Case Report(s)

Takenaka Corporation v ASM Development Sdn Bhd

HIGH COURT [KUALA LUMPUR]
SITI MARIAH HAJI AHMAD, J
COMMERCIAL SUIT NO: D6-22-3229-1998
4 JUNE 2008
IN THE HIGH COURT OF MALAYA IN KUALA LUMPUR
(COMMERCIAL DIVISION)
COMMERCIAL SUIT NO: D6-22-3229-1998
BETWEEN
TAKENAKA CORPORATION
PLAINTIFF
AND
ASM DEVELOPMENT SDN BHD
DEFENDANT

GROUNDS OF JUDGMENT

The background facts

The plaintiff and the defendant had commenced negotiations on the award of the contract in relation to a project known as "The Proposed Mixed Commercial Development and Integrated Transport Interchange of LRT-KTM-ERL at Bandar Tasik Selatan" in particular for the construction and completion of a podium block known as Zones A and B. Following the negotiations, the defendant had issued to the plaintiff a letter of intent dated 1st October 1996 which was valid for a period of two months from the date thereof. It was a term of the letter of intent that the plaintiff was to commence preliminary and pre-contract works from the date of the letter of intent. In the event negotiations were terminated for whatever reason, no award of contract would take place. If this happens the plaintiff would be reimbursed for works performed up to 1st December 1996 based on a certification of the works evaluated by Messr Hijjas Kasturi Associates Sdn Bhd as the project architect subject to a maximum limit of RM800,000.00.

The plaintiff performed the pre-contract works up to the expiry date of the letter of intent and had continued to do so even after the expiry of the letter of intent due to the repeated representations made by the defendant that the project would be eventually awarded to the plaintiff.

An extended letter of intent dated 30th November 1996 was subsequently issued by the defendant on 3rd February 1997. The plaintiff's acceptance of this extension letter contained an exception with regard to the amount

to be reimbursed in respect of works performed by the plaintiff up to 1st May 1997.

The extension letter expired on 1st May 1997. The plaintiff in its letter dated 25th June 1997 set out its claim for the amount of RM2,800,000.00 being the amount payable for all preliminary and pre-contract works performed during the seven months period from 1st October 1996 until 1st May 1997 under the letter of intent and the extension letter of intent.

Upon receiving the plaintiff's claims the defendant then requested that the plaintiff submit the breakdown of its claim of RM2,800,000.00 and the plaintiff complied. The plaintiff had also received a copy of the defendant's letter dated 10th July 1997 to its project architect, Messrs Hijjas Kasturi Associates Sdn Bhd instructing the architect to evaluate the plaintiffs claim for RM2,800,000.00. This letter was forwarded to the architect together with all documents necessary to facilitate the evaluation exercise.

Unfortunately Messrs Hijjas Kasturi did not carry out evaluation because the defendant had failed to pay the professional fees. The defendant also did not agreeable to the appointment of independent architect to prepare evaluation report. The defendant has failed to procure the certificate of evaluation at all.

The plaintiff subsequently sent letter of demand. The defendant nonetheless failed to make the necessary payment. Therefore the plaintiff prays for:

* A sum of RM2,800,000.00

* Interest at the rate of 8% per annum from the date the amount became due until the date of full payment

* Costs

The Defendant's Defence

The defendant alleged that the letter of intent was not intended to have any legal effect. Any work carried out by the plaintiff was carried out for its own benefit and in anticipation of the contract being awarded to the defendant. The contract was not awarded to the defendant.

Alternatively, the defendant alleged that the defendant's liability if any was subject to the evaluation by Hijjas Kasturi Associates Sdn Bhd, the architect for the proposed project and limited to the sum of RM800,000.00 only.

The defendant also alleged that there was no extension of the validity of the letter of intent as the plaintiff did not agree to the defendant limiting its liability to pay the plaintiff of up to RM800,000.00 only.

The defendant did not at any time agree to pay the sum of RM2,800,000.00. Lastly the defendant alleged that there was no evaluation by Hijjas Kasturi Associates Sdn Bhd in respect of the claim for RM800,000.00 and consequently the defendant is not liable to pay the plaintiff.

Issues for Determination

1. Whether there was a legally valid and binding contract created by the letter of intent dated 1st October 1996 issued by the defendant to the plaintiff in respect of the works carried out by the plaintiff;
2. Whether there was a fresh second contract which came into force on 1st December 1996 between the plaintiff and the defendant by way of their conduct; and
3. Whether the defendant's liability, if any, is only limited to RM800,000.00.

Evidence of Witnesses

A total of three witnesses were called to give evidence. The plaintiff in their case called upon one witness whereas the defendant in return called two witnesses.

The Evidence of Gary Elmer Taylor (PW1)

PW1 was and still is the Director of Tengson CES Associates Sdn Bhd, a company engaged by the plaintiff to carry out commercial and contract services for the project and was seconded full time. PW1 was involved in the defendant's project as part of the tender team for the plaintiff acting as a Contract Manager for the preparation of the tender for the project. PW1 continues to monitor all the outstanding issues since then.

PW1 was the department head in charge of all the contract, costing, budget, pricing and commercial matters. The evidence of PW1 is as follows:

Immediately upon confirmation of the letter of intent, the plaintiff proceeded with all the necessary pre-contract works. Nevertheless, there was still no indication or confirmation whether or not the award to the plaintiff can be made before 1st December 1996.

Subsequently the defendant issued the extension to the letter of intent on 3rd February 1997 extending the original expiry date of 1st December 1996 to 1st May 1997. However the plaintiff did not agree to the condition imposed by the defendant on the maximum cost of RM800,000.00 for reimbursement if the project was abandoned during the extended period. This qualification was then inserted in the extension letter of intent.

Until 10th March 1997, the defendant had still never queried or rejected the qualification that the plaintiff had inserted in the acknowledged extension to the letter of intent. The plaintiff continued working in good faith upon expectation that the project was proceeding. On 12th March 1997, PW1 attended a meeting and was requested by the defendant to withdraw the conditions attached to the extended letter of intent.

The plaintiff by their letter informed the defendant that they could not withdraw the conditions as it was already more than three months after the original expiry date of the letter of intent where the plaintiff had repeatedly made proper representation to the defendant on this issue but the defendant never objected to it until the meeting on 12th March 1997.

On the 17th March 1997 PW1 attended another meeting where the defendant confirmed its intention not to extend any further the validity of the letter of intent which expired on 1st May 1997.

The plaintiff then requested a settlement of the compensation as result of non-award of the project on a pro-rate basis at RM400,000.00 per month from 1st October 1996 to the end of April 1997 for a total of RM2,800,000.00.

Subsequently, by letter dated 10th July 1997 the defendant requested the Architect Hijjas Kasturi Associates to evaluate the plaintiff's claim of RM2,800,000.00. On 17th December 1997, the defendant again wrote to the plaintiff confirming that the defendant is still evaluating the plaintiff's claim.

On 23rd November 1998 plaintiff's solicitors wrote to Hijjas Kasturi inquiring about the evaluation but Hijjas Kasturi replied stating that the defendant was not able to maintain them as professional consultants and as such it will be difficult for them to further serve the defendant.

Subsequently the defendant had no objections in Hijjas Kasturi preparing the evaluation report provided that the plaintiff should bear the costs. Since the costs charged by Hijjas Kasturi was a considerable amount and thus plaintiff opted to appoint another firm to carry out the evaluation. Hijjas Kasturi had no objections to this. Nevertheless, on 8th February 2001 the defendant's solicitors wrote to the plaintiff's solicitors stating that the defendant was not agreeable on such proposal.

During cross-examination PW1 maintained his position as set out in the examination in-chief. His evidence has not been challenged. During re-examination he maintained that the defendant or any of the staff did not instruct the plaintiff to cease work during the relevant period. He also testified that the defendant never complained about the work carried out by the plaintiff. He also stated that the defendant never officially notify that the project will not be proceeded. In his evidence PW1 also

stated though the total costs incurred on the project is worth RM6,452,250.00 as demonstrated in the Exhibit P26 but the plaintiff only claimed based on pro rate basis of RM400,000.00 per month for five months from 1st December 1996 to 1st May 1997.

The Evidence of Mohd Fuad bin Yon (DW1)

DW1 was the defendant's company director from 1993 to 1996. His evidence is as follows:

The letter of intent was signed by DW1. The plaintiff was brought in to design and build a steel transfer structure for air-rights for a building to be constructed over three railway line ie, LRT/KTM/ ERL. The letter of intent was issued because the defendant wanted certain preliminary works to be carried out first before the project was awarded. The preliminary works were carried out for two months. If no contract was awarded after that two months, defendant would reimburse plaintiff for the works done for the two months subject to the evaluation of Hijjas Kasturi Associates and subject to a maximum sum of RM800,000.00. If the contract was awarded to plaintiff, the sum of RM800,000.00 would be absorbed and treated as part of the contract sum.

In his cross-examination DW1 agreed that the evaluation of plaintiff's work is to be done by Messrs. Hijjas Kasturi, the architect of the project. He also agreed that for Hijjas Kasturi to evaluate the work, that ASM would have instructed Hijjas Kasturi to do so.

He also stated ASM did instruct Hijjas Kasturi to do the evaluation but he did not aware whether its fees being paid. He also confirmed that the plaintiff proposed for independent party to prepare a report but not agreeable by the defendant. He also confirmed that there was a court order for the defendant to direct Hijjas Kasturi to prepare for evaluation report.

In re-examination the defendant agreed to maximum claim of RM800,000.00 with a condition that evaluation is to be done by Hijjas Kasturi.

The Evidence of Mohd Fauzi bin Yon (DW2)

DW2 was a director at the defendant from November 1996 after taking over from DW1. DW2 was the one who signed the extension letter of intent. According to him when the contract was not awarded by 1st December 1996, plaintiff requested for an extension of the letter of intent. Consequently the letter dated 30th November 1996 was issued. The reimbursement remained at RM800,000.00. DW2 does not remember whether the extended letter was backdated. According to DW2, a letter is usually sent after he has signed it. Plaintiff did not

agree that the reimbursement be limited to RM800,000.00. Plaintiff accepted and signed the letter but stated that the reimbursement would be discussed and agreed if and when the project is abandoned.

During cross-examination DW2 maintained his evidence as stated in examination in-chief. He also further stated that the plaintiff was never asked to stop work during month of December to February 1997. DW2 also agreed to the suggestion that no evaluation was undertaken by Hijjas Kasturi as at 15th October 1998. He also testified that he was not aware whether ASM replied to the request by Takenaka Corporation for the pro rate basis.

Findings of The Court

First Issue

Whether there was a legally valid and binding contract created by the letter of intent dated 1st October 1996 issued by the defendant to the plaintiff in respect of the works carried out by the plaintiff.

It is not disputed that the defendant had by a letter of intent dated 1st October 1996 which was addressed to the plaintiff requested the plaintiff to start preliminary and pre-contract works in respect of the execution and completion of the project. This direction by the defendant to the plaintiff to start preliminary works was set out with other terms in paragraph 3 of the letter of intent which provided for:

(a) the type of work to be carried out there under by the plaintiff for the defendant;

(b) duration of the contract; and

(c) the term of payment to the plaintiff for the preliminary and pre-contract works completed up to the expiry date of the said letter of intent.

On perusal of the letter the court found that the language used to describe the contractual obligations in the letter of intent clearly shows that there was intention to create a legally binding and enforceable contract and therefore, the acceptance communicated by the plaintiff to the defendant resulted into the contract being concluded. It is not disputed that upon receipt of the letter of intent, the plaintiff had immediately set out to perform its obligations by commencing preliminary works.

It is the terms of the letter of intent that in the event no award of contract in respect of the project is made, the plaintiff shall be reimbursed for the works carried out during the two months period provided that the works performed shall be evaluated by Hijjas Kasturi Associates and that the payment endorsed by Hijjas Kasturi shall not exceed RM800,000.00.

The evidence shows as of today, no payment has been received for the two months preliminary works carried out from 1st October 1996 to 1st December 1996. Therefore the plaintiff is entitled to claim payment from the defendant for the works performed.

It is to be noted that the contract provided that payment for the preliminary works can only be approved if the evaluation of works done was made by Hijjas Kasturi. Nevertheless, no such evaluation was made. If we were to look into the matter carefully, the plaintiff had tried to procure this evaluation report from Hijjas Kasturi, but Hijjas Kasturi did not evaluate the works done because the defendant did not pay its fees. When the plaintiff proposed for its own appointed architect firm to do the evaluation works, the defendant refuted the idea (unlike Hijjas Kasturi which made no objection whatsoever) resulting the evaluation to be aborted.

In the case of *Croudace v. London Borough of Lambeth* [1986] 33 BLR 20 the architect under the contract had retired and no other person was appointed to take his place, the court held that the employer's acts and omissions including but not limited to its failure to appoint a successor architect, amounted to a failure to take such steps as were necessary to enable the contractor's claim for loss and expenses be ascertained and these had amounted to a breach of contract.

Therefore since it is the defendant who failed to do all the things necessary to procure the architect's certificate, the defendant has committed a breach to the contract ie, the letter of intent. The defendant had also failed to give any evidence to dispute the actual sum incurred in the preliminary works during trial and thus is deemed to be admitted. Therefore it is my considered view that there was a legally valid and binding contract created by the letter of intent dated 1st October 1996 issued by the defendant to the plaintiff in respect of the works carried out by the plaintiff and the defendant had breached its obligation under the first contract by failing to secure the certificate of evaluation from Hijjas Kasturi, the project architect.

Second Issue

Whether there was a fresh second contract which came into force on 1st December 1996 between the plaintiff and the defendant by way of their conduct.

The second contract ie, the extension letter of intent came into force on 1st December 1996 upon expiry of the first letter of intent. The evidence of both plaintiff's and defendant's witnesses shows that the plaintiff continued carrying out the preliminary works and the defendant in turn had not disapproved the plaintiff's act or conduct.

Thus I am of the view that the conduct of both parties show that the parties had intended to have a subsequent contract in respect of the extension of the first letter of intent. The defendant had also not in any manner objected to the plaintiff's condition that the works performed during the second contract be assessed on a pro rate basis.

The extension letter of intent which was dated and came into force in 1st December 1996 was received by the plaintiff only on 3rd February 1997. This clearly shows that the letter was backdated contrary to what was testified by DW2. Evidence shows that in between 1st December 1996 and 3rd February 1997 the plaintiff had agreed to continue in good faith with the preliminary works because it believed that the defendant would reimburse it for the value of the works performed during the validity period of the second contract.

Had the defendant made known to the plaintiff that reimbursement would be limited to RM800,000.00 at the time before the second contract came into force, the plaintiff would have discontinued the preliminary works. Thus, the defendant is estopped from denying the existence of the second contract. It can then be concluded that there indeed was a fresh second contract which came into force on 1st December 1996 between the plaintiff and the defendant by way of their conduct.

Third Issue

Whether the defendant's liability, if any, is only limited to RM800,000.00.

The plaintiff's work under the second contract should be reimbursed on the basis of quantum meruit. In the book Keating on Building Contracts, 5th Edition by Anthony May at page 78 quantum meruit is explained as "The expression quantum meruit means 'the amount he deserves' or 'what the job is worth' and in most instances denotes a claim for a reasonable sum. A claim on a quantum meruit basis cannot arise if there is an existing contract between the parties to pay an agreed sum. But there maybe a quantum meruit claim where there is:

1. an express agreement to pay a reasonable sum;
2. no price fixed. If the contractor does work under a contract expressed or implied and no price is fixed by the contract, he is entitled to be paid a reasonable sum for his labor and the materials supplied ..."

In this case since the second contract had arisen from the conduct of both parties, and no remuneration for works done by the plaintiff was fixed, the plaintiff is entitled to be paid a reasonable sum on a pro rate basis to which the defendant never raised any objection in their letter dated 29th January 1997.

I am also of the view that since the clause to limit the reimbursement sum only came to be known by the plaintiff after the plaintiff had commenced preliminary works for the second stage of the contract, there was no consensus as to this term. Therefore it was non-existent and no such clause regarding the remuneration for works carried out exists and thus a claim on quantum meruit would be the proper remedy.

In the circumstances it can be concluded that the defendant's liability is not only limited to RM800,000.00 but should be based on quantum meruit.

Conclusion

Upon considering the evidence of the witnesses, facts and circumstances of the case and the learned counsels' submissions, the court is of the opinion that the plaintiff has proven its case.

Therefore the plaintiff's claim is allowed for the sum of RM2,800,000.00 being RM800,000.00 under the first contract and the sum of RM2,000,000.00 based on pro rate basis of RM400,000.00 per month for five months from 1st December 1996 to 1st May 1997 with interest and costs.

the superintending officer (SO/the architect) and relied upon by the appellant was as giving rise to a set off was void. It was void because it was issued after the S5 suit was commenced.

It was also contended that the certificate No 14 was not issued bona fide. The appellant argued that the parties intended that the SO in the phase 2 contract was not to be treated as being functus officio despite the parties having taken their dispute to the court. It was contended that it was argued that no issue arose in the present case of an exercise of a concurrent jurisdiction between the SO and the court or arbitrator.

Held, allowing the appeal:

(1) It is a principle of general application that both an employer and a builder has a right of set off against each other in the absence of a contrary intention expressed by the parties. Such a contrary intention may appear from express words used by the parties or by clear implication from what they said or did (see para 6);*Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57.

(2) The words 'shall be entitled to deduct any money owing from the Contractor to the Government' in cl 50 expressly permits a set off in the appellant's favour. Further, the right of set off was not confined to the particular contract, in this case the phase 2 contract, but to use the words of the clause, 'any other contracts' to which the appellant and the respondent were parties. Hence, it must perforce include the phase 1 contract. On this basis, the case should be decided in the appellant's favour (see para 7).

(3) It is not the law that in any circumstance whatsoever an architect is functus officio once a court or an arbitrator is seised of a dispute. It depends very much on the terms of the particular contract under which the employer engaged the builder. In other words, it is a question of construction and not a question of general law as to whether an architect is functus (see para 10).

(4) Clause 49 provides that no certificate of the SO is to be considered as being conclusive evidence as to 'the sufficiency of any work, materials or goods to which it relates'. In other words, all issues were open before an arbitrator or a court of law. Hence, it could not be said that certificate No 14 was void because the architect was functus officio when he issued it (see para 15).

(5) Whether certificate No 14 was issued bona fide or lack of it was a matter to be tried on the facts as established based on the evidence adduced at a full trial of the action. It was not a matter that was fit for summary disposal through the O 14A procedure (see para 16).

(6) The phrase 'any money owning' did not refer to a liquidated sum and thereby limited or restricted the appellant's right only to a set off at law. If the parties wanted to do that they would have had to have been more specific in the use of their language. Hence, the phrase 'any money owning' used by cl 50 did not have the effect of depriving the appellant of its right of equitable set off (see para 17).

(7) Equity has always permitted a litigant to plead an unliquidated sum by way of a set off. On a proper construction of cl 50, the appellant did not actually had to produce a specific and final figure. All he had to do was to quantify his loss in a bona fide way by reasonable means. That he had done. Whether the set off would succeed on merits was a matter that must await the trial of the action (see paras 18 & 20).

[Bahasa Malaysia summary

Perayu, pemaju satu projek telah menggaji responden untuk menjalankan pembinaan di dua fasa projek tersebut. Kemudiannya pertikaian berbangkit di antara kedua pihak. Dua tindakan telah difailkan oleh responden (tindakan S3 berhubung dengan kontrak fasa 2 dan tindakan S5 berhubung dengan kontrak fasa 1). Berhubungan dengan tindakan S3, perayu menyampaikan suatu pembelaan dan tuntutan balas di mana ia mengatakan fraud, kemungkiran kontrak dan kecuaian di pihak responden. Berhubungan dengan tindakan S5, responden berdasarkan tuntutannya di atas sijil-sijil interim yang dikeluarkan berhubungan dengan fasa 1. Perayu menuntut untuk penolakan wang yang dihutang oleh responden kepada perayu atas kontrak fasa 2 dengan sebarang jumlah yang kemungkinan dihutang oleh perayu kepada responden di bawah kontrak fasa 1. Untuk menyokong pembelaannya untuk penolakan, ia bergantung kepada klausa 50 kontrak fasa 2. Dalam satu saman yang dikeluarkan oleh responden di bawah A 14A Kaedah-Kaedah Mahkamah Tinggi 1980, hakim telah memutuskan terhadap perayu. Maka rayuan ini. Ia dihujahkan oleh responden bahawa hak untuk penolakan yang dikekalkan oleh klausa 50 hanya untuk wang. Responden selanjutnya berhujah bahawa tiada jumlah yang dihutang oleh responden kepada perayu oleh kerana sijil interim No 14 yang dikeluarkan oleh pegawai penguasa (PP/arkitek) dan digunakan oleh perayu sebagai memberi hak untuk penolakan adalah terbatal.

Ia dihujahkan bahawa ia adalah terbatal oleh kerana ia dikeluarkan selepas tindakan S5 dimulakan. Ia juga dihujahkan bahawa sijil No 14 tidak bona fide dikeluarkan. Perayu berhujah bahawa pihak-pihak berhasrat bahawa PP di dalam kontrak fasa 2 tidak boleh dianggap sebagai functus officio walaupun pihak-pihak telah membawa pertikaian mereka ke mahkamah. Ia dihujahkan bahawa tiada isu yang berbangkit dalam kes ini mengenai satu penggunaan bidang kuasa serentak di antara PP dan mahkamah atau penimbangtara.

Diputuskan, membenarkan rayuan:

(1) Ia adalah satu prinsip am yang dipakai bahawa kedua-dua majikan dan pembina mempunyai satu hak penolakan terhadap satu sama lain jika tiada satu niat bertentangan dinyatakan oleh kedua pihak. Niat

bertentangan ini mungkin terdapat daripada perkataan-perkataan nyata yang digunakan oleh kedua pihak ataupun melalui implikasi yang jelas daripada apa yang mereka katakan atau lakukan (lihat perenggan 6); *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57.

(2) Perkataan-perkataan 'shall be entitled to deduct any money owing from the Contractor to the Government' di dalam klausa 50 secara jelas membenarkan penolakan bagi pihak perayu. Selanjutnya, hak untuk penolakan tidak terangkum kepada kontrak tertentu, dalam kes ini kontrak fasa 2, tetapi untuk menggunakan perkataan-perkataan klausa 'any other contracts' yang mana perayu dan responden adalah pihak-pihak.Maka, ia mesti memasukkan kontrak fasa 1. Atas dasar ini, kes ini patut diputuskan berpihak kepada perayu (lihat perenggan 7).

(3) Ia bukanlah undang-undang dalam keadaan apa sekali pun bahawa seorang arkitek adalah functus officio apabila mahkamah atau penimbangtara mempunyai bidang kuasa ke atas sesuatu pertikaian. Ia bergantung sepenuhnya kepada terma-terma sesuatu kontrak yang mana majikan menggaji pembina tersebut. Dalam perkataan lain, ia adalah satu persoalan tafsiran dan bukan persoalan undang-undang am sama ada seseorang arkitek adalah functus (lihat perenggan 10).

(4) Klausa 49 memperuntukkan bahawa tiada sijil yang dikeluarkan oleh PP dianggap sebagai bukti muktamad akan 'the sufficiency of any work, materials or goods to which it relates'. Dalam perkataan lain, segala isu-isu adalah terbuka di hadapan seorang penimbangtara ataupun mahkamah. Dengan itu, ia tidak boleh dikatakan bahawa sijil No 14 adalah terbatal oleh kerana arkitek yang mengeluarkannya telah functus officio apabila ia mengeluarkannya (lihat perenggan 15).

(5) Sama ada ada sijil No 14 dikeluarkan bona fide atau tidak ia adalah satu perkara yang perlu dibicarakan atas fakta-fakta yang dibuktikan melalui keterangan yang dikemukakan di perbicaraan penuh tindakan tersebut. Ia bukannya satu perkara yang sesuai untuk ditolak terus melalui prosedur A 14A (lihat perenggan 16).

(6) Frasa 'any money owning' tidak merujuk kepada satu jumlah yang tak menentu dan dengan itu menghad atau menghalang hak perayu hanya kepada satu tolakan di sisi undang-undang. Sekiranya pihak-pihak hendak melakukan perkara tersebut, mereka perlu lebih spesifik dalam penggunaan bahasa mereka. Dengan itu frasa 'any money owning' yang digunakan oleh klausa 50 tidak mempunyai kesan mengkilankan perayu akan hak ekuitinya untuk tolakan (lihat perenggan 17).

(7) Ekuiti sentiasa membenarkan seseorang litigan memplidkan satu jumlah tak tertentu melalui tolakan. Melalui satu tafsiran yang wajar klausa 50, perayu sebenarnya tidak perlu mengemukakan satu jumlah

yang spesifik dan muktamad. Apa yang perlu dilakukannya ialah mengirakan kerugiannya secara bona fide melalui cara yang munasabah. Ini telah dilakukannya. Sama ada tolakan tersebut akan berjaya atas merit adalah satu perkara yang akan diputuskan semasa perbicaraan tindakan tersebut (lihat perenggan 18 & 20).]

Notes

For a case on principles of functus officio, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 2833.

For cases on set off in equity, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2654–2655.

For cases on set off in building contract, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2900–2905.

Cases referred to

Federal Commerce and Navigation Co v Molena Alpha Inc (The Nanfri) [1978] QB 927 (refd)

GA Group Ltd v Scottish Metropolitan Property Plc (1992) Inner House (folld)

Hiap Tian Soon Construction Pte Ltd & Anor v Hola Development Pte Ltd & Anor [2003] 1 SLR 667 (refd)

JA Milestone & Sons Ltd (In Liquidation) v Yates Castle Brewery [1938] 2 KBD 439 (distd)

L'Grande Development Sdn Bhd v Bukit Cerakah Development Sdn Bhd [2007] 4 MLJ 518 (refd)

Morgan & Son, Ltd v Martin Johnson Ltd [1949] 1 KB 107 (refd)

Pacific Rim Investments Pte Ltd v Lam Seng Tiong & Anor [1995] 3 SLR 1 (refd)

Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd [1995] 2 MLJ 57 (refd)

Piggott v Williams (1821) 56 ER 1027 (refd)

Legislation referred to

Rules of the High Court 1980 O 14A

Appeal from: Civil No D8(S5)–22–241 of 2000 (High Court, Kuala Lumpur)

CK Yeoh (Jason Chan with him) (Ranjit Ooi & Robert Low) for the appellant.

Rajendra Navatnam (Wong Hin Loong with him) (Azman Davidson & Co) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This appeal turns upon the construction of a clause in a standard form PWD (JKR) contract in its application to the facts that are relevant to this dispute. I will refer to the clause in question at some length later. Let me first set out the facts and background against which this appeal rests.

[2] There is a project called the Puncak Alam Development. The appellant is the developer of that project. The project comes in two phases. It employed the respondent to carry out construction of both phases. Phase 2 was to consist of 331 units of double storied terrace houses. A letter of award was issued by the appellant to the respondent in respect of Phase 2 on 15 November 1998. Later a contract in the PWD form was executed by the parties.

[3] In point of time Phase 1 came after Phase 2. It was to comprise of 16 blocks of single storied terrace houses. The letter of award in respect of Phase 1 was issued on 5 July 1999. A second standard contract in PWD form was entered into between the parties.

[4] Later, disputes arose between the parties. Two actions were filed. Both by the respondent. I will call them the S3 and S5 suits. Because they were filed in the third and fifth courts respectively of the Civil Division of the Kuala Lumpur High Court. The S3 suit was in respect of Phase 2. In it the respondent claimed a sum of RM5,862,612.33 as being due under interim certificates issued for work done on Phase 2 of the project. The appellant delivered a defence and counterclaim in which it alleged fraud, breach of contract and negligence on the respondent's part. In its counterclaim it claimed a sum of RM46,210,924.68 on the ground that 243 out of the 331 units lacked structural integrity and had therefore to be demolished. It relied on interim certificate 14 issued by the superintending officer, that is to say, the architect in the present case.

[5] The S5 suit was commenced by the respondent to recover a sum of RM3,665,582.94 that was claimed to be due on interim certificates issued in respect of Phase 1. The appellant delivered its defence and counterclaim to the S5 suit. Among other pleas taken, the appellant sought to set off monies owing from the respondent to the appellant on the Phase 2 contract against any sum that may be due from the appellant to the respondent under the Phase 1 contract. In support of its defence of set off, it relied on cl 50 of the Phase 2 contract. The question is whether it could do so. The judge on a summons taken out by the respondent under O 14A of Rules of the High Court 1980 ('the RHC') held against the appellant. His judgment is reported in *L'Grande Development Sdn Bhd v Bukit Cerakah Development Sdn Bhd* [2007] 4 MLJ 518. The appellant has appealed to us against that decision.

[6] The starting point is the general law regarding the defence of set off in the context of a building contract. It is a principle of general application that both an employer and a builder have a right of set off against each other in the absence of a contrary intention expressed by the parties. Such a contrary intention may appear from express words used by the parties or by clear implication from what they said or did. See, *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57. Next, I turn to examine cl 50 to see if it either expressly or by clear implication excludes the right to a set off provided by the general law. This is what the clause says:

> The Government or the SO on its behalf shall be entitled to deduct any money owing from the Contractor to the Government under this Contract from any sum which may become due or is payable to the Contractor under this Contract or any other contracts to which the Government and the Contractor are parties thereto. The SO in issuing any certificate under Clause 47, shall have regard to any such sum so chargeable against the Contractor, provided always that this provision shall not affect any other remedy to which the Government may be entitled for the recovery of such sums.

References in the clause to 'the Government' are, of course, to the appellant employer, while references to the SO or superintending officer are to the architect appointed for the project.

[7] In my judgment, cl 50 expressly permits a set off in the appellant's favour. The words 'shall be entitled to deduct any money owing from the Contractor to the Government' in cl 50 support my conclusion. Further, the right of set off is not confined to the particular contract — in this case the Phase 2 contract — but, to use the words of the clause, 'any other contracts' to which the appellant and the respondent are parties. Hence, it must perforce include the Phase 1 contract. On this basis, the case should be decided in the appellant's favour. But, says the respondent, there are three impediments to this result.

[8] In the first place, it is contended that the right to a set off preserved by cl 50 applies only to monies – to use the language of the clause – 'owing from the Contractor to the Government', that is to say, from the respondent to the appellant. In the present case there are no sums owing from the respondent to the appellant because interim certificate No 14 issued by the SO (the architect) and relied upon by the appellant was as giving rise to a set off is void. It is void because it was issued after the S5 suit was commenced. In support of this argument the respondent relied on *JA Milestone & Sons Ltd (In Liquidation) v Yates Castle Brewery* [1938] 2 KBD 439 where Singleton J said this:

> A dispute had arisen between the parties, and, on the decision of the Court of Appeal in *Lloyd Bros v Milward*, it was not open to the architect to give further certificates. If he could do so in the present case, he would be

> determining the very point on which the dispute had arisen. He would indeed be determining a difficult question of law. The parties were at issue. The defendants knew that the plaintiffs' solicitors were about to issue a writ, and, on the very day on which the writ was issued, the architect gave certificates to some subcontractors, and gave them to others at a later date. I do not consider that those certificates have any effect in law. They cannot be regarded as valid certificates, nor as valid directions to the defendants to pay the subcontractors.

[9] In answer to this argument, the appellant relies on the decision of the Inner House of the Court of Session of Scotland in *GA Group Ltd v Scottish Metropolitan Property Plc* (1992) Inner House Cases. In that case, counsel during argument referred the court to *Milestone v Yates* Lord Coulsfield (with whom Lord Murray and Lord Penrose agreed) appears to have been unimpressed with that case. For this is the conclusion that he reached on the very point at issue before us:

> In treating the question as being whether the architect was functus officio, the arbiter seems to have adopted an approach put before him by the claimants. It seems to me, however, that that approach may be misleading. As long as the contract continues, the architect remains in office and must, in my view, be entitled and, indeed obliged, to exercise the powers and duties of that office, as the situation requires. It is obvious, for example, that he remains entitled to certify payments to the contractors. The proper questions to ask are, in my view, whether in any particular respect the architect is excluded from acting because of a reference to an arbiter or whether in any such respect he, and his employers, are bound by any decision of the arbiter. The answer to these questions will depend on the particular circumstances, and I doubt if any general statement can properly be made.

[10] With respect, I agree. It is not the law that in any circumstance whatsoever an architect is functus officio once a court or an arbitrator is seised of a dispute. It depends very much on the terms of the particular contract under which the employer engaged the builder. In other words, it is a question of construction and not a question of general law as to whether an architect is functus.

[11] In the present case the position is governed by cll 49, 54(e) and Document G/2-Preliminaries & General Conditions of Contract. Each of these read as follows.

First, cl 49:

> No certificate of the SO under any provision of this Contract shall be considered as conclusive evidence to the sufficiency of any work, materials or goods to which it relates, nor shall it relieve the Contractor from his liability to amend and make good all defects, imperfections, shrinkages, or any other faults whatsoever as provided by this Contract. In any case, no certificate of the SO shall be final and binding in any dispute between the Government and the Contractor if the dispute is brought whether before an arbitrator or in the Courts.

Second, cl 54(e):

> The Arbitrator shall have power to review and revise any certificate, opinion, decision, requisition or notice and to determine all matters in dispute which shall be submitted to him, and of which notice shall have been given in accordance with sub-clause (c) aforesaid, in the same manner as if no such certificate, opinion, decision, requisition or notice had been given.

Last, Document G/2-Preliminaries & General Conditions of Contract:

> In relation to Clauses 47(a) and (b) of the Conditions of Contract, the Contractor shall note that all interim valuations made by the Consultant Quantity Surveyor are merely recommendations for payment and toward this end, the Superintending Officer (SO) reserves the right to cause any amendments to be made as the Superintending Officer (SO) deems fit and the date upon which the Superintending Officer (SO) endorses the said recommendation or amended interim valuation shall be held as the date of the Superintending Officer (SO) valuation for the purpose of Clause 47(a). The exercise of this right by the Superintending Officer (SO) shall not entitle the Contractor to any claim for breach of contract, extension of time, loss of profit, expenses, interests and/or the like.

[12] It is submitted by the appellant that the combined effect of these terms of the contract is as follows:

(i) the SO's certificate is not binding and conclusive;
(ii) the arbitrator is entitled to review and revise any certificate issued; and
(iii) the SO has the right to cause any amendments to be made as he deems fit and the date upon which the SO endorses the said recommendation or amended interim valuation shall be held as the date of the SO's valuation for the purpose of cl 47(a).

[13] Upon the foregoing basis, it was argued for the appellant that the parties intended that the SO in the Phase 2 contract was not to be treated as being functus officio despite the parties having taken their dispute to the court. It was argued that unlike *Milestone v Yates* no issue arises in the present case of an exercise of a concurrent jurisdiction between the SO and the court or arbitrator. According to the terms of the contract, the arbitrator, or as in the present case, the court's decision shall prevail. No question arises here as to the determination by the SO of the very point upon which the dispute falls to be determined.

[14] In my judgment there is merit in this argument. Applying what Lord Coulsfield said in the *GA Group* case, the question to be asked is this: does the particular contract exclude the architect from acting because of a reference to an arbiter, be it an arbitrator or the court? If it does then the architect is contractually proscribed from issuing a

Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and Another

[2008] 2 SLR 623; [2008] SGCA 8
CA 36/2007
29 FEB 2008
COURT OF APPEAL
ANDREW PHANG BOON LEONG JA, CHAN SEK KEONG CJ, V K RAJAH JA
CHOU SEAN YU AND CHUA SUI TONG (WONGPARTNERSHIP) FOR THE APPELLANT,
MORRIS JOHN (DREW & NAPIER LLC) FOR THE RESPONDENTS

Tort — Negligence — Remedies — Remoteness of damage — Distinction between test of remoteness in contract and test of remoteness in tort — Liability of construction professionals for additional interest incurred on construction loans due to delay in completion of construction project caused by their negligence — Whether allowing such loss to be recovered as damages in law would open floodgates for claims against construction professionals

Damages — Rules in Awarding — Proof of damage — Applicable guidelines to proof of damage — Process of proving damage intensely factual — Flexible approach to proof of damage — Claimant must adduce before court most cogent evidence of loss in given circumstances — Whether hotel developer adduced sufficient evidence to prove that it had incurred additional interest as damage

Contract — Remedies — Remoteness of Damage — Applicable test for remoteness of damage in contract — Rule in Hadley v Baxendale — Criticisms of rule in Hadley v Baxendale — Rationality and functionality of the rule in Hadley v Baxendale — Distinction between test of remoteness in contract and test of remoteness in tort — Whether interest incurred on construction loans due to delay in completion of construction project recoverable under first limb of rule in Hadley v Baxendale

Building and Construction Law — Damages — Delay in Completion — Interest incurred on construction loans during period of delay — Whether such interest recoverable in law as damages

Civil Procedure — Damages — Interest — Date of commencement of interest for damages awarded by court — General rule that interest should run from date of accrual of loss — Whether interest should run from date of accrual of loss or from later date where there is unjustifiable delay on part of claimant in bringing action to trial — Section 12(1) Civil Law Act (Cap 43, 1999 Rev Ed)

[LawNet Admin Note:

([2008] 2 SLR
Page 623, in the catchwords, replace "Contact" with "Contract".)

The HTML and PDF versions incorporate the above amendment.]

Facts

The appellant, Robertson Quay Investment Pte Ltd ("RQI"), was the owner and developer of the Gallery Hotel ("the Hotel"). The first respondent, Steen Consultants Private Limited ("Steen Consultants"), was the company engaged by RQI to provide civil and structural engineering services for the construction of the Hotel ("the Project") and the second respondent, Mr Shahbaz Ahmad ("Shahbaz"), was the civil and structural engineer who was responsible for the design, planning and supervision of the Hotel's structural works. The Hotel's structural drawings were done in 1996 by Shahbaz, but were subsequently found to be underdesigned. The drawings were therefore corrected and submitted to the relevant building authorities in 1997. Unfortunately, the respondents gave the building contractor the uncorrected 1996 version of the drawings. As a result of the mistake, there were structural deficiencies in the Hotel, which required additional remedial and strengthening works ("the repairs"). The repairs delayed the completion of the Project by 101 days from 1 September 1999 to 10 December 1999 ("the period of delay").

On 10 May 2005, RQI filed its writ of summons ("the original writ") and commenced the originating suit against Steen Consultants for loss and damage suffered and expenses incurred during the period of delay. RQI subsequently filed an amended writ of summons ("the amended writ") on 4 July 2005 which added Shahbaz as a defendant. The statement of claim ("the SOC") was filed and served on 19 September 2005. The respondents admitted liability and interlocutory judgment was entered by consent against them on 9 November 2005. Following an assessment of damages hearing, RQI was awarded a total sum of $699,429.41 by the learned assistant registrar ("the AR"), which included $279,363.82 for interest on loans from RQI's shareholders and other related parties ("the Shareholder Loans") and $215,859.84 for interest on a term loan ("the Term Loan") and an overdraft facility ("the Overdraft") (collectively referred to as "the Bank Loans") that were incurred by RQI during the period of delay. Interest was also awarded for the total damages at the rate of 6% per annum from the date of the original writ to the date of judgment. The AR, however, did not award RQI loss of rental income in respect of the Hotel. On appeal by both parties to the High Court, the judge affirmed the AR's award of damages for most of the heads of claim, but set aside her award of $495,223.66 (*viz*, the sum of $279,363.82 and $215,859.84) for the interest which RQI had allegedly incurred on the Shareholder Loans

and the Bank Loans (collectively referred to as "the Loans"). The judge also dismissed RQI's claim of $276,882.00 for loss of rental income in relation to the Hotel and ordered that interest of 6% per annum was to run from the date of service of the SOC (*ie*, 19 September 2005) instead of from the date of the original writ (*ie*, 10 May 2005).

RQI appealed against the judge's decision. At the hearing of the appeal, counsel for RQI, Mr Chou Sean Yu ("Mr Chou"), informed the court that RQI was no longer proceeding with its claim for loss of rental income in relation to the Hotel. The appeal was thus limited to RQI's claim for interest incurred on the Loans during the period of delay and the proper date from which interest on the damages awarded should run. RQI argued that the basis of its claim for the interest was that if the Project had been completed on time, RQI would have generated income from the operations of the Hotel and the resultant income would have been utilised to make early repayment of the Loans, such that RQI would not have become liable to pay the additional interest in question. RQI also argued that such interest was not too remote to be recovered as damages and was, in fact, recoverable under the first limb of the rule in *Hadley v Baxendale* (1854) 9 Exch 341; 165 ER 145 ("*Hadley*"). The respondents argued that in the light of the fact that the Term Loan was repayable only on 9 May 2002 while the Overdraft and the Shareholder Loans had no specific repayment dates, the interest incurred on the Loans over the period of delay would still have had to be paid by RQI even if there had been no delay in the completion of the Project. RQI therefore had not, in the first place, incurred any additional financing costs.

Held, dismissing the appeal:

(1) In most claims for damages in contract or tort, the issue of proof of damage either rarely posed problems for the parties or was generally taken for granted by the parties. Nonetheless, it was fundamental and trite that a plaintiff claiming damages must prove his damage. Until damage was proved, there was no need to even discuss topics such as remoteness of damage and mitigation because they were potentially relevant only *after* there was proof of damage to begin with. The process of proving damage was an intensely factual one, and it was impossible to lay down any *general* rules or principles as to what constituted adequate proof of damage since the *particular* factual circumstances could take, literally, a myriad of forms: at [27].

(2) However, the law did not demand that the plaintiff proved with complete certainty the exact amount of damage that he had suffered. A court had to adopt a flexible approach with regard to the proof of damage. Different occasions might call for different evidence with regard to certainty of proof, depending on the circumstances of the case and the nature of the damages claimed. The correct approach

that a court should adopt was that where precise evidence was obtainable, the court naturally expected to have it, but where it was not, the court must do the best it could. A plaintiff could not simply make a claim for damages without placing before the court sufficient evidence of the loss it had suffered even if it was otherwise entitled in principle to recover damages. On the other hand, where the plaintiff had attempted its level best to prove its loss *and* the evidence was cogent, the court should allow it to recover the damages claimed. The only guideline was that the plaintiff must adduce before the court the most cogent evidence of loss available in the given circumstances: at [28], [30], [31] and [37].

(3) RQI's claim for additional interest was in fact a claim for the *actual interest incurred and paid* by RQI during the period of delay. In this regard, RQI adduced copies of statements from United Overseas Bank, payment vouchers and receipts evidencing the interest that it had incurred and paid during the period of delay *vis-à-vis* the Loans. However, all this evidence merely established the *quantum* of the alleged damage, but not the fact that the alleged damage was indeed (and *in fact*) suffered by RQI *as a result of the delay caused by the respondents*: at [32] and [33].

(4) The evidence before the court showed *only* that the *Bank* Loans were taken out for the purpose of financing the Project; this was *not*, however, the case in so far as the *Shareholder* Loans were concerned. The loan agreements for the Shareholder Loans were not produced by RQI, and Mr Chou admitted at the hearing that there was no evidence to show that those loans (or part thereof) had been utilised to finance the Project. It appeared that the Overdraft was also utilised to *pay the interest incurred on the Shareholder Loans*. It would naturally follow that the interest incurred on the Overdraft as a result of using that credit facility to service the Shareholder Loans could not be recovered as well, as such interest was, strictly speaking, not a loss suffered by RQI as a result of the delay caused by the respondents' mistake: at [37] and [38].

(5) RQI had failed to establish a *factual link* between the delay in the Project's completion on the one hand and the additional interest in question on the other. A plaintiff in RQI's shoes would need to *go further* and prove that, had the Project been completed on time, full (or, more likely, partial) repayment of the Loans would have been made *using the income generated from the Hotel's operations*. Such proof would establish the *necessary link* between the breach of contract (as evidenced by the *late* completion of the Project) and the loss alleged by RQI (*ie*, additional interest incurred during the period of delay). This, *in turn*, entailed RQI adducing (concrete) evidence of *how* repayment of the Loans was to have been made upon the timely completion of the Project. Mr Ngo Soo Hiong, a director of RQI, did not, in his affidavit of evidence-in-chief,

mention that RQI had intended to repay the Loans using income generated from the operations of the Hotel subsequent to its completion. Given that none of the loans was contractually repayable upon the timely completion of the Project, it did not appear likely that RQI would have repaid the Loans in full by that point. Thus, even if the Project had been completed on time, the Loans (or part thereof, at least) would still have remained unpaid as at the original completion date, such that RQI would still have incurred interest on the Loans for the period after 1 September 1999: at [39] to [41].

(6) RQI had also not satisfied the court as to the quantum of its actual loss arising from the delay in the Project's completion. Logically, RQI's assertion that the best quantifiable proxy for its loss consisted of the actual interest incurred during the period of delay would only hold true if RQI would have made *full* repayment of the Loans upon the commencement of the Hotel's operations. Given that the Loans involved rather large sums, it would have been impossible for RQI to have generated sufficient income right at the start of the Hotel's operations to repay the Loans in full. The method of quantification put forward by RQI would lead to the absurd conclusion that RQI could magically generate sufficient income to repay the Loans in full right at the outset of the Hotel's operations: at [43].

(7) There was no doubt that the rule in *Hadley*, as restated by Asquith LJ in *Victoria Laundry (Windsor) Ld v Newman Industries Ld* [1949] 2 KB 528 ("*Victoria Laundry*"), represented the law in relation to remoteness of damage in contract. Although the House of Lords in *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 ("*The Heron II*") was critical of the terminology used by Asquith LJ in *Victoria Laundry*, the House was generally of the view that the learned lord justice's restatement of the rule in *Hadley* was a sound pronouncement of the law. There was also no point in embarking on an exegesis of the precise degree of probability required to satisfy the threshold of "reasonable contemplation" as to do so would be to engage in "semantic hairsplitting". Although there were various critiques of the rule in *Hadley*, they were, in the final analysis, unfounded. Based on *first principles*, the rule in *Hadley* was undergirded by a firm foundation in logic as well as by justice and fairness and served two important functions: at [55], [58], [60] and [61].

(8) The *first* main reason (and function) of the rule in *Hadley* was that it was important in *distinguishing* between the rules and principles relating to remoteness in the law of contract and those in the law of tort. If the rule on remoteness in *contract* were reduced to one of reasonable foreseeability (which was the test in tort) only, there would be a confusing conflation between contract and tort. It was for this reason that the House of Lords in *The Heron II* criticised

the use of this term by the English Court of Appeal in *Victoria Laundry*. The terminology adopted in *Hadley* itself was that of "reasonable *contemplation*", as opposed to "reasonable *foreseeability*". For there to be a meaningful as well as a functional distinction between the rules and principles relating to remoteness in contract and those in tort, the term or concept of "reasonable contemplation" must reflect clearly both the nature as well as the functions of the law of contract: at [71] to [74].

(9) The *second* main (and closely related) reason (and function) for the rule in *Hadley* was that it most appropriately described the rules relating to remoteness in the *context* of the law of *contract*. The task of the courts, in the context of remoteness of damage in contract, was to formulate rules and principles that would apply universally to all contracting parties in situations where the contracting parties had not expressly provided, in advance, for what was to happen in the event of a breach of their respective contracts. In doing so, the courts would bear in mind the fact that the contracting parties did have the opportunity to communicate with each other in advance and must ensure that the rules and principles formulated did not rewrite the contract in question: at [74] to [79].

(10) The two limbs set out in *Hadley* were *consistent with* these principles. Damage which fell under the *first limb* of *Hadley* (*ie*, *"ordinary" damage*) ought to be *well within* the reasonable contemplation of all of the contracting parties concerned. Since everyone (*including the contracting parties*) must, *as reasonable people*, be taken to know of damage which flowed "naturally" from a breach of contract, the first limb of *Hadley* did *no* violence to the original bargain between the contracting parties. *If* the contracting parties had thought about this issue, they *would, in all likelihood, have agreed* that the contract-breaker should be liable in damages for all such "*ordinary*" damage. It was therefore neither unjust nor unfair to *impute* knowledge of such damage to them. Damage which fell under the *second limb* of *Hadley* (*ie*, *"extraordinary" or "non-natural" damage*) was *not*, by its *very nature*, within the reasonable contemplation of the contracting parties. It would be both *unjust and unfair* to *impute* to them knowledge that such damage or loss would arise upon a breach of contract. *However*, if, *armed with* such *actual* knowledge, the contracting parties did not make express provision in their contract for what was to happen in the event of a breach of that contract resulting in "extraordinary" or "non-natural" damage, *then they must be taken to have agreed that should such damage occur, the contract-breaker would be liable for such damage*: at [80] to [83].

(11) Additional interest incurred on construction loans as a result of a delay in the completion of a construction project was not too remote to be recoverable under the *first* limb of *Hadley*. Third-party

financing of the costs of construction in large, commercial construction projects was inevitable in this day and age, and, accordingly, the parties to such a project, as reasonable people, must be imputed with the knowledge that a delay in completion would certainly give rise to additional financing costs. The risk of opening the floodgates to claims against construction professionals for such additional interest, although real, was not so substantial as to justify loss of that nature being adjudged as irrecoverable as damages in law. The claim by RQI for additional interest would have been allowed *if not for* its failure to prove its loss with regard to the alleged additional interest incurred: at [91] to [94].

(12) On a plain reading of s 12(1) of the Civil Law Act (Cap 43, 1999 Rev Ed), the court had a wide discretion to grant interest for any part of the period between the date when the cause of action arose and the date of judgment. The general rule was to award interest on damages from the date of the accrual of the loss in question, but the court might choose to award interest from a later date in some circumstances such as where there had been an unjustifiable delay on the part of the claimant in bringing his action to trial. In the present case, RQI commenced the originating suit only on 10 May 2005 when it filed the original writ. This was more than five years after its loss accrued and RQI had not furnished a reason for this delay. Given that there was an unwarranted delay by RQI in commencing its action, the general rule could be departed from in the present case: at [53].

Case(s) referred to

Achilleas, The [2007] 1 Lloyd's Rep 19 (refd)
Achilleas, The [2007] 2 Lloyd's Rep 555 (refd)
Aruna Mills Ltd v Dhanrajmal Gobindram [1968] 1 QB 655 (folld)
Biggin & Co Ld v Permanite, Ld [1951] 1 KB 422 (folld)
Brown v KMR Services Ltd [1995] 4 All ER 598 (refd)
C Czarnikow v Koufos [1966] 2 QB 695 (refd)
Chaplin v Hicks [1911] 2 KB 786 (refd)
CHS CPO GmbH v Vikas Goel [2005] 3 SLR 202 (refd)
Dunlop Pneumatic Tyre Company, Limited v New Garage and Motor Company, Limited [1915] AC 79 (refd)
Elar Investments, Inc v Southwest Culvert Co, Inc 676 P 2d 659 (1983) (refd)
Fidelity and Guaranty Insurance Underwriters, Inc v Allied Realty Company, Ltd 384 SE 2d 613 (1989) (refd)
Friis v Casetech Trading Pte Ltd [2000] 3 SLR 590 (refd)
H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd [1978] QB 791 (refd)

Hadley v Baxendale (1854) 9 Exch 341; 165 ER 145 (folld)
Herbert & Brooner Construction Co vGolden 499 SW 2d 541 (1973) (refd)
Jackson v Royal Bank of Scotland plc [2005] 1 WLR 377 (refd)
Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd [2006] 3 SLR 769 (refd)
Kaines (UK) Ltd v Osterreichische Warrenhandelsgesellshaft Austrowaren Gesellschaft mbH [1993] 2 Lloyd's Rep 1 (refd)
Kienzle v Stringer (1981) 130 DLR (3d) 272 (refd)
Koufos v C Czarnikow Ltd [1969] 1 AC 350 (refd)
McElroy Milne v Commercial Electronics Ltd [1993] 1 NZLR 39 (not folld)
MCST No 473 v De Beers Jewellery Pte Ltd [2002] 2 SLR 1 (refd)
Multiplex Constructions Pty Ltd v Abgarus Pty Ltd (1992) 33 NSWLR 504 (refd)
Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co (The Wagon Mound) [1961] AC 388 (refd)
Pegase, The [1981] 1 Lloyd's Rep 175 (refd)
Raffles Town Club Pte Ltd v Tan Chin Seng [2005] 4 SLR 351 (refd)
Roanoke Hospital Association v Doyle and Russell, Inc 214 SE 2d 155 (1975) (folld)
Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd [2007] SGHC 30 (refd)
Sempra Metals Ltd v Inland Revenue Commissioners [2007] 3 WLR 354 (refd)
Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd [1999] 2 Lloyd's Rep 423 (folld)
Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric [2007] 3 SLR 782 (refd)
Tang Kin Hwa v Traditional Chinese Medicine Practitioners Board [2005] 4 SLR 604 (refd)
Victoria Laundry (Windsor) Ld v Newman Industries Ld [1949] 2 KB 528 (folld)
W M Foley Construction Corp v Bono 2006 WL 3604785 (Unreported, 12 December 2006) (refd)

Legislation referred to

Civil Law Act (Cap 43, 1999 Rev Ed) s 12(1) (consd)
Administration of Justice Act 1982 (c 53) (UK) s 15
Law Reform (Miscellaneous Provisions) Act 1934 (c 41) (UK) s 3(1)
Supreme Court Act 1981 (c 54) (UK) ss 35A, 35A(1)

29 February 2008

Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

[1] This is an appeal by Robertson Quay Investment Pte Ltd ("RQI"), the plaintiff in Suit No 324 of 2005 in the court below ("the originating suit"), against the decision of the trial judge ("the Judge") in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2007] SGHC 30 ("*Robertson Quay*"). Essentially, *Robertson Quay* concerned cross-appeals by the respective parties to this appeal against the award of damages made by the learned assistant registrar ("the AR") in her oral judgment delivered on 7 December 2006 following an assessment of damages hearing ("the AD hearing").

The facts

[2] The facts of this case are largely undisputed. RQI is the owner and developer of the Gallery Hotel ("the Hotel"), a commercial development located at 76 Robertson Quay, Singapore 238254, consisting of a ten-storey hotel, basement car parks and adjourning commercial units in the form of restaurants and entertainment outlets.

[3] The first respondent, Steen Consultants Private Limited ("Steen Consultants"), which was the first defendant in the originating suit, is the company that was engaged by RQI to provide civil and structural engineering services for the construction of the Hotel ("the Project"). The second respondent, Mr Shahbaz Ahmad ("Shahbaz"), who was the third defendant in the originating suit, was at all material times a director of Steen Consultants as well as the civil and structural engineer who was responsible for the design, planning and supervision of the Hotel's structural works. (We will refer to Steen Consultants and Shahbaz collectively as "the respondents" in this judgment.)

[4] The structural drawings of the Hotel were done in 1996 by Shahbaz, but the accredited checker employed by RQI, Mr Goh Joon Yap ("Goh"), the second defendant in the originating suit (although the action against him was discontinued prior to the AD hearing), found the drawings to be underdesigned. The drawings were therefore corrected and submitted to the relevant building authorities in 1997. Unfortunately, the respondents gave the building contractor the uncorrected 1996 version of the drawings instead (see *Robertson Quay* at [1]).

[5] As a result of the above mistake ("the respondents' mistake"), there were structural deficiencies in the Hotel, which required additional remedial and strengthening works ("the repairs"). The repairs delayed

the completion of the Project by 101 days from 1 September 1999 to 10 December 1999 ("the period of delay"). The temporary occupation permit for the Hotel, which was originally to be issued at the end of December 1999, was eventually issued only in March 2000 instead.

[6] It was undisputed both in the proceedings below and in this appeal that: (a) the period of delay was 101 days; and (b) the structural deficiencies in question existed and were caused by the respondents' mistake. In respect of the latter, Steen Consultants had, before the commencement of the originating suit, admitted to RQI in writing on various occasions that there were structural deficiencies in the Hotel and had, in a letter dated 10 September 1999 to RQI, undertaken to pay for the costs of the repairs. Between February 2000 and November 2000, Steen Consultants certified payment of a total sum of $597,893.35 and paid that amount to the contractor carrying out the repairs.

[7] On 10 May 2005, RQI filed its writ of summons ("the original writ") and commenced the originating suit against Steen Consultants and Goh for loss and damage suffered and expenses incurred during the period of delay. RQI subsequently filed an amended writ of summons ("the amended writ") on 4 July 2005 which added Shahbaz as a defendant. The statement of claim ("the SOC") was filed and served on 19 September 2005.

[8] For the purposes of this appeal, it would be helpful to set out in full RQI's various heads of claim in the originating suit (as reflected in the SOC). They are as follows:

No	Item	Figure
i.	Main contractors' preliminaries	$117,915.22
ii.	Management fee and remuneration for the executive directors overseeing the Project	$49,612.77
iii.	Consultant's charges	$19,935.48
iv.	Salaries of management staff of the Hotel	$88,147.37
v.	Clerk of works' salary	$29,386.61
vi.	Interest on loans from RQI's shareholders and other related parties ("the Shareholder Loans")	$279,363.82
vii.	Interest on a term loan and an overdraft facility (collectively referred to as "the Bank Loans")	$215,859.84
viii.	Loss of profits and/or loss of rental in respect of the Hotel (including the adjoining commercial units)	To be assessed

[43] The defendant said he must appeal to seek justice for Mr Luk.

Discussion

[44] Whatever was the parties' relationship and however such relationship deteriorated, the existence of the DC could not be disputed.

[45] Under the DC, the defendant agreed to sub-contract the works in Areas 102 and 105 to the plaintiffs and the two sub-contracts in Chinese were executed to take effect from 22 September 2000.

[46] The defendants also agreed that the "Tiny" computer belonged to the plaintiffs.

[47] The defendant must have realized that the plaintiffs required all the relevant documentations and the data contained in the "Tiny" computer in order to execute the two sub-contracts. The defendant's suggestion that the plaintiffs could have completed the sub-contracts without the relevant documentations and the data from the "Tiny" computer was unreasonable and quite properly rejected by the judge.

[48] However, due to personal grudges, the defendant removed the data from the "Tiny" computer and unreasonably withheld the relevant documentations from the plaintiffs, rendering it impossible for them to properly carry out the sub-contracts.

[49] The judge was clearly right to read into the two sub-contracts the implied terms he had found to give the two sub-contracts their necessary business efficacy.

[50] The judge was entitled to find that the defendant was in breach of those terms and had therefore repudiated the sub-contracts.

[51] The defendant's argument that he had provided the plaintiffs with all the relevant documents was not borne out by the evidence. The defendant, having removed the data from the "Tiny" computer and then claimed that they had no intellectual right to those data, had demonstrated that he had not, for whatever reason that he felt justified, adopted a reasonable approach in his dealings with the plaintiffs.

[52] The judge's findings, including the findings on the issue of damages, were essentially findings of facts.

[53] The judge went through, in commendable detail, the background and the evidence of the case as well as the relevant legal matters to resolve the issue of whether the defendant was liable for breach of the sub-contracts.

[54] The judges' conclusion that the defendant was so liable was, in our view, unassailable. It was certainly not a conclusion that could be disturbed by the Court of Appeal in accordance with the principle

established in *Tang Kwok Ming v Daxprofit Scaffolding Ltd* (unreported CACV 5/1998)

[55] The defendant's complaints against the plaintiffs' conduct, in particular how they had improperly treated Madam Loke and Mr Luk, were not matters relevant to the disputes between the plaintiffs and the defendant on the sub-contracts. The allegation that the plaintiffs had set up another company with the same name as Signtech in order to channel business and assets from Signtech was withdrawn before the judge. They are not matters that could be pursued in this appeal.

[56] The judge's award of damages, based on the evidence that he had heard, on its face was not wrong and certainly not so outside the permissible range of awards except that the judge appeared to have overlooked, in calculating the loss of profit, the sum of $480,000, being the amount of works done and paid for.

[57] The plaintiffs conceded that the award of damages by the judge was excessive. In their written submissions, the plaintiffs accepted that the total contract sum was $1,291,906 and that $480,000, being the amount of works done and paid for should be deducted in the calculation of the loss of profit.

[58] The plaintiffs accepted that the value of unpaid works was $596,560 and that the loss of profits, based on 30% of the balance of $215,346 should only be $64,604, making a total loss of $661,164 (i.e. $596,560 + $64,604).

[59] In fact the judge found that the value of unpaid works was only $470,881.35, bearing in mind the usual disallowance in construction contracts. The plaintiffs did not object to the judge's finding.

[60] Taking into consideration the $480,000, being the amount of works done and paid for, the value of the balance of the works should only be $341,024.65 (i.e. $1,291,906 - $480,000 - $470,881.35) and basing on a 30% profit margin, the loss of profit should be $102,307.40 (i.e. $341,024.65 x 30%).

[61] The total damages suffered by the plaintiffs under the Area 102 sub-contract should therefore be $573,188.75 (i.e. $470,881.35 + $102,307.40)

Conclusion

[62] We find no merits in the defendant's appeal and we dismiss it except that the total damages awarded to the plaintiffs are reduced to $573,188.75 with interest thereon from the date of the issue of the writ.

[63] We make no order as to costs.

Chow Kee James T/A TAPBO Civil Engineering Co v Transway Construction & Engineering Ltd T/A Wo Kee Construction & Engineering Co

[2008] HKCU 786
COURT OF APPEAL
HON ROGERS VP, LE PICHON JA AND BARMA J IN COURT
CACV 36/2007
15 MAY 2008, 21 MAY 2008

Building and Construction — Construction — Sub-contracting — Back-to-back contract — Action for unpaid wages — Counterclaim — Contra charge — Penalty charges — Liquidated damages

(ON APPEAL FROM HCCT NO. 11 OF 2006)

Mr Kent Yee, instructed by Messrs Foo, Leung & Yeung, for the Plaintiff/Respondent
Mr Russell Coleman SC & Mr Liu Chin Yu, instructed by Messrs C.L. Chow & Macksion Chan, for the Defendant/Appellant

Le Pichon JA

Hon Rogers VP:

[1] I agree with the judgment of Le Pichon JA.

Hon Le Pichon JA:

[2] This was an appeal from an order of Deputy High Court Judge Gill made on 19 December 2006 and a subsequent costs order of 23 May 2007. At the conclusion of the appeal, judgment was reserved which we now give.

Background

[3] The plaintiff was the main contractor under a contract dated 5 December 2001 with the Water Supplies Department ("the employer") for the laying of steel water mains in Castle Peak ("the main contract"). After undertaking some preliminary work, on 1 March 2002, the plaintiff subcontracted the balance of the project to the defendant. The sub-contract was recorded in a letter of 1 March 2002 (incorporating nine schedules) from the plaintiff to the defendant countersigned by the defendant. Schedule 2 provided that "all documents in this schedule to be back-to-back by the whole contract documents of the main contract between [the employer and the plaintiff]."

[4] The proceedings were brought by the plaintiff to recover from the defendant payment of wages amounting to some $282,000 it had made

on behalf of the defendant. While the defendant did not dispute the amount claimed, it filed a counterclaim or set off for over $3.7 million as the balance due under the sub-contract as adjusted.

[5] The judge gave judgment in favour of the plaintiff on its claim of $282,250.74 which was to be set off against judgment in favour of the defendant in the sum of $629,104.58, leaving a net balance due to the defendant of $346,853.84. As to costs, after hearing an application to vary the costs order *nisi*, the judge varied that order to the extent that the plaintiff was ordered to pay 1/4 of the defendant's costs and the defendant 3/4 of the plaintiff's costs.

This appeal

[6] The trial below was essentially that of the counterclaim which comprised 17 issues. The defendant seeks to challenge only 5 of those issues on this appeal in addition to the costs order made below. I will deal with the 5 issues first.

Industrial diesel oil

[7] The judge held that the plaintiff was entitled to contra charge the defendant for $131,912.15 being the cost of industrial diesel oil used in generators provided by the plaintiff "to supply electricity to the site".

[8] Clause 1.4 of schedule 3 to the sub-contract provided as follows:

> "Services provided by [the plaintiff] to [the defendant] free of charge:
>
> a. Supply of site temporary electricity and water supplies (except connection, fixing, maintenance, fueling and transportation)."

In his skeleton submission, Mr Coleman SC who appeared for the defendant took the point that on a proper construction of clause 1.4(a), electricity should be provided free and that the word "fueling" meant no more than the act of putting fuel in the generators instead of the value of the fuel itself and that therefore the cost of the fuel consumed should not be borne by the defendant. However, at the hearing, Mr Coleman SC took an entirely different point.

[9] As I understand it, he sought to challenge the judge's conclusion on the basis that the amount in issue represented the cost of fuel used by generator(s) to supply electricity to the site office only and that the office was used by representatives of the employer, the engineer, the plaintiff and, to a small extent, by the defendant. In other words, the defendant's position was that no part of the cost of the fuel in dispute was attributable to fuel consumed by generators (which it was accepted was provided by the plaintiff) to provide electricity for 'front line work'.

[10] The plaintiff's witness, Lam Shiu Ming, gave evidence to the effect that three generators had been provided, one for the workshop (i.e. the site office) and two others for the use of construction work but that the contra charge was confined to oil used by the defendant for the two generators "at the work front" only. That aspect of his evidence was not challenged. So far as the defendant's evidence was concerned, although the passage in the transcript referred to by Mr Coleman from the evidence of one of the defendant's witnesses, Lam Man Cheung, could conceivably be read as suggesting that the defendant supplied its own fuel for generators supplying electricity for its work, that would appear to be inconsistent with its case on the construction of clause 1.4(a), quite apart from the apparent absence of relevant invoices to substantiate that claim. Further, that evidence would also appear to be inconsistent with the witness statement of another of the defendant's witnesses, Alfred Lau Kui Tim, which was to the effect that the defendant had not ordered oil for their 'plants'. In the context, that could only mean the generators used by them.

[11] I am of the view that the evidence this court has been shown to support the new point taken on behalf of the defendant that the amount in issue was not in respect of oil consumed by generators used for front line work but for the generator supplying electricity to the site office shared with others is, at best, tenuous and wholly unsatisfactory as opposed to clear unchallenged evidence to the contrary. While the first sentence in § 29 of the judgment may not have been entirely accurate, the judge must have meant that the charge only related to oil consumed for generators providing electricity to the defendant for its "front line work".

[12] I did not gain the impression that Mr Coleman was seriously pursuing the construction point but if it were still a live issue, I would say that I am in agreement with the judge that the 'fueling' exception relates to the cost of fuel.

Penalty charges for damaging existing water mains — $177,974.90

[13] In the course of carrying out the sub-contract, the mains were damaged on three occasions resulting in the employer imposing financial charges totalling $177,974.90 on the plaintiff. The plaintiff sought to make a contra charge of that amount.

[14] Under the main contract, the plaintiff was required, under the special conditions, to procure an insurance policy in the joint names of the plaintiff and the employer. It is common ground that, first, the insurance taken out provided coverage not only for the plaintiff but also "all its subcontractors" and therefore extended to the defendant; second, the defendant did not pay and was never asked to pay any part of the insurance premium. At the appeal hearing, it was suggested for the first time that the defendant had an obligation, under the back-to-back arrangement, to take out or pay for that insurance.

[15] Notwithstanding requests by the defendant, the plaintiff never claimed on the insurance. The judge held that as the plaintiff was not under any contractual obligation to report the incidents to the insurers, the penalty charges had to be borne by the defendant.

[16] The defendant's case, in essence, is that the plaintiff ought to have mitigated its loss by claiming under the policy. Had it done so, the defendant would not have been responsible for more than what would have been chargeable under the excess clause, namely $30,000 for each incident. Therefore the contra charge should have been $90,000 only, a difference of $87,974.90.

[17] Mr Yee who appeared for the plaintiff submitted that the judge was correct in finding that the plaintiff was not under any contractual obligation to claim on the insurance. That may be so but it is no answer to the mitigation point. Then it was said that the policy contained some exception that effectively excluded negligent acts. However, Mr Yee was unable to show this court the relevant provision in the policy.

[18] I consider the defendant's contention to be correct since the plaintiff was liable under the main contract for the penalty charges imposed. The plaintiff was in a position to mitigate its loss by making the insurance claims but it failed to do so. Accordingly, the contra charge should be limited to the sum of $90,000.

ICE services — $61,650

[19] Clause 1.4 of schedule 3 to the sub-contract reads:

> "e. Supply of once-off ICE services (second certification due to 1st failure to be back-charged at [the defendant's] account)"

The judge appeared to attribute to the word "once-off" charges for making the first visit only.

[20] Mr Yee was unable to point to any second certification. All he was able to show the court were a number of invoices itemising ICE services provided for each month commencing June through November 2002. There was no evidence that any of the services rendered in those months was a second or subsequent visit in respect of the same item of work rendered necessary because of any inability on the part of ICE services to make the requisite certification on the first visit. Absent such evidence, I can see no basis for this contra charge.

Site agent — $398,606.52

[21] Clause 17(2) of the general conditions of the main contract provided that

> "[The plaintiff] shall ensure that he is at all times represented on the Site by a competent an authorised English-speaking agent … Such agent shall be constantly on the Site and shall give his whole time to the superintendence of the Works."

The short point that arises is whether the judge was correct in holding that, as a result of the back-to-back arrangement, the plaintiff's obligation under the main contract shifted to the defendant so that the latter was to be responsible for the cost of providing a site agent.

[22] Mr Coleman drew the court's attention to the judge's finding at § 9 of his judgment to the effect that the plaintiff's role, apart from protecting its profit in the "sale on" of the lion's share of the main contract, was a supervisory one. In essence the point made was that it was not open to the plaintiff to shift its contractual obligation by a back-to-back arrangement to provide a site agent to superintend the work.

[23] The amount in question related to the salary of Mr Peter Yeung who prior to 15 August 2002 was employed by the plaintiff as its Assistant Project Manager ("APM"). He was appointed site agent by the plaintiff with effect from 15 August 2002, following the 'uninformed' absence on that day of the previous site agent, Mr Ben Li who had been an employee of the defendant.

[24] There is no challenge to the judge's finding that the plaintiff retained a supervisory role notwithstanding the sub-contract. In order to perform that role and to discharge its contractual obligations under the main contract, the plaintiff had to have a site agent. In this regard, clause 4 of the general conditions of the main contract relating to 'assignments and subcontracting' is of relevance and, in particular, subclause (4) of that clause which specifically provided that the subcontracting of any part of the works "shall not relieve the [plaintiff] from any liability or obligation under the contract particularly in respect of the provision of superintendence in accordance with clause 17".

[25] In view of that provision, the contractual intention is quite clear: the obligation to superintend by having a site agent would remain with the plaintiff irrespective of any subcontracting. Moreover, the defendant wrote to the plaintiff on 6 September 2002 indicating that it could fulfill its contractual obligations with the various staff that it had. As far as is known, there was never any reply from the plaintiff disputing that. Hence, as far as concerns the defendant's own work, it would appear that it had fulfilled its obligations. In those circumstances, I do not consider that the plaintiff is entitled to contra charge the defendant for the cost of its site agent.

Liquidated damages and additional insurance premium

[26] The main contract provided for liquidated damages at a daily rate to be ascertained in accordance with a specified formula. It is common ground that the amount comes to $4019 per day. The period of delay of 104 days under the main contract attracted liquidated damages of $417,976. The judge ruled that the plaintiff was entitled to calculate its liquidated damages by applying the rate applicable under the main contract to the period of delay under the sub-contract which was 136 days resulting in a sum of $546,584 which was $128,608 more than what the plaintiff had to pay the employer. He further held that the plaintiff was entitled to recover from the defendant the amount of additional insurance premium of $190,639.08 it had to pay in respect of the defendant's period of delay as "provision of additional services".

[27] Dealing with the additional premium first, Mr Coleman submitted that as the defendant was never under any obligation under the back-to-back arrangement or otherwise to pay any part of the insurance premium, the same must apply to the additional premium. Further, if the clause entitling the plaintiff to liquidated damages was intended to be exhaustive and a genuine pre-estimate of loss from any delay, the plaintiff may not recover the additional premium by way of general damages. There is therefore no basis upon which the plaintiff could be entitled to the additional premium if it was claiming liquidated damages and not general damages.

[28] It is accepted that the defendant was never asked to pay any part of the original premium under the policy. Although the amount of the original premium is not in evidence, it has to be a significant amount given the value of the additional premium charged for the period of delay. The plaintiff's failure to demand reimbursement for part of the original premium cannot be explained away as an act of magnanimity, given the manner in which the proceedings have been fought and the amounts the individual items involved. Logically, the only basis upon which the defendant would have to bear the additional premium would be by way of general damages. The question therefore is whether that is precluded where, as confirmed by Mr Yee, the plaintiff was claiming liquidated damages.

[29] In my view, as a matter of construction, the provision for liquidated damages in the main contract was plainly intended to be an exhaustive remedy for any delay in the completion of the project. Under the back-to-back arrangement, the same would apply to the sub-contract. As the period of delay under the main contract (of 104 days) was different from that of the sub-contract (of 136 days), the question posed is whether, under the back-to-back arrangement, the plaintiff is only entitled to recover damages for the period of delay under the main contract or under the longer period under the sub-contract. I am inclined to the

view that liquidated damages should be calculated by reference the period of delay under the sub-contract since losses may conceivably arise under the sub-contract during the period of delay outside that of the main contract.

[30] Thus, while I consider that the judge was correct in holding that the plaintiff was entitled to liquidated damages in the sum of $546,584, there was no basis upon which he could have allowed any reimbursement for the additional premium of $190,639.08.

Costs

[31] As stated above, the plaintiff instituted these proceedings to recover from the defendant payment of wages it had made on the defendant's behalf. Notwithstanding the defence that the sum was extinguished by set off of sums due to the defendant under the same contract, the plaintiff maintained that monies remained due and owing from the defendant. It was not until the first day of the trial that the concession was made orally to the effect that a small amount was due to the defendant. The pleadings were amended on the third day to reflect the concession. After trial, the defendant was awarded a sum that greatly exceeded the amount conceded although it has to be said that the award represented but a small percentage of the amount of the counterclaim. The judge awarded the defendant 1/4 of its costs and the plaintiff 3/4 of its costs, to be netted off. Assuming that the plaintiff's costs and the defendant's costs are more or less within the same range, the net effect of the judge's order was to award the plaintiff half of its costs.

[32] As the judge recognised, the trial was essentially that of the counterclaim. The reality is that had the defendant not made the counterclaim, it would not have recovered anything at all. Undeniably, it was a successful party to the action and the principles set out in the judgment of Nourse LJ in *In re Elgindata (No 2)* [1992] 1 WLR 1207 apply:

> "The principles of these. (i) Costs are in the discretion of the court. (ii) They should follow the event, except when it appears to the court that in the circumstances of the case some of the order should be made. (iii) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or costs of the proceedings he may be deprived of the whole or any part of his costs. (iv) Were the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprived him of his costs but may order him to pay the whole or a part of this unsuccessful party's costs."

[33] It was said that the counterclaim involved the determination of 17 discrete issues and that the defendant only succeeded on 7 of them. While that may bring the third of the principles set out above into play

(such that it would be appropriate to deprive the defendant of part of its costs), it would not result in the defendant having to bear part of the plaintiff's costs (which was the net effect of the judge's order) unless the defendant had acted "improperly or unreasonably". In the present case, there is no question of the defendant having acted improperly or unreasonably given the judge's express finding in § 19 of his ruling on costs and therefore no proper basis for making an award of costs in favour of the plaintiff.

[34] I would set aside the judge's order on costs and substitute in its place a costs order that the defendant be entitled to 75% of its costs below.

[35] Finally it would be appropriate to comment on the form of the costs order made by the judge. In general, a costs order that would require two separate sets of taxation (one of the plaintiff's costs and the other of the defendant's costs) to work out the net effect duplicates costs and is undesirable. A more efficient and cost-effective costs order would be to award the successful party the appropriate percentage of its costs.

Conclusion

[36] An agreed draft order should be submitted for approval. As regards the costs of this appeal, I would make an order *nisi* that the costs be in favour of the defendant.

Hon Barma J:

[37] I agree.

terms contained in the slip, and in some places in direct conflict with its provisions.

It will also be observed that the slip does specify a series of cases in which no claim can be made under the policy. It may fairly be presumed that if it had been in the minds of the parties to exclude claims for loss in any other case, that case would have been specified in the same connection. To specify there all cases but one, and to leave that one to be discovered in another part of the instrument among a multitude of irrelevant provisions, is (to say the least) somewhat misleading.

A clause prescribing legal proceedings [within] a limited period is a reasonable provision in a policy of insurance against direct loss to specific property. In such a case the insured is master of the situation. He can bring his action immediately. In a case of re-insurance against liability the insured is helpless. He cannot move until the direct loss is ascertained between parties over whom he has no control, and in proceedings in which he cannot intervene. …

It is difficult to suppose that the contract of re-insurance was engrafted on an ordinary printed form of policy for any purpose beyond the purpose of indicating the origin of the direct liability on which the indirect liability, the subject of the re-insurance, would depend, and setting forth the conditions attached to it.

[emphasis added]

[146] Again, *Home Insurance Company* ([143] *supra*) is simply no authority for the approach which the Judge took. In that case, the Privy Council had to construe an instrument that had been carelessly patched together from two effectively separate contracts. The court in effect found that, on an objective view, Home Insurance and Victoria-Montreal had intended for their agreement to be embodied in the typewritten rider. Thus, one can in fact read this as a case where the court declined to admit extrinsic evidence to contradict the terms of the reinsurance contract, *ie*, the court applied the parol evidence rule (although the court itself made no explicit reference to that rule). We fail to see how this case supports the Judge's approach *vis-à-vis* the admissibility of extrinsic material in interpreting a written contract.

[147] The final case that the Judge relied on was the English Court of Appeal's decision in *Hydarnes Steamship Company v Indemnity Mutual Marine Assurance Company* [1895] 1 QB 500 ("*Hydarnes Steamship Company*"). In brief, Lopes LJ rejected a clause in a contract for insurance on freight ("the commencement clause") which stated that (*id* at 508):

> [T]he assurance aforesaid shall commence upon the freight and goods or merchandize [*sic*] on board thereof from the loading of the said goods or merchandize [*sic*] on board the said ship or vessel at Monte Video.

His reasoning (*id* at 507–508) is reproduced below for ease of discussion:

> The question is whether the risk had attached. It was said, on the one hand, that it had never attached, because no meat ever was loaded on board the ship. It was said, on the other hand, that it had attached, because the refrigerating machinery broke down after the vessel had left Monte Video, and before she finally sailed from Buenos Ayres. The question depends on the construction of the policy, which like any other document must be construed as far as possible according to the ordinary meaning of the words used, having regard to the circumstances which existed at the time when the contract was made. In this case it was well known to both parties to the contract that no frozen meat ever was loaded at Monte Video. It was also clear that, as soon as the vessel finally sailed with the meat on board, the freight would no longer be at risk, except in the event of the ship's not arriving, because by the terms of the contract the freight was to be earned on the arrival of the ship, even though the meat should have had to be jettisoned. Therefore, what the assured especially required to be protected against was the loss of the freight, not by a peril of the sea, but by the breaking down of the refrigerating machinery during the period which elapsed between the ship's arrival at Monte Video and her final sailing on her voyage to England. The very object of the insurance was to cover that period. That being so, the insurance is expressed to be upon "freight of meat valued at *3000l*, warranted free from all claims (except general average and salvage charges) unless caused by stranding, sinking, burning, or collision, but to be liable for any loss occasioned by breaking down of machinery until final sailing of the vessel … at and from Monte Video ... to any port or ports in the United Kingdom." If it had stopped there I should imagine there would have been no difficulty in construing the words. The difficulty arises from a subsequent part of the policy, which is mainly in print [*ie*, the commencement clause] … It is argued that the meaning of that clause is that the risk was not to attach until the frozen meat had been loaded. But it appears to be impossible to give it that meaning, because it is admitted that all parties knew that frozen meat could not be loaded at Monte Video, which is the place mentioned in the clause. This clause, as it stands, is clearly inconsistent with the previous part of the policy. The question is which portion of the policy is to take effect. It appears to me that we must give effect to the earlier part, and reject so much of the subsequent printed clause as refers to the loading of the said goods or merchandize [*sic*] on board the said ship or vessel, as being inapplicable to the state of things which existed. Rejecting those words, the effect is that the insurance is on freight, and is to commence at and from Monte Video. Upon this construction of the policy all difficulty disappears.

[148] Again, the facts of *Hydarnes Steamship Company* are distinguishable from those of the present appeal. In the former case, the object of the insurance policy was expressed in the policy itself as being insurance upon the "freight of meat valued at 3,*000l*, warranted free from all claims (except general average and salvage charges) unless caused by stranding, sinking, burning, or collision, but to … [include] any loss occasioned by breaking down of machinery until final sailing

of the vessel … at and from Monte Video … to any port or ports in the United Kingdom" (see the passage reproduced at [147] above). As such, as Lopes LJ put it (see *Hydarnes Steamship Company* at 508), the "[commencement] clause, as it [stood], [was] clearly inconsistent with the previous part of the policy [*ie*, that part of the policy which set out the items being insured]" and "[t]he question [was] which portion of the policy [was] to take effect" (*ibid*). Thus, the court interpreted the commencement clause in the light of the *internal* context (as defined at [53] above) of the insurance policy. The case did not concern the issue of whether and when evidence of the *external* context may be adduced and relied on to affect the interpretation of a contract. There is a further distinction – *viz*, while allowing the commencement clause to have effect in *Hydarnes Steamship Company* would have led to an absurdity (because there would in effect never have been any insurance protection), giving effect to Special Exclusion 4(b) in the present case does not have such a consequence.

[149] Having decided that the Judge's reliance on the context of the Policy to interpret Special Exclusion 4(b) was legally impermissible, we now turn to his views grounded on justice and fairness.

Arguments based on justice and fairness

[150] In our view, amorphous notions based on justice and fairness did not warrant the Judge straying beyond the confines of the Policy. The Judge's conclusion that giving effect to Special Exclusion 4(b) would be "contrary to all sense of justice and fair play" (see *B Gold Interior Design* ([5] *supra*) at [56]) was based on his view that B Gold had relied on Zurich Insurance to provide insurance cover for the specific purpose of B Gold's compliance with cll 18 and 19 of the Conditions of Contract, which purpose had been made known to Zurich Insurance without the latter demurring (see [30] above). However, we have already noted (at [135]–[139] above) that the lack of clarity regarding the communications between Lee and Long, which rendered the context of the Policy unclear, precluded the Judge from referring to that context when construing the Policy. In any case, B Gold had agreed not to rely on any arguments based on misrepresentation or breach of duty against Zurich Insurance (see [11] and [28] above). The Judge's reasoning would effectively allow these arguments in by the back door, without giving Zurich Insurance a chance to respond. This would be unjust.

[151] Furthermore, B Gold arguably has another – and, in our view, more appropriate – remedy, namely, that against Lee. Lee was B Gold's insurance agent. It was his duty to ensure that the Policy adequately covered B Gold's needs. Once B Gold signed the Policy, it was bound by its terms under normal contractual principles (in the absence of vitiating factors such as fraud or duress).

[152] It is of little import that Lee had expressly told Yeo (through Jacqueline) that the type of insurance cover required under the Contract was not within the scope of his services (see [13] above) or that, on Lee's unchallenged evidence, he had merely been acting as a facilitator between B Gold and Zurich Insurance (see [136] above), a point which counsel for B Gold emphasised at the hearing of this appeal. The fact remains that Lee was B Gold's agent in arranging for the insurance required by the Contract. As noted in Tan Lee Meng, *Insurance Law in Singapore* (Butterworths Asia, 2nd Ed, 1997) at p 530:

> Apart from insurance brokers, any person who has agreed to procure insurance cover for another person may be regarded as that other person's agent for [the purpose of obtaining insurance]. For instance, shippers who sell goods under [CIF] contracts and solicitors and other professional persons who act for their clients in effecting insurance cover may also be regarded as their clients' agents.

[153] That B Gold may pursue a claim against Lee (on the basis of the latter being its agent) is illustrated by the following cases. In *Yuill & Co v Scott Robson* [1908] 1 KB 270, a seller of bullocks agreed in a contract of sale with the buyer to insure the cattle "against all risks" (*id* at 275). Pursuant to this obligation, the seller effected an ordinary all-risks Lloyd's policy which contained a "free of capture, seizure and detention" clause. The cattle, which were shipped from Buenos Aires to Durban, became diseased during the journey and had to be slaughtered because the South African authorities refused to allow them to land. The underwriters refused to pay for the loss on the basis of the "free of capture, seizure and detention" clause. The English Court of Appeal held the seller liable for failing to provide the comprehensive insurance cover required by the contract. Even though the seller was not a professional insurance agent or broker, he had agreed to procure insurance for the buyer and could be regarded as the buyer's agent for the purposes of obtaining such insurance.

[154] In *Norwest Refrigeration Services Pty Ltd v Bain Dawes (WA) Pty Ltd* (1984) 55 ALR 509 ("*Norwest Refrigeration Services Pty Ltd*"), the Australian High Court rejected a submission that a shipping co-operative ("the Co-op") had, in obtaining insurance for its members through an insurance broker, functioned merely as an intermediary acting in a voluntary capacity for the transmission of the insurance proposal to the insurer via the broker. The court agreed with the reasoning of Olney J in the court below that (at 512–513):

> [T]he Co-op held itself out as being prepared to arrange insurance for such of its members who requested this to be done. This being so the Co-op was under a duty to exercise proper care to ensure either that it arranged insurance of the type requested by the members or that it warned a prospective insured of the limitations that would be contained in any insurance cover that it arranged for the member.

[155] The language of the Australian High Court in *Norwest Refrigeration Services Pty Ltd* (at 513), *viz*, "duty to exercise proper care", demonstrates that the legal justification for designating as an agent any person who has agreed to procure insurance cover for another lies in tort. The principle is that a person who undertakes to perform a task or service for another assumes a responsibility towards and owes a *prima facie* duty of care to the latter. The seminal case in this regard is *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 ("*Henderson*"), a decision of the House of Lords. In that case, claims were brought by underwriting members (known as "Names") of Lloyd's who had incurred heavy personal liabilities arising out of alleged negligent underwriting by the managing agents of syndicates of which they were members. In some cases, a "members' agent" was interposed between the Name and the managing agent so that, *prima facie*, there was no privity of contract between the Name and the managing agent; in other cases, there was a direct contractual link between the two. In both cases, the Names brought claims in tort against the managing agents in order to take advantage of the more generous limitation period paid down in the Latent Damage Act 1986 (c 37) (UK). In holding that a duty of care arose in both situations, Lord Goff of Chieveley said (at 182):

> [T]here is in my opinion plainly *an assumption of responsibility* in the relevant sense by the managing agents towards the Names in their syndicates. The managing agents have accepted the Names as members of a syndicate under their management. They obviously hold themselves out as possessing a special expertise to advise the Names on the suitability of risks to be underwritten; and on the circumstances in which, and the extent to which, reinsurance should be taken out and claims should be settled. The Names, as the managing agents well knew, placed implicit reliance on that expertise, in that they gave authority to the managing agents to bind them to contracts of insurance and reinsurance and to the settlement of claims. I can see no escape from the conclusion that, in these circumstances, prima facie a duty of care is owed in tort by the managing agents to such Names. [emphasis added]

[156] The significance of the House of Lords' decision in *Henderson* is well summarised in W V H Rogers, *Winfield and Jolowicz on Tort* (Sweet & Maxwell, 17th Ed, 2006) at para 5 32 as follows:

> Since *Henderson*, assumption of responsibility has been the basis of recovery in a wide range of situations and as we have seen it is to some extent a rival to the *Caparo* test [*ie*, the tripartite formula laid down by the House of Lords in *Caparo Industries Plc v Dickman* [1990] 2 AC 605, which consists of: (a) reasonable foreseeability, (b) proximity, and (c) fairness, justice and reasonableness] as the general approach to the duty of care question. ...
>
> In few, if any of these cases has the defendant expressly assumed responsibility in the sense that he has recognised that he will incur a legal liability if he fails in it, but this is not necessary – the assumption of the responsibility in question is one which is based on the law's objective assessment of the situation.

[157] Furthermore, the rule that a person who agrees to procure insurance for another should be regarded as the latter's agent for the purpose of obtaining that insurance is to a certain extent necessitated by commercial practicality. As *MacGillivray* ([42] *supra*) puts it (at para 36 1):

> Most insurance business is in practice transacted through agents, and for good reason. Insurers, for their part, are almost always incorporated companies, which can only act by their agents, from the directors down to a local agent soliciting proposals for insurance. ... In company business also, the assured is often assisted by retaining a broker or other intermediary to obtain the best possible terms available and to represent him in negotiations with the insurers. *Moreover, it is often the case that agency enters into insurance transactions regardless of the role of brokers, because the course of business may demand that one party shall effect an insurance on property on behalf of another. Thus in [CIF] export sales it is usual for the seller to take out an insurance on the buyer's behalf to cover all or part of the transit of the goods, and it is frequently the case that parties to a building or construction contract, for example, will arrange for a single contractors' risks policy to be taken out by one of them to cover the interests of all.* [emphasis added]

Since parties to a commercial contract often agree that one of their number will procure insurance cover for one or all of the parties, it makes sense to impose a duty of care on the person who is to arrange for such insurance so as to ensure that he acts with the skill and care that may be reasonably expected of a person in his position (see the English Court of Appeal case of *Chaudhry v Prabhakar* [1989] 1 WLR 29 at 34).

[158] In our view, the principle that a person who has agreed to procure insurance for another becomes the latter's agent for the purpose of obtaining insurance and thus owes him a duty of care is eminently justified by both commercial reality and existing principles of tort law. In the present case, the following unchallenged facts gave rise to the assumption of responsibility by Lee to B Gold:

> (a) Yeo had requested Lee's assistance in arranging for a CAR policy as it was the first time that B Gold was seeking to obtain this kind of insurance. Jacqueline (who usually liaised with Yeo on Lee's behalf (see [12] above)) had informed Yeo that Lee would check "on [her] behalf" and get back to her.
>
> (b) Lee had in fact contacted Long to ask if Zurich Insurance could provide the kind of insurance required by B Gold (see [14] above). When Long confirmed that it could, Jacqueline had informed Yeo that Lee would be recommending someone who was able to arrange for the necessary insurance cover.

(c) Lee had faxed to Long all the documents relating to the Contract which he had earlier received from Yeo (see [14] above) and had requested Long's advice on "Contractor All Risks" and "Public Liability" insurance specifically (see the Undated Note reproduced at [15] above). Long subsequently replied to Lee saying that Zurich Insurance was able to offer the necessary insurance cover to B Gold.

[159] The fact that Lee had assumed the responsibility of procuring the requisite insurance cover for B Gold by the time the Fire broke out is further confirmed by his conduct after the Fire. If Lee had not in fact assumed such responsibility, there would have been no reason for the following actions on his part:

(a) After the Fire, it was Lee who called Long to inform him of the incident. Thereafter, B Gold, Zurich Insurance and MediaCorp all communicated with Lee regarding their respective claims under the Policy in relation to the Fire.

(b) Lee attended a meeting sometime in April 2003 with Li Xizhen (B Gold's manager) during which they negotiated the extension of the Policy to cover subcontractors (see [21] above).

(c) When a new claims manager at Zurich Insurance was appointed, Lee contacted him to reiterate B Gold's stance on extending insurance cover to subcontractors. The claims manager eventually informed Lee that Zurich Insurance was willing to amend the Policy in this manner. Lee called Li Xizhen to inform her of this. When the endorsement to the Policy effecting this amendment was ready, Lee collected it "on behalf of [B Gold]".

(d) After the Policy was amended, Lee discussed the amendment with Li Xizhen. During this discussion, it was agreed that B Gold would object to the effective date of the extended insurance cover stated in the endorsement to the Policy (B Gold's view was that the Policy should have covered subcontractors right from the outset). To this end, Li Xizhen prepared and handed Lee a letter addressed to Zurich Insurance for Lee to convey to Zurich Insurance.

[160] It is inconsequential that Lee acted gratuitously in assisting B Gold to obtain the Policy. The duties owed in tort by gratuitous agents are set out in F M B Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 18th Ed, 2006) at paras 6 025 to 6 026 as follows:

> A gratuitous agent will be liable to his principal if in carrying out the work he fails to exercise the degree of care which may reasonably be expected of him in all the circumstances.
>
> … Where there is no contract between principal and agent, it would seem that the alleged agent cannot be liable for pure failure to do what he undertook to do without consideration. However, he can certainly be liable in tort for negligently failing to complete, or to complete with due care, work which he has undertaken and upon which he has embarked. Thus a person who gratuitously agrees to procure insurance for another may owe a duty of care in respect of the manner in which he does so.

[161] The English courts have consistently recognised these principles (see, *eg*, *Wilkinson v Coverdale* (1793) 1 Esp 75; 170 ER 284 in relation to a gratuitous agent's duty to ensure adequate insurance cover; *Norwest Refrigeration Services Pty Ltd* ([154] *supra*) in relation to a gratuitous agent's duty to warn about his principal about exclusion clauses; and *Chaudhry v Prabhakar* ([157] *supra*) in relation to a gratuitous agent's duty not to make negligent misstatements). The Singapore High Court has also adopted these principles (see, *inter alia*, *Koh Keow Neo v Chee Johnny* [2004] 3 SLR 385 at [90] and [92] (although no breach of duty was found on the facts in that case)).

[162] Thus, so long as Lee failed to fulfil the standard of care expected of a gratuitous agent – *viz*, what is reasonably expected of the agent in all the circumstances, having regard to factors such as the skill and experience which he has or represents himself as having (*per* Stuart-Smith LJ in *Chaudhry v Prabhakar* at 34) – he would be potentially liable for breaching his duty of care to B Gold as its (gratuitous) insurance agent. For present purposes, the question of whether Lee has indeed breached such duty is not for us to determine. We merely note that the courts ought not to conflate distinct causes of action and disregard the plain terms of a contract under the guise of justice when alternative avenues for obtaining justice exist. The Judge was mistaken in concluding that the applicable principles of law left a lacuna which had to be filled by considerations of fairness and justice.

[163] The danger of allowing the courts to impose their own peculiar sense of what is fair and just in each case is that the concepts of "fairness" and "justice" are almost infinitely malleable. Indeed, in contrast with the conventional view whereby commercial certainty on the one hand and individualised fairness and justice on the other are depicted as mutually exclusive, Calnan regards fairness as tipping the scales in favour of commercial certainty (see Calnan's article ([127] *supra*) at p 20):

> *Perhaps the most important ingredient of fairness in commercial law is the requirement for certainty.* There are a number of reasons for this. Commercial parties need to be able to plan their transactions with a reasonable degree of certainty that they will achieve the desired result. In the event of a dispute, they also want to be able to avoid the cost and delay inherent in litigation. Indeed, certainty is not important just to the parties to the contract; in practice, the benefit of a contract is often assigned or charged to a third party who is unaware of the background and simply wants to be able to rely on the written document. [emphasis added]

[164] Given the ease with which arguments based on fairness and justice can be manipulated to suit their wielder's needs, such arguments should never be the sole reason for deviating from established principles

of law (the applicable principles in the present appeal being those outlined above at [132]). In our view, the court below misjudged the point at which the scales between certainty and fairness should be balanced in this case. There was no legal principle warranting the Judge's decision to allow extrinsic evidence to affect his interpretation of the Policy, nor would excluding such extrinsic material result in an unfair or unjust result. Having decided this, we now turn to the question of the proper scope and meaning of the Policy.

Our interpretation of the Policy

Whether B Gold's claim falls under Section II

[165] As B Gold's claim is for an indemnity in respect of its liability to pay MediaCorp compensation for the Damaged Property, it falls within Section II, which deals with third-party liability (see [19] above). In Summons in Chambers No 19257 of 2004 (filed under DC 2126/2004), B Gold had asked for certain preliminary issues to be determined, including the question of whether, upon a proper construction of the Policy, Zurich Insurance was liable under Section II to indemnify B Gold in respect of all sums which the latter should become liable to pay MediaCorp in the Main Action. At the hearing of the summons on 8 March 2005, the deputy registrar noted in his minute sheet, *inter alia*, that B Gold was "still allowed to make the claim" under Section II for third-party property damage notwithstanding that the Damaged Property belonged to MediaCorp. We accept the submission by counsel for B Gold that, given this determination by the deputy registrar, both B Gold and Zurich Insurance proceeded on the basis that MediaCorp was a third party for the purposes of B Gold's claim under Section II. We also note that there is provision for "Cross Liability Cover" in the Schedule, which means that when one of the insured parties named in the Schedule makes a claim against another insured party under the Policy, that claim is treated as a claim by a third party and thus falls within the ambit of Section II (see, *eg*, *Speno Rail Maintenance Australia Pty Ltd v Hamersley Iron Pty Ltd* (2000) 23 WAR 291 and *National Vulcan Engineering Insurance Group Ltd v Transfield Pty Ltd* (2003) 59 NSWLR 119). Thus, the key question is whether either Special Exclusion 2 or Special Exclusion 4(b) applies to exclude Zurich Insurance's liability to indemnify B Gold.

Whether Special Exclusion 2 applies

[166] Special Exclusion 2 provides that Zurich Insurance will not indemnify B Gold in respect of the expenditure incurred in repairing or replacing anything "covered or coverable" under Section I (see [20] above). We agree with the Judge that the Damaged Property (consisting of, *inter alia*, the AHU Room and AHU No 17) was not "covered" under Section I as the items entered in the Schedule (which correspond

to the items covered under Section I) were confined to "[p]ermanent [and] temporary works including all materials to be incorporated therein". In fact, B Gold appeared to have conceded this point for the purposes of the appeal, since its arguments largely pertained to the question of whether the Damage Property was "coverable" within the meaning of Special Exclusion 2.

[167] We find that the Damaged Property was not "coverable" under Section I either. The interpretation propounded by Zurich Insurance, *viz*, that "coverable" means "could have been covered by the parties' agreement", would effectively obviate coverage under Section II since it would always be open to Zurich Insurance to argue that the insured could, by agreement, have included in Section I the particular property for which a claim under Section II is being made. The reasoning of the Judge in this regard (see *B Gold Interior Design* ([5] *supra*) at [37]) was, in our view, impeccable.

[168] Instead, "coverable" in Special Exclusion II should be read to mean "intended to be covered", not by reference to the Contract or any other extrinsic agreement, but by reference to the terms of the Policy itself. Counsel for Zurich Insurance disagreed with the Judge's conclusion that what Zurich Insurance contemplated as being coverable under Section I was limited to the three items mentioned in Memo 1 (see [30] above). We accept that Memo 1 pertains to the issue of *quantum*, as is evidenced by its heading ("Sums Insured") and its stipulation that the sums insured shall not be less than the values stipulated for the three items listed therein. However, we find persuasive the argument by counsel for B Gold that Memo 1 indicates *by inference* what type of property Zurich Insurance contemplated as being coverable under Section I, namely, "the contract works" (see the first item in Memo 1) and "construction plant, equipment and construction machinery" (see the second and third items in Memo 1). This view is cemented by the wording of cl (b) of Section II, which refers to "accidental loss of or damage to property belonging to third parties occurring in direct connection with *the construction or erection of the items insured under Section I*" [emphasis added] (see [19] above). It is thus apparent that the items insured under Section I must be the result of construction or erection, *ie*, they cannot encompass the existing property of MediaCorp.

[169] As such, the Damaged Property, being MediaCorp's existing property, was not "covered or coverable under Section I" within the meaning of Special Exclusion 2. Accordingly, we find that Special Exclusion 2 does not operate to preclude Zurich Insurance's liability to indemnify B Gold under Section II.