

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1997] SGHC 215

Suit 398/1992

Between

Zicom Pte Ltd

... Plaintiff

And

Antara Koh Pte Ltd

... Defendant

GROUND OF DECISION

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Zicom Pte Ltd v Antara Koh Pte Ltd

[1997] SGHC 215

Suit 398/1992
Judith Prakash J
19 August 1997

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Judgment:

2 **Cur Adv Vult**

3 **Introduction**

4 1. The plaintiff company is in the engineering business and specialises
in the

manufacture and installation of hydraulic winches and related equipment. The
defendant

company's main business is as a contractor for piling and civil and marine
construction

works.

5 2. In October 1990, the defendants asked the plaintiffs to construct and install the

hydraulic machinery necessary to equip a marine piling barge. The plaintiffs' quotation

for the equipment was accepted by the defendants on 11 October 1990. It is common ground

that under the original contract, the latest date for delivery of the equipment by the

plaintiffs was 17 January 1991. At the defendants' request, the plaintiffs made an early

delivery of part of the equipment in December 1990. The balance of the equipment was

delivered between 27 February and 5 March 1991. The plaintiffs' claim herein is in respect

of unpaid invoices issued by them for the equipment and also for servicing work done at

the defendants' request. The defendants have counterclaimed alleging that they have

suffered damage because of the late delivery of the balance of equipment and

also because
of defects in the equipment delivered. As it turned out, the plaintiffs' claim was
relatively straight forward and most of the trial was spent on the defendants'
counterclaim.

6 The plaintiffs' claim

7 3. By their statement of claim endorsed on the Writ of Summons filed
herein on 3 March

1992, the plaintiffs claim the sum of \$63,113.83 outstanding under 13 invoices
issued to

the defendants between March 1991 and January 1992. After service of the writ
on 5 March

1992, the defendants paid the plaintiffs \$3,521.23 in settlement of five of the
invoices.

As at the start of the trial therefore, the balance due was \$59,592.60. In their
final

submissions, the defendants accepted that of this sum they could only dispute
\$5,097.60

claimed under invoice 8025/92. The plaintiffs are therefore, by the defendants'

admission, entitled to judgment for \$54,495.

quotation of 10 October 1990 and the defendants' written acceptance of that quotation

next day. Neither of these two documents mention interest. The interest term is found only

in the conditions printed on the reverse of the invoices which the plaintiffs subsequently

sent the defendants. The defendants contend that there was no evidence of a course of

dealings between the parties showing that the contents of subsequent invoices were

incorporated into the contract as terms.

9 5. The law is that conditions may be incorporated into a contract by a course of

dealing between the parties where each party has led the other reasonably to believe that

he intended that their rights and liabilities should be ascertained by reference to the

terms of a document which had been consistently used by them in previous transactions: see

Chitty on Contracts (26th Ed) para 780. In this regard, the plaintiffs rely on *Eastman*

Chemical International AG v NMT Trading Ltd & Anor [1972] 2 LLR 25 and
Circle

Freight International Ltd v Medeast Gulf Exports Ltd [1988] 2 LLR 427. In the
first

case, the parties had been dealing with each other for a period of about a year
prior to

entering the contract which was before the court and, for every contract made
between

them, the defendants had sent an invoice in which was set out a specific
reference to the

conditions of the Road Haulage Association Ltd. In the second case, prior to the
contract

in question, there were at least 11 occasions when invoices had been sent to the

defendants containing a notice that the business between them and the plaintiffs
was

conducted on certain standard trading conditions. In both cases it was held that
there had

been a sufficient course of dealing between the parties to incorporate the

conditions into the respective contracts.

plaintiffs over the years before the present transaction. He also stated that he was aware

of the sales conditions on the invoices. His explanation for not paying the plaintiffs'

invoices, including the invoice for interest, was that he wanted to off-set the amount

against the damages the defendants had sustained by reason of the plaintiffs' breach of

contract.

11 7. Whilst it does not seem that in this instance there were as many previous dealings

between the parties as in the cases the plaintiffs cited, it appears to me from the

evidence that the defendants had full knowledge of the plaintiffs' terms and were prepared

to deal with them on that basis. Even Mr Ng was aware of the interest condition although

he asserted that the plaintiffs had not applied it previously to the defendants because of

the good relationship between them. Accordingly I hold that there were enough prior

dealings between the parties and sufficient knowledge on the defendants' part of the

plaintiffs' conditions, for such conditions to be incorporated as a part of the contract

between them. Therefore the plaintiffs are entitled to interest at one per cent per month

on their unpaid invoices.

12 8. I have noted the defendants' point that the plaintiffs failed to specifically plead

it was a term of the contract that they be paid interest at one per cent a month. The

statement of claim does, however, include a claim for interest on the amount due at that

rate. In my view that was a sufficient pleading of their entitlement in this case.

Certainly the defendants knew what the plaintiffs based their claim to interest on and

were not embarrassed by the lack of particularity. Although the statement of claim could

have been better drafted, the deficiency is not, in my view, fatal.

13 **The counterclaim**

14 9. The details of the defendants' counterclaim and the plaintiffs' response
can be

briefly summarised from the pleadings. The defendants pleaded that
Sembawang Construction

Pte Ltd ('Sembawang') had been engaged by the Port of Singapore Authority as
the main

contractor for the construction and erection of a feeder berth at the Empire Dock
(the

project'). The defendants were in turn engaged by Sembawang to supply plant
and equipment,

including a piling barge, labour and supervision, to install marine piles for the
project.

15 10. The plaintiffs agreed to supply the defendants with seven hydraulic
winches and

related remote controls and power packs to be installed onto the defendants'

piling

barge

known as PB8. This agreement was, according to the defendants, evidenced by:

16 (a) discussions between Mr Koh of the defendants and Mr Foo of the
plaintiffs whereby

the requirements of the defendants in relation to the equipment and its proposed
use were

explained;

17 (b) the plaintiffs' quotation of 10 October 1990; and

18 (c) the defendants' acceptance on 11 October 1990 of the quotation.

19 11. According to the defendants, the agreement contained the following
express and/or

implied terms:

20 (a) that the plaintiffs would deliver the equipment within 12 to 14 weeks
from the

defendants' confirmation of the order;

21 (b) that time was of the essence; and

22 (c) the equipment would be fit for its intended purposes and/or of
merchantable quality

and/or free of defects.

23 12. The defendants alleged that in breach of the above terms, the
plaintiffs were late

in delivering the equipment. Four winches were delivered on 27 February 1991,
the

remaining three on 1 March 1991 and the remote controls were delivered on 5
March 1991. In

further breach of the terms, the equipment was defective and not fit for the
intended

purpose. This caused further delays to the project. By reason of these breaches,
the

completion of the project was delayed and the defendants had suffered loss and
damage

which exceeded the plaintiffs' claims.

24 13. The plaintiffs responded by denying that they were in breach of
contract and put

the defendants to strict proof of their allegations. Further, the plaintiffs said that
the

equipment was not intended by the defendants to be used for the project and even if it had

been, the defendants had never communicated this intention to the plaintiffs. The

plaintiffs said that the equipment was in fact intended by the defendants to be used for a

project in Tuas in late 1991.

25 14. The plaintiffs also denied that time was of the essence of the agreement. Their

position was that the original date of delivery contemplated in the agreement had been

varied or waived by the defendants' instructions to the plaintiffs to deliver part of the

goods ordered at an earlier date and to deliver the balance at such time as the defendants

notified them that they wanted delivery. In the circumstances, any condition as to time

being of the essence had been varied or waived by the defendants.

26 15. The issues which I have to decide therefore are as follows:

27 (1) whether there was a variation of the original contract term relating
to the

delivery of the equipment;

28 (2) if there was no variation, whether the late delivery of part of the
equipment

caused the defendants to be late in completing their piling work in respect of the
project;

29 (3) whether the equipment delivered was defective and if so, whether
any delay was

thereby caused to the defendants; and

30 (4) whether the amounts claimed by the defendants as damages are
recoverable.

31 **The evidence**

32 16. There were two witnesses for the defendants and five for the
plaintiffs. It is not

necessary to give a very detailed account of the testimony of each of them. I will,

however, summarise the main points of the affidavits of evidence-in-chief which indicate

the varying stories told by each side.

33 (1) *Mr Jimmy Koh*

34 17. Mr Koh stated that he was the representative of the defendants who dealt with Mr

Foo of the plaintiffs in the negotiations which led to the agreement for the manufacture

and supply of the equipment. In the course of these negotiations, he had explained to Mr

Foo the requirements of the equipment and its intended use for marine piling works in

connection with the project. He told Mr Foo that the defendants were in possession of a

marine piling frame, Yoshinaga YDF 80, and had commissioned the construction of a new

barge onto which this piling frame would be installed. He also explained that

the

defendants required an entire hydraulic system with new mooring winches, a pile lifting

winch and other accessories to be installed onto the marine piling frame and on the deck

of the barge in order to operate the piling frame and the barge as a piling barge. Mr Foo

had also been informed of the urgency of the supply of the equipment as the defendants had

to meet the completion date specified under their contract with Sembawang.

35 18. By their quotation dated 10 October 1990, the plaintiffs offered to supply and

deliver the equipment within 12 to 14 weeks of confirmation of order. The defendants

accepted the plaintiffs' offer on 11 October 1990. Mr Koh stated that delivery of the

equipment was thus scheduled to take place at the earliest by 3 January 1991 (12 weeks) or

by the latest 17 January 1991 (14 weeks). It was expressly stated in the defendants'

confirmation that time was to be of the essence of the order. Mr Koh asserted that this

term had been inserted in the agreement precisely because the new equipment was to be used

for the project.

36 19. Mr Koh admitted that the plaintiffs had delivered part of the equipment early viz

the oil cooler on 7 December 1990 and the hydraulic power packs on 19 December 1990 and

that they had done this at the defendants' request. He asserted that the plaintiffs had

not, however, indicated to the defendants that because of the request to have early

delivery of the power packs, the plaintiffs would be unable to deliver the balance of the

equipment by the contractual delivery date. On the contrary, it was still understood that

time was of the essence of the contract and that the plaintiffs still had to meet that

date.

37 20. Mr Koh also stated that from around December 1990, he and his colleague, Mr Anthony

Ng, frequently visited the plaintiffs' factory. During his visits, they stressed to Mr Foo

that time was of the essence as the equipment was required for the defendants to complete

their marine piling work for Sembawang. Mr Foo always assured the defendants that the

plaintiffs would be able to meet the latest delivery date under the contract without any

problem.

38 21. Prior to the contractual delivery date, the defendants made all necessary

preparations, such as the running of the hydraulic piping on PB8, to have the vessel ready

to be installed with the equipment as and when it was delivered. The advanced state of

preparation on board PB8 meant that the equipment could have been installed within 10 days

of delivery. However, the plaintiffs delivered the equipment late: four winches were

delivered on 27 February 1991, three winches were delivered on 1 March 1991 and the remote

control was delivered on 5 March 1991. As a result of the late delivery of the aforesaid

items, the installation of PB8 was completed late with the consequence that completion of

the marine piling work was delayed.

39 22. Under the defendants' contract with Sembawang, the piling works were to take place

over a period of four months commencing in November 1990 and be completed by 15 March

1991. Mr Koh asserted that because of the delays encountered by the defendants due to the

late delivery and defects in the equipment, the marine piling works were completed only on

24 May 1991, a delay of about 70 days. Of these 70 days, about 46 days were due to late

delivery of the equipment. The other 24 days' delay was due to defects in the equipment

supplied.

40 23. Mr Koh went on to say that the consequence of late completion of the marine piling

works was that the defendants became liable to Sembawang for liquidated damages of \$10,000

per day. In September 1991, the defendants notified the plaintiffs of the delay of 70 days

and put them on notice that the defendants would be claiming compensation from them for

any liquidated damages imposed by Sembawang. Subsequently, after negotiations between

Sembawang and the defendants, the delay claim was settled for \$200,000.

41 24. Other details of the defendants' loss were given by Mr Koh. He
claimed:

42 (a) a total of \$65,798 for salary and wages incurred during the 70 days
delay;

43 (b) \$58,360 for the hire of two tug boats;

44 (c) \$256,666 being loss of rental fees for the barge for 70 days; and

45 (d) \$63,333 being loss of rental fees for the hydraulic hammer for 70
days.

46 The defendants' total claim came up to \$446,157.

47 (2) *Mr Anthony Ng*

48 25. At the material time, Mr Anthony Ng was the defendants' plant
manager. According to

his affidavit, he was present on site most of the time and thus had personal
knowledge of

the defects in the various equipment supplied by the plaintiffs.

49 26. According to Mr Ng, one of the most serious defects related to the
mooring winches.

The plaintiffs had supplied six such winches which were used to hold the piling
barge in

place during driving of the marine piles. The winches were in turn held in place by a

system of hydraulic brakes. On 25 March 1991, Mr Koh and Mr Ng wrote to the plaintiffs

complaining that the winches were drifting and were unable to hold the piles in position.

This problem, Mr Ng asserted, resulted from the failure of the hydraulic brakes.

50 27. Mr Ng went on to elaborate that the failure of the hydraulic brakes was due to the

faulty design of the system in that it lacked a proper filtration system. This in turn, he

said, led to the oil within the hydraulic system being contaminated. It was possible, he

speculated, that this contamination of the hydraulic oil caused the hydraulic control

valves to malfunction. This in turn would have led to the malfunctioning of the hydraulic

brakes. Since the plaintiffs had designed and manufactured the hydraulic

system, the

failure of the brakes must in any event have been their fault.

51 28. Mr Ng went on to say that when the pile barge drifted from its intended position,

the marine piles were out of alignment during piling. The defendants had to rectify the

situation and this led to them incurring additional expenses. There was also delay to the

project of about three weeks because of rectification works.

52 29. Another defect which was highlighted in the defendants' letter of 25 March 1991 was

that the system tended to overheat. Mr Ng gave two reasons for the overheating. First,

that the cooler provided for in the system was insufficient to dissipate the heat within

the system and that secondly, there was no flush line cooling circuit provided for in the

power pack. The plaintiffs, after being informed of the defendants' complaints, changed

the cooler to one that was bigger in size. As a result of the overheating, the entire system had to be shut down from time to time to enable it to cool down before operations

resumed. This caused further delays totalling about 12 days.

53 30. There was also the problem of the mooring winches not being able to respond

immediately once the controls were activated. Once activated, the winches would also not

start off smoothly. These were teething problems which the plaintiffs had to rectify and

the plaintiffs' attempts to do so caused further delays.

54 31. Another major defect related to the two hydraulic pumps. These were provided by the

defendants but installed by the plaintiffs. The problem encountered was that the pressure

in the pumps could not be maintained at the requisite level and the winches therefore had

insufficient pulling force. The defendants complained about this problem on 25

March 1991.

On 3 April 1991, the plaintiffs responded and attributed the problem to the fact that

there were foreign particles such as fine shot blasting slags in the pumps. They further

maintained that the valves and bearing plates and the cylinder block had been damaged as a

result of these foreign particles.

55 32. In rebuttal, Mr Ng stated that there was no shot blasting carried out by the

defendants or any other party involved in the project during the period of the project.

Further, it was highly unlikely that shot blasting slags from the shipyard in the vicinity

could have entered the system in the way that the plaintiffs had alleged. In any case, the

hydraulic lines which were the likeliest point of entry of any foreign particles into the

33. Accordingly, Mr Ng concluded the reason given by the plaintiffs as to how the

a proper filtration system that led to the oil being contaminated and this lack
arose out

must be responsible. The defendants eventually had to purchase two new pumps to replace

57 34. The four pumps were used interchangeably whenever the problem
occurred. The

three days. On top of this delay, the two additional pumps which the defendants had to

35. Mr Ng concluded by stating that the defendants had been delayed for a total of about 24 days on account of the defects in the equipment supplied.

60 36 Mr Foo was at all material times holding the position of technical
director in the

plaintiff company and was responsible for the plaintiffs' engineering, design and

production departments.

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the plaintiffs that the equipment had been ordered to equip the barge PB8 for the

defendants' job with Sembawang. Neither was there any discussion of any penalties for any

delay nor mention made that time was to be of the essence of the contract. On the contrary

Mr Foo was given to understand that the equipment was to be used in a project in Tuas in

the middle of June 1991.

62 38. Mr Foo stated that he believed that the equipment the defendants had ordered from

the plaintiffs was intended for a job scheduled to take place later than the project. His

belief was based on the fact that one month after placing the order with them the

defendants sent the plaintiffs various used machinery for them to service. These included

a 10-tonne piling winch, an 8-tonne hammer winch, two turntable cylinders and a control

panel. This equipment was subsequently installed on PB8 by the defendants. Mr Foo

contended that the defendants had ordered a piling winch from the plaintiffs and if their

new equipment was intended for the Sembawang job, they would have not serviced and

installed the old winches onto the barge.

63 39. The plaintiffs prepared to manufacture the items making up the defendants' order as

a batch with the scheduled delivery date being 17 January 1991. About two weeks after the

order was confirmed, Mr Koh requested Mr Foo to advance the supply of the hydraulic oil

cooler and the power packs to 7 December 1990 and 19 December 1990 respectively. He

informed Mr Foo that so long as the oil cooler and the power packs which were required to

power all the used deck machinery were installed on PB8 so that it could be

mobilised, the

balance of the equipment could be delivered to the defendants at later dates to be

notified by them. Mr Foo also stated that the defendants must have been aware that the new

arrangement affected the delivery of the other equipment.

64 40. In accordance with the defendants' instructions, the plaintiffs delivered the

balance of the order between February and March 1991. At no time did the defendants reject

the plaintiffs' equipment. Mr Foo therefore asserted that in requesting the plaintiffs to

re-schedule their deliveries and subsequently accepting the deliveries made, the

defendants had waived the time originally fixed for delivery and affirmed the subsequent

variation or postponement of the time.

65 41. Mr Foo also gave evidence in relation to the defects complained of
by the

defendant. He pointed out that all the installation works on the barge were done
by the

defendants and that the hydraulic pipes had been run in their own yard which
was adjacent

to shipyards and fabrication yards where shot blasting works were carried out.
Mr Foo

averred out that it is critical in a hydraulic system that the oil which is the
medium

through which force is generated through precision hydraulic pumps, motors
and control

valves, be absolutely free of dust and dirt. Once the system is contaminated,
many

problems arise.

66 42. After the plaintiffs' equipment had been installed on the barge and
some operations

had taken place, the defendants started to complain. Complaints were received on 20 March

and 3 April 1991. The plaintiffs replied on 3 April itself and drew the defendants'

attention to the presence of shot-blasting slags in the hydraulic oil present in the hydraulic system. This contamination resulted in damage to the hydraulic components and

the performance of the system was thereby adversely affected. The defendants had installed

their own piping system and equipment and it was evident to the plaintiffs that the

workmanship and the degree of care exercised by the defendants was very poor. Mr Foo

asserted that any malfunctioning or breakdown in the hydraulic system or the piling system

was due to the defendants' own fault and their refusal or failure to heed the plaintiffs'

advice.

as after sales services in respect of such systems.

dusty and shot blasting was carried out in the adjoining shipyards.

[illegible]

the piping of the pilot lines on PB8 and this took place between 11 and 17 January 1991.

work, he confirmed with the defendants' foreman that the system had been thoroughly

defendants' foreman that the flushing had been done. He then commissioned the system by

they must ensure that the oil is free of contamination as the effects of dust and dirt in

the system would not manifest themselves until a week or two had passed.

73 48. On 19 January 1991, the defendants tested their own piling winch. It
gave way and

defendants to flush the whole system to rid it of contaminating particles. The defendants,

however, did not do so as they were behind schedule and piling works were then in

progress.

76 51. On 28 March 1991, PB8 returned to the defendants' yard. The defendants again

complained of low pressure in the system. Mr Chan and his team attended to their

complaint, checked the hydraulic pumps and again found the bearing plates worn off due to

the presence of shot blasting particles in the oil.

77 52. In his affidavit, Mr Chan also averted to incidents in July and August when the

defendants complained about the performance of the pumps. The August incident was another

case where the problem was that the bearing plates had worn out because of contaminated

oil. Mr Chan concluded by saying that the plaintiffs' equipment had worked satisfactorily

at the site of the project and subsequently at Tuas and that whenever any

problems with
the working of the machinery arose, they were always due to the contamination
of the oil
in the system.

78 (5) *Lih Mang Nai and Azman bin Yusof*

79 53. The abovenamed persons were both employed by the plaintiffs as
hydraulic

technicians at the material time. At all relevant times they worked together in
attending

to the defendants' complaints.

80 54. On 11 January 1991, the two technicians were instructed by Mr Chan
to help the

defendants run some pilot pipes on PB8. They completed the piping on 17
January 1991. They

confirmed the evidence that Mr Chan had given with regard to the
commissioning of the

system on PB8 on 18 January 1991. They also confirmed that they had found
shot blasting

particles in the hydraulic pump a week after PB8 had gone on site as well as on
28 March

1991 and on 23 August 1991. They also asserted that the defendants had
repeatedly refused

to follow their advice to flush the hydraulic system even when the presence of
fine

particles and sand was the cause of all the complaints raised.

81 Findings

82 (1) *The allegation of delayed delivery*

83 55. It is common ground that when the contract was made between the
plaintiffs and

defendants on 11 October 1990, the latest date for delivery of the equipment
was 17

January 1991. The plaintiffs' offer was to supply the equipment within 12 to 14
weeks of

confirmation of the order. The defendants accepted this timeframe and added
the further

condition that time would be of the essence. The importance of timely delivery was also

made clear by the letter of credit which the defendants established to pay for the

equipment. It stipulated that delivery from the plaintiffs' warehouse was to be 'not later

than 15 January 1991 for transportation to [defendants'] warehouse'. On 24 October 1990,

the plaintiffs gave an undertaking 'to effect delivery ... [of the equipment] ... within

the validity period of ... [the letter of] credit'. The expiry date of the credit was 31

January 1991.

84 56. The plaintiffs' delivery obligation under the original contract is clear. It is

also clear that if there was no subsequent variation of the contract, the plaintiffs

breached it by delivering the winches and remote control panel in late February and early

March 1991. The burden is therefore on the plaintiffs to show that they were not in breach

of contract by reason of such a variation or that even if they were in breach the defendants cannot rely on it because of waiver or estoppel.

85 57. The plaintiffs have, in my view, some difficulty in discharging this burden since

they were not consistent in the stand that they took in relation to the delayed delivery.

At first, in July 1992, their position was that they were not late in delivering the equipment as they had delivered it within a reasonable time. This was pleaded in their

Further and Better Particulars of the Reply and Defence to Counterclaim. But, subsequently, in November 1993, they amended their Reply and Defence to Counterclaim and

pleaded by para 6 thereof that:

86 "The Plaintiffs specifically deny that time was of the essence of the agreement and say

that the original date of delivery contemplated in the said agreement was varied

or waived

by the Defendants' instructions to the Plaintiffs to deliver part of the goods ordered at

an earlier date and to deliver the balance at such time to be notified by the Defendants.'

87 This allegation was a specific assertion that the defendants had instructed the

plaintiffs to deliver the equipment at times to be notified by them and not in accordance

with the contractual schedule.

88 58. When it came to the evidence, the position was also blurred. The plaintiffs'

managing director, Mr Sim Giok Lak, stated in his affidavit of evidence-in-chief that the

defendants were aware that their request for early delivery of the power packs and

hydraulic oil cooler affected the delivery of the other equipment. In court, Mr Sim

averred that the defendants had been expressly informed by Mr Foo that delivery would be

affected. Similarly, Mr Foo shifted his position from that of implied notice in his

affidavit evidence to that of express notice when he asserted in court that he did tell Mr

Koh of the change in delivery dates.

89 59. These changes in the plaintiffs' stand cannot of themselves decide the issue. I

have also to consider the probability of the defendants agreeing to later delivery of the

other equipment when they were informed by Mr Koh that to advance delivery of two items

would have this effect.

90 60. I am satisfied on the evidence that the circumstances were such that the delivery

schedule was important to the defendants. They had just concluded a contract with

Sembawang to drive 216 piles within four months from 15 November 1990. The coincidence

between the conclusion of that contract and the conclusion of the contract with the

plaintiffs for equipment which could be attached to the Yoshinaga pile frame and thus be

used to convert a new barge into a piling barge is too great to be overlooked. I accept

the defendants' submission that they had specially ordered the equipment from the

plaintiffs for the Sembawang project. This was the reason why they took care to make time

of the essence in their contract with the plaintiffs.

91 61. I also accept Mr Koh's evidence that he had informed Mr Foo of the defendants'

forthcoming project in Sembawang and had stressed the importance of timely delivery. He

said Mr Foo had visited his office several times before the order was placed and these

visits took place during the period when the defendants were negotiating with Sembawang

for the project. Mr Foo himself confirmed that he had made many visits to Mr Koh's office

before Mr Koh placed the order for the equipment. This was an interesting admission as the

plaintiffs' counsel in his cross-examination of Mr Koh tried to make out that there had

been no visits prior to the conclusion of the contract.

92 62. Mr Foo's concession was made to bolster his assertion in court that he had

overheard a conversation between Mr Koh and Mr Ng which gave him the impression that the

defendants intended to use PB8 with the plaintiffs' equipment on it at Tuas. I find this

evidence suspicious. It was brought up for the first time in court and contradicted what

he had stated in his affidavit which is that he had been 'given to understand' that

Tuas

was where the equipment was to be used. That turn of phrase implied a direct telling

rather than an overheard conversation. I also think that it was highly unlikely that at

the time when they were so busily negotiating with Sembawang for a new project, Mr Ng and

Mr Koh would have been discussing the project at Tuas which had been on-going since May

1990 and was not urgent.

93 63. It appears to me improbable that the defendants would have agreed to relax the

stipulated delivery schedule since they were at all times aware of the deadline imposed by

Sembawang. Mr Koh denied that he had chosen to have the equipment delivered on the dates

in February and March when actual delivery took place. He asserted that the dates chosen

by him were those in the contract and the importance of those dates was reinforced by the

terms of the letter of credit which the defendants had issued for the plaintiffs. Mr Koh

also denied that Mr Foo had told him that there would be some delay in delivering the

remaining items orders if the cooler and power packs were to be delivered early. As far as

he was concerned, the oil cooler was to be bought from a supplier, not made by the

plaintiffs, and the fabrication of the power packs was independent of the fabrication of

the winches so early delivery of these items did not necessarily imply later delivery of

the others.

94 64. There is another inherent improbability in the plaintiffs' story. The balance of

the equipment was delivered in three stages: on 27 February, 1 March and 5 March 1991. The

plaintiffs say that delivery was made on those dates because they were the dates that the

defendants wanted the various items delivered. Under cross-examination, however, Mr Foo

testified that the equipment was ready to be delivered in early February 1991 and that he

had advised Mr Koh of this. At that time Mr Koh did not take the equipment immediately

because he accepted Mr Foo's advice that as his yard was at the sea front and very dirty,

he should not take delivery of the equipment until he was ready to install it since it

might become contaminated with dirt while lying in his yard. If this was in fact the case,

then the defendants with Mr Foo's advice fresh in their minds would not have asked the

plaintiffs to deliver the equipment in three stages over the week prior to the return of

the barge to the yard on 8 March 1991. Instead, they would have asked for one

delivery on

7 March or 8 March itself. The fact that the plaintiffs delivered the equipment in drips

and drabs indicates to me that they delivered the items as and when they were ready and

not in response to requests from the defendants. Further, bearing in mind that the new

equipment was expected to improve the rate of piling and given that the defendants were

already late, no reason was given why if the defendants were informed in early February

that the new equipment was ready they waited a month to bring the barge back for

installation. The fact that time would be lost during installation is not a reason for the

delay since in any case the barge was brought back in March and lost eight days while the

new equipment was commissioned. The probability is, in my opinion, that the plaintiffs'

equipment was not ready in early February as alleged.

95 65. Having considered all the circumstances of the case including the plaintiffs'

shifting stand and the defendants' proven desire to use the new equipment in their

contract with Sembawang, I hold that the plaintiffs did not tell the defendants that

delivery of power packs and cooler meant a later delivery of the other items. Neither

the defendants agree that the other items should only be delivered as and when they

for delivery. Instead, what happened was that the plaintiffs agreed to advance delivery

part of the order without asking for or receiving any agreement to change the delivery

schedule of the balance. There was no variation of the contract. Neither did the

defendants in any way waive their rights to prompt delivery. The plaintiffs were therefore

in breach of contract when they did not deliver all the items by 17 January 1991.

I will

discuss the consequences of such breach later.

96 (2) *Was the equipment defective?*

97 66. At the end of the trial, the defendants' submission was that the equipment was

defective in performance in the following respects:

98 A. Non contamination-related defects:

99 (a) inadequate cooling and filtration system;

100 (b) problems with response of pile-lifting winch; and

101 (c) problems with sensitivity of control of winches.

102 B. Contamination-related:

103 (a) damage to hydraulic pumps;

104 (b) over-heating; and

105 (c) low hydraulic pressure.

106 67. The defendants submitted that the cooling and filtration system was inadequately

designed and this was only remedied after the defendants complained about the system.

Whilst they also relied on Mr Chan who had stated in court that the flushline cooling

circuit should have been incorporated as part of the original design instead of having to

be added later, their main witness on the inadequacies of the cooling system was Mr Ng.

107 68. In his first affidavit, Mr Ng said that one of the defects in the equipment was

that the system tended to overheat, that is the temperature was over 60C. In the same

affidavit he gave two reasons for this overheating: first, that the cooler provided was

insufficient to dissipate the heat within the system and secondly, that there was no

flushline cooling circuit provided for the power pack system. Mr Ng's oral testimony on

the overheating was, however, somewhat confused.

108 69. At first, he disagreed that the normal operating temperature of the system was

about 60C and asserted that the normal operating range was between 50C and 55C. He then

changed his position and said that the maximum temperature at which a hydraulic system

could operate without damage was 65C. He went on to agree that his complaint in his letter

of 25 March 1991 that the temperature of the system was 'over 60C' meant that the

temperature was closer to 60C than to 70C and that therefore the system

temperature was

within the maximum limit of 65C.

109 70. The above evidence made it clear that the temperature of the hydraulic system was

within the maximum limit and the system could not be considered to have overheated. Mr Ng

realised the implications of his admission and tried to retrieve his position by saying

that he thought that he complained about the temperature going above 60C as 'just a

precaution' and also that when the temperature was 65C and above, the oil was diluted and

the defendants had to shut off the system to allow it to cool. He admitted, however, that

overheating only stopped the piling for a few hours.

110 71. The defendants' position is that when they informed the plaintiffs of the problem

with the size of the cooler, the plaintiffs changed it to a bigger one and subsequently

also added a flushline cooling circuit to the pump. The plaintiffs' position is that there

was nothing wrong with the cooler they had originally supplied and that both the new

cooler and the flushline were added as stop-gap measures to deal with the overheating

which was caused by contamination of the oil in the system. Mr Foo said that the only

solution to this problem was to close down the hydraulic system and thoroughly flush it

and that he had advised Mr Ng accordingly.

111 72. Mr Ng testified that he could not remember whether the plaintiffs' representatives

told him that the introduction of a flushline cooling circuit was a stop-gap measure.

Immediately after that answer, however, he agreed that Mr Foo had advised that the only

solution was to shut down and flush the system. In that case he must have known

that the

addition of the flushline cooling circuit was a stop-gap measure. He also agreed with Mr

Foo that once a hydraulic system had been contaminated, the oil would overheat and that no

cooler could prevent it. That being the case, the problem was not really with the size of

the original cooler.

112 73. In totality, Mr Ng's evidence on the overheating was not convincing and I hold that

the defendants' claim that it was due to the inadequacies of the cooler has not been

proved. I next turn to deal with the allegation relating to the filtration system.

113 74. The plaintiffs' stand on the defendants' position that the plaintiffs did not

install a proper filtration system was explained by Mr Foo during his cross-examination.

He said that the main function of the filter in a hydraulic system is to maintain the

cleanliness of the system which should be clean in the first place. The filter can trap a

bit of odd dirt found in the pipes and the valves and in so doing can deal with minor

contamination of the oil. The filter is also there to prevent dirt from going into a clean

system for example when you top up or change oil. The filter, however, cannot clean a

dirty system and this is not its function. He also maintained that the system which the

plaintiffs designed had filters both outside and inside the tank and these were adequate

if the system was clean in the first place.

114 75. Mr Ng in cross-examination agreed with much of what Mr Foo had said as stated

above. At the end of the day there was no dispute that a filter can deal with

minor

contamination only; that its main function is to maintain the cleanliness of the system

which must be clean to begin with and that a filter cannot clean a dirty system.

115 76. The defendants' complaint about the filtration system was contained
in Mr Ng's

affidavit of evidence-in-chief. There he stated without elaboration that there was
a lack

of a proper filtration system. When he came to court, he was cross-examined at
length on

this complaint and he made various contradictory statements.

116 77. First, he disagreed that the plaintiffs' system had filters inside and
outside the

tank and said that there were only filters inside the tank and he supported this
by saying

that the diagram of the filtration system, P1, showed that there was only one
filter

inside the tank. Subsequently, when he was shown certain points on the
diagram, he

admitted that he had earlier made a mistake and that these two points indicated
two other

filters inside the tank. He then admitted that a third point was also a filter and,
finally, conceded that there were actually three filters in the tank.

117 78. Mr Ng, when he realised that he had been caught out, changed his
position by saying

that one of the filters had been replaced by the defendants with a finer one. This

changing of filters was done without the knowledge of the plaintiffs who had
supplied the

filter which the manufacturers had recommended. As the plaintiffs' counsel
pointed out,

the issue of the change of the filter had never been mentioned prior to the
hearing either

in the correspondence or in any of the defendants' affidavits. It would appear
that this

was a story made up to support the defendants' claim to inadequacies on the
system when Mr

Ng realised that his position that there was only one filter could not be sustained.

118 79. The defendants have not succeeded in convincing me that there was anything wrong in

the design of the filtration system.

119 80. The next two defects in the defendants' list related to the pile lifting winch. The

complaints were that the winch was not working and that the control for that winch was

insufficiently sensitive thus causing jerkiness. The defendants made written complaints

about these defects on 20 March 1991 and again on 25 March 1991.

120 81. In relation to the winch control, the plaintiffs informed the defendants that their

supplier had supplied the controls with the wrong spring and that replacement springs were

on the way from Japan and should be installed within a week. It therefore appears that in

relation to the control at least, there was a defect which the plaintiffs were liable

to

rectify. Certainly they appeared to have rectified it because there was no further

complaint about the matter after the plaintiffs' letter of 3 April 1991. I will consider

the issue of damages, if any, for this defect later. It would be noted that Mr Ng himself

conceded that defects such as these were teething problems.

121 82. As regards the winch itself, Mr Foo stated in cross-examination that after the

first complaint, the plaintiffs had gone down to service the hydraulic pump and had

changed the parts. After the second complaint, they had stripped the pilot valve which was

a part supplied by the defendants themselves and had found dirt inside. This problem with

the winch was in the plaintiffs' view connected with the contamination of the hydraulic

system because basically the winch could not work because there was no power

or

insufficient power to drive it.

122 83. Mr Foo explained in court how a hydraulic system works. He said:

123 '... In a hydraulic system, you have an oil reservoir, a hydraulic pump.
The pump is

powered by a diesel engine. The pump runs at very high speed. It sucks oil from
the

reservoir and pressurizes the oil to very high pressure. The pressure propels the
oil

through the pipelines and that in turn runs the machinery. IN between the pump
and

machinery we have a control valve, the function of which is to control the
machine. The

pump and the valves are a very high degree of accuracy. The tolerance between
these parts

are measured in microns - ie. In millionths of an inch. If we have dirt in the
system, the

oil is contaminated and two things will happen. Firstly, the valves will be
blocked

easily. It will malfunction. Secondly, the pumps which are under high pressure and speed

are rotating very fast so the dirt in the system acts like grinding powder. It can wear

out a pump's internal components very easily. If the components start wearing out the

tolerance becomes bigger. Oil will leak from the pump instead of going to push the

machine. Then the pressure of the system will drop. The machine will lose power and it

becomes slower because some of the oil was leaked. Secondly, hydraulic pump is a converter

of energy. But because of the leakage, part of the power is lost into the tank. The energy

which is lost turns into heat and the oil becomes hotter and hotter. Therefore there is a

domino effect. When the system is very hot, the oil thins and leaks more and then more

heat is developed and the system becomes hotter and hotter. Overheating, pressure loss,

leaking, poor response are therefore all related to dirt in the system.'

124 84. Since the defendants were unable to offer any explanation as to what caused the

winches to fail whereas the plaintiffs were the manufacturers and therefore knowledgeable

about the system and gave a coherent explanation of the workings and problems related to

such a system, I accept the plaintiffs' evidence that the problems with the winches arose

from contamination in the system. I must now consider the cause of such contamination.

125 85. The plaintiffs' evidence was that contamination could take the form of dust, rust

from the pipes, welding slag and shot blasting slag. They attributed the presence of shot

blasting slags which they subsequently found in the hydraulic oil to incomplete/improper

flushing, poor installation of piping system and equipment and a lack of care.
They also

asserted that any malfunctioning or breakdown of the hydraulic system or the
piling system

was due to the defendants' own fault and their failure to heed the plaintiffs'
advice.

126 86. Mr Foo's evidence in cross-examination was that the plaintiffs had
instructed the

defendants on the proper way to install the pipes and hoses ie that the pipes be
properly

sealed and flushed, and that when a seal is broken, the equipment must be
installed

immediately. He said that his technicians and supervisor had reported to him
that the

defendants had left pipes and tanks unsealed and uncovered. Mr Chan's
evidence was that

the defendants' yard was very dirty and during the supervision of piping
installation, he

had advised the defendants to clean the pipes and to make sure that they were

covered

before they were installed and that the defendants had to flush the system. He also said

that the defendants had not fully covered the pipes and that after cutting piping, they

had not cleaned the pipes before installation.

127 87. The defendants carried out chemical cleaning of the piping system
on 4 and 5

January 1991. However, the plaintiffs' assertion was that the utility of the chemical

cleaning was undermined by the fact that further piping works were carried out thereafter.

Mr Chan testified that he was unable on 8 January 1991 to commission the hydraulic system

using the power pack and oil cooler supplied by the plaintiffs because the piping works

had not been fully completed. Both the technicians stated that they were instructed to

assist the defendants run some pilot piling on 11 January 1991 and that this was only

completed on 17 January 1991. Also, on 16 January 1991, nine lengths of pipes of six

metres each were delivered to PB8 which further supports the contention that piping works

were on-going at the time.

128 88. Mr Foo's evidence was that in piping installation, chemical cleaning should be done

only after all the piping is completed and that the flushing and cleaning is done before

the completion of piping, then it is a wasted effort. He testified that when he found out

about the contamination in the system, he advised the defendants that the only solution

was to shut down the system and flush it thoroughly. Mr Ng contended that he had followed

Mr Foo's advice and carried out the flushing by changing the oil three times and that it

took about two hours continuous running of the pumps to do this. He also admitted,

however, that flushing of this nature would not amount to the fully contamination of the

system and that it could only help the defendants carry on. So, clearly, he failed to heed

the plaintiffs' advice to shut down the system and flush it completely.

129 89. Mr Ng was not helpful to the defendants on this issue. In cross-examination he

agreed that the reason why the bearing plate and the valve plate in the pumps worn out was

the contamination in the system. At one point, he even agreed that all the defects and

problems stemmed from the contamination to begin with. He made other damaging admissions.

In particular, he agreed:

130 (a) that fine particles had been trapped between the valve plate and the cylinder block

and therefore the pump would not work resulting in an insufficient pressure supply and

complete breakdown of the system;

131 (b) that changing filters was a stop-gap measure and could not get rid of contamination

and that to do so one must disconnect and chemically flush the pipes;

132 (c) that he had used compressed air to clean piping and that this was not effective as

the chemical flushing advised by the plaintiffs;

133 (d) that he had pressurised the plaintiffs' representatives to complete the matters as

soon as possible and had insisted that the plaintiffs commissioned the hydraulic system

even though it was contaminated;

134 (e) that the plaintiffs had advised the defendants not to commission the system until

it had been fully cleaned and flushed;

135 (f) as at March 1991 he knew that the hydraulic system was badly
contaminated; and

136 (g) (during re-examination) that he thought shot blasting was the source
of

contamination.

137 90. The defendants sought to argue that the contamination would not
have occurred if

the plaintiffs had provided adequate advice and supervision during the piping
installation

and final commissioning. In this regard Mr Ng had testified that the plaintiffs'

representatives did not attend during flushing of the system and Mr Foo had
admitted that

they were not present to supervise the installation of the whole work. However,
Mr Chan's

evidence was that he attended to supervise the piping as and when requested by
the

defendants and that in any case he had advised them on the proper procedures.
Further,

even though there may have been some lack of supervision by the plaintiffs, the

fact

remains that at the time they started commissioning, they were not satisfied with the

pipng installation and Mr Chan only proceeded because Mr Ng told him that it was very

urgent and that the plaintiffs should pressurise the piping and make sure that there was

no leakage.

138 91. It is my view that, on the balance of probabilities, the hydraulic system was

contaminated because the pipe installation was not carried out properly in the sense that

the defendants did not take sufficient care to ensure that dirt did not enter the pipes

during installation and also failed to flush the pipes again after installation and before

commissioning started on 18 January 1991. This was because the defendants were drastically

behind schedule and were desperate to try and start work on the project as soon as

possible. Further, when the problems in the hydraulic system caused by contamination

started manifesting themselves in March and April, the defendants were reluctant to shut

down the system entirely and carry out chemical cleaning which would have been the only

way to de-contaminate it effectively. Thus, the problems that arose as a result of the

contamination ie damage to the hydraulic pumps, over-heating and low hydraulic pressure

cannot be made the responsibility of the plaintiffs.

139 (3) *What damages are the defendants entitled to?*

140 92. There is no real dispute as to the principles which apply when the court has to

decide whether a party in breach of a contract is liable to compensate the other party in

respect of any particular item of damage which the latter claims to have suffered

as a

result of the breach. Both parties agree that the defendants can only claim items of

damage that either arose in the usual course of things from the breach of contract or

which may, reasonably, have been supposed to have been in the contemplation of both

parties at the time the contract was made. This is of course the *Hadley v Baxendale*

formulation on the rules of remoteness of damage. Where the parties differ is in regard to

the application of these principles to the present case.

141 93. The defendants quantified their loss on the basis that the plaintiffs by their

various breaches of contract had caused them to be 70 days late in completing the project.

Of these 70 days, they attributed 46 days delay to the late delivery of the equipment and

24 days to malfunctioning and defective equipment. As far as the 24 days are concerned,

the defendants cannot, in my view, substantiate their allegation that those delays

resulted from the plaintiffs' breach of contract for two reasons. The first is that, as I

have found above, the equipment supplied by the plaintiffs was not defective except in one

minor aspect and the plaintiffs are not responsible for breakdowns arising from

contamination. The second is that it was clear from the evidence of both Mr Koh and Mr Ng

that no detailed records of delays caused by malfunctioning equipment were kept and Mr Ng

in particular was guessing as to the number of days delay each problem caused. Therefore

even in the case of the defect that was the plaintiffs' responsibility, it is impossible

for me to ascertain just how much or how little delay that defect caused. The defendants

have not discharged the burden of proof in this respect.

142 94. Moving to the delay in delivery, the defendants' position is straight-forward. They

say that 46 days elapsed between the contractual date of delivery and the actual delivery

of the last item of the plaintiffs' equipment and therefore the plaintiffs delayed their

works by 46 days and should pay liquidated damages for those days. Since they managed to

settle Sembawang's liquidated damages claim for \$200,000, however, they are claiming

reimbursement of that whole amount.

143 95. The plaintiffs' response is two-fold. First, they say that they had no knowledge of

this project for Sembawang and since it was not specifically disclosed to them that the

defendants had deadlines to meet in regard to it, they cannot be made responsible for the

liquidated damages which Sembawang imposed on the defendants. Secondly, they say that in

any event the 46 days delay was due to the defendants' own fault in starting work on the

project late and that if they had complied with the Sembawang contract as regards

commencement, they would have finished work on time notwithstanding any delay in the

delivery of the plaintiffs' equipment.

144 96. The first issue is one of remoteness. The plaintiffs say they should not be

responsible for liquidated damages of any sort since neither the contract with Sembawang

nor the liability of the defendants to pay such damages was specifically made known to

them. They say that liability would only arise if the plaintiffs knew that the defendants

intended to use their equipment for the project. Basically their argument is that such

damage cannot reasonably be supposed to have been in their contemplation at the time they

made the contract.

145 97. I have, however, found that Mr Foo was informed by the defendants that they

intended to use his equipment on PB8 for the purposes of the project. I have also found

that he knew that this was the reason for the defendants' urgency. I accept that the

defendants did not inform him at the time the contract was made about the liquidated

damages clause in their contract with Sembawang but that does not mean that

the plaintiffs

cannot be made responsible for such damages. The issue is whether they should have

contemplated that damage of that sort might arise. As Davies L.J. put it in *Hill v*

Ashington Piggeries [1969] 3 All ER 1496 at 1524:

146 'In order to establish liability for the damage caused by a breach of contract, the

party who had suffered damage does not have to show that the contract-breaker ought to

have contemplated, as not being unlikely, the precise detail of the damage or the precise

manner of its happening. It is enough if he should have contemplated that damage of

that kind is not unlikely.'

147 In the present case, the plaintiffs were commercially experienced and must have been

aware that in marine construction contracts, as in other types of construction contracts,

timeframes are strict and liquidated damages clauses are almost always inserted into such

contracts. If Mr Foo or Mr Sim had thought about it at that time, they would have realised

that it was not unlikely that the defendants would have to pay liquidated damages if they

were late in completing their piling for the project or, for that matter, were late in

completing any other on-going project for which the equipment was intended.

148 98. In any case, even if the plaintiffs had not known about the existence of the

Sembawang project they had dealt with the defendants before and knew that they were marine

piling contractors. They also knew that the equipment ordered was for a piling

barge and

that the defendants wanted to use it immediately upon delivery. They would have known that

the natural consequence of the delay of custom-made equipment which was to be used

immediately would be delay in the marine piling works. It also follows, as the defendants

submitted, that delayed works result in personnel being employed on the job longer,

equipment being tied up for the job and the defendants being liable for damages for delay.

149 99. I therefore hold that, in principle, the plaintiffs are liable to compensate the

defendants for such amount of the liquidated damages which they paid Sembawang which they

can show arose from the delay. This is where the defendants have some problems.

150 100. The evidence before me shows that under their contract with Sembawang, time was of

the essence and the defendants had to complete their works in accordance with the schedule

laid down by the main contractor. On 16 November 1990, they were specifically instructed

by Sembawang to commence and complete the piling works within four months of 15 November

1990. This being the case and especially since there was a liquidated damages clause

providing for such damages at the rate of \$10,000 per day, the plaintiffs' argument is

that the defendants should have started work immediately on 15 November 1990 and that if

they had done so they would have completed it by 15 March 1991. The defendants on the

other hand contended that it was their intention all along to use their new barge equipped

with the Yoshinaga piling frame and the plaintiffs' equipment for the project and that

they were confident that with all the equipment they would have a very efficient

piling

barge and would be able to complete on time even though they started work only in late

January 1991.

151 101. I consider that the defendants were being disingenuous in insisting that they

could have completed by 15 March 1991 if the plaintiffs had complied with their

contractual obligation. This is because they did not give me reliable evidence on the rate

of piling that could be expected with the use of the new equipment. Mr Koh's evidence at

first was that he expected to take 45 days to drive 100 odd piles. This meant a rate of

about 2.6 piles a day (taking 100 odd to mean 120). Then when he was reminded that in fact

the project called for 216 piles, he stated that he could drive that number in 45 days as

well, thus bringing the rate up to 4.8 piles a day. In his dealings with Sembawang

trying

to assure them that the defendants would finish on time, a rate of 6 piles per day was

promised. In fact the defendants came nowhere near that rate. The evidence showed that

before the plaintiffs' equipment was installed, the rate was 2.2 piles a day and

thereafter the rate was 3.1 piles a day. Thus the defendants must have realised that even

if the plaintiffs were on time, they would be somewhat late in completing especially since

the period from January to March encompassed the Chinese New Year holidays during which no

work would be done.

152 102. Notwithstanding the foregoing, I do not consider that the plaintiffs are entitled

to insist that the defendants should have started work on the project on 15 November 1990

and that since they did not do so, the plaintiffs cannot be responsible for any

delays

caused by their breach. It was up to the defendants to decide how to meet their contractual obligations. The plaintiffs' duty was to meet their own contractual obligations and ensure that they themselves did not cause any delay on the defendants'

part.

153 103. I think that the way to calculate the delay which the plaintiffs caused the

defendants is not simply to take the difference between the scheduled date of delivery and

the actual date of delivery. Instead one should estimate how long it would have taken the

defendants to do the job if the plaintiffs had been on time and how much longer it took

because of the plaintiffs' delay. The estimation of the time that the defendants needed

for the work really depends on a practical assessment of the average piling rate. On the

evidence that I have before me, it appears that after the plaintiffs' equipment was

installed, the average piling rate was 3.1 piles per day and I will use this as the basis

of my calculations.

154 104. Using the rate of 3.1 piles per day it would take 70 days to drive
216 piles. The

scheduled date of delivery by the plaintiffs was 17 January 1991 and the defendants

conceded that it would take ten days thereafter to install and commission all the

equipment. Thus, from the beginning it must have been anticipated by the defendants that

they would not be able to start piling work until 28 January 1991. Looking at the

defendants' piling logs, it appears that during the period 28 January to 8 March 1991,

they worked for 23 days (eight days were taken off for Chinese New Year and a few Sundays

were not worked). If they had not had to stop then to install the plaintiffs' equipment,

they would have been able to continue work during the period 9 to 14 March, ie
a further

five days. That means that because of the plaintiffs' delay, the defendants in fact lost

28 days on which they could have been piling with the use of the plaintiffs' equipment.

However, I do not think that these 28 days are exactly equivalent to the delay which the

plaintiffs' late delivery caused the defendants. This is because the defendants had

actually started piling on 26 January 1991 and had piled during most of that period using

their old equipment plus the plaintiffs' power packs and hydraulic cooler and this must be

considered as having mitigated the damage they sustained by reason of the breach.

first, Sembawang wanted to charge the defendants \$10,000 a day in accordance with the

liquidated damages clause. After negotiations, however, they were persuaded to reduce the

\$700,000 penalty to \$200,000. The exact basis of the settlement was not made clear in the

evidence. The defendants consider that the plaintiffs should pay them \$10,000 for

everyday's delay and this would translate into \$90,000 based on the nine days that I have

found the plaintiffs responsible for. It would not, however, in my judgment be right to

assess the damages in this straight-forward arithmetical fashion since the defendants

obviously obtained a huge discount from Sembawang. The best that I can do is to divide

\$200,000 by 70 days which gives a figure of approximately \$2,857 per day of delay. That

would work out to \$25,713 for nine days' delay. I think it would be right to award the

defendants this sum as representing the plaintiffs' share of what they had to pay

Sembawang.

157 107. The defendants also claimed that they incurred additional expenses by reason of

the project taking extra time. First, they had a claim for the salary and wages of their

engineers and other employees. This claim was not supported by any documentation. It

consisted of a mere assertion in Mr Koh's affidavit of evidence-in-chief that those

personnel had been involved in the project and that the sums set out in his affidavit

represented their salaries. Such an assertion is by itself insufficient proof of the

expense and I accordingly do not make any award under this head.

158 108. The defendants also had a claim for the hire of two tug boats which were used in

the project. They paid \$58,360 for the extra 70 days. This expense was substantiated by

invoices. The sum of \$58,360 for 70 days works at \$833.71 per day which means that for

nine days the cost was \$7,503.39 which sum has to be borne by the plaintiffs.

159 109. The next item of claim was loss of rental fees for PB8 and for their hydraulic

hammer. The defendants' case in this regard was that if they had finished the project

earlier they could have rented out these two items and earned a profit from them. However,

Mr Foo's evidence was that the plaintiffs did not know that the defendants were in the

business of hiring out barges and hydraulic hammers. I accept his evidence in this regard.

Mr Koh testified that he had not told Mr Foo of this aspect of the defendants' business

since he did not regard the plaintiffs as potential customers. He thought however that the

plaintiffs did, somehow, know about this. However, as I have found, the information which

the defendants were at pains to tell me they had given Mr Foo was that they wanted the

plaintiffs' equipment for their own use for their contract with Sembawang. In these

circumstances, it was not foreseeable on the part of the plaintiffs that delay in delivery

would cause the defendants to lose out in rental earnings which they could otherwise have

made. The defendants also did not adduce any specific evidence of rental demand for these

two items which they were unable to satisfy by reason of the delay in the project. I

therefore disallow this head of the defendants' counterclaim.

160 **Conclusion**

161 110. In the result, there will be judgment for the plaintiffs on their claim in the sum

of \$59,592.60 with interest on the sum of \$54,495 at the rate of 12% per annum
from 1

February 1992 to date of payment. The plaintiffs are also entitled to the costs of
their

claim.

162 111. There will be judgment for the defendants on their counterclaim in
the sums of

\$25,713 and \$7,503.39 and interest on both sums at 6% per annum from the
date of service

of the defendants' defence and counterclaim to date of judgment. As for costs, I
am

awarding the defendants half the costs of their counterclaim as they succeeded
only on the

issue of delay and failed on the issue of defective equipment.

163 JUDITH PRAKASH

164 JUDGE

Judith Prakash J

Richard Buxton with Douglas Leong for the plaintiffs
Andre Maniam with Edwin Lee for the defendants
