PPG Industries (Singapore) Pte Ltd *v* Compact Metal Industries Ltd [2013] SGCA 23

Case Number	: Civil Appeal No 125 of 2011
Decision Date	: 14 March 2013
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA
Counsel Name(s)	: Nicholas Narayanan (Nicholas & Tan Partnership LLP) for the appellant; Michael Por Hock Sing and Er Jing Xian Cindy (Michael Por Law Corporation) for the respondent.
Parties	: PPG Industries (Singapore) Pte Ltd — Compact Metal Industries Ltd

Contract – Remedies – Remoteness of Damage

Damages – Assessment

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2012] SGHC 91.]

14 March 2013 Judgment reserved.

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

Introduction

1 This is the defendant's appeal against the decision of the High Court judge ("the Judge") in *Compact Metal Industries Ltd v PPG Industries (Singapore) Pte Ltd* [2012] SGHC 91 ("the GD").

2 Having carefully considered the arguments of both parties, we are of the view that the Judge's decision and reasoning ought to be affirmed – with the exception of two particular issues (*viz*, that relating to the award of damages for additional site preliminaries incurred by the plaintiff as part of the delay costs incurred for late installation of the panels in question, and that relating to the defendant's counterclaim). For the reasons set out below, we allow in part the defendant's appeal with regard to the first issue, *viz*, the award of damages to the plaintiff for additional site preliminaries. In so far as the second issue regarding the defendant's counterclaim is concerned, we remit it back to the Judge below for her decision because (as both parties correctly conceded) the GD does not disclose the Judge's decision and reasoning in relation to the defendant's counterclaim. However, we respectfully *differ* from *the reasoning* (*albeit not the decision*) given in the GD with regard to *one* other issue (*viz*, whether the plaintiff was entitled to claim from the defendant the liquidated damages that it had to pay to the main contractor as a result of the defendant's breach of contract). We will elaborate on both the point about the additional site preliminaries and the point about the liquidated damages below. Before proceeding to do so, we note that the facts have been comprehensively set out by the Judge in the GD and we will therefore not rehearse any of the facts, save to the extent that they impact on the points just mentioned.

The award of damages to the plaintiff for additional site preliminaries

3 The damages awarded by the Judge for the additional site preliminaries represented the costs incurred by the plaintiff's subsidiary, Façade Master Pte Ltd ("Façade"), for the additional days of

delay in the completion of the project that were caused by the defendant's failure to provide paint of a satisfactory quality. These costs include staff salaries, transportation costs, equipment costs and utilities bills. The Judge awarded the plaintiff damages totalling $1,040,662.35 for 273 days' worth of costs expended on additional site preliminaries. The Judge accepted, *inter alia*, the view of the plaintiff's expert, Keith Pickavance ("Pickavance"), that the defendant's breach of contract caused 273 days of delay in the completion of the project.

4 Before us, the defendant argues that it is inequitable for the Judge to allow damages for 273 days of delay when the project's architects, RSP Architects Planners & Engineers (Pte) Ltd ("RSP"), had granted extensions of time totalling 168 days to the project's main contractor, Taisei Corporation ("Taisei"), and, as such, the project would have been delayed in any event even if there were no problems with the paint. In support of its position that the Judge's decision to award 273 days' worth of additional site preliminaries should be upheld by this court, the plaintiff essentially relies on Pickavance's view that the paint tonality issue caused a critical delay of 273 days in the completion of the project with no concurrent causes of delay. The plaintiff also points out that the Judge accepted Pickavance's view and that the defendant had made no arguments that challenged the analysis advanced by Pickavance in his expert evidence.

5 In our view, the sole issue that arises here is that of *causation*. The but-for test is used to determine factual causation for the purposes of contract law: see the decisions of this court in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782 at [63] and *Anti-Corrosion Pte Ltd v Berger Paints Singapore Pte Ltd and another appeal* [2012] 1 SLR 427 at [39]. Thus, the crucial question is whether the 273 days' worth of additional site preliminaries (or part thereof) would not have been incurred by the plaintiff but for the defendant's breach of contract. To recast this question: Whether the 273 days of delay in the completion of the project (or part thereof) were caused by the defendant's breach of contract, or by some other delaying event.

6 In this regard, both parties' expert witnesses on the issue of delay, namely Pickavance and Thomas Anthony Harker ("Harker"), proffered diametrically opposed views as to the cause of the 273 days of delay in the completion of the project. Pickavance opined that the defendant's failure to provide paint of satisfactory quality *solely* caused the entire 273 days of delay and there were no concurrent causes of delay. On the other hand, Harker opined that not a single day of delay was caused by the defendant's breach of contract.

7 In our view, both experts' positions are unreasonable and cannot, by any measure of logic and common sense, be accepted in their entirety (if at all). It cannot reasonably be said that the defendant's breach of contract caused absolutely *no* delay to the completion of the project, particularly since the parties had spent several months to achieve a satisfactory quality of the paint. Harker's position is, with respect, untenable and unrealistic.

8 On the other hand, it seemed (at least at first blush) that the defendant could not have been *solely* liable for the full 273 days of delay, because there were other delaying events which in all likelihood contributed in some measure to the 273 days of delay in the completion of the project. The numerous delaying events for which Taisei sought to obtain extensions of time from RSP are represented in the breakdown of delaying events appended to an affidavit filed on behalf of RSP. Out of these delaying events, RSP granted Taisei extensions of time totalling 168 days for four specific delaying events. Counsel for the defendant conceded during oral submissions (correctly, in our view) that two of these delaying events could not be relied upon by the defendant in the present appeal, *viz*, "Reinstatement Works to Podium Granite Cladding at GL 1/F & 5/F" and "Removal of concrete encasements to Elevation 4 shafts steel structures", for which a total of 81 days of extensions of time were granted by RSP to Taisei.

9 We are left with two specific delaying events which are relevant to the present appeal; they are "No Noisy Work/Stop Work Orders" and "Exceptionally adverse weather conditions", for which 78 days and 9 days of extensions of time, respectively, were granted by RSP. Both delaying events were not attributable to the defendant's fault, but in all likelihood did contribute to the ultimate delay in the completion of the project. If work at the project site was ordered to stop or weather conditions were so adverse that works could not proceed, it stands to reason and common sense that these two delaying events would have consequently caused some measure of delay in the completion of the project, and it must follow that the defendant should not have been held liable for the delay in the completion of the project which was caused by these two delaying events. RSP's decision to grant Taisei extensions of time for these two specific delaying events is further acknowledgement that these two delaying events did cause delays in the completion of the project. Therefore, we reject Pickavance's view that there were no concurrent delays in the completion of the project, for it does not accord with either logic or common sense. We do not find Pickavance's explanation to the effect that the two delaying events did not cause concurrent delay to the completion of the project persuasive. In particular, in so far as the adverse weather conditions were concerned, Pickavance's explanation that it could only have reduced the degree of acceleration works done and could not have caused delays is plainly contrary to the ordinary course of nature and common sense. If inclement weather could have caused acceleration works to be delayed, then, *a fortiori*, it should naturally follow that the works for the project would have been delayed as well.

10 At this juncture, we would also like to point out that the opinions of experts will always remain as opinions and do not bind the court concerned. This is particularly the case where the expert's opinion relates to an issue of mixed fact and law, as is the case here (*ie*, the issue of causation). With respect, we found the views of both experts in the present case to be of limited utility in helping us to address the issue at hand inasmuch as they both adopted extreme positions which were (as noted above) inconsistent with both common sense and logic.

11 For the reasons set out above, we are of the view that the defendant should not be held liable for the entire 273 days' worth of additional site preliminaries. The defendant should only be liable for 186 days' worth of additional site preliminaries. We therefore allow the defendant's appeal in this respect and reduce the damages awarded to the plaintiff for the additional site preliminaries from $1,040,662.35 (being $3,811.95 multiplied by 273 days of delay) to $709,022.70 (being $3,811.95 multiplied by 186 days of delay).

The claim for liquidated damages by the plaintiff

12 As already pointed out above (at [2]), whilst we agree with the Judge that the plaintiff was entitled to claim from the defendant the liquidated damages that were paid to the main contractor as a result of the defendant's breach of contract, we would respectfully differ from the *reasoning* she adopted in arriving at that particular decision.

13 In particular, the Judge held that the *second* limb of the rule in the celebrated English decision of *Hadley v Baxendale* (1854) 9 Exch 341; 165 ER 145 ("*Hadley*") applied and that the plaintiff had satisfied the requirement of actual knowledge on the part of the defendant under this limb (see the GD at [105] and [114]). The rule in *Hadley* was affirmed by this court in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another* [2008] 2 SLR(R) 623 ("*Robertson Quay*"); *MFM Restaurants Pte Ltd and another v Fish & Co Restaurants Pte Ltd and another appeal* [2011] 1 SLR 150; and *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2013] SGCA 15. The relevant reasons as well as rationales were canvassed in some detail in these decisions and we will therefore not rehearse them in this judgment.

14 The *second* limb of the rule in *Hadley* applies, of course, in the situation of *extraordinary or non-natural* damage. In order, therefore, to fix the defendant with liability for the damage or loss arising in this particular regard, *actual* knowledge on the part of the defendant must be shown. As this court observed in *Robertson Quay* (at [82]), as damage which falls under the second limb in *Hadley* does "*not*, by its *very nature*, [fall] within the reasonable contemplation of the contracting parties", it would, "[i]n the circumstances ... be both *unjust and unfair* to *impute* to them knowledge that such damage or loss would arise upon a breach of contract" [emphasis in original]. This court then proceeded to observe, as follows (*ibid*):

> *However*, *if* the contracting parties, *having had the opportunity to communicate with each other in advance*, had *actual* (as opposed to imputed) knowledge of *the special circumstances* which resulted in the "extraordinary" or "non-natural" damage, then it is *neither* unjust *nor* unfair to hold the contract-breaker liable in damages for such damage. If, *armed with* such *actual* knowledge, the contracting parties do not make express provision in their contract for what is to happen in the event of a breach of that contract resulting in "extraordinary" or "non-natural" damage, *then they must be taken to have agreed that should such damage occur, the contract-breaker would be liable for such damage*. [emphasis in original]

15 At this juncture, it is pertinent to note that the facts and circumstances giving rise to the present appeal are *sui generis*. Correspondingly, the decision should be considered in light of the manner in which the parties had framed and argued the legal issues.

16 The plaintiff's claim was for the liquidated damages that Façade had incurred, Façade being a subsidiary of the plaintiff. It would be immediately apparent that there is an issue as to whether the plaintiff had suffered a loss *vis-à-vis* the claim for liquidated damages. As a consequence, we requested further written submissions from the parties on this particular point. In its written submissions, the defendant argued that there was no evidence that the plaintiff had suffered a loss, and that the appeal should be allowed on this basis. The defendant further argued that it should be granted leave to raise this new point at this stage of the proceedings. After considering the further submissions, we did not think that there was any merit to the defendant's objections for the following reasons.

17 First, the issue (relating to the plaintiff's entitlement to claim on behalf of its subsidiaries) was raised and considered before the Assistant Registrar hearing the assessment of damages. The Assistant Registrar, after hearing the respective parties' submissions, held that she would proceed on the basis that the damages suffered by the plaintiff's subsidiary would be attributed to the plaintiff, without a breakdown of each subsidiary's role or liability in this matter. Although the decision of the Assistant Registrar may appear unusual at first blush, a brief perusal of the relevant transcripts suggests that her decision was necessitated by the parties' conduct in the litigation. The plaintiff and the defendant had each engaged an expert to deal with the issue of the delay. The experts proceeded on the basis that the plaintiff and its subsidiaries (including Façade) were to be considered as a single entity. Viewed in this context, the decision of the Assistant Registrar is understandable from a practical perspective. We ought, at this juncture, to emphasise that this decision should not be construed as in any way diminishing – let alone abrogating – the separate legal personalities doctrine which is a fundamental one in company law. Instead, this decision arises as a practical consequence of the way in which the proceedings were conducted. Indeed, the Appellant's Case filed in the present appeal by the defendants was entirely silent as to whether Compact, as an individual entity, had suffered any loss, even though the defendant would have known of this point for some years since the point was raised before the Assistant Registrar hearing the assessment of damages.

18 Indeed, the fact that this point was not raised until a very late stage in the appeal was

corroborated by the defendant's further written submissions (which were filed in response to the queries raised by this court after the hearing). The defendant sought leave, in this regard, to raise a point of law as to whether the plaintiff and Façade were to be treated as a single entity for the purposes of the appeal. We dismiss the defendant's belated attempts to introduce this point. First, as already observed, we note that the request for leave comes at an extremely belated stage. The request came *after* the hearing before this court, and only when further written submissions were sought by the court in this regard. Indeed, the proceedings between the parties have remained unresolved for close to eight years since the writ was filed. Second, as was observed by this court in *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737 at [61]–[62], the defendant's attempt to introduce a new point late in the day would necessitate an amendment of the pleadings. This, in turn, would likely require the plaintiff to be given leave to adduce further evidence on the new point. Given that the point that the defendant is seeking to raise is not a new point (as it was canvassed before the Assistant Registrar, a point which was, not surprisingly, emphasised by the plaintiff in its further written submissions), we think that it would be prejudicial to allow the application for leave at this extremely belated stage. As a result, we will proceed to assess the liquidated damages by construing Compact and Façade as one entity for the purposes of this appeal.

19 In our respectful view, the situation in the context of the present appeal is *not* one which concerns extraordinary or non-natural damage. It concerns, instead, *ordinary* damage which falls within the *first* limb of the rule in *Hadley*. There is thus *no* requirement of *actual* knowledge on the part of the defendant as knowledge of such damage would be *imputed* to it. The rationale underlying this was clearly stated by this court in *Robertson Quay*, as follows (at [81]):

> Since everyone (*including the contracting parties*) must, *as reasonable people*, be taken to know of damage which flows "naturally" ... from a breach of contract, the first limb of *Hadley* does *no* violence to the original bargain between the contracting parties who, *ex hypothesi*, have not expressly provided for what is to happen in the event of a breach of their contract. *However*, *if* the contracting parties had thought about this issue, they *would, in all likelihood, have agreed* that the contract-breaker should be liable in damages for all such "*ordinary*" damage. It is therefore neither unjust nor unfair to *impute* knowledge of such damage to them ... . Indeed, to argue otherwise would be unjust and absurd as the logical conclusion of such an argument would be that the contract-breaker would not be liable for any loss at all. [emphasis in original]

20 Returning to the facts of the present case, as the Judge pertinently pointed out (see the GD at [110]), "the spectre of liquidated damages is the bane of every contractor in Singapore and is *part and parcel of the construction industry as a whole*" [emphasis added]. The defendant entered into the contract aware that the paint ordered by the plaintiff was customised for use in the project to refurbish the MAS building (see *Compact Metal Industries Ltd v PPG Industries (Singapore) Ltd* [2006] SGHC 242 at [109]) and the parties thus entered into the contract against this backdrop of an overall tiered contractual structure governing the relationships of the various contractors involved in the project. Put simply, if a defendant breaches its contract which consequently causes delay to a construction project, the defendant must be taken to know that the other party, which is a sub-contractor to the project, would be liable to the main contractor in liquidated damages. This is common knowledge within the construction industry and, hence, justifies the *imputation* of knowledge in such circumstances.

21 Indeed, it appears to us that, if this head of the *plaintiff's* claim is characterised as extraordinary or non-natural damage, the damage might, instead, be *too remote* – given the important requirement (emphasised above) that *actual* knowledge must be demonstrated on the part of the defendant if the damage is *not* to be found to be too remote. To elaborate, in this case, the Judge considered, *inter alia*, knowledge which the defendant had *actual* possession of *well after* the

time the contract had been entered into (see the GD at [111]–[112]) – indeed, at a fairly late stage of the hearing of the assessment of damages (which was *itself* well after the hearing with respect to the issue of *liability*). *However*, in the paragraph *immediately preceding* the paragraphs just referred to (*viz*, the GD at [110]), the Judge had, in fact, *already touched on* the issue of *imputed* knowledge which would have resolved the issue of remoteness of damage based on the *first* limb of the rule in *Hadley*. This is, in our view, the correct legal analysis, as pointed out above at [19]–[20].

22 In the circumstances, whilst we agree with the *decision* of the Judge with regard to this particular issue, we do so on the basis of the application of the *first* limb of the rule in *Hadley* (*instead* of the *second* limb, which was the basis of the Judge's reasoning in the court below).

Conclusion

23 In summary, although we allow in part the appeal with regard to the award of damages to the plaintiff for additional site preliminaries and order that the issue of the defendant's counterclaim be remitted back to the Judge for her decision, we affirm the Judge's decision and reasoning with regard to all the other issues. However, we have also explained why, although we agree with the Judge's decision with regard to the claim by the plaintiff for liquidated damages, we do so for *different reasons*.

24 In the circumstances, we order that each party bears its own costs in so far as this appeal is concerned. The costs orders made by the Assistant Registrar and the Judge are to stand. The usual consequential orders will apply.