considered to be making an application under O 26. In particular, an application does not cease to be one if it is made orally rather than formally, and it would be artificial to say that it is not made *under O 26* when that is precisely the principal source of the court's power to grant the relief sought. And, insofar as the court takes cognisance of this matter without an application by Party A, then it cannot be said that *Party A* is *enforcing* ***his*** *right* to the answers.

107 It might also be argued that Party A has the option to apply under O 108 r 1(4)(*b*) for an order that O 108 r 4(*c*) does not apply to his action; this way, he *can* enforce an obligation to answer interrogatories served on Party B. However, this is one step removed from the question of whether Party A is ordinarily entitled to answers. Without having gotten such an order (or an equivalent) — which is the default position — Party A will be in no position to enforce any right to answers through an application under O 26.

108 The ***third*** difficulty — which is the flipside of the second — is that there is no way for Party *B* to *challenge* any interrogatories served on it by Party A. The principle here is that the law will not allow one party to impose an obligation on another party that cannot be challenged in court, unless this is expressed in clear language. This argument arises because O 108 r 4(*c*) clearly prohibits Party B from taking his usual course of action to have the interrogatories varied or withdrawn, namely, filing an application under O 26 r 3(2):

> **Interrogatories without Order (O. 26, r. 3)**
>
> **3.**—…
>
> (2) A party on whom interrogatories without order are served may, within 14 days of the service of the interrogatories, apply to the Court for the interrogatories to be varied or withdrawn and, on any such application, the Court may make such order as it thinks fit (including an order that the party who served the interrogatories shall not serve further interrogatories without order).

This difficulty is in my view the most compelling difficulty, because it reveals the lack of symmetry between Party A's apparent right to receive answers and Party B's apparent obligation to furnish answers. Party B might find himself in an invidious position because, until the interrogatories are varied or withdrawn, Party B will be obligated to answer those interrogatories within a period of as short as 14 days from the date he was served with them (O 26 r 2(1)(*a*)), or risk sanctions for non-compliance under O 26 r 6(1).

109 One might attempt the argument that Party B is not entirely without recourse. On Party B's application to have the interrogatories varied or withdrawn under O 26 r 3(2), the court may in fact require Party B to answer those interrogatories. This not only follows from the language "such order as it thinks fit", but also is implicit from O 26 r 1(4), which provides:

> **Discovery by interrogatories (O. 26, r. 1)**
>
> **1.**—…
>
> (4) In this Order —
>
> …
>
> "ordered interrogatories" means interrogatories served under paragraph (2) or *interrogatories which are required to be answered pursuant to an order made on an application under Rule 3(2)* and, where such an order is made, the interrogatories shall not, unless the Court orders otherwise, be treated as interrogatories without order for the purposes of Rule 3(1).
>
> [emphasis added in italics]

Similarly, when the court is considering whether to sanction Party B for failing to answer interrogatories under O 26 r 6(1), the language "such order as it thinks just" would equally allow the court to order that Party B need not answer the interrogatories. This was the result in *Maxiplus v Lunn* The Times (27 February 1992), where the Court of Appeal held that Party B's failure to apply to vary or withdraw the interrogatories did not prevent the court from making an appropriate order under O 26 r 6(1). However, insofar as Party B is inviting the court to grant relief by exercising its powers under O 26 r 6(1), it would amount to an application under O 26. Alternatively, insofar as

Party B relies on the court to take cognisance of the matter on its own motion, then Party B would not be considered to be challenging his obligation to answer the interrogatories and (more importantly) there is no guarantee that the court will do so in the 14 days within which Party B might be required to answer interrogatories.

110 If Party A *was* entitled to answers, then Party B would be obligated to answer interrogatories posed by A, no matter how numerous, wide or unreasonable, and be liable to sanctions for non-compliance until the court takes cognisance of the matter on its own motion. This, in my view, is an unsatisfactory result and seems incorrect.

111 Ultimately, I need not decide whether Party A is entitled to answers to interrogatories served on Party B without leave of court under O 26 r 3(1), in view of, ***first***, the defendant's concession that the TMA should be depreciated by 50%; ***second***, the fact that the burden of proving the age of the TMA lay with the plaintiff; and ***third***, the fact that I would have drawn an adverse inference against Party B even if it is not obligated to answer the interrogatories. However, I would conclude this way: the first difficulty *suggests* — but the second and third difficulties *each necessitate* — the conclusion that, in an action to which O 108 applies, Party B is not under an obligation to answer interrogatories served on it by Party A without leave of court and, correspondingly, Party A is not entitled to the answers. Of course, my view has been arrived at not without hesitation, considering the arguments that can be made for the opposite view.

[note: 1]Affidavit of Evidence-in-Chief of Loh Swee Huat, paras 4–5; Bundle of Documents, pp 3 (Accident Statement Report for the truck, Sketch Plan) and 11 (Accident Statement Report for the motor car, Sketch Plan).

[note: 2]Affidavit of Evidence-in-Chief of Loh Swee Huat, para 6.

[note: 3]NE, pp 14E (Cross-Examination of Tok Cheng Sim) and 34B–34C (Cross-Examination by Plaintiff's Counsel of Victor Fong Whye Phoy); Plaintiff's Closing Submissions, para 29.

[note: 4]Affidavit of Evidence-in-Chief of Loh Swee Huat, BA 23 (Invoice of PAL's Appraiser Pte Ltd dated 1 Dec 2014); Affidavit of Evidence-in-Chief of Dennis Yap Teck Wee, para 3.

[note: 5]Affidavit of Evidence-in-Chief of Loh Swee Huat, para 7.

[note: 6]Affidavit of Evidence-in-Chief of Loh Swee Huat, BA 27 (PAL's Appraiser Pte Ltd survey report, p 4).

[note: 7]Affidavit of Evidence-in-Chief of Loh Swee Huat, BA 22 (Invoice from the Repairer); Affidavit of Evidence-in-Chief of Tok Ching Sim, para 5 and BA 58 (Invoice from the Repairer).

[note: 8]Notes of Evidence, pp 14D–14E (cross-examination of Tok Cheng Sim); 21E–22A (cross-examination of Loh Swee Huat), 34C (cross-examination by Plaintiff's Counsel of Victor Fong) and 38A–38B (Questions by the Court to Victor Fong).

[note: 9]Plaintiff's Closing Submissions, para 11.

[note: 10]Plaintiff's Closing Submissions, para 9(d) and 18.

[note: 11]Plaintiff's Closing Submissions, paras 9(e)–11, 27–28 and 30–31.

[note: 12]Plaintiff's Closing Submissions, paras 20 and 34.

[note: 13]See also Plaintiff's Closing Submissions, paras 19–20.

[note: 14]NE, p 39A (Questions by the Court to Victor Fong Whye Phoy).

[note: 15]NE, p 39A (Questions by the Court to Victor Fong Whye Phoy).

[note: 16]Plaintiff's Closing Submissions, para 30.

[note: 17]Defendant's Closing Submissions, para 26(i).

[note: 18]Defendant's Closing Submissions, para 26(iii).

[note: 19]Plaintiff's Closing Submissions, paras 12, 22 and 33.

[note: 20]Plaintiff's Closing Submissions, paras 36–37 and 41 *et seq*.

[note: 21]Plaintiff's Closing Submissions, para 37.

[note: 22]Affidavit of Evidence-in-Chief of Loh Swee Huat, para 9; Affidavit of Evidence-in-Chief of Victor Fong Whye Phoy, para 4; Bundle of Documents, p 36 (Land Transport Authority Notification on Transfer of Ownership).

[note: 23]Affidavit of Evidence-in-Chief of Victor Fong Whye Phoy, para 6(i); BA 104 (Expert report).

[note: 24]Affidavit of Evidence-in-Chief of Victor Fong Whye Phoy, BA 104 (Expert Report).

[note: 25]Affidavit of Evidence-in-Chief of Victor Fong Whye Phoy, BA 103 (Expert Report).

[note: 26]Affidavit of Evidence-in-Chief of Victor Fong Whye Phoy, BA 105 (Expert Report).

[note: 27]Affidavit of Evidence-in-Chief of Victor Fong Whye Phoy, BA 105 (Expert Report).

[note: 28]See, *eg*, Plaintiff's Closing Submissions, paras 32–33, 36, 39.

[note: 29]See, *eg*, Plaintiff's Closing Submissions, paras 24–25 and 44–45.

[note: 30]NE, pp 32A–32C (Cross-Examination by Plaintiff's Counsel of Victor Fong).

[note: 31]Affidavit of Evidence-in-Chief of Victor Fong, paras 6(i)–(ii); pp 4–5 of Expert Report; NE, pp 36B (Cross-Examination by Plaintiff's Counsel of Victor Fong Whye Phoy).

[note: 32]NE, pp 34B, 35A–35D (Cross-Examination by Plaintiff's Counsel of Victor Fong Whye Phoy) and 37D (Questions by the Court to Victor Fong Whye Phoy).

[note: 33]NE, pp 34E–35A (Cross-Examination by Plaintiff's Counsel of Victor Fong Whye Phoy).

[note: 34]NE, pp 34A (Cross-Examination by Plaintiff's Counsel of Victor Fong Whye Phoy).

[note: 35]Notes of Evidence, p 21C (Cross-examination of Loh Swee Huat).

[note: 36]NE, pp 33D (Cross-Examination by Plaintiff's Counsel of Victor Fong Whye Phoy) and 39B (Questions by the Court to Victor Fong).

[note: 37]Plaintiff's Closing Submissions, paras 45–46.

[note: 38]NE, pp 33E–34C (Cross-Examination by Plaintiff's Counsel of Victor Fong Whye Phoy).

[note: 39]NE, p 12C (Cross-Examination of Tok Cheng Sim).

[note: 40]NE, pp 16B–16C (Cross-Examination of Tok Cheng Sim); Plaintiff's Closing Submissions, para 39.

[note: 41]NE, p 24D–24E (Cross-examination of Loh Swee Huat).

[note: 42]NE, p 27C (Re-examination of Loh Swee Huat).

[note: 43]NE, p 24C (Cross-examination of Loh Swee Huat).

[note: 44]Notes of Evidence, pp 20E–21A (cross-examination of Loh Swee Huat).

[note: 45]Notes of Evidence, p 21B–21C (cross-examination of Loh Swee Huat).

[note: 46]NE, p 32E (Cross-Examination by Plaintiff's Counsel of Victor Fong Whye Phoy).

[note: 47]Plaintiff's Closing Submissions, paras 32, 35, 40, 42 and 48.

[note: 48]Defendant's Closing Submissions, paras 41–44

[note: 49]Defendant's Closing Submissions, para 50(i).

[note: 50]NE, p 22A–22D (Cross-examination of PW2 Loh Swee Huat).

[note: 51]Defendant's Closing Submissions, para 50(ii).

[note: 52]Defendant's Closing Submissions, paras 42–44, 45(viii), 46 and 50(ii).

[note: 53]Defendant's Closing Submissions, paras 47–49.

[note: 54]NE, p 23C–23D (Cross-Examination of Loh Swee Huat).

[note: 55]NE, p 39D–39E (Questions by the Court to Victor Fong Whye Phoy).

[note: 56]NE, p 16C (Cross-Examination of Tok Cheng Sim).

[note: 57]Affidavit of Evidence-in-Chief of Victor Fong Whye Phoy, BA 103 (Expert Report); NE, p 30B–30D (Cross-Examination by Defendant's Counsel of Victor Fong Whye Phoy).

[note: 58]NE, p 40B (Questions by the Court to Victor Fong Whye Phoy).

[note: 59]Plaintiff's closing submissions, para 49.

[note: 60]Plaintiff's closing submissions, para 49.

[note: 61]Statement of Claim, para 5; Affidavit of Loh Swee Huat, para 8.

[note: 62]NE, pp 25C–26C (Cross-examination of PW2 Loh Swee Huat).

[note: 63]Plaintiff's Closing Submissions, para 52.

[note: 64]Plaintiff's closing submissions, para 25.

[note: 65]Plaintiff's closing submissions, para 37.

[note: 66]Plaintiff's closing submissions, para 38.

[note: 67]Plaintiff's closing submissions, para 48.

[note: 68]NE, p 23A–23C; Defendant's Closing Submissions, para 45.

[note: 69]NE, pp 22E and 23C–23D.

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