City Ken Pte Ltd *v* Comfortdelgro Engineering Pte Ltd
[2010] SGHC 29

Case Number : Suit No 62 of 2006

Decision Date : 22 January 2010

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Deborah Barker SC and Audra Balasingam (KhattarWong) for the plaintiffs; Indranee Rajah SC, Kirpalani Rakeshgopal and Samuel Lee (Drew & Napier LLC) for the defendants.

Parties : City Ken Pte Ltd — Comfortdelgro Engineering Pte Ltd

Contract – Breach

Contract – Contractual terms – Implied terms

22 January 2010 Judgment reserved.

Kan Ting Chiu J:

1 This is action arises out of a contractual relationship between the parties. The plaintiffs City Ken Pte Ltd are motor vehicle repairers. The defendants Comfortdelgro Engineering Pte Ltd, who are also engaged in motor vehicle repairs, had a contract to repair the taxis of CityCab Pte Ltd ("CityCab"), but instead of undertaking the repairs themselves, they sub-contracted the repairs out to the plaintiffs.

2 The dispute between the parties arose out of an arrangement they termed a profit-sharing arrangement. The arrangement, as described by the plaintiffs, was that:

> (i) The Plaintiffs will invoice the Defendants 80% of the costs of the accident damage repairs to the CityCab Taxis;
>
> (ii) The Defendants will pay the amount invoiced to the Plaintiffs within 30 days of the Plaintiffs' invoices;
>
> (iii) In the event the driver (or his/her insurers) of the other vehicle involved in the accident offers the Defendants a settlement of the claim for repair costs at a sum below the amount so claimed, the Defendants will be able to recover from the Plaintiffs any over-payment under the revenue sharing scheme agreed, described in the aforesaid minutes as the "over-payment of profit sharing for the difference between the claim amount and the settlement received" ("Over Payment Return"). [note: 1]

The overall scheme was that the defendants were to pay the plaintiffs 80% of the repair amounts, and issue invoices to CityCab for the full sums, but CityCab did not pay the invoices, and the defendants would make claims in CityCab's name against the third parties and retain the amounts received from them.

3 In cases where the defendants were not able to recover the full claim from a third party, they

were entitled to a refund or clawback from the plaintiffs, initially through credit notes issued by the plaintiffs and subsequently through debit notes issued by the defendants. It was recorded in the minutes of a meeting between the parties that: [note: 2]

> Basis of Profit Sharing
>
> 1. 20% for [the Defendants] and 80% for [the Plaintiffs] based on all repair bills for labour and spare parts sales but not applicable to excess cases.
>
> 2. The term of payment for works order reflecting the 80% share for [the Plaintiffs] shall be 30 days.
>
> 3. In the event that [the Defendants] be offered to settle the claim in partial and/or incurred legal costs, [the Defendants] would be able to recover from [the Plaintiff] for the over-payment of profit sharing for the difference between claim amount and settlement received.

4 The parties maintained the working relationship between 1997 and 2003. During this period, the corporate identity of the defendants went through several transformations and the contract went through several revisions, but nothing turned on that.

5 It was apparent that the parties were more familiar and concerned with vehicular repairs than paperwork. They did not engage lawyers to draft formal agreements. They were not careful to monitor the records and the accounts between themselves when the contractual relationship was on-going. When the relationship was terminated in September 2003, both were unclear about the state of the records and the accounts. The plaintiffs started by demanding $15,370,697.51 from the defendants. After the action was filed, the amount was reduced to $2,208,716.63, made up of two components, $740,602.33 for unpaid invoices, and $1,468,114.30 deducted by the defendants through their disputed debit notes they had issued, and the amount for the unpaid invoices was reduced to $11,053.24 and the amount for the disputed debit notes rose to $1,785,786.72.

6 The defendants also took changing positions. They initially contended that there was no sum due to the plaintiffs at the termination of relationship. Subsequently, they paid $123,652.57 to the plaintiffs. After the plaintiffs commenced the action, they made a further payment of $90,816.60, and in the course of the hearing, they made further payments on two occasions amounting to $1,935.57 and $2,158.28.

7 These difficulties arose because the parties disagreed over the effect and the implementation of the arrangement, in particular with reference to the defendants' handling of the claims, the issuance of their debit notes, and the payment of the plaintiffs' invoices.

The plaintiffs' claim in the action

8 The plaintiffs claimed against the defendants:

> (a) $1,785,786.72 being the sum of the plaintiffs' invoices with no set offs for debit notes issued after January 2002; or
>
> (b) (i) $11,053.24 being the unpaid balance of the plaintiffs' invoices after setting off the defendants' debit notes, and
>
> (ii) damages; or

(c) an account of all sums due from the defendants to the plaintiffs.

9 The defendants did not admit any part of the plaintiffs' claims. They maintained that their debit notes were valid, that they had dealt with the claims and settlements properly, and that there were no further payments due to the plaintiffs.

10 The plaintiffs pleaded in their statement of claim that:

> 3(c) It is a term of the Taxi Agreement that:
>
> (i) The Plaintiffs will invoice the Defendants 80% of the costs of the accident damage repairs to the CityCab Taxis;
>
> (ii) The Defendants will pay the amount invoiced to the Plaintiffs within 30 days of the Plaintiffs' invoices;
>
> (iii) In the event the driver (or his/her insurers) of the other vehicle involved in the accident offers the Defendants a settlement of the claim for repair costs at a sum below the amount so claimed, the Defendants will be able to recover from the Plaintiffs any over-payment under the revenue sharing scheme agreed, described in the aforesaid minutes as the "over-payment of profit sharing for the difference between the claim amount and the settlement received" ("Over Payment Return").
>
> 3(d) [I]t was *an implied term* of the Taxi Agreement that the Defendants would *use all reasonable efforts* to pursue the claims for repair costs and other claims, would use due diligence in pursuing such claims, would keep the Plaintiffs informed of such efforts and would *consult the Plaintiffs* and would *obtain the Plaintiffs' approval* with respect to any settlement proposed. [note: 3]
>
> [emphasis added]

The handling of the claims

11 The plaintiffs alleged that between 1997 and 1998 the defendants consulted and sought their approvals on the settlement of the claims, and in cases where settlement fell below 80% of invoiced amounts, the plaintiffs would issue credit notes to the defendants which the latter would use to set off against any sums due to the defendants. In 1999, the procedure was changed whereby the defendants issued debit notes to the plaintiffs instead of the plaintiffs issuing credit notes to the defendants. The plaintiffs did not state whether the change from the use of debit notes in place of credit notes was made with their agreement. Nevertheless, the defendants continued to provide information to and seek the approval of the plaintiffs on settlements up to 2002. [note: 4]

12 The procedure changed further in January 2002. The defendants did not inform or consult the plaintiffs on the claims or to seek their approval. When claims were settled below the 80% level, the defendants issued debit notes to the plaintiffs on the shortfalls and set off the amounts from payments due to the plaintiffs. The plaintiffs alleged that the debit notes the defendants issued did not contain sufficient particulars to match them to the plaintiffs' invoices, and did not contain any information on the settlements. [note: 5]

13 The defendants admitted in their pleaded defence that they had consulted and sought the

plaintiffs' approval on settlements up to January 2002 but they denied that they were obliged to do that. [note: 6] Subsequently they tried to change their position without amending their defence, and denied that they had consulted the plaintiffs or sought their consent before 2002. [note: 7]. The defendants also denied that their debit notes were lacking in content.

The debit notes

14 The plaintiffs had two primary complaints over the debit notes, that

(a) the debit notes issued from January 2002 and the consequential clawbacks set off against the plaintiffs' invoices were invalid because the defendants did not consult and seek the plaintiffs' approval for the settlement of claims; and

(b) the defendants had not dealt with the claims reasonably and diligently.

Whether the terms pleaded in para 3(d) of the Statement of Claim can be implied

15 There was little evidence on the circumstances in which the agreement between the parties was arrived at. Tee Swee Kiong, the founder and former director of the plaintiffs filed an affidavit of evidence-in-chief in which he asserted that the parties agreed that it was agreed that the plaintiffs would be involved in any decision on the settlement or dropping of any claim (which meant that this was an express term of the agreement rather than an implied term as the plaintiffs pleaded). However, he did not give evidence during the trial on medical grounds that he had pulmonary fibrosis, bronchiectasis, chronic bronchitis and emphysema, although he was recorded on video in apparent good health meeting with other persons for a meal at a coffee shop and doing shopping at a supermarket. I was prepared to allow for medical facilities to be made ready and available when he gave his evidence, but he decided that he would not attend court to testify. In the circumstances, his affidavit was not admitted in evidence as there was no reason for it to be admitted under O 38 r 2(1) of the Rules of Court (Cap 322, R5, 2006 Rev Ed) ("Rules of Court") if he could not be cross-examined on the disputed contention.

16 The plaintiffs' assertion that the defendants consulted them and sought their approval from the time the agreement came into force in 1997 till January 2002 was accepted by the defendants with the qualification that they were not obliged to do that under the terms of the agreement.

17 There was, however, no contemporaneous evidence on the origin for that practice. There was nothing to show if the consultations and approvals were done on a contractual or voluntary basis.

18 The plaintiffs had an interest in the settlement of the repair claims with third parties. As the defendants can set off the over-payment returns from payments due to the plaintiffs, the plaintiffs were affected by the settlements. The arrangement was that the defendants were in charge of the claims, including the costs and expenses that may be involved. It would appear onerous that while the defendants had the burden of dealing with and funding the claims, they needed the approval of the plaintiffs for all settlements.

19 In the absence of contemporaneous records, the conduct of the parties had to be referred to to ascertain whether they conducted their affairs on the basis that there was an agreement that the plaintiffs had to be consulted and their approvals obtained for any settlement.

20 Two letters of the plaintiffs were of assistance for this purpose. First, there is a letter from the plaintiffs, signed by Tee Swee Kiong to the defendants dated 17 April 2003 [note: 8] which stated:

> With reference to our meeting on April 17, we have mentioned that the number of outstanding accident claim cases was about on thousand cases.
>
> We have the understanding that the corporate legal department is handling the outstanding cases which is in our opinion the claims process is rather lengthy. We have spent much time going through the above mentioned cases and realized that a number of the claim cases are not settled within the required time.
>
> In order to facilitate the process we would sincerely request the authority concern to grant the right to assist [the Defendants] in resolving the outstanding cases. We would like to propose that CityKen Pte Ltd takeover the rest of the outstanding cases. Furthermore we will set up a claim department at no cost to [the Defendants].
>
> In order to justified the basis of the settlement . We would like to assure that all the recovery amount will be duly channeled to [the Defendants] supported with proper documentation proof.
>
> We are confident that the above arrangement will be beneficial to all parties involved.

and a subsequent letter from the plaintiffs signed by its executive director Alan Tee Wee Loong ("Alan Tee") to the defendants dated 31 May 2005 [note: 9] which dealt with a specific claim, but contained the following important passage:

> Contrary to what was previously agreed at the beginning of our working relationship, we note that it has been a long while since we are consulted concerning the progress of any files. This has left us in the dark as to what has happened to the many repair claims.

The earlier letter was written while the working relationship between the parties was ongoing, while the second letter was written after that was terminated.

21 The first letter was written in April 2003, more than a year after the defendants ceased to consult the plaintiffs and seek their approvals for settlements but while the contractual relationship was continuing. An agreement on the consultation and approval would be a significant aspect on the working relationship between the parties and it would be reasonable to expect the plaintiffs to bring it up in their letter. Even if the plaintiffs were concerned about straining the working relationship with allegations of breach of duty, a polite reminder of the agreed arrangement could have been made, but there was no reference to it in the letter.

22 After the working relationship was terminated on 30 September 2003, Alan Tee complained to the defendants in the second letter of 31 May 2005 that the plaintiffs had not been consulted, but there was no complaint that their approvals were not sought. There was no reason for further restraint at this time.

The legal principles applicable on the finding of implied terms

23 The plaintiffs submitted that:

> In relation to implied terms, a term will be implied in a contract if it is necessary in the business sense to give efficacy to the contract i.e. if it is so obvious that it goes without saying. [note: 10]

and cited two cases, *Reigate v Union Manufacturing Co (Ramsbottom)* [1918] 1 KB 592 and *Forefront*

Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd [2006] 1 SLR(R) 927 in support.

24 The former case is authority for the business efficacy test as explained by Scrutton LJ at p 605:

> 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.

and in the latter case, Andrew Phang Boon Leong J discussed the rationale for the business efficacy test and the officious bystander test set out by MacKinnon LJ in *Shirlaw v Southern Foundries (1926) Limited* [1939] 2 KB 206 at 227:

> 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!'

and concluded that the two tests are complementary test. Both tests would apply to a business contract but the first test would not apply to non-business contracts where the issue of business efficacy does not arise and only the officious bystander test will apply.

25 The agreement between the parties was a business agreement. Applying the tests to the facts, it is quite clear that the plaintiffs' approval of settlements was not necessary to give efficacy to the agreement between the parties. To the contrary, such a requirement can be abused by the plaintiffs to withhold their approval for settlements to avoid making clawback payments to the defendants. An officious bystander will not say that the plaintiffs must have a veto power over the settlement of claims.

26 The argument that the defendants should consult the plaintiffs on settlements was not without basis. In a situation where the defendants were obliged to use proper efforts and diligence in dealing with claims, and where there was no necessity for them to seek the plaintiffs' approval on settlements, the plaintiffs would not be unreasonable to want to be consulted. However, when the plaintiffs did not insist on an express term for this, they had to satisfy the business efficacy test and the officious bystander test, and they have failed to do that, particularly when there was an implied term that the defendants were to use reasonable care and due diligence in settling the claims.

27 The plaintiffs alleged that it was implied that the defendants would use reasonable efforts and due diligence in settling the claims. The balance tilted in favour of such an implied term as the defendants were entitled to recover shortfalls in settlements from the plaintiffs. It was essential to the plaintiffs that the claims were pursued properly and be settled on reasonable terms. As the handling of the claims was left to the defendants, they should, by the business efficacy and officious bystander tests, be obliged to exercise reasonable care and diligence in settling the claims. It is quite unthinkable that the defendants were entitled to deal with the claims as they saw fit, and be allowed to reclaim the shortfalls from the plaintiffs. Indeed, while the defendants denied this implied term in their pleaded defence, their case at the trial was that they had dealt with the claims and settlements properly.

Complaints over the handling of the claims

Complaints over the handling of the claims

28 The plaintiffs alleged that:

(i) The Defendants had failed to consult them on settlements from 2002 onwards;

(ii) The Defendants' debit notes lacked sufficient particulars to enable the Plaintiffs to identify in respect of which vehicle/repair job they related to;

(iii) The Defendants did not provide sufficient information relating to the settlement of claims from 2002 onwards. [note: 11]

29 Complaint (i) is disposed of by my finding that there was no implied term that the defendants were to consult the plaintiffs on the settlements.

30 Complaints (ii) and (iii) related more to the manner in which the defendants made the clawbacks than to the manner in which they settled the claims, but nevertheless it was relevant to the issue whether the defendants were entitled to make the clawbacks.

31 The plaintiffs complained that the debit notes did not contain their invoice numbers, the defendants' work order numbers, the dates of the accident and the dates of the repairs, which were needed for the plaintiffs to match the debit notes to the invoices. The plaintiffs disputed the debit notes' validity because they did not contain these particulars. [note: 12]

32 This was a serious complaint. The amounts set off through the debit notes were substantial. As this was an ongoing process, it would have been reasonable for the plaintiffs to raise the issue with the defendants as the amounts were set off. There were no records of any request from the plaintiffs to the defendants for information on their debit notes.

33 The defendants' case was that the plaintiffs had the information. In an interesting development, the defendants called a former employee of the plaintiffs, Yeow Mey Hwa ("Yeow") as their witness.

34 Yeow's evidence was that when she was employed by the plaintiffs as a Senior Accounts Assistant, she worked out the figures in the debit notes the defendants issued. She received the claim file from the defendants' claims officers after a claim was settled, and she worked out the figure to be clawed back and a debit note for the figure would be raised by the defendants. [note: 13] She also described how the defendants' payments were made:

> The Defendants' cheque payments on the invoices raised by the Plaintiffs would normally be attached to their Payment Voucher which set out a list of the invoices being settled and a list of the Debit notes which the Defendants were using to set off the total sum of those invoices. The time taken by the Defendants to issue their Payment voucher utilizing the newly raised Debit notes to set off the Plaintiffs' invoices would be about two to three months. The reason for this is because the Defendants were usually prompt in making their payments. For example, if the Defendants issued their Payment Voucher in March for invoices raised by the Plaintiffs in February, the Defendants would utilize the Debit notes raised in January to set off the February invoices. [note: 14]

35 She added that:

[T]o the best of my knowledge and belief, the Plaintiffs did not during my tenure as their Senior Accounts Assistant raise any questions, or objections to the following, or any of them, namely:

(a) my recovery sum, Debit and Credit note calculations;

(b) the Debit notes issued by the Defendants which were based on my calculations; and/or

(c) the Defendants utilizing all relevant Debit notes to set off against the Plaintiffs invoices. [note: 15]

36 Yeow's evidence was corroborated by Chong Lye Peng Jenny, the defendants' former Accounts Officer who deposed in her affidavit of evidence-in-chief that the defendants' payment system was converted from a manual system to an electronic system in February 2002. After the change, the defendants' payment was made by a payment advice with brief details on the amount to be paid, the invoice number and invoice date, as well as the defendants' cheque, which can be torn off from the payment advice slip, and the payment advice slip would normally have an attached listing of the plaintiffs' invoices and the defendants' debit notes.

37 The plaintiffs, on the other hand, relied on the evidence of their former employee Lee Cheng Hai ("Lee") whose evidence was that the defendants' cheques were issued with no accompanying documents. Lee's dealings with the documents were limited. He was not engaged in the finance or accounting workings of the plaintiffs. His role was to collect documents from the defendants and he did not check or make a record of the documents he received from the defendants and handed to the other employees of the plaintiffs. Consequently, the reliance that should be placed on his evidence must be correspondingly limited.

38 There was more reliable evidence from other witnesses of the plaintiffs on the documents. The first of these witnesses was Bob Yap Cheng Ghee of KPMG Forensic which was engaged by the plaintiffs to establish the amount of the unpaid invoices of the plaintiffs. In the course of his work, he had gone through the plaintiffs' records, and he confirmed that he had seen the defendants' payment vouchers with attachments. [note: 16]

39 The second witness, Caroline Tan Shirui ("Caroline Tan"), manager of the plaintiffs, agreed that some of the defendants' debit notes came with attachments which showed the invoices that were set off, [note: 17] although she maintained some other debit notes were without attachments.

40 In addition to these witnesses' evidence, there was documentary evidence. There were monthly statements of accounts which the defendants brought into the proceedings. They claimed to have received the statements, which listed the plaintiffs' unpaid invoices, from the plaintiffs, and Yeow confirmed that she had generated such statements when she was in the plaintiffs' employ.

41 The plaintiffs denied that the statements were their statements, and claimed that they had not authorised the statements to be sent to the defendants. That was a very late denial. The plaintiffs were informed by the defendants of these statements of accounts when the defendants made discovery of them in their first List of Documents and third Supplementary List of Documents which were filed before the commencement of the trial. The plaintiffs did not raise any objections to them on either occasion, and were deemed to have admitted the authenticity of the statements under O 27 r 4 of the Rules of Court. In their closing submissions, the plaintiffs argued that:

[T]he [Statements of Accounts] were only produced during the course of the proceedings. This is

despite the fact that a discovery order was made against the Defendants. [note: 18]

without explaining why they did not object to them when they received them within the time allowed by the rule.

42 There was evidence that the plaintiffs knew that the statements were issued. First, there was an exchange of emails between Don Tay Boon Kim ("Don Tay") and Shirley Yeo Poh Choo ("Shirley Yeo"). The former was a former accounts assistant of Auto Ventures Pte Ltd, an associate company of the plaintiffs, while the latter was a senior accounts officer of the defendants. Shirley Yeo filed an affidavit of evidence-in-chief where she exhibited an exchange of emails between her and Don Tay. [note: 19] In one message Don Tay sent to Shirley Yeo a statement of account, and in her email to Don Tay, Shirley Yeo requested Don Tay to make a correction to the statement. The requested correction was noted on one of the statements the defendants disclosed in the course of discovery. [note: 20] While Don Tay maintained that he did not deal with the accounts of the plaintiffs, he conceded that he could have assisted the accounting staff of the plaintiffs to send the statements of accounts to the defendants.

43 The defendants also produced an exchange of emails [note: 21] between Pang Yee Li ("Pang") who was a Finance Executive of Auto Ventures (Asia) Pte Ltd and Shirley Yeo which referred to a statement of account which Shirley Yeo deposed was that it was a statement of account of the plaintiffs. Pang disputed that and claimed she had never dealt with the plaintiffs' accounts, but she was contradicted by the evidence of Alan Tee and Caroline Tan that she was involved with the plaintiffs' accounts.

44 On the evidence, while the debit notes themselves did not contain particulars for the plaintiffs to identify the vehicles and repairs they related to, the plaintiffs had that information because the defendants had forwarded the claim files to Yeow, the information was supplied together with the defendants' payment cheques, and the plaintiffs' statement of accounts showed that they knew which of their invoices had remained unpaid.

The defendants' handling of the claims

45 The plaintiffs alleged that the defendants had not exercised diligence in handling the claims. As it has been established that there was a contractual term to use reasonable efforts and diligence, the defendants were indeed obliged to do that.

46 The plaintiffs' allegation of negligence was made in September 2007 when the statement of claim was amended for the first time. The evidence of negligence that the plaintiffs relied on at the trial was not in existence then. The evidence came later in the form of a report by David Poon Soon Cheong ("Poon"), a Senior Executive of the plaintiffs with experience in motor accident claims. He was instructed in early 2008 to inspect thousands of the defendants' claim files. His brief was, in his words, "to highlight any instances of negligence". He deposed in his first affidavit of evidence-in-chief that he "personally went through each of the files and looked through each of them" [note: 22] and submitted and undated report of his findings which did not indicate how the claims should have been settled in his view.

47 Poon deposed a supplementary affidavit of evidence-in-chief in which he revised the level of his personal involvement in examining the files. He clarified that "a team of assistants supervised by me reviewed and recorded the contents of each of the said files" and "I then reviewed each claim file together with the claim form to confirm that the contents were correctly recorded". [note: 23]

48 A few observations and comments in the review process are apposite. First, it appears that the plaintiffs had alleged negligence against the defendants even before the files were reviewed and the report was compiled. Second, it would be preferable that the review and report be done or verified by independent persons rather than the plaintiffs' employees. Third, the review process did not include seeking clarifications, where possible, from the defendants' claim officers, witnesses and the parties and the lawyers the defendants engaged. There are numerous factors that can affect the settlement of a motor accident claim including the availability and quality of evidence, the size of the claim, the time and legal costs that may have to be incurred, and the advice of lawyers. It is not sufficient for someone to look through a file and make a finding without seeking any clarification or explanation.

49 When Poon was examined by counsel for the defendants, he clarified that about 2000 claim files were reviewed, out of which 924 files were picked out in his report. It was unclear who had selected the 924 files. He admitted during cross-examination that he did not go through every one of the files himself, [note: 24] then he changed position and said that he selected the files. [note: 25]

50 The basis for the selection of the files was also unsatisfactory. When counsel took him through one of the files that were picked up, which Poon had made a note that the settlement was "OK in view that liability was not clear-cut". [note: 26] His reason for listing this was a negligent settlement was that "[t]hey could have settled on a higher percentage". [note: 27]

51 Other disclosures followed after counsel went through more files with him:

> Q … So now we are --- and this is your report on negligent handling of cases, correct? Then we have seen that actually, it refers to cases which you now say are not negligent.
>
> A Yes.
>
> Q So why you go and put non-negligent, okay cases under a negligent --- under a list of negligent cases?
>
> A As I've said, at the time of signing the affidavit, I must admit I did not go through everyone of it under the exhibition, the annex 2.
>
> Q It's not the affidavit anymore, you know. It's the report, the report itself.
>
> A Yah, correct, I did not go through everyone of it. [note: 28]

and:

> Court: [H]ow did incorrect cases get to be inside your report actually? You know, how did the okay cases get to be included in your report?
>
> Witness: I suppose the person who select this one. [note: 29]

which diminished the credibility of the whole review process and his report.

52 The defendants' reply to Poon's report was in the form of a report by Foo See Tiong ("Foo"), a divisional Vice President of the defendants on 50 of the files picked up by Poon.

53 He was not qualified to undertake that task. By his own admission, he was not an expert on claims as he had no experience in dealing with them. After hearing his evidence, I find that he was no better a witness than Poon and his evidence was not helpful to the defendants' case.

54 Ultimately, was the allegation of negligence made out? The burden of proof was on the plaintiffs. They alleged negligence even before they inspected the claim files, then they assigned Poon, their employee to undertake the task. Although he presented a report, it was an unsatisfactory report for the reasons I have mentioned. My conclusion is that the allegation was not proved.

The plaintiffs' claim of late payment of their invoices

55 The plaintiffs had pleaded that the agreement specifically provided that the plaintiffs' invoices were to be paid in 30 days.

56 Moving on, the plaintiffs referred to an internal memorandum from Foo to the defendants' CEO dated 21 May 2003 [note: 30] that:

> 1.2 Based on the accident claims recovery status report in April 03 … the recovery rate of the outstanding cases was slow. There was little or no progress made to those cases from the years 1997 to 1999.
>
> …
>
> 2.1 [The Defendants] undertook all the taxi accident repairs and insurance claims from CityCab from Sep 97 to Aug 01 and sub-contracted the project to [the Plaintiffs]. The arrangement of the billing was such that [the Plaintiffs] and [the Defendants] would receive 80% and 20% of the repair bill respectively. [the Defendants] paid [the Plaintiffs] 80% of the repair bills once the repair jobs were completed. In other words, [the Defendants] is the creditor of $2.86 million. In an event of discrepancy between the claims and final settlement bill, the difference would be shared in a similar proportion by [the Plaintiffs] and [the Defendants] respectively, i.e. 80% and 20%.
>
> …
>
> 5.1 [The Defendants] is the creditor of the outstanding claims i.e. about $2.73 million as at 1 April 2003. If the claims are not recovered or fully recovered, [the Defendants] has to seek refunds, to make up for the difference from the contractor, [the Plaintiffs]. As the outstanding claims have been long overdue and unable to be unsettled with the third-party insurance companies, the quantum of recovery would not be high. On an average, it may be as low as 40%. Based on this assumption [the Plaintiffs] will have to refund [the Defendants] a sum of $1.64 million. Therefore, I suggest [the Defendants] *continues to withhold the $1.7 million payments due to [the Plaintiffs]*.
>
> [emphasis added]

57 Foo admitted during cross-examination that the payments were held back. [note: 31] He tried to justify that on the basis that the defendants "followed … commercial practice, we are in business", [note: 32] but accepted upon further questioning that "commercial practice" does not override contractual obligations. [note: 33]

58 There was *prima facie* evidence the defendants had held back and were continuing to hold back payment of the plaintiffs' invoices beyond the 30-day period, but the defendants objected that there was no claim for this. The defendants also contended that even if there was a proper claim for late payment of the invoices, the claim was not made out, the memorandum and Foo's admission notwithstanding.

59 The plaintiffs' response was that their case "at the beginning of these proceedings was that the Defendants were in breach of contract in that they had wrongfully withheld payments due to the Plaintiffs." [note: 34]

60 A reading of the statement of claim which was amended twice shows that it was pleaded that it was an express term of the agreement that the defendants were to pay to the plaintiffs' invoices within 30 days. However, while that was stated as a term of the contract (together with the alleged implied terms), there was no assertion that this term was breached by the defendants, whereas breaches of the alleged implied terms were spelt out. This omission was not confined to the statement of claim, but has also carried over to the plaintiffs' opening statement. It cannot be said in the circumstances that this claim was a part of the plaintiffs' case at the beginning of the proceedings. The plaintiffs' pleaded case and the reliefs they sought related to the alleged implied terms only. I therefore rule that this claim falls outside the plaintiffs' case.

The plaintiffs' claim for $11,053.24 for unpaid invoices

61 The plaintiffs initially claimed payment for 31 invoices. The defendants denied liability on the invoices. The defendants' Assistant Vice President of Corporate Finance, Lim Ai Choo ("Lim") went through the claims for the 31 invoices and filed an affidavit in which she set her findings on the invoices. [note: 35]

62 During the trial, the plaintiffs' witness, Caroline Tan was cross-examined at length on them and this was referred to in the defendants' closing submissions. [note: 36] At the close of the case, the plaintiffs reduced this claim to 15 invoices totalling $11,053.24 [note: 37] and they responded to Lim's findings on those 15 invoices in their closing submissions. [note: 38]

63 The objections taken by the defendants to the invoices were that they were, *inter alia*,

(a) already paid;

(b) not payable following the re-classification of the claim;

(c) issued twice for the same repairs;

(d) raised for work contracted to another company, City Auto Testing Centre;

(e) not related to repair works and were not covered under the agreement between the parties (eg, towing charges, refuse disposal charges, photocopying charges);

(f) issued to another company, SBS Bus Services; and

(g) time-barred.

64 I reject the plaintiffs' claim on the 15 invoices. I will not repeat the arguments and counter-

arguments made in the submissions. On the factual aspects of the disputed matters, I agree with the positions of the defendants. I will add that on the claims for towing, refuse disposal and photocopying charges, there was no assertion that there was any express or implied term that the defendants were to pay for them. These appear to be expenses incurred in the repairing process and the making of claims, which were matters within the plaintiffs' responsibility, and should be borne by them.

65 On the issue of time-bar, the plaintiffs had contended that:

> [T]here was a running account between the parties and it was understood that the balance would be settled within 3 months of the termination of the contractual arrangement between the parties. The allegation of time-bar is therefore not a good defence. [note: 39]

Nothing more was stated of the running account. Lord Pearson had made clear in the decision of the Privy Council in *Bajaj Textiles Ltd v Gian Singh & Co Ltd* [1971] 2 MLJ 133 at 135 that:

> [A] claim on a running account would be insufficient as a matter of pleading unless particulars were given either of an account stated (the parties having agreed the amount outstanding) or of the mutual transactions from which the outstanding balance arose.

The plaintiffs had not provided any particulars of the running accounts that they were referring to, and there was no assertion or evidence that the invoices in question formed part of the accounts and were accepted by the defendants. The plaintiffs' reliance on the running account was unfounded.

Conclusion

66 The plaintiffs' claims against the defendants are dismissed, and I will hear the parties on the question of costs.

[note: 1] Statement of Claim (Amendment No. 2) paras 3(c) (i)–(iii)

[note: 2] AB1–1A, minutes of meeting of 11 July 1997

[note: 3] Statement of Claim (Amendment No. 2) para 3(c) and (d)

[note: 4] Statement of Claim (Amendment No. 2) para 5

[note: 5] Statement of Claim (Amendment No 2) para 6

[note: 6] Defence (Amendment No 4) para 4

[note: 7] Defendants' Closing Submissions para 189

[note: 8] AB27

[note: 9] AB89

[note: 10] Plaintiffs' Closing Submissions para 44(iii)

[note: 11] Plaintiffs Closing Submissions para 95

[note: 12] Affidavit of Evidence-in-Chief of Alan Tee paras 31 to 34

[note: 13] Affidavit of Evidence-in-Chief of Yeow Mey Hwa paras 6, 14, 15, 23 and 25

[note: 14] Affidavit of Evidence-in-Chief of Yeow Mey Hwa para 27

[note: 15] Affidavit of Evidence-in-Chief of Yeow Mey Hwa para 42

[note: 16] Notes of Evidence 27 August 2008, page 117, lines 6–8

[note: 17] Notes of Evidence 1 September 2008, page 51 line 28 to page 52 line 4

[note: 18] Plaintiffs' Closing Submissions para 186

[note: 19] Affidavit of evidence-in-chief of Shirley Yeo Poh Choo, exh SYPC–4

[note: 20] 31DBD12910.1

[note: 21] 31DBD12851.131

[note: 22] Affidavit of evidence-in-chief of David Poon Soon Cheong para 5

[note: 23] Supplementary Affidavit of evidence-in-chief of David Poon Soon Cheong paras 5 and 6

[note: 24] Notes of Evidence 28 August 2008, page 70 lines 28–31, page 50 lines 31 to page 51 line 3, lines 17–18

[note: 25] Notes of Evidence 28 August 2008 page 72 lines 9–10, page 72 lines 16–17

[note: 26] Notes of Evidence 28 August 2008 page 48 lines 18–20

[note: 27] Notes of Evidence 28 August 2008 page 49 line 31

[note: 28] Notes of Evidence 28 August 2008 page 70 lines 22–31

[note: 29] Notes of Evidence 28 August 2008 page 71 lines 10–13

[note: 30] 1DBD83–86

[note: 31] Notes of Evidence 21 November 2008 page 14 lines 17–21

[note: 32] Notes of Evidence 21 November 2008 page 14 lines 30–31

[note: 33] Notes of Evidence 21 November 2008 page 15 lines 16–18

[note: 34] Plaintiffs' Closing Submissions para 165

[note: 35] Supplementary Affidavit of evidence-in-chief of Lim Ai Choo, exh LAC–7

[note: 36] at paras 318–415

[note: 37] Plaintiffs' Closing Submissions paras 37(i), para 38(viii)

[note: 38] Plaintiffs' Closing Submissions Annex A

[note: 39] Plaintiffs' Closing Submissions Annex A para 2