**IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE**

**[1994] SGCA 113**

CA 24/1993

Between

Turner (East Asia) Pte Ltd

… *Appellant*

And

Pioneer Concrete (Singapore) Pte Ltd

… *Respondent*

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# GROUNDS OF DECISION

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Contract — Contractual terms — Express terms; Contract — Contractual terms — Implied terms

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# Turner (East Asia) Pte Ltd v Pioneer Concrete (Singapore) Pte Ltd

**[1994] SGCA 113**

CA 24/1993
Goh Joon Seng J; Warren Khoo L H J; L P Thean JA
21 September 1994

1 Cur Adv Vult

2 This is an appeal from a decision of Rubin JC (as he then was) whereby he held that the appellants were in breach of a contract for the supply of ready-mixed concrete and ordered damages to be assessed.

3 The appellants (Turner) were the main contractors of the building project known as the Gateway project at Beach Road, Singapore. The respondents (Pioneer Concrete) were in the business of supplying ready-mixed concrete for use in building works. In April 1983, the parties commenced negotiations for the supply of ready-mixed concrete for use by Turner in the execution of the project. The negotiations, which went into considerable details regarding the terms of the contract and the technical aspects, culminated in a letter of intent dated 22 July 1983 whereby Turner informed Pioneer Concrete of Turner`s intention to award the contract to them. The letter of intent contained 27 numbered paragraphs. It had attached to it three appendices. Appendix A set out the price schedule for the various grades of concrete to be supplied. Appendix B identified the letters exchanged between the parties which

eventually became incorporated as part of the contract. Appendix C provided for the length of notice to be given by Turner to Pioneer for the supply of the concrete and associated products.

4 The important provisions of the letter of intent are set out below:

> *1 Concrete shall be provided at the rates given in Appendix A. These rates shall be based upon Pioneer operating a batch plant on site. ...*
>
> ...
>
> (3) Pioneer shall bear the full cost of establishing an on-site batch plant in accordance with drawing P-999. Turner shall supply a water and electricity source at the boundary to the batch plant. Pioneer shall pay for all water, electricity charges, fuel oil, maintenance, etc, associated with the operation of the batch plant. The capacity of the site batch plant shall be as described in Pioneer`s letter of 7 June 1983.
>
> ...
>
> (14) Pioneer shall provide a performance bond in the amount of 20% of the contract`s total value. The performance bond may be adjusted downward at three-month intervals to reflect work yet to be completed. The first payment shall be made only after receipt of the performance bond.
>
> (16) Pioneer shall, upon completion of this agreement, remove the batch plant from site when directed by Turner. Removal of the batch plant shall take place approximately two years from 1 August 1983 ...
>
> ...
>
> (20) Pioneer shall receive from Turner and its sub-contractors an approximate schedule for delivery of concrete. This schedule may be changed from time to time. Pioneer shall comply with Turner`s programme and shall make every effort to assure a timely supply of concrete on site. Periods for notification for supply of concrete are given in Appendix C. Pioneer shall operate the batch plant to suit Turner`s workday and shall bear all overtime costs ...
>
> ...
>
> (22) ***The total quantity of concrete to be supplied is estimated to be 75,000m + 10%*** . [Emphasis added.]

> (23) The contract period shall be from 1 August 1983 to 31 December 1985, and may be extended by the mutual agreement of both parties.
>
> (24) All payments due shall be paid within 45 days by Turner or its sub-contractors upon receipt of Pioneer`s invoice. Invoices shall exclude defective material.
>
> (26) Appendix B lists all correspondence submitted by Pioneer for purposes of offering, clarifying or amending their proposal.

5 Pioneer Concrete signified their approval of the terms of the letter of intent on 25 July 1983. On 4 August 1983, Turner issued a document described as an agreement on what appears to be a standard purchase order form. It was addressed to Pioneer Concrete. It stated `This agreement is your authorization to provide ready mix concrete to Turner for the Gateway project`. It provided that the letter of intent and its appendices together with the `Concretor` section of the specifications should constitute the contract. On the reverse side of this order is a printed set of terms and conditions. Pioneer Concrete signed the purchase order on 29 October 1983. It is not in dispute that these terms and conditions were part of the contract. Some of the terms and conditions are reproduced below:

> *1* ***Complete agreement****: This purchase order, including these terms and conditions, the specifications hereto and any additional terms and conditions incorporated into and attached hereto, constitutes the sole and entire agreement between the parties hereto. Vendor`s quotation is incorporated and made a part of this purchase order only to the extent of specifying the nature and description of the goods ordered, and then only to the extent that such items are consistent with the other terms of this purchase order. No other terms or conditions shall be binding upon purchaser unless accepted by it in writing. A separate statement of the transportation charge does not alter the delivery terms herein stated.*
>
> *...*
>
> (5) ***Time of essence*** : Time is of the essence in this purchase order. ...
>
> (6) ***Purchaser`s remedies*** : ... Purchaser shall have the right to recover any loss, damage or expense sustained by purchaser

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> as a result of vendor`s breach of the terms of this purchase order.
>
> (9) ***Changes*** : Purchaser has the option at any time to make changes in quantities or in specifications and drawings. If such changes cause an increase or decrease in the amount due or in the time required for performance an equitable adjustment shall be made. Increase or decrease will be based on unit rate shown on the purchase order. Any claim for adjustment under this provision must be asserted within ten (10) days from the date when the change is ordered. Changes to this purchase order will be binding only if in writing and signed by an authorized representative of purchaser.

6 In accordance with para 14 of the letter of intent, Pioneer Concrete provided a performance bond in the sum of $1.8m issued by an insurance company. The amount of the bond was expressed to be reduced in three-monthly stages according to the quantity of the concrete expected to have been supplied. The scale is reproduced below:

7 Pioneer Concrete also erected on site the batching plant stipulated in the letter of intent, and started making deliveries of concrete. They continued to supply the concrete until December 1984. At or about that time, Turner had difficulties with the owners over payments and other matters under the main contract. This resulted in a letter dated 15 December 1984 from Turner telling Pioneer Concrete to cease deliveries. The main contract with the owners was terminated by Turner on 18 January 1985. Pioneer had delivered a total of 40,368m3 of concrete up to the time they were told to stop.

8 Pioneer Concrete contended in the court below that Turner were obliged under the agreement to order a fixed quantity of ready-mixed concrete, that is, 75,000m3 plus or minus 10%, as provided in para 22 of the letter of intent. They claimed for loss as a result of Turner`s failure to place further orders.

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9 Turner, to use the words from their defence, contended in the court below that the effect of the agreement was merely to make Pioneer Concrete the sole suppliers of concrete for the project for the contractual period set out in the agreement and to regulate the price at which concrete was to be supplied. Secondly, Turner contended that their obligation to order any quantity of concrete was subject to the continuation of the main contract between them and the owners. Alternatively, Turner contended that the agreement between the parties was frustrated by the termination of the main contract between them and the owners.

10 The learned judicial commissioner decided in favour of Pioneer. He held that the purchase order, incorporating the letter of intent and other documents, created a firm and binding agreement for the supply of a fixed quantity of concrete, subject to the stated margin of 10% either way. He rejected what he said was Turner`s argument that the purchase order was not a legally binding document but was only a statement of mutual moral obligations intended only to indicate the source of supply of the material and the quantity expected to be ordered. He also rejected Turner`s witness`s contention that a non-binding supply arrangement was a norm in the building industry. The learned judicial commissioner rejected the argument that the contract was subject to an implied term that it subsisted only so long as the main contract subsisted, referring to classical observations in ***The Moorcock*** and to other cases, including Chan Sek Keong JC`s [as he then was] judgment in ***MTU Asia Pte Ltd v Brightside-Woh Hup*** , which was a case that had arisen from the termination of the main contract in the same project, where Turner was sued by a sub-contractor. He also held that the termination by Turner for alleged breaches by the owners could not constitute an event of frustration.

11 **Turner`s contentions on appeal**

12 Before us, counsel for Turner contended as follows. Firstly, he said that the learned judicial commissioner misconstrued Turner`s position in the proceedings below. It was never Turner`s position that there was no binding contract between them and Pioneer. It was Turner`s position there and before us that there was a binding contract, but that it did not oblige Turner to accept the amount of concrete stated. Counsel referred to ***Percival Lim v London County Council Asylums & Mental Deficiency Committee*** . Atkin J in that case discerned three types of contract for the supply of goods and materials. Paraphrasing what Atkin J said, the three types are as follows:

> (a) where the purchaser undertakes to buy a definite quantity of the supplier`s goods;
>
> (b) where the supplier merely offers to supply goods at a price, but unless and until the purchaser chooses to place an order, there is no binding contract,
>
> (c) where, though the purchaser is not bound to order any definite quantity, he is bound to buy all the goods that he in fact needs; such a contract is broken if the purchaser does need the goods in question but gets his supplies from some other supplier.

13 Counsel for Turner said that Turner`s position had always been that the contract in question fell under type (c). It had never been their position that it fell under type (b), contrary to what the learned judicial commissioner must have thought, judging from the language he used in rejecting Turner`s arguments. Counsel for Turner submitted that, given the learned judicial commissioner`s misapprehension of Turner`s position, it was not surprising that he was moved to adopt Pioneer Concrete` construction.

14 Turner`s counsel`s submission, as we understand it, in the main is that the contract was not one for the supply of a fixed quantity of concrete. He relied on the heading of the various letters forming part of the contractual documents,

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the provision for the regulation of the price of the concrete to be supplied over a period of time, and the fact that the quantity stated in para 22 was described as an estimate rather than a contract quantity. He contended that the quantity stated there was merely to provide Pioneer Concrete with some idea of the amount required. Counsel submitted that the project was a large one and the amount of concrete required could not be ascertained with certainty at the outset. The parties could not have intended having a contract to supply a quantity of concrete which Turner might turn out not to have any use for. It would be more consonant with the commercial purpose to have a flexible supply contract. Counsel also relied on cl 9 of the terms and conditions of the purchase order giving, he said, liberty to Turner to alter the quantity required at any time they chose.

15 **Pioneer Concrete`s contentions**

16 The submissions of counsel for Pioneer Concrete, briefly, were as follows. Firstly, he said that the nature of the contract was one to supply about 75,000m3 to be delivered as and when Turner gave notice requiring delivery. In supply contracts for a building project, and indeed in building contracts in general, it is not possible to state the exact quantity of materials to be ultimately used. That is why a margin of error was included in this case. No argument based on the fact that this was an estimated as opposed to a firm quantity was available to Turner. Secondly, if the contract did not create a binding obligation in respect of the indicated quantity of concrete, it would not have been necessary for Turner to insist on and obtain a performance bond and for the performance bond to contain the stipulated quantity of 75,000m3. The schedule to the bond made it abundantly clear that 75,000m3 was to be supplied. Thirdly, as to the argument about an implied term, counsel for Pioneer Concrete, relying on ***The Moorcock*** and other cases, submitted that a term should be implied only to give

business efficacy to the contract. The court should not lightly imply a term, particularly where the contract, as in this case, is a complete and carefully negotiated contract.

17 **Our views**

18 Our views are as follows. In regard to Turner`s counsel`s criticism that their position had been misunderstood by the learned judicial commissioner, we have to say that Turner`s position in the terms in which it was put in their pleadings and by their witness was certainly less than clear. It was certainly not expressed in the clear terms in which it was expressed before us. The case of ***Percival Lim*** , which would have helped to clarify Turner`s position, does not appear to have been referred to in the court below. On the whole, we do not think that the criticism that their position was misunderstood is justified.

19 Turner`s counsel sought to characterize the subject contract as one falling within the third type mentioned by Atkin J in the ***Percival Lim*** case.3 We have to say that the nature and effect of a contract must primarily be sought from the provisions of the contract themselves, having regard at the same time to the circumstances in which the contract came into being. What Lord Wilberforce said in ***Reardon Smith Line Ltd v Yngar Hansen Tangen*** at pp 995-996 is to the point, and we respectfully agree with it:

> *No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as `the surrounding circumstances` but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.*

20 Lord Wilberforce further stated that, just as the intention of the parties is to be ascertained objectively, so also:

> *when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties.*

21 In this case, the parties negotiated for the supply of concrete to what must have been known to both parties as a substantial project. The contract was for the period from 1 August 1983 to 31 December 1985, subject to extension by the mutual agreement of the parties. Detailed prices were agreed, with a specified increase of $2.30 per m3 for the period 1 January to 31 December 1985. It can be safely assumed that the prices were fixed with reference to the total amount which Pioneer would expect to supply. Obviously, the price a supplier would quote for 75,000m3 of concrete would be different from one for, say, half as much. This is particularly so in the instant case as the implementation of the contract involved the installation of a batching plant at considerable expense. No doubt other preliminaries and overheads would also have to be incurred. It can also be assumed that the estimated quantity needed during the 17-month contract period was an informed estimate to which both parties would commit themselves, one to ordering, and the other to supplying. Of course, in a building project, no one can know beforehand exactly how much concrete would be needed. That is the reason for the [plusmn]10% margin in this contract.

22 Following from this, it can be assumed that if the supply contract were to be capable of being prematurely terminated at the instance of Turner, or, for that matter, at the instance of Pioneer Concrete, different prices and different terms would have been negotiated. This is the commercial reason, and reason at law, why any term extraneous to the language of the contract, such as that

suggested by Turner, should not be lightly implied. Although the parties had the project and its completion in mind when negotiating the contract, this does not lead to the conclusion that their contract was intended to come to an end if the main contract works should come to an end. The implication of such a term is not necessary to give efficacy to the contract, in the sense in which Bowen LJ in ***The Moorcock*** at p 68 used the word. In our view, there is no reason to imply such a term as has been suggested on behalf of Turner.

23 We accept Mr Selvadurai`s submission that the contract was, simply, one for the supply of the quantity stated in para 22 of the letter of intent, to be ordered and delivered during the contract period. The contents of the performance bond confirms this position. The heading of the correspondence, which counsel for Turner referred to, is of no assistance. The fact that a price is fixed in advance, incorporating an increase for the year 1985, adds to the certainty of the contractual undertaking rather than results in the uncertainty or `flexibility` which, in sum, is what counsel for Turner sought to impress upon the contract.

24 We now turn to cl 9 of the purchase order. The clause, as part of a printed form, is easily applicable, and was probably intended to apply, to a contract for the execution of a certain amount of work at a lump sum where the amount of work to be done is determinable at the outset. The amount of work could be an amount stipulated by agreement of the parties or an amount determined by drawings and specifications or by some other means. In order to cater for the possibility of the actual amount required being increased or reduced in the course of execution of the work, a provision for variation is usually included in such a contract, often by reference to a unit rate or a schedule of rates agreed at the time of the contract. The contract sum is adjusted according to the amount thus varied. Clause 9, it seems to us, is a clause of this kind.

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25 In the instant case, the contract is already based on unit rates stipulated in Appendix C. The quantity of concrete to be supplied is also envisaged to vary from day to day. Hence the provision in para 20 of the letter of intent of a schedule of delivery, which schedule might be changed from time to time. It follows that the amount payable in respect of concrete supplied also varies from day to day. Since the contract, apart from cl 9, already incorporates changes to quantities to be supplied from time to time and therefore the amount payable from time to time, it is hard to see what further need there is for a provision in terms of cl 9. It seems to us that cl 9, which appears, as we have said, in a standard printed form, has no possible application to the contract at hand.

26 These general propositions are sufficient to dispose of the arguments made on behalf of Turner. However, in deference to counsel, we must refer to the case of ***Kier & Co Ltd v Whiteheads Iron & Steel Co Ltd*** , which he cited. In that case, the plaintiffs were contractors in the business of undertaking concrete work. By exchange of bought and sold notes, both in identical terms, a contract was concluded between them and the defendants for the sale of steel. The sold note was: `We have this day sold to you the undermentioned material.` The quantity was expressed as: `Buyer`s total requirements up to 8,000 tons.` Presumably, the price of steel had gone up after the contract. The plaintiffs contended that the word `requirements` was equivalent to `demands`, and that they had the right to ask for any amount they liked up to 8,000 tons without any reference to the purpose for which the steel would be needed. Branson J rejected this argument. He held that a proper interpretation of the contract was that the sellers would supply all the steel which the buyers needed up to 8,000 tons, and the buyers would take all the steel they needed up to 8,000 tons, but the buyers could not, for instance, demand the supply of steel for the purpose of resale.

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27 Counsel for Turner submitted that the contract in the instant has similar effect to that of the contract in ***Kier*** `s case,5 in that Turner were required to order all the concrete that they needed for the project from Pioneer Concrete and no one else. There was no need to order any fixed or minimum quantity given that both the word `estimated` in the present contract and the words `up to` in ***Kier*** `s case5 connote a variable and not a fixed amount.

28 In our view, the ***Kier*** `s case5 does not assist Turner at all. The case shows, if anything, that the construction of each contract depends on its own wording. It serves no purpose to draw any parallel between ***Kier*** `s case5 and the present case. What we have in the instant case is, simply, a contract requiring Pioneer Concrete to supply and Turner to take the quantity stipulated during the contract period. There is nothing said about Turner being obliged to honour the contract only so long as the main contract continued.

29 The frustration point was not seriously pursued, and we need not say anything about it.

30 **Conclusion**

31 For the reasons set out above, we dismiss this appeal with costs. The sum deposited by Turner as security for costs is to be released to Pioneer Concrete`s solicitors to account of Pioneer Concrete`s costs.

32 Appeal dismissed.

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*Turner (East Asia) Pte Ltd v Pioneer Concrete (Singapore) Pte Ltd* [1994] SGCA 113

Goh Joon Seng J
Warren Khoo L H J
L P Thean JA

Alvin Yeo and Chee Chi Ming (Wong Meng Meng & Pnrs) for the appellants
Pathmanaban Selvadurai and Lok Vi Meng (Rodyk & Davidson) for the respondents

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