Hiap Tian Soon Construction Pte Ltd and Another v Hola Development Pte Ltd and Another [2002] SGHC 258

Case Number : Suit 1328/2001

Decision Date : 31 October 2002

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : David Ong Lian Min and Yak Jinq Wee (David Ong & Co) for the plaintiffs; Yang Yung Chong and Eugene Tan (Lee & Lee) for the first defendants

Parties : Hiap Tian Soon Construction Pte Ltd; Goh Kim Hock — Hola Development Pte Ltd; Lonpac Insurance Bhd

Building and Construction Law – Building and construction contracts – Breach of obligation to proceed regularly and diligently – Delay in handing over project site

Building and Construction Law – Guarantees and bonds – Revision of contract sum – Whether unconscionable to call on bond based on original contract sum

Equity – Defences – Equitable set-off – Whether right to equitable set-off excluded by contract – Whether necessary to inform plaintiff before exercising right to set-off – Whether defendant made reasonable assessment of losses

Held, awarding interlocutory judgment for the first plaintiffs' claim and part of the first defendants' counterclaims,

(1) Hola had a valid claim for damages as Hiap Tian Soon had conceded liability for the damaged piles (see [12]-[16]).

(2) Hola's right to an equitable set-off was not excluded by contract. In a building contract, one starts with the presumption that each party is to be entitled to all remedies arising by operation of law, including the right to set-off. However, it is open to parties to rebut that presumption by contrary provisions in the contract, provided that clear and unequivocal words are used. Here the parties did not craft additional provisions to import the concept of 'temporary finality' into the contract, and it can only be inferred that Hola's right of set-off remained intact (see [17] – [32]).

(3) It was not necessary for Hola to inform Hiap Tian Soon that it intended to exercise the right of set-off. In any case, Hola's General Manager, Lau Yaw Seng, had testified that he had orally informed Hiap Tian Soon of his intention to set off the amounts (see [33]).

(4) However, a party purporting to exercise the right of set-off must quantify his loss by means of a reasonable assessment made in good faith. In deciding what a reasonable assessment is, the court must take into account, inter alia, the quantum of the sum purported to be set-off and the complexity of the rectification works required. The set-off sum of $214,196.90 claimed by Hola was by no means a small amount, and they ought to have done more than to obtain two casual verbal estimates of the costs involved. Hola had accordingly failed to quantify their losses by means of a reasonable assessment, and could not rely on the defence of equitable set-off. As such, Hiap Tian Soon's termination of the contract was valid and they were entitled to succeed on their claim (see [34] – [45]).

(5) Hola's counterclaim for loss and damages arising from Hiap Tian Soon's failure to proceed with reasonable diligence would be allowed. Hiap Tian Soon's progress of work had consistently lagged behind the construction programme they had furnished to both Hola and the architects. Further, they

had persisted in their delay despite reminders from Hola to expedite the work (see [46] – [55]).

(6) Hiap Tian Soon was however not liable for delay in handing over the site from 24 July 2001 to 27 September 2001, since Hola were themselves in delay in checking on the progress of the hand-over, and had also consented to the delayed hand over (see [56] – [59]).

(7) As the original contract price was revised downwards from $10,090,000 to $7,995,000, it was unconscionable of Hola to call on the performance bond in the sum of $1,090,000. The sum payable under the performance bond is subject to revision unless the parties have agreed that that amount is to be unaffected by any changes to the original contract sum. Hola was therefore only entitled to call on and demand payment on the performance bond in the sum of $799,500, based on 10% of the revised contract sum (see [60] - [67]).

(8) With regard to Hola's counterclaim for failure to rectify the defective works, Hiap Tian Soon had generally conceded liability on the damaged piles and as such were liable for 158 piles as well as for piles subsequently discovered damaged in grids 8/B and 6/A (see [68]-[72]).

Case(s) referred to

Aurum Building Services (Pte) Ltd v Greatearth Construction Pte Ltd

[1994] 3 SLR 330 (refd)

Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khalifa

[2000] 1 SLR 657 (refd)

GHL Pte Ltd v Unitrack Building Construction Pte Ltd

[1999] 4 SLR 604 (folld)

Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd

[1974] AC 689 (folld)

Jurong Engineering Ltd v Paccan Building Technology Pte Ltd

[1999] 3 SLR 667 (folld)

Kum Leng General Contractor v Hytech Builders Pte Ltd

[1996] 1 SLR 571 (refd)

Lojan Properties Pte Ltd v Tropicon Contractors Pte Ltd

[1991] SLR 80 (refd)

OCWS Logistics v Soon Meng Construction Pte Ltd

[1999] 2 SLR 376 (folld)

Pacific Rim Investments Pte Ltd v Lam Seng Tiong & Anor

[1995] 3 SLR 1 (folld)

Pembanaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd

[1995] 2 MLJ 57 (distd)

The Nanfri; Federal Commerce & Navigation Co. Ltd v Molena Alpha Inc

[1978] 1 QB 927 (refd)

Judgment

Cur Adv Vult

GROUNDS OF DECISION

The facts

1. By a contract dated 20 May 2000 (the Contract), the first defendants, Hola Development Pte Ltd (Hola) employed Hiap Tian Soon Construction Pte Ltd (the first plaintiffs) to construct a light industrial flatted factory with a basement car park at Ubi Avenue 1. The contract period commenced on 24 July 2000 and was to end 15 months later (in October 2001). The first plaintiffs commenced piling works on or about 21 July 2000 and these works were completed in September 2000. In reliance upon two interim payment certificates issued by Mr Cheong Jiong Chian from the firm of IMT Architects (the Architects), Interim Certificate Nos 1 and 2, certifying that the piles were satisfactorily installed, Hola made payment to the first plaintiffs for the installed piles.

2. The first plaintiffs then began excavation works using the 'open cut method' for the basement excavation without obtaining prior approval from ASE Designtec, the project structural engineers, or the Building and Construction Authority (BCA). The excavation works resulted in soil movement which in turn damaged the piles that had been installed, causing substantial delays to the project. By this time, Interim Certificate Nos. 3, 4, 5, 6 and 7 had already been issued. Upon realising the full extent of the defects, Hola's General Manager, Mr Lau Yaw Seng (Lau) approached the Architects to take into consideration the defective piles and works by way of a retrospective valuation of all work done when issuing the subsequent interim certificates. The Architects however, declined to certify the cost of the rectification works in subsequent interim certificates. Consequently, Hola decided to withhold payment of the sums certified under the said interim certificates.

3. On 18 July 2001, the first plaintiffs terminated the Contract on the grounds of non-payment by Hola. Hola however asserted that the first plaintiffs' termination of the Contract was conduct amounting to an unlawful repudiation of the Contract and accepted this repudiation, bringing the Contract to an end. Hola called on the performance bond furnished by the first plaintiffs, which had been guaranteed by the second plaintiff Goh Kim Hock (Goh) who is the first plaintiffs' director.

4. On 22 October 2001, the first plaintiffs applied for an injunction to restrain Hola from receiving any monies under the performance bond pending trial of this action. The injunction was granted on 15 January 2002. On 8 February 2002, the first plaintiffs discontinued this action against the second defendant Lonpac Insurance Bhd, who had issued the performance bond in favour of Hola.

The pleadings

5. The first plaintiffs' claim against Hola was for a sum of $457,152.13, being the retention sum and the amount certified under several interim payment certificates issued by the Architects. This amount was disputed by Hola, who argued that the first plaintiffs had failed to take into consideration the fact that one of the interim payment certificates (No. 13), amounted to a negative certification to reflect items that were allegedly removed from the building site when the first plaintiffs vacated

the premises. Hola argued therefore that the correct sum due under the payment certificates (as well as the retention sum) should only be $358,107.94.

6. Hola refused to make payment under the payment certificates on the ground that they had valid claims against the first plaintiffs for defective building work which they purported to set-off against the certified amount due under Interim Certificates Nos. 8, 9 and 10; this amounted to $214,196.90.

7. Further, Hola asserted various counterclaims inter alia, for their losses resulting from the first plaintiffs' alleged invalid determination as well as from the delay in the progress of their work and in the hand-over of the site. Finally, Hola argued that it was entitled to receive the full sum of $1,009,000.00 pursuant to the performance bond procured by the plaintiffs.

The issues

8. At the outset, the parties were informed that only liability would be determined at the trial and the quantum of damages would be decided by the Registrar at a later stage, if necessary.

The plaintiffs' case

9. The first issue which I had to consider was whether the first plaintiffs' claim against Hola should succeed.

10. To decide this point, it was necessary to consider whether the first plaintiffs' termination of the Contract on 18 July 2001 was valid. The first plaintiffs argued that it had terminated the Contract in accordance with cl 26(1)(a) of the Conditions of Contract on the ground that Hola had failed to pay monies due to them under Interim Certificates Nos. 8, 9 and 10. Clause 26(1)(a) of the Conditions of Contract provides:

> Without prejudice to any other rights and remedies which the Contractor may possess, if
>
> (a) The Employer does not pay to the Contractor the amount due on any certificate within the Period for Honouring Certificates named in the appendix to these Conditions and continues such default for seven days after receipt by registered post or recorded delivery of a notice from the Contractor stating that notice of determination under this Condition will be served if payment is not made within seven days from receipt thereof; or
>
> (b) …
>
> (c) …
>
> (d) …
>
> then the Contractors may thereupon by notice by registered post or recorded delivery to the Employer or Architect forthwith determine the employment of the Contractor under this Contract; provided that such notice

shall not be given unreasonably or vexatiously.'

11. While conceding the non-payment, Hola contended that they had a valid set-off in respect of damaged and defective piles as against Interim Certificates Nos. 8, 9 and 10. Pursuant to this right of set-off, Hola claimed to withhold the balance amount due under Interim Certificates Nos. 8, 9 and 10 pending rectification of the defective piles. Hola thus argued that the first plaintiffs' termination of the Contract was invalid and amounted to an unlawful repudiation.

Was Hola's set-off valid?

12. The law on equitable set-off is clear. The doctrine has its roots in the historical intervention of the courts of equity to allow deductions whenever there were good equitable grounds for directly impeaching the demand which the plaintiff-creditor was seeking to enforce. The only cross-claims that may be deducted therefrom are those that arise out of the same transaction or are so closely connected with the plaintiff's demands that it would be manifestly unjust to allow him to enforce payment without taking account of the cross-claim. As Chao J noted in *OCWS Logistics v Soon Meng Construction Pte Ltd* [1999] 2 SLR 376:

> An unliquidated claim of the defendant for damages could be set-off if it arose from the same transaction as the claim of the plaintiff or was closely connected with the subject matter of the claim: this was equitable set-off, see *Hanak v Green* [1958] 2 QB 9 and *Morgan & Son Ltd v Martin Johnson & Co Ltd* [1949] 1 KB 107.

13. Similarly, the Court of Appeal in *Pacific Rim Investments Pte Ltd v Lam Seng Tiong & Anor* [1995] 3 SLR 1 found (at p 14) that:

> …the exercise of equitable set-off is only permitted, if equitable considerations support such an exercise. It arises where there are good equitable grounds for directly impeaching the title to the legal demand which the creditor is seeking to enforce. As Lord Denning MR succinctly said in *The Nanfri,* at pp 974-975:
>
> > …it is not every cross-claim which can be deducted. It is only cross-claims that arise out of the same transaction or are closely connected with it. And it is only cross-claims which go directly to impeach the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account his cross-claim.'

14. I turn next to consider whether Hola had a valid defence of set-off to the first plaintiffs' claim.

15. The first plaintiffs did not deny responsibility in respect of the defective piles. In fact, they

conceded liability for the damaged piles and for rectification costs of 158 piles. That would mean that the first plaintiffs conceded that Hola has a valid claim for damages. However, the first plaintiffs objected to Hola's claim of having a valid set-off at the time when payment became due under the certificates, on the ground that any common law right to set-off had been excluded by the Contract.

16. It is therefore necessary to consider whether, by the terms of the Contract between the first plaintiffs and Hola, the latter's right of set-off had been excluded.

Was Hola's right of set-off excluded by the Contract?

17. It is trite law that parties may, by contract, exclude the remedy of equitable set-off. In *Pacific Rim Investments (supra)*, the Court of Appeal noted that the right to an equitable set-off may be expressly excluded by contract. It would suffice if the contract contained clear words which excluded the right to set off, either expressly or by necessary implication: (*Kum Leng General Contractor v Hytech Builders Pte Ltd* [1996] 1 SLR 751 and *Aurum Building Services (Pte) Ltd v Greatearth Construction Pte Ltd* [1994] 3 SLR 330).

18. In *Kum Leng General Contractor v Hytech Builders Pte Ltd* [1996] 1 SLR 751, Rajendran J cited (at p 755) *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 with approval, quoting Diplock LJ:

> It is, of course, open to parties to a contract for sale of goods or for work and labour or for both to exclude by express agreement a remedy for its breach which would otherwise arise by operation of law or such remedy may be excluded by usage binding upon the parties…But in construing such a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption.

19. Here, the first plaintiffs argued that the *only* mechanism for Hola to have recovered the cost of rectifying the damaged work, by way of set-off, is that provided for in cl 2(1) of the Conditions of Contract which states:

> The Contractor shall (subject to sub-clauses (2) and (3) of this Condition) forthwith comply with all instructions issued to him by the Architect in regard to any matter in respect of which the Architect is expressly empowered by these Conditions to issue instructions. If within seven days after receipt of a written notice from the Architect requiring compliance with an instruction the Contractor does not comply therewith, then the Employer may employ and pay other persons to execute any work
>
> whatsoever which may be necessary to give effect to such instruction and all costs incurred in connection with such employment shall be recoverable from the Contractor by the Employer as a debt or may be deducted by him from any monies due or to become due to the Contractor under this Contract.

20. The first plaintiffs submitted that on a true construction of cl 2(1), Hola was only able to

recover the cost of rectifying damaged work by way of set-off, if the Architects had issued an instruction to the first plaintiffs to rectify the damaged work and, the first plaintiffs had failed to comply with such instruction or do any rectification, causing Hola to engage another contractor to rectify the work. The first plaintiffs argued that prior to 18 July 2001, Hola had not employed another contractor to carry out the rectification work; therefore, Hola had no right of set-off before this date.

21. To decide this point, I considered the case of *Lojan Properties Pte Ltd v Tropicon Contractors Pte Ltd* [1991] SLR 80, where one of the issues before the Court of Appeal was whether on the true interpretation of the contract provisions, the appellants were entitled to deduct from the amounts certified by the architects under an interim certificate of payment, sums of money which the appellants claimed to have expended on the rectification of defective works which the respondents had failed to do. The Court of Appeal agreed with the trial judge's findings that the right of set-off had been excluded by the contract used between the parties.

22. It is noteworthy that the contract used by the parties in *Lojan Properties* was based on the Revised Standard Form of the Singapore Institute of Architects (Revised SIA Form). As Karthigesu JA noted (at p 84C):

> The unique features of the Conditions of Contract are that the contractor is assured of regular periodic payments during the period the contract works are in progress based on a retrospective revaluation of all work carried out under the contract (see cl 31(1) and (2)) and subject to the exceptions mentioned in cl 31(11) the contractor is put in a position to enforce payment if payment is not made on the due date by action in the courts.

23. Clause 31(11) of the Conditions of Contract in *Lojan Properties* provided:

> No certificate of the Architect shall be final and binding in any dispute between the employer and the contractor, whether before an arbitrator or in the courts, save only that, *in the absence of fraud or improper pressure or interference by either party, full effect by way of summary judgment or interim award or otherwise shall, in the absence of express provision, be given to all decisions and certificates of the architect*…until final judgment or award, as the case may be, and until such final judgment or award *such decision or certificates shall…be binding on the employer and the contractor* in relation to any matter which, under the terms of the contract, the Architect has as a fact taken into account or allowed or disallowed, or any disputed matter upon which under the terms of the contract he has as a fact ruled, in his certificates or the terms of the contract….[emphasis added].

24. It is clear that in coming to its decision, the court was heavily influenced by the unique features of the contract. Karthigesu JA specifically approved the following passage from the first instance judgment, where the judge, referring to cl 31(11), said:

> It is intended that the contractor be paid the amounts

> expressed to be payable in the interim certificates, and if no payment is made by the employer it is intended to enable the contractor in the absence of fraud, improper pressure or interference or in the absence of express provisions, to obtain quick summary judgment for the amounts certified as due. In so far as any sum claimed by the employer is concerned, only the amounts expressly deductible under the contract may be set off against the amount due under the interim certificate. I therefore come to the conclusion that subject to any deduction or set-off as provided expressly in the contract, the amounts certified in the interim certificates are due and payable to the plaintiffs.

25. The contract between the parties was based on the 1980 version of 'Agreement and Schedule of Conditions of Building Contract (Private edition without quantities)', which is in turn based largely on the RIBA/ JCT forms. The contract did not contain cl 31(11) and the corresponding concept of 'temporary finality' which was introduced in the Revised SIA Form specifically to limit the Employer's right of set-off. The absence of cl 31(11) or a clause substantially similar to it in the contract was fatal to the first plaintiffs' argument -- that the contract had excluded Hola's right of set-off.

26. The first plaintiffs cited *Pembanaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57 in support of their contention. This was a decision of the Supreme Court of Kuala Lumpur where it was held that the express enumeration of permitted set-offs in the contract implied that the employer was limited to make deductions which fell strictly within the scope of permitted set-offs on the basis of the *expressio unius* principle. The court found that there were seven express provisions in the contract which permitted the employer to set-off sums. The court held that having regard to these provisions, and applying the *expressio unius* principle, the common law right of set-off had been extinguished.

27. It is interesting to note that the contract in *Pembanaan* was very similar to the present contract between the first plaintiffs and Hola. Clause 2(1) in the *Pembanaan* contract is identical to cl 2(1) of the Contract and states:

> The contractor shall (subject to sub-clauses (2) and (3) of this condition) forthwith comply with all instructions issued to him by the architect in regard to any matter in respect of which the architect is expressly empowered by these conditions to issue instructions. If within seven days after receipt of a written notice from the architect requiring compliance with an instruction the contractor does not comply therewith, then the employer may employ and pay other persons to execute any work whatsoever which may be necessary to give effect to such instruction and all costs incurred in connection with such employment shall be recoverable from the contractor by the employer as a debt or may be deducted by him from any monies due or to become due to the contractor under this contract.

28. The Supreme Court in *Pembanaan* held that the builder was under no contractual obligation to comply with the employer's complaints relating to defective works unless supported by written instructions issued by the Architects pursuant to cl 2(1). The ordinary common law right of set-off

had been extinguished, not expressly but by clear implication. As Edgar Joseph Jr FCJ noted (at p 78):

> In our view, therefore, the express enumeration of permitted set-offs in a contract or sub-contract, can imply that a defendant builder or main contractor, as the case may be, is limited to making such deductions from the amounts claimed as fall strictly within the scope of permitted set-offs, and nothing else, on the basis of the *expressio unius* principle.

29. With respect, the problem with the Supreme Court's reasoning is that it runs counter to the decision of the House of Lords in *Gilbert-Ash Ltd v Modern Engineering* [1974] AC 689. In that case, the employer was empowered by three (3) conditions in the contract to make deductions from the amount certified under interim certificates, for breaches of particular warranties by the contractor. Lord Diplock noted (at p 719):

> The effect of these conditions is to substitute for the sums which would be deductible from the price by operation of law in respect of those breaches of contract, sums calculated in the manner agreed. *The expressio unius rule of construction cannot be prayed in aid to exclude the right of the employer to set up breaches of other warranties in diminution or extinction of the instalment of the purchase price stated in the certificate as due* [emphasis added.]

30. There is much merit in Lord Diplock's observations. Apart from the obvious danger of excessive reliance on the *expressio unius* principle which requires one to infer specific intent from silence, it is clear that the law presumes that parties are entitled to all legal remedies, including the defence of set-off. As Goff LJ stated (at p 988B in *The Nanfri; Federal Commerce & Navigation Co. Ltd v Molena Alpha Inc* [1978] 1 QB 927, (a case where charterers sought to deduct from the hire due to the owners the damages arising from the vessel's loss of speed):

> First, it may be said that this charterparty contains express provisions in clauses 11 and 14 allowing deductions and therefore on the principle expressio unius est exclusio alterius they should not be allowed in any other cases. In my judgment, however, that is not sufficient because equitable set-off is part of the general law and can only be excluded by clear provisions to that effect, and such an inference as I am now considering is not sufficient.

31. While it is clearly possible to exclude any or all of these remedies by way of contract, this must be done clearly and unequivocally; one effective means of exclusion is by way of the 'temporary finality' provision, as in cl 31(11) of the Revised SIA Form. It is equally clear that the position in Singapore differs from that stated in *Pembanaan* as the Court of Appeal in *Pacific Rim Investments* has quoted *The Nanfri* with approval.

32. The rule laid down in *Gilbert-Ash* is clear and simple to apply. In relation to a building contract, one starts with the presumption that each party is to be entitled to all those remedies for breach as would arise by operation of law, including the right of set-off. However, it is open to parties to rebut that presumption by contrary provisions in the contract, provided that clear and unequivocal

words are used. In the present context, it was open to the parties to exclude the defence of set-off, by using the SIA Revised Form for example, or, if the RIBA form was preferred, by crafting additional provisions to import the concept of 'temporary finality' into the contract. The parties did not choose to do so and it can only be inferred that Hola's right of set-off remained intact. I therefore find that Hola's right of set-off had not been excluded by Contract.

Had the first plaintiffs been informed that Hola intended to exercise the right of set-off?

33. I noted the first plaintiffs' contention that they had not been informed of Hola's intention to set-off the amounts due under Interim Certificates Nos. 8, 9 and 10; I reject their contention that this was required for set-off. Even if I am wrong on this point, I am prepared to accept Lau's testimony that he had orally informed the first plaintiffs of his intention to set off the amounts, by 24 April 2002. In his written testimony (at para 50) Lau stated:

> …Hiap Tian Soon alleged by letter dated 25 July 2001 that Hola's claim was a sham and was an excuse to justify the non-payment of the interim certificates. This was definitely not true since I had earlier informed Goh Kim Hock [the second plaintiff] of my intention when he came to look for me for payment. I had also told him on a number of occasions that payment would not be made until the damaged piles were rectified and stated so in my letter to the first plaintiffs dated 31 July 2001…

Were Hola's losses quantifiable by a reasonable assessment made in good faith?

34. The next main contention on the part of the first plaintiffs in relation to the set-off was, that Hola's losses in relation to the defective piles were not 'quantifiable by means of a reasonable assessment made in good faith'. In support of this argument, the first plaintiffs pointed out that the project's quantity surveyor, Ian Chng Cost Consultants (the Quantity Surveyor) only replied with a cost assessment on 23 July 2001, after the first plaintiffs' purported termination of the Contract. The first plaintiffs argued that Hola had not quantified their damages in good faith at the time they purported to set-off their claim, and were therefore precluded from relying on the defence of equitable set-off. As counsel for the first plaintiffs submitted:

> Even if the right to set-off did arise, the damages or cost of rectifying the piles was never quantified by means of a reasonable assessment made in good faith, at least prior to the date of the termination of the Contract (i.e. 18 July 2001).

35. Hola on the other hand, argued that while a reasonable assessment of the unliquidated damages must be made in good faith in order for the right of equitable set-off to be exercised, the party purporting to exercise the set-off need not arrive at an accurate and exact figure.

36. It is clear from *Pacific Rim Investments* that equitable set-off may only be exercised where the loss is quantifiable by means of a reasonable assessment made in good faith. As Thean JA noted in *Pacific Rim Investments* (at p 11):

> The majority of the Court of Appeal [in *The Nanfri*], Lord Denning MR and Goff LJ, agreed that in the circumstances

> the appellant charterers were entitled to an equitable set-off and to deduct from the hire, sums as loss arising from the loss of speed because the claims were so closely connected, *provided that the unliquidated loss was quantifiable by means of a reasonable assessment made in good faith* [emphasis added.]

37. Indeed, in *The Nanfri*, Lord Denning MR specifically noted (at p 975E):

> If the charterer quantifies his loss by a reasonable assessment made in good faith – and deducts the sum quantified – then he is not in default. The shipowner cannot withdraw his vessel on account of non-payment of hire nor hold him guilty at that point of any breach of contract. If it subsequently turns out that he has deducted too much, the shipowner can of course recover the balance. But that is all.

38. It is clear from the above passage that all that is required from the party purporting to exercise the right of set-off is, that he seeks to quantify his loss in a bona fide way by reasonable means. The party does not actually have to produce a specific and final figure, quantified by professional quantity surveyors, contrary to what the first plaintiffs suggested. Similarly, the fact that the estimated figure may eventually turn out to be too high or too low is not, in itself, sufficient to preclude a party from relying on set-off as a defence.

39. There was evidence that some attempts were made by Hola to obtain an estimate of the cost of the rectification works. Lau testified (para 40 of his affidavit of evidence-in-chief) that he had obtained a verbal estimate from the Quantity Surveyor for the sum of S$200,000.00 prior to the purported termination:

> …I do remember that during the course of these discussions in or about April 2001, one of the Consultants had estimated the cost of the rectification of the damaged piles to be in the region of $200,000.00.

40. Wong Kwong Yow of ASE Designtec (the structural engineer) had also deposed (para 28 of his affidavit) to this discussion and the verbal estimate that was offered, in the following terms:

> [Mr Peter Lau] also requested for an estimate of the cost of repairs. I remember that during the discussion, the sum of $200,000.00 was brought up in passing, being the estimated cost of rectification for the defective piles.

41. In addition, Lau obtained a second verbal estimate from a friend of his who was in the construction industry (who did not testify) who informed Lau that the estimated cost of repairs would be approximately $300,000.00. However, no evidence was offered by Hola to explain how these estimates were arrived at.

42. It is important to remember that what is reasonable depends on the facts of each case. In deciding what a reasonable assessment is, the court must take into account various factors. I propose to list just a few factors.

43. First, the quantum of the sum purported to be set-off is highly relevant. Here, Hola were seeking to set-off a sum of $214,196.90, which is by no means a small amount. Further, this sum would, but for the set-off, have clearly been due to the first plaintiffs, as these sums were certified by the Architects. Secondly, the court must consider the complexity of the rectification works required. While parties are clearly not required to have ascertained the exact cause of the problem or calculated the rectification cost down to the last dollar, they should at least draw a distinction between rectification which is easily quantifiable (e.g. if all that was required was the purchase of certain materials to replace defective materials) and that which would clearly require closer consideration such as in this case, where different parties were giving differing quotes. In the latter instance, the party who is purporting to exercise the right of set-off will be held to a higher standard than he would have been held to in the first situation. While, as I have stated earlier, it would not have been necessary for Hola to have obtained a full quantity surveyor's report in order to meet the reasonableness requirement, they certainly must have done more than they actually did. It is not enough to obtain two casual verbal estimates in passing; at the very least, Hola must have had some basis or engaged in some form of rational analysis before coming to an estimate of the costs involved. I find that the two estimates used by Hola were not reasonable and that Hola had failed to show that the losses had been quantified by means of a reasonable assessment.

44. Consequently, it is not open to Hola to rely on the defence of equitable set-off as, the loss in respect of which they were purporting to exercise the set-off was not quantifiable by means of a reasonable assessment made in good faith. As such, the first plaintiffs' termination of the Contract was valid.

Quantum of the first plaintiffs' claim

45. The next issue which I have to consider is whether the quantum claimed by the first plaintiffs was appropriate. Assuming their claim against Hola was valid, Hola should be liable for the total amount certified under the interim payment certificates and which remains outstanding. Hola had argued that the sum should be $358,107.94 whereas the first plaintiffs put forward a higher figure of $457,152.13, which failed to take into account Interim Certificate No 13 (which showed a negative certification of $84,050.76). As the total amount certified under all the interim payment certificates came to $1,310,661.83 and, by the plaintiffs' own evidence, the amount received from Hola was $952,553.89, the quantum of the first plaintiffs' claim should logically be the difference between the two (2) amounts, which is Hola's figure of $358,107.94. However, in the event the first plaintiffs disagree with my calculations, I direct the Registrar to assess the amount due and owing to them.

Hola's counterclaims

46. I next turn to consider whether Hola's counterclaims have any merit.

Damages for the delay in the progress of the plaintiff's work

47. Hola argued that the first plaintiffs were in breach of their obligation to proceed regularly and diligently, pursuant to cl 25 of the Contract which provides:

> (1) If the Contractor shall make default in any one or more of the following respects, that is to say:-
>
> …
>
> (a) If he fails to proceed regularly and diligently with

the Works or

(b) …

(c) …,

then the Architectmay give to him a notice by registered post or recorded delivery specifying the default, and if the Contractor either shall continue such default for fourteen days after receipt of such notice or shall at any time thereafter repeat such default (whether previously repeated or not), then the Employer without prejudice to other rights or remedies, may within ten days after such continuance or repetition by notice by registered post or recorded delivery forthwith determine the employment of the Contractor under this Contract provided that such notice shall not be given unreasonably or vexatiously.

48. Against this, the first plaintiffs contended that their obligation was only to complete the project by the date of completion provided for in the Contract. Since they had validly terminated the Contract before this date, it would be illogical to speak about them being responsible for the delay in the completion of the project.

49. Following the Court of Appeal's decision in *Jurong Engineering Ltd v Paccan Building Technology Pte Ltd* [1999] 3 SLR 667, the law on this point is clear. The main contractors in *Jurong Engineering* terminated the subcontract on the grounds that the subcontractor had failed to proceed with reasonable diligence and had thus breached the agreement between the parties. The court held that 'reasonable diligence' could only be determined by pacing the progress of the subcontractor's work against the subcontract programme. As Goh J opined (at p 668):

> If the progress of the subcontract works consistently lagged behind and did not keep pace with the subcontract programme, then the respondents [subcontractors] could not be said to be progressing with reasonable diligence.

50. Goh J also quoted *Hudson's Building and Engineering Contracts* (11 ed vol 2 paras 9-034 and 9-035 (where it was stated that '*..it would be absurd, it is submitted, if the owner was to be without remedy until after a perhaps distant completion date…'.*

51. While the material contractual term in *Jurong Engineering* was 'reasonable diligence', I am of the view that the same principles should apply when one is dealing with the phrase 'regularly and diligently', as was used in the Contract. On the facts before me, I find that the first plaintiffs' progress of work consistently lagged behind the construction programme which they had furnished to Hola and the Architects. By January 2001, some six (6) months after the date of commencement of the work, the first plaintiffs were already 2 months in delay when the progress of their work was

measured against the construction programme they had submitted. This delay was very serious in the light of the fact that the contractual completion date was 9 October 2001, a mere 10 months away. Further, it should be noted that the first plaintiffs persisted in their delay despite reminders from Hola to expedite the work.

52. Despite the Architects' request (on or about 19 January 2001) that the first plaintiffs expedite the work and submit a revised master programme which incorporated efforts to make up for lost time, the latter submitted a revised construction programme pushing back the completion date to December 2001. However, the first plaintiffs were soon in delay again, even in respect of the revised programme. By April 2001, they were more than 3 months behind the revised schedule A second revised programme submitted in or about May 2001, showing an expected completion date of April 2002. However, by 19 June 2001, the first plaintiffs reported that they were 50 days behind schedule under the second revised programme.

53. I cannot accept the first plaintiffs' contention that they were at all times ready and willing to carry out rectification works and that the delay was in fact caused by the fact that the BCA had not given approval to carry out such rectification. It is clear from the evidence that the first plaintiffs had failed to do even those rectification works that did not need BCA approval; for example, they failed to produce the necessary soil and earth movement reports. Whilst the delay began in late 2000 or early 2001, soon after the date of commencement, I find that the first plaintiffs only submitted rectification proposals as late as June 2001. This was clear from the architect's testimony in cross-examination (N/E 135-136):

> Q: In relation to damaged piles and sewer, you agree 1st Plaintiffs were anxious to rectify?
>
> A: No.
>
> Q: You agree 1st Plaintiffs showed willingness to rectify the damaged works?
>
> A: No.
>
> Q: Why?
>
> A: Despite several reminders from my engineer to submit ECC surveys, they were slow in responding despite several reminders at site meetings week after week.
>
> Q: But 1st Plaintiffs complied with your engineer's instructions and submitted rectification proposals?
>
> A: Eventually yes they did submit plan quite late, June-July 2001, 2-3 months later.

54. The first plaintiffs had also argued that even on the assumption that the progress of works was in delay, this would not by itself be a breach of contract, as cl 25 only gave Hola a right to determine their employment. This argument must be rejected in the light of *Jurong Engineering* where, the Court of Appeal clearly envisaged that the breach of the obligation to proceed with reasonable diligence will give rise to damages as well as to a right to terminate the contractor's employment. It should be noted that the Court of Appeal quoted the following extract from *Hudson's Building and*

Engineering Contracts (11 ed vol 2 para 9-034) with approval:

> …even in the absence of an express term for due diligence and of any linked express termination clause, both such terms require to be implied by law, in construction contracts and subcontracts generally, as a matter of business efficacy. *The primary obligation will, it is submitted, sound in damages* if within the rules of remoteness, as where the nature of the work undertaken indicates that work by other contractors of the owner, or in a subcontract of the main contractor, or commitments entered into with neighbours or others, are within the contemplation of the contract as being dependent on the maintenance of a reasonable rate of progress….[emphasis added.]

55. I therefore allow Hola's counterclaim for loss and damages for breach of the Contract arising from the first plaintiffs' failure to proceed with reasonable diligence.

Delay in handing over the site

56. The Contract was terminated on 18 July 2001. Pursuant to cl 26(2)(a) of the Conditions of Contract, the contractor was obliged to hand over the site of the project within 7 days, i.e. by 24 July 2001. However, the site was only handed over by the first plaintiffs on 3 October 2001. Hola claimed that the first plaintiffs were liable for the losses suffered by Hola arising from the delay in the hand-over of the site, between 24 July 2001 and 3 October 2001. The first plaintiffs only conceded liability in respect of the delay to hand over the site, between 27 September 2001 and 3 October 2001. Are the first plaintiffs liable for any loss suffered by Hola, arising from the delay in handing over, between 24 July and 27 September, 2001?

57. Hola argued that there is no clear evidence that they had waived their right to damages against the first plaintiffs for the late hand-over of the site between 24 July 2001 and 27 September 2001. The company argued that it had never consented to the late hand-over, and that this was clear from reminders that the Architects sent to the first plaintiffs requesting for the hand-over of the site In his written testimony the architect (Cheong Jiong Chian) deposed (at paras 38-41 of his affidavit):

> Initially I had waited for Hiap Tian Soon to contact me to arrange a date for the handover of the site. However when Hiap Tian Soon failed to contact me to handover the site, I directed Hiap Tian Soon by way of a letter dated 29 August 2001 to the handover of the site on 4 September 2001.
>
> However, in a letter dated 4 September 2001, Hiap Tian Soon refused to do so on the basis that they had not been paid for interim certificates 8, 9 and 10 and 11. I then replied in a letter dated 7 September 2001 that the site needed to be handed over so that the tenderers could conduct a site inspection as part of their preparations for the new tender. In this respect I then suggested 11 September 2001 for the handover of the site. Hiap Tian Soon however proposed to hand over the site on 27

> September 2001 in a letter dated 10 September 2001.
>
> By now, Hola noted with concern the inordinate delay by Hiap Tian Soon to hand over the site after the termination of the contract. In a letter dated 18 September 2001, which I forwarded to Hiap Tian Soon, Hola reiterated the urgency in taking over possession of the site and gave a deadline for the handover of the site – 27 September 2001, failing which Hiap Tian Soon would be in trespass…
>
> Notwithstanding this, Hiap Tian Soon only gave back possession of the site to Hola on or about 3 October 2001. When Hiap Tian Soon failed to hand over the site by 27 September 2001, I reminded them in a letter dated 28 September 2001 that they would be responsible for any delay in handing over the possession of the site back to Hola…'

58. I have not seen Hola's letter dated 18 September 2001 as it was not tendered as evidence. After considering the architect's testimony and the first plaintiffs' submissions, I find that the first plaintiffs are not liable for the delay for the period between 24 July 2001 and 4 September 2001, since Hola were themselves in delay in checking on the progress of the hand-over and, did not write to the first plaintiffs until 29 August 2001 and, had authorised the first plaintiffs to remain on the site until 4 September 2001 in that letter. In respect of the period 4-27 September 2001, I accept the architect's testimony that Hola had in fact consented to Hiap Tian Soon's handing over of the site on 27 September 2001. From the architect's testimony, it appeared that by the letter of 18 September, Hola allowed the first plaintiffs to remain on the site until 27 September 2001, while noting that thereafter, the first plaintiffs would be regarded as being in trespass.

59. I find that the first plaintiffs are not liable for the delay in handing-over of the site, between 24 July 2001 and 27 September 2001.

The performance bond

60. Pursuant to the Letter of Award dated 20 May 2000, the first plaintiffs had procured a performance bond in the sum of $1,009,000.00. The amount was meant to be 10% of the original contract sum of $10,090,000.00 as spelt out in the guarantee. Subsequently, the Architects revised the contract sum to $7,995,000.00 following a request by Lau. The first plaintiffs consequently contended that, given the reduction in the contract sum, the guarantee sum must likewise be reduced to $799,500 (i.e. 10% of $7,995,000). However, Hola argued that the parties had not contemplated the revision of the performance bond; in support of this argument, Hola referred to Goh's evidence under cross-examination (at N/E 5):

> Q: Did you ask architects or first defendants for a reduction?
>
> A: No.

61. However, it would appear clear from case-law that the claim for payment under the performance bond should be confined to 10% of the revised contract sum, and not 10% of the original contract sum, as argued by Hola. The Court of Appeal's decision in *GHL Pte Ltd v Unitrack Building*

Construction Pte Ltd [1999] 4 SLR 604 is instructive in this regard. The case established that where the original contract sum has been revised downwards, the sum payable under the performance bond should be based on the revised sum. It was further deemed unconscionable for the holder of the performance bond to demand payment based on the original contract sum.

62. I accept that the revision of about 20% of the original contract sum in the present case is much lower than the 65% revision in *GHL*. Even so, the principle established in *GHL* is clear. The revision of the contract sum represents a reduction of the contractor's responsibility towards the developer. Under such circumstances, the security held by the developer in the form of a performance bond must similarly be reduced. As was noted by Thean JA (at p 617 of the case):

> As between GHL and Unitrack, the latter's commitment under the contract was considerably reduced and similarly the security for such commitment would, in normal cases, be correspondingly reduced.

63. The Court of Appeal in *Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khalifa* [2000] 1 SLR 657 did not think it possible to define, in precise terms, what constitutes *unconscionability* and stated at para 42 (p 668):

> …What kind of situation would constitute unconscionability would have to depend on the facts of each case…There is no pre-determined categorisation.

64. In the present case, the contract sum was revised from $10,090,000.00 to $7,995,000.00. As such, the amount payable under the performance bond should be 10% of the revised contract sum, namely $799,500.00. It would therefore be unconscionable of Hola to call on the performance bond in the sum of $1,090,000.00.

65. Hola had argued that the *GHL* case may be distinguished as Hola and the first plaintiffs, unlike the parties in *GHL*, did not contemplate a revision of the performance bond. This is a misreading of the *GHL* case. The parties in *GHL* similarly did not contemplate an express revision of the performance bond; what they had contemplated was a revision of the original contract sum.

66. More importantly, the fact that the parties did not contemplate a revision of the performance bond does not place that sum beyond revision. In fact, the converse appears to be the case: the sum payable under the performance bond is subject to revision *unless* the parties have agreed that that amount is to be unaffected by any changes to the original contract sum. This can be seen at para 28 of *GHL* (at p 617), where the Court of Appeal stated:

> GHL had not adduced any evidence to the effect that it was agreed that, notwithstanding the revision of the contract sum, the amount of performance bond would continue to be 10% of the original contract sum. It seems to us that in all probabilities after the revision of the contract on 30 April 1999 the parties contemplated that the amount of the bond would be correspondingly revised downwards to 10% of the revised contract sum…

67. I therefore find that Hola are only entitled to call on and demand payment on the performance bond in the sum of $799,500.00, based on 10% of the revised contract sum; it was

unconscionable of them to claim $1,009,000.00.

Dispute over the number of piles

68. There only remains one minor issue to be addressed, relating to the number of piles in respect of which the first plaintiffs were willing to accept liability. The first plaintiffs had accepted that they are liable for the damaged piles and for the rectification of 158 piles. That must mean that the first plaintiffs admitted liability in respect of the original 32 piles that were damaged as well as the piles in grid 7/A. However, Hola had argued that in addition to these 158 piles, the first plaintiffs were also liable for the piles subsequently discovered to be damaged in grids 8/B and 6/A.

69. In a quotation dated 23 July 2001 from Hock Ann Piling Pte Ltd to the first plaintiffs (see exhibit 'GKH-19' in Goh's affidavit), it was stated that:

> ...the nos. of RC Pile to be driven are 173 nos. as per the above mentioned drawing. Deducting pile cap 7/A for 20 nos. of RC piles already driven on 19 January 2001, the balance of RC pile will be driven will be 153 nos.

70. At trial, the structural engineer was cross-examined on this quotation (N/E 130-131):

> Q: See GKH-19 p145 of PW1's EIC. You said to your counsel 187 compensating piles were required. Explain?
>
> A: 153+20+5 RC piles, so total is 178 not 187. Piles driven for 7/A were 20 in number and again found to be damaged, so 5 more had to be added.
>
> Q: If this is the case, 173 were original number of compensation piles but 5 more added. But 20 had been driven so balance is 153?
>
> A: Yes.
>
> Q: So total number of compensating piles should be 153+5 = 158?
>
> A: Yes

71. It is clear that the structural engineer's above testimony was in relation to exhibit 'GKH-19' only, which in turn relates to the 32 piles initially reported as damaged, as well as the piles in grid 7/A. The exhibit was prepared before Hola discovered that the piles in grids 8/B and 6/A were damaged. Consequently, I find that the first plaintiffs are also liable for the piles in grids 8/B and 6/A. I accept the structural engineer's testimony that those piles were defective, but that the defects were not discovered until much later, due to the first plaintiffs' submission of inaccurate pile eccentricities plan to the structural engineer. Specifically, the structural engineer had deposed (in para 32 of his affidavit):

> Union Contractors Pte Ltd ("Union Contractors") who were the new contractor engaged to replace Hiap Tian Soon, subsequently discovered that in fact certain piles at Grid

> 7/A as well as Grid 8/B and Grid 6/A were defective. What was particularly disturbing to me was that in respect of Grid 8/B and Grid 6/A, Hiap Tian Soon had submitted inaccurate pile eccentricities plan to ASE Designtec showing that the pile eccentricities were within acceptable tolerance of 75mm when in actual fact the actual pile eccentricity had exceeded the tolerance of 75mm... Fortunately for Hola, these defects were noted by Union Contractors.....

72. It was clear that the first plaintiffs generally conceded liability on the damaged piles. Hence, they are liable not just for the 158 piles, but also for the damaged piles in grids 8/B and 6/A.

The decision

73. In conclusion, I award interlocutory judgment with costs, to the first plaintiffs on their claim against Hola. I also award interlocutory judgment with costs, on Hola's counterclaim for the first plaintiffs' failure to rectify the defective works and for the delay in the works. The first plaintiffs' liability for non-rectification shall include the defective piles in grids 8/B and 6/A, in addition to the 158 piles in respect of which they have conceded liability. Assessment of the first plaintiffs' claim and Hola's counterclaim shall be done by the Registrar and the costs of such assessment shall be reserved to the Registrar. Unless and until both claim and counterclaim have been assessed and quantified by the Registrar and the figures set off to determine which party ultimately has to make payment, the injunction against Hola restraining them from calling on the performance bond (which can only be in the lesser amount of $799,500) will continue.

74. Finally, as a matter of procedure, it was unnecessary for the second plaintiff to have been joined as a party to these proceedings merely because he was the guarantor of the performance bond issued on the first plaintiffs' behalf by Lonpac Insurance Bhd.

Sgd:

LAI SIU CHIU

JUDGE

Copyright © Government of Singapore.