Petrosin Corp Pte Ltd v Clough Engineering Ltd
[2005] SGHC 170

Case Number : Suit 229/2004

Decision Date : 20 September 2005

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Kenneth Tan SC (Kenneth Tan Partnership) and Oommen Matthew (Haq and Selvam) for the plaintiff; Steven Chong SC, Sim Kwan Kiat and Kelvin Poon (Rajah and Tann) for the defendant

Parties : Petrosin Corp Pte Ltd — Clough Engineering Ltd

Contract – Formation – Whether oral agreement concluded between parties

Contract – Consideration – Past consideration – Plaintiff providing assistance to defendant to clinch project – Whether such assistance constituting sufficient consideration for subsequent agreement

Contract – Formalities – Whether requirements under s 6(e) Civil Law Act (Cap 43, 1999 Rev Ed) fulfilled

20 September 2005

Tay Yong Kwang J:

1 This action is in respect of the plaintiff's claim against the defendant for loss and damages suffered as a result of the defendant's alleged breach of an oral agreement entered into by the parties on or about 18 October 2001 and evidenced by a memorandum of understanding ("MOU") which was not signed by both parties.

The plaintiff's case

2 The plaintiff is a Singapore company whose primary business is that of design and construction of equipment and plants for the oil and gas, petrochemical, refining, power generation and other related industries worldwide. It was incorporated in 1989 with a paid-up capital of $21m. The defendant is an Australian company whose primary business is that of project development in the oil and gas, minerals, infrastructure and property industries.

3 Sohail Latif ("Latif"), the President of the plaintiff, testified that he had worked with the plaintiff on projects in Pakistan since 1991. He introduced the defendant to Pakistan and advised and assisted it in securing and operating projects in that country. It was after he had introduced and assisted the defendant through companies in which he held an office that the defendant's associated company, Clough Ltd, became a public listed company in Australia.

4 From 1996 to 2000, there was a hiatus in the collaboration between the companies that Latif was involved in and the defendant because of the political situation in Pakistan. However, in 2001, new opportunities became available there. A project known as the Sawan Field Project was to be developed. This involved the construction and commissioning of a gas purification plant in Pakistan. A company called Corvetina Technology Limited ("Corvetina"), of which Latif was also President, and the plaintiff collaborated, advised and guided the defendant, enabling it to clinch the said project by 28 October 2001 from the project's owners, a company known as OMV. The project was worth some US$169m. The shareholders of Corvetina and the plaintiff were different entities.

5 From early June 2001, Latif, representing Corvetina and the plaintiff, was negotiating with Jeremy Roberton ("Roberton"), a director of the defendant, on three separate proposed agreements. They were a commission agreement between Corvetina and the defendant in relation to the Sawan Field Project ("the Sawan commission agreement"), a General Agency Agreement between Corvetina and the defendant for future collaboration and an in-country or local works agreement in relation to the same project. The last of these proposed agreements ("the local works agreement") formed the subject matter of this action.

6 The only benefit to the plaintiff in introducing and assisting the defendant in the Sawan Field Project was that it would be awarded the local works agreement. This was made abundantly clear by Latif to Roberton, who in turn indicated to Latif that the defendant was ready, able and willing to award the local works agreement to the plaintiff. The works contemplated under this agreement were the support services essential for the Sawan Field Project, namely, civil construction works, pipe fabrication, construction of buildings, storage tanks, roads, air strips and recreational facilities, plant installation and pre-commissioning assistance and other miscellaneous works.

7 On 19 June 2001, Latif met Roberton in Singapore. The next day, Latif spoke to Roberton over the telephone as the latter had flown to Perth. They discussed the Sawan commission agreement as well as the local works agreement. On 21 June 2001, Latif sent an e-mail to Roberton stating:

> As you suggested and we have agreed, in principle, that if there is any indeed a sizeable in-country work, Petrosin would be pleased to execute the work as a local sub-contractor. Based on our telephonic understanding from you last night, the in-country work would roughly for as under [*sic*]:
>
> i) Approx. US$6 to 8 million for mechanical and erection work;
>
> ii) Approx. US$22 million for civil construction and related work.
>
> The above would represent a total value of about US$28-30 million in-country work.
>
> ...

8 Sporadic discussions then took place over the course of the next few months between Latif on the one hand and Roberton and the defendant's officers on the other relating to all three proposed agreements. On 22 September 2001, Latif sent to Roberton by e-mail a draft MOU in relation to the local works. On 23 September 2001, he met the defendant's officers in Perth. At that meeting, the defendant's officers gave him the impression that, after having benefited from the advice and assistance rendered by the plaintiff, the defendant might be bypassing the plaintiff where allocation of the local works was concerned. Latif immediately protested by e-mail the next day, writing to Roberton as follows:

> Thank you for the meeting Sunday 23 Sept in your offices.
>
> We hope the things do work out in the best interest of Clough.
>
> As there were some handouts given which I only had a chance to review after I left the meeting, I do like to record some observations.
>
> 1 On fees, we have no built in interest. Therefore the benefit we are looking for is from

subcontracting.

2 However the subcontracting must be done in good grace, respect and dignity. If not possible, we should look at alternative ways of handling the interest of our group. My understanding is reflected in my email to you of 21 June 2001.

3 Allowing OMV to get involved on pre-screening the so called Clough itself proposed 6-8 subcontract packages allows a built in mechanism to jeopardize whatever we are trying to do. If for example there is package for airstrip, your proposal will allow OMV to get you to remove our name from the list presumably on solid grounds.

To date Clough has handled us with an approach not acceptable to us at all. You have been reluctant to share information, scope, bids, etc.

9 Latif claimed that there was no discussion on the issue of pre-qualification or OMV's approval at the 23 September 2001 meeting. He asserted that there was a further meeting on 25 or 26 September 2001 when this issue was discussed.

10 On 13 October 2001, Latif raised the question of signing the MOU in relation to the local works. His e-mail of 13 October 2001 to Roberton read:

We have forwarded to you a Memorandum of Understanding in Perth for local subcontracting work. You have not yet agreed with the execution of an agreement although now a major improvement has been made thankfully that we have received copies of tender documents, your bid proposals and various vendor bids you had received from Pakistan.

Please understand that because of the agency fees of which we have no benefit whatsoever, this matter is what benefits our group and this should not be left unattended and should be put to bend and should be done while you are here on Wednesday, 17 October 2001. As long as it stays in this manner, when apprehensions remain with our people which are not doing any good.

I am asking Amir Hassan to be prepared when we meet on Wednesday. We are in a position to sign the agreement with you. Of course, the agreement would be dependent of your getting contract from OMV. We do not believe that there is anything in these documents which require presence of our people in Perth for an extended period to reach the above mentioned agreement. Of course, once an agreement is made, then our people and your people would work together. Our people should go to Perth for as long as required as your subcontractor to liase with your people and assist Clough in every manner possible so that Clough is assisted in a substantive manner by our organization.

I would also think that Clough nominate a person who possibly acts as Client's representative and is based in our office for the project duration to be Clough's eyes and ears to ensure that Clough's interests are protected at all times, to keep us on our toes if needed as we fully appreciate and recognize the importance of this project, tight margins, tight deadlines and therefore the necessity to move fast and to move professionally.

We expect to be partners to pain and gain in proportion to our contribution to the project and therefore have common interest with Clough towards success of this project.

11 Roberton replied the next day (14 October 2001) as follows:

Lets get a few things straight –

1. The current Clough senior management do fully understand and appreciate the support Petrosin / Otech has given Clough both in the past and what they are currently giving us on the Sawan project.

2. Personally, I do not want Clough to work in Pakistan, either now or in the future, other than with Petrosin / Otech. All other senior Management within Clough (Harold Clough, Brian Hewitt and Rob Jewkes) feel exactly the same way. Please discuss this with them if you have any doubts.

3. There is no sinister plot for Clough to work in Pakistan with anyone other than yourself and your companies either now or in the future. Please believe this.

4. Both myself and yourself made a big mistake not finalising all these matters before we submitted the SAWAN bid.

5. As you are aware we do have a fundamental problem/difference with timing of payment of fees.

We have agreed with your request on this Sawan project.

However we have to reach a clear understanding for the future on this issue – if we cannot resolve this to our satisfaction for the future it may be the stumbling block to any ongoing Clough work in Pakistan.

6. Any lack of agreement to date has not been a deliberate attempt to avoid such agreements – I have a very small staff (1 person) and sometimes you also take some time to respond.

This in no way indicates we have some other motive – please also believe this.

In response specifically to the agreements.

As I said in my earlier email – I will be in Singapore from 2:10pm Wednesday 16th until 7:30pm Thursday. I will need to spend a few hours at our office but intend to spend the rest of the time with you to finalise the agreements between us.

AA. : Agency Agreement –

I still believe we need a specific agreement for Sawan (which is what I sent you).

We are also happy to finalise a general ongoing agency agreement – as per the draft as long as we address the timing of payment issues. I suspect this may need to be specific for each project ?? would this be the way to handle it without detracting from the rest of the agreement.

BB: MOU for Sawan Subcontract work

I also want to finalise this when I am in Singapore later this week. Once this MOU is signed I see we will need your people in Perth (as you described) and hopefully within a couple of weeks we could fairly quickly get scope and pricing sorted out.

Sohail – I see the Clough future in Pakistan is very much intertwined with Petrosin – as I have discussed with you before.

I personally intend to make Sawan an example of how we could work together in the future (hopefully the future work will be with a lot less "discussion" than we have had on this one).

We can make it work – if we trust each other and do it together.

12 On 18 October 2001, Latif and Roberton had an important meeting in Singapore during which both of them agreed verbally on all the terms of the three agreements mentioned earlier. Roberton made some amendments in his handwriting to fine-tune the terms of the said agreements but the drafts with his handwritten corrections were not retained because the final versions were later typed out and printed by the plaintiff's staff. Roberton said he wished to visit the defendant's Singapore office in Jurong and then rush to Changi International Airport to catch his flight back to Perth. He wanted to proof-read the final versions to ensure that they contained all the amendments proposed by him and agreed by the parties but did not have enough time to do so in Singapore. He therefore left for Perth with the three unsigned agreements, one of which was an undated MOU relating to the local works.

13 As far as Latif was concerned, agreement had been reached between the parties at the meeting of 18 October 2001. There were no qualifications or reservations and there was nothing further to agree on. Roberton had said he would sign the agreements in Perth and return them subsequently. The said undated MOU concerning the local works was in the following terms:

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding (hereinafter referred to as "MOU") is signed on _____ day of October 2001 by and between:

Clough Engineering Ltd (hereinafter referred to as "CLOUGH", a company incorporated in Australia and with its office at 251, St George's Terrace Perth 6000, Western Australia which terms include its successors in interest, administration and permitted assigns

and

Petrosin Engineers & Contractors Pte Ltd. (hereinafter referred to as "Petrosin" a company registered in Singapore with its office at 7 Temasek Boulevard, Suntec Tower One, #29-03 Singapore 038987 which terms include its successors in interest, administration and permitted assigns

WHEREAS

A. OMV is awarding a contract to Clough Sawan Field project in Pakistan.

B. Petrosin has assisted in Clough obtaining this contract.

NOW, THEREFORE, in consideration of the premises and mutual covenants contained herein, the parties hereto agree as follows:-

1. Clough and Petrosin recognise the Sawan Project as a strategic contract for both companies and that performance to satify [*sic*] the client is of paramount importance.

Clough and Petrosin recognise this project has a very tight budget and a very tight schedule.

Both companies agree to work together as a team to ensure, to the best of their ability, the project is completed safely, to the required quality, to schedule, within budget and to the complete satisfaction of the client.

2. Upon award of contract by OMV to M/s Clough Engineering, Clough will work together with Petrosin with the intention of awarding all in-country work to Petrosin on an exclusive basis subject to conditions outlined below:

This work would represent a value of up to USD30 million.

Subcontract Work for the above would include but not limited to the following:

i) Civil construction

ii) Pipe fabrication

iii) Erection

iv) All local work relating to buildings, roads, air strip, recreation facilities

v) Complete plant installation and pre-commissioning assistance

vi) Tankage, etc.

vii) Other local work such as temporary accommodation facilities etc.

3. Clough would provide a copy of the bids it has from 4-6 bidders.

4. Clough will provide Petrosin the amount they are allocating in their cost estimates for all local work.

5. The work awarded to Petrosin would be based on Petrosin matching the commercially competitive prices and terms and conditions from credible Paksitani [*sic*] companies.

6. As Petrosin would be the main contractor for these works, Petrosin would take overall responsibility and may appoint sub-contractors of specialty/services as required by Petrosin while complying to the project specifications and quality standards. Petrosin and or their subcontractor will provide Clough with appropriate performance guarantees for all work undertaken.

7. Petrosin Project Manager, as a contractor to Clough, shall report to the Clough Project Manager as in any client sub-contractor relationship. However it is the intention that personnel from Petrosin and Clough shall work together as a team for the mutual benefit of the project.

8. In those cases where Clough does not have competitive bids available, Clough may negotiate the work scope directly with Petrosin without inviting bids noting however that should the direct negotiations in such instances do not result in an agreement, Clough may invite bids from other credible companies with Petrosin still retaining the right to match the lowest price and terms and conditions offered by the lowest bidders.

9. In addition to the above local work, Clough may also consider, at Clough's option, to

consider Petrosin to bid on the following work currently expected to be done by Clough outside Pakistan:

a) Detailed engineering

b) Design and supply of Pressure vessels and heat exchangers

c) Design and supply of Skid mounted units

IN WITNESS WHEREOF, the parties hereunto set their hands the day and year first above written.

Agreed and accepted,	**Agreed and accepted,**
For and behalf of	For and behalf of
Petrosin Engineers & Contractors Pte Ltd:	**Clough Engineering Ltd**
By:	By:
_____	_____
Name: Sohail Latif	Name: J. J. Roberton
Title: President	Title:Director-International Division
Date: October _____ , 2001	Date: October _____ , 2001

14 When the agreements were not signed and returned as promised, Latif pressed Roberton for them. On 22 October 2001, Roberton e-mailed to say that he expected to send the signed agreements to Latif the next day. However, this did not happen. Instead, on 26 October 2001, something ominous took place. Roberton telephoned Latif to say that he had problems with his subordinates and further discussions on the MOU were necessary. Latif reminded him that they had shaken hands and congratulated each other on 18 October 2001, with Roberton even remarking how easy it was to reach an agreement once parties negotiated face to face.

15 Shocked that the defendant was attempting to resile from the agreement already in place, Latif sent an e-mail on 27 October 2001 setting out the events of 18 October 2001 and asserting that "we both reached an agreement". On 28 October 2001, Roberton replied to say that he had faxed the signed copies of the three agreements to Latif. He also stated that "the MOU has been changed significantly in the form but not in the intent we discussed/agreed on 18th October". However, he did not deny that the two of them had reached an agreement on 18 October 2001. Roberton also sent a letter on 28 October 2001 explaining that he did not believe that the intent had been changed at all but that "some more detail has been put in as to how we can develop the agreement into a working relationship".

16 The re-drafted agreement signed by Roberton on 28 October 2001 read:

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding (hereinafter referred to as "MOU" is signed on ___ day of

October 2001 by and between:

Clough Engineering Ltd (hereinafter referred to as "CLOUGH"), a company incorporated in Australia and with its office at 251, St George's Terrace Perth 6000, Western Australia which terms include its successors in interest, administration and permitted assignees

and

Petrosin Engineers & Contractors Pte Ltd. (hereinafter referred to as "PETROSIN") a company registered in Singapore with its office at 7 Temasek Boulevard, Suntec Tower One, #29-03 Singapore 038987 which terms include its successors in interest, administration and permitted assignees

WHEREAS:-

A. OMV Pakistan ("OMV"), a company registered in Austria and operating within Pakistan is contemplating the award of a contract to Clough for the engineering, procurement, construction and commissioning of the Sawan Gas Purification Project (hereinafter referred to as the "Project") in Pakistan.

B. Petrosin has rendered assistance to Clough in the preparation of the tender for the Project and in attempting to secure a contract.

NOW, THEREFORE, in consideration of the premises and mutual covenants contained herein, the parties hereto agree as follows:

1. Clough and Petrosin (henceforth to be referred to as the "Parties") recognise that the Project is a strategic opportunity for both companies and that performance to satisfy the client, whilst at the same time meeting the tight budgetary and time constraints, is of paramount importance.

2. The Parties agree to work together as an integrated team to ensure to the best of their ability the project is completed safely, to the required quality, to schedule, within budget and to the complete satisfaction of the client.

3. As a part of the process for achieving these objectives the Parties will work together to develop a contracting strategy for the project

It is anticipated that this contracting strategy:

- will involve the award of a substantial proportion of the in-country work to Petrosin on an exclusive basis.
- will untilise [*sic*] the best available resources in Pakistan.
- will include an incentive scheme to share savings / overruns.

4. The work expected to be awarded to Petrosin is likely to represent a value of approximately to USD30 million and may include but not be limited to the following:

i) Civil construction

ii) Pipe fabrication

iii) Erection

iv) All local work relating to buildings, roads, air strip, recreation facilities

v) Complete plant installation and pre-commissioning assistance

vi) Tankage, etc.

vii) Other local work such as temporary accommodation facilities etc.

5. Clough will provide Petrosin with a copy of the bids that it has received from the other subcontractors at tender stage.

6. Clough will indicate to Petrosin the amount they have allocated in their cost estimates for the in-country work.

7. The award of any subcontract to Petrosin will be subject to the following terms and conditions:

7.1 Any subcontracts will be conditional upon Petrosin matching either Cloughs budgeted allowance or any commercially competitive prices and terms and conditions from credible Paksitani [*sic*] companies.

7.2 In cases where Clough does not have competitive bids available, Clough may negotiate the work scope directly with Petrosin without inviting bids, noting however that should the direct negotiations in such instances not result in an agreement, Clough may invite bids from other credible companies.

7.3 The award of any subcontract to Petrosin will be subject to the Approval of OMV under the provisions of Article 11 of the head contract agreement and subject to the satisfactory agreement of appropriate terms and conditions which shall generally be on a "back to back" basis with the head contract.

7.4 As the Principal subcontractor, Petrosin will take responsibility for portions of work and may appoint secondary subcontractors of specialty/services as required provided that any such secondary subcontractors undertake to comply with the project specifications and quality standards. Petrosin and or their secondary subcontractors will provide Clough with appropriate performance guarantees for all work undertaken.

7.5 Petrosin's nominated Project Manager, as a subcontractor to Clough, shall report to the Clough Project Manager as in any head contractor/sub-contractor relationship. However, it is the intention that all personnel from Petrosin and Clough shall work together as an integrated team for the mutual benefit of the project.

8. In addition to the above local work, Clough may, at Clough's option, consider Petrosin to bid on the following work currently expected to be done by Clough outside Pakistan:

a) Detailed Engineering

b) Design and supply of Pressure vessels and heat exchangers

c) Design and supply of Skid mounted units.

IN WITNESS WHEREOF, the parties hereunto set their hands the day and year first above written.

Agreed and accepted,	**Agreed and accepted,**
For and behalf of	For and behalf of
Petrosin Engineers & Contractors Pte Ltd:	**Clough Engineering Ltd**
By:	By: (Signed)
_____	_____
Name: Sohail Latif	Name: J. J. Roberton
Title: President	Title:Director-International Division
Date: October ____ , 2001	Date: October 28th , 2001

17 In Latif's view, the re-drafted agreement signed by Roberton on 28 October 2001 introduced the following new terms to the oral agreement reached on 18 October 2001 and they were not acceptable to the plaintiff:

(a) removal of the plaintiff's right to match the lowest bidders' price, terms and conditions (cl 8 of the undated MOU as compared with cll 7.1 and 7.2 of the MOU dated and signed by the defendant);

(b) the defendant's requirement that the plaintiff accept the terms and conditions on a back-to-back basis with the defendant's contract with OMV (cl 5 of the undated MOU as compared with cl 7.3 of the MOU dated and signed by the defendant);

(c) the plaintiff having to match the defendant's budgeted allowance for work the defendant wanted done in Pakistan (cl 8 of the undated MOU as compared with cl 7.1 of the MOU dated and signed by the defendant);

(d) substitution of "all in-country work" with "substantial proportion of the in-country work" (cl 2 of the undated MOU as compared with cl 3 of the MOU dated and signed by the defendant); and

(e) requiring the plaintiff to be part of an incentive scheme to share savings or overruns, a term which was not mentioned at the meeting of 18 October 2001.

18 Since Roberton had changed the agreement reached on 18 October 2001, Latif went to meet the defendant's chairman and majority shareholder, Harold Clough, on 28 November 2001 at the Conrad Hotel here. Harold Clough assured Latif that the defendant would honour its agreements. Based on this, Latif signed the original MOU, dating it as 28 October 2001, and sent it to the defendant by courier, referring to his meeting with Harold Clough.

19 Latif immediately formed the impression that the defendant had made a deal with some other party and intended to exclude the plaintiff and Corvetina. This was notwithstanding the fact that the other two agreements with Corvetina had been signed by Roberton essentially in the form as agreed on 18 October 2001. In any event, the defendant subsequently repudiated those two agreements wrongfully.

20 Following the repudiation of the Sawan commission agreement, Corvetina commenced legal action against the defendant, which then applied for a stay of proceedings by invoking the clause on arbitration. The matter proceeded to arbitration and the defendant was found to have breached the agency agreement with Corvetina.

21 Latif asserted that the defendant repudiated the local works agreement it made with the plaintiff by unilaterally introducing new terms inconsistent with the original terms agreed and transcribed into the MOU. The defendant later awarded the local works to parties unknown to the plaintiff. The plaintiff was not awarded any part of the local works. If it had been awarded the local works, its profits would have been considerable, being originally pleaded and said to be some 25% of US$30m (the total value of the works) or US$7.5m but subsequently left at large to be assessed.

22 In his second affidavit of evidence-in-chief, Latif claimed that from as early as April 2001, when the defendant approached the plaintiff for advice and assistance, he had made it absolutely clear that he expected a twofold return in the form of an agency fee for a company to be nominated and an award of subcontract works to the plaintiff. Further, he had made it clear that the defendant must agree to give the plaintiff the right of first refusal for local construction and fabrication works. This right meant that the main contractor (in this case, the defendant), upon securing the main contract, must award some specified subcontract work to the one who had the right of first refusal, subject to the latter's ability to meet the terms and price of a *bona fide* third party bidder. There was no requirement that the one with the right of first refusal had to make a bid or pre-qualify because he had already been accepted.

23 Although there was usually a provision in the main contract that the subcontractor must be approved by the owners, Latif was not prepared to subject the plaintiff to such an approval procedure as it would effectively negate its hard-earned right of first refusal.

24 Subsequently, "in order to translate the agreement reached" between him and Roberton, Latif prepared an MOU and sent it to Roberton by e-mail dated 22 September 2001, which spelt out the essential agreed terms and made no mention of approval by OMV. This was modified slightly at the said meeting of 18 October 2001, resulting in the final MOU.

25 On 23 September 2001, Latif met senior officers of the defendant in Perth, including Roberton and Rob Jewkes, then chief executive officer of the defendant. This was soon after the attack on the World Trade Centre in New York and all foreigners, including OMV expatriates, had left Pakistan. At that meeting, there was a handout which was placed on the table in front of each person present but it was not referred to nor discussed during the meeting. The focus was on the security situation in Pakistan. It was a short meeting which started sometime after 3.00pm that Sunday.

26 When Latif returned to his hotel room after dinner that night, he noticed that the said handout mentioned the need for OMV's approval. He protested the next day about this as there had been no discussion on this at the meeting.

27 In early October 2001, Roberton agreed that the plaintiff would not be subjected to approval by OMV and the defendant sent various documents to the plaintiff to study and prepare itself in order

to match the competitive bids from third parties. On 12 October 2001, Latif had discussions in Singapore with Roberton and Rob Jewkes. Once again, the issue of OMV's approval was mentioned in passing. This was followed by an e-mail on 13 October 2001 from Latif to Roberton, to which the latter replied the next day (14 October 2001), stating:

> In Perth OMV has been told in no uncertain terms of our intention to use Petrosin for all in country work.
>
> …
>
> In Singapore – we were discussing the security situation in Pakistan at the moment and indicated using Petrosin as the main contractor in Pakistan would help us. They agreed but commented that Clough could not abdicate responsibility and turn the project as a whole into a consortium with different responsibilities for different scopes etc ie: they still expected Clough to be responsible for the total job no matter how much Petrosin was undertaking. We agreed.
>
> …
>
> To summarise:
>
> … OMV have been told and accept Petrosin will be our main contractor in Pakistan. They will not accept a consortium approach but they will accept anything sensible we want to do as long as Clough takes responsibility for it.
>
> As I see it – the contract still contains a clause which gives OMV approval of all subcontractors. Clough is now in a position to rebuff any technical/practical reason for OMV to reject Petrosin.
>
> …

As far as the plaintiff was concerned, "that drove the final nail into the coffin with respect to OMV approval". Latif reiterated that Roberton had gone to the plaintiff's office here for the sole and specific purpose of finalising the agreements and that was exactly what he accomplished. Only the formality of executing the MOU remained.

28 Latif accused the defendant of trying to keep all the profits from the Sawan Field Project for itself. There was a perception, he claimed, that the defendant was a dubious and devious lot. In 2001, the defendant got into various troubles with the Pakistani authorities and, therefore, securing the Sawan Field Project was going to be an uphill task. Nevertheless, the plaintiff devoted a considerable part of its time and resources to assisting the defendant, including persuading a state-owned enterprise, with which the defendant was locked in litigation, not to object to the defendant's participation in the said project. It also helped the defendant stave off unfair competition from rival bidders.

29 The plaintiff and the defendant would have reached an agreement on the contract price for all local works very quickly. This was evident from Roberton's e-mail of 14 October 2001 to his project staff to get ready for a long session with the plaintiff in the week commencing on 22 October 2001 to work out the prices and scope of the local works, "with a view to locking in a price prior to us actually signing the contract with OMV".

30 On 13 December 2001, the plaintiff's Pakistani office received a request for pre-qualification in respect of "camp building" from the defendant. As this aspect of the works represented only about

10% of all the local works, the plaintiff did not think it made economic sense to mobilise a full team of managers, engineers and craftsmen, together with the paraphernalia, to go to a very remote desert location in order to pre-qualify for this small portion of the local works. By that time, the relationship between the two parties had soured badly. At a meeting in Singapore on 26 February 2002, the plaintiff accepted the defendant's repudiation. Alternatively, such acceptance was by way of e-mail of the same date or by the plaintiff's solicitors' correspondence with the defendant or its solicitors or by the commencement of this action (as pleaded in the Further and Better Particulars dated 16 September 2004).

31 Latif agreed that his name was on the exit control list of Pakistani. He explained that many very respectable people in Pakistani were also on that list as a result of the viciousness and vindictiveness of the political party which was in power at the material time.

The defendant's case

32 Roberton, an engineer, was the manager of the defendant. He worked for the defendant between 1972 and 1987 and after that, for various other engineering companies until June 1993 when he rejoined the defendant. Between May 1999 and 2002, he was the director of the defendant's International Division, looking after its offshore operations throughout the world except for Australia, New Zealand and Indonesia. He was responsible for seeking, bidding and executing engineering construction work overseas and reported to Rob Jewkes. He is currently with another company, employed as the manager of a division.

33 Roberton first met Latif in 1993. He learnt that Latif was associated with a number of companies such as Corvetina and Otech Pakistan Pvt Ltd ("Otech") but was not aware of the exact nature of the association. He never met the directors of those companies. All his correspondence and conversations were with Latif or with Tassadaq Malik ("Malik"), the general manager of the plaintiff. He also learnt from his predecessor that the defendant and Otech had an ongoing agency relationship concerning all projects undertaken by the defendant in Pakistan and that he had to inform Latif of any project there that the defendant intended to bid for so that Latif's company could assist in obtaining the contract. If any such project was secured for the defendant, it would pay Latif's company a commission which would usually be an agreed percentage of the total contract amount.

34 Roberton's first dealing with Latif was in 1993 when they worked together to finalise the tender documents for a project in Pakistan owned by a state-owned company. He was told that Latif had contacts within the said company and could advise him on how to bid. The defendant's bid was not the lowest in that case and it was therefore not awarded the project.

35 In 1999, when Roberton had to resolve some issues in another project in Pakistan with the same state-owned company, Latif was upset that Roberton had not conducted his dealings through him. Latif sent him a fax setting out his concerns and referred to a draft, unsigned 1996 agency agreement between the defendant and Otech. Latif suggested that it was time to reinstate negotiations on that agency agreement. Latif was then living in Singapore, having left Pakistan in 1996 or 1997 after having learnt that his name was on the country's exit control list. He only began travelling to Pakistan again after his name was removed from the exit control list sometime in 2000.

36 In mid-2000, OMV, an Austrian company, invited the defendant to submit a pre-qualification form for work in the Sawan Field Project. In June that year, Roberton did so without Latif's involvement. The pre-qualification bid was not successful. Roberton then asked the defendant's consultant, who was until then Australia's High Commissioner for Pakistan, to find out why the defendant did not make it to the pre-qualification list. Roberton was subsequently informed that the

Pakistani government had a stake in the Sawan Field Project and that the defendant was not politically acceptable due to its litigation with a state-owned company.

37 In January 2001, Roberton realised that he had not involved Latif in the pre-qualification exercise. Accordingly, he telephoned Latif and sought his advice on the Sawan Field Project. He also e-mailed Latif to ask whether the defendant should ask OMV to explain why it had rejected the defendant. Latif said he would do what he could to assist the defendant and that was when he became involved in the matter.

38 In March 2001, OMV asked Roberton whether the defendant was keen in bidding for the Sawan Field Project because a few of the other bidders had withdrawn their bids and the list of bidders was inadequate. Roberton informed OMV that it was very keen. On 28 March 2001, Roberton met two of OMV's officers in Pakistan and was told that OMV would consider awarding the Sawan Field Project to the defendant if the state-owned company, with which the defendant was engaged in litigation, had no objections.

39 On 2 April 2001, the defendant was invited to participate in the tender for the Sawan Field Project. Roberton then informed Latif that they should meet in Singapore on 3 May 2001 to discuss the potential working relationship between Latif and the defendant in the said project. Latif replied to say that he could not meet on that date. He also stated that the defendant should use the plaintiff for local construction and fabrication works and that the plaintiff would have to offer the defendant a competitive price. He was concerned about the defendant's meetings with other subcontractors.

40 Roberton believed that it would be beneficial to have a Pakistani company carry out some of the subcontract works in the project as the company would be familiar with the way things worked in that country. On 26 April 2001, he emailed Latif to state that they needed to talk about how they could make the relationship between their respective companies work for the project. Latif requested that the plaintiff be given the right of first refusal for the local works on the basis that it would have the opportunity to match the price that the defendant would obtain from other potential subcontractors.

41 Roberton did not think this proposal would be in the defendant's interests as it would not be able to obtain competitive prices if it was known in the market that there existed an exclusive agreement with one subcontractor. He was doubtful whether the plaintiff could carry out all of the local works in any event. He then told Latif that they should discuss the matter as he was not keen to give anywhere near 100% of the local works to the plaintiff. As the bidding would close on 26 June 2001, he met Latif on 19 June 2001 to finalise their understanding for the bid.

42 On 20 June 2001, Roberton told Latif that the local works for the project were worth some US$30m and that if the plaintiff wanted any of the works, it would have to provide competitive pricing and prove it was capable of performing all the various types of works. Latif replied to propose that they proceed either under the "traditional arrangement" or with the plaintiff being awarded the local works. Roberton understood "traditional arrangement" to mean payment of a commission of 5% with no subcontract works involved. He had already told Latif earlier that that was not acceptable as the costs had to be kept low if the defendant wanted to be successful in its bid for the project.

43 Roberton proposed that the plaintiff pay Otech 2.5% of the total value of the project if it was awarded the project. Latif said he was happy with 2.5% plus some of the local works as he claimed that most of the agency fee would be passed on to other people and he needed the local works to make some profit. Roberton replied that so long as the plaintiff was technically qualified and competitive in pricing, there was no reason why the defendant would not engage the plaintiff.

44 On 26 June 2001, Latif e-mailed to say that he would appreciate an in-principle agreement. Roberton replied that the defendant would engage the plaintiff to do as much work as it was capable of doing at competitive prices. Roberton knew that OMV's approval was needed for its subcontractors.

45 In August 2001, Roberton was informed by OMV that if the project was awarded to the defendant, it would not be able to use the plaintiff as its subcontractor because of directions "from above". At a meeting with Latif in Singapore on 19 August 2001, Roberton related this to Latif who said he understood that to be a message to him from the Minister for Petroleum, Pakistan. He added that he would sort things out.

46 On 29 and 30 August 2001, the defendant and OMV met in Pakistan to discuss the bid for the project. From 20 to 27 September 2001, they also met in Perth. Roberton informed OMV of the intention to have the plaintiff do the local works. OMV replied that its prior approval must be sought and that it would not block the use of the plaintiff as a subcontractor so long as it was technically competent to do the works. They met further in September 2001 in Perth. After each meeting, Roberton would update Latif on the developments.

47 On 19 September 2001, Latif e-mailed to say that the parties needed to translate the local works subcontract into an agreement and that the defendant could let OMV know that the Minister for Petroleum met his people last week and totally denied having given any instructions not to engage the plaintiff in subcontract work.

48 On 22 September 2001, Roberton received Latif's e-mail attaching a proposed agency agreement and a proposed MOU. On 23 September 2001, the plaintiff and the defendant's officers met in Perth. Roberton's notes on what needed to be discussed were provided to everyone who attended that meeting. The notes stated that the defendant had agreed to work with the plaintiff as much as possible in Pakistan, that the plaintiff was now acceptable to OMV but OMV still wanted to vet all subcontractors, that the plaintiff would be invited to bid for all of the eight to twelve subcontract packages if the defendant thought it was suitable, that the plaintiff must perform before it would be invited to bid and that the suggested agreement document submitted by Latif did not reflect what he and Roberton had agreed on.

49 On 24 September 2001, Roberton received the e-mail reproduced in [8] above. Further e-mail discussions followed between Roberton and Latif on the draft agreement between the plaintiff and Otech in respect of the Sawan Field Project. On 6 October 2001, Latif e-mailed to say that OMV had asked the Pakistani government for approval for the defendant to use the plaintiff for local works and that the government had given its approval. During his many telephone discussions with Latif, Roberton always told him that the plaintiff would need to be approved by OMV for the subcontract works. On 14 October 2001, Roberton e-mailed Latif to inform him that he would like to finalise the MOU for the Sawan Field Project when he arrived in Singapore later in the week. He testified that he was prepared to reach an "in principle agreement" that provided for the plaintiff to carry out the local works subject to it matching the defendant's budget or any competitive pricing from other subcontractors and being able to perform, and that the plaintiff would have to be approved by OMV. He said he never intended to reach a final agreement at the 18 October 2001 meeting as any in-principle agreement would be subject to review by the defendant's commercial department and Rob Jewkes before the defendant committed itself to a binding agreement.

50 Roberton testified that his general practice at that time was to submit any significant agreement to the defendant's commercial team for review and comment before finalisation. Most of the agreements in which he was involved were referred to Rob Jewkes for approval.

51 In mid October 2001, Roberton was in Kuwait. On his way home on 18 October 2001, he stopped over in Singapore and met Latif alone at about 4.00pm in the plaintiff's premises. Prior to that meeting, Roberton e-mailed Latif to ask him to send to his hotel room copies of the MOU for the works in Pakistan, the agency agreement drafted by the defendant and the draft agency agreement for the Sawan Field Project. Latif's recollection was that the meeting, lasting about two hours or more, took place at about 9.30am and that his personal assistant, Angela Yee, was present. Roberton said he could have walked past Angela Yee or she could have entered the boardroom to bring them some drinks but no one else joined him and Latif for the meeting. He also recalled that the meeting lasted about an hour or so.

52 At the meeting of 18 October 2001, Roberton informed Latif that the defendant wanted to work with the plaintiff on the Sawan Field Project, but any subcontractor that Clough wanted to engage would have to be approved by OMV and the plaintiff had to demonstrate to OMV that it had the ability to perform the subcontract. Roberton did not attend that meeting expecting to achieve a final agreement between the parties but to reach an understanding on how they could work together. He did not have the authority to agree to the MOU or the agency agreements without the defendant's commercial team having reviewed the documents first. Further, the defendant's project manager had to be satisfied with the chosen subcontractor's ability and competitive pricing. There was therefore a need to pre-qualify for the works.

53 When the meeting concluded that day, both Roberton and Latif were in general agreement concerning the way forward. The defendant would award the plaintiff as much local works as possible, subject to the plaintiff satisfying the defendant of its ability and competitiveness. There was thus an agreement reached on intent.

54 On 19 October 2001, Roberton received an e-mail informing him that OMV would be awarding the Sawan contract to the defendant. On 22 October 2001, Roberton sent to his colleague, Timothy Walker ("Walker"), in Perth for his comments his "final drafts" of the general agency agreement between Corvetina and the defendant, the agency agreement between Corvetina and the defendant for the Sawan Field Project and the MOU. That same day, he e-mailed Latif to say that he would send the signed agreements to him the next day and that he had a team working on the resolution of all the pricing issues.

55 On 24 October 2001, Walker e-mailed to say he had made some changes to the agreements and that he had concerns regarding the MOU. In particular, he was concerned that the MOU placed the defendant at a considerable commercial disadvantage and would breach the confidentiality between the defendant and the subcontractors who would tender for the local works. It also did not afford sufficient protection to the defendant. At around this time, Roberton tried to arrange a meeting between Russell Waugh, the defendant's project manager for the Sawan Field Project, and Latif. However, Latif refused to meet the defendant's project manager.

56 Roberton denied that Latif's e-mail of 27 October 2001, wherein he purported to set out the events of the 18 October 2001 meeting, was an accurate record of that meeting. He asserted that while Latif and he reached agreement that the parties wanted to work together, they did not reach any agreement on the terms. He was required to obtain the approval of Rob Jewkes and the defendant's commercial department first. For that reason, no document was signed that day. It was not possible for him to have the agreements signed and sent to Latif the next day. He only promised Latif that he would have the documents reviewed and sent back to Latif as soon as possible. They did not shake hands to signify an agreement. It was probably just an act of courtesy.

57 On 28 October 2001, Roberton e-mailed Latif to inform him that he had faxed signed copies of

the three agreements to him. The unsigned version of the documents was attached to the e-mail.

58 On 1 November 2001, Latif replied to say that Corvetina accepted the typographical changes to the agency agreements but the plaintiff was not prepared to sign the MOU because it had been changed materially by the defendant.

59 On 13 November 2001, Roberton e-mailed Latif stating that he was sorry that the parties could not reach an agreement on the MOU. He advised Latif that OMV intended to conduct a full review of the plaintiff's capability and systems before approving the plaintiff for a major role in the Sawan Field Project. Latif replied the next day stating that he believed an agreement had been reached between the parties on 18 October 2001 and advising that it would be in the defendant's interests to stay clear and continue with the position that it would be subcontracting the local works to the plaintiff.

60 On 23 November 2001, the defendant signed a contract with OMV on the Sawan Field Project. One of the terms of that contract was that the defendant must obtain OMV's approval for all its subcontractors.

61 On 28 November 2001, Roberton e-mailed Russell Waugh asking him to invite the plaintiff to bid for the local works in the Sawan Field Project. Russell Waugh replied to say that he would do so.

62 Subsequently, on 17 December 2001, Roberton received an e-mail from the defendant's construction engineer saying that he had sent to the plaintiff a request for information, asking that it complete the questionnaire for subcontractors. The plaintiff's Malik replied to say that the plaintiff's office in Singapore had advised that the matter was subject to resolution between the plaintiff and the defendant's senior management and that its office in Pakistan would not handle the request.

63 On 10 January 2002, Roberton informed Latif that the plaintiff had been approved by OMV for the mechanical/piping work and that if the plaintiff wanted to take part in the building work, it should proceed with the pre-qualification exercise as requested by OMV. Latif protested that the agreement between the parties was that the plaintiff would not need to go through any pre-qualification process and the plaintiff had the right to match the lowest credible bid received. The defendant was concerned about the plaintiff's ability to handle all the local works, but the plaintiff refused to undergo the pre-qualification process and meet with the defendant's officers.

64 On 17 January 2002, Roberton e-mailed Latif to state that it was always the case that any subcontractor for the Sawan Field Project would need to be pre-qualified and accepted by OMV irrespective of any pre-award discussions. All subcontracts would be on a commercially competitive basis and the defendant would not award any work to a subcontractor unless it was confident of its performance. He noted that the plaintiff was refusing to submit information, do presentations or conduct tours of its facilities although the defendant wanted to work with the plaintiff. He asked Latif to reconsider his position and submit to the pre-qualification exercise.

65 On 18 January 2002, Latif replied, reiterating the terms of the agreement allegedly made on 18 October 2001. However, in another e-mail a couple of minutes later, he told Roberton that he understood that the defendant's project team would be visiting the plaintiff's Islamabad office that day and "our people will give full respect and cooperation". Roberton was told subsequently that the plaintiff's Malik gave a presentation but refused to allow the defendant's representatives to visit the plaintiff's work sites or other facilities.

66 On 12 February 2002, Roberton advised Latif that the plaintiff would probably not be given

any work in the Sawan Field Project as it had refused to comply with basic international contract requirements and submit appropriate pre-qualification documents to the main contractor and the owner. Latif replied on 20 February 2002 to say that the matter was in the hands of his lawyers.

67 On 21 February 2002, Roberton e-mailed to reiterate the defendant's position since the meeting of 18 October 2001. He asserted that a draft agreement was discussed that day and a written version was then produced for the defendant to review. Having found that version unacceptable in some respects, the defendant offered the plaintiff its terms in the MOU that it signed on 28 October 2001. However, the plaintiff rejected it by sending "a counter offer MOU" of the same date by way of its letter dated 28 November 2001. That counter-offer was not accepted by the defendant and, if it was necessary, the defendant was giving formal notice of rejection by that e-mail. Notwithstanding that there was no agreement between the parties for the local works, the defendant had repeatedly offered the plaintiff involvement in the Sawan Field Project but had been rebuffed.

68 The next day, Latif replied to say that he rejected Roberton's recollection of the events of 18 October 2001 and that he was very disappointed with Roberton's "totally concocted story". He also claimed that his lawyers had "a witness testimony of your stating in the corridor outside my office that you will take the three agreements, sign them and send them back on Monday from Perth as you were rushing to Jurong".

69 On 26 February 2002, Roberton and Walker met Latif in Singapore and told him that the defendant had decided to terminate its relationship with him and his associated companies.

70 Walker, a commercial manager in the defendant at the material time, also testified. He had a diploma in construction management and in quantity surveying. In 2002, he graduated from Curtin University in Western Australia with a postgraduate diploma in commercial law. He started working for the defendant in 1996 and, except for a break between February 2003 and November 2004, is still working for the defendant.

71 He first met Latif in October 1997 when he re-located to Perth from Thailand. At that time, there were disputes in three of the defendant's projects in Pakistan. Walker was responsible for monitoring the legal proceedings in respect of two of those projects. In November 1997, he was told that Latif was the defendant's agent in Pakistan and that he assisted the defendant in obtaining projects there. It was his understanding that the defendant conducted all its business in Pakistan through Latif and that included the day-to-day running of the said legal proceedings. Between 1997 and 2003, he spoke to Latif on a few occasions.

72 Walker became involved in the Sawan Field Project in July 2001 when Roberton told him that he was to assist in finalising the contractual documentation between the defendant and OMV. He was to review the tender documents and draft contract and to give advice and support to the defendant's directors in the negotiations.

73 Roberton told him to attend the meeting of 23 September 2001, a Sunday, in Perth. The day before the meeting, he received an e-mail from Roberton attaching the notes for the meeting. He had a brief discussion with Roberton before the meeting and was told that the discussions between the parties would include an update on the legal matters in the two projects in Pakistan and an explanation on how the plaintiff would be involved in the Sawan Field Project.

74 He could not recall the exact words exchanged at that meeting but could remember that Roberton said words to the effect that the plaintiff would need to pre-qualify and be capable of

performing the subcontract work before any such work could be offered to it. Roberton also told Latif that OMV had the right to veto the plaintiff as a subcontractor. OMV believed that the plaintiff did not have the necessary expertise. Latif said the plaintiff was able to do the work, but Roberton had concerns that it might not have the capacity to carry out some of the work. Latif demanded that the plaintiff be given the exclusive right to all subcontract work for the Sawan Field Project but was told by Roberton that negotiations between the defendant and OMV were going to be finalised and that he would discuss the issue of subcontract work further with Latif.

75 After that meeting, Walker told Rob Jewkes and Roberton that he was against Latif's proposal as it would not be in the best interests of the defendant. This was because OMV would not necessarily approve of the plaintiff being the subcontractor for all the works and the plaintiff was not technically qualified to undertake all the works. The defendant would also not be able to obtain bids from other subcontractors and would end up paying a higher price to the plaintiff.

76 After Roberton's meeting with Latif in Singapore, Walker received an e-mail from Roberton on 21 October 2001 stating that all dealings with the plaintiff were to be conducted through Roberton because Latif was unhappy that Russell Waugh was contacting the plaintiff directly. Latif wanted to deal with only the defendant's senior management. Around that date, Roberton also told Walker that Latif had provided a draft MOU in respect of the Sawan Field Project and the two draft agency agreements. Roberton said that the position reached at the meeting in Singapore was that the plaintiff would be given as much subcontract work as possible within the constraints of the contract between the defendant and OMV, and wanted Walker to review the draft agreements. On 22 October 2001, the three draft agreements were e-mailed to Walker.

77 Upon reviewing the MOU, Walker noted that it was not subject to the terms of the draft agreement between the defendant and OMV in that it did not provide that the award of any subcontract work would be subject to the approval of OMV. He modified the MOU by inserting this requirement.

78 On 24 October 2001, Walker e-mailed Roberton his comments on the three draft agreements, stating that he had made some changes but was still concerned about the MOU. He was concerned that the defendant would be at a commercial disadvantage by entering into such an exclusive arrangement with the plaintiff because other subcontractors would not be willing to submit any quotations to the defendant if they became aware of the exclusive arrangement. He was also concerned that the MOU went beyond a normal MOU in that it had the potential to form a binding agreement on a number of commercial issues but lacked the standard protective clauses such as those on jurisdiction, dispute resolution and termination. He suggested that he and Roberton have a chat later that day before the said documents were signed and sent.

79 On 26 October 2001, Walker e-mailed Roberton to enquire whether there was anything else he wanted him to do with the MOU while Roberton was away but there was no response from Roberton.

80 On 7 November 2001, Walker received an e-mail from Roberton attaching an e-mail from Latif dated 1 November 2001 and stating that the plaintiff would not sign the MOU. Roberton later discussed this matter with Walker and told him that if Latif did not accept the position, then there was going to be no agreement at all.

81 On 23 November 2001, Walker and a director of the defendant went to Pakistan to sign the contract between the defendant and OMV. That contract provided that the defendant could only use subcontractors who had been pre-approved by OMV or pre-qualified to the satisfaction of the

defendant and OMV. Subcontractors which had not been pre-approved for particular subcontract work would need to obtain approval from OMV by submitting pre-qualification forms. Walker therefore arranged for such forms to be sent to the plaintiff for the various types of work. He was informed by his assistants that the plaintiff refused to complete the forms.

82 On 11 January 2002, a meeting was held among the defendant's officers involved in the Sawan Field Project. It was agreed that Roberton would contact Latif and ask him to reconsider his position on the issue of the pre-qualification process.

83 Around 22 February 2002, Roberton informed Walker that they needed to travel to Singapore to have a discussion with Latif as the parties were unable to resolve the dispute. The defendant had decided to terminate its relationship with Latif and his associated companies. At the meeting on 26 February 2002 in Singapore, Latif said words to the effect that promises had been made to parties in Pakistan to facilitate the defendant getting the Sawan Field Project and if they were not paid, there would be dire consequences for the defendant. Roberton then informed Latif about the termination.

The decision of the court

84 The plaintiff's case was based on the alleged oral agreement of 18 October 2001 made in Singapore between Latif and Roberton, acting for the respective parties, which provided that the defendant would work with the plaintiff and award all local works to the plaintiff exclusively and that such award would not be subject to pre-qualification or approval from OMV. The alleged repudiation lay in the defendant introducing new terms inconsistent with those mentioned in the MOU prepared on 18 October 2001. It was also pleaded that the defendant breached the agreement by failing and refusing to award any of the local works to the plaintiff. The plaintiff also submitted that an objective test should be applied to determine whether agreement had been reached between parties and the parties' subjective belief was irrelevant (*Chitty on Contracts* vol 1 (Sweet & Maxwell, 29th Ed, 2004) at p 122; *Projection Pte Ltd v The Tai Ping Insurance Co Ltd* [2001] 2 SLR 399).

85 The defendant argued that there was no concluded oral agreement on 18 October 2001 to award all local works to the plaintiff without the need for pre-qualification or prior approval from OMV. Even if there was such an oral agreement concluded in the terms of the MOU, it was no more than an agreement to agree. In any event, the defendant submitted, there was no breach as the amended MOU of 28 October 2001 was similar in intent with the 18 October 2001 one and the defendant made numerous attempts to work with the plaintiff with the intention to award the local works to the plaintiff. It was further submitted that the pleaded consideration was past consideration and that no consideration moved from the plaintiff. The final ground of defence was that the alleged oral agreement was unenforceable by virtue of s 6(*e*) of the Civil Law Act (Cap 43, 1999 Rev Ed).

86 Latif's e-mail of 22 September 2001 to Roberton stated that "we need to translate our agreement in some kind of Memorandum of Understanding as enclosed". Although the plaintiff claimed that all the amendments to that draft MOU were agreed upon and finalised at the crucial 18 October 2001 meeting, it was significant that Roberton did not sign it there and then. It was not a complex document. There were only two pages and Roberton could have easily read through the final version by comparing it with the amended draft, especially right after having spent an hour (according to him) or two hours (according to Latif) going through the terms. The plaintiff produced no other witness to testify about this meeting although Latif's personal assistant was said to be present and his e**l**mail of 22 February 2002 asserted there was a witness to contradict Roberton's version of the events.

87 I accepted that Roberton told Latif he was taking the documents back to Perth because they

had to be vetted by the defendant's commercial department first. Whether Roberton said that he would review them or that he would have them reviewed did not, in my opinion, make a material difference. I note that he did not state this in his Affidavit of Evidence-in-Chief but said this only in court. However, it was consistent with his practice and he did send what he described as the "final drafts" to Walker in the said commercial department for his comments and amendments upon arrival in Perth.

88 I did not accept that the issue of pre-qualification or OMV's approval was not discussed at the 23 September 2001 meeting in Perth. That meeting was held to discuss the subcontract matter. Roberton's evidence about that meeting was corroborated by Walker while Latif's evidence stood on its own despite the presence of another officer of the plaintiff at that meeting. The notes for that meeting mentioned that the issue of pre-qualification and OMV's approval was a major one for discussion. In Latif's e-mail of 24 September 2001, he noted that the defendant had proposed that the plaintiff undergo the pre-screening process. In the defendant's e-mail of 14 October 2001, it was also mentioned that the proposed OMV contract still had a provision in cl 11 stating that OMV's approval was required for all subcontractors. It was also mentioned that OMV would not object to the plaintiff so long as the defendant was sensible about the matter and would not award the plaintiff work for which it was not technically competent or capable. Accordingly, the defendant had to be satisfied that the plaintiff had the ability to carry out the works and for this, the plaintiff would have to take part in the pre-qualification exercise, even if such a process should turn out to be a mere formality.

89 Since Latif was closely involved in the defendant being awarded the OMV contract, he must have known about the said cl 11. In any event, as pointed out above, he was told about it before the meeting of 18 October 2001. It could not be that the defendant, well aware of its obligations under the imminent OMV contract (upon which any subcontract would depend for its existence), would go ahead nevertheless and make an agreement with the plaintiff contrary to its terms.

90 When prospective contracting parties are in negotiations over a matter involving several issues, it is common to agree that one or several related issues be discussed at a time so that they progress towards a complete agreement on all issues over time. When issue 1 has been agreed, the parties move on to issue 2 and so on. When all issues on the agenda have been dealt with, the parties sit back and take a good look at the final outcome and decide whether they are satisfied with it. If they are not, they re-visit the issues in question or make further adjustments or additions even though they have already expressed agreement on the issues as they went along. When they are satisfied that everything has been covered, they may agree they have a deal and nothing more needs to be done. However, when they decide to put everything in writing and provide for signatures to be appended, until the time the signatures of both parties are affixed to the document, there would be no concluded agreement between them and the parties are free to walk away after all the negotiations by declining to sign.

91 This, I found, was broadly the position in the present case where the discussions on 18 October 2001 were concerned. That was why Latif was so anxious to have the MOU signed and returned to him that he had to "press" Roberton for it. If there was a concluded oral agreement on 18 October 2001, it would not have mattered whether the MOU was signed or not. Since the defendant's commercial department expressed reservations, the defendant was at liberty to re-open the relevant matters and to put refinements to the terms drafted. There would be an agreement only when both parties signed the final document and, quite clearly, neither the MOU of 18 October 2001 nor any other MOU was signed by both the plaintiff and the defendant. I therefore found that there was no concluded oral agreement on 18 October 2001, contrary to what was alleged by the plaintiff.

92 If I am wrong on this point and an oral agreement had been reached, the defendant would have breached the terms of the oral agreement evidenced in cl 2 of the MOU of 18 October 2001 in respect of the term "all" and cl 8 in respect of "the right to match the lowest price and terms and conditions offered by the lowest bidders" by its introduction of the modified terms in the MOU of 28 October 2001 (particularly cll 3 and 7 thereof). Statements such as "we agree to work together as a team" are capable of being breached by a party if it refuses to do anything to achieve the stated common objective or, worse, seeks to place impediments along the way to sabotage the final objective. The mechanics of working out the terms were set out, admittedly not in great detail, in the MOU even if they appeared much too simplistic to a legally trained mind and created opportunities for dispute later. Clauses on eventualities such as the mode and the place of resolution of disputes between the parties were missing but such clauses, though usual in construction contracts, are not essential terms in a contract in the sense that a contract, whether or not relating to construction, could still come into being without them. The document in question may have been termed an MOU instead of a contract or an agreement (like the other two documents were) but nomenclature alone does not a contract make or unmake.

93 The plaintiff asserted that it provided assistance and advice to the defendant in collaboration with Corvetina and pleaded that such assistance was provided in or around July 2001. It also sought to rely on the preamble in the draft MOUs as an admission by the defendant that consideration was furnished by the plaintiff (see preamble B in the MOU of 18 October 2001 at [13] *supra* and the reworded preamble B in the MOU of 28 October 2001 at [16] *supra*).

94 The defendant argued, relying on *Pao On v Lau Yiu Long* [1980] AC 614, that a mere recital in a preamble could not, on its own, discharge the plaintiff's burden of proving that valuable consideration had in fact been furnished. That case stated that the mere existence or recital of a prior request was not sufficient in itself to convert what was *prima facie* past consideration into sufficient consideration in law to support a promise (at 630). It was submitted that the plaintiff's alleged acts of assistance did not occur in July 2001 as pleaded but took place in April, August and September 2001. Further, as acknowledged by Latif, the plaintiff and its associated companies (such as Corvetina) were distinct entities and neither Latif nor Roberton could differentiate between what the plaintiff did and what Corvetina did. The defendant also asserted that in concluded arbitration proceedings between Corvetina and the defendant, Latif had relied on the same acts of assistance in securing the Sawan Field Project as consideration to support the agency agreement with Corvetina.

95 The correspondence between Latif and Roberton showed that there was active consultation and discussion between the two men in 2001. Roberton was an experienced businessman in the engineering construction industry. He would not be negotiating with Latif along the lines mentioned in the various e-mails and MOUs if the plaintiff had not rendered assistance and advice in the tender for the Sawan Field Project. He and Walker in fact reworded and expanded preamble B in their MOU, while still acknowledging that work had been done by the plaintiff. If indeed Latif "played no role in the preparation of the tender" (as claimed in the defendant's written submissions), one wonders why the said preamble was changed to read "Petrosin has rendered assistance to Clough in the preparation of the tender for the Project and in attempting to secure a contract".

96 Latif was acting in his dual capacities in the plaintiff as well as Corvetina. This fact was well known to the defendant and hence the three documents relating to the plaintiff, the defendant and Corvetina. Obviously, it would be impossible to specify exactly which acts were done in which capacity. The pleadings may not have been very precise as to the period of advice and assistance but the defendant surely knew what the plaintiff was talking about. Even if the plaintiff's role were confined to merely asking some other party to assist in opening or re-opening doors for the defendant in Pakistan, it would have rendered consideration in law because consideration must be real but need

not be adequate. The consideration was not past because it was part of a process aimed at having the Sawan Field Project awarded to the defendant with the intended consequential pay-off to the plaintiff in terms of subcontract work, the details of which were to be worked out.

97 Accordingly, I found that there was valuable consideration moving from the plaintiff to the defendant.

98 The final argument of the defendant centred on s 6(*e*) of the Civil Law Act which provides:

> 6. No action shall be brought against —
>
> …
>
> (*e*) any person upon any agreement that is not to be performed within the space of one year from the making thereof,
>
> unless the promise or agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person lawfully authorised by him.

The defendant argued that awarding subcontract work was a process that would go on throughout the life of the main contract between the defendant and OMV, the duration of which was 18 months. The last subcontract awarded in the Sawan Field Project was in January 2003, some 16 months after the date of the alleged oral agreement of 18 October 2001. Therefore, the defendant argued, since the plaintiff's case was that all local works were to be awarded to the plaintiff at any point in time for the duration of the main contract, the above statutory provision would apply and the alleged agreement must be in writing and signed by both parties. It was further submitted that the decision of the High Court in *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd* [2005] 2 SLR 651 (at [85]), accepting that e-mail correspondence were included in the words "in writing" for the purpose of s 6(*d*) of the Civil Law Act (which is concerned with contracts for the sale or other disposition of immovable property or any interest therein), did not assist the plaintiff here because the e-mail in that case showed that both parties had reached an agreement.

99 I note firstly that the said s 6(*e*) requires only the signature of the party to be charged (that is the defendant here) and not the signatures of both parties, contrary to the submissions of the defendant. Secondly, I am of the view that the words "that is not to be performed within the space of one year from the making thereof" mean that performance of the agreement must begin within one year of the making of the agreement. Any performance, whether in part or in whole, is often the best indication that there exists a contractual arrangement. The words do not mean that performance of the entire agreement must be completed within one year. To that extent, therefore, s 6(*e*) does not assist the defendant here as it is not applicable.

100 For the reasons set out above, the plaintiff failed in its action against the defendant and I dismissed the claim accordingly. As I have ruled against the defendant on several of the issues raised, I ordered that the plaintiff pay 75% of the costs of the proceedings.

Plaintiff's claim dismissed with costs at 75%.