DALAM MAHKAMAH TINGGI DI KUALA LUMPUR
(BAHAGIAN SIVIL)
[GUAMAN NO: WA-22NCVC-640-10/2016]

ANTARA

EASY REGION ENGINEERING SDN BHD ... PLAINTIFF
(No. Syarikat: 853832-A)

DAN

BUREAU VERITAS (M) SDN BHD ... DEFENDANT
(No. Syarikat: 159907-P)

GROUNDS OF JUDGMENT
(*Full Trial*)

Introduction

[1] These are my grounds of judgment after a full trial. The plaintiff was the defendant's sub-contractor in respect of a project known as "Inspection and Certification-Schlumberger Malaysia" ("**the project**") which involved the inspection, servicing and certification of drilling and lifting equipment for oil and gas at the premises of Schlumberger WTA (M) Sdn. Bhd. ("**Schlumberger**"). The defendant was Schlumberger's main contractor for the project. As the defendant's sub-contractor under the project, the plaintiff carried out two types of jobs, namely "**resident jobs**" and "**ad-hoc jobs**".

[2] The scope of work under resident jobs and ad-hoc jobs was explained by DW1 in his answer to Question 7 in his witness statement (DW1A) which reads as:-

"Q: Can you elaborate on the scope of work under the Project?

A: Yes. I will first refer to Exhibit 1 – Scope of Work in the RFP at pages 344 to 348 CBD. In general, and as stated earlier, the scope of work involved the inspection, servicing and certification of drilling and lifting equipment at Schlumberger's premises.

For the scope of work under items (A) and (B) of Exhibit 1 – Scope of Work from pages 344 to 346 CBD, Schlumberger would issue POs with instructions for the vendor/ contractor to deploy personnel to perform specific inspection, servicing or certification services as required by Schlumberger. In turn, the Defendant would relay Schlumberger's instructions to the Plaintiff via a Notification of Inspection ("NOI"). As **this scope of work involved the *ad hoc* deployment of personnel to Schlumberger's premises on a temporary basis to perform specific services as required by Schlumberger, in the industry, we commonly call them "*Ad Hoc* Jobs".** Depending on the personnel and services required, Schlumberger would pay manpower charges (**"Manpower Charges"**) and service charges for the *Ad Hoc* Jobs. **We use the term "Service Charges" loosely and for convenience as the term also <u>includes the charges for chemicals, tools, equipment and consumables used to perform the specific services on site.</u>** In Exhibit 2 – Schedule of Rates and Prices of the RFP at pages 349 to 352 CBD, the Manpower Charges and Service Charges for *Ad Hoc* Jobs would be under items (A) to (h). As stated earlier, there was a slight change in the scope of work for the Project during the tender process. Therefore, there was also a slight change in Exhibit 2 – Schedule of Rates and Prices when the Project was awarded to the Defendant under the Letter of Award. Exhibit 2 – Schedule of Rates and Prices under the Letter of Award can be seen at pages 396 to 401 CBD. The Manpower Charges and Service Charges for *Ad Hoc* Jobs would be under items (A) to (K) of Exhibit 2 – Schedule of Rates and Prices in the Letter of Award.

In addition to the *Ad Hoc* Jobs, there is another scope of work which is under item (3) of Exhibit 1 – Scope of Work (page 347 CBD). **This scope of work involved the residential or full time placement of personnel at Schlumberger's premises to support all segments of operations on site. In the industry, it is common to refer to these jobs as "Resident Jobs".**

The Resident Jobs for the Project can be easily identified by the Defendant's reference no. of IDD 14/0288.

In Exhibit 2 – Schedule of Rates and Prices of the RFP, the Manpower Charges for Resident Jobs would be under item (i) at page 352 CBD. Due to the slight change in the scope of work as mentioned earlier, the Manpower Charges for Resident Jobs would be under item (L)of Exhibit 2 – Schedule of Rates and Prices in the Letter of Award (page 401 CBD).

Under this scope of work, the Manpower Charges would be based on a monthly or lump sum payment which includes the chemicals, tools, equipment and consumables used to perform the services at Schlumberger's premises. In other words, **only Manpower Charges are payable for Resident Jobs, whereas Service Charges are not payable for Resident Jobs."**

[emphasis added]

[3] The plaintiff's claim against the defendant is for the sum of RM1,138,169.97 in respect of outstanding invoices for carrying out inspection and cleaning work of pipes (*excluding certification which was undertaken by the defendant*) at all the premises of Schlumberger in Wilayah Persekutuan Labuan. The main issue is whether the defendant is liable to pay the sum of RM1,138,169.97 to the plaintiff for the invoices issued in respect of service charges for resident jobs (*inclusive of manpower charges of RM148,76 5.97*). The defendant takes the position that they are not liable to pay for service charges for resident jobs, but are only liable for invoices in respect of manpower charges. The defendant does not deny that three (3) out of the 18 invoices that form the subject matter of the plaintiffs claim are in fact invoices for manpower amounting to RM48,765.97.

[4] The defendant has not paid the plaintiff's claim for the sum of RM1,138,169.97 in view of their counterclaim. The defendant's counterclaim is based on their contention that they are entitled to a refund of the sum of RM28,772.40, being the second or double payment of three (3) invoices which had been paid by the defendant to the plaintiff. The defendant also claims that they are entitled to a refund by the plaintiff for the sum of

RM161,902.00, being a payment of service charges to the plaintiff which was paid by "mistake".

[5] The defendant's position is that because of the collaborative nature of the relationship between the parties, the plaintiff was never formally appointed as a sub-contractor for the project. According to the defendant, the plaintiff and the defendant also did not enter into any formal agreement to stipulate the terms and conditions of this so-called sub-contract for the project. Mr. Rakesh Kumar (DW1) who was the sole witness for the defendant, said that the parties did not think that a formal contract was necessary as it was understood that the terms and conditions of the main contract (between the defendant and Schlumberger) would form the basis of the terms and conditions under the sub-contract.

[6] According to Mr. Rakesh Kumar, the terms and conditions of the main contract are stipulated in the request for proposal (**"RFP"**), the Letter of Award dated 29 January 2015 (p.388 -400 B1) and periodic instructions issued by Schlumberger via job orders or Purchase Orders (**"PO"**) for the duration of the project.

[7] It was emphasised by the defendant that the plaintiff had already agreed to the terms and conditions under the RFP. In this regard, reference was made to the plaintiff's email dated 16 June 2015 (p.287 to 288 B1) which states *'In general, as far as we both agreed that ERE & BV are collaborating each other which stated only in a piece of letter"* and the email dated 11 December 2015 at (p.252 to 253 B1), whereby the plaintiff had stated *"allow me to say that ERE is BV strategic partner specifically in delivering the Works in the SLB premises."* Reliance was also placed on an email dated 17 November 2014 that was sent by Mohd Farid Bin Mohd Hanif (PW3) to Mohammad Tahir Bin Md. Yussof (PW2) which reads as:-

> "Kindly refer to attachment, the revised schedule of rates as per new requirements from SLB. Unfortunately, we are yet to get pricing from 3rd party on gauge calibration and item E. We will furnish as soon as we get it from them.
>
> **With this proposal, we agreed with all the terms and condition outline in the RFP."**
>
> [emphasis added]
>
> (p.373, B1)

[8] Thus, relying upon the terms of the RFP (which had been agreed to by the plaintiff), the defendant alleged that they are liable to pay for manpower charges and service charges if it is for *ad hoc* jobs. And for resident jobs, the defendant's position is that they are only liable to pay for manpower charges, as all service charges are subsumed in the manpower charges.

[9] However, the plaintiff does not accept the defendant's assertion that the plaintiff had agreed and/or accepted that the terms under the main contract would form the basis of the terms under the sub-contract. As such, the plaintiff takes the position that the defendant is liable to pay regardless of the terms of the RFP. Thus, according to the plaintiff there is a sum of RM 1,138,169.97 which is due and owing and the relevant invoices with regard to these amounts are as follows:-

No	Invoice No.	Date	PO No.	Job Order No.	Sum (RM)
1.	ERE/BV/INV /09/ 15/2506	01.09.2015	IDD 14-0288	BV-SLB/J/08/15/060	630.00

2.	ERE/BV/INV /09/ 15/2529	08.09.2015	IDD 14-0288	BV-SLB/J/06/15/035 (JUNE)	44,939.00
3.	ERE/BV/INV /09/ 15/2528	08.09.2015	IDD 14-0288	BV-SLB/J/06/15/035 (JUNE)	23,007.00
4.	ERE/BV/INV /09/ 15/2531	08.09.2015	IDD 14-0288	BV-SLB/J/06/15/035 (JUNE)	146,663.00
5.	ERE/BV/INV /09/ 15/2553	11.09.2015	IDD 14-0288	BV-SLB/J/07/15/035 (JULY)	102,967.00
6.	ERE/BV/INV /09/ 15/2552	11.09.2015	IDD 14-0288	BV-SLB/J/07/15/035 (JULY)	154,397.00
7.	ERE/BV/INV /09/ 15/2554	11.09.2015	IDD 14-0288	BV-SLB/J/07/15/035 (JULY)	13,392.00
8.	ERE/BV/INV /11/ 15/2660	13.11.2015	IDD 14-0288	BV-SLB/J/08/15/035 (AUGUST)	22,833.00
9.	ERE/BV/INV /11/ 15/2659	13.11.2015	IDD 14-0288	BV-SLB/J/08/15/035 (AUGUST)	18,084.00
10.	ERE/BV/INV /11/ 15/2658	13.11.2015	IDD 14-0288	By-SLB/J/08/15/035 (AUGUST)	171,015.00
11.	ERE/BV/INV /11/ 15/2667	13.11.2015	IDD 14-0288	BV-SLB/J/09/15/035 (SEPTEMBER)	62,667.00

12.	ERE/BV/INV /11/ 15/2665	13.11.2015	IDD 14-0288	BV-SLB/J/09/15/035 (SEPTEMBER)	22,046.00
13.	ERE/BV/INV /11/ 15/2664	13.11.2015	IDD 14-0288	BV-SLB/J/09/15/035 (SEPTEMBER)	126,463.00
14.	ERE/BV/INV /06/ 16/2992	24.12.2015	IDD 14-0288	BV-SLB/J/11/15/035 (NOVEMBER)	38,036.29
15.	ERE/BV/INV /12/ 15/2716	28.12.2015	IDD 14-0288	BV-SLB/J/10/15/035 (OCTOBER)	28,179.00
16.	ERE/BV/INV /12/ 15/2715	28.12.2015	IDD 14-0288	BV-SLB/J/10/15/035 (OCTOBER)	13,886.00
17.	ERE/BV/INV /12/ 15/2714	28.12.2015	IDD 14-0288	BV-SLB/J/10/15/035 (OCTOBER)	138,866.00
18.	ERE/BV/INV /06/ 16/2991	30.06.2016	IDD 15-0769	BV-SLB/J/10/15/066	10,099.68
				TOTAL	1,138,16 9.97

Defence and counter-claim

[10] In the defence and counterclaim dated 21 November 2016, the background is given as follows:-

"2.1. On or about 5.11.2014, Schlumberger WTA (M) Sdn Bhd **("Schlumberger")** had invited the Defendant to participate in a tender exercise for a project known as *"Inspection and Certification – Schlumberger Malaysia"* **("Project")** which *inter alia* involved the inspection, servicing and certification of lifting and drilling equipment at Schlumberger's premises for a proposed duration of one (1) year plus one (1) year extension.

2.2. On or about 6.11.2014, the Defendant had approached the Plaintiff to collaborate on the Project, wherein should Schlumberger award the contract to the Defendant, the Defendant would engage the Plaintiff as a sub-contractor for the Project. The Defendant had further forwarded the tender documents for the Project to the Plaintiff which *inter alia* stipulate the terms of the proposed contract under the Project.

2.3. In pursuance of the collaborative effort between the Defendant and the Plaintiff to obtain the award for the Project, the Plaintiff had *inter alia* assisted the Defendant in drawing up the commercial proposal for the tender of the Project.

2.4. On or about 11.11.2014, the Defendant submitted its tender for the Project to Schlumberger, including the commercial proposal incorporating the input by the Plaintiff.

2.5. Upon several requests by Schlumberger for the Defendant to revise its commercial proposal for the Project, the Defendant had on or about 17.11.2014, 12.12.2014 and 17.12.2014 submitted its revised commercial proposals to Schlumberger. In pursuance of the collaborative effort between the Defendant and the Plaintiff for the Project, the Plaintiff had again provided its input in respect of the revised commercial proposals.

2.6. On or about 29.01.2015, Schlumberger awarded the contract for the Project to the Defendant for a duration of two (2) years plus one (1) year extension via a Letter of Award dated 29.01.2015 **("Main Contract")**.

2.7. The terms of the Main Contract between Schlumberger and the Defendant are *inter alia* stipulated in the tender documents, the Letter of Award and/ or periodic instructions issued by Schlumberger via Job Orders or Purchase Orders **("PO")** for the duration of the Project.

2.8. There was no formal appointment of the Plaintiff as a sub-contractor for the Project as the Plaintiff had at all material times participated as a collaborative partner of the Defendant for the Project. The Plaintiff and the Defendant also did not enter into any formal agreement to stipulate the terms of the sub-contract for the Project **("Sub-Contract")**, as the Plaintiff and the Defendant had agreed and/ or accepted that the terms under the Main Contract would form the basis of the terms under the Sub-Contract.

2.9. The deployment of personnel to perform services in relation to the Project are primarily as follows:

(a) Residential or full time placements of personnel at Schlumberger's premises for the duration of the Project **("Resident Jobs")**, which are identified by the reference no. IDD 14/0288. Under this scope, Schlumberger would pay a monthly lump sum for the personnel stationed at Schlumberger's premises on a full time basis based on the Schedule of Rates and Prices under the Letter of Award **("Manpower Charges for Resident Jobs").**

(b) *Ad hoc* deployments of personnel to Schlumberger's premises on a temporary basis to perform the services as required by Schlumberger for the Project **("*Ad Hoc* Jobs")**. Depending on the personnel and services required for the Project, Schlumberger would pay manpower charges and/ or service charges for selective works performed at site including the chemicals, tools and/ or consumables used to carry out the said works **("Manpower and/ or Service Charges for *Ad Hoc* Jobs")**.

2.10. With regard to the Resident Jobs, it was the position of Schlumberger that the monthly lump sum or Manpower Charges for Resident Jobs paid by Schlumberger would include the services rendered by resident personnel; hence Service Charges are not payable for Resident Jobs.

……

……

15. On or about 16.10.2015 and 29.12.2015, the Defendant had made payment of the following invoices **("paid invoices")** to the Plaintiff:

No.	**Invoice No.**	**Date of Payment**	**Sum (RM)**
1.	ERE/BV/INV/02/15/2166	16.10.2015	RM2,269.40
2.	ERE/BV/INV/04/15/2317	16.10.2015	RM21,303.0
3.	ERE/BV/INV/11/15/2668	29.12.2015	RM5,200.00
Total			**RM28,772.4**

16. However, on or about 15.07.2016, the Defendant by mistake had again made payment in the sum of RM28,772.40 for the paid invoices to the Plaintiff.

17. By a letter dated 18.08.2016, the Defendant had requested the Plaintiff to refund the sum of RM28,772.40, being the second payment or double payment of the paid invoices.

18. However, the Plaintiff has to date failed, refused and/ or neglected to refund the sum of RM28,772.40 to the Defendant, or any sum at all.

19. By reason of the aforesaid, the Defendant is entitled to a refund by the Plaintiff for the sum of RM28,772.40, being money paid by the Defendant to the Plaintiff under a mistake of fact.

20. Furthermore, the Defendant had periodically provided *ad hoc* services to the Plaintiff, either in relation to the Project or otherwise.

21. Pursuant to the services rendered by the Defendant to the Plaintiff, the Defendant would periodically issue

invoices to the Plaintiff for payment of the services rendered **("Defendant's invoices")**.

22. At the insistence of the Plaintiff, the Defendant had agreed to set off the Plaintiff's payment of approximately 89 of the Defendant's invoices against the Defendant's payment of approximately 77 of the Plaintiff's invoices **("said contra-payment")**.

23. However, due in part to the large number of invoices involved in the said contra-payment and due in part to the Plaintiff's insistence that the Defendant expedite its verification and approval process for payment of the Plaintiff's invoices, so as to enable these invoices to be set off against the Defendant's invoices, the Defendant had by mistake made payment of the Plaintiff's invoices involving Service Charges for Resident Jobs to the Plaintiff via the said contra-payment, the particulars of which are as follows:

No.	**Invoice No.**	**Reference No.**	**Sum (RM)**
1.	ERE/BV/INV/07/15/2444	IDD 14/0288	RM13.635.00
2.	ERE/BV/INV/07/15/2445	IDD 14/0288	RM1,860.00
3.	ERE/BV/INV/07/15/2446	IDD 14/0288	RM1,916.00
4.	ERE/BV/INV/07/15/2450	IDD 14/0288	RM16.820.00
5.	ERE/BV/INV/07/15/2449	IDD 14/0288	RM22,412.00

6.	ERE/BWINV/07/15/2448	IDD 14/0288	RM105,259.00
Total			**RM161,902.00**

The issues for trial

[11] The parties formulated the following issues for trial:-

11.1 Whether the defendant is liable to pay the sum of RM1,138,169.97 to the plaintiff for the outstanding invoices.

11.2 Whether the defendant's conduct amounts to admission on the part of the defendant towards the sum claimed by the plaintiff.

11.3 Whether the plaintiff's employees/workers (*manpower*) carried out the said work from January 2015 or from 15 April 2015.

11.4 Whether the defendant has knowledge of and is liable towards the invoice itemized as item No.18 in the Statement of Claim for the sum of RM10,099.68.

11.5 Whether the defendant received the plaintiff's letter of demand dated 2 February 2016.

11.6 Whether the defendant is liable to pay the plaintiff for any of the invoices stated in paragraph 6 of the Statement of Claim.

11.7 What are the terms of the sub-contract between the plaintiff and the defendant? Specifically:

(a) Whether the terms of the main contract between Schlumberger and the defendant would form the basis of the terms of the sub-contract between the plaintiff and the defendant;

(b) Whether the defendant is liable to pay service charges for the resident jobs to the plaintiff or whether the defendant is only liable to pay manpower charges for the resident jobs to the plaintiff.

11.8 Whether the plaintiff is automatically entitled to be paid for all the invoices issued by the plaintiff to the defendant in respect of the project.

11.9 Whether the defendant had admitted that it is liable to make payment to the plaintiff for any of the invoices stated in paragraph 6 of the Statement of Claim.

(Counterclaim)

11.10 Whether the defendant is entitled to a refund by the plaintiff for the sum of RM28,772.40, being the second or double payment of three (3) invoices which had been paid by the defendant to the plaintiff.

11.11 Whether the defendant is entitled to a refund by the plaintiff for the sum of RM161,902.00, being a payment of service charges to the plaintiff.

Summary of the plaintiff's case

[12] The defendant had appointed the plaintiff as a sub-contractor to carry out inspection and cleaning work of pipes at Schlumberger, Wilayah Persekutuan Labuan sites in respect of the project. The terms of the said appointment were, *inter alia,* that the defendant is to pay the plaintiff for work done within 30 days of the issuance of the plaintiff's invoices and that the defendant is to pay the plaintiff's employees' wages/salary (manpower) on a monthly basis. The plaintiff carried out the said work and provided manpower for the project from January 2015 to December 2015 wherein the plaintiff had issued invoices amounting to RM1,138,169.97 to the defendant for the work done (hereinafter referred to as "**the outstanding invoices**"). The defendant acknowledged receipt of the outstanding invoices. The defendant paid the plaintiff's employees' wages/salary on a monthly basis.

[13] However, the defendant failed, refused and/or neglected to make payment for the outstanding invoices despite several reminders from the plaintiff. By email communications between the plaintiff and the defendant, the plaintiff demanded payment for the outstanding invoices. It is alleged that the defendant admitted the debt and merely sought time from the plaintiff to pay the outstanding sum which is due and owing.

[14] The plaintiff demanded payment for the outstanding invoices from the defendant via its letter dated 2 February 2016 and letter dated 17 May 2016 issued by the plaintiff's solicitors, Messrs Rahman Rohaida. The defendant responded via its letter dated 30 May 2016 seeking a copy of all relevant documents to prove the plaintiffs claim. The plaintiff, via their solicitors' letter dated 17 August 2016, informed the defendant that a copy of all relevant documents were within the defendant's possession as the plaintiffs copies bear the defendant's acknowledgment. The plaintiff further demanded payment for the outstanding invoices. However, the defendant failed, refused and/or neglected to make any payment in respect of the outstanding invoices to the plaintiff and the sum of RM1,138,169.97 remains due and owing from the defendant to the plaintiff.

Summary of the defence

[15] The defendant and the plaintiff had collaborated on a project which was awarded by Schlumberger to the defendant ("**the main contract**"). The plaintiff, being a collaborative partner, was not formally appointed as a sub-contractor for the project. The parties also did not enter into any formal agreement to stipulate the terms of the sub-contract ("**the sub-contract**"), as they agreed that the terms under the main contract would form the basis of the terms under the sub-contract. The deployment of personnel to perform services for the project are primarily as follows:

(a) Residential/full time placements of personnel at Schlumberger's premises ("**resident jobs**"). Under this scope, Schlumberger would pay a monthly lump sum for the resident personnel stationed at Schlumberger's premises ("**manpower charges for resident jobs**").

(b) *Ad hoc* deployments of personnel to Schlumberger's premises on a temporary basis to perform the services as required by Schlumberger ("***ad hoc* jobs**"). Depending on the personnel and services required, Schlumberger would pay manpower and/or service charges for selective works performed at site, including chemicals, tools and consumables used ("**manpower and/ or service charges for *ad hoc* jobs**").

[16] The defendant alleges that manpower charges for resident jobs would include the services rendered by resident personnel; hence service charges are not payable for resident jobs. The plaintiff is not automatically entitled to be paid for all the invoices issued. The payment of the plaintiffs invoices is subject to the defendant's verification and approval. The defendant has made all the requisite payments of the manpower charges for resident jobs and the manpower and/ or service charges for *ad hoc* jobs to the plaintiff.

[17] The disputed invoices at items no. 1 to 17 pertain to resident jobs, to which only manpower charges are payable by the defendant. However, the plaintiff had claimed for service charges via the outstanding invoices, to which the plaintiff is not entitled to payment. The defendant has no knowledge of the invoice at item no. 18. The defendant could not have admitted that it was liable to pay the outstanding invoices, which involved service charges for resident jobs, when the defendant itself was not paid any service charges by Schlumberger for the resident jobs. The defendant had by mistake made double payment amounting to RM28,772.40 to the plaintiff. Therefore, the defendant is entitled to a refund by the plaintiff for the said sum. The defendant had also by mistake paid the plaintiff's invoices (via a contra-payment) involving service charges for resident jobs amounting to RM161,902.00. Therefore, the defendant is entitled to a refund by the plaintiff for the said sum.

The witnesses

[18] The witnesses who testified are as follows.

No.	Name	Designation		Witness Statement
1.	Ahmad Arham Bin Talib	Director of Easy Region Engineering Sdn Bhd.	PW1	PW1A
2.	Mohammad Tahir Bin Md. Yussof	Businessman. (former Business Development Manager of the defendant).	PW2	PW2A
3.	Mohd Farid Bin Mohd Hanif	Currently Director of DH Synergy Sdn Bhd. (former General Manager of the plaintiff)	PW3	PW3A
4.	Rakesh Kumar	Country Chief Executive of the Industry and Facilities Division of the defendant in Singapore, Malaysia and Brunei.	DW1	DW1A

Summary of Evidence

[19] The following is the evidence of the witnesses as summarized by the parties. The Notes of Evidence shall be referred to as "NOE".

NAME (PW1) : AHMAD ARHAM BIN TALIB

Examination in Chief:

The Plaintiff is not privy to any agreement and/or contract between the Defendant and Schlumberger (Answer 4-PW1A). The Defendant paid all of the Plaintiffs invoices in respect of the supply of residential manpower and *ad hoc* manpower but failed to make payment towards 18 of the Plaintiffs invoices in respect of work done (service) (reference is made to pages 22-205 of Bundle B1) (Answers 8 and 9-PW1A). All of the Plaintiffs invoices were forwarded to the Defendant as and when they were issued and Statement of Accounts were forwarded to the Defendant periodically (Answer 11-PW1A).

The Plaintiff had sent numerous emails to the Defendant as a reminder and/or demand to make payment towards the outstanding invoices(reference is made to pages 287-288, 273-274, 269, 267-268,250, 263-264, 249-250 of Bundle B1) (Answer 12-PW1A). The Defendant never denied the Defendant's debt to the Plaintiff for the said work (service) and only requested for time to settle the said payment (reference is made to pages 271-272,270, 267, 254-255, 251, 216, 214¬215, 213, 206 of Bundle B1) (Answers 12 and 13-PW1A). The Defendant had asked the Plaintiff to separate the payment for the inspection and cleaning work of pipes at all Schlumberger premises, Wilayah Persekutuan Labuan (service) from the payment for supply of manpower to carry out the said work when the Defendant was asked by Schlumberger to amend their commercial proposal (reference is made to pages 252-254 of Bundle B 1) (Answer 14-PW1A). The Plaintiff carried out the said work as well as supplied manpower to carry out the said work from January 2015 to December 2015 (reference is made to pages 289-292, 295-299, 293-295, 300-303, 304-309, 310-314 of Bundle B1) (Answer 20-PW1A). The Defendant never demanded the return of the sum paid towards invoices for work done (service)from the Plaintiff or wrote to put the Plaintiff on notice that the said invoices for work done (service) were paid by mistake(Answer 23-P W1A).

Cross-examination:

PW1 received the following part of the Request for Proposal (RFP) document: Exhibit 1-Scope of Work (pages 344-348 Bundle B1) and Exhibit 2- Schedule of Rates (pages 349-352 & 367-370 Bundle B1) (page 13 NOE). The Plaintiff was appointed as sub-contractor for the Schlumberger project (pages 13 and 14 NOE). There was no formal agreement signed between the Plaintiff and the Defendant for the Plaintiff's appointment as sub-contractor (page 15 NOE). There is nothing in writing to reflect that there were discussions between the Plaintiff and the Defendant on the terms and conditions for the Plaintiff's appointment as sub-contractor (page 16 NOE). The Plaintiff and the Defendant are collaborating on the Schlumberger project (page 17 NOE). There are two (2) types of jobs under the project, one is resident jobs and the other is *ad hoc* jobs (page 21 NOE). The manpower rates for *ad hoc* jobs are found in Exhibit 2-Schedule of Rates items (f), (g) and (h) (pages 369-370 Bundle B1) and the manpower rates for resident jobs are found in Exhibit 2-Schedule of Rates item (i) (page 370 Bundle B1) (pages 23-24 NOE). Under the term in Schlumberger's RFP Exhibit 2-Schedule of Rates (page 370 Bundle B1), only manpower rates or charges are payable for resident jobs (pages 24-25 NOE). PW1 confirmed that the email dated 17 November 2014 (page 373 Bundle B1), sent by the Plaintiff's then General Manager En. Farid, was copied to him (page 25 NOE). PW I disagreed that via the email dated 17 November 2014 (page 373 Bundle B1), the Plaintiff has agreed to all the terms and conditions in the RFP (pages 25-26 NOE). The Defendant has paid most of the Plaintiff's invoices except for the 18 invoices (pages 26-27 NOE). There was no undertaking by the Defendant to pay the Plaintiff's invoices and the Defendant merely stated that they would process the payment and payment would only be made if approved in the email on page 270 of Bundle B1 (pages 33-34 NOE).

The Defendant has always maintained in the email correspondences on pages 270 and 254 of Bundle B1 that the Plaintiff's invoices are subject to review and approval before payment can be made (page 34 NOE). None of the emails referred to at page 9, Q13 & A13 PW1A shows that the Defendant has admitted its debt to the Plaintiff (pages 36-37 NOE). There is no document to show that the Defendant had asked the Plaintiff to separate the payment for services from the payment for manpower (pages 37-38 NOE).
Re-examination: The terms and conditions agreed by parties in relation to the project in question is reflected on page 365 of Bundle B1 (pages 38-40 NOE). Vide the email on page 365 of Bundle Bl, parties agreed to mark up manpower rates by 35% and to reduce service rates by 30-40% having separated payment for services from payment for manpower (pages 40-44 NOE). Payment for service is payment for consumables to carry out the work whereas payment for manpower is just supply of workers (pages 41-44 NOE). The arrangement between the Defendant and Schlumberger and the Plaintiff and Defendant are different arrangements (page 44 NOE). The process prior to the issuance of the invoice involves obtaining instructions from the Defendant by way of the Notice of Inspection which is based on the Schedule of Rates submitted, the details of the job recommendation are then described in the invoice which is submitted along with the final report for the inspection work and Acknowledgment of Receipt to be endorsed by the Defendant (page 44 NOE). The Defendant had given its commitment to pay the outstanding invoices after the Plaintiff stated that they intended to stop work wherein the Defendant informed the Plaintiff that they were negotiating payment for the service charges with Schlumberger (pages 45-47 NOE). The Defendant admitted its debt because they did not challenge any of the Statement of Accounts and invoices sent to them (page 47 NOE). The separation of invoices for manpower and

service charges happened in the initial stage wherein Mr Tahir and Hj Suriani agreed that the separation was necessary as the manpower charges were straight forward whereas the service charges depended on the pieces of equipment required (page 48 NOE). Mr Rakesh was never involved in the initial stages involving the submission of prices to Schlumberger wherein the only people involved from the Defendant were Mr Tahir, Hj Suriani and Frederic Muray (page 49 NOE).
NAME (PW2) : MOHAMMAD TAHIR BIN MD YUSSOF
Examination in Chief: The Plaintiff's appointment as sub-contractor was separate from the contract and/or agreement between the Defendant and Schlumberger (Answer No.4- PW2A). It was never agreed upon by the Plaintiff and the Defendant that the Defendant will only pay for invoices issued by the Plaintiff in respect of manpower (Answer No. 7-PW2A). The Plaintiff was asked to separate the payment for service from the payment for manpower when the Defendant was asked by Schlumberger to amend their commercial proposal (Answer No. 7- PW2A). The Defendant had initially agreed upon the separation of payment for service and manpower and it was only upon Schlumberger's refusal to pay the Defendant that the Defendant refused to pay the Plaintiff in respect of service invoices(Answer No. 8-PW2A). The Defendant requested for time from the Plaintiff to settle all outstanding payment as the Defendant was still negotiating with Schlumberger to make payment to the Defendant(Answers No. 8 and No.9-PW2A) (reference is made to page 206 of Bundle B1).
Cross-examination: PW2 sent the RFP document (pages 332-362 Bundle B1) to the Plaintiff via the email dated 6 November 2014 (pages 363-364 Bundle B1) (pages 54-55 NOE). PW2 approached the Plaintiff to collaborate on the Schlumberger project via the email dated 6 November 2014 (pages 363-

364 Bundle B1) (page 55 NOE). There is no formal appointment of the Plaintiff as sub-contractor (page 56 NOE). There is no formal agreement signed for the Plaintiff's appointment as sub-contractor (page 56 NOE). There is a separation between "resident" and "*ad hoc*" (pages 56-57 NOE). PW2 is not familiar with each and every term and condition under the RFP (page 57 NOE). PW2 agreed that the terms and conditions in the RFP would supposedly constitute the terms and conditions between the Plaintiff and the Defendant (page 58 NOE). There is no document to reflect that the Plaintiff was asked to separate the payment for service from the payment for manpower, only verbal instructions (page 59 NOE). PW2 agreed that it is not part of his job scope to approve the invoices to be paid by the Defendant (page 59 NOE). Since PW2 has no authority, it is not for PW2 to say whether the Defendant has to pay the invoices or not (page 60 NOE). PW2 confirmed that Mr. Rakesh (DWI) was his superior and DW1's email (page 206 Bundle B1) would supersede PW2's email (page 206 Bundle B1) (page 60 NOE).
Re-examination: The Request for Proposal from Schlumberger on page 332 of Bundle B1 was not forwarded to the Plaintiff (pages 60-61 NOE). The Defendant intended to pay the Plaintiffs invoices for service charges but subsequently received instructions from management not to pay the Plaintiff for service charges because Schlumberger refused to pay the Defendant (page 62 NOE). It is PW2's understanding that the Defendant has to pay the Plaintiff for service charges as well (page 63 NOE).
NAME (PW3) : MOHD FARID BIN MOHD HANIF
Examination in Chief: The Plaintiff is not privy to any agreement and/or contract between the Defendant and Schlumberger (Answer 4-PW3A). The Defendant paid all of the Plaintiffs invoices in respect of the supply of residential

manpower and *ad hoc* manpower but failed to make payment towards 18 of the Plaintiffs invoices in respect of work done (service) (Answers 8 and 9-PW3A). All of the Plaintiffs invoices were forwarded to the Defendant as and when they were issued and Statement of Accounts were forwarded to the Defendant periodically (Answer 10-PW3A). The Plaintiff had sent numerous emails to the Defendant as a reminder and/or demand to make payment towards the outstanding invoices (reference is made to pages 275-277, 255-257, 259-262, 252, 216-217, 214, 206-208,209-212 of Bundle B1) (Answer 11-PW3A).

The Defendant never denied the Defendant's debt to the Plaintiff for the said work (service) and only requested for time to settle the said payment (reference is made to pages 265-266,216,213,270,267,254-255,251,216,214-215,213, 206 of Bundle B 1) (Answer 12-PW3A). The Defendant had asked the Plaintiff to separate the payment for the inspection and cleaning work of pipes at all Schlumberger premises, Wilayah Persekutuan Labuan (service) from the payment for supply of manpower to carry out the said work when the Defendant was asked by Schlumberger to amend their commercial proposal (Answer 13- PW3A). The Plaintiff carried out the said work as well as supplied manpower to carry out the said work from January 2015 to December 2015 (Answer 15- PW3A). The Defendant had agreed to make payment towards invoices for work done (service) up to September 2015 (reference is made to pages 276-277 of Bundle B1) (Answer 18-PW3A). Towards the final stages of communication, the Defendant had stated that they were not able to make payment towards the invoices for service as the Defendant were not able to get payment from Schlumberger under a completely separate contract than that of the Plaintiffs appointment as sub-contractors (reference is made to pages 213 and 206 of Bundle Bl) (Answer 18-PW3A). The Defendant never demanded the return of the sum paid towards invoices for work done (service) from the Plaintiff or wrote to put the Plaintiff on notice that the said invoices for work done (service) were paid by mistake prior to the Counterclaim being filed

(Answer 18-PW3A).
Cross-examination: PW3 sent the email dated 17 November 2014 (page 373 Bundle B1) to the Defendant (page 71 NOE). PW3 confirmed that “we” in the email dated 17 November 2014 (page 373 Bundle B 1) refers to the Plaintiff (page 71 NOE). The RFP in the email dated 17 November 2014 (page 373 Bundle Bl) refers to the document at page 332 to page 362 Bundle Bl (page 71 NOE).
Re-examination: The RFP referred to in the Plaintiffs email on page 373 of Bundle B1 covers the Defendant’s entire scope of work whereas the Plaintiffs scope of work is only related to services and manpower supply (pages 72 and 73 NOE).
NAME (DW1) : RAKESH KUMAR
Examination in Chief: DW 1 is the Country Chief Executive and has overseen the Schlumberger project (Answer 3-DW IA). The Defendant’s employees who were handling the project, including PW2, were reporting to DWl (Answer 3-DW 1 A). Schlumberger had invited the Defendant to participate in a tender exercise for the project via an email dated 5 November 2014 (pages 363-364 Bundle Bl). The Request for Proposal (RFP) dated 5 November 2014 (pages 332-362 Bundle B1) was attached to the email from Schlumberger (Answer 4-DWI A). The Defendant had approached the Plaintiff to collaborate on the project. Should the project be awarded to the Defendant, the Plaintiff would in effect be appointed as the subcontractor (Answer 4-DWlA). Via an email dated 6 November 2014 (page 363 Bundle Bl), the Defendant had forwarded the RFP to the Plaintiff (Answer 4-DWlA).

The Plaintiff had informed the Defendant of its agreement to the terms and conditions in the RFP via the email dated 17 November 2014 (page 373 Bundle B1) (Answer 5-DW1A). Due to the collaborative nature of the relationship between parties, the Plaintiff was never formally appointed as sub-contractor for the project. There was no formal agreement to stipulate the terms and conditions for the sub-contract as it was understood that the terms and conditions of the Main Contract (including the RFP) would form the basis of the terms and conditions under the sub-contract. At the least, the Plaintiff had agreed to the terms and conditions under the RFP (Answer 6-DW1A). There are 2 types of scope of work, namely Resident Jobs and *Ad Hoc* Jobs (Answer 7-DW1A). For *Ad Hoc* Jobs, Manpower Charges and Service Charges are payable. For Resident Jobs, only Manpower Charges are payable whereas Service Charges are not payable (Answer 7-DWIA). The Defendant would never agree to an arrangement where Schlumberger would only pay Manpower Charges for Resident Jobs to the Defendant but the Defendant would pay both Manpower Charges and Service Charges for Resident Jobs to the Plaintiff (Answer 8- DW1A). The terms and conditions in the RFP provide that the Manpower Charges for Resident Jobs would be based on a monthly or lump sum payment which includes the chemicals, tools, equipment and consumables used to perform the services at Schlumberger's premises. Therefore, the Plaintiff is not entitled to claim for separate Service Charges in respect of Resident Jobs (Answer 8-DW1A). The Plaintiff has claimed for Service Charges via the disputed invoices. However, the Defendant is not liable to pay Service Charges for Resident Jobs. The Defendant is only liable to pay Manpower Charges for Resident Jobs, which the Defendant has already paid (Answer 11-DW1A). The Plaintiff is not automatically entitled to be paid for all the invoices issued. The payment of the invoices is subject to the Defendant's verification and approval (Answer 11-DW1A). The Defendant had never admitted its debt to the Plaintiff (Answer 13-DWIA). The Defendant had always

been clear with the Plaintiff on the demarcation between what was payable for Resident Jobs and what was payable for *Ad Hoc* Jobs (Answer 13-DW1 A). The Defendant could not have admitted that it was liable to pay Service Charges for Resident Jobs to the Plaintiff, when the Defendant itself was not paid any Service Charges by Schlumberger for Resident Jobs (Answer 13-DW1A). The Plaintiff did not deny that there was double payment made by the Defendant for the 3 invoices as per the letter at page 386 of Bundle B1 (Answers 14 and 15-DW1A). Pursuant to a contra-payment, the Defendant by mistake made payment of the Plaintiff's invoices involving Service Charges for Resident Jobs (pages 8-21 of Bundle B1). The Defendant maintains that it is not liable to pay Service Charges for Resident Jobs and therefore seeks a refund from the Plaintiff (Answers 16 and 17-DW1A).
Cross-examination: DW1 was only involved in the negotiations/dealings between the Plaintiff and the Defendant from January 2015 (pages 78-80 NOE). DW1's knowledge in regards to the negotiations/dealings between the Plaintiff and the Defendant are based on documentation and has no actual knowledge in relation to the transaction between the Plaintiff and the Defendant prior to the Defendant's contract and/or agreement with Schlumberger (pages 80-81 and page 91 NOE). DWl had knowledge of the terms and conditions agreed upon by the Plaintiff and Defendant vide the email on page 365 of Bundle B1 but did not raise any issue in respect of the said email (pages 83-84 NOE). DWI agreed that vide the email on page 365 of Bundle B 1, parties had agreed to separate the invoices into manpower rates and service charges (page 84 NOE). DW1 was not involved in the discussions as to how much to charge Schlumberger (pages 84-85 NOE). There is no evidence that the RFP, Letter of Award and periodic instructions issued by Schlumberger as referred to in question and answer 6 of DWlA was

forwarded to the Plaintiff (page 92 NOE). The Defendant's officer on site had approved the Notice of Inspections, being the work done by the Plaintiff, together with the figureslsum (pages 93-95 NOE). The Defendant has never rebutted or stated that they disagree to the Statement of Accounts and invoices sent by the Plaintiff prior to the last email before the suit was initiated (pages 100-101, page 105, page 108, pages 114-1 15 NOE). The Defendant has previously paid six (6) invoices relating to service charges (pages 101-104 NOE). DW I was not present during the meeting on 15.09.2015 wherein parties agreed to contra payment (page 105 NOE). There is no evidence before the Court that Schlumberger refused to pay the Defendant for service charges (pages 109 and 11 1 NOE). The Defendant has never questioned the invoice on page 201 of Bundle Bl for manpower which the Defendant alleges they did not receive (page 1 17 NOE).
Re-examination:

Analysis and conclusion

[20] It is obvious enough that the plaintiff and defendant collaborated with each other for purposes of ensuring that the defendant secured the project from Schlumberger. The plaintiff gave their input for the commercial terms for the Request for Proposal ("**RFP**") and had also intimated that they had agreed to the RFP (see: defendant's emails at p. 287 to 288, p. 252 to 253, p. 363, p. 365 and p. 373 B1). Clearly, the plaintiff assisted the defendant in preparing the commercial proposal for purposes of the RFP. The question is whether the RFP terms and conditions which are part of the main contract constitute the terms and conditions vis-*à*-vis the sub-contract between the plaintiff and the defendant.

[21] Having looked at the entire factual matrix and the contemporaneous documents and the evidence of the witnesses, I am reluctant to make that conclusion as I have not seen the precise terms and conditions of the main contract between the defendant and Schlumberger to draw the inference in that respect. No one came from Schlumberger to testify as regards the content of their main contract with the defendant.

[22] It was suggested by the defendant that Schlumberger disputed the outstanding invoices for "services" (Resident Jobs) but I find that there is no evidence of Schlumberger actually disputing the outstanding invoices. It was only the defendant who insisting that Schlumberger was disputing the outstanding invoices. In fact, DW1 agreed that Schlumberger was aware of the plaintiff's demand for payment for the work done and the service charges and was even prepared to help "push" the defendant to make payment. This is self evident from the email from Schlumberger dated 25 November 2015 to the plaintiff (p.267 B1) where they said that they will help to push the defendant to make payment on the invoices. Quite obviously, the stance taken by Schlumberger does not sit well with the suggestion that Schlumberger was disputing the outstanding invoices.

[23] Indeed, the stance taken by Schlumberger implicitly repudiates the suggestion that the plaintiff is bound by the RFP terms and conditions because under the RFP, service charges are not payable for resident jobs. It is also significant to note that Tahir (PW2) (*a former employee of the defendant*) had said, the defendant had always intended to make payment on the outstanding invoices. But the defendant did not make payment because there were disputes between the defendant and Schlumberger and the defendant was trying to negotiate with Schlumberger for payment.

[24] In my view, whatever position (if any) may have been between the defendant and Schlumberger, is of no concern to the plaintiff as the plaintiff had done the work and had sent the outstanding invoices for RM1,138,169.97, which indisputably remains unpaid. The contemporaneous emails, suggest that the defendant was looking into the matter and was intending to pay on these invoices. The defendant's main concern all along was that the plaintiff should not stop work. And the defendant expected that the payments would be made. It is not in dispute that the plaintiff did the work from January 2015 to December 2015. The defendant paid on Invoices No. 1 to No.17. But not for Invoice No. 18 onwards. At a meeting on 15 September 2015, parties met and discussed and it was agreed that the defendant would make payment via a contra arrangement.

[25] At the meeting, it was agreed that the plaintiffs invoices would be paid via a contra from the amounts that were due and payable by the plaintiff to the defendant for other work that was done by the defendant. DW1 (Rakesh) was not present at the meeting. But he claimed that he knew what was discussed at the meeting. He said that he was updated about the meeting. In my view, the most appropriate and relevant person to testify on the matters that were discussed at the meeting is Hj. Suriani Jasman ("**Suriani**") who was the defendant's Industry Manager (Industry & Facilities Division). Suriani was one of the senior staff of the defendant who was handling the project. He was present at the meeting on 15 September 2015. There is no explanation for his absence from the witness box. Tahir (PW2) was also present at the meeting. But, Suriani did not testify during the trial. It was suggested by DW1 that the payment of RM161,902.00 (service charge to Resident Jobs) was a "mistake".

[26] But it was established during the trial that these payments were all duly verified by the defendant through their Singapore office and then only payment was made to the plaintiff. Also DW1 agreed that all invoices and statements of account were duly received by the defendant and there is no evidence that the defendant contemporaneously raised any objection to the invoices or the statement of account. Suriani was not called as a witness to explain about any purported "mistake".

[27] And quite significantly, it was not put to Tahir (PW2) that RM161,902.00 was paid because of a "mistake" on the defendant's part.

[28] During cross-examination, DW1 tried to say that the contra payment was based on invoices that were randomly picked. But counsel for the plaintiff pointed out that the contra was confined to 6 invoices which were issued in July 2015. In this regard, DW1 had himself admitted in his witness statement that PW2 was one of the executives in the defendant who was handling the project. PW2 was in fact the defendant's Business Development Manager – Industry.

[29] In so far as PW2's role is concerned, it may be seen from question 4 of DW1A that he was "handling" the project for the defendant. In this regard, DW1 said,

> "The Defendant's **employees who were handling the Project**, Mr. Suriani Jasman (Industry Manager, Industry & Facilities Division), **Mr. Mohammad Tahir Yussof (Business Development Manager Industry**) and Mr. Kamarul Faris Sulaiman (Industrial Inspector &Admin), were reporting to me at that time."
>
> [emphasis added]

[30] It is also relevant to mention that the "mistake" theory only surfaced when the defence dated 21 November 2016, was filed in this proceedings. And there was no suggestion that PW2 had any axe to grind or had any ulterior motive in giving adverse evidence against his former employer, the defendant.

[31] PW2 said that it was always the intention of the defendant that the service charges be paid. However, there was a management decision not to pay, apparently when Schlumberger decided not to pay. On the issue of payment by "mistake", it is relevant to note the following skirmish between DW1 and counsel for the plaintiff:-

> "Q: Now the Plaintiff has sent twenty-four (24) invoices to you, correct or not? Have your good office refute or decline ... or given a notice to the Plaintiff to say that you can't claim for any of these services?

A: You want answer yes or no or you want me to explain?

Q: Yes or no?

A: No, there was no email, only verbal conversations ...

Q: No, no it is okay, I am asking you for any evidence here?

A: No.

Q: And do you also agree with me that you have actually approved and verified six (6) invoices in relation to service charges and you have made payment to the Plaintiff?

A: The approval was given ...

Q: No, I am asking you, do you agree or not because there were six(6) payments that was made to the Plaintiff, correct or not?

A: The six (6) payments have been agreed, yes, it was made.

Q: And that is in relation ...

A: Wrongly made.

Q: Sorry again?

A: Wrongly made.

Q: No, you were saying wrongly made, now when you say wrongly made, I will take you to the emails. I refer you to page 277 of Bundle Bl, in relation to the six (6) invoices which purportedly wrongly made. Have you seen this email before?

A: Yes.

Q: Were you copied of this email?

A: No.

Q: "I am following up with one of the action item that we had agreed during our last meeting dated 15 September 2015 held at BV's office, Kuala Lumpur.

Based on our discussion, we had agreed on below action items:

1. Proceed with the contra payment arrangement as agreed by both party..."

Was it a mistake?

A: Yes, it was a mistake.

Q: But none of your officers refuted or denied to this email? Can you show that this email is not true, you have made the six (6) payments correct or not?

A: Correct.

Q: When did you make all the six (6) payments?

A: I think it should be somewhere in October or something. It should be October, November ...

PC: My Lord, the six (6) invoices are in the Ikatan Bahagian (A), item(2) to (7) My Lord (Bundle B1). These are meant for service charges.

Court: From where?

PC: Bahagian (A), item (2) to (7) My Lord.

Q: This is in relation to service charges, correct or not Mr Rakesh?

A: Correct.

PC: He agrees to this.

DW1: No, agreed to that, yes, it is in relation to service charges. PC: Yes.

Q: And do you agree also that all these invoices in relation to service charges are dated in July only, correct so you have actually made payments for service charges for the earlier bills?

A: It was randomly picked and contra payment to us.

Q: It cannot be randomly paid because all the bills issued were meant for July payment?

A: So one (1) month, it was randomly picked and paid. Later we realized ....

Q: Sorry Mr Rakesh, if you said randomly, there will be June, there will be May, correct or not? There was only one (1) month for the month of July only this whole payment was made for service rendered?

A: That is why it is random.

Q: What do you mean by random? You has picked up the earlier bills to settled the invoices, it is not random, the management has decided ... you see there were bills for the month of July until June 2016, correct or not?

A: (No answer)

Q: And that meeting you all had was on 15th September 2015 so basically item No.(8) in the Ikatan Bundle was issued, yes, there were other invoices which you did not pay, you check and see?

A: Okay, okay, I know.

Q: There are thirteen (13) invoices which were issued prior to the meeting, correct?

A: Okay, yes.

Q: You have only decided to make six (6) payments to set-off your contra for other due payments correct?

A: Correct.

Q: But based on this email it was not a mistake, do you agree with me?

A: Yes, I said I agree.

Q: No, no, based on this email, it was not a mistake, it was consented, it was agreed by both parties, correct or not?

A: No .... I disagree with you.

(see p.101-104 NOE)

[32] Based on the evidence as above, I doubt very much that the contra payment based on 6 invoices which included service charges for resident jobs was done randomly. There is just no credible evidence to show that it was a random payment. Indeed, I find it too far-fetched that payments could be made by randomly picking invoices. In any event, DW1 is not the right person to say whether it was paid randomly or whether it was a payment by mistake.

[33] As I said, Suriani would have been able to shed light on the matter. But he was not called as a witness during the trial. On the contrary, given the defendant's practice of ensuring that all payments are duly verified, I would think that it is more likely than not that the payments were payment, albeit via a contra, after the defendant was satisfied that these payments were due and payable to the plaintiff. It was not a mistake. Indeed, the factual matrix does not support the defendant's suggestion that the payment was made by "mistake".

[34] In this regard, to continue with the narrative of events, it is quite apposite to note that since no payment was forthcoming on the outstanding the invoices, the plaintiffs became frustrated and gave notice that they would be stopping work. They sent an ominous email dated **20 November 2015** at 4.31pm to Kamarulfar is Sulaiman (*which was copied to inter alia, Ab. Rahman Osman of Schlumberger*), and it reads as:-

> "Mr. Faris,
>
> As per direction given by ERE Board of Director, **starting tomorrow 21st November 2015, ERE is unable to continue our services for BV-SLB jobs.**
>
> If you need further explanation, kindly refer to ERE Director, Mr. Ahmad Arham Talib.
>
> Thank you.

Best Regards,

DZULKEFLI BAKAR
HEAD – OCTG INSPECTIONS & OPERATIONS DIVISION
(LABUAN BASE MANAGER)

(p.271, Bl)

[35] The response from Schlumberger was swift. At 4.58 p.m., Ab Rahman Osman of Schlumberger wrote:-

"Hi ERE and BV team

Please continue you (sic) job as normal and I believe this not professional way, since you immediate stop work effecting Schlumberger operation. I believe we are looking for long term business partnership here. Let have a discussion on this and solve any issue.

regards
Ab Rahman Osman Procurement Manager
Schlumberger WTA (M) Sdn Bhd" (p.271, B1)

[36] On 23 November 2015 (p.268 B1) PW1 sent a lengthy email (at 11.41 am) to Suriani (copied to *inter alia*, DW1, PW2 and PW3) stating the plaintiff's position. On 23 November 2015 Ab. Rahman Osman of Schlumberger wrote the following email to PW1 (at 2.13 p.m.):-

"Dear Arham,

Thanks for your email and clarification, however as per our conversation last Friday I am appreciate you can continue the Job as usual while I sort out this issue with BV and your side, please let me know if we can have an urgent meeting regarding this issue and to come out with the way forward plan.

Thanks for your support.

regards
Ab Rahman Osman
Procurement Manager
Schumberger WTA (M) Sdn Bhd"

(p.268, B1)

[37] In an email dated 24 November 2015, Dzulkefli Bakar (*Head-OCTG Inspections Operations Division, Easy Region Engineering Sdn Bhd*) wrote the following email to Ab. Rahman Osman of Schlumberger. The caption for the email was *"Long Outstanding Pgment Issue-Stop Work on 21 November 2015 for Schlumberger's NDT contract"*:-

"Mr. Rahman,

Since Mr. Arham email has encounter a problem to sent out any email, I'm forwarding his reply to your email below.

Dear Rahman,

I really sorry that I couldn't have time yesterday to receive your calls. I busy chased my Clients for payments as I need to pay salaries to 60 staff by this month end. You may not understand how's I feel in taking care of ERE cash flow. Again, ERE is a small company.

Regards to your request, for ERE to continue the works in SLB premises, I need BV to give in written email, their confirmation & commitment on the payment. Only you

(SLB) can give pressure to BV for having face to face meeting between Hj. Suraine, You & me.

Unless if you (SLB) can issue direct Work Order for ERE to continue the works, I will ensure my team shall execute as soon as my Base Manager received the WO. After all, between SLB-BV-ERE, we didn't bounce with any Contractual Document regards to WO from SLB direct to ERE is registered Vendor/Contractor with SLB.

We are facing problem due to approx. RM1 Million unpaid payment from BV 4th Schedule company to ERE NDT company. Our cost in executing the works, with 11 resident crews and 3 standby plus equipment & heavy consumables are much more higher than 3 nos of BV inspectors as witness only.

I considered your appreciation to ERE to continue the works, but please help me to push BV for the payments as soon as possible.

Thank you.

Regards,
Arham Talib.
ERESB. (p.267-268, B1)

[38] Then, on 25 November 2015 (5.50 p.m.), Ab. Rahman Osman of Schlumberger wrote the following email to PW1 where he said he would "help push" for payment. It reads as:-

"....
"Dear Arham,

I am fully understood your concern, and will **help to push BV to make release a payment to ERE** and at the same time I will help also any pending payment with BV from our side as well. For your information I already spoke to Haji Suriani and Tahir regarding this and will follow up on this by tomorrow. Thank you for your continues support to SLB we do appreciate it.
regards
Ab Rahman Osman
Procurement WTA (M) Sdn Bhd"

(p.267, B1)

[39] The meeting which was held on 15 September 2015 plays an important role in the factual matrix. After the meeting the contra payment was put in place but there are still invoices (*the outstanding invoices*) which had not been paid by the defendant. Thus, in an email dated 30 October 2015 from PW3 to Suriani and copied to *inter alia,* PW2 and PW1, it was stated that:-

"I am following up on one of the action item that **we had agreed during our last meeting dated 15 September 2015 held at BV Office, Kuala Lumpur**.

Based on our discussion, we had agreed on below action items:

1. **Proceed with the contra payment arrangement as agreed by both party – DONE.**

2. Remaining outstanding ERE invoice for the work executed in the month of August 2015 will be paid at the end of September 2015 - **STILL OUTSTANDING**.

3. Internal verification and approval process for payment will not take more than 3 weeks upon received of ERE invoices – NOT IN COMPLIANCE, refer item no.2 above.

As what we had emphasized during the meeting, we need to closely manage our cash flow in order to support Schlumberger's operation and ad hoc requirements.

Therefore it is critical for us to receive on time payment from BV as per our term of 30 days upon invoicing. At the same time we are trying hard to continuously improve our services and without good support from BV, we do not think we can perform as per client's expectation.

Pls find attached the details of outstanding invoices (SOA) for your immediate action. With this outstanding amount, we have no choice than to only sustain our services, only until 9th October 2015, ~~9th November 2015~~. Failing to receive any payment from BV prior to this date will force us to stop the work as we will be struggling to manage the associated expenses related to this contract.

We appreciate the understanding and we are looking forward to receive an urgent reply and action from your side. Thanks.

Best regards,

MOHD FARID MOHD HANIF
GENERAL MANAGER"

[emphasis added]
(p.277, B1)

[40] In an email dated 16 June 2015 to Suriani Jasman and copied to PW2 and PW3, PW1 stated the following:-

"Dear Hj Suraine,

We would like to call for meeting between ERE & BV as details below:

1. Date: 22nd June 2015

2. Time: 11AM

3. Venue: BV Office

4. Agenda: NDT Works for Schlumberger

    a) Request to re-visit the Submission Prices to BV. Justifications shall be given.

    b) Propose & submit the new Prices to BV.

5. ERE Attendees: Mr. Farid, Mr Dzulkefli & myself.

We are strongly hope that you are able to accept my request. Treat it as an URGENT & IMPORTANT meeting.

In general, as far as we both agreed that ERE & BV are collaborating each other which stated only in a piece of letter. Both companies are not bound with any contractual or an agreement, only PO basis. BV is highly respect international company with ERE is a local small NDT company.

Based on condition/scenario that ERE faced in executing the Works for SLB Labuan, I foresee that ERE as a local small NDT company shall not be able to sustain to serve not only for SLB Labuan/Kemaman/ PKFZ or Miri but also to ERE current Clients. Since we executed the Works for SLB, our Labuan OPEX was tremendously high.

Why?

1st, ERE as a local small NDT company has limited resources. It affects ERE Labuan Operations from the Management & Financial stand points.

2nd, Executing the Works for SLB Labuan itself, giving so many hurdles with unforeseen requirement & unhidden costs which are eaten off our performance, morale, deliverables & quality services to our current Clients.

For us to maintain running our Labuan Operations, we are not able to cope with the requirement & return from SLB with a lot of issues that being brought up are not solve.

Comparison being done between SLB with our previous & current Clients – requirement & return.

We shall elaborate more details on this matter during our meeting & it shall be once for all.

I shall notify formally to BV my next course by week end of 22nd June either you are able for us to meet or versa.

Thank you.

Best Regards,

AHMAD ARHAM B. TALIB
DIRECTOR."

(p.287-288, B1)

[41] Eventually, the situation was such that the plaintiff had completed their work and yet the invoices remained unpaid. And the plaintiff sent a solicitor's letter of demand dated 17 May 2016 to the defendant through Messrs Rahman Rohaida which reads as:-

> "....
>
> ....
>
> We are informed by our client that you are indebted to our client in the sum of RM1,158,052.27 as at 31.12.2015 being the balance sum due and owing to our client for work done at Ere Yard Labuan Federal Territory, Malaysia.
>
> We are further informed by our client that despite repeated demands, you have failed, refused and/or wilfully neglected to pay the said sum of RM1,158,052.27.
>
> In the premises, we are instructed by our client to demand from you, which we hereby do, the payment of the sum due and owing to our client amounting to RM1,158,052.27 within fourteen (14) days from the date hereof.
>
> TAKE NOTICE that if payment of the aforesaid sum is not made to our client or to us as their solicitors within the time period stipulated above, we have our client's strict instructions to commence legal proceedings against you for recovery of the same, in which event you will be liable for additional interest and all costs incurred by our client."
>
> (p.328, B1)

[42] The defendant replied via letter dated 30 May 2016 which reads as:-

"We refer to your letter dated 17 May 2016 on the abovementioned subject matter.

To facilitate our consideration of your client's claim for the sum of RM1,158,052.27 for work done at Ere Yard Labuan Federal Territory, Malaysia, please provide us with the breakdown of the amount with details of rates charged, description and dates of services rendered, references of mobilization notices from us (and Schlumberger) to your client and our acknowledgement of the services rendered (e.g. timesheets signed by us and Schlumberger). In addition, **please provide us with evidence of a written contract underlying the said services rendered.**

Please be informed that upon receipt of the above documents requested for, we will engage directly with your client for resolution.

In the event you client takes further action before providing the requested materials, we will produce this letter to the relevant Court on the question of an award of costs."

[emphasis added]

(p.329, B1)

[43] After the plaintiff's legal demand notice had been sent, PW2 (Tahir) wrote to PW1 on 17 June 2016 at 1.20 p.m. (copied to *inter alia* DW1 and Frederic Paturet) and stated the following:-

"Meeting with Mr. Rakesh yesterday referred.

Its been agreed that BV will arrange necessary payment related to all "manpower for resident" and "Manpower plus service for ad-hoc", asap. Mr. Frederic and Mr. Kamarulfaris bave been instructed to quickly confirm and validate all ERE invoices related to the above in order for payments to be release accordingly. We are trying our very best to expedite payments to ERE. Will keep you posted accordingly, hope it can be soonest.

Thank you for your patient and Selamat Berpuasa.

Best Regards,

Mohammad Tahir Yussof
Business Development Manager – Industry
Bureau Veritas (M) Sdn Bhd" (p.214, B1)

[44] Thereafter, in an email dated 17 June 2016 to PW2 and PW3, Frederic wrote (at 2.21 p.m.):-

"Dear Tahir, Farid,

Faris and I are working on this,

Faris needs some days to dive into the invoices and refresh on his memory on the jobs done and those invoiced and paid by SLB; too many PO not received yet. Then the split manpower/services charges needs to be reviewed too.

All this takes time. Faris may need to visit you somedays next week.

I will catch up with Faris this Monday afternoon on some several points I discussed with him this morning but we need probably until end of the month prior we provide accurate numbers to be agreed before to release any payment.

This week is unrealistic.

Thank you and have a safe week end,
Best regards.

Frederic PATURET
Technical and Operations Manager
Bureau Veritas (Malaysia)"

(p.213, B1)

[45] And in an email dated 17 June 2016 (sent at 2.58 p.m.) from DW1 to Frederic Paturet (of the defendant) and copied to PW1, PW2 and PW3, it was stated that:-

"Frederic
All the resident manpower to be paid out, all Adhoc ones that has been approved and/or have no disputes from SLB, to be paid off too.
Regards
Rakesh"

(p.213, B1)

[46] Eventually, the plaintiff's solicitors replied via letter dated 17 August 2016 and stated that:-

"We refer to the above matter and to your letter dated 30.05.2016.

We are instructed by our client to state that the documents requested by you in your abovementioned letter are well within your knowledge wherein a copy of the same has been received by you and our client's copies bear your acknowledgement.

We are also instructed to state that the details of your client's claim against you are well within your knowledge and the same shall be pleaded with references to the relevant documents in the suit filed against you.

Kindly take note that we have our client's strict instructions to commence legal proceedings against you should you fail and/or refuse to make payment of the sum of RM1,158.052.27 due and owing to our client within forty eight (48) hours from the date hereof."

(p.330, B1)

[47] It is significant that Schlumberger was not in the loop of these emails by the defendant which seem to suggest that there was a dispute as to the plaintiff's entitlement to be paid the service charges for resident jobs. But the fact remains that the plaintiff carried out the said work (service) as well as supplied manpower to carry out the said work from the month of January 2015 to December 2015. The plaintiff also issued invoices to the defendant for work carried out based on the notices of inspection verified and approved by the defendant's own officer (surveyor) on site wherein the said invoices were acknowledged as received by the defendant. In the result, the plaintiff had done the work (services for resident jobs) and issued the invoices, without any query by the defendant. It is important to note that the defendant never denied receiving the outstanding invoices and statement of accounts, including the 18 invoices that form the subject matter of this suit.

[48] It is also relevant that DW1 (p.105 NOE, lines 24-26) had confirmed he received the email enclosing the plaintiffs statement of accounts for the full sum that forms the subject matter of the plaintiff's claim. And DW1 also testified (p. 116 of the NOE, lines 4-5) that the one invoice at p. 201 B1 that the defendant claimed they had not received, was actually received but at a later time.

[49] DW1 confirmed that even the invoice at p. 201 B1 was reflected in the statement of accounts which was sent to the defendant. DW1 confirmed (p.117 NOE, lines 19-20 p.93 NOE, lines 29-34 and p.94 of the NOE, lines 1-14) that the Notices of Inspection, work done by the plaintiff and the figures/sum for the work done were all approved by the defendant's own officer (surveyor) on site. And despite receiving all of the plaintiffs invoices, the defendant did not make payment towards the 18 outstanding invoices and had never objected to and/or adduced any complaint with regard to the same. DW1's testimony confirms that there was no objection and/or complaint with regards to the outstanding invoices issued by the plaintiff for service charges.

[50] First, DW-1 confirmed that the defendant has never disagreed to pay the plaintiffs invoices for service charges despite receiving the statements of accounts and outstanding invoices from the plaintiff until the last email before the plaintiff initiated this suit. (p. 100 NOE, lines 29-33 and p.101 NOE, lines 1-20).

[51] Secondly, at p.108 of the NOE, lines 1-6, DW-1 confirmed that the defendant did not object to or query about the plaintiff's statement of accounts attached to p.275 B1, which included service charges.

[52] Thirdly, DW1 confirmed at p.114 NOE, lines 1-33 that the defendant never stated in its email that the plaintiff is not entitled to claim for service charges but merely stated that they are in the midst of processing the payment to be made to the plaintiff.

[53] Based on the defendant's conduct as stated above and the documentary evidence which were adduced during the trial and the fact that there was no objection to the invoices which were issued and no less than 6 invoices for resident jobs which included service charges were paid by the defendant via contra payment, it is clear that an estoppel operates and which precludes the defendant from belatedly objecting to the amounts stated in the invoice.

[54] I find that based on the oral and documentary evidence, the issue of "mistake" has not been proven by the defendant on a balance of probabilities. In my view, it is more likely that the "mistake" theory is an afterthought on the defendant's part so as to avoid paying the amounts that are due to the plaintiff as per the outstanding invoices. I find it rather curious that the defendant never took the position in any of the emails to the plaintiff, that they had made payments via contra, by "mistake".

[55] Further, on the evidence, I am unable to conclude that the main contract between the defendant and Schlumberger in turn governs the contractual relationship between the plaintiff and the defendant vis-*à*-vis the sub-contract. Indeed, the defendant had not clearly or unambiguously taken the position in any of the contemporaneous emails that service charges for resident jobs is not payable because it is subsumed under manpower charges as per the RFP. Indeed, if the RFP governed the relationship between the plaintiff and the defendant vis-*a*-vis the sub-contract then it is curious why the defendant responded to the plaintiff's legal letter of demand by stating:-

> "**.....please provide us with the breakdown of the amount with details of rates charged, description and dates of services rendered**, references of mobilization

notices from us (and Schlumberger) to your client and our acknowledgement of the services rendered (e.g. timesheets signed by us and Schlumberger). In addition, **please provide us with evidence of a written contract underlying the said services rendered**...."

[56] The point that I wish to emphasize here is that the defendant knew exactly what work was done and the services charges that were being claimed and yet the defendant was asking for documents and details. Clearly, there was a lack of good faith on the defendant's part.

[57] Next, if the RFP was the governing document and service charges for resident jobs are not claimable, then why was this position not taken by the defendant when they responded to the legal letter of demand. In making my conclusion on this point, I have taken into account PW2's evidence in chief where he said (in PW2A) that:-

> **"Q4: Is the Plaintiff part of the contract and/or agreement between the Defendant and Schlumberger?**
>
> A4: No, the Plaintiff is not. The Plaintiff's appointment as sub-contractor was separate from the contract and/or agreement between the Defendant and Schlumberger wherein the Plaintiff's appointment was not mentioned in the contract and/or agreement between the Defendant and Schlumberger. The Plaintiff had only assisted the Defendant in preparing the technical and commercial proposal to bid for the Schlumberger project and the amended commercial proposal."

[58] But, I have also not overlooked PW2's evidence during cross-examination where he testified as to the applicability of the RFP to the sub-contract between the plaintiff and the defendant. In this regard he said during cross-examination (p.57-59 NOE) as follows:-

"Q: Encik Tahir, I will now refer you to page 373 of this Bundle B1. I will refer you to the email from Encik Farid to you, in particular I want you to look at the second line Encik Tahir. I will read to you the second line,

"With this proposal, we agreed with all the terms and conditions outline in the RFP."

So pursuant to this email, the Plaintiff has agreed to all the terms and conditions in the RFP, do you agree?

A: I supposed this is Farid.

Q: Yes or no, do you agree or disagree?

A: I do not know because Farid says he understand so I supposed he understand the terms and agreement.

Q: Now I put it to you that the reason why Plaintiff agreed to the terms and conditions in the RFP, is because these terms and conditions would constitute the terms and conditions between the Plaintiff and the Defendant, do you agree or not?

A: Again?

Q: If not there is no other reason why you want to agreed to it, do you agree?

A: Again?

Court: Listen to the question very carefully. First of all, this email from Farid, Farid has said, we agreed, who is the "we", EASY REGION alright. What is your question again on this, I didn't get a clear answer?

Q: The question is this Encik Tahir, by virtue of this email, I put it to you that the terms and conditions in the RFP would constitute the terms and conditions between the Plaintiff and the Defendant as well, do you agree?

A: Yes I suppose so.

Q: Since earlier on, since just now Encik Tahir, you said that you are not that familiar with the terms and conditions in the RFP, I put it to you that you are not in any position to say what are the terms and conditions between Plaintiff and the Defendant, do you agree?

A: Yes, as I mentioned to you earlier, I am the Business Developer and we have another two (2) parties who are making the final decision. They may understand the full understanding of the terms and conditions. He is our Industrial Manager and our Regional Director for marketing.

Q: So the one who understand the terms and conditions would be the Industrial Manager and Regional ...?

A: Yes I suppose so, Industrial Manager because he signed the Contract you see.

Q: But not you so based on that Encik Tahir, I put it to you that you are in no position to testify as to whether the Defendant has to pay manpower charges for resident job only or manpower plus service charges, do you agree?

A: No because that is technical. That is not terms as mentioned here, that is merely technical regarding manpower or resident. That is technical.

Court: Let me get your answer, I am not familiar with terms and conditions alright but I am saying Defendant is liable to pay for resident manpower and services, is it? That is what you are saying? You, you, earlier you said, I am only Business Development and all that. I am not familiar with the terms and conditions but you are saying that you are in a position to say that Defendant is liable, BEREAU VERITAS is liable to pay for resident manpower and services, is that your answer?

PW2: Yes.

[59] It is important to emphasize that although PW2 (*being a former employee of the defendant*) gave evidence to support the plaintiff against his former employer, there was no suggestion that he had tailored his evidence because of any ulterior motive or a grudge against the defendant. He was a witness under subpoena. He was quite frank in admitting that the terms of the RFP are quite technical and that there others in the defendant, who would be more familiar with the terms and conditions of the RFP. But he was clear in his mind that the defendant (*his former employer*) was liable to pay for manpower and service charges for resident jobs. It is clear that the defendant never disputed the invoices as and when they were issued.

[60] The legal implications arising from such conduct on the defendant's part is that an account stated comes into being and/or the defendant is estopped from denying any liability to pay on the outstanding invoices. In this regard, it is relevant to refer to the decision of Kang Hwee Gee J in *HTC Global Services MSC Sdn Bhd v. Kompakar Ebiz Sdn Bhd* [2011] 9 MLJ 572 HC where he said:-

> "[27] It is clear from the affidavits of the parties that after having received those invoices on those two written contracts the defendant did not see it fit to lodge any complaint or disagreement on the items in the invoices until the suit was filed.
>
> [28] The law is clear. Where a party fails to raise any objection on the invoice of which they have been served relating to any contract it is to be estopped from denying that payment is due from them. See *Sykt Pakar Kayu & Perdagangan Sdn Bhd v. MAA-sk Sdn Bhd* [1986] 1 CLJ 595; *MP Factors Sdn Bhd v. Suangyan Projects Sdn Bhd & Ors* [2007] 4 AMR 327.
>
> [29] Similarly with respect to the third contract which is oral in nature, it is the duty of the defendant to object to the invoices that had been issued and received by them and having failed to do so the same principle of estoppel will apply. It is clear that in respect of the five invoices pertaining to the third contract no such objection had been lodged with the plaintiff until the suit is filed. "it is settled law that

where a party failed to raise any objections on the invoice it had been served relating to any contract it was estopped from denying that payment was due from it".

[61] In the present context, it is also relevant to refer to *Caltex Oil Malaysia Ltd v. Classic Best Sdn Bhd & Ors* [2007] 4 MLJ 772; [2007] 7 MLJ 131 HC where Suriyadi Halim Omar J dealt with the issue of undisputed invoices in the following manner:-

"[10] In coming to a decision in cases involving goods sold and delivered such as in this case, I would place due emphasis on the written documents, namely the statement of accounts, Invoices, delivery orders, delivery notes and the debit notes. These documents would collectively constitute a contract reduced into writing. This principle had been laid down in the case of *Pernas Trading Sdn Bhd v. Persatuan Peladang Bakti Melaka* [1979] 2 MLJ 124 where Salleh Abas FJ (as he then was), delivering the judgment of the Federal Court said, 'We feel that this course of action is not open to the respondents, as it is clear that under s. 92 of the Evidence Act 1950, oral evidence to contradict, vary, add to or subtract from, the terms of any contract, grant or disposition of property which had been reduced in writing is not admissible. The sales invoice and the delivery note being the contract reduced in writing between the appellants and the respondents s. 92 therefore applies.' See also *YK Fung Securities Sdn Bhd v. Ronald Yeoh Kheng Hian* [1989] 3 MLJ 490 where the High Court had decided that 'he was subsequently furnished with the relevant monthly statement of accounts to which he had no objections, protest or queries.'

[11] Further in the case of *Syarikat Pakar Kayu dan Perdagangan Sdn Bhd v. Maa-sk Sdn Bhd* [1986] 1 CLJ 595, also a case concerning goods sold and delivered, the High Court granted the plaintiffs application for summary judgment on the ground that the defendant had not raised any objection or queries even though detailed particulars of the transactions were provided through the monthly statements of accounts.

[12] Based on the above authorities and by virtue of s. 92 of the Evidence Act 1950, the defendant in this case cannot offer oral evidence to contradict, vary, add to or subtract from, the terms of any contract.

[13] In the present case, the plaintiff had sent statement of accounts and invoices to the first defendant. The fact is undisputed. Letters of demand were sent by the plaintiff to the defendant and **the defendant had neither protested nor questioned the plaintiff on the statements of accounts, invoices, delivery notes**, debit notes and the letter of demand. Furthermore, the first defendant had stopped payment of its two cheques issued to the plaintiff without giving any reasons.

[14] In the case of *Emperee Industries Sdn Bhd v. Renecgo Sdn Bhd* [1987] 1 CLJ 477, also a case on goods sold and delivered, the High Court allowed the plaintiffs application for summary judgment since the delivery orders had shown that the defendant had

acknowledged receipt of each delivery and the plaintiff had issued detailed invoices followed by statements of accounts. **The defendant had not attempted to explain away these documents and had in addition to that, not been able to show why he had not protested if indeed he had been invoiced for someone else's goods.**

[15] In the case of *Syarikat Tan Thiam Siong Sdn Bhd* [1983] 1 CLJ 256, also a case on goods sold and delivered, the High Court, granting the plaintiffs application for summary judgment, held that: The law is that **in the event of non-query an account-stated came into existence which created an estoppel against the defendant from querying the accounts thereafter**. There are situations for example if there was fraud, when a query may be permitted but on the facts of the case, no such situation existed.'

[16] Applying the above principles to the present case, it is an undisputed fact that the plaintiff had sent statements of accounts to the first defendant and the first defendant had not questioned the plaintiff on the said accounts. This means that a situation of 'account-stated' had arisen and the defendants are thereby estopped from now questioning the statement of accounts.

[17] The defendants had not alleged fraud and had even made payment based on accounts supplied by the plaintiff. **The first defendant had made payment** vide two Bank Utama cheques of which it had

stopped payment. **The defendants had not questioned the invoices sent by the plaintiff.** If indeed they have not received the goods that they ordered, or that they were invoiced for someone else's orders, it is only natural that the objection should have been raised there and then and not after this action is filed.

[emphasis added]

[62] In so far as Schlumberger's position is concerned, I find that there is no cogent evidence that Schlumberger actually disputed the plaintiff's service charges for resident jobs and there is also no evidence that the defendant has not been paid by Schlumberger. The defendant's mere say-so that they have not been paid by Schlumberger is self-serving and insufficient. During cross examination, DW1 said that the defendant was "negotiating" with Schlumberger to ensure that the plaintiff's invoices were paid. In this regard, DW1 was referred to PW2's email dated 23 August 2016, to PW3 where PW2 had said, *"...On the issues of the service charges payments,* ***we are still negotiating*** *with Schlumberger accordingly. Please bared (sic) with us for the time being."* DW1 said that this was done as a matter of "goodwill" and he explained as follows:-

"Q: So you are saying you cannot pay because SCHLUMBERGER do not want to pay you, are you saying that, this is what you are saying right?

A: No.

Q: Then why did Tahir actually was negotiating with SCHLUMBERGER for this payment?

A: Now I explain?

Q: Yes explain.

A: As we always maintained towards the collaborative arrangement, we did a favour or we took as a goodwill offer to them that we negotiate on their behalf saying that okay, this amount is pending

…

Q: You negotiate on whose behalf?

A: **On our behalf for ERE because I tell Schlumberger that look, I have to pay, they are asking for this money. I want to get this money from you to pay this. That's it so I have done a goodwill favour on basis of goodwill, it is a collaborative approached since they keep asking it.**

We said okay, we will go to Schlumberger and ask for this. **Schlumberger has made it very clear, I will not pay this. We still go and ask, guys, this needs to be paid, can you pay this. They say no**. That is what we are trying to explain. We even explain to Mr Farid and Mr Arham that what money I received from this, whatever money I received from this, what you called service charges, if Schlumberger agrees to pay, I will definitely share with you. I will tell you what money has been paid by Schlumberger and I will let you know the amount and we will sit down and talk about this. But as per the contract and agreement, there is no payment due to them. Neither we BV owes to ERE or Schlumberger owes to BV.

[emphasis added]
(see: line 7-30 p.109 NOE)

[63] DW1 admitted that he had no evidence to establish that Schlumberger did not want to pay the service charges. And this seen from his answer during cross-examination (See: line 17-19 p.111 NOE) where he said:-

> "Q: So Mr Rakesh, **do you have any evidence before the Court to show that SCHLUMBERGER do not want to pay or did not pay for this service charges?**
>
> A: **Right now I do not have."**

[emphasis added]

[64] In the result, I find there is just no evidence by way of a paper trail to support the defendant's allegation that RM161,902.00 was paid because of a "mistake". There is also no evidence that Schlumberger had not paid or did not want to pay or refused to pay the defendant for the service charges for resident jobs. No doubt the emails that were sent by the defendant to the plaintiff in around June 2016 (p.213-216 Bundle B1) seem to suggest that these invoices were pending verification and/or that there was an issue with service charges but these emails were not contemporaneous with the issuance of the invoices or the execution of the work by the plaintiff and were in fact sent after the plaintiff's legal letter of demand. It is also curious that these emails were not copied to Schlumberger, which seems quite odd given that Schlumberger was aware of the plaintiff's claim for payment and yet the emails that were sent shortly before the suit was filed were all passing between the persons within the defendant and copied to the plaintiff. These belated emails may well have been contrived by the defendant to give the impression that the defendant was disputing these invoices, when in truth they never disputed the invoices at the time when the invoices were issued, nor when the meeting was held on 15 September 2015 or when the contra payment was made in respect of 6 invoices which included service charges for resident jobs.

[65] In the result, for the reasons as stated above, I am of the view that the defendant has not proven that (a) the RFP terms and conditions were binding on the plaintiff vis-*à*-vis the subcontract between the plaintiff and the defendant and/or that (b) the contra-payment for 6 invoices which included service charges for resident jobs (which had been agreed upon at the meeting on 15 September 2015) was a payment made under a "mistake" and/or that Schlumberger had refused to pay the defendant. On the contrary, I am of the view that the plaintiff has proven on a balance of probabilities that a sum of RM1,138,169.97 comprising of services charges for resident jobs (and RM48,765.97 worth of manpower charges) is due and owing by the defendant to the plaintiff.

The order

[66] The plaintiff's claim is therefore allowed and judgment is entered against the defendant in the sum of RM1,138,169.97 with interest at 5% per annum from 29 January 2016 until the date of full payment or realization. The defendant is to pay costs of RM30,000.00 (subject to 4% allocator).The defendant's counterclaim is dismissed with no order as to costs. The parties are to take out a single order.

[67] Although I allowed the plaintiff's claim for RM1,138,169.97, I subsequently realized when preparing these grounds of judgment, that there should have been a deduction for the overpayment of RM28,772.40. In this regard, the plaintiff did not deny that there was double payment that was made by the defendant. The plaintiff's position is that they would not refund the excess payment of RM28,772.40 until the defendant settles the outstanding invoices. (see: paragraphs 8 to 10 of defence to counterclaim at p.72-73 Bundle A). As such, the judgment sum will eventually have to be reduced on account of the overpayment by the defendant. I shall leave it to the parties to apply to this Court for the necessary adjustment to be done (p*ursuant to the Court's inherent powers)* so that the judgment sum is reduced accordingly. But this should be done after the conclusion of the appeal in the Court of Appeal. Of course, whether such an application is necessary will depend very much on the ultimate outcome of the defendant's appeal in the Court of Appeal.

Order accordingly.

Dated: 4 OCTOBER 2017

(S NANTHA BALAN)
Judge
High Court
Kuala Lumpur

COUNSEL:

For the plaintiff - Habizan Rahman & Thevini Nayagam; M/s Rahman Rohaida

For the defendant - Jason Lai & Esther Goh; M/s Munhoe & Mar

Case(s) referred to:

HTC Global Services MSC Sdn Bhd v. Kompakar Ebiz Sdn Bhd [2011] 9 MLJ 572 HC

Caltex Oil Malaysia Ltd v. Classic Best Sdn Bhd & Ors [2007] 4 MLJ 772; [2007] 7 MLJ 131 HC