# Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd
# [2004] SGHC 107

**Case Number** : Suit 1490/2002

**Decision Date** : 25 May 2004

**Tribunal/Court** : High Court

**Coram** : V K Rajah JC

**Counsel Name(s)** : Tan Liam Beng and Yow Su Joan (Drew and Napier LLC) for plaintiff; Yang Yung Chong and Joan Sim Su Mei (Lee and Lee) for defendant

**Parties** : Jia Min Building Construction Pte Ltd — Ann Lee Pte Ltd

*Building and Construction Law – Equitable remedies – Estoppel – Whether term of contract varied by parties – Whether waiver of strict requirements of contract – Whether varied term waived in entirety*

*Building and Construction Law – Set-off and abatement – Whether right to exercise set-off removed by clear and unequivocal words*

*Building and Construction Law – Suspension of performance – Whether non-payment of claims entitled subcontractor to suspend performance*

*Building and Construction Law – Termination – Repudiation of contract – Main contractor in breach of obligation to make progress payments – Contract affirmed by subcontractor – Subsequent repudiation by subcontractor – Whether main contractor precluded by own breach from terminating contract*

*Contract – Remedies – Mitigation of damage – Whether innocent party acted reasonably*

25 May 2004 *Judgment reserved.*

**V K Rajah JC:**

1 Sometime in 1999, the defendant was appointed as the main contractor to build Hilltop Grove Condominium Development ("the project") on Lot 3143V Mukim 10, Hillview Avenue, Singapore ("the site"). Pursuant to a written agreement dated 4 October 1999 ("the sub-contract") between the plaintiff and the defendant, the defendant engaged the plaintiff as its sub-contractor for the structural works of the project. The work embraced the substructure and the superstructure for three residential blocks of flats inclusive of external works ("the works") for the lump sum price of $5,860,000 ("the sub-contract sum"). The Letter of Award ("LOA") enclosing the sub-contract included a term:

> Should you fail to cope with the work and/or fail to carry out the true intent of this contract, we shall reserves [*sic*] the right to terminate the sub-contract at our discretion.

The plaintiff signified its acceptance of the sub-contract and its terms by signing the LOA, as well as the sub-contract. The sub-contract itself is unremarkable save for its relative brevity. It did, however, include an express term that the plaintiff would "employ sufficient workmen to execute [the] contract".

2 Sub-clause 5.1 of the sub-contract stated:

> Monthly interim payment shall be made to you based on the actual work done as per our agreed breakdown details with deduction for materials supplied by Main Contractor and subjected [*sic*] to approval by the Consultants/Owners/Main Contract, and upon receiving of Progress Payment from the Owner.

3 Pursuant to the sub-contract, the plaintiff was obliged to supply labour and materials for the works. This term was varied by agreement, resulting in the defendant purchasing the requisite building materials on the plaintiff's behalf. It is common ground that this arrangement was arrived at between the parties because the suppliers preferred to deal with the defendant and the defendant was able to procure better pricing arrangements. The purchases included steel reinforcement bars ("rebars") and ready-mix concrete. Metal scaffolding and formwork for the structural works were also rented. After effecting the purchases, the defendant issued invoices for them and made corresponding deductions of the amount payable from the interim payments due to the plaintiff. It became a pattern for the defendant to deduct from the progress payments the amounts payable for the building materials supplied during the previous month.

4 The plaintiff contends that during the negotiations in September 1999, the parties had orally agreed that the interim payments to the plaintiff for works done would be made on a half-monthly basis, and not on a monthly basis as contractually provided for. This oral agreement is alleged to have been also confirmed just prior to the formal execution of the sub-contract. The plaintiff further asserts that the existence of this variation is corroborated by the fact that all its submissions for progress payments until October 2000 were submitted, accepted and settled by the defendant on a half-monthly basis. There were two occasions when this was delayed but nothing really turns on this. In the circumstances, the plaintiff avers that, notwithstanding sub-cl 5.1 (at [2] above), there was a contractual variation recognising that progress payments be made "on a *half monthly* basis with deduction for materials supplied by the defendant and *subject to the approval of the defendant*" [emphasis added]. This half-monthly payment regime proceeded uneventfully until the second half of October 2000.

5 In the meantime, a tempest was slowly but surely brewing and taking shape on a separate front. From the commencement of the contract the plaintiff did not have sufficient workmen to carry out the works. The defendant made arrangements for several foreign workers ("seconded workers") to assist the plaintiffs. Under this arrangement, while the defendant was responsible for procuring the seconded workers, the plaintiff remained responsible for their monthly wages. The defendant also rendered financial assistance to the plaintiff by way of early progress payments – without receiving corresponding payments under the main contract for variation works. Indeed on an occasion in April 2000, it advanced a loan of $25,000 to the plaintiff. The plaintiff, in its evidence, denied that it had any financial problems when the contract commenced. It claimed that the secondment of workers was a temporary arrangement initiated at the commencement of the contract to help tide it over, pending the arrival of workers it intended to directly employ. Despite this claim, no credible explanation was offered by the plaintiff as to why this "temporary arrangement" carried on for a year until the termination of the contract.

6 From about April 2000 until the contract was terminated by the defendant in December 2000, the defendant sent several written complaints to the plaintiff about the shortage of labour executing the works. The defendant also asserts that apart from these written communications, the same issues were raised during the worksite meetings held during this period. The shortage of workers extended to several different facets of the works.

7 On 29 August 2000, Han Yuh Kwang ("Han"), the project manager of the defendant, sent a facsimile message to Phua Choon Seng ("Phua"), a director of the plaintiff. It should be noted here

that Phua was, for all intents and purposes, the controlling mind of the plaintiff. The note was captioned "SLOW STRUCTURAL WORK PROGRESS". The message referred to an agreement by the plaintiff to meet a promised schedule and included a reference to the potential imposition of liquidated damages for delay. It also ought to be pointed out, at this juncture, that the plaintiff had unilaterally stopped paying the wages of the seconded workers from August 2000. The plaintiff did not respond to this message. On 4 September 2000, the defendant sent a further facsimile message strenuously complaining about the delay. The plaintiff was warned to increase its workforce immediately, failing which the defendant would seek to employ other sub-contractors.

8 The plaintiff's responses did not satisfy the defendant and the steady flow of complaints from the defendant continued unabated. On 21 October 2000, Han sent to Phua another facsimile message expressing deep dissatisfaction and distress over the lackadaisical execution of the works. The message made a reference to Phua's assurance given earlier in the morning that he would engage a team of workers to address outstanding work by 24 October 2000. It stated emphatically that this would be the last warning before the defendant took alternative measures to complete the work

9 Thereafter, the defendant made no further progress payments. According to the plaintiff, various progress claims as outlined below continued to be sent to the defendant, but to no avail:

| | Date of Progress Claim | Amount Claimed |
|---|---|---|
| No 21 | 31 October 2000 | $583,579.26 |
| No 22 | 15 November 2000 | $ 79,937.35 |
| No 23 | 30 November 2000 | $ 20,787.07 |
| No 24 | 12 December 2000 | $ 1,258.16 |
| | Total | $685,561.84 |

10 The defendant denies having received the progress claims for the periods ending 31 October 2000, 30 November 2000 and 12 December 2000. It asserts that it could not timeously effect the deduction of $270,065.23 for materials purchased in September 2000 at the end of October 2000; this could only be effected from the certification of progress claim No 22, made 15 days later on 15 November 2000. The amount of $109,934.77 that Han subsequently certified as a progress payment was in respect of work for a full month from 16 October 2000 to 15 November 2000.

11 On 20 November 2000, Han had a discussion with Low Wee Geok ("Low"), the defendant's accounts manager. She expressed concern about the plaintiff's parlous financial condition and its inability and apparent lack of interest in fulfilling its contractual obligations to the defendant. They both agreed it would be in the defendant's interests to protect itself from the plaintiff's potential default of its obligations by deducting from the pending progress payment a further sum of $225,183.77; this being the total cost of materials incurred for October 2000. With the implementation of this further deduction, no moneys were payable to the plaintiff pursuant to the claim made.

12 Han asserts that he verbally informed Phua of the defendant's decision and the reasons for this on at least two occasions including a site meeting on 12 December 2000. It was never communicated to the plaintiff that the defendant intended to halt all further payments to it. Phua, on the other hand, states that Han informed him that the defendant would not be making any further

progress payments.

13 On 12 December 2000, the defendant sent yet another note to the plaintiff complaining, once again emphatically, about the progress of the plaintiff's work. It warned that the plaintiff should "increase [its] workforce IMMEDIATELY to accelerate [its] progress and complete … outstanding items". If this was not adhered to by 14 December 2000 "we shall exercise our rights and shall employ other sub-contractors to complete all your remaining works and all costs incurred will be borne by your company".

14 The plaintiff's very first written response was sent on 15 December 2000. The plaintiff complained that progress payments had stopped since October 2000 even though "additional steel reinforcement work" had been carried out on the site. The plaintiff added that without payment it could not pay its workers and sub-contractors and that it could no longer ensure "a regular progress or work". A stoppage of work could ensue at "any moment".

15 On 18 December 2000 the defendant wrote again to the plaintiff stating that from 16 December 2000, the plaintiff's workers "had ceased all work on the site" and that this stoppage was "affecting the progress of work tremendously". It required the plaintiff "to catch up the schedule discussed on 12 December 2000". If work was not resumed immediately the defendant would forthwith proceed to engage another party to complete the works.

16 Finally, by a letter dated 19 December 2000, the defendant terminated the sub-contract. The letter also referred to the 12 December 2000 meeting and placed on record the plaintiff's failure to submit proper claims. It also pointed out that the delay caused by the work stoppage affected the critical path of the works. As the plaintiff had refused to comply with the defendant's many earlier requests for the proper execution of the works, the defendant added that it had no alternative but to treat and accept the plaintiff's conduct as a repudiation of the contract.

17 On 20 December 2000, the plaintiff responded to the defendant, vigorously refuting its right to terminate the sub-contract. It insisted that, "We did not stop work on 16 December 2000 and our men in fact are still working on site right up to the moment of writing this letter." It stressed that it was not obliged to give a detailed breakdown of the rebars utilised in its progress claims and that all that was needed was the submission of the respective delivery orders. However, for good measure, it included the relevant particulars. The letter also expressed the plaintiff's disappointment that the cost of the rebars were being deducted from the proper claim, without any corresponding payment for the plaintiff's installation work.

18 The Rubicon had been crossed. Both parties appeared, by this point, to be receiving legal advice. The defendant had taken the position that the plaintiff's workers were no longer working on the site. The plaintiff, on the contrary, insisted adamantly that its workers were on site and properly attending to its contractual obligations.

19 Matters swiftly climaxed. The defendant took control of the site. The plaintiff was not allowed to remove any items from the worksite. The defendant paid outstanding wages directly to the seconded workers for the period August to December 2000.

20 In his affidavit evidence, Phua asserted that when the contract was terminated, "almost 100 per cent" of the sub-contract works had been completed. However during the proceedings, it was common ground that work on parts of the lower roof, the upper roof, the lift-room of Block 2, as well as the roof of the sub-station had not been completed. The structural work on the communal facilities had not commenced either. The defendant's expert valued the uncompleted works, on the basis of

the contractual pricing as at 19 December 2000, to be $191,449.30. The plaintiff could not really dispute this and has accepted this sum as representing the deduction to be made for uncompleted work for the purposes of the final account.

21 The defendant asserts that because of the critical timeframe, it had to ensure the urgent completion of the outstanding works, failing which its other sub-contractors would be affected and the very completion of the entire project on schedule compromised. This would have, in turn, exposed it to severe financial penalties under the main contract. It did not have the luxury of time to call for competitive tenders. The plaintiff did not lead evidence to dispute this. Immediately after terminating the sub-contract, the defendant directly engaged Y&Q Construction ("Y&Q"), the plaintiff's subcontractor for bar bending. Y&Q insisted on being paid on a daily-rated basis and not on the unit-rated basis of its previous arrangement with the plaintiff. Capital Builders was engaged to carry out the carpentry formwork and the defendant's own general workers completed the balance of the work. The defendant claims that as a consequence of this, very substantial costs were incurred.

22 At the commencement of the proceedings, there were several areas of dispute relating to liability and quantum. Counsel subsequently, with commendable good sense, resolved between themselves several issues as the hearing progressed. The parties could not, however, agree on a few important issues which I shall now address. I should also add, for good measure, that counsel confirmed they would not take issue with each other on the strict observance of pleading principles *per se* in these proceedings.

**Did the parties vary the contractual payment terms?**

23 Phua initially asserted through the plaintiff's pleadings that when the sub-contract was signed, he had discussions with Han on varying the contractual term for payment of progress payments from a monthly to a half-monthly basis. Han denied this. In the course of the proceedings, Phua conceded that the discussions were in fact with another employee of the defendant, Lim Swee Guan ("Lim"), the defendant's project director; the latter also agreed that soon after the commencement of the sub-contract works, Phua asked him to authorise half-monthly payments to the plaintiff.

24 Lim accordingly instructed Han to certify and arrange for half-monthly payments to the plaintiff as a gesture of goodwill. Lim further explained that in May 2000, he authorised the payment of variation works undertaken by the plaintiff to assist the latter financially, notwithstanding the absence of proper documentation.

25 Han agrees that he suspected that the plaintiff had some cash-flow problems and that the defendant sought to help the plaintiff to complete the sub-contract works. This would be in the parties' mutual interests. He accepts that there was an arrangement that progress payments would be made on a half-monthly basis.

26 The defendant, however, contends that despite its acquiescence to this arrangement, it was neither obliged nor bound to adhere to the arrangement. It asserts that it was still entitled to rely on the "pay when paid" arrangement envisaged in cl 5.1 of the sub-contract. I do not accept this.

27 It is reasonable to conclude from the statements made by Lim and Han, the discussions they had with Phua as well as the conduct of the parties, that they in fact varied the terms of the contract in so far as the timing of the progress payments were concerned. There is really no difficulty in surmising that the change had been verbally agreed upon, and that the parties subsequently acted upon this. This could well be described as a classic case of estoppel. Warren Khoo J in *China*

*Construction (South Pacific) Development Co Pte Ltd v Leisure Park (Singapore) Pte Ltd* [2000] 1 SLR 622 at [20] made the following observation when addressing a situation where there had been habitual departures from the terms the contract:

> There has been *a general waiver* of the strict requirements of the contract, and it is inequitable for the employer to go back on it when it suits him. [emphasis added]

28 Are estoppel and waiver distinct doctrines? This is still an area of great controversy. The term "waiver" has different meanings to different judges at different times. It could mean variation or forbearance or rescission. The different views are neatly captured in *Meagher, Gummow and Lehane's Equity – Doctrines and Remedies* (4th Ed, 2002) at para 17-140. It may be more convenient to classify situations, similar to that under consideration, as being embraced under the doctrine of estoppel rather than the more amorphous concept of waiver.

29 There appears to be misapprehension in some circles of the building industry and the legal profession that the court will be inclined to interpret construction contracts *sui generis* and/or that it will take a more benign approach in invoking and applying equitable principles to achieve a favourable result for sub-contractors or contractors (as the case may be). This is inaccurate. While the court will strive towards achieving a decision based on principle and laced with pragmatism, parties in construction contracts should not expect the court to rewrite or fill in lacunae in contracts to reach an equitable result. Parties who sign a contract are expected to honour it both in letter and spirit and should not be allowed to say that the terms of a contract, objectively interpreted, do not mirror their intentions.

30 Sub-contractors are certainly not in the same shoes as beneficiaries in a fiduciary relationship and should not be deemed to be able to avail themselves of a preferential status, by dint of their purported weaker commercial or bargaining position. The relationship between contractors and sub-contractors (or their employers as the case may be) is a matter of pure contract:

> When parties enter into a detailed building contract there are, however, no overriding rules or principles covering their contractual relationship beyond those which generally apply to the construction of contracts.
>
> [*per* Lord Morris in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195 at 200]

Legislative intervention will be required to overhaul contractual issues apposite to building contracts. This has already taken place in some other jurisdictions.

31 The court will have to view each individual case without any *parti pris* in favour of or against either party. Counsel should use judiciously, if at all, the fatigued mantra that "cash flow is the lifeblood" of the building industry. It is also the lifeblood of every other type of business. As Lord Diplock felicitously observed in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195 at 216:

> "Cash flow" is the lifeblood of the village grocer too …

Parties that do not take care to properly incorporate their intentions in their contracts have to accept the vagaries of litigation. That said, it would be fair to assume that the court will be fully attuned to all the practicalities and exigencies that are an integral part in the execution of contractual works. There could be many a slip between the cup and the lip. Terms are frequently

applied flexibly and departures from the literal terms of a contract are not uncommon in practice. This is an area bristling with awkward technical issues relating to notices and timelines that are often more conspicuous by reason of non-observance and/or breach rather than their punctilious observance.

**Could the defendant make the deductions from progress payments?**

32 The plaintiff relies on Han's certification dated 15 November 2000 in asserting that for the month ending 15 November 2000, the sum of $109,934.77 was due to it. It initially contended that it had submitted the progress claim for the period ending 31 October 2000. Given that there is no evidence to this effect, coupled with the fact that the plaintiff neither took issue with this nor pressed the point in any of the communications between the parties, I accept Han's evidence that the defendant had not received the progress claim. Phua himself conceded that he could not locate the subject claim.

33 The internal approval process by the defendant involved two steps. Han's responsibility was to certify the amount due after comparing the work actually completed with the claim submitted. Upon Han's internal certification, Low would then process the payment after taking into account any deductions to be made for materials supplied. She would then subject the figures to a final scrutiny.

34 The last payment certified by Han and paid by the defendant was for the month ending 15 October 2000. The sum involved was $82,400. Han was adamant that the only other claim received was for the month ending 15 November 2000, which he had initially certified at $109,934.77. When Low received Han's certification for the net amount of $109,934.77, she noted that Han had only deducted the sum of $270,065.23 which was the cost of materials purchased in September 2000. By that point in time, on 17 November 2000, the cost of materials for October had escalated to $225,183.77. In view of the problems pertaining to the plaintiff's work, as stated earlier, Han and Low concluded that the cost of materials for October 2000 ought to be deducted as well. The plaintiff now contends that on the basis of the past practice, this deduction was premature and improper.

35 Han conceded, in cross-examination, that in light of previous practice, the deduction should have been made at the end of November 2000 and was "premature". On the other hand, the plaintiff itself had not submitted its claim for the period ending 31 October 2000. Assuming that there was indeed a practice, one would be inclined to think that the plaintiff's own failure to adhere to the half-monthly submission arrangement would be reason enough to re-assess the entire issue. In this context, it is pertinent to note that there is no evidence of any subsequent claim for November or December 2000 ever having been sent to the defendant as alleged by the plaintiff. Very little work was, in fact, completed by the plaintiff between the 15 November 2000 claim and the 12 December 2000 claim. On the basis of the plaintiff's claims, the value of the work done amounted to only $22,045.23 – substantially less than the cost of the materials. Han and Low are justifiably vindicated in making the deduction.

36 The plaintiff did not adduce any evidence as to the genesis of why and how the system of monthly deductions for materials was implemented. Rather, it made a bare assertion that a practice of deducting the previous month's purchased materials was in place. Han's evidence, which I again accept, indicates that this depended not so much on an established practice or by reason of an agreement with the plaintiff as to the timing of the receipt of the relevant invoices. Low also explained that she could only carry out the valuation of materials at the end of each month upon receipt of the relevant supplier's invoices. This accounted for why the deductions could only be made in respect of purchases up to the end of the preceding month. This assertion was not undermined in any meaningful sense by the plaintiff.

37 In my view, no understanding or agreement was attained between the parties confirming that this practice of deductions was binding or constituted a further variation of the express contractual term (see [2] above). There was no coherent evidence of reliance by the plaintiff amounting to an estoppel that could be raised against the defendant. Unlike the instance of the variation of the monthly progress payments, Phua could not point to any discussion with any officer of the defendant on this issue. The plaintiff's pleadings and affidavit evidence consisted only of a bald assertion that the progress payments were subject to "deduction for materials supplied by the defendant and subject to the approval of the defendant". The deductions were clearly an administrative exercise unilaterally adopted by the defendant and were not tied to a corresponding payment that had to be made by the defendant to its suppliers.

38 It appears that because of its own internal difficulties, the plaintiff departed from its own version of a settled practice in not submitting timeous progress claims. It is common ground that if there were no claims, there were no payments due. In any event, even if such a practice prevailed, it must have been premised upon a co-relative and concurrent obligation of the plaintiff to submit its claims on time.

39 Han asserts that at the site meeting dated 12 December 2000, he had explained why no payments had been made for progress claim No 22. Phua denies this and asserts Han merely told him that no further payments were going to be made. This assertion was made by Phua only during his re-examination and ought to be viewed with scepticism. In this context, if Phua's assertion is indeed true, it is odd that the plaintiff in its letters of 15 December 2000 and 20 December 2000 made no reference whatsoever to such a significant statement of intention. Indeed the plaintiff's letter of 15 December 2000 included a further progress claim. I reject Phua's evidence on this issue.

40 Sub-clause 5.1 of the sub-contract (see [2] above) expressly allowed "deduction for materials supplied by the main contractor" from interim payments. The plaintiff did not have the temerity to argue that the whole sub-clause had been waived; it merely contended that in place of monthly payments, there were to be half-monthly payments. Clearly it cannot be asserted that the sub-contract had been waived in its entirety. It is one thing to assert that payments were to be made earlier; it is altogether another matter to contend that the defendant had waived the entire sub-clause enshrining its right to deduct the price of materials supplied. There were no discussions on this. In the circumstances, it surely cannot be seriously contended that the defendant *sub silentio* by deducting materials for the previous month is irrevocably precluded from relying on an express term.

41 The words "deduction for materials supplied" are generally framed. To interpret, in the circumstances, these words solely by reference to the parties' subsequent conduct would clearly be incorrect; it would be akin to having the tail wag the dog. It is settled law that a contract should be interpreted objectively. To suggest "deduction" and "supplied" are limited only to materials that the defendant has paid for, as plaintiff's counsel vaguely suggested, is wholly untenable. Such a construction puts a weight and a slant to the plain meaning of these clear words that are wholly unwarranted.

42 In the circumstances, I find that the plaintiff has failed to prove the existence of any past practice that precluded the defendant from deducting the cost of the materials from the 15 November 2000 claim for progress work. I should add that even in the absence of an express clause such as sub-cl 5.1, I would have nevertheless been prepared to hold as an alternative ground, that in the present factual matrix, the defendant had an implied right of set-off. My reasons are outlined below.

43 There is really no issue that the defendant exercised its right of set-off in good faith. It is hornbook law that the common law and/or equitable right to exercise set-off in diminution of a claim

can only be removed by clear and unequivocal words. Set-off is circumscribed by the requirement, in common law, that the amount should be ascertainable and due. One cannot have a legal set-off of a claim that is ambulatory and which lacks specification. Equitable set-off embraces a larger constituency and includes unliquidated damages but, unlike legal set-off, needs to be inseparably connected to the claim against which it is raised. The exercise of these rights have to be *bona fide* and reasonably made. There is also no requirement that notice be given prior to the exercise of these rights. The fact that the amount set off may subsequently turn out to be erroneous will not vitiate the initial basis for exercising the right, though it could lead to other consequences.

44 The parties' previous conduct was not unequivocal and did not preclude the exercise of the defendant's right of set-off. No issue of estoppel arises to rebut the applicability of the set-off presumption. Lord Diplock in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195 at 215 observed:

> [I]n construing such a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, *and clear express words must be used in order to rebut this presumption*. [emphasis added]

To rebut this presumption one must be able to find in the contract or in the parties' conduct, expressions and/or actions through which the parties have expressed unequivocally their intention that this remedy should not prevail in respect of breaches of that particular contract.

45 It also cannot be seriously contended that delay *per se* in making progress payments under the plain terms of a bare construction contract could ordinarily amount to repudiation: see *Emden's Construction Law*, Issue 86, December 2003 at [46]. It follows that, absent specific contractual terms, the failure by an employer or a contractor to make payments in accordance with the contract will not usually exonerate the contractor or sub-contractor from its obligations to proceed with its work (*cf Emden* at [47]). There will, however, be instances where a failure to pay can be grave enough to amount to a repudiation. One illustration is where non-payment is accompanied by the clear evincing of an intention not to make further payments. Another is where payment is made subject to conditions that would amount to the re-writing of the terms of the contract. These scenarios exemplify the defaulting party's intention not to be bound by the terms of the contract. The innocent party then has the option as to whether to accept the repudiation and terminate the contract or to affirm the contract by proceeding with it.

47 On the other hand, a temporary slow down in the progress of the work by itself will not invariably be viewed as a repudiation of contractual obligations. There could be many legitimate reasons for this such as work cycles, modified schedules, work allocations and changes in prioritisation. A temporarily reduced workforce must not invariably be viewed as triggering the onset of a repudiatory event. Cogent evidence would be required to support a plea that it amounts to a repudiatory event. No bright line can be drawn and one would have to ask whether the reduction of the workforce could be viewed as evincing an intention not to be bound by the contract or as an anticipatory breach of contract. My observations must be tempered by immediately stating that if the delay caused is serious enough to have a cascading effect and/or serious consequences, either alone or together with an amalgam of additional circumstances, it could amount to a repudiation. It could, after all, be viewed as amounting to a suspension of work (see [56]) Alternatively, it could be viewed as a delaying factor and normal contractual principles would apply. A court may also take into account the cause of the slowdown and in some cases the motivation behind it – was there, for example, an improper corollary purpose? This could facilitate the evaluation process as to whether an intention not to be bound by the contract has been evinced – in short, has there been a repudiatory event?

**Was the sub-contract properly terminated?**

48 As a preliminary issue it is necessary to ascertain whether the defendant's workers were still working on the site when the contract was terminated on 19 December 2000. It is also relevant to examine whether the failure of the defendant to effect payment of the 15 November 2000 claim, in turn, caused the work stoppage, if any.

49 The last payment made by the defendant was for the half-month ending October 2000. It is, however, incontrovertible that the plaintiff stopped paying the seconded workers, at the very least, well before the November stoppage of payments – in August 2000. Philip Barandon, the technical co-ordinator of the plaintiff was moved to another site in August 2000. Furthermore, the plaintiff had not submitted its claim for 31 October 2000 as initially alleged. Phua himself could not confirm this had been done. There was no correspondence or, for that matter, any other evidence to bear this out. The picture emerging from these facts, as well as the prevailing circumstances at that juncture, seem to indicate that the plaintiff, who had all along been afflicted with symptomatic financial stress, was now displaying manifest signs of a much deeper financial malaise. This was not directly attributable to the defendant, certainly not by any stretch of imagination, before mid-November 2000.

50 The fact that the plaintiff could not even submit the progress claim for the period ending 31 October 2000, when it clearly needed an injection of funds, leads to the ineluctable inference that the plaintiff's day-to-day administration of the contract was dysfunctional, to say the least. In this context, it is pertinent to note that this problem appeared to haunt the plaintiff right until the "last" progress claim was submitted. This should, based on the plaintiff's case, have been submitted on 15 December 2000. However, it was dated 12 December 2000 and the copy produced to the court was unsigned. The defendant denies having received it and there is again no evidence that it was ever sent. What is of crucial significance is that this document reveals that the amount the plaintiff sought to recover for the period 1 December 2000 to 12 December 2000 was only the trifling amount of $1,258.16, as opposed to the already paltry sum of $20,787.07 for the previous half month. The last four "progress claims" conclusively point to a rapid downward spiral in the amount of work being progressively completed by the plaintiff. It was as if the plaintiff had taken the view that it had "completed" its job and lost interest in attending diligently to the works.

51 I found that Han was the more reliable witness on every significant issue where he and Phua differed. Phua appeared to have taken great pains to portray the plaintiff as the injured party and coloured some of the facts. He stated what he wanted to believe with the misplaced conviction that it would be believed and appeared keen to ignore awkward established facts. While Han's evidence was not entirely untarnished, his evidence on crucial points was largely consistent with independent corroborative evidence. In particular, I found Phua's evidence that the workers were continuously working on the site right up to 20 December 2000 most implausible. He disagreed vehemently "that work had slowed down" while seeking precariously to maintain that "there was not much work left". He had, however, no option but to concede that the remaining works were not insubstantial since they included the lift motor room, whole upper roof, reinforced concrete canopy and 10% of the lower roof of Block 2, 15% of the sub-station, not to mention incomplete external works that included the swimming pool, club house, guard house, walls and foundation of the playground and other miscellaneous items.

52 Disregarding concrete evidence of its deep financial problems, administrative snafus and other incontrovertible facts, the plaintiff insisted that its workers were working normally right up to the point of termination. However, none of the workers were called. The work cards produced by the plaintiff's foreman merely showed that workers' job cards had been filled in, at best. I found the foreman's evidence unsatisfactory since he was unable to vouch, in a competent and acceptable

manner, for the accuracy of the records he sought to rely on. The plaintiff's job cards neither indicated nor clarified the job sites, location or trade that the workers were allegedly at or engaged in. The plaintiff had another project which was simultaneously underway at Bukit Batok. As Han rightly pointed out, it could not be said at which site the workers concerned were working. Apart from Han's and Lim's evidence, the defendant also relied on a terse remonstration from the resident site engineer sent on 18 December 2000 captioned "stop work for all blocks by your structural subcontractors". The plaintiff could not take issue with this letter. Nor did the plaintiff take issue, during cross-examination, with the principal assertions made by the defendant in the correspondence preceding the termination. For instance, it was never disputed that the plaintiff's letter of 21 October 2000 accurately outlined an undertaking by the plaintiff to engage a team of workers to carry out the work. In the circumstances, I accept the defendant's evidence that work had stopped on the site on 16 December 2000. Indeed, Phua himself had threatened to stop work in his letter of 15 December 2000.

53 In his final closing submissions, counsel for the plaintiff, perhaps sensing the tenuous nature of the plaintiff's contention on this decisive issue, abruptly changed the plaintiff's legal tack. He robustly contended that if it were indeed found that the plaintiff had stopped work on the site, this had been caused by the defendant's failure to effect timeous payments and/or the wrongful exercise by the defendant of its purported right of set-off. The plaintiff was clearly on the horns of a dilemma. Its primary plank all along and Phua's own evidence, in particular, were premised on the contention that the workers had continued working right until termination of the sub-contract. If that was so, how could it also allege that the defendant's failure to effect payment had caused the work to stop? The plaintiff could not, in the final analysis, reconcile these two diametrically conflicting positions.

54 Indeed there was no mention of this alternative position in the plaintiff's affidavit evidence, its opening statement or pleadings. It adduced no evidence whatsoever to show any kind of nexus, direct or otherwise, between the defendant's failure to effect the progress payments and the work stoppage. The truth of the matter is that the plaintiff was already in dire financial straits and over-extended from about August 2000, despite the fact that the defendant was then making regular payments. Barandon, the plaintiff's technical co-ordinator, was transferred to another site in August. The seconded workers' salaries were not paid in August. It is significant that while the plaintiff did not dispute this point, it also consciously evaded this issue either by way of explanation or by reference to any ameliorating factors that might assign culpability to the defendant. All Phua could lamely proffer under cross-examination was that if the defendant "had paid my claim, I would have paid the workers' salaries". It is axiomatic that this only addresses the post-November 2000 position. Indeed, when the defendant subsequently paid the workers' wages directly, the plaintiff complained that this sum should not have been paid to the workers but to it. Indeed, the particular payment is one of the plaintiff's heads of claim in these proceedings and will be addressed later. In refuting any suggestion about its ongoing financial problems the plaintiff resorted to distortion and dissembling. In asserting that the defendant was the author of its problems, the plaintiff sought to manipulate unsympathetic facts.

55 It is also significant that despite the many misgivings it had about the plaintiff since April 2000, the defendant neither stopped progress payments nor attempted to throttle the plaintiff financially. Until just before termination took place, the plaintiff had no complaints whatsoever about the defendant's payment schedule. Indeed, the defendant certified payment for 80% of the additional variation works and paid the plaintiff this amount even though contractually the defendant could have deferred this until it was, in turn, paid by the employer. This was despite the fact that the plaintiff had failed to submit properly particularised claims; Han had been seeking to procure this since February 2000.

56 It appears to be settled law that a contractor/sub-contractor has no general right at

common law to suspend work unless this is expressly agreed upon. This is so even if payment is wrongly withheld: see *Lubenham Fidelities and Investments Co Ltd v South Pembrokeshire District Council* (1986) 33 BLR 46, *per* May LJ at 55:

> Whatever be the cause of the under-valuation, the proper remedy available to the contractor is, in our opinion, to request the architect to make the appropriate adjustment in another certificate, or if he declines to do so, to *take the dispute to arbitration* … [emphasis added]

57 This view is echoed in *Halsbury's Laws of Singapore*, vol 2, (LexisNexis Singapore, 2003 Reissue) at [30.321] (see also *Keating on Building Contracts*, (7th Ed, 2001) at para 6-96). *Hudson's Building and Engineering Contracts*, vol 1, (11th Ed, 1995) at para 4-223 states:

> [I]t seems clear that in England and the Commonwealth *there is recognised right to suspend work*, or indeed of payment otherwise due upon a breach by the other party (although in the case of payment, as has been seen … legitimate deduction for damage previously suffered or other valid set-offs will, in the absence of express provision, be permitted from sums otherwise due). [emphasis added]

This passage appears to support, at first blush, the contrary position. It is, however, amply evident that this passage has endured an editorial mishap, for at para 4-224, it is stated:

> [I]t is no accident that the English and Commonwealth courts have consistently refused to imply a right to suspend work (or of non**l**payment by the owner) upon a breach of contract.

58 There appear to be strong grounds for denying such a right. The existence of such a right could create chaos within the building industry if contractors were to muscle their way through disputes with threats or actual acts of suspension instead of having their disputes adjudicated. Projects could be held to ransom with severe consequences. Furthermore, it would be incorrect in principle to imply in what is commonly viewed as "an entire contract for the sale of goods and work and labour for a lump sum payable by instalments", a right to break up performance into segments in the absence of any specific and express contractual agreement.

59 Clutching at straws, the plaintiff in its final submissions also contended in the alternative that "there is no evidence that [it] had intended to stop work for the entire project (as opposed to *suspending work* from 16 to 19 December 2000)". I reject this contention. There is no basis to argue that there is a common law right to suspend work temporarily. The same earlier rationale applies *a fortiori* against divining from the common law such a right. How and when can such a right be exercised and policed? Can it be exercised repetitively? Such imponderables militate against finding in favour of such a right.

60 In the circumstances, I find that the defendant was entitled to terminate the sub-contract after the plaintiff had stopped work on 16 December 2000. If indeed the plaintiff was facing a situation of "financial impossibility" the defendant could hardly be held responsible for this unhappy state of affairs. It cannot be denied that "an absolute refusal to carry out the work or an abandonment of the work before it is substantially completed, without lawful excuse, is a repudiation" (see *Keating on Building Contracts* ([57] *supra*) at para 6-84. The defendant exercised an express right to terminate the contract (see [1]).

61 The plaintiff also argued that the defendant is precluded from terminating the contract. It raised two quixotic arguments in this context. It first said that a party cannot rely on its own wrong. I have no quarrel with the principle. This principle applies to all facets of the common law and has its

origins in Roman law – "*Nullus commodum capere potest de injuria sua propria*". The principle is explained in the decision of *Roberts v The Bury Improvement Commissioners* (1870) LR 5 CP 310 at 326 thus:

> [H]e cannot sue for a breach of contract occasioned by his own breach of contract, so that any damages he would otherwise have been entitled to for the breach of the contract to him would immediately be recoverable back as damages arising from his own breach of contract.

In short, the plaintiff's position on this issue is tenable only if the non-payment of the 15 November 2000 claim "caused" the work to stop. The word "caused" is used here to emphasise the nexus between the cause and effect. A close relationship between these two elements will attract the inference that this principle applies. "Partial" causation could conceivably justify a suspension but the party invoking the principle will then have to satisfy the court it was reasonable in all the circumstances to suspend work. This is not usually an easy burden to discharge in the instance of "partial" causation. In the final analysis, the test is not whether there is complete or partial causation but whether there is effective causation. Employers or contractors are not in the normal course of events viewed as financial insurers of their contracting parties. Each case will have to be decided independently and no overarching principle can be stated.

62 I have found no factual basis for the plaintiff's belated argument on causation. However, if indeed the failure to pay the 15 November 2000 claim had caused the work to stop, I see no reason in principle why the plaintiff could not have invoked this principle to defeat the defendant's right to terminate the contract and to mount its counterclaim. Despite some misgivings expressed by academics as to whether this principle ought to extend to the non-payment of money as opposed to physical acts of impediment, I believe it stands to reason that the principle is of general application and can be invoked *apropos* all types of disenabling acts. I find the views on this issue, expressed by McMullin J in *Canterbury Pipe Lines Ltd v Christchurch Drainage Board* [1979] 2 NZLR 347 at 371, persuasive.

63 It is further contended by the plaintiff that where parties are simultaneously in breach of a contract, neither party can serve a valid notice to terminate the relationship. Reliance is placed on an extract from *Chitty on Contracts*, vol 1, (28th Ed, 1999) at para 25-015:

> Where both parties are simultaneously in breach of contract, there is authority for the proposition that neither party is entitled to terminate performance of the contract.

64 Reliance on this passage is misplaced. That statement envisages an instance where both parties are simultaneously in breach of the *same* obligation. Indeed, in the example given by *Chitty*, the situation is one where both parties have substantially delayed referring a matter to arbitration. This would obviously preclude either of the parties from relying on the *other's* breach to claim the right to terminate the contract. As either of the parties can unilaterally "cure" the breach in such a scenario, there can be no basis for either of them raising such a breach as a ground for termination.

65 Assuming *arguendo*, that the defendant was in breach of its obligations in failing to make the 15 November 2000 claim payment, I do not see how this would preclude it from subsequently exercising its right to terminate the contract if a subsequent factual basis to do so emerged. As it has been pithily said, an unaccepted repudiation is a "thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind", *per* Asquith LJ in *Howard v Pickford Tool Co Ld* [1951] 1 KB 417 at 421. The plaintiff had affirmed the sub-contract by its conduct and communications. It clearly chose to proceed with the contract. It is therefore not an option for the plaintiff to approbate and reprobate its contractual obligations. Even assuming the defendant had

committed a breach, this did not preclude it from subsequently terminating the affirmed contract when the plaintiff itself committed a breach by stopping its work. *Chitty on Contracts* ([63] *supra*) succinctly states at para 25-010:

> If the innocent party elects to treat the contract as continuing, then it remains in existence for the benefit of the wrongdoer as well as of himself. The wrongdoer is entitled to complete the contract and to take advantage of any supervening circumstance which would excuse him from or diminish his liability.

66 If non-compliance with a contractual obligation is to be deemed to have removed a defaulting party's subsequent right to terminate the contract, there must be a direct causal nexus between the non-compliance and the failure to complete. The burden of proving this lies with the non-defaulting party, and the absence of any repudiation by the defaulting party prior to that time is critical (see *Nina's Bar Bistro Pty Ltd (formerly Mytcoona Pty Ltd) v MBE Corporation (Sydney) Pty Ltd* [1984] 3 NSWLR 613). As previously stated in [62], the plaintiff has failed to establish this nexus.

**The defendant's counterclaim for damages**

67 Han testified that the completion of the Block 2 structural works was urgent. Block 2 had been scheduled for completion in early December 2000. Thereafter the crane utilised in the construction had to be demobilised. Piling could only be commenced after the demobilisation of the crane. Work for the club house could not commence prior to piling. Similar issues arose in connection with the construction of the swimming pool. Any delays at that stage would have an unfortunate and immediate percolating effect with severe financial consequences for the defendant and others involved in the project.

68 Given the critical nature of the work, the defendant opted to employ Y&Q and Capital Builders albeit at what is acknowledged was a high cost. Timing was critical. The plaintiff adduced absolutely no evidence to refute this. The plaintiff, however, vehemently contended that the amount counterclaimed as the cost for completing the balance of work was manifestly excessive. They pointed out that Ian Ness, the defendant's expert, had valued the balance of work under the terms of the sub-contract to be completed by the plaintiff at $191,449.30. Han had agreed with this amount.

69 Han clarified that the sum of $191,449.30 was derived by Ness in the context of a lump sum contract after taking into account the unit rates which had been arrived at purely for the purposes of payment under the terms of the sub-contract. He added that since the lump sum price and unit rates were fixed, only the quantity of actual works was variable. Furthermore, he asserted that there had been an element of front-loading in the sub-contract.

70 Ness acknowledged that the defendant's claim was, at first blush, a "very high amount" when compared with a valuation based purely on the contractual terms. He stated that there was an absence of "suitable evidence" and postulated that the disparity was caused by:

(a) the material purchases being more than the amount measured due to wastage/loss;

(b) allocation of work and/or material invoices under the gauge of the amount to be paid or incurred; and

(c) the overall quantities set out in lump sum not being correct.

71 Ness also observed that to confirm his view that the lump sum measurement may not be

correct, it was necessary for a quantity surveyor to review the relevant drawings and contract documents. This was not done by the defendant. On the other hand, Francis Teo, the plaintiff's expert, did not make any observations on this aspect of the defendant's claim and/or evidence.

72 The burden of proving that the loss has not been mitigated lies squarely on the party in breach. If he is unable to show that the claimant has acted unreasonably, the normal measure of damages ought to be awarded. Any doubts pertaining to this long-standing principle on the burden of proof engendered by the Privy Council decision in *Selvanayagam v University of the West Indies* [1983] 1 WLR 585 have now been permanently dispelled by the Privy Council's subsequent decision in *Geest plc v Lansiquot* [2002] 1 WLR 3111 at [14]. It should also be stressed that if the party in breach intends to contend that the claimant has failed to act reasonably in mitigating damages, notice of such an assertion ought to be pleaded. As Lord Bingham observed in *Geest plc v Lansiquot* [2002] 1 WLR 3111 at [16]:

> [I]t would have been the *clear duty of the company to plead* in its defence that the plaintiff had failed to mitigate her damage and to give appropriate *particulars sufficient to alert* the plaintiff to the nature of the company's case, enable the plaintiff to direct her evidence to the real areas of dispute and *avoid surprise* … [emphasis added]

The emphasis is on openness. If there are no pleadings, notice ought to be given in writing.

73 The burden of proving the *actual* amount of damage nevertheless remains with the claimant. In assessing the reasonableness of the claimant's conduct, the court will take cognisance of the fact that the claimant is "not bound to nurse the interests of [the party in breach]" (*per* Roskill LJ in *Harlow & Jones, Ltd v Panex (International), Ltd* [1967] 2 Lloyd's Rep 509 at 530) but, at the same time, cannot disregard the defaulting party's interests. Reasonableness in this context often means tempering self-interest with reference to the knowledge that another party may have to foot the invoices. If the claimant utilises an unreasonably priced or an exorbitant means of rectifying the breach, this cannot be visited upon the party in breach.

74 In my judgment, given the urgency of the situation, it was reasonable for the defendant to have proceeded to engage Y&Q and Capital Builders and to utilise some of its workers as well. Mitigation is neither an exact science nor a mathematical exercise. It must be viewed through a commercial lens and measured by commercial common sense. The court will not audit every decision made in the turmoil of a difficult and fluid commercial situation. In *China Resources Purchasing Co Ltd v Yue Xiu Enterprises (S) Pte Ltd* [1996] 1 SLR 734 at 741, Karthigesu JA opined that when a duty to mitigate arises, then the standard of reasonableness to be applied to the decision of the innocent party is not a high one. I should add that the issue of whether the claimant has acted reasonably is clearly a matter of fact and not law.

75 Plaintiff's counsel contends that the defendant ought to have tendered for quotes or alternatively bifurcated the new sub-contract as some of the works were not urgent. While this, with the benefit of hindsight, might have been a better course of conduct to adopt, it does not mean the defendant was unreasonable in proceeding as it did. It is trite law that a claimant:

> … will not be held disentitled to recover the cost of such measures, merely because the party in breach can suggest that other measures less burdensome to him might have been taken.
>
> [*per* Lord MacMillan in *Banco de Portugal v Waterlow & Sons, Limited* [1932] AC 452 at 506]

76 The plaintiff however levels some valid criticisms about the quantum of the claims appearing

excessive. The fact that the damages claimed substantially exceed the contractual price is, by itself, not a valid objection. Indeed a party may also recover additional losses incurred as a result of a reasonable but unsuccessful attempt to mitigate. Nevertheless, I cannot ignore the fact that the defendant's expert, Ness, is unable to support the original claim in an unqualified manner. The issue here is not the remoteness of the damages but the quantum claimed. This necessitates a careful review of the claim. I am not inclined to allow the claim in full, in light of the tentative nature of Ness' observations.

77 The defendant's original claim for consequential damages has been adjusted on three occasions. At the start of the proceedings it was $1,125,630. This was the amount Ness alluded to. This figure was, in the course of submissions, further reduced to $716,114 and finally to $707,070. The plaintiff has questioned the reliability of this amount by pointing to the *ex facie* disproportionate claims for concrete and rebars. In the plaintiff's final submissions, it computes the loss to be $207,100.32. This, however, appears to be based on a rough cut and paste approach.

78 There are a few options open to me. First, I could steeply discount the counterclaim, allowing the sum of $191,449.30 to represent the value of the balance of the contracted works – as assessed by Ness, purely on the contractual terms. Alternatively, I could do the best I can with the available evidence and attempt to mathematically arrive at the exact estimate of the quantum. Neither of these approaches strike me as entirely satisfactory. In the circumstance, it also does not seem appropriate that the defendant be wholly bereft of its right to recoup its losses, notwithstanding the lack of concrete evidence supporting the precise amount it claims. I am satisfied, after reviewing all the documents the defendant has submitted to support its counterclaim, that the amount incurred is substantially in excess of $191,449.30 but I am not persuaded that the precise sum of $707,070 claimed is an accurate assessment. I am inclined to think the best approach would be to award the defendant half of its final claim amount of $707,070, which amounts to $353,535.

79 This approach of pragmatic estimation may be relied upon in situations where the court is satisfied that a real and substantial loss has occurred but is somewhat sceptical about the reliability of conflicting figures, in arriving at the precise quantum of loss. When the defaulting party has raised legitimate queries that the claimant has not fully addressed, a court can, in the interests of finality and fairness, provide the best assessment of damages by reference to the material made available to it. This is not to suggest that the burden of proving the quantum of loss goes unheeded. The claimant would have to, as a matter of course, first succeed in persuading the court that real, generally verifiable and substantial losses have occurred notwithstanding that the precise quantum of losses it is claiming falls short of mathematical exactness (see the approach of Chao Hick Tin J (as he then was) in *Industrial Valve Services Pte Ltd v Crosby Valve Pte Ltd* [1997] SGHC 344 at [39]–[40]; and the English Court of Appeal in *Ashcroft v Curtin* [1971] 1 WLR 1731 at 1737–1738). The general principle that emerges is that:

> [O]nce the claimant has established that he suffered some type of loss it is not a defence for the defendant to allege that it is too difficult to quantify. It is the court's duty to do its best to assess the nature and extent of the loss in monetary terms as best it can.
>
> [*The Law of Damages* by Andrew Grubb (LexisNexis UK, 2003) at para 27.33]

**Miscellaneous points**

80 There are two further, albeit smaller items, that the parties could not reach an agreement on. The first relates to the sum of $82,425.42 that the defendant paid directly to the seconded workers. The plaintiff states this should not have been paid without its consent and the defendant cannot

therefore deduct this amount from the final account. It cannot be disputed that this was a proper debt of the plaintiff. The plaintiff does not take issue with the quantum but purely with the mechanics of settlement – which it asserts was done without its authority. Accepting *arguendo* that the defendant should not have paid the amount without the plaintiff's authority, the fact remains that the defendant had effectively discharged a debt incurred by the plaintiff. The plaintiff did not subsequently pay the seconded workers and/or make separate arrangements to resolve the issue of their outstanding wages. It appeared content until proceedings were initiated, some two years later, to ignore this issue altogether. There is a general equitable principle under which "a person who has in fact paid the debts of another without authority is allowed to take advantage of his payment", *per* Wright J in *B Liggett (Liverpool), Limited v Barclays Bank, Limited* [1928] 1 KB 48 at 59 (see also *Chitty on Contracts* at para 34-317). To invoke this doctrine the payment ought to be in discharge of an actual legal liability. A mere belief that a legal liability has been extinguished without supporting evidence will not suffice for the doctrine to operate. I think it would be most unjust in the circumstances to allow the plaintiff to retain the benefit of this payment without having to give credit for it. This would amount to unjust enrichment.

81 The other item that defied resolution between the parties was a late disagreement arising from the defendant's levy of an administrative fee for handling the various purchases of the materials on behalf of the plaintiff. Lim had apparently agreed to refund the sum of $17,012.24, which he quantified as the amount of this levy. During the hearing it appeared that the defendant had been levying an administrative fee of 10% of the value of the relevant items. Until this figure emerged, the plaintiff contends it was under the misapprehension that the levy was a mere 3%. It is clear that the sub-contract did not expressly sanction this levy. The defendant's assertion that this was industry practice does little to help. Asserting and proving a practice are two separate and distinct matters.

82 The defendant subsequently agreed to make a further refund of $19,000 to take into consideration the difference. This is in addition to the sum of $17,012.14 that Lim had earlier agreed to. The parties however could not concur on whether there should be a refund of the defendant's mark-up on the prices of the concrete and rebars it procured on behalf of the plaintiff. This mark-up was more than the 10% levied on the other materials. The plaintiff asserted that these materials could only be charged at the defendant's actual cost. The defendant strenuously opposed this. It contended that the pricing of the concrete and rebars had been expressly agreed upon in the sub-contract. Under the caption "Supply of Material" the prices for concrete and rebars were stated to be $62 per cubic metre and $420 per ton respectively. The plaintiff argued that this figure was provided merely for quotation purposes and included wastage, lap lengths, corner returns and other miscellanea, which the plaintiff would not recover.

83 In the course of cross-examination, Phua had however expressly acknowledged that the parties had agreed on the "cost" of these items. Plaintiff's counsel contends that Phua was not aware of the mark-up when he made this concession. All of this only emerged subsequently when Han was cross-examined. The defendant, in turn, contends that this was an agreed price and that it took the risk of absorbing price fluctuations for these two items. In light of Phua's express acknowledgement, the contractual matrix and the parties' course of dealings, I do not think it is right for the plaintiff to reopen this issue and I accordingly disallow this additional claim. As earlier explained, this was a point "fortuitously" seized upon by the plaintiff only after cross-examination, and illustrates a wholly unsatisfactory manner of advancing a claim that was never adverted to in the affidavit evidence or pleadings. It relates to a matter which could have been easily ascertained through discovery and/or interrogatories. As a result, the defendant has been deprived of the opportunity of effectively putting across its response and/or defence to this additional claim.

**Conclusion**

84 The parties have mutually agreed that the following payments be made to the plaintiff in order to settle the final account, subject to my findings on the disputed items:

| | | $ |
|---|---|---|
| (a) | Outstanding payment for sub-contract works as at date of termination | 498,550.70 |
| (b) | Remaining amount due on account of power floating works | 9,393.40 |
| (c) | Rectification works to existing houses | 6,522.50 |
| (d) | Extension for retaining and counterfort wall | 5,820.00 |
| (e) | Hacking and reconstruction of beams and slabs | 6,137.40 |
| (f) | Variations (additional works) | 395,000.00 |
| (g) | Refund of administration fee for supply of materials | 36,631.28 |
| (h) | Materials on site by agreement | 70,000.00 |
| | | 1,028,055.28 |

85 In addition, the parties have also agreed to allow the following deductions in favour of the defendant:

| | | $ |
|---|---|---|
| (a) | Salaries of seconded foreign workers (August to December 2000) | 82,425.42 |
| (b) | Cost of materials (September 2000 to 19 December 2000) (without GST) | 596,457.20 |
| | | 678,882.62 |

86 After taking into account the amount allowed for the defendant's counterclaim, *ie* the sum of $353,535, there is a balance of $4,362.34 due to the defendant. The defendant is entitled to enter judgment against the plaintiff for this amount.

87 On the issue of costs, it is only right to take into consideration the conduct of the entire proceedings and the fact that both parties partially succeeded in their claims. Given the result that the final outcome is in reality a financial impasse that preserves the *status quo*, I make no order as to the costs of these proceedings. The parties will have to bear their own costs. Finally, I would like to thank counsel for their effort and assistance. They were fair in their dealings with each other and candid with the court.

*Judgment for the defendant after setting off the plaintiff's claim.*