Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd
[2006] SGHC 3

Case Number : Suit 630/2004

Decision Date : 17 January 2006

Tribunal/Court : High Court

Coram : Andrew Phang Boon Leong J

Counsel Name(s) : Lee Tau Chye (Lee Brothers) for the plaintiff; Timothy Tan Thye Hoe and Juanita Low Hsiu-Min (AsiaLegal LLC) for the defendant

Parties : Forefront Medical Technology (Pte) Ltd — Modern-Pak Pte Ltd

Contract – Contractual terms – Express terms – Construction of terms of contract – Whether express condition that defendant to obtain materials from a particular party

Contract – Contractual terms – Express terms – Whether express term of contract that defendant discharged its contractual obligations with regard to the suitability of material by provision of relevant certificates of analysis from a particular party

Contract – Contractual terms – Implied terms – Whether it was an implied term of contract that defendant discharged its contractual obligations with regard to suitability of material by provision of relevant certificates of analysis from a particular party

17 January 2006

Andrew Phang Boon Leong J:

Introduction

1 The legal issues in the present case are straightforward. They stem from an equally straightforward factual matrix, which is as follows.

2 The plaintiff, manufacturers of medical devices for surgical procedures, contracted with the defendant who was to, and in fact did, produce clamshells pursuant to three purchase orders placed by the plaintiff and based on the defendant's quotation of 5 May 2003.

3 The plaintiff's medical devices, manufactured to the order of the plaintiff's customer, were packed into the defendant's clamshells which were then placed in individual blister packs. These were, in turn, placed in individual product boxes which were then placed in shipping boxes. The boxes were then sent for gas sterilisation before onward shipment abroad for distribution.

4 The plaintiff brought the present action against the defendant, alleging that the clamshells were made of substandard material. The plaintiff's customer had alleged that there were cracks in a significant number of the clamshells and the clamshells were ultimately sent back to Singapore for reworking, repackaging and re-sterilisation. The plaintiff now claims, as a result, $408,573.07 as well as consequential loss and damages.

5 Although the defendant was the supplier of the clamshells, the supplier of the material that was thermoformed by the defendant into the clamshells concerned was May Polyester Films Sdn Bhd ("May").

6 It is important at this juncture to note that the only contractual terms in issue in the present proceedings are those relating to the defendant's obligations with regard to the *material* from which

the clamshells were made.

7 It is also important to note that there was no single document which contained all the terms of the contract. In the circumstances, it was necessary for the present court to consider all relevant documents as well as testimony in order to ascertain the terms of the contract. To put it simply, a *holistic* approach was necessary in the circumstances.

The legal issues

8 The legal issues that arose for decision in the present case are as follows.

9 The first two issues centred on what the precise terms of the contract were. As already mentioned, there was no single document. There is a more general lesson here, which I shall return to at the end of this judgment. To return to the present proceedings, the first issue was whether or not it was a condition of the contract that the defendant obtain its material for the production of the clamshells from May only. The defendant argues that this was in fact a condition of the contract, whereas the plaintiff argues otherwise.

10 The second issue was whether or not it was an express or in the alternative an implied condition of the contract that the defendant would be considered to have discharged its contractual obligations with regard to the suitability of the material by the provision of the relevant Certificates of Analysis ("COAs") from May.

11 It is important to point out that if the defendant prevailed with respect to both these issues, that would be the end of the matter inasmuch as the case would necessarily be decided in the defendant's favour. However, if the defendant was successful on the first issue but not the second, the remaining issues (to be considered shortly) would still need to be decided. On the other hand, if the defendant was successful on the second issue, that, too, would be the end of the matter. Indeed, it could not be denied that the defendant did in fact provide the relevant COAs from May.

12 If the defendant was unsuccessful with regard to the first two issues, the two further issues would arise for decision.

13 The third issue was whether or not the clamshells were in fact made from defective material. If they were not, then the defendant would clearly not be in breach of its contract with the plaintiff.

14 Even if the plaintiff was successful with respect to the issues mentioned thus far, there was yet a fourth issue: Did the plaintiff suffer damage as a result of the defendant's breach?

15 In my view, the crucial issues lie at the threshold and, in particular, with regard to the first two issues set out above. I found in favour of the defendant on both these issues. In other words, I found that it was a condition of the contract that the defendant procure the material for the production of the clamshells from May only. I also found that it was either an express or implied term of the contract that the defendant would be considered to have discharged its contractual obligations with regard to the suitability of the material by the provision of the relevant COAs from May. In the circumstances, the plaintiff's claim must be dismissed.

16 I pause here to point out that *the plaintiff has appealed only against my ruling with regard to the second issue* which I have set out briefly in the preceding paragraph. However, I should add that, for the sake of completeness, I will deal with all four issues mentioned above. Nevertheless, consistent with the nature of the present appeal as well as the fact that, in any event, the first two

issues are (as I have mentioned) the crucial issues, my focus in this judgment will be on them, rather than the remaining two. This is particularly so with regard to the second issue which, as we have just seen, is in fact the sole issue the plaintiff has appealed against.

17 Before I proceed to elaborate on my reasons for my findings and reasons with respect to both these issues, I set out, once again (to emphasise the point) for the sake of completeness, my brief views on the remaining two (*ie*, third and fourth) issues raised during the hearing itself although they are not strictly relevant to my decision.

18 In so far as the third issue is concerned, having reviewed all the available evidence, I find that the material from which the defendant's clamshells was made was in fact inherently defective. In this regard, I find the expert evidence furnished on behalf of the plaintiff to be both reasoned and reasonable. The main focus of that evidence was on the nature of the material itself. This was, in my view, the correct approach to adopt. The main issue was not one of comparison with other material, but whether or not the material of the very subject matter of the present action itself was defective. The expert evidence furnished on behalf of the defendant did not, with respect, contradict the basic thrust and tenets of the expert evidence furnished on behalf of the plaintiff.

19 I should add that the vigorous attempts by the defendant to demonstrate that there were alternative causes for the defective clamshells (other than the fact that the clamshells were made from inherently defective material) were, in my view, unconvincing and were merely attempts by the defendant to shore up what was basically a weak case that turned primarily on the court's evaluation of the expert evidence tendered by both parties for the court's consideration.

20 In so far as the fourth issue is concerned, I find that the attempts by the defendant to show that the plaintiff and, *inter alia*, Laryngeal Mask Co (Ltd) Seychelles ("LMC") were associated companies and that, hence, there had been no real loss suffered by the plaintiff as both these last-mentioned companies were associated companies, to be unconvincing. It was quite clear that both the plaintiff and LMC had entered into arm's-length transactions.

21 I also find that that the defendant had not adduced any evidence to rebut the amount of damages claimed by the plaintiff.

22 However, it is important to reiterate that the third and fourth issues become relevant *only if the plaintiff prevails with regard to the first and, especially, second issues*. I emphasise, once again, the *second* issue because if (as I find) the defendant had clearly discharged its contractual obligations with regard to the suitability of the material by the provision of May's COAs, the plaintiff would have no cause of action against the defendant under the contract. Its legal recourse would then be against May for the provision of the substandard material.

23 In other words, the first and (especially) second issues are (to reiterate an important point) *threshold* issues. It is important to bear this in mind because the mere fact that the material may not be up to the requisite standard does *not*, in and of itself, determine *who* ought to be liable in the *contractual context*. This must, *ex hypothesi*, depend on the *precise terms of the contract itself*. It is not surprising, therefore, that the plaintiff has appealed against my decision with regard to the *second* issue only.

24 It also bears emphasising that, in the absence of any relevant vitiating factors, it is incumbent that parties observe, scrupulously, the precise terms of the contract. In these proceedings, for instance, if the plaintiff had agreed with the defendant that it was an express or implied condition of the contract that the defendant would have discharged its contractual obligations

with regard to the suitability of the material by the provisions of May's COAs, it (the plaintiff) ought not to be allowed to disregard this condition. Sanctity of contract is vital to certainty and predictability in commercial transactions. If a party (here, the plaintiff) were allowed to unravel the contract by ignoring a term it had entered into voluntarily, this would undermine the very concept of a contract itself. Parties entering into contracts necessarily take business risks. Business losses are not unexpected. All these are hard facts of commercial life. The law does not exist to shield contracting parties from miscalculations or even commercial folly. That is why vitiating factors in contract law are applied strictly as the law attempts to balance the need for commercial certainty on the one hand and fairness to individual parties in egregious situations on the other.

25 It is noteworthy that both parties in the present proceedings are commercial entities who are no babes in the woods. In any event, no allegation of any legal impropriety, let alone vitiating factors, was raised and I therefore say no more in this regard.

26 Finally, it is important to stress that notwithstanding many academic critiques to the effect that commercial certainty and predictability are chimerical, it cannot be gainsaid that the *perception* of their importance is deeply entrenched within the commercial legal landscape in general and in the individual psyches of commercial parties (and even non-commercial parties, for that matter) in particular. It may be worth observing that most of these critiques stem from a radical view of the law. To put it bluntly, many of such views stem from the premise that objectivity of the law is not merely elusive but positively illusory. In particular, such a sceptical approach is based on the idea that everything is subjective. This is, of course, the very antithesis of the very enterprise of the law itself. Such an approach also conveniently misses its own absolute cast. Unfortunately, though, it is an absolute view that dispirits and disempowers. It is profoundly negative and ought to be avoided at all costs.

27 I now turn to my detailed reasons with regard to the first two issues which relate to key terms in the contract itself.

The terms of the contract

The law relating to implied terms

28 One central issue relates to implied terms. Hence, before proceeding to consider what the key or crucial terms in the present contract were, it would be appropriate to set out briefly the applicable principles relating to implied terms that are germane to the present proceedings.

29 It has always been acknowledged that particular terms might be implied into particular contracts. However, in order not to undermine the concept of freedom of contract itself, terms would be implied only rarely – in exceptional cases where, as one famous case put it, it was *necessary* to give "*business efficacy*" to the contract (see *per* Bowen LJ (as then was) in the English Court of Appeal decision in *The Moorcock* (1889) 14 PD 64). In the words of Bowen LJ himself (at 68):

> Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and there are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction

> such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances.

30 Indeed, Lord Esher MR adopted a similar approach, although it is Bowen LJ's judgment that is most often cited. This is probably due to the fact that a close perusal of Lord Esher MR's judgment will reveal that the learned Master of the Rolls did not *explicitly* adopt the "business efficacy" test as such. It might be usefully observed at this juncture that the third judge, Fry LJ, agreed with both Bowen LJ and Lord Esher MR (see [29] *supra* at 71).

31 There was another test, which soon became equally famous. It was by MacKinnon LJ in another English Court of Appeal decision. This was the famous "*officious bystander*" test which was propounded in *Shirlaw v Southern Foundries (1926) Limited* [1939] 2 KB 206 at 227 ("*Shirlaw*") (affirmed, [1940] AC 701), as follows:

> If I may quote from an essay which I wrote some years ago, I then said: "Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'"
>
> At least it is true, I think, that, if a term were never implied by a judge unless it could pass that test, he could not be held to be wrong.

Interestingly, the essay referred to above was in fact a public lecture delivered at the London School of Economics in the University of London: see Sir Frank MacKinnon, *Some Aspects of Commercial Law – A Lecture Delivered at the London School of Economics on 3 March 1926* (Oxford University Press, 1926) (and see, especially, p 13).

32 Both these tests are firmly established in the local case law (in addition to the cases cited below, see also, for example, *Lim Eng Hock Peter v Batshita International (Pte) Ltd* [1996] 2 SLR 741 at 745–746, [13]–[15] (affirmed in *Batshita International (Pte) Ltd v Lim Eng Hock Peter* [1997] 1 SLR 241) and *Chai Chung Ching Chester v Diversey (Far East) Pte Ltd* [1991] SLR 769 at 778, [34] (affirmed in *Diversey (Far East) Pte Ltd v Chai Chung Ching Chester* [1993] 1 SLR 535), with regard to the "business efficacy" and "officious bystander" tests, respectively.

33 The relationship, however, between the tests is not wholly clear. Surprisingly, this appears to be the situation not only in the local context but also in England as well. In the recent English High Court decision of *John Roberts Architects Limited v Parkcare Homes (No 2) Limited* [2005] EWHC 1637 (TCC), for example, Judge Richard Havery QC was of the view (at [15]) that it was unnecessary for him to decide the point. And in the equally recent House of Lords decision of *Concord Trust v Law Debenture Trust Corpn plc* [2005] 1 WLR 1591, Lord Scott of Foscote merely referred (at [37]) to the fact that "[v]arious tests for the implication of terms into a contract have been formulated in various well known cases", and then proceeded to refer specifically (only) to the "business efficacy" test in *The Moorcock* (set out at [29] above). I would venture to suggest, however, that there ought – and can – be a resolution to this issue for reasons that I will elaborate upon in a moment.

34 On one view, the "business efficacy" and "officious bystander" tests are viewed as being wholly *different* tests (see, for example, the cases cited at [39] below). Looked at in this light, both tests could be utilised as alternatives. Such an approach, however, tends towards more complexity (and, possibly, confusion) in what is an already relatively general (even vague) area of the law.

35 On another view, however, the two tests are *complementary*. This is the view I prefer as it is not only simple, albeit not simplistic, but is also consistent with the relevant historical context. In the English Court of Appeal decision of *Reigate v Union Manufacturing Company (Ramsbottom), Limited and Elton Copdyeing Company, Limited* [1918] 1 KB 592 ("*Reigate*"), for example, that great commercial judge, Scrutton LJ, observed (at 605) thus:

> A term can only be implied if it is *necessary in the business sense* to give *efficacy* to the contract; *that is*, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, "What will happen in such a case," they would *both* have replied, "*Of course, so and so will happen; we did not trouble to say that; it is too clear*." Unless the Court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed. [emphasis added]

36 An even cursory perusal of the above statement of principle by Scrutton LJ will reveal the *integration as well as complementarity* of the "business efficacy" and "officious bystander" tests. This is especially evident by the learned judge's use of the *linking* phrase "that is" in the above quotation. Indeed, the plain and natural meaning of this quotation is too clear to admit of any other reasonable construction or interpretation. And it is this: that the "officious bystander" test is the *practical mode by which* the "business efficacy" test is implemented. It is significant that the observations of Scrutton LJ in *Reigate* ([35] *supra*) *antedated* the more prominent pronouncement of the "officious bystander" test by Mackinnon LJ in *Shirlaw* ([31] *supra*) by *some two decades*. Of not insignificant historical interest, in this regard, is the fact that MacKinnon LJ was in fact Scrutton LJ's pupil and had close ties with him: on both professional as well as academic levels (see generally *The Dictionary of National Biography 1941–1950* (L G Wickham Legg & E T Williams eds) (Oxford University Press, 1959) pp 557–559 at p 557).

37 The following observations by Cross J in the English High Court decision of *Gardner v Coutts & Company* [1968] 1 WLR 173 at 176 may also be usefully noted:

> When one hears the words "implied term" one thinks at once of MacKinnon L.J. and his officious bystander. It appears, however, that the individual, *though not yet so characterised, first made his appearance as long ago as 1918 in a judgment of Scrutton L.J. …* [emphasis added]

38 I should mention that there is now local authority that supports this approach as well: see the recent Singapore High Court decision of Judith Prakash J in *Telestop Pte Ltd v Telecom Equipment Pte Ltd* [2004] SGHC 267 at [68]. Reference may also be made to the following observation by Colman J in the English High Court decision of *South Caribbean Trading Ltd v Trafigura Beheer BV* [2005] 1 Lloyd's Rep 128 at [37], which is, however, rather more *cryptic* (and may, on one reading at least be the opposite of that proposed in this judgment at [35] above):

> The conceptual basis for any such implication [of a contractual term] could consist either of that derived from the other express terms or that derived from *business efficacy under the "officious bystander" approach* in *The Moorcock* (1889) 4 PD 64. [emphasis added]

39 It should, however, be noted that there are other possible approaches as well. For example, there is some authority in the local context which suggests that the "business efficacy" and "officious

bystander" tests can be utilised interchangeably, thus signalling that there is no real difference in substance between the two tests (see, for example, the Singapore Court of Appeal decisions of *Bank of America National Trust and Savings Association v Herman Iskandar* [1998] 2 SLR 265 at [45]; *Miller Freeman Exhibitions Pte Ltd v Singapore Industrial Automation Association* [2000] 4 SLR 137 at [42]; *Hiap Hong & Co Pte Ltd v Hong Huat Development Co (Pte) Ltd* [2001] 2 SLR 458 at [18]; *Tan Chin Seng v Raffles Town Club Pte Ltd (No 2)* [2003] 3 SLR 307 at [33]; and *Romar Positioning Equipment Pte Ltd v Merriwa Nominees Pty Ltd* [2004] 4 SLR 574 at [29]; as well as the Singapore High Court decision of *Loh Siok Wah v American International Assurance Co Ltd* [1999] 1 SLR 281 at [32]). There is yet other authority suggesting that these two tests are *cumulative* (see, for example, the Malaysian Federal Court decision of *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151 at 170). It might well be that the approach from complementarity may be very close, in practical terms, to this suggested approach. However, the former could nevertheless still lead to different results and, in any event, does not comport with the background described briefly above. Finally, there is some authority suggesting that both the "business efficacy" and "officious bystander" tests are not only different but that the criterion of "necessity" is only applicable to the former test (see the Malaysian High Court decision of *Chua Soong Kow & Anak-Anak Sdn Bhd v Syarikat Soon Heng (sued as a firm)* [1984] 1 CLJ 364 at [7]). This last-mentioned approach is probably the least persuasive of all since the criterion of "necessity" ought to be equally applicable to both tests (see, in this regard, *Miller Freeman Exhibitions Pte Ltd v Singapore Industrial Automation Association*, cited earlier in this paragraph).

40 Given the persuasive historical and judicial background as well as the general logic concerned, I would suggest that the approach from complementarity ought to prevail (see [36] above). It should also be noted that none of the cases in the preceding paragraph suggesting different approaches actually canvasses the rationale behind the respective approaches advocated.

41 However, it is important to note that the tests considered above relate to the possible implication of a *particular* term or terms into *particular* contracts. In other words, the court concerned would examine the *particular factual matrix* concerned in order to ascertain whether or not a term ought to be implied. This is the established general approach, regardless of the view one takes of the "business efficacy" and "officious bystander" tests. There are practical consequences to such an approach, the most important of which is that the implication of a term or terms in a particular contract *creates no precedent for future cases*. In other words, the court is only concerned about arriving at a just and fair result via implication of the term or terms in question in that case – *and that case alone*. The court is only concerned about the presumed intention of the particular contracting parties – *and those particular parties alone*. This particular proposition is of vital significance to the resolution of the present case for the following reason.

42 There is a *second* category of implied terms which is wholly different in its nature as well as practical consequences. Under this category of implied terms, once a term has been implied, such a term will be implied in *all future* contracts of *that particular type*. The precise terminology utilised has varied. In the English Court of Appeal decision of *Shell UK Ltd v Lostock Garage Ltd* [1976] 1 WLR 1187 at 1196, for example, Lord Denning MR utilised the rubric of contracts "of common occurrence", whilst Lloyd LJ in the (also) English Court of Appeal decision of *National Bank of Greece SA v Pinios Shipping Co No 1* [1990] 1 AC 637 (reversed in the House of Lords but not on this particular point) referred to such a category as encompassing "contracts of a defined type" (at 645). But the central idea is clear: it is that the term implied is implied in a *general* way for *all* specific contracts that come within the purview of a broader umbrella category of contracts (reference may also be made, for example, to the House of Lords decisions of *Scally v Southern Health and Social Services Board* [1992] 1 AC 294, especially at 307 and *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 at 45).

43 To distinguish this particular category of implied terms from the first, legal scholars have referred to it as the category of "terms implied in *law*" (see generally, for example, Sir Guenter Treitel, *The Law of Contract* (Sweet & Maxwell, 11th Ed, 2003) ("Treitel") at pp 206–213). The first or former category has, in turn, been referred as to the category of "terms implied in *fact*" (see generally Treitel, at pp 201–206).

44 The *rationale as well as test* for this broader category of implied terms is, not surprisingly, quite *different* from that which obtains for terms implied under the "business efficacy" and "officious bystander" tests. In the first instance, the category is much broader inasmuch (as we have seen) the *potential* for application *extends* to *future* cases relating to the same issue with respect to the *same category* of contracts. In other words, the decision of the court concerned to imply a contract "in law" in a particular case *establishes a precedent* for similar cases in the future for *all* contracts of *that particular type*, unless of course a higher court overrules this specific decision. Hence, it is my view that courts ought to be as – if not more – careful in implying terms on this basis, compared to the implication of terms under the "business efficacy" and "officious bystander" tests which relate to the *particular contract and parties only*. Secondly, the test for implying a term "in law" is broader than the tests for implying a term "in fact". This gives rise to difficulties that have existed for some time, but which have only begun to be articulated relatively recently in the judicial context, not least as a result of the various analyses in the academic literature (see, for example, the English Court of Appeal decision of *Crossley v Faithful & Gould Holdings Ltd* [2004] 4 All ER 447 at [33]–[46]).

45 However, I say no more about the category of "terms implied in law" as the present case turns, in my view, on the application of the category of "terms implied in fact".

Was it a condition of the contract that the defendant procure its material for the clamshells from May?

General

46 In the absence of comprehensive documentation (as was the case here, as to which see [7] above), such documents as exist and are available to the court become of signal importance. Of equal importance are the respective witnesses' testimony since, presumably, oral terms might also constitute part of the contract.

47 At this juncture, therefore, it would be apposite to comment, albeit briefly, on the two key witnesses in the present proceedings in so far as this particular issue is concerned.

48 The first is Mr Ron Wight ("Mr Wight"), who is the chief technical officer of the plaintiff. He struck me as being generally a reliable witness of truth. However, there were clearly points during the trial when he was visibly uneasy. It seemed to me that he wanted to tell the truth but had, on occasion, to "varnish" it slightly. This is understandable in view of the fact that he was a key witness for the plaintiff. This tension which I detected will become clear in my analysis of his testimony below.

49 The second witness is Ms Karin Leng Fong Sin ("Karin Leng"), who is the marketing executive for the defendant. I found her to be a reliable witness of truth – albeit more so than Mr Wight. Although, as we shall see, there were apparent difficulties with the defendant's case on this issue in particular, she did not waver. Nor did she attempt to gloss over the inherent difficulties. She attempted, as far as I could see, to give her evidence in a straightforward and truthful manner.

Context and analysis

50 In so far as this particular issue is concerned, the main written evidence is contained in a handwritten note by Karin Leng on an inter-office memorandum of the defendant to her subordinate, Lilian.[note: 1] Indeed, the focus of both parties appeared to be on this handwritten note. However, it seems to me that the memorandum itself is significant. The actual contents of the memorandum itself (dated 16 December 2002) read as follows:

> SUBJECT: Petg 0.40mm (Forefront Medical)
>
> 1) Petg must be food and drug grade.
>
> 2) Their current petg supply from May Polyester films are approved 'United State Pharacopia Class 6' grade.
>
> [emphasis added]

51 The handwritten note on the memorandum reads as follows:

> 16/12/2002
>
> *Asked/Requested Lilian* to *source from May Polyester* base [*sic*] on Ron of FMT [*sic*] *recommendation*. [emphasis added]

52 Looking closely at the memorandum (at [50] above), it is clear that the material required (in this instance, PETG 6763) was not only specific but was also specialised inasmuch as it had to be of that standard which would pass muster under the stringent requirements of the Food and Drug Administration ("FDA") of the US. This is not surprising in view of the fact that the medical devices were to be packed into the clamshells for onward transmission to the US. This would, of course, mean that the material supplied by May would have had to have undergone tests to ensure that it met the requisite FDA standards. As can be seen from the second paragraph in the memorandum itself, May's material in fact met these standards. This was probably due to the fact that the material had already been approved when Parade had been manufacturing clamshells for the plaintiff, the defendant being, of course, the "successor" of sorts to Parade.

53 The issues that arise at this juncture seem to me to be as follows.

54 First, given the fact that May's material had already been approved with respect to the previous contracts between the plaintiff and Parade, did this expedite matters with respect to the timeframe for approval of the samples of clamshells from the *defendant* in order for the defendant to commence manufacturing the actual clamshells pursuant to the actual contract itself? If there was such an expediting of matters, then it would support the defendant's contention that it was an express condition of the contract between it and the plaintiff that the defendant must procure the material for the manufacture of the clamshells from May. What *was* clear from the evidence was that the defendant *did* in fact need to have its *samples* approved by the plaintiff.

55 Secondly, *even if* the fact that May's material had already been approved did *not* in fact expedite matters, would the other surrounding circumstances (in particular, the need for the plaintiff not to delay matters further, given its prior difficulties with Parade) nevertheless indicate, on the balance of probabilities, that it was an express condition of the contract between the plaintiff and the defendant that the latter must procure the material for the manufacture of the clamshells from May?

56 Bearing the above two issues in mind, I commence my analysis with a more general point

first. Much was made by counsel for the plaintiff of the word "recommendation" in Karin Leng's handwritten note (see [51] above). The plaintiff's argument was that the word "recommendation" was to be taken in its literal sense. In other words, a "recommendation" was not mandatory and that, therefore, it could not have been an express condition of the contract that the defendant must procure the material for the manufacture of the clamshells from May.

57 I was much persuaded by this argument at first blush. However, it seemed to me not to gel with the general context surrounding this particular contract. Before I elaborate on this particular point, I should point out that, from my assessment of the overall testimony of Karin Leng, I not only found her to be a reliable witness of truth (as to which, see [49] above) but also a witness whose command of the English language, whilst competent, was not particularly nuanced. This is why I accept her testimony to the effect that the use of the word "recommendation" in her handwritten note was, *in so far as she was concerned*, a clear *instruction from* Mr Wight that the plaintiff *required* the defendant to procure the necessary material *from May*.

58 Looking, first, at the actual contents of the inter-office memorandum (reproduced at [50] above), it is clear that there were stringent requirements with regard to the material which would pass muster under the contract (indeed, any contract of this nature) with the plaintiff. Bearing this important context in mind, I also note that Karin Leng utilised, in so far as her instructions to Lilian were concerned, the phrase "*Asked/Requested*" (see [51] above). This, like the word "recommendation", is not apparently couched in the imperative mode. However, it does *not* seem to me that her instructions to Lilian were any less than that – in other words, that they were any less than *instructions*. It was clear to me that Karin Leng was *not* offering Lilian *an option* as such. Why, then, did she utilise the words "Asked/Requested"? Indeed, why did she utilise two words when one would have sufficed? More importantly, why didn't she utilise a word or words which conveyed, more accurately, the meaning that these were in the form of *instructions*, *not* optional requests? I can only surmise that precision in usage was not a strong point in so far as Karin Leng's command of the English language was concerned. It was also clear to me that Karin Leng preferred utilising *polite and courteous* language. All this is consistent with the use of the word "recommendation" and the *context* in which that word was used was important – as opposed to the plaintiff's literal interpretation in order to suit its case. It was clear from the *context* that "recommendation" did not carry the meaning that the plaintiff sought to place on it. *However*, if this is the case, then one must (as I do) accept Karin Leng's evidence to the effect that the word "recommendation" actually meant "instructed" – in other words, that it carried a mandatory connotation in the light of the circumstances of the case.

59 At this juncture, it would be appropriate to elaborate a little more on the elements comprising the particular context surrounding the making of the handwritten note by Karin Leng herself.

60 Although it is not clear beyond peradventure that time was of the essence of the contract between the plaintiff and the defendant (the result of the loose form in which this contract was, unfortunately, concluded), it is clear that it was *at least significant* inasmuch as the plaintiff would have desired the defendant to produce the requisite clamshells as soon as possible. After all, the reason why the plaintiff had approached the defendant to manufacture the clamshells was precisely because the *previous* manufacturer, Parade, had not discharged its obligations satisfactorily;[note: 2] indeed, in her affidavit, Ms Irene Ong Ai Lian, the purchasing and administration officer of the plaintiff, stated at para 4 that, "[s]ometime in November 2002, due to our existing supplier [*ie*, Parade] which could not deliver the clamshell [*sic*] to us in time for our production usage, I started to source for alternative suppliers".[note: 3] At this point, it is important to note that *there were (until the present case) no complaints whatsoever by the plaintiff about the quality of the material that was supplied by May* – which was and is, to date, the *only* approved supplier of material for the manufacture of the clamshells for the plaintiff. This is important inasmuch as it in fact tends to support the defendant's

argument that the plaintiff had insisted that it procure the necessary material from May. Indeed, this reasoning is buttressed by the fact (just noted) that time, if not of the essence, must surely have been of more than passing significance to the plaintiff.

61 Another document that was relevant related to a letter from the defendant to the plaintiff dated 3 July 2003.[note: 4] The main body of the letter (addressed to Mr Wight for the plaintiff and signed by Ms Adeline Kang for the defendant) reads as follows:

> RE: CLAMSHELL PRODUCTION
>
> Thank you for your letter of 2 July 2003 assuring us that we will be working closely together.
>
> However, *we are concerned that we are only using one source of material supply, i.e. May Polyester Sdn Bhd. Their machine, we believe, has been in service for a decade now and the recent breakdown is a concern.*
>
> There are many well established PETG film suppliers *and we will like to protect our customers by ensuring that we do not run out of material. We can only do so when we have an alternative source. This has been our policy working both with internal and external parties*.
>
> [emphasis added]

62 Counsel for both parties naturally took diametrically opposed interpretations of the contents of the letter just quoted. The plaintiff argued that this letter was no more than an expression of concern on the part of the defendant as May was facing possible difficulties with supplying the requisite material. On the other hand, the defendant argued that this letter supported their argument that the plaintiff had stipulated, contractually, that it (the defendant) could *only* procure the necessary material for the manufacture of the clamshells from May. Whilst it is true that May was facing possible difficulties in the manner briefly alluded to above, it is also true that the above letter was equally consistent with the fact that, in the light of these potential difficulties from May, the fact that it (the defendant) had been contractually constrained to procure the requisite material from May was a major concern for the defendant, who therefore wanted to source for an alternative supply of material.

63 It is my view that the letter presently considered supports the defendant. It is, at worst, neutral in so far as the defendant's case is concerned. Even if this were so, I find that, on balance, the available evidence that *was* helpful pointed (as I have already concluded above) in the defendant's favour.

64 I would add that it also seemed to me that the defendant would have had *an equally strong case* if it had argued that it was an *implied* condition of the contract between it and the plaintiff that it (the defendant) procure the material from May – and nobody else. However, I note that, whilst counsel for the plaintiff appeared to accept that this was an argument that could be mounted by the defendant, the actual pleadings themselves do not appear to support such an approach. This is unfortunate. In my view, the rules of civil procedure in general and those which relate to pleadings in particular should not be allowed to be ends in themselves. They exist in order to provide the basic structure in order that substantive justice be achieved. However, in the real world, which is far more complex and "messier", the rules of civil procedure can, on occasion, produce the opposite result. This seems to me, unfortunately, one such occasion although I note that it is not impossible for the defendant to raise this particular argument on appeal, given that no further evidence needs (in my view at least) be adduced in this particular regard.

65 I turn now to the second (and, in my view, equally if not more, crucial) issue as to whether or not it was an express or implied condition of the contract that the defendant would be considered to have discharged its contractual obligations with regard to suitability of the material by the provision of the relevant COAs from May.

Was it an express or implied condition of the contract that the defendant would be considered to have discharged its contractual obligations with regard to suitability of the material by the provision of the relevant COAs from May?

66 On an e-mail from Mr Wight to Karin Leng dated 24 April 2003[note: 5] is the following crucial note written by Karin Leng on 25 April 2003, which reads as follows:

> 25/4/03
>
> *Ron has given assurance that so long all May Polyester's Cert. of Analysis shows regrind less than 5% and M.P. conformance specs meets FMT specs., MP will not be held liable once good del & gone through QC/QA check*. FMT do their own products test in M'sia which also give double assurance of quality acceptance.
>
> [emphasis added]

67 It can be seen from what has just been quoted in the preceding paragraph that Mr Wight had in fact given Karin Leng a clear assurance that the defendant would be considered to have discharged its contractual obligations with regard to suitability of the material by the provision of the relevant COAs from May containing the required confirmation. This, in my view, clearly formed part of the contract between the plaintiff and the defendant ("FMT" clearly referring to the plaintiff, Forefront Medical Technology (Pte) Ltd and "MP" clearly referring to the defendant, Modern-Pak Private Limited). Indeed, it was a crucial term which I would put at the level of a condition and was an integral part of the overall agreement which, as we have already seen, was one that could only be ascertained by reference to all the relevant documents and testimony, taken as a whole. As already mentioned, the defendant clearly provided these certificates from May and thereby discharged their contractual duties in this important regard. It would also appear, as we shall see below, that despite initial reservations by Karin Leng, the clamshells had in fact gone through the necessary quality control ("QC") and quality assurance ("QA") checks.

68 It is also important to note that in the body of the actual e-mail itself, Mr Wight also refers to the telephone conversation where he gave that assurance, as follows:

> Dear Karin,
>
> …
>
> As I explained to you during our tele-conversation today, FMT requires the following,
>
> *written confirmation from May Polyester regarding the % of regrind. It MUST NOT exceed 5% as defined by the specification.
>
> *certificate of conformance that confirms your product meets the FMT component specifications.

69 The words "MUST NOT" rendered in capital letters in the original text above are significant. This confirms – and, indeed, underscores – the handwritten note by Karin Leng to the effect that

May's COAs in this particular regard were to be of pivotal importance. I pause here to note that the relevant Certificates of Conformance were also given by the defendant to the plaintiff, although this category of certificates was not apparently mentioned by the plaintiff (through Mr Wight to the defendant through Karin Leng as being an express condition of the contract as such. As I have just mentioned, however, even if they were, the contractual obligations in this respect were in fact complied with.

70 This assurance was in fact confirmed in no uncertain terms by Mr Wight himself when he was cross-examined by counsel for the defendant. In this regard, the following extract from the Notes of Evidence is very illuminating:[note: 6]

> DC: I refer you next to DB 10 – e-mail from you to Karin Leng – 2nd para – as I see it, there are two certificates required – first, a written confirmation from May confirming that there is not more than 5% regrind and, secondly, a certificate of conformance from the defendants that confirms that FMT component specs are met?
>
> A: Yes.
>
> Q: In terms of material, I put it to you that all that was required from the defendants was May's certificate of analysis showing less than 5% regrind.
>
> A: That was not all that was required.
>
> Q: *Still on pg 10, there is a handwritten note there by Karin Leng – I put it to you that you did give this assurance to Karin on 25 April 2003*.
>
> A: *I agree*.
>
> Q : *Would you also agree that for the three purchase orders issued by the plaintiffs which are the subject-matter of this claim, the defendants have given or provided May's certificates of analysis showing less than 5% regrind as well as their own certificates of conformance?*
>
> A: *Yes*.
>
> Q: And would you agree that the clamshells supplied by the defendants for these three purchase orders successfully went through the plaintiffs' QC and QA checks?
>
> A: No, I disagree.
>
> Q: I put it to you that if they had not gone through your QC and QA checks successfully, they would not have been sent on to Malaysia for sterilization and then on to the USA for delivery to the customers.
>
> A: The very first shipment from the defendants to the plaintiffs was rejected and there were non-conforming product raised (numbers 88 and 89).
>
> Q: Weren't [*sic*] all the clamshells that were sent to the US successfully go through the plaintiffs' QC and QA checks?
>
> A: What do you mean by successfully? The defendants had to do a 100% sort and replacement due to 20% rejection of the first shipment.

Q: *I am talking about the clamshells ultimately shipped to the US.*

A: *They passed the check after sorting.*

Q : *And wouldn't each clamshell have been at least visually inspected by the plaintiffs separately before the device was installed into the clamshell?*

A: *Visually inspected, yes.*

Q: *I put it to you, then, that having furnished May's COA's (Certificate of Analysis) showing less than 5% regrind and the defendants' COC's (Certificate of Conformance), and having successfully passed the plaintiffs' QC and QA checks, and the plaintiffs' visual inspection prior to installation of the device into the clamshell, the defendants have fully discharged their contractual obligations as to material.*

A: *They have submitted the required documents, yes.*

Ct: *The checks were effected by the defendants?*

A: *Yes.*

Ct: Does it necessarily follow that the clamshells that were sent on to the US were defect-free?

A: When they left the plaintiffs, they were defect-free.

Q: The inspection was visual?

A: Yes.

DC: Distinction must be drawn between the checks the defendants did and the QC and QA checks done by the plaintiffs.

Ct: QC and QA checks done by the plaintiffs – what is the nature of these checks?

A: They are picked at random and checked dimensionally, visually, cosmetically and functionally. It's an Acceptable Quality Limit (AQL) – a measurement of the probability of a defect measured against the actual number of defects.

DC: There is another 100% check, in effect, because the devices need to be installed by the plaintiffs into the clamshells.

DC: Just one point on the AQL – would it be fair to say that one is not looking at zero tolerance – there is a certain acceptable number of rejects?

A: Yes.

Q: Percentage terms?

A: The first shipment of over 20% reject rate is too high – no more than 1% is the acceptable standard.

Q: Was this 1% ever stipulated in writing to the defendants by the plaintiffs?

A: As a hypothetical instance. Certificate of Conformance lays down the criteria – no percentage stipulated.

The AQL was 0.065 of one. It is not a percentage check because not every clamshell is checked.

Q: Refer to your affidavit, para 12 – COC certifies quality, dimensional accuracy, function and appearance – the COA serves as a proof that the defendants had complied with the material requirements of the plaintiffs – *I put it to you, then, that, contractually, once May's COA has been obtained, the defendants are deemed to have complied with all the requirements relating to material under the contract?*

A: *Yes.*

Q: *I further put it to you that since the defendants have furnished May's COA's as required contractually for the clamshells supplied under the three subject purchase orders, the defendants have fully complied with the requirements on material.*

A: *Yes.*

[emphasis added]

71 I note, also, that it was clear that, despite Mr Wight's initial response, the necessary QC and QA checks were in fact carried out. This is not only borne out by the material parts of the testimony quoted above but also by the very logical and commonsensical reason to the effect that there would have been no way that the clamshells could have been shipped to the US in the first instance if they had not in fact passed the necessary QC and QA checks.

72 The fact that I have found Mr Wight to be generally a witness of truth merely serves to drive home the point. Indeed, there was no reason for him to make the above admission in the first instance – and so clearly at that. Having made that admission, it must, having regard to my general assessment of him as a witness, be accorded the (significant) weight it deserves. That this admission was given freely and was not in any way obtained surreptitiously is admitted in counsel for the plaintiff's own reply submissions where the "damage control" sought to be effected was, with respect, too little and too late. Indeed, this response did not even deal with the issue of Mr Wight's admission directly, let alone effectively. There was, of course, a good reason for this. As already mentioned, the admission was both freely given and of the utmost significance. More importantly, it was the unadulterated truth. That is why counsel for the plaintiff could not, as I have just mentioned, counter the admission effectively – indeed, at all.

73 It bears emphasising, once again, that, given the dearth of documentary evidence, this admission by Mr Wight becomes even more important. Indeed, I would go so far as to state that this admission might not only constitute part of the terms of the contract in question but might even constitute part of a *collateral contract* between the plaintiff and the defendant. Like implied terms, collateral contracts will not of course be easily found by the court. But this is not to state that they will not be found to exist where the requisite factual and legal circumstances are present (as appears to me to be the case here). In so far as general principles are concerned, the following valuable observations by Belinda Ang Saw Ean JC (as she then was) in the Singapore High Court decision of *Lemon Grass Pte Ltd v Peranakan Place Complex Pte Ltd* [2002] 4 SLR 439 at [116]–[119] should be

noted:

> 116 A collateral contract is an agreement distinct from the main contract. A court must therefore find all the usual legal requirements of a contract having been fulfilled with respect to the collateral agreement before it can be enforced.
>
> 117 What this means is that the statement purporting to be the contractual promise in such a collateral contract must be promissory in nature or effect rather than representational ... The plaintiffs must establish the agreement of the parties to its terms. Thus, to succeed in a claim founded on a collateral contract, the plaintiffs have to prove certainty of the terms.
>
> 118 It is for the party seeking to rely upon the collateral contract who has to bear the burden of establishing that both parties intended to create a legally binding contract ...
>
> 119 They must also establish consideration, which in the case of a collateral contract is easy to prove. All that is required is the promisee [the plaintiffs] entering or promising to enter into a principal contract with the promisor [the defendants].

74 All the general requirements set out above would appear to have been satisfied in the present proceedings. However, as a collateral contract was not pleaded by the defendant, I say no more about it.

75 In the circumstances, I find that it was, having regard to the reasons set out above, clear that it was in fact *an express condition* of the contract that the defendant would be considered to have discharged its contractual obligations with regard to suitability of the material by the provision of the relevant COAs from May.

76 It seems to me equally clear that, if I am wrong with regard to the conclusion arrived at in the preceding paragraph, it was nevertheless clear that there was, in any event, *an implied condition* to like effect. Let me elaborate. However, before proceeding to do so, it would be appropriate to note that I will be applying the legal principles mentioned above (in particular at [29]–[31], relating to the category of "terms implied in *fact*").

77 Turning now to an application of the relevant principles relating to "terms implied in fact" to the relevant facts in the present proceedings, it is clear that the circumstances were such that the defendant must have entered into the contract with the plaintiff on the understanding and basis that, in so far as the requisite quality of the material utilised was concerned, the COAs from the actual materials supplier (May) would suffice. That the defendant sought the assurance from Mr Wight (and which was dealt with in some detail above) is clear evidence of this. Indeed, I have gone further and indicated that the assurance was itself part of the *express* terms of the contract. It follows, *a fortiori*, that the assurance was, therefore, *at the very least* evidence of an *implied* term of the contract in the manner just stated, if the argument from an express term is not accepted.

78 Indeed, it is my view that such an implied term (indeed, condition) was necessary in order to give business efficacy to the contract.

79 From the perspective of the *plaintiff*, it was clear (to *it*, at least) that there were no problems with the material hitherto supplied by May and the quality of which was taken as a given. Indeed, as I have already held, it was also a condition of the contract that the defendant procure its material for the manufacture of the clamshells from May. Even if this was not a condition (a point which I, of course, reject), it is clear that, *at the very least*, the circumstances surrounding the

ultimate procurement of the material by the defendant from May demonstrated that the plaintiff was in fact more than satisfied with May's material up to, and until, the time of the making of the contract between it and the defendant.

80 It is also important to note, once again, that the reason why the plaintiff turned to the defendant to manufacture the clamshells in question from May's material was because it was *dissatisfied with* the *previous* manufacturer, Parade. Further, there was some indication, at least, that the plaintiff was concerned to get the production of the clamshells back on track via its contract with the defendant. From the general business perspective, this was in fact sheer commonsense – particularly given the plaintiff's problems with clamshells manufactured by Parade, as just mentioned above. In the circumstances, it would have made little (or no) business sense to the plaintiff to have insisted that the furnishing (by the defendant) of the requisite COAs from May would not have sufficed to have discharged the defendant from its contractual obligations relating to the quality of the material of the clamshells and to have desired something more from the defendant as well.

81 From the perspective of the *defendant*, the circumstances surrounding the plaintiff's endorsement of May as the supplier of materials (either as a condition or, as I have argued above, as at least a factual reality) applied, equally, to make it necessary that it be a condition of the contract that the defendant would be considered to have discharged its contractual obligations as to the quality of the material of the clamshells by furnishing the requisite COAs from May.

82 Indeed, had the plaintiff insisted otherwise, it would not have made business sense for the defendant to have entered into the contract. The defendant would have had to take on an additional responsibility (the substance of which it had no control over) with respect to a contract (between it and the plaintiff) where time, if not of the essence, was nevertheless of no mean significance. As we have seen, the concern of the plaintiff was to have the clamshells produced by the defendant in as timely a fashion as possible. By the same token, the concern of the defendant was to focus on the production of the clamshells, without having to worry about the quality of the material over which it had no control. In the circumstances, it would have made eminently good business sense for *both* contracting parties to agree that, in so far as the quality of the material was concerned, the confirmation by May via its COAs would be sufficient. I have already held that this was an *express* condition of the contract between the plaintiff and the defendant. Even if I am wrong on this point, it is clear that if an officious bystander had asked both parties whether May's COAs would have been a sufficient confirmation of the quality of the material utilised by the defendant to manufacture the clamshells, both plaintiff and defendant alike would have firmly told him, "Oh, of course!" Indeed, it is my view that it would not be unrealistic to have expected them to add, "Please understand that our focus is on production of the clamshells as soon as possible. After all, May has been the only approved supplier of the material so far and has never given any problems. Please do not trouble us with such an irrelevant question!" If, of course, I am correct in my finding above to the effect that it was also an express condition of the contract that the defendant *had to* procure its material from May, then this finding would have followed, *a fortiori*. In other words, one might even have expected the contracting parties to have added further, "Since we have agreed that the defendant *has to* procure the materials for the manufacture for the clamshells from May, isn't this a totally ridiculous question to ask of us?"

83 In the circumstances, it is clear, in my view, that it was *at least* an *implied* condition of the contract that the defendant would be considered to have discharged its contractual obligations with regard to suitability of the material by the provision of the relevant COAs from May.

84 However, as I have already elaborated upon above, I would in fact go *further*. It is my view that it was in fact an *express* condition of the contract that the defendant would be considered to

have discharged its contractual obligations with regard to suitability of the material by the provision of the relevant COAs from May. This was clearly borne out by both the documentary *and* oral evidence available before the court.

Conclusion

85 For the reasons set out above, the plaintiff's claim must be dismissed, with costs to be agreed or taxed if not agreed.

86 However, an important *general* lesson arises from these proceedings. It is that, *wherever possible*, contracting parties ought to reduce their (entire) agreement into *writing*. I recognise that this is *not always possible*, given the nature of the transaction and/or of the parties, as well as of the specific timeframe in question. Nor may parties find it always *desirable*. For example, at least one or even both parties to a contract might want to leave things open deliberately for pragmatic reasons or even for no apparently good reason at all. That is, of course, their choice. But potential contracting parties must understand that if they choose not to reduce their agreement into writing, they must suffer the legal consequences of not doing so – as was the case with the plaintiff in this particular case. Parties *must* abide by the terms of the contract willingly entered into and objectively ascertained. This is desirable from both practical as well as moral points of view. Hence, this principle, already mentioned above, cannot be overemphasised. It is all too easy to seek to point the finger at the other party when things go wrong. At this juncture, mere finger-pointing is immaterial. What matters are the terms the parties entered into and, in particular, the terms germane to the legal issues that have subsequently arisen between them. All this is to be ascertained from an objective perspective. Not to belabour the point, but the best objective evidence is *a written agreement* that does not fall afoul of any vitiating factors. In the absence of such a written agreement (as was the case here), the court will do its best to ascertain the material terms in both their express and (if any) implied forms in the light of all the relevant evidence available. That has been done in the present case and the crucial terms I have found to be in favour of the defendant – both on an express as well as on an implied basis.

[note: 1]See vol 2 of the Bundle of Affidavits of Evidence in Chief ("2BA") at p 295; also reproduced in the Defendant's Bundle of Documents ("DB") at p 5.

[note: 2]See DB at p 1.

[note: 3]See vol 1 of the Bundle of Affidavits of Evidence in Chief ("1BA") at p 133.

[note: 4]See 2BA at p 305.

[note: 5]See 2BA at p 394; also reproduced in DB at p 10.

[note: 6]See Notes of Evidence ("NE") at pp 8-11.