Leefon Corporation (Pte) Ltd v Stone Tec Material Supplies Pte Ltd [2001] SGHC 216

Case Number : DA 600003/2001

Decision Date : 07 August 2001

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Ong Pang Meng with A Jeyanthy (Tang & Partners) for the appellants; Oliver Quek with Ng Hwee Ching (Rodyk & Davidson) for the respondents

Parties : Leefon Corporation (Pte) Ltd — Stone Tec Material Supplies Pte Ltd

JUDGMENT:

1. Leefon Corporation (Pte) Ltd ('Leefon') started the action below to recover the sum of $15,279.98 from Stone Tec Material Supplies Pte Ltd ('Stone Tec'). The basis of Leefon's claim was that they had overpaid Stone Tec for materials supplied. Stone Tec not only denied the claim but also asserted that in fact it had been underpaid by some $99,251.80. It made a counterclaim for this amount. In the course of the trial, Leefon reduced its overpayment claim to $12,784.14. In the event, the District Judge dismissed Leefon's claim and allowed the counterclaim. Leefon now seeks to reverse that decision.

Background

2. In 1997, Leefon was awarded a subcontract to supply stone materials for the building project known as Sunrise Condominium. The main contractor for the project was GTM-Wan Soon Construction Pte Ltd. In the course of looking for suppliers, Leefon came into contact with Stone Tec, a company which supplies materials for construction work who gave an initial quotation for the materials. In December 1997, Leefon, wanting a further quotation from Stone Tec, forwarded to them a fresh bill of quantities ('BQ') and the architect's drawings for the project.

3. On 10 February 1998, Stone Tec wrote to Leefon, by way of proforma invoice, setting out the terms on which it was prepared to supply materials (consisting of sandstone, limestone, compressed marble, granite rubble and other types of stone) to Leefon for the project. Attached to this letter were 15 pages of the BQ duly filled in with the rates at which Stone Tec was prepared to supply the various materials. On 9 March 1998, Leefon accepted Stone Tec's offer by signing and stamping the proforma invoice in the manner provided for in the invoice. Stone Tec also signed the proforma invoice, apparently on 10 March 1998.

4. Among the terms set out in the proforma invoice was the following:

> 'Production takes about ten days and it subjected *(sic)* to factory working condition without obstruction. At least 7 days notice is required before we proceed cutting *(sic)* at our factory.'
>
> and
>
> 'Agreement will be confirmed and valid upon signed *(sic)* by both parties and received your purchase order or confirmation letter.'

In the BQ, the dimensions, profiles and quantities of materials required were clearly stated. In

addition, the prices quoted by Stone Tec were expressed in terms of dollars per metre run or per square metre except in respect of pilaster caps and weirs which were quoted in a per piece basis.

5. According to the dates in Stone Tec's delivery orders, they commenced delivery of materials to the project on 24 July 1998 but the bulk of material was supplied from 6 October 1998 onwards. The last delivery was made in February 1999.

6. Leefon did not pay for the materials as and when the same were supplied. Instead, they made payment at odd intervals. Stone Tec contended that these payments were made in response to demands for settlement of outstanding invoices but Leefon maintained that the payments were not related to invoices but most were lump sum payments made on account to help Stone Tec with its cash flow difficulties. The payments made were as follows:

Date	Amount
01.08.98	$ 61,336.50
21.10.98	$103,000.00
03.12.98	$103,000.00
05.04.99	$ 30,900.00
07.05.99	$ 51,500.00
Total	$349,736.50

7. Some time in mid December 1998, Stone Tec submitted their claim for payment. Leefon was not satisfied with this computation and a meeting was called at the end of December to resolve the matter. A further computation was submitted by Stone Tec in early 1999 but this too was rejected by Leefon. Leefon asserted that the billing had been done using rates different from that quoted in the agreed BQ in that for items for which the prices quoted were on a per unit basis, the amount billed was based on the number of delivered pieces and for those items in respect of which the prices quoted were on a square metre basis, again the amount billed was based on the number of pieces delivered. Leefon accordingly did their own computation of what was due to Stone Tec on the basis of the prices in the BQ.

8. By the beginning of 1999, Leefon had paid Stone Tec $267,236.50 but according to Stone Tec's invoices, this amount was way below what was due to them. For the next few months Stone Tec kept pressing for payment and Leefon subsequently made two further payments in April and May 1999. The dispute over the correct billing basis continued and there were various meetings between the parties to try and resolve the issue. They were not able to do so. By 1 December 1999, Leefon had recomputed the amount due to Stone Tec as being $306,918.10. This was not accepted by Stone Tec. According to the latter's invoices, the total amount due from Leefon was $448,988.30 and since Leefon had paid only $349,736.50 there was a balance due to them of $99,251.80.

9. When the action was filed, Leefon had prepared a revised statement of accounts whereby the total amount due to Stone Tec was computed as being $334,465.52 which meant that Leefon had overpaid them by $15,259,98. By the time the trial started, however, Leefon had revised their computation again and they applied for and were given leave to amend their statement of claim to show that the amount due to Stone Tec was in fact $336,952.36. This meant that the overpayment was in the lesser amount of $12,784.14 and Leefon accordingly reduced their claim to this sum.

The pleadings

10. By the time the action was commenced, both sides knew where the battle lines were drawn: each

of them had come up with different computations of the amounts chargeable by Stone Tec for the materials supplied. When it came to pleadings, however, both sides were succinct in the extreme. This was a case that would have benefited from a careful delineation of each party's stand and the basis therefor instead of reliance on standard form short pleadings which are better suited to a case in which there is no substantial dispute.

11. The amended statement of claim consisted of two paragraphs. The first stated that the plaintiffs' claim against the defendants was for the sum of $12,784.14 being the amount overpaid by the plaintiffs to the defendants for the supply of materials for the plaintiffs' project at Sunrise Gardens Condominium. As particulars of the claim, the plaintiffs referred to the annexed statement of account. This statement was a 13 page long table setting out the plaintiffs' detailed computation of the amounts due to the defendants for the materials delivered. This table dealt with each type of material delivered and in respect of the same gave the following details: with reference to the BQ, the section of the BQ, the description, the size, the unit, the rate, the total, the list, the item, and with reference to goods actually supplied, the size, the quantity, the unit, the rate and the total. The second paragraph stated that the defendants had failed to reimburse the plaintiffs despite repeated demands.

12. The defence and counterclaim was equally brief. The first three paragraphs consisted of denials of the plaintiffs' claim. The counterclaim consisted of seven paragraphs but the substance of the claim was contained in only two paragraphs viz paragraphs 6 and 7 which read:

> '6. By a contract or contracts made between the Defendants and the Plaintiffs on or about or from February 1998, the Defendants provided the materials contracted for to the Plaintiffs for money consideration.
>
> 7. In breach of the said contract or contracts, the Plaintiffs have to date failed to pay for the Defendants' supplies in the total outstanding sum of $99,251.80.
>
> **PARTICULARS**
>
> The particulars are set out in the Annexure herein.'

The annexure referred to contained a table of items under the following headings: date, invoice number, amount (S$) and at the end of that, a total which was set off against a list of payments received, credit notes and debit notes. The balance due was shown as being $99,251.80.

13. The defence to counterclaim added nothing substantial. It consisted mainly of an assertion that the defendants had been overpaid and a denial that the plaintiffs were indebted to the defendants in the sum of $99,251.80 as claimed or at all.

The parties' cases as appeared from the affidavits of evidence-in-chief

14. Leefon had two witnesses. The first was Daniel Wee Han Boon. He was a project manager with Leefon, in charge of their Stone Division, between February 1997 and December 1998. The first few paragraphs of his affidavit dealt with initial negotiations between Leefon and Stone Tec which had focussed on the rates quoted by Stone Tec. Finally, the parties came to an agreement in about early February 1998 and Stone Tec's proforma invoice was signed thereafter. According to Mr Wee's affidavit, the contract consisted of the proforma invoice and the agreed BQ referred to therein and these documents were exhibited as WHB3 to his affidavit. That exhibit comprised the proforma

invoice, the completed BQ consisting of ten pages and Stone Tec's quotation dated 8 October 1997 which consisted of five pages.

15. Mr Wee went on to say that the contract was done on a back-to-back basis in that Stone Tec was to co-ordinate with the main contractor in respect of the work schedule, delivery schedule for the materials, cut lists, fabrication/templates, and arrangement for delivery of the materials. Apart from this co-ordination, all other queries of the main contractor from Stone Tec and vice versa were to be routed to Leefon. The cutting lists were to be forwarded to Stone Tec by the main contractor on a progressive basis.

16. In April 1998, Stone Tec informed Leefon that the full cutting lists had not yet been received from the main contractor and that they would not be responsible for any delay in the project as a result. In May the main contractor informed Leefon that there were some changes to the original drawings/plans. These changes were documented in the form of supplemental drawings and forwarded to Stone Tec. On 8 August 1998, Leefon forwarded to Stone Tec five cutting lists together with 12 drawings and four schedules of quantities.

17. Some time between August and September 1998, Herman Ang, Stone Tec's general manager, requested Daniel Wee to make part- payment of $103,000 to enable Stone Tec to ship in sandstone. Mr Wee stated that he authorised this part-payment as he was shown documents evidencing that shipping arrangements had indeed been made.

18. In October 1998, the main contractor informed Leefon that the delivery schedule for the fabricated sandstone had not been complied with. The main contractor was also not satisfied with the quality of the sandstone so far delivered. Attempts made by Mr Wee to contact Mr Ang to resolve these complaints were unsuccessful and subsequently Mr Wee decided to visit Stone Tec's fabricators in Singapore to find out the actual status of affairs. He learnt from these visits that none of the fabrication works were complete and he subsequently wrote to Stone Tec informing them that all fabrication works should be completed by 21 November 1998. This deadline was not complied with.

19. On 21 November 1998, Stone Tec asked for funds to enable them to make payment to their suppliers and fabricators. Mr Wee said that he refused to authorise this payment was Stone Tec was not able to show that they had carried out substantial work that would justify the payment request. However, subsequently, Leefon's then deputy general manager, one Mr Liew, authorised the payment and the second payment of $103,000 was made on 3 December 1998.

20. Paragraphs 20 to 23 of the affidavit dealt with some difficulties relating to the fabrication works and the use of epoxy pieces as a temporary measure. The main contractor wanted these pieces removed and while the parties were trying to sort out the situation, Stone Tec submitted their payment claims to Leefon. Mr Wee told his colleague, Mr Seah, to look into these claims. He himself left Leefon's employ on 31 December 1998.

21. The next witness was Mr Ronnie Seah Chong Peng. He was a senior project executive in the employ of Leefon between October 1996 and June 2000. Much of his affidavit recited events that had already been dealt with by Mr Wee. In paragraph 21, he started to deal with the claim for payment made by Stone Tec in December 1998. Mr Seah said that this claim contained only the invoice numbers, the dates of the invoices and the sub-total amount due without specifying the actual quantities supplied or the unit rate and without making any reference to the agreed BQ. A meeting was convened on 26 December to try to resolve the matter.

22. At the meeting, Leefon was represented by Mr Wee, Mr Liew, and Mr Seah whilst Stone Tec's

representatives were Mr Ang, Mr David Lim, their site co-ordinator, and Ms Lucy Wang, a director of Stone Tec who was in charge of billing. During the meeting, Stone Tec was told to submit their claims in a table format and/or in a form of a 'schedule of finish' so as to facilitate comparison of the items supplied with the items and prices quoted in the BQ. Mr Seah asked Stone Tec to forward their computation in a table which would indicate the materials supplied and the total cost of these materials based on the unit and unit rates contained in the BQ.

23. In early 1999, Stone Tec submitted their computation. Mr Seah rejected this computation because the billing was done using rates which were different from those quoted in the agreed BQ in that for items which the prices quoted were per unit, the amount billed was based on the number of delivered pieces and that for items for which prices quoted were in square metres, the amount billed for the quantity similar was again based on the number of pieces delivered. Stone Tec did not furnish any conversion formula to enable Mr Seah to verify their computation. Stone Tec was therefore told to resubmit their computation based on unit and unit rate as denoted in the agreed BQ.

24. Instead of resubmitting the computation, between March and July 1999, Stone Tec sent numerous reminders to Leefon asking for the outstanding amount to be paid. On 7 July 1999, Leefon wrote to Stone Tec stating its reason for non-payment. This was that there was a discrepancy between the prices quoted in the BQ and accepted by Leefon and the prices actually charged. Leefon also said that up to then they had paid Stone Tec $280,000 as against its claim on the invoices totalling $380,000. Such payment had been made out of goodwill. The full payment according to the invoices could not be made because of discrepancies.

25. In early August 1999, Leefon suggested that a site meeting be held to confirm the actual quantities of materials supplied and/or any additional works done. The site meeting was held on 10 August 1999 and attended by Mr David Lim and Mr Seah. During that meeting, no verification took place but Mr Lim agreed that all materials supplied were in accordance with the agreed BQ and the additional and variation works were as previously agreed between the parties.

26. Around the end of August there was another meeting to try and resolve the problem. Again Stone Tec was asked to submit a summarised bill in a table format to facilitate comparison with the rates in the BQ. Stone Tec forwarded their further computation on 15 September. Mr Seah compared this with the construction drawings, cut lists and actual supply to site as reflected in the delivery orders. He did not agree with the computation as he found that the items listed were not according to those in the BQ. Further, there were a lot of items that were not listed in the BQ. He therefore recomputed the figures and forwarded his computation to Stone Tec on 16 November 1999 for their verification. Subsequently, the parties met on 23 November 1999 and Stone Tec put forward their objections to Leefon's computation. Subsequently, Mr Seah recomputed the figures based on a detailed study of the quotation and agreed BQ, the cut lists and site measurements. The re-computation was forwarded to Stone Tec but they did not accept it. Thereafter, the parties were not able to reach any agreement. It is important to note that although certain portions of Mr Seah's affidavit were expunged on Stone Tec's objections, as they dealt with without prejudice negotiations between the parties, those parts of his affidavit I have paraphrased above were not affected by these criticisms. Yet, Stone Tec did not cross-examine him at all on any of the allegations which remained in his affidavit.

27. There were three witnesses for Stone Tec. The first was Herman Ang Soon Leang. Mr Ang identified himself as a director of Stone Tec and confirmed that on or about 9 March 1998, he, on behalf of Stone Tec and Daniel Wee, on behalf of Leefon, had signed an agreement whereby Stone Tec was to provide materials to Leefon for the Sunrise Condominium. He identified the agreement as being exhibit ASL2 to his affidavit. This exhibit contained the proforma invoice, the five page

quotation of October 1997 and the ten page BQ. He went on to say that Leefon required a substantial portion of the materials to be custom-made and cut to measure. He told Mr Seah and Mr Wee that since the slabs had to be cut to measure, exact site measurements would have to be given to him and also incorporated in the form of a complete cutting list. However, the cutting list was not supplied to Stone Tec and therefore for those materials that required cutting, Stone Tec had no choice but to order un-cut slab materials from India and wait for Leefon to supply cutting lists with the exact measurements required.

28. Finally, the first part of the cutting list was given to Stone Tec who proceeded with the cutting works almost immediately. Mr Ang recalled that cutting works commenced on or about 2 October 1998 and were completed on or about 5 December 1998. Mr Ang told Mr Seah about his concern that Leefon's instructions were also given at short notice and that the cutting lists were not complete but given to him in parts. Mr Seah told Mr Ang to go ahead and rush his subcontractors with the cutting works and supplies. He would ensure that Stone Tec was paid. Stone Tec delivered the materials as agreed and raised invoices to Leefon for the materials supplied. These invoices were not paid in full. Yet, Stone Tec continued to perform their end of the agreement to completion.

29. Mr Ang went on to say that Stone Tec had sent various reminders to Leefon for payment. Rather amazingly, Leefon then commenced this action against Stone Tec for a sum allegedly overpaid to Stone Tec. In sheer exasperation Stone Tec retained solicitors to defend the claim and commence a counterclaim.

30. The next witness was Ms Lucy Wang Siam Keng. She was also a director of Stone Tec. Her affidavit contained nothing that was different from the contents of Mr Ang's affidavit. In fact, most of her affidavit was hearsay based on what she understood Mr Ang had told Mr Seah and Mr Seah had told Mr Ang. She too was 'amazed' that Leefon had sued Stone Tec and confirmed that Stone Tec had acted 'in sheer exasperation' in defending the claim and mounting the counterclaim.

31. The last witness was David Lim Boon Ann who was the sales and project co-ordinator of Stone Tec. His affidavit was identical to that of Ms Wang.

The decision below

32. The District Judge first summarised the case of each party. She then noted that what had to be determined were first the nature of the contract between the parties and secondly, whether Stone Tec was entitled to apply rates that differed from those in the BQ to the materials supplied. The judge did not go on to note the third matter to be determined, perhaps because of the decision she had reached on the first two. The third issue was whether, on the basis that Stone Tec's rates were not contractually agreed, Leefon's calculations based on the BQ were correct.

33. After summarising the evidence presented by each party, the judge discussed her findings. The judge noted that Leefon had not referred to the contract between the parties in their pleadings. They had merely made their claim for overpayment without stating its basis. However, it was not disputed in evidence that the contract for the supply of materials was AB3 to AB14 [note: these pages comprised the proforma invoice and the BQ but excluded the October 1997 quotation]. She examined the computation made by Leefon of the materials supplied and observed that Leefon could not show in this computation that the materials supplied corresponded with the descriptions in the BQ.

34. The judge went on to find that the contract was a contract for the supply of materials. She also observed that 'it may be' that the parties had agreed that the cutting lists from the main contractors

be taken as the purchase orders. She also noted that the delivery terms of the contract provided for production to take ten days and seven days' notice to be given before cutting was to be proceeded with so that all in all 17 days' notice was required for delivery. In fact, no such notice was given and the materials were all delivered within a few days of supply of the cutting lists.

35. The judge stated that it was not disputed that the materials that were ultimately supplied by Stone Tec were vastly different from the descriptions in the BQ. It was also not disputed that where the items were the same as those in the BQ, the rates in the BQ were used. She continued at 20 of her grounds:

> '20. An examination of the description of the items in the delivery orders and invoices, which are in accordance with the cutting lists, would show that they do not correspond with the descriptions in the BQ at all. A comparison of the descriptions in the BQ and the delivery orders would show substantial differences, for which it would not be possible to extrapolate the agreed rates in the BQ to apply to the materials delivered by the defendants. As such, they must be taken to be variation orders or additional orders. The issue therefore, arose as to whether the terms of the variation orders or additional orders have been agreed by the plaintiffs. Mr Ang has alleged that Mr Wee and Mr Seah had undertaken to pay the defendants pursuant to the variation but he had not informed them of the rates for the variation orders. However, the defendants had issued invoices to the plaintiffs on the same date as the delivery orders for the materials delivered. There was no evidence that the plaintiffs had disputed any of these invoices until sometime in December 1998, according to Mr Wee's evidence. Mr Wee claimed upon clarification by the court, that he did not receive the invoices. However, he admitted that he was aware that the invoices were sent and he claimed that he had highlighted to Mr Ang verbally that the defendants should make progress claims.'

36. The judge went on to state that since the contract was for the supply of materials, it was not necessary for Stone Tec to make progress claims rather than to issue invoices. Leefon had paid Stone Tec's first two invoices on 1 August 1998 and had not raised any issue that a progress claim should have been made by Stone Tec. The bulk of the invoices for the sandstone supplied were dated from 6 October 1998 to 31 December 1998. She then referred to Stone Tec's submission that Leefon's agreement to Stone Tec's rates for the variations orders and the additional orders could be inferred from their conduct in accepting and using the materials supplied. The judge concluded in 23:

> 'The plaintiffs did not reject or return any of the materials or raise an issue over the invoices initially. In fact, upon receipt of the invoices, various payments were made by them on 21 October 1998, 3 December 1998, 5 April 1999 and 7 May 1999. While the last two payments were made after the dispute had arisen, the first two were not. Although the 30 day payment period may not have expired on 21 October 1998 or 3 December 1998, Mr Wee admitted under cross-examination that part of the materials been delivered when the payments were made and in respect of the payment made on 3 December 1998, the defendants had probably delivered materials up to the value of the payments that were made. In any event, the delivery orders together with the invoices would have been submitted by the defendants. Mr Wee claimed that he did not look at the invoices as the contract was a progressive one. But the terms of the contract at AB3 as regards payment are clear. There is no requirement for a progressive claim to be made. In the words of Steyn LJ in *Trentham Ltd v Archital Luxfer*

[1993] Lloyd's Law Reports, 25, at page 29:

> "In a case where the transaction was fully performed the argument that there was no evidence upon which the Judge could find that a contract was proved is implausible. A contract can be concluded by conduct …"

In the circumstances, I agree with the defendants' counsel's submission that there was a contract for the supply of the materials at the rates stated in the invoices, by the conduct of the plaintiffs in accepting delivery and using the materials upon receipt of the invoices. The plaintiffs continued to do so until all the materials required for the project have been supplied and delivered by the defendants.'

Analysis

37. From the above, it can be seen that the judge's decision was based on the following:

(1) her finding that many of the items in the Stone Tec invoices did not correspond at all with the descriptions in the BQ and her inference from that finding that it would not be possible to extrapolate the agreed rates in the BQ to apply to the materials delivered;

(2) her conclusion that those materials which did not comply with the description in the BQ had to be considered as additional or variation orders;

(3) her redefining of the issue as being whether the terms of the variation or additional orders had been agreed by Leefon and her finding that Leefon did not reject or return any of the materials or raise any of issues initially but had instead made two payments in October and December 1998 'upon receipt of the invoices'; and

(4) her conclusion that there was a contract for the supply of materials at the rate stated in the invoices arising from Leefon's conduct in accepting the delivery and using materials upon receipt of the invoices.

38. With due respect to the judge, I cannot accept her reasoning. First, there is no evidence to substantiate her conclusion that because the items in the invoices were described differently from the items in the BQ no extrapolation could be made from the BQ rates to establish the cost of the items delivered. Mr Seah's testimony was that he had been able to do exactly that by a detailed study of the quotation and the BQ, the cutting lists and the site measurements. He also took into account the actual items supplied to the site as reflected in the delivery orders. Such a calculation is not impossible since the items delivered were used in accordance with the drawings and the BQ had been drawn up on that basis as well. It was not as if the items were to be used in some way that was totally different than the use originally envisaged. It would be recalled that Mr Seah had averred that at a meeting at the site in August 1999, Mr Lim had agreed that all materials supplied were in accordance with the BQ. Mr Seah was not cross-examined on this allegation or on any of the computations that he had made in relation to the correct costing for the items delivered. It was not put to him that overall what he had done was an impossibility nor were any specific areas in any of his computations criticised. At the least, this lack of cross-examination showed that Stone Tec had

no basis on which to quarrel with those computations. At the most it could be considered an admission of the truth of Mr Seah's evidence.

39. Secondly, there was little basis for the conclusion that the materials that did not comply with the description of items in the B Q had to be considered as additional or variation orders by that reason alone. This conclusion was based on the physical differences in the description only. It was not based on any pleading on the part of Stone Tec. Nor was it based on any case made out in the affidavits of evidence-in-chief of Stone Tec's witnesses. Mr Ang had agreed in 4 of his affidavit that the contract between the parties was the one signed by Mr Wee and himself in March 1998. He said nothing in any of the paragraphs following that about there being additional or variation orders. His concern in the subsequent paragraphs was to explain the difficulties that Stone Tec had encountered because of alleged delays in the delivery of the cutting lists and the fact that he had had to order uncut slabs of sandstone from India and arrange for cutting in Singapore. Since it was not pleaded that there had been additional or variation orders to which different rates would apply from those agreed to in the BQ, it was not open to Stone Tec's counsel to make submissions on that basis. Nor was it open to the judge to make a finding on the issue.

40. It was Stone Tec who contended that the rates in their invoices (which they agreed were not the BQ rates) were the applicable rates. This was the basis of Stone Tec's counterclaim. They should have pleaded their case on that basis. Instead, their counterclaim simply referred to a contract or contracts made from February 1998 without specifying that such contract was any different from that relied on by Leefon. Nor did they give any particulars of how such contract was formed ie by oral agreement or by conduct. This deficiency in the pleading was compounded by the affidavits of evidence-in-chief. There was nothing there to tell either Leefon or the court that Stone Tec was proceeding on contracts that were different from or additional to the one sued on by Leefon and accepted by the judge as the contract between the parties. Stone Tec had the onus of making their counterclaim clear. They could only propound a case that was pleaded. Having failed to meet this basic legal obligation, there was no ground for them to put forward arguments on variation of the contract or on additional contracts whether or not there was evidence to support their assertion that Mr Wee had agreed to pay them extra. In fact such evidence was irrelevant in the context of their pleaded case which contained no reference to any new contract or any contract which had been varied for good consideration.

41. Since there was a contract in existence, there was no room for any argument or conclusion that the acceptance and use of materials delivered by Stone Tec resulted in contracts for the purchase of those materials at the rates stated in the invoices issued. The cases quoted by counsel for Stone Tec both in the court below and before me related to the very different situation where, in the absence of any existing written or oral contract, conduct was used to show that the parties had come to an agreement. The situation here was the opposite: a contract existed and the conduct was in accordance with the existing contract. Leefon had asked Stone Tec to supply materials on a certain basis. When the materials came, Leefon accepted them and used them as it was all along envisaged they would be accepted and used. Acceptance and use of the materials in these circumstances cannot be used to justify a conclusion that Leefon had agreed to the new rates quoted in the invoices.

42. Further, the invoices sent reflected charges on a per piece basis. Until these charges were examined carefully in the context of the amount of material supplied, it could not be ascertained whether the rates charged were as per the BQ or otherwise. In the situation that existed, Leefon's acceptance and use of the materials was not capable of giving rise to only one inference ie that they had agreed to pay whatever Stone Tec had chosen to charge and that they were no longer relying on the agreed contractual rates. It should be noted that the rates in the BQ were those quoted by

Stone Tec and accepted by Leefon and for that reason it may not have occurred to Leefon that the rates in the invoices would have differed from those in the BQ. Further, as was pointed out below, the original intention had been for the items to be cut locally rather than in India as indicated by the condition in the proforma invoice relating to the seven day notice requirement before Stone Tec would proceed with 'cutting at our factory'. Thus, an increase in rates by reason of local cutting would not have been a factor in Leefon's consideration when they accepted the materials. It should be noted that it was not put to Mr Wee during cross-examination that Mr Ang had informed him that local cutting would result in increased costs and that he had urged Stone Tec to go ahead nevertheless.

43. None of the four payments made by Leefon before the dispute over billing arose was made in such circumstances as to give rise to an unequivocal inference that Leefon had accepted the new rates. The non BQ rates were applied mainly to the sandstone which was delivered from October 6 onwards. Before that Leefon had paid Stone Tec $61,336.50 which was the amount outstanding under two invoices dated 24 July 1998 issued for granite rubble stone and broken Solnhofen. Most of these materials were charged at unit prices based on the area in terms of square metre of materials delivered, though one component was charged on a per piece basis. According to Mr Ang, the materials billed for here were straight forward materials, not sandstone, and therefore did not require any cutting. The billing for these materials was in accordance with the BQ and the different components were charged according to the 'metre square' rate or the piece rate. Since these invoices were in accordance with the BQ rates, Leefon's payment of them could not give rise to any inference of accepting a varied rate or varied price basis.

44. The next two payments made by Leefon were in the sum of $103,000 each. Leefon's explanation was that these were lump sum payments made to help Stone Tec to pay their fabricators and stone cutters. These payments did not represent acceptance of outstanding invoices although, in court, Mr Wee accepted that by the time the first of these payments was made, ie on 21 November 1998, Stone Tec had probably supplied materials which exceeded $103,000 in value. In rejecting Leefon's explanation of these payments, the judge overlooked the fact that the amounts of the payments were round sums and did not reflect individual invoices issued in respect of deliveries made. Nor did she have regard to the letter that Stone Tec wrote to Leefon on 21 November 1998 asking for $100,000 to enable Stone Tec to pay their suppliers and fabricators. No mention was made in that letter of payment of specific invoices for materials already supplied nor was there any reference to any change in the costing due to the cutting lists and/or the necessity to fabricate locally instead of in India.

45. The character of these two payments was also reflected by the fact that Stone Tec, as shown by the appendix to their counterclaim, had issued specific invoices for these two amounts and subsequently, in drawing up their accounts, deducted the amounts of these two invoices from their claims. Otherwise there would have been a duplication and an overcharge since the two invoices for $103,000 each did not reflect any specific delivery of materials.

46. In order to establish their counterclaim, Stone Tec had also to show how their invoices were computed. They, however, failed to show exactly how this was done. There was no explanation of how they arrived at the prices charged. Mr Ang was unable to explain to the court how the balance sum of $99,251.80 which Stone Tec claimed to be due had been derived. His only explanation was that the invoices had been done by Ms Wang. During cross-examination of Ms Wang she was taken through some of the invoices and asked on what basis they had been prepared. Her reply was that the invoices were based on the cutting lists and they tallied with the BQ except when the sizes of materials supplied had differed. When asked to cross refer to the BQ and quotation and point out the corresponding item numbers in the BQ, she was unable to do so. Further, when she was asked for the

computation of the amount outstanding, Mr Wang's reply was that she had 'forgotten to put it in'. As early as 4 December 1999 in response to a letter from Leefon asking for the basis of Stone Tec's claim, Stone Tec had stated that they were trying to extract all necessary documents to show Leefon how their claim was calculated. Unfortunately, by the time the matter came to court, this was still not done. Whilst Stone Tec was able to give a mathematical calculation of their claim by adding the amounts of all the invoices together and subtracting the payments received from the total (as they had done as early as 23 November 1999), they were not able to justify their bills by reference to agreed rates or their own costs or even by what would be reasonable costs in the market for the items supplied.

Conclusion

47. Whilst I have pointed out the deficiencies in Stone Tec's evidence, the basic problem with their counterclaim was that it was not properly pleaded. As every litigation lawyer should know, what you do not plead you cannot prove and thus cannot successfully claim. Stone Tec failed to establish any legal basis which would have entitled them to charge Leefon for the materials in the way that they did. It was common ground that the substantial portion of Stone Tec's claim was not calculated in accordance with the BQ which contained the contractually agreed rates. Stone Tec having failed to show the legal basis of their claim, the counterclaim failed and should have been dismissed.

48. As regards Leefon's claim, they pleaded that they had overpaid Stone Tec based on their computation of what was due to Stone Tec under the contract. The contract was admitted by Stone Tec. Stone Tec denied that they had been overpaid but they did not challenge Mr Seah's evidence on how the computation had been arrived at based on the BQ rates, taken together with the drawings, the cutting lists and the amounts delivered. This was a grievous mistake on their part. Since they did not challenge that evidence, they must be held to have accepted it as the correct calculation of the amount due on the basis that the correct rates to apply were those contained in the BQ. Accordingly, Leefon had proved their claim and it should have been allowed.

49. In the premises, I allow Leefon's appeal and set aside the judgment below. There shall be judgment for Leefon in the sum of $12,784.14 together with interest at 6% per annum from the date of the judgment below. Stone Tec's counterclaim is dismissed. Leefon shall have the costs of the action and of this appeal.

Sgd:

JUDITH PRAKASH
JUDGE

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