Eng Hui Cheh David v Opera Gallery Pte Ltd
[2009] SGHC 121

Case Number : Suit 182/2007

Decision Date : 19 May 2009

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Quek Mong Hua, Julian Tay and Lim Ke Xiu (Lee & Lee) for the plaintiff; Manjit Singh and Vinit Chhabra (Manjit Govind & Partners) for the defendant

Parties : Eng Hui Cheh David — Opera Gallery Pte Ltd

Contract

19 May 2009 Judgment reserved

Lai Siu Chiu J:

1 This case revolved around a bronze sculpture called "The Thinker" ("the sculpture") that David Eng ("the plaintiff") bought from the gallery of Opera Gallery Pte Ltd ("the defendant") in November 2005 for US$1m and which the plaintiff was told was a limited edition of the original by the renowned French sculptor Rodin Auguste ("Rodin"). In this suit, the plaintiff (who alleged that the defendant had misrepresented the sale to him) claimed a refund of his payment and alternatively damages for the defendant's breach of contract.

The facts

2 The 63 year old plaintiff is a successful businessman whose wife (prior to November 2005) had purchased art pieces from the defendant. In the course of making such purchases which were delivered to his home, the plaintiff became acquainted with the defendant's director Stephane Le Pelletier ("Pelletier") who is a French national. The plaintiff had reason to believe that Pelletier regarded him as a high net worth customer.

3 The defendant is an established art gallery which was started in 1994. It has associated companies operating similar art galleries under the same name "Opera Gallery" in Paris, London, New York, Miami and Hong Kong.

4 Some time in early November 2005, the plaintiff received an invitation to attend the defendant's exhibition preview and sale of artworks on 18 November 2005 ("the exhibition") at its gallery. Together with the invitation, the plaintiff received from the defendant an impressively bound catalogue ("the catalogue") entitled "Masterpieces of the Century" and subtitled "Treasures from Opera Gallery" (see the extracts at 1AB7-13 and 3AB1-8). The catalogue contained descriptions and photographs of the artworks which would be put up for sale in the exhibition.

5 According to the plaintiff, Pelletier (who denied it) personally invited him on 9 November 2005 to visit the defendant's gallery to view the artworks before the exhibition. At the defendant's gallery, Pelletier drew the plaintiff's attention to the sculpture which original the plaintiff had seen in the Rodin Museum in Paris, France. The catalogue contained the following description of the sculpture:

> This year, our piece de resistance will be the iconic work of Auguste Rodin's The Thinker – a post

mortem edition. This world famous figure was the centrepiece of Rodin's fame and is to this day a symbol of his work as a whole. We will be offering for sale the posthumous limited edition of Rodin's The Thinker, of which there are 25 limited editions worldwide

6 Pelletier showed the sculpture to the plaintiff and informed him that it was the fourth out of 25 pieces cast from an original mould made by Rodin and kept by the Rodin Museum. The plaintiff was told it was a collector's item and an original work which would come with full documents of provenance including certificates from its previous owners. Pelletier added that it was the only piece that was in private hands and available for sale as the other pieces were either in museums or in other public institutions. The sculpture had been brought into Singapore as an exclusive masterpiece and had been endorsed by the Singapore Tourism Board as stated in the catalogue.

7 Upon a closer examination of the sculpture, the plaintiff noticed and conveyed to Pelletier that there was a hairline crack at the (right) bent elbow joint and also some stains and greenish discolouration. He inquired if the crack could be repaired and the sculpture cleaned and waterproofed as, if he bought it, the plaintiff intended to display it in his garden near his swimming pool. Pelletier responded that the defects raised were not major issues and he would rectify them to the plaintiff's satisfaction if the latter bought the sculpture.

8 When Pelletier told him the price of the sculpture was $1.8m, the plaintiff said he was not prepared to pay such a high price for it. The plaintiff counter-offered $1m. Pelletier did not appear willing to accept the plaintiff's counter-offer. However, as the plaintiff was walking out of the defendant's gallery (according to the plaintiff), Pelletier called him back and requested the plaintiff to wait while Pelletier contacted the owners of the sculpture.

9 According to the plaintiff, Pelletier made a telephone call in his presence. The plaintiff could not understand the conversation as it was in French. Pelletier turned to the plaintiff at one stage and inquired if the plaintiff's offer of $1m was firm. The plaintiff nodded his head whereupon Pelletier resumed his telephone conversation. After he had hung up, Pelletier turned to the plaintiff, shook the plaintiff's hand and said the deal was "done". Pelletier then congratulated the plaintiff and said the $1m was a very good price and said it was only possible because the French owner's family was in urgent need of funds as the head of the household had recently passed away. Pelletier apparently added that a sale in Singapore would help the owner's family as there would be substantial savings in taxes that would otherwise be levied if the sale took place in France.

10 The plaintiff also claimed that Pelletier showed him photographs and newspaper cuttings (in French and other foreign languages) of other editions of the sculpture that were owned by museums and other public institutions in various parts of the world. He denied that Pelletier had explained the newspaper articles to him. The plaintiff also claimed he did not see the following engravings at the foot of the 2 m tall sculpture:

SAYEGH GALLERY EDITEUR LE PENSEUR G M AUGUSTE RODIN
COPYRIGHT REPRODUCTION 1998.
CIRE PERDUE C VALSUANI PARIS
4/25

11 The plaintiff asserted that he bought the sculpture as he relied on and believed what Pelletier represented to him in [6]. He asserted that Pelletier was suave, persuasive and convincing as was evident by the fact that the plaintiff was in the defendant's gallery for only 15-20 minutes before the deal was concluded. The plaintiff's written testimony (unlike Pelletier's) did not mention that he was accompanied by a friend Deen Shahul ("Shahul) when he visited the defendant's gallery on

9 November 2005. Neither did the plaintiff call Shahul as a witness although Shahul turned up in court to listen to the proceedings.

12 On the following day or thereabouts, the plaintiff received the defendant's tax invoice dated 10 November 2005 ("the tax invoice") which stated that the price of the sculpture was US$1m after a discount of US$800,000 and described it as:

> Bronze by: RODIN Auguste (1840-1917)
> "Le Penseur" [life-size]
> No. #4/25

13 The plaintiff was surprised that the price was US$1m as he understood from his conversation with Pelletier that the price was S$1m. The plaintiff therefore met up with Pelletier on or about 13 November 2005 and raised the subject. Pelletier insisted that the price was US$1m not S$1m. He added that if the plaintiff had changed his mind on the purchase, the defendant could easily sell the sculpture to other buyers. The plaintiff eventually agreed to the price of US$1m ("the purchase price") and paid the same. He arranged for telegraphic payment of the purchase price on 14 November 2005 which the defendant received on 18 November 2005. The defendant notified guests present at the opening of the exhibition on 17 November 2005 that the sculpture had been sold.

14 When the plaintiff inquired about the documents of provenance, Pelletier allegedly assured him the same would be delivered along with the sculpture pending which the defendant would issue the plaintiff with its own certificate. The defendant did issue the plaintiff with its certificate ("the certificate") on or about 10 November 2005. The certificate which was on the defendant's letterhead had a photograph of the sculpture and stated:

> Authenticity Certificate
> Certificate number: 200511103460
>
> We the undersigned, Opera Gallery certify that the
>
> Bronze #4/25
>
> Represented by the photograph above, size 180 x 97 x 140 cm is an original work
>
> RODIN Auguste (1840-1917)
> 2005 Gallery price US$1,800,000
> Le Penseur [Life- Size]

15 The plaintiff then discussed with Pelletier where the sculpture should be placed in the plaintiff's garden. Pelletier agreed to provide and install without charge, a granite base for the sculpture.

16 On 20 February 2006, the sculpture was delivered to the plaintiff's residence while the plaintiff was out of Singapore. The plaintiff left it to his housekeeper Lau Kay Lee ("Lau") to liaise with the defendant on the delivery issue. The plaintiff's evidence was that he merely told Lau a sculpture he had purchased from the defendant would be delivered without providing Lau with any details.

17 On his return to Singapore that evening, the plaintiff discovered that the piece delivered by the defendant was not the one he had purchased; it was a different piece altogether and inferior to the sculpture he had bought. To the plaintiff's dismay, the base of the piece stated it was #12/25 not

#4/25 which he had bought. (Henceforth where necessary, the two sculptures will be referred to by their editions *viz* 4/25 and 12/25).

18 The plaintiff immediately telephoned Pelletier that same evening and conveyed what had happened. Pelletier who was then in Phuket, Thailand was profuse in his apologies and explained that the defendant had delivered 12/25 instead of 4/25 because the former was superior to the latter. Pelletier said that the defendant had tried to remove without success the defects and imperfections in 4/25 (see [7]) the plaintiff had requested. Pelletier said 12/25 did not have the imperfections of 4/25. The plaintiff informed Pelletier that he did not want 12/25 or the deal anymore.

19 The plaintiff followed up by instructing Lau to write to the defendant to place on record his conversation with Pelletier which letter dated 21 February 2006 was hand-delivered to the defendant.

20 The plaintiff then engaged the services of a solicitor (IK). The plaintiff instructed IK to contact Pelletier for a proper explanation of what had transpired. IK duly carried out the plaintiff's instructions and contacted Pelletier on 27 February 2006 to whom IK subsequently sent an email on 1 March 2006 summarising what he had discussed with Pelletier but which the latter disavowed. The email (see AB 30) recorded that Pelletier had offered to reinstate 4/25 to the plaintiff.

21 Pelletier emailed on the defendant's behalf on 7 March 2006 to IK's email attaching a letter (at AB31) to the plaintiff and his wife (see AB 32) apologising for the misunderstanding. He confirmed that the plaintiff had indeed purchased 4/25 and explained why the defendant sourced for another piece from the same series *viz* 12/25 – it was to deliver to the plaintiff a piece with a better patina condition as the defendant was told, after consulting French professionals, that it would not be possible to touch up the natural imperfections on the patina of 4/25. Pelletier admitted his mistake in not informing the plaintiff in advance before substituting 4/25 with 12/25. Pelletier added that if the plaintiff was unhappy with 12/25, the defendant would accommodate the plaintiff's request to replace it with 4/25.

22 The plaintiff however was not satisfied with the defendant's offer or explanation. He instructed IK to reject the defendant's offer, reject the delivery of 12/25 and to demand the return of the purchase price, which IK did in an email to Pelletier on 13 April 2006. By then, the defendant had appointed their present solicitors. Between April and 10 May 2006, the defendant's solicitors reiterated the defendant's willingness to deliver 4/25 but the plaintiff refused the offer.

23 On 11 May 2006, the defendant's solicitors made clear the defendant's position – the plaintiff could take 4/25 or 12/25. If the plaintiff persisted in refusing both, the defendant would recover 12/25 and return it to France while 4/25 would be warehoused in Singapore until the dispute was resolved. If the plaintiff wanted 4/25 to be disposed off, the defendant required the plaintiff's written authorisation to this effect and the sale proceeds would be handed over to the plaintiff's solicitors.

24 The plaintiff rejected the defendant's solicitors' proposal and filed this suit on 22 March 2007. After further exchange of correspondence, the defendant eventually collected 12/25 from the plaintiff's house on 12 June 2006. The defendant did not return the purchase price to the plaintiff. 4/25 is currently in storage in a warehouse in Singapore pending the outcome of this suit.

The pleadings

25 In the statement of claim, the plaintiff alleged that the defendant (through Pelletier) made the following representations of 4/25 in early November 2005:

(a) it was a rare and exclusive masterpiece as:

(i) it was a posthumous limited edition of Rodin's masterpiece of which there were only 25 limited editions worldwide;

(ii) it was an original work;

(iii) 4/25 was the only edition that was in a private collection and therefore available for sale;

(iv) it was sold with documents of provenance and originality which attested to the aforesaid representations;

(b) by reason of its rarity and exclusivity, it was worth US$1.8m;

(c) the defendant would rectify the defects in 4/25 as required by the plaintiff.

26 The plaintiff alleged he was induced by the defendant's representations to buy 4/25 for US$1m on 13 November 2005.

27 The plaintiff pleaded that the agreement he made with the defendant was partly oral and partly written. In so far as it was in writing, it was evidenced in the catalogue, the tax invoice and the certificate while the oral terms were the representations set out in [25] above. As an alternative, the plaintiff pleaded that pursuant to ss 13(1) and 14(2) of the Sale of Goods Act Cap 393 (1999 Rev Ed) ("the SGA") (see [100] *infra)*, there were implied into the sale these conditions:

(a) that 4/25 would correspond with the descriptions set out in the tax invoice, certificate and in the defendant's representations;

(b) that 4/25 was of a satisfactory condition.

28 The plaintiff alleged that the defendant delivered to his house not 4/25 that he bought but 12/25. Subsequently, by its letter dated 6 March 2006, the defendant informed the plaintiff and his wife that the defendant delivered 12/25 because the defects in 4/25 could not be rectified. The defendant offered to deliver 4/25 without rectifying the defects.

29 The plaintiff alleged that the representations in [25] were untrue in that 4/25:

(a) was not a limited edition as there were more than 25 editions of the sculpture worldwide;

(b) was not the only edition available for sale as the defendant delivered to him 12/25;

(c) was not an 'original work';

(d) was not sold with documents of provenance and originality;

(e) had defects which could not be rectified to the plaintiff's requirements.

He also relied on s 2 of the Misrepresentation Act Cap 390 1994 Rev Ed ("the MA").

30 The plaintiff pleaded that the defendant was in repudiatory breach of the agreement and he was entitled to rescind the contract. He pleaded as an alternative that there had been a total failure of consideration. He claimed a refund of the purchase price and in the alternative, damages.

31 The defendant filed a defence as well as a counterclaim. I shall only refer to salient extracts of the defendant's pleadings. In the defence, the defendant averred that to any reasonable reader, the catalogue and the description in [5] above would convey the following:

(a) the sculpture was the work of Rodin born 1840 died 1917;

(b) "post-mortem edition" and "posthumous" meant the work was done after the passing of Rodin;

(c) the sculpture available for sale was after Rodin's passing and was a limited edition and limited to 25 pieces worldwide and

(d) the defendant had available at its gallery for viewing and inspection one of the 25 pieces.

32 The defendant denied it made the representations alleged by the plaintiff in particular on "original work", "private collection", "documents of provenance" and "rare and exclusive masterpiece". The defendant pointed out that the plaintiff visited the defendant's gallery with a friend before 10 November 2005, the plaintiff was familiar with Rodin and Rodin's work and had inspected and examined the sculpture on display. The defendant denied that Pelletier had telephoned the plaintiff as alleged in [5] and or that the plaintiff had been informed that the defendant had acquired "a rare masterpiece of the work of Auguste Rodin". What was told to the plaintiff by Pelletier at the gallery was the following:

(a) the sculpture was commissioned by Sayegh Gallery ("Sayegh") an established gallery in Paris, France;

(b) the 25 editions were from an original mould which Sayegh Gallery had secured;

(c) Sayegh Gallery intended to commission only 25 pieces worldwide to keep the pieces special and exclusive to the mould;

(d) the authentication, provenance and words 4/25 (stated in [10] above) were carved into the base of the sculpture and was visible to the naked eye. The words "Valsuani Paris" referred to foundry makers in a region of Paris that had mastered the technique of melting wax waste which was the method used in the production of the 25 pieces. The references were clearly visible to the naked eye;

(e) because of the mould and the fine work associated with the Valsuani foundry, the price of US$1.8m for 4/25 was reasonable;

(f) the plaintiff was shown photographs and newspaper cuttings which verified the exclusivity of the mould, the 25 limited pieces, Sayegh Gallery, Valsuani foundry and the special nature of the edition. The articles (one of which was in English) expressed the provenance clearly as from Sayegh Gallery.

33 The defendant averred that the sale was completed when the plaintiff paid for 4/25 on or about 18 November 2005. Sometime before Christmas 2005, the plaintiff visited the defendant's gallery and inspected 4/25 again. The plaintiff raised the issue of spots on 4/25 to Pelletier and inquired if they could be removed. Pelletier informed the plaintiff the spots were part of the patina and came with 4/25 but that he would make inquiries about the removal. At no time did the plaintiff inform the defendant that he would reject 4/25 if the spots were not removed.

34 Having ascertained from professionals in France that the spots on 4/25 could not be removed or touched up, the defendant made efforts to and did secure another piece from the limited edition *viz* 12/25 which contained no spots. 12/25 was also from the Sayegh Gallery, was air-flown to Singapore and made available for the plaintiff's inspection on 15 February 2006. The plaintiff's representative Lau inspected 12/25 for 30-40 minutes at the defendant's warehouse and took photographs, it contained the same engraving set out in [10] above. The defendant then delivered and installed 12/25 at the plaintiff's house on 20 February under the supervision of the plaintiff's architect in the presence of Lau.

35 The defendant disputed the plaintiff's contention that the defendant was in breach of the contract of sale and that the plaintiff was entitled to cancel the same. The defendant contended that the plaintiff's complaint of misrepresentation was an afterthought. The defendant added that the plaintiff had adopted an unreasonable stand between 19 May 2006 and 11 June 2006 in rejecting 4/25 and in not permitting 12/25 to be removed from his house unless the defendant returned the purchase price. 12/25 was returned to the defendant on 12 June 2006, well after the defendant' solicitors' letter dated 11 May 2006 in [23] to the plaintiff's solicitors.

36 The defendant alleged that the plaintiff had defamed its reputation as an established art gallery. The defendant had associated companies operating similar art galleries worldwide and had

close association with the Singapore Tourism Board. The defendant accused the plaintiff of malice in instituting this suit to disparage the quality of 4/25 and the good name and business of the defendant.

37 The defendant counterclaimed against the plaintiff damages for defamation as well as the expenses it had incurred for making the granite base for 4/25 ($9,450), installation cost ($2,950) and removal expenses ($2,850) of 12/25 from the plaintiff's residence as well as warehousing charges at $60 per week for 4/25.

The evidence

38 Besides himself, the plaintiff called Lau and a French lawyer Olivier Ledru ("Ledru") as his witnesses. Pelletier testified for the defendant together with a French lawyer Jean-Loup Nitot, the owner/director of Sayegh Gallery *viz* John Sayegh-Belchatowski and an art dealer from Hong Kong Abrahim Mohseni.

(i) the plaintiff's case

39 The plaintiff's testimony has in general been set out earlier in [3] to [22] above. I will turn to his cross-examination for the additional facts that were adduced from him over and above what appeared in his written testimony.

40 It emerged from the plaintiff's cross-examination that he started collecting art objects by the purchase of a painting some 20 years ago. The plaintiff's visit to the Rodin Museum in Paris was some ten years ago when he saw the original sculpture there. The plaintiff thought 4/25 that he saw in the defendant's gallery was an original and added that it was represented to him that it was an original of the sculpture. He testified it certainly looked like the original even though counsel for the defendant pointed out the improbability (based on the defendant's asking price of US$1.8m for the sculpture). At a later stage of his cross-examination, the plaintiff clarified that he thought he was buying an original but limited edition of the sculpture and agreed that "edition" meant there was more than one of the same sculpture in existence.

41 The plaintiff also agreed that the words "post mortem edition" and "posthumous" meant the sculpture was done after Rodin's death (*viz* after 1917). He agreed that he understood the extract in [5] from the catalogue to mean that the defendant was offering for sale one of the 25 limited editions of the sculpture.

42 The plaintiff however claimed he was unaware that Sayegh Gallery had found a lost mould of Rodin and that it had written to the Rodin Museum for permission (which was given) to produce the sculpture from the mould. He maintained he was not told this fact by Pelletier as otherwise he would not have bought 4/25. The plaintiff claimed (at N/E 129) that 4/25 was represented to him by Pelletier as one of 25 pieces from the Rodin Museum and that the mould that produced it had been destroyed.

43 The plaintiff denied that on 9 November 2005 Pelletier had taken him through and had explained and/or translated the foreign newspaper cuttings to him. He claimed that Pelletier had only casually pointed out that the articles referred to the sculpture in museums and universities while he himself merely glanced through the articles, and they formed no impression on him. I should point out that one of those articles was in English and it disclosed that Sayegh Gallery had discovered a lost plaster of the sculpture and had obtained permission to cast it again. At one stage, the plaintiff denied Pelletier had shown him photographs of the sculpture when he was shown the newspaper cuttings.

Later, he corrected himself when he was shown his own affidavit of evidence in chief ("AEIC"), wherein he had deposed that Pelletier had shown him some photographs.

44 As for the engraving in [10] at the base of (and behind) the sculpture, the plaintiff explained that he did not look for it (N/E97) on 4/25 and the first time he saw it was on 12/25. Even then, he had to look very closely to see the wording which he confirmed was visible to the naked eye.

45 I should point out that at the hearing on 13 July 2007 of the plaintiff's summary judgment application (which was not granted), his counsel had, in answer to the court's question, confirmed that the plaintiff did not think he was buying the original masterpiece by Rodin (which was much smaller) but a limited edition. His counsel (IK) had then informed the court that the plaintiff changed his mind about the purchase when 12/25 was delivered to him as he realised then, contrary to Pelletier's representation, that 4/25 was not exclusive. (I should point out that I had made it clear to counsel for the plaintiff in the course of the plaintiff's cross-examination [at N/E 557] that I was not prepared to hear any submissions that the notes of arguments did not correctly reflect what transpired at the hearing below unless IK came to court to confirm to that effect.)

46 After further cross-examination, the plaintiff agreed that he had all the time to check 4/25 including the engraving, on his first as well as second visit (on 18 November 2005) to the defendant's gallery, and he (or Lau who also visited the defendant's gallery) could have taken photographs. Pressed by counsel for the defendant, the plaintiff agreed he knew that 4/25 was a "reproduction" and conceded that the words "Original Rodin" did not appear anywhere in the catalogue. However, the plaintiff denied counsel's suggestion that Pelletier had clearly told him 4/25 came from an original mould of Rodin discovered by the Sayegh Gallery. He also denied that he knew what he was buying was a reproduction and limited edition of the sculpture but he had subsequently changed his mind on the purchase for his own reasons. The plaintiff countered that Sayegh Gallery was never in his mind because the catalogue did not mention Sayegh Gallery at all.

47 It was noteworthy that the plaintiff's oral testimony that he rescinded his purchase due to the defendant's failure to give him a certificate of provenance for the sculpture was not his pleaded case. In his (previous) solicitor's email dated 13 April 2006 [22] to the defendant, the reason given for the plaintiff's change of mind was the defendant's failure to rectify the defects/discolouration on 4/25. The first complaint of the lack of provenance came in the plaintiff's solicitor's letter dated 24 November 2006, after the plaintiff had apparently made his own investigations in France and well after he decided he did not want 4/25.

48 There was disagreement between counsel as to whether 4/25 has a hairline crack. Both parties' counsel had viewed 4/25. While counsel for the defendant indicated he saw no hairline crack, counsel for the plaintiff said it was impossible to tell due to the lighting in the warehouse and the fact that the base of the sculpture was at eye level.

49 In the light of the parties' disagreement, I decided to and did view 4/25 where it was warehoused. At the court's request, the defendant took measurements of the engraved words in [10]. The court was informed that the entire engraving of the words "Sayegh Gallery" to "Reproduction 1988" was 13cm in length with a height of 2.5cm while the words "Cire Perdue C Valsuani Paris" were engraved separately with a length of 5.5 cm and a height of 4cm (see 3AB10 and N/E 194-195).

50 Counsel for the defendant adduced from the plaintiff in cross-examination that when the plaintiff viewed 4/25 at the defendant's gallery, the sculpture was sitting on a much lower stand of about two feet high (according to the plaintiff) and three feet high (according to Pelletier). At that

height, the engraving (at the back of the sculpture) was more easily visible than at a height of about five-six feet when it was in the warehouse, which was the height of the pedestal upon which the piece in cross-examination was placed.

51 The plaintiff admitted (at N/E 200) that he had walked round 4/25 at the defendant's gallery but claimed he had paid no attention to the engraving as he was looking at the sculpture as a whole. However, counsel drew to the court's attention that in his second O 14 affidavit, the plaintiff had deposed that he had seen the engravings and inscriptions on the sculpture but they were meaningless to him. In court, the plaintiff explained his discrepant evidence on the basis that his O 14 affidavit was in reply to Pelletier's affidavit where Pelletier had said he would assume the plaintiff had seen the engravings. The plaintiff said he wanted to make the point that even if he had seen the engravings, they would have meant nothing to him. After further questioning by the court, the plaintiff claimed he did not see the engraving at all. He denied counsel's suggestion that his complaints of staining and discolouration of the patina were concocted to find fault with 4/25.

52 Queried at one stage in re-examination by his counsel (N/E 282), the plaintiff testified he was fighting this case on principle because Pelletier had convinced him he was buying an original Rodin and he had trusted Pelletier; it had nothing to do with the purchase price of 4/25. Although he was a wealthy man, the plaintiff clarified his money was hard-earned and contrary to what was suggested to him by counsel for the defendant, US$1m was a big sum to him. He was not reneging on the sale because of the purchase price as doing so would destroy his business reputation built over 30 years.

53 In the course of cross-examination (N/E 220), the plaintiff revealed that on his trip to Paris in March - April 2006 and on his friends' recommendation, he had consulted Moyersoen Law Firm ("Moyersoen") and was told that only twelve first copies of the sculpture could be considered originals.

54 Lau was the plaintiff's first witness. He had been the plaintiff's housekeeper for about 28 years. When he came to court, Lau had been undergoing chemotherapy for nose cancer. In his AEIC, Lau expressed his gratitude to the plaintiff for paying for his treatment and medical expenses.

55 After he was told that the plaintiff had purchased the sculpture, Lau visited the defendant's gallery to take a look. He was impressed with the lifelike features of the sculpture which he was told weighed more than a ton. Lau visited the defendant's gallery again on 5 January 2006 to check on the delivery status of the sculpture. He claimed that Pelletier told him then (which Pelletier denied) that the sculpture would be moved to the defendant's warehouse for touching-up and restoration to a perfect condition. At the same meeting, Lau told Pelletier of the price quoted by the plaintiff's architect for the granite base. Earlier (in December 2005), the plaintiff had rejected a metal base provided by the defendant, because of the material and the rust on it.

56 Lau saw the sculpture again at the defendant's warehouse before 15 February 2006, accompanied by James Chow, the defendant's representative. He noticed that the greenish discolouration marks he had previously seen were no longer present so he assumed that the defendant had cleaned them off as the plaintiff had requested. Lau took random photographs of the sculpture which he subsequently handed to the plaintiff. The sculpture was delivered to the plaintiff's residence five days later.

57 It was after the plaintiff's return to Singapore that Lau was told for the first time that the plaintiff had purchased 4/25 while the defendant had delivered 12/25 to the plaintiff's residence. Only then was Lau aware that the sculptures he saw at the defendant's gallery and at the warehouse were not one and the same.

58 Nothing turns on Lau's cross-examination. He maintained he was unaware that the sculpture he saw at the defendant's gallery and that which was installed at the plaintiff's residence were different even though he noted a difference between the piece he saw during his first and third visits (for which he made a note) in that the genitals were missing from the one displayed at the warehouse. When he took photographs of the sculpture on 15 February 2006, Lau said he did not see the engraving at its base. Neither did he see the engraving when the sculpture was installed at the plaintiff's residence even though the operation took about 3½ hours, the granite base was already installed in the garden and the sculpture was placed on the granite base, which was about his height. Lau denied he felt obliged to testify in favour of the plaintiff because the latter had paid his medical bills and treatment. (I had no doubt that Lau was beholden to the plaintiff).

59 I should point out that the fact that Lau had inspected the sculpture three times before it was delivered to the plaintiff's residence was not mentioned in the plaintiff's AEIC nor was the fact that Lau had taken and handed to him photographs of the sculpture. In its closing submissions, the defendant pointed out that the plaintiff was handed Lau's photographs at the latest by 16 February 2006 and yet the plaintiff never once questioned Lau on whether the sculpture photographed was/was not 4/25.

60 The plaintiff's last witness Ledru (PW3) is from Moyersoen whose legal advice the plaintiff had sought [53]. Ledru's expert testimony was to the effect that under French law, bronze copies made from a plaster mould made by the sculptor are originals and under certain conditions can be considered as created by the artist, even if the casting was done after the death of the artist. Ledru relied on a decision of the Court of Appeal in Besancon to say that an original bronze was limited to eight copies plus four castings of the artist not intended for sale. Ledru opined that under Article 6.4 of the French Code of ethics governing artistic foundry-men, only the first twelve mouldings made under the supervision of the artist or his legal representatives can be considered originals, the others being merely reproductions. However, there was no limit on the number of copies cast from a work that was in the public domain, provided such castings included the word "reproduction" in a sufficiently legible manner. Ledru added that presenting a reproduction as an original work (*viz* without the word "reproduction") would be an act of counterfeit, punishable by criminal and civil law.

61 It had emerged from the plaintiff's cross-examination that when he briefed Moyersoen, he did not inform the law firm (or Ledru) that 4/25 had the same engraving that was shown on 12/25. The plaintiff had only provided Moyersoen with the certificate, as stated in the firm's first legal opinion dated 29 September 2006 addressed to the plaintiff's former solicitors. Ledru revealed that he only became aware of the engraving on 4/25 in July 2008, when he was alerted by the plaintiff's solicitors. Notwithstanding that 4/25 did have the engraving with the word "reproduction" and like 12/25, it should have complied with French law, Ledru opined that the defendant had nonetheless committed an act of counterfeit because of the certificate issued to the plaintiff in [14]. Ledru added that the certificate changed the complexion of things because the defendant used the words "original work" in the certificate when the casting was a reproduction.

62 Not surprisingly, counsel for the defendant attacked not only Ledru's opinion but also his credentials in the course of cross-examination. It emerged that Ledru was not a lawyer with a specialised practice or with special qualifications particularly in intellectual property. When questioned, he agreed that presenting a copyright reproduction as an original work would not amount o counterfeiting. However (during re-examination), Ledru maintained that the defendant should not have used the word "original" in the certificate. Instead, the appropriate word to put on the certificate would have been "reproduction".

63 As an aside, I should point out that in a letter dated 29 June 2006 to the plaintiff's former

solicitors, the Rodin Museum had confirmed that the sculpture was in the public domain. As such, the Rodin Museum no longer had any property rights in the sculpture. The Rodin Museum confirmed Ledru's view that French law authorised bronze reproductions so long as they were clearly engraved with the word "reproduction" to differentiate them from the original which in this case was in the Rodin Museum.

(ii) the defendant's case

64 John Sayegh-Belchatowski ("Sayegh") from Sayegh Gallery was the defendant's first witness. In his AEIC, Sayegh deposed that during Rodin's lifetime, Rodin created the original sculpture measuring 72cm (about 28 inches high) and later Rodin made a larger bronze model of the same work measuring 2m, of which two copies existed. In 1998, Sayegh Gallery found a plaster mould belonging to a private collector in Switzerland, which had been used to execute the first large bronze sculpture of Rodin. The mould was an exact replica of the original held by the Rodin Museum.

65 Sayegh purchased the mould from its Swiss owner and obtained the authorisation of the Rodin Museum to reproduce 25 bronze specimens from the mould, all identical and all measuring approximately 2m high. The permission was given in the Rodin Museum's letter dated 15 October 1998 on condition that:

(a) each piece must be described as a reproduction;

(b) each piece must mention the year of issue spelt out in four digits at the back of the piece;

(c) the reproductions were limited to 25 pieces;

(d) the number of each piece must be mentioned on the piece itself from 1/25 to 25/25.

66 Consequently, Sayegh Gallery commissioned Valsuani Foundry to reproduce the 25 pieces, in compliance with the conditions stipulated by the Rodin Museum. Sayegh confirmed that both pieces 4/25 and 12/25 formed part of the 25 reproductions. He added that at the time of their production, none of the 25 pieces had any cracks or defects. Had there been the least defect on any piece, it would not have been put up for sale to the public. This equally applied to 4/25. The price of each piece was negotiated between the parties since the exclusiveness of the series was limited to 25 pieces worldwide.

67 In cross-examination, Sayegh clarified that when it was said Rodin made the mould from which Sayegh Gallery cast the 25 reproductions, it did not mean that Rodin carried out the casting. Rodin never made moulds himself. Instead, the process was carried out by his workers under Rodin's supervision.

68 Sayegh revealed that of the 25 reproductions, he had sold 1/25 to 15/25 and kept the rest. He then explained that during his lifetime, Rodin produced 9 originals of the sculpture. After Rodin's death, Rodin Museum produced 12 pieces from the original mould it owned and still owns. The first of

the 9 original sculptures is in the Rodin Museum while the remaining 8 and the 12 limited editions reproduced by the Rodin Museum were owned by various museums worldwide. All 21 sculptures are deemed to be originals of Rodin. Sayegh produced in court a copy of the impressive catalogue (exhibit D2) that Sayegh Gallery had printed when it cast the 25 limited editions of the sculpture. Pages 46 and 47 of the catalogue showed the location of the 21 originals of the sculpture – 7 were in Europe (including Moscow), 9 were in the United States, 1 in South America (Argentina) while the remaining 4 were in Japan.

69 Sayegh's lawyer Jean-Loup Nitot ("Nitot") who was qualified in 1973 testified for the defendant. He is a specialist in the field of intellectual property and practises in Paris. Nitot (DW2) confirmed that the sculpture had fallen into public domain under article L123-1 of the French code of intellectual property as Rodin passed away more than 70 years ago. As such, the works of Rodin can be reproduced without restriction since 1982. The only precondition was that reproduction must faithfully follow the original and it was the responsibility of the Rodin Museum to ensure that such was the case.

70 Based on the letter dated 15 October 1998 from the Rodin Museum to the Sayegh Gallery, Nitot confirmed that the 25 limited editions produced by the Sayegh Gallery were reproduced with the permission of the Rodin Museum and were in conformity with French law as well as the requirements of the Rodin Museum.

71 Nitot explained that prior to March 1981, there was no legal obligation under French law to mention the word "reproduction" on a replica of a piece of art. That was why the 12 limited editions produced by the Rodin Museum in 1960 did not have the word "reproduction" on the pieces. However, as the 25 pieces reproduced by the Sayegh Gallery were done after 1981, French law required the word "reproduction" as well as the date of commissioning to appear on every piece, which was done.

72 Pelletier (DW3) was the only factual witness for the defendant. He disagreed with the plaintiff's version (in [5] to [8]) of what transpired at the defendant's gallery on 9 November 2005. He denied having told the plaintiff that the French owner needed to sell 4/25 for financial reasons. 4/25 had in fact been purchased by his head office from Sayegh Gallery. Pelletier did not speak to the purported owners that day but was actually calling his head office in Paris to seek clearance to sell 4/25 for US$1m against the asking price of US$1.8m. He accepted the plaintiff's counter-offer of US$1m only after he received the green light from Paris. He felt that the plaintiff was keener to buy the sculpture than he was to sell it.

73 Pelletier pointed out that the exhibition at the defendant's gallery was 9 days away when the plaintiff first saw the sculpture and there could well be other interested buyers on 18 November 2005. Pelletier added that he did not specifically invite the plaintiff to the defendant's gallery before the exhibition as the plaintiff had claimed. He pointed out that the plaintiff's office was in the same building as the defendant's gallery and the plaintiff chose to view the exhibits before 18 November 2005 to which Pelletier had no objections.

74 Pelletier revealed that after he had sold 4/25 to the plaintiff, he sold two more reproductions of the sculpture at higher prices (including 9/25 to a buyer in Indonesia). There was some confusion in his testimony regarding whether 4/25 left Singapore and came back after the plaintiff had rejected it. After further probing, it was made clear that 4/25 never left Singapore but was stored in a warehouse pending the outcome of this trial.

75 Pelletier explained it was due to his eagerness to please the plaintiff as a customer that prompted him to go to the trouble of sourcing another sculpture (12/25) for the former at the

defendant's expense, thinking that would be the solution to the plaintiff's complaint of discolouration on 4/25 and the defendant's inability to get rid of the defects. He never meant to deceive the plaintiff as the latter alleged nor did he make any of the representations pleaded in the plaintiff's statement of claim.

76 Pelletier expressed his unhappiness over the manner in which the plaintiff had misled him *vis-a-vis* the role of the plaintiff's former counsel IK. When he was first approached by IK, Pelletier was given the impression that IK was requested to approach the defendant on a friendly basis with a view to finding an amicable solution to the matter. Pelletier was given to understand that it would help if he were to make some kind of apology to the plaintiff. Pelletier alleged that IK's email dated 1 March 2006 (see [20]) only recorded what he (IK) considered appropriate. This included the following sentences:

> I propose to convey your apology and explanation to David who is presently overseas. I will also discuss with him your offer to reinstate 4/25 to him.

77 Pelletier was prompted thereby to write his letter dated 6 March 2006 to the plaintiff and the plaintiff's wife where he said:

> I am writing this letter today to apologise for the misunderstanding regarding the Augusta RODIN "Le Penseur" sculpture you had purchased from our gallery in November 2005.
>
> The sculpture displayed in the gallery was Ltd No. 4/25, which was the piece you originally ordered.
>
> After we closed the deal, you had noticed some natural imperfections on the patina, and you had requested me to touch-up this particular sculpture, in order to deliver it to you in perfect condition.
>
> After consulting with professionals in France for some advice, I was told that it would not be possible to touch-up this particular sculpture with natural imperfection.
>
> In order to deliver a piece with a better patina condition, we decided to source for another piece from the same series, especially for you.
>
> I assume I made a mistake in not informing you and seeking your opinion in advance, about the exchange of Ltd No. 4/25 with 12/25, which was delivered to you in perfect condition.
>
> I hope you understand that what we did was solely done with your best interest in mind, and our ultimate goal was only to fully satisfy your request to have a perfect piece.
>
> If you are not really happy with the Ltd No. 12/25, which is now in your possession, I will be most happy to accommodate your request to have the Ltd No. 4/25 back.

78 He was therefore shocked to receive IK's email dated 13 April 2006 but received on 19 April 2006 (at AB39) in which IK said:

> It is David's understanding that the original statue he ordered ie 4/25 would be waterproofed and the "defect" rectified and thereafter returned to him. This, as you are aware, did not take place. Your letter of 6 March 2006 now states that the "defect" was a natural imperfection and it would not be possible to "touch it up". David is not, as indicated to you on the telephone, prepared to

accept this as this was not the original agreement.

In the circumstances, please arrange to collect 12/25 from David's residence and arrange to return the price paid.

79 IK's email provoked the following sharp response from Pelletier on 20 April 2006 (at AB40):

Your email of 19 April 2006 came as a shock. When you first spoke to me, you said to me that you were not speaking as a lawyer but as a friend of Mr David Eng reviewing this transaction on friendly terms to find a good solution for both. I told you that the patronage of Mr David Eng is important to Opera Gallery and we would like to find a way to keep the goodwill going on both sides. You never conveyed to me that I should consult solicitors. The impression given is that there is no need as these are all friendly conversations. Mr Imran, if you intend to use what is discussed in these conversations as your basis to then say the contract is off, do you not think that you should have alerted me on your intention so that I would immediately cease talking to you and engage lawyers. I cannot accept the letters from you as fair representations of the conversations. All that portion where I said to you that Opera is not reviewing the transaction on the merits but welcome a common way to resolve this satisfactorily to both sides is not there. Why have you not set out in your letter that the deal was closed on 10th November 2005 and that Mr David Eng first raised the patina issue sometime before Christmas? Why do you say nothing about the last conversation I had with Mr David Eng sometime towards the last week of February 2006?

Your email dated 1st March 2006 and your last email are poles apart. I find it unfair. I would not have entertained any conversations or letters from you if I had known the contract is to be called off by you…

80 As Pelletier did not receive any immediate response to his above email, he considered the contents in his email unchallenged. I should add that Pelletier's comment that IK spoke to him as a friend and not as the plaintiff's lawyer was confirmed by the plaintiff himself during cross-examination (at N/E 258). Yet, when IK referred to Pelletier's above email in TRC's letter dated 6 July 2006 to the defendant's solicitors, he said:

In any event, the contents of the email of 20 April 2006 have previously been denied.

However, the documents before the court did not show any previous denials by IK of Pelletier's email.

81 Pelletier described the plaintiff's stand as ambivalent and unreasonable. Although (through his lawyers) the plaintiff had rejected 12/25 and indicated he no longer wanted 4/25, the defendant's solicitors had to send three letters to his former solicitors TRC (on 4 May 2006, 8 May 2006 and 10 May, 2006) before TRC responded on 10 May 2006 to say that the defendant could collect 12/25 "immediately". The defendant's solicitors requested the plaintiff to reconsider his position on 11 May 2006. The plaintiff's solicitors reiterated on the same day that the plaintiff wanted a refund of the purchase price on the basis that he had accepted the defendant's repudiatory breach of contract. On 15 May 2006 (see AB50), the defendant's solicitors replied to the plaintiff's solicitors *inter alia* as follows:

It is a matter of record that our clients are unable to mitigate damages as your client has refused to allow recovery of 12/25 without the full refund, a condition which our clients consider improper. As for 4/25, your client has refused to take delivery or to authorise the sale of the sculpture or to effect the sale himself. Your client will have to bear the consequences arising at

law.

82 It was only after the following request (on 20 May 2006) from the defendant's solicitors to the plaintiff's solicitors

> Kindly confirm without equivocation that your client will allow for the recovery of 12/25 without any payment and that our clients' representatives may call at your client's premises late next week or the week thereafter to effect the recovery

that the plaintiff's solicitors (on 25 May 2006) gave the go-ahead. Even then, there was a further delay in removing 12/25 from the plaintiff's residence as was reflected in the defendant's solicitors' letter dated 29 May 2006; the plaintiff refused to allow the removal that day because he was not in Singapore. 12/25 was finally taken away from the plaintiff's residence on 12 June 2006, after further (and increasingly acrimonious) correspondence between the parties' solicitors which continued until and after the writ was filed herein.

83 In his AEIC, Pelletier alleged that the plaintiff has adjusted his story several times after filing the writ. He referred in this regard to IK's email to him in [78] above and which TRC referred to in its letter dated 10 May 2006 (see [81] above). The plaintiff's then position was that the defendant had failed to waterproof 4/25 and to rectify the defect of imperfections on the patina. The plaintiff came up with a new excuse for repudiation after he had purportedly accepted the defendant's repudiatory breach. In his solicitors' letter dated 16 June 2006 (at AB64), the plaintiff alleged that he cancelled his purchase because the precondition of waterproofing had not been fulfilled. Then, by his solicitors' letter dated 24 November 2006 (at AB86) the plaintiff asserted he had consulted "an expert" who had confirmed that the sculpture was not an original artwork as represented by the defendant in the certificate. However, when requested, the plaintiff refused to provide the defendant's solicitors with a copy of his expert's report/opinion.

84 Pelletier deposed that in the statement of claim, the plaintiff made fresh allegations in his para 7(1)(2) and (3) as set out earlier in [25]. Pelletier denied he made any of the representations alleged. He pointed out that the plaintiff had refused to answer the following Interrogatories administered by the defendant:

> 1. What are the provisions of any "laws of France" which the plaintiff claims renders the reproductions by Sayegh Gallery as allegedly improper?
>
> 2. Did the person or persons check with the Rodin Museum, Paris, whether Sayegh Gallery had obtained consent for the reproductions?

85 The plaintiff refused to answer the above (and the remaining two) Interrogatories administered by the defendant. In his solicitors' letter dated 11 May 2007 (at AB101) the defendant's solicitors were informed:

> Your clients may wish to note that the propriety or otherwise of the reproductions by Sayegh Gallery is not in issue.

Pelletier complained that despite the above comment, the plaintiff failed to amend his statement of claim to remove the allegations that the defendant had violated the laws of France (by claiming 4/25 was an original).

86 In cross-examination, counsel for the plaintiff took Pelletier to task on the certificate. Pelletier's

stand was that although the certificate was the defendant's document, it would not be as important as a certificate from the Sayegh Gallery. However, the plaintiff never requested him for a certificate from the Sayegh Gallery. Pelletier disagreed with counsel that the effect of the certificate was to represent to the plaintiff that the defendant was selling an original Rodin to the plaintiff. He denied having told the plaintiff that the defendant's certificate was good enough as evidence of authenticity. Pelletier further disagreed that the plaintiff thought the purchase price was in Singapore dollars and that the first time the plaintiff saw that the price was US$1m was on 10 November 2005. Pelletier explained that the defendant had a price list at the gallery for all its exhibits and on 9 November 2005, the plaintiff was well aware that the purchase price was quoted in United States dollars. Even the bundle of newspaper cuttings that he showed the plaintiff stated the price was in United States dollars. He alleged the plaintiff tried to "play on the currency" (see N/E 602). Questioned by the court, Pelletier confirmed that the normal practice in art circles was to list prices of art pieces in United States dollars and that was the case for the defendant's price list.

87 The issue of whether the sale was concluded on 9 or 10 November 2005 was another bone of contention during cross-examination of Pelletier. While Pelletier was adamant that the sale was concluded on 9 November 2005, counsel for the plaintiff drew Pelletier's attention to the fact that in his email of 20 April 2006 to IK (at [79]) Pelletier himself had said that the sale was concluded on 10 November 2005. Pelletier denied he changed the sale date to 9 November 2005 because he had given the certificate to the plaintiff on 10 November 2005 and knew full-well that an authenticity certificate was a term of the sale. Pelletier maintained that the plaintiff only requested an invoice not an authenticity certificate and neither did he offer the defendant's own certificate in lieu of one from Sayegh Gallery.

88 Pelletier agreed that the catalogue made no mention of Sayegh Gallery even though 4/25 was a reproduction commissioned by the Sayegh Gallery and that fact would be important information to a potential buyer. He confirmed that he had not given (as opposed to shown) a copy of Sayegh Gallery's catalogue (exhibit D2) to the plaintiff either. However, Pelletier disagreed that was the main difference between the (defendant's) catalogue and Sayegh Gallery's and that had the plaintiff known of Sayegh Gallery's catalogue, the plaintiff would not have bought 4/25.

89 Pelletier explained that the catalogue was meant to promote the exhibition. The invited guests could always ask for more information of the pieces for sale that they saw in the defendant's gallery and details would have been provided, including the fact that 4/25 was commissioned by the Sayegh Gallery. He pointed out that the catalogue clearly stated that 4/25 was a post-mortem/posthumous and limited edition of Rodin's masterpiece. Moreover, the engraving on 4/25 contained the words Sayegh Gallery; anyone looking at the piece could not miss seeing those words. Pelletier revealed that after the plaintiff spotted the engraving, he discussed the engraving with the plaintiff, contradicting the plaintiff's claim that he never saw the engraving at all. He told the plaintiff that the piece came from the original mould of Rodin, was a copyright reproduction 1998 numbered 4/25, that it was cast by the Valsuani foundry as well as the size and weight. He could not recall telling the plaintiff that it was cast from an original mould kept by the Rodin Museum. He denied telling the plaintiff that the hairline crack the plaintiff saw at the elbow could be rectified. Neither did the plaintiff tell Pelletier that he wanted the piece waterproofed as he intended to put it near his swimming pool.

90 Pelletier added that he took the plaintiff through the newspaper cuttings after the plaintiff had inspected 4/25. The newspaper cuttings included an article in English which clearly referred to the Sayegh Gallery and to which he had drawn the plaintiff's attention (and which was exhibited as SLP-17 in his AEIC). He disagreed with the plaintiff's testimony that the newspaper cuttings informed the plaintiff (and that he had told the plaintiff) 4/25 was the only piece in a private collection that was available for sale, as the other limited editions were in museums, palaces, universities and other

institutions and therefore unlikely to be available for sale. Since he was not from the Sayegh Gallery, Pelletier said he would not have known and therefore could not have told the plaintiff that 4/25 was the only piece available for sale from a private collection.

91 Pelletier disagreed that when he spoke to the plaintiff on the telephone from Phuket, the plaintiff told him 12/25 was rejected and the plaintiff wanted the purchase price back. The plaintiff only rejected the piece later. In fact, in that conversation, Pelletier said he asked and the plaintiff indicated he was happy with the patina and remarked that the piece was beautiful. The plaintiff then inquired how the defendant came to acquire 12/25 to which Pelletier replied that it came from the same cast (as 4/25) and was a limited edition. The plaintiff then said he would speak to Pelletier when the latter returned to Singapore. However, thereafter, Pelletier could not contact the plaintiff on the telephone despite many attempts.

92 It emerged from Pelletier's cross-examination that the defendant was prompted to make a counterclaim because he felt that the plaintiff was attacking the good name of the defendant.

93 I should point out that during re-examination, Pelletier clarified that the plaintiff did not bring up the issue of discolouration of the patina on 9 November 2005. He raised it about a month later in December 2005 close to Christmas, well after the sale had been completed.

94 Nothing turns on the testimony of the defendant's last witness who was Abrahim Mohseni ("Mohseni"), an art consultant from Hong Kong, tasked with reporting on the structural condition of 4/25 when it was warehoused, after the plaintiff's refusal to accept the piece. Mohseni's inspection revealed no defects or structural damage to 4/25 save that there were minor structural irregularities due to casting.

The issues

95 The primary issue before the court is, did the defendant make any or all of the representations alleged by the plaintiff in regard to 4/25? Deciding the primary issue necessitates determining what were the terms, if any, of the sale. Finally, did the plaintiff have the right to rescind the sale?

The law

96 A representation is defined as a statement of fact made by one party to the contract (the representor) to the other (the representee) which, while not forming a term of the contract, is yet one of the reasons that induces the representee to enter into the contract. A misrepresentation is simply a representation that is untrue (see *Cheshire, Fifoot and Furmston's Law of Contract* Second Singapore and Malaysian edition Butterworth 1998 at p 444),

97 To succeed in his claim against the defendant, the plaintiff must prove:

(a) a representation of fact was made to him by Pelletier which was untrue;

(b) he was induced to act on the representation and

(c) he suffered a loss as a result.

98 In his opening statement (para 30), the plaintiff correctly submitted that the representation need not be the sole or decisive factor in inducing him to act and it is sufficient that the representation played a real and substantial role in causing him to act to his detriment. The case of *Tan Chin Seng v Raffles Town Club Pte Ltd* (*No 2*) [2003] 3 SLR 307 was cited in support of this proposition.

99 The plaintiff had also relied on s 2 of the MA in his pleadings [29]. That section states:

> (1) Where a party has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true.
>
> (2) Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded, the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party.
>
> (3) Damages may be awarded against a person under subsection (2) whether or not he is liable to damages under subsection (1), but where he is so liable any award under subsection (2) shall be taken into account in assessing his liability under subsection (1).

It was submitted that it was not necessary to prove there was fraudulent intention on the part of Pelletier in making the representations complained of to hold the defendant liable in damages for misrepresentation.

100 The plaintiff had relied on s 13(1) and 14(2) of the SGA at [27]. He alleged that he purchased 4/25 but the defendant delivered to him 12/25 and for the breach thereof, he had the right to rescind the contract.

101 The provisions from the SGA relied on by the plaintiff read as follows:

> **Sale by description**
>
> **13** — (1) Where there is a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description.
>
> **Implied terms about quality and fitness**
>
> **14** — (2) Where the seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of satisfactory quality.
>
> **Duties of seller and buyer**
>
> **27** — It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for

them, in accordance with the terms of the contract of sale.

102 The plaintiff also cited the following passage from *Chitty on Contracts* (30th edition Sweet & Maxwell 2008 Vol 11 page 1425 para 43-053):

> Where the term broken is a condition, upon any breach the buyer may treat the contract as discharged *ie* refuse to perform his own obligations and refuse to accept the goods or further performance. He may also sue for damages; or he may instead elect to recover money he has paid in restitution, if there has been a total failure of consideration.

The findings

103 This was a case where the parties' versions of crucial facts were so diametrically different that acceptance of one side's version must mean that the court would have to find that the other party lied, an unenviable task indeed.

104 I start my review of the evidence with events that took place on 9 November 2005 when the sale (according to the defendant) of 4/25 to the plaintiff was concluded. The plaintiff had claimed but which Pelletier denied, that the latter had telephoned him to visit the defendant's gallery before the exhibition and that was why the plaintiff came to be at the defendant's gallery on 9 November 2005. In addition to the representations that Pelletier purportedly made to him, the plaintiff alleged (in para 24 of his AEIC) that Pelletier even taunted him by saying it was alright if he (the plaintiff) changed his mind because Pelletier could easily resell 4/25 as there was a queue of potential purchasers for the sculpture at the discounted price of $1m. Whose version was more credible?

105 The defendant is an established art gallery in Singapore. Pelletier testified that in addition to the plaintiff, the defendant had sent out invitations to the exhibition to 5,000-8,000 people in the region. Surely, the plaintiff was not (as he liked to think) the only high net worth art collector that the defendant had in its clientele records. After all, 9/25 was sold to an Indonesian buyer. Was there a need for the defendant/Pelletier to specifically telephone the plaintiff to invite him to the defendant's gallery before the exhibition? I think not.

106 To my mind, it was the plaintiff (whose office was also in Takashimaya Shopping Centre) who was eager to view the exhibits before the defendant's other guests did (at the exhibition). Was there any reason for Pelletier to taunt the plaintiff? I think not. It would be foolish for any art gallery to offend its customers and its potential customers. Pelletier went to the trouble of sourcing 12/25 (at the defendant's expense which included airfreight charges for a weight of over one ton) for the plaintiff to try to solve the problem of imperfections on the patina of 4/25; such conduct makes it highly unlikely that he would have taunted a valued customer like the plaintiff. Pelletier may well have told the plaintiff that the defendant would have no difficulty in selling 4/25 at the price of US$1m or even US$1.8m if the latter did not wish to buy it. At best that was a boast which was not an idle boast as proven by the fact that the defendant subsequently sold 9/25 and 12/25 without any difficulty.

107 It cannot be disputed that the engraving in [10] is on 4/25. The fact that the plaintiff (as he claimed and his counsel submitted) did not see the engraving does not change the fact that it existed. Contrary to the plaintiff's denial, it was also clearly visible.

108 Despite his prevarication at N/E 112 (see below) the plaintiff must have seen the engraving but chose to deny what he saw. Counsel and the court saw the engraving at or above eye-level because of the high pedestal on which the sculpture was placed at the warehouse. At the defendant's gallery,

it was unchallenged evidence from Pelletier that the pedestal upon which 4/25 was placed was much lower, about 28-30 inches high. At that low level, it was much easier for the plaintiff to stoop or bend down to look at the engraving, which would clearly be more easily visible in a brightly-lit gallery than at or above eye-level in a warehouse.

109 The plaintiff could not in any case have missed seeing the engraving. In this regard, the following extracts from the plaintiff's cross-examination (at N/E 112) are significant:

> Q: So the defendant's case is this; you had all the time to look at the sculpture. You could take photographs. Your male friend was with you. Any reasonable person would have seen these engravings and know exactly what you are buying. Don't you think that is true Mr Eng?
>
> A: It is not in my nature to look into details of what was presented to me.
>
> Q: I suggest to you Mr David Eng, that is an untruth. You said earlier before lunch, US$1 million is a lot of money. I put it you that anybody who make that kind of a statement would want to examine the sculpture from top to bottom to make sure he is getting good value. Isn't that true, Mr Eng?
>
> A: It's true, but can I clarify my –
>
> Court: That comes in re-examination.

110 It bears remembering too that the plaintiff had deposed in his earlier O 14 affidavits (see [51]) that he had seen the engravings and inscriptions on 4/25 but asserted they were meaningless to him. His counsel's submission (para 181) that the question whether or not the plaintiff saw the engraving was not a matter with which the O14 application was concerned with is no answer for the plaintiff's inconsistent testimony. Indeed, I take issue with the plaintiff's lame explanation in [109]. At best, it was unconvincing and at worse, it was untrue. It is significant that the plaintiff was *the only one* who detected a hairline crack at the right elbow joint of 4/25. Neither his counsel, the defendant's counsel, Sayegh or even the defendant' consultant Mohseni could detect the crack. Such an acute observation could only have been possible if the plaintiff had scrutinised the sculpture carefully and in great detail as I am certain he did. Therefore, he could not have missed the engraving. Even if the words "Sayegh Gallery" in the engraving were meaningless to the plaintiff (as they did not appear in the catalogue, which omission his counsel made much of), the words "Auguste Rodin Copyright Reproduction 1998" would have/should have alerted any onlooker let alone a buyer who was paying US$1m for the sculpture. I agree with the defendant's submission (para 37) that anyone buying 4/25 would immediately want to know where this edition came from. Yet, the plaintiff did not ask any questions of Pelletier.

111 In the closing submissions tendered on the plaintiff's behalf, it was said (in paras 2 and 3):

> The idea that an established Art Gallery would risk its reputation by duping a customer into parting with US$1million for a "Copyright Reproduction" bronze sculpture of Auguste Rodin's masterpiece "The Thinker", on the basis of representations that this was an original work, seems at first to be improbable. How could the defendants, or rather their director, Mr Le Pelletier, have hoped to get away with it?
>
> Yet, on the other hand, why should someone such as the Plaintiff, Mr David Eng, make up such a seemingly far-fetched story? He is no art connoisseur "familiar with and well-versed in" the works of Rodin, as the Defendants suggested in their Defence, but someone who visited the Rodin

> museum in Paris as a tourist some years ago and admired what he saw there. Why should he be prepared to go to Court and give evidence on oath, thereby risking so much more than loss of face if the case is decided against him, instead of quietly letting the matter rest by accepting that he had been taken in by a combination of persuasive and misleading sales talk and the omission from the Gallery's literature of any reference to the true provenance of the work?

Why indeed. I shall set out my educated guess on the plaintiff's reason for bringing this action in the following paragraphs. I entertain grave doubts that the defendant made any of the representations alleged in the plaintiff's pleadings and even more doubt that Pelletier duped the plaintiff.

112 It was clear from the evidence that the plaintiff was very eager to buy 4/25 because he thought he was getting the only reproduction available, of 25 limited editions of the sculpture. That would mean 4/25 was a good investment. He did not pay any or much attention to what Pelletier said nor was he interested in the newspaper cuttings and articles even though he was told amongst other snippets of information, that the provenance arose from the Sayegh Gallery having discovered a lost mould and it had obtained permission from the Rodin Museum to cast 25 pieces from it. In his mind, the plaintiff thought he had secured a good deal after discounting the price by a massive US$800,000 (amounting to 44% of US$1.8m). He even tried (albeit unsuccessfully) to change the currency of the price from American to local dollars despite knowing full well, as Pelletier said, that the defendant's price was not quoted in Singapore dollars; he attempted to "get an advantage" (in Pelletier's words) but did not pursue it when he realized Pelletier was not going to budge on the issue.

113 However, when 12/25 was delivered to his residence, the plaintiff realised that his good fortune was mistaken. Lo and behold, there was another copy of the 25 limited editions of the sculpture that was available. His investment in 4/25 no longer seemed so attractive and the plaintiff looked for ways to get out of the sale. Hence, his various reasons for rejecting 4/25 at various times as set out in Pelletier's testimony (see [83] above). My finding is reinforced by the following extracts from the plaintiff's cross-examination (at N/E 150-151):

> Q My question to you is this: if 4/25 was returned to you with no mishandling, and you can look at it as long as you like, and the condition is exactly what you saw on that day and there was no story about Mr Pelletier this and Mr Pelletier that, would you agree this is what you were entitled to?
>
> A I don't agree for the fact that there was a 12/25 delivered to me.
>
> Court: You're not answering the question. That has been taken back Mr Eng. 12/25 is out of the picture. Let's stick to 4/25 which was what you bought and which the defendants say to this day they are ready, willing and able to deliver to you and it is warehoused somewhere in Singapore.
>
> Q So if it is in the condition you saw it –
>
> A If 4/25 was delivered to me from the beginning, I would have accepted it.
>
> Court: Now, not beginning. That's why you are in court.
>
> A I will not accept it now.

and again at N/E 180:

Q I put it to you that you have been influenced by some person or by yourself after all the purchase arrangements are completed, and you believe that "now I lose out because there is another or other editions surfacing in the market". Do you agree or disagree?

A Yes, I agree.

Q Thank you…Really the heart of your complaint is this, Mr David Eng, you say "I no longer want 4/25, you know there is a 12/25, so I don't want it". Isn't that true?

A Yes.

114 Because his previous solicitors had indicated (in [85]) that the plaintiff would not take issue with the reproductions by Sayegh Gallery, the plaintiff came up with a new reason for rejecting 4/25 in his AEIC (para 13). He alleged that Pelletier had explained to him that 4/25 was produced from an original mould made by Auguste Rodin and kept by the Rodin Museum. I accept the defendant's submission (para 39) that this "new account" of what Pelletier said was clearly contrived and/or an afterthought because:

(a) it was not pleaded in the statement of claim as one of the representations made by the defendant nor was it raised in the plaintiff's Reply and Defence to the Counterclaim;

(b) it was not in either of the plaintiff's two affidavits filed for the O14 proceedings and

(c) it was at variance with the plaintiff's story that Pelletier told him a French family was selling 4/25 out of necessity because it needed funds.

115 The plaintiff probably realised that with the owner of Sayegh Gallery coming to court to testify, his stand that he did not know that 4/25 was a limited edition reproduction and that he thought he was buying an original Rodin could no longer hold. He had to find a new excuse for rescinding the sale.

116 In the plaintiff's closing submissions (paras 176-178), his counsel sought to explain why the plaintiff had not raised the new misrepresentation in [114] earlier. When IK first contacted the defendant, his only complaint then was the issue of waterproofing 4/25 and the "defect' of discolouration on the patina. His counsel argued that there was no need for a purchaser to state accurately the basis for termination of a contract of sale provided that he has grounds for termination (whether or not known to the plaintiff at the time). It was said that at the time of IK's email to Pelletier in [78] above, the plaintiff was unaware the 4/25 which he purchased could not be described as an original work or that the mould was not kept by the Rodin Museum. Although he had his suspicions that he may have been the victim of misrepresentations and of a breach of contract, the plaintiff was not prepared to make his allegation until after he had checked out the provenance of the sculpture and obtained legal advice (from Moyersoen).

117 The plaintiff cited *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch D 339 which was followed by our court in *Fong Whye Koon v Chan Ah Thong* [1996] 2 SLR 706. With respect, those cases are not relevant at all. *Boston Deep Sea Fishing and Ice Co v Ansell* stands for the proposition that an employer who terminates an employee's services without cause can rely on the employee's subsequent misconduct as a ground for his dismissal, even though the misconduct was not known to the employer at the time of his termination. *Fong Whye Koon v Chan Ah Thong* concerned a claim for specific performance against a defendant/seller of a public flat who changed her mind on the sale; the issue for the court's determination was the presumption of constructive fraud. How do these cases

help to explain the plaintiff's failure to complain either directly to the defendant or through his lawyers until after he had consulted Moyersoen in April-May 2006?

118 I would add that notwithstanding my ruling in [45] above, the plaintiff's submissions (see paras 185 to 187) still sought to put a different complexion on the concessions that the plaintiff's counsel had made at the O14 hearing in the court below.

119 In essence, the gravamen of the plaintiff's case at trial was that the certificate [13] containing the words "original work" of Rodin was a misrepresentation. In cross-examination however, the plaintiff had conceded the catalogue did not use the words "original Rodin". Relying on Ledru's opinion, it was said (at para 83 to 85of the plaintiff's submissions) that both the certificate and the tax invoice [12] corroborated the plaintiff's account of events on 9 November 2005. It was submitted by his counsel that the two words "original work" were not put on an authenticity certificate to convey it was a special limited edition. There was no reference on the certificate to a reproduction let alone a copyright reproduction and there was no mention of the Sayegh Gallery. Even if the defendant's interpretation in its submissions (in para 68) that the certificate conveyed that bronze 4/25 represented in the photograph was a limited edition, how would the purchaser know that fact? Rather, the natural and obvious meaning of the certificate was that the bronze in the photograph and described more fully in the certificate was one of a limited edition of original works by Rodin, a representation which was untrue.

120 I would agree that the certificate per se would suggest that bronze 4/25 was an original work of Rodin. However, that would be ignoring 4/25 altogether where the engraving stated clearly that it was a reproduction. It was Nitot's testimony (which I accept) that French law required certification on the bronze itself and that was indeed done. Ledru's cross-examination (at [60]) suggested that he had modified the uncompromising stand he took in his original opinion. I myself find it remarkable that the plaintiff chose not to raise the discrepancy between the certificate's wording and that on the engraving at the material time, if indeed he believed he was buying the sculpture cast from the original mould of the Rodin Museum.

121 In any case, the certificate was handed to the plaintiff after the sale was concluded on 9 November 2005. The plaintiff therefore cannot rely on the certificate to found his case. If, as the plaintiff claimed, Pelletier did not show him the catalogue of Sayegh Gallery (in D2) on 9 November 2005, how would the plaintiff know (see [68] above) that the 21 originals of the sculpture were owned/housed in museums, universities and other public institutions in various parts of the world? The catalogue did not contain that information. Could it be that the plaintiff confused himself by mixing the information in the catalogue of Sayegh Gallery with that in the catalogue?

122 I am not prepared to accept the expert opinion of Ledru (quite apart from his lack of specialist qualification) because it was obvious from his cross-examination that the plaintiff had omitted to provide Ledru with all relevant documentation to arrive at his views. In particular, the plaintiff did not inform Ledru that 4/25 was cast from an original mould of Rodin discovered by the Sayegh Gallery, that the mould had been verified as genuine by the Rodin Museum and that 4/25 (like 12/25) had the words "copyright reproduction 1988" engraved on it.

123 A related issue that I need to address at this stage was the plaintiff's claim that until it was shown to him in court by counsel, he was unaware of the letter dated 15 October 1998 from Rodin Museum to the Sayegh Gallery in [65] above or the fact that the Sayegh Gallery had discovered the mould and it was then verified by the Rodin Museum. The plaintiff was untruthful – Pelletier's affidavit filed on 23 May 2007 to oppose his O14 application referred to the provenance from Sayegh Gallery as well as the letter from the Rodin Museum, which was exhibited (as SLP-19) in Pelletier's affidavit along

with Sayegh Gallery's letter dated 5 April 2006 to Pelletier, confirming that 4/25 was part of the limited edition of 1/25 to 25/25 cast by the Valsuani foundry.

124 I accept Pelletier's testimony that the plaintiff first raised his complaint on the discoloration in the patina only in December 2005 and not on 9 or 10 November 2005. Consequently, Pelletier's alleged promise to rectify the supposed defect even if given (which I doubt) could not amount to a condition of or a condition precedent to, the sale.

125 The final issue that I need to address concerns the argument on whether the defendant should have taken steps to dispose of 4/25 after taking it back from the plaintiff's residence. In this regard the exchange of correspondence in [22] to [23] between the parties' counsel is relevant. As Pelletier pointed out in cross-examination (see N/E 578), if the plaintiff wanted the defendant to sell 4/25, he should have requested/authorised the latter to do so, addressed the issue of ownership/title and advised how the sale proceeds should be dealt with pending this trial and its outcome. He failed to do so and it did not lie in the plaintiff's mouth for his counsel to criticise the defendant during Pelletier's cross-examination for not disposing of 4/25 after 12 June 2006.

The decision

126 I was not impressed by the plaintiff as a witness. He prevaricated often and it was difficult to follow his testimony which at times was inconsistent. His shift in stance between his oral testimony and his AEIC/the affidavits he had previously filed cast doubts on his credibility. Pelletier on the other hand never wavered in his position and came across as a more credible witness than the plaintiff, despite his lack of fluency in English. He was consistent throughout in his written and oral testimony and his version of the facts did not change under cross-examination.

127 As the plaintiff has failed to prove his case, I dismiss his claim with costs. I accept the defendant's submission (para 63) that the plaintiff got what he bargained for. He was initially happy with 4/25 and paid for it. He changed his mind subsequently only because 4/25 did not turn out to be exclusive due to 12/25 being available. The plaintiff cannot renege on the contract he had concluded with the defendant on 9 November 2005 as no representations were made by the defendant that induced him to purchase 4/25.

The counterclaim

128 The defendant's counterclaim was two-pronged – (i) in defamation for malicious falsehood by the plaintiff in disparaging its good name and reputation and (ii) for expenses incurred of $15,250 [37] excluding warehousing charges of $60.00 per week which are still continuing.

129 Where the defamation claim was concerned, the plaintiff submitted that the defendant had neither pleaded particulars of nor did it have any basis to make the claim. The plaintiff's submission alleged that Pelletier was to blame if there was any damage to the defendant's reputation since he was the author of the defendant's misery. Pelletier had admitted under cross-examination (N/E 547) that the plaintiff had only conveyed his unhappiness with the defendant's behaviour to the plaintiff's professional advisors. In any case the allegations of misrepresentation were made in connection with judicial proceedings for which the plaintiff enjoyed immunity from suit. The claim for malicious falsehood must fail because:

(a) there was no actionable publication;

(b) anything stated by the plaintiff was true;

(c) if it was not true, the plaintiff honestly believed it to be true and there was no malice.

130 It was submitted that what the plaintiff said about the defendant or in relation to 4/25 was absolutely privileged as it was said in the course of judicial proceedings. As privilege should have been but was not pleaded by the plaintiff in the reply and defence to the counterclaim, I am disregarding the submissions based on this defence. The letter from counsel requesting leave to amend the reply and defence to the counterclaim was written well after the plaintiff had filed his closing submissions. In the light of para 17 of the plaintiff's reply and defence to the counterclaim which states:

> The plaintiff reserves his right to plead such defences as may be necessary with regard to any additional particulars the defendants may plaintiff provide.

the request came much too late and cannot be entertained. No application to court was made by the plaintiff before or even during the trial to amend the defence to the counterclaim pursuant to the right reserved in the above pleading.

131 The defendant on the other hand submitted *in extenso* that the plaintiff's claim was an abuse of process, citing *Speed Seal Products Ltd v Paddington* [1986] 1 All ER 91. It was argued that this tort did not depend on the plaintiff's proceedings being completed before an action could be brought. The defendant alleged that the plaintiff instituted his claim for an improper motive as he had all along suppressed the fact that the real reason he sought to cancel the sale contract was due to 12/25 being available. The plaintiff was aware he had no basis to cancel his purchase as no representations were ever made to him by the defendant.

132 As abuse of process was not specifically pleaded in the counterclaim, the court cannot have regard to the defendant's submission on this cause of action. The case of *Speed Seal Products Ltd v Paddington* does not assist to overcome the defendant's omission in this regard. A claim in malicious falsehood is not to be equated with a plea of an abuse of process.

133 I accept the plaintiff's submission that there were no particulars furnished by nor evidence adduced from, the defendant to support its claim based on defamation. While the plaintiff may have in common parlance "badmouthed" the defendant that does not mean he did so out of malice.

134 To found the tort of malicious falsehood, the elements (see David Price's *Defamation Law, Procedure & Practice* 3rd edition Sweet & Maxwell 2004 p 47) are:

1 The statement must be false;

2 It must be published maliciously;

3 The publication must cause financial loss or be likely to cause such loss.

None of the ingredients for the action are present in this case. The plaintiff's primary motive in commencing this suit was to recover the purchase price. Whatever statements he made to outsiders were in pursuit of that goal, not to harm the defendant financially.

135 While there is little doubt in my mind (contrary to his denial) that the plaintiff deliberately withheld from Moyersoen vital information that 4/25 had the exact same engraving as 12/25 and was cast from an original mould of Rodin with the blessings of the Rodin Museum, that was motivated by his need to obtain the law firm's opinion (favourable to him) to support his case *viz* that the defendant represented to him that 4/25 was an original Rodin. His suppression of information was not done with any malicious intent, even if he used the unfortunate word "fake" to describe 4/25.

136 Consequently, the defendant has not proven its claim in malicious falsehood. I should add that the plaintiff's contention that the defendant's counterclaim was an attempt to intimidate him is absurd. Anyone who saw the plaintiff in the witness stand would never believe he could be so easily intimidated.

137 In relation to its claim for expenses, the plaintiff did not challenge the quantum but only its principle. All that he said in his AEIC (para 61) was that the claim was "outrageous" as such charges would have been borne by the defendant as part of the contract for 4/25 had he not rescinded his purchase.

Conclusion

138 As it is my finding that the plaintiff had no basis to rescind the contract and he, not the defendant breached the contract in refusing to take delivery of 4/25, the defendant is entitled to judgment on (part only of) its counterclaim [37]. The defendant is entitled to its claim for warehousing charges incurred for storage of 4/25 since 12 June 2006 and continuing at $60 per week. The defendant's claim for charges totalling $5,800 relating to the installation in and the removal of 12/25 from, the plaintiff's residence are disallowed. Those charges should not have been incurred without the plaintiff's prior knowledge or consent, however well-meaning Pelletier's intentions were. As Pelletier had agreed that the defendant would pay for the cost of the granite base for 4/25, the claim of $9,450 is also disallowed if the plaintiff complies with the order made below.

139 The plaintiff shall take delivery of the sculpture 4/25 from the defendant within 14 days of the date hereof failing which the defendant is at liberty to resell the sculpture at the best market price it can achieve. If the resale price is less than the plaintiff's purchase price of US$1m, the defendant is entitled to recover from the plaintiff the shortfall and all expenses (which shall include the cost of the granite base) relating to and incidental to the resale. If the defendant resells the sculpture at a price higher than US$1m, the defendant is entitled to retain the profit. The defendant shall have the costs of the plaintiff's claim and one-third of the costs of its counterclaim but with full disbursements.