GIB Automation Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd [2007] SGHC 48

Case Number : Suit 360/2005

Decision Date : 02 April 2007

Tribunal/Court : High Court

Coram : Sundaresh Menon JC

Counsel Name(s) : N Kanagavijayan, S Rajan (Kana & Co) for the plaintiff; Tan Teng Muan, Wong Khai Leng, Alia Mattar (Mallal & Namazie) for the defendant

Parties : GIB Automation Pte Ltd — Deluge Fire Protection (SEA) Pte Ltd

Building and Construction Law – Sub-contracts – Incorporation of main contract terms – Construction of back-to-back provision – Whether sub-contract entered into on back-to-back basis with main contract incorporating terms of main contract in its entirety

Contract – Breach – Repudiatory breach – Whether actions of party in breach such that party may reasonably be taken to have renounced contract – Whether party entitled to terminate contract on basis of own view of terms of contract

Contract – Remedies – Mitigation of damage – Duty to mitigate losses – Applicable principles

Evidence – Admissibility of evidence – Hearsay – Whether truth of contents of document accepted as authentic still needing to be proved – Limits to applicable principle

2 April 2007 Judgment reserved.

Sundaresh Menon JC

1 The parties in this case had a commercial relationship going back some years. At some stage, the relationship soured and this has given rise to the claims that are the subject of this suit as well as those in Suit No 1 of 2006 which involved related though not identical parties and which were also heard by me and is dealt with in my judgment in *Jaya Sarana Engineering Pte Ltd v GIB Automation Pte Ltd* [2007] SGHC 49.

Preliminary points

2 The present action was commenced by the plaintiff, GIB Automation Pte Ltd, a company in the business of, amongst other things; supplying, testing and commissioning a particular brand of fire detection and alarm systems known as Edwards System Technology ("EST"). The action related to three sets of transactions between the parties. Two of these are easily disposed of as preliminary matters.

a) Changi Prison Cluster "A" Project

3 The defendant, Deluge Fire Protection (SEA) Pte Ltd is also in the business of supplying fire protection systems and had been appointed as the main contractor to provide a fire protection system for the Changi Prison Cluster "A" Project. The defendant in turn awarded the plaintiff a sub-contract for the supply, testing and commissioning, and maintenance of the EST fire alarm system for the said project ("the Changi Prison contract"). This was stated to be for a lump sum of $860,000. The letter of award was dated 10 December 2001. It was not disputed that the defendant had paid a

sum of $651,811.89 to the plaintiff. The plaintiff claimed payment of the balance sum of $220,878.11 ("the balance sum").

4 The plaintiff's claim was founded upon its assertion that the defendant's representative, Mr Donald Cheo had informed the plaintiff's managing director, Mr Benjamin Gan that the Changi Prison contract would be awarded as a fixed lump sum contract for a sum of $860,000. The plaintiff contended that the agreement between the parties was that the sum of $860,000 would be payable regardless of whether there were any additions or omissions to the plaintiff's scope of work.

5 It may be noted that the plaintiff's case was not pleaded in this way. The pleading on this issue was sparse to say the least. In particular, nothing was stated in the statement of claim as to any such agreement or understanding. This was a point taken by Mr Tan Teng Muan, who appeared for the defendant. It is well-established that a court may not make findings on the basis of facts that are not pleaded: see *Multi-Pak Singapore Pte Ltd (In Receivership) v Intraco Ltd and others* [1992] 2 SLR 793 at [22] to [24].

6 Furthermore, the material portion of the letter of award states as follows:

> Your scope of work shall include but not limited to the design, supply, testing and commissioning, warranty and maintenance (12 monthly servicing with effect from issuance of Practical Completion Certificate by the Architect – together with Deluge maintenance team) of the above addressable fire alarm system. …
>
> *Any variation works, omission or addition, shall be back to back basis. Such variation claim shall be base on your unit price break down as per your quotation to us in appendix A*. [emphasis added]

7 There is no dispute that the letter of award is to be construed as a whole. There is also no dispute that the plaintiff was a sub-contractor. The words "back to back basis" though not the most felicitous, are adequate in my view to convey the sense that any variations would be valued and taken into account if and to the extent a like adjustment was made in the defendant's own contract. More importantly, the express terms of the latter paragraph quoted above make it clear that additions and omissions were liable to be valued and that this would be on the basis of the unit prices supplied by the plaintiff.

8 To the extent Mr Gan testified that the sum in question would be payable regardless of whether there was any addition or omission, this was inconsistent with the express terms of the letter of award and no evidence was lead to suggest that the letter of award had been consensually varied or in what circumstances this had transpired.

9 Further, Mr Gan's evidence under cross-examination was that the way the contract was administered, the defendant would inform the plaintiff as and when specific items were required and when this transpired, the equipment in question would be delivered and invoiced. Indeed, the plaintiff accepted that it had been paid for all of the items that it had delivered.

10 More importantly, according to Mr Cheo, there had been omissions of material work amounting to $262,880 in respect of certain items of equipment. Mr Gan was not in a position to assist on this because he was not the person directly dealing with this issue. According to the plaintiff, they only became aware of the omissions after reading the affidavit of Mr Cheo but even then, they did not seek leave to adduce the evidence of any individual who did deal with this matter and who had the requisite knowledge.

11 In my judgment, having regard to the pleadings, the nature of the case advanced by the plaintiff, the express terms of the letter of award and the evidence in relation to the omissions, the plaintiff's claim in this respect cannot be allowed. I therefore dismiss this part of the claim.

b) Miscellaneous claims

12 The statement of claim included a claim for a sum of $251,100.75. In common with the plaintiff's claim under the Changi Prison contract, the statement of claim stated simply that the defendant was indebted to the plaintiff for the sum in question, under other contracts, projects and works for the supply of equipment, testing and commissioning as requested by the defendant. The documents relating to this claim were included in the agreed bundle, which was agreed as to authenticity but not as to truth of contents.

13 The documents related to claims made in connection with a number of projects and consisted of invoices, letters, purchase orders and similar documents. Further, Mr Gan in his affidavit of evidence-in-chief exhibited the documents with a brief description in two paragraphs of the sort of documents that were being put forward.

14 Mr Tan submitted that the plaintiff had adduced no direct evidence in respect of the claims. Furthermore, the plaintiff was seeking to make out its claim essentially on the basis of the documents. It was true that the documents in question in this case had been included in the agreed bundle. However, Mr Tan submitted that the defendant had not dispensed with the need to prove the contents of these documents. He relied in this regard on the recent decision of the Court of Appeal in *Jet Holding Ltd and others v Cooper Cameron (Singapore) Pte Ltd and Another and other Appeals* [2006] 3 SLR 769 ("*Jet Holding*") where Andrew Phang Boon Leong JA said as follows at [75]-[78]:

> We should point out at this juncture that even if the plaintiffs succeed on the various arguments as to authenticity (which we have held they do not), in order to prevail, they must *also* prevail on this particular issue. Indeed, our findings on the issue of authenticity render it, strictly speaking, unnecessary to consider the objections based on hearsay. However, in deference to the vigorous arguments rendered by counsel and, in particular, in deference to the efforts made by counsel for the plaintiffs, we turn now to consider the arguments centring on hearsay. However, we should point out at the outset that we do not find the arguments for the plaintiffs on this particular issue persuasive and we find that they therefore fail on this particular issue as well.
>
> It is trite law that even where there is an agreed bundle of documents, the *truth* of the contents of the Documents nevertheless remains at issue and is subject to, *inter alia*, objections centring on the doctrine of hearsay.
>
> However, it is also true that the rule against hearsay has come under increasing criticism and consequent calls for reform in many other jurisdictions … As we have already emphasised, however, any reform in this area, based as it must be on many policy factors, must necessarily be effected by the Singapore legislature, if at all. In other words, the plaintiffs in the present case must also be able to demonstrate that they can surmount any legal obstacles stemming from the rule against hearsay. [emphasis added]
>
> As we have already mentioned, we are of the view that the plaintiffs fail on this ground as well. They did not bring themselves within any of the potentially applicable exceptions to the rule against hearsay. [emphasis in original]

15 This passage makes it clear that even if a document is accepted as authentic, the truth of its contents may not be proved by the document itself because of the hearsay rule. There may well be limits to the principle. If an invoice is accepted as authentic and if it is shown that it has been sent to and received by the addressee, it may well be the case that the invoice alone may not be relied upon to prove that the sum stated there is due and owing by the addressee. However, if it be shown for instance that the invoice had been sent and received and that part-payment had been made without demur by the addressee then it may well be that the court may infer that the debt has been sufficiently proved. This is obviously not put forward as a proposition of law but simply as an illustration that the principle may have limits.

16 None of this arises in this case however, because of the approach in fact taken by the plaintiff. I have already made reference to the brevity of the pleadings as well as the direct evidence on this issue. In addition, it may be noted that Mr Kanagavijayan, who appeared for the plaintiff, accepted that the effect of *Jet Holding* was that the truth of the contents of a document had to be proved. However, he then set about "proving" the truth of the contents of these documents in his closing submissions, essentially by referring to the documents themselves.

17 Mr Tan objected to this. It should be noted that some of the invoices were dated as far back as 1998. Further, in a number of instances, it was not clear what the document referred to or whether it clearly reflected an agreement between the parties. There was no attempt to correlate the specific items shown on some purchase order or invoice to that shown on a delivery order so that one might infer that the particular items covered by the invoice had in fact been delivered by the plaintiff. In some cases, there was no clear evidence to show that the items had been supplied or that the work had in fact been done. In other instances, it became apparent during the cross-examination of Mr Gan that the invoices may have been issued at a time when rates had not been agreed. In yet other cases, there was evidence that the invoice related to work done under a "back-to-back" arrangement when the defendant's claims had already been rejected.

18 These are illustrations of the deficiencies in the case put forward by the plaintiff so that on any basis, I did not consider this a case falling within any possible limitation to the principle in *Jet Holding*. I accordingly reject this part of the plaintiff's claim.

The Marina Line project

Factual background

19 I turn to the third part of the plaintiff's claim which was the most substantial and took up the most time at the trial.

20 The defendant was the main contractor for the supply, installation, testing, commissioning and maintenance of a complete fire protection system for the Stage 1 Marina Line MRT project. The defendant sub-contracted a substantial portion of the work to the plaintiff. Under the sub-contract, the plaintiff was to design, supply, test, commission and maintain the fire alarm system for the project. However, there is an issue as to just what document it is that constitutes the sub-contract. This is the first issue that arises and I deal with this in more detail below.

21 Many of the other issues flow from this. There was a dispute as to whether the specifications had changed so as to result in the contract price having increased. The most important issue arose from the plaintiff's seeming refusal to supply certain items towards the end of 2004 and in early 2005. The plaintiff alleged that its obligation to deliver was contingent upon the defendant issuing a letter of credit. The defendant denied this. As a result, the defendant terminated the agreement. The

defendant also contended that in any event, even if its termination was wrongful, the plaintiff had failed to mitigate its losses. The defendant disputed the sums claimed by the plaintiff and in turn sought damages for the plaintiff's failure to deliver the items ordered leading to the termination of the contract. I deal with each of these issues in turn.

The terms of the sub-contract

22 On 24 May 2002, a meeting was held between the representatives of the parties. Following that meeting, on 28 May 2002, the plaintiff wrote to the defendant setting out certain matters. The terms of the letter specifically state that the plaintiff was seeking to list the matters agreed at the meeting for the defendant's verification and it then set out in three separate paragraphs that the plaintiff was to carry out certain works at certain specified locations for the sums stated there. In relation to the Marina Line project, the paragraph in question stated as follows:

> GIB to supply, test and commission EST addressable fire alarm and detection system for inert gas system at Marina MRT Line (6 stations) for the sum of $1,315,000 as per attached equipment breakdown list.

23 There then followed the following paragraphs:

> Kindly note the following terms and condition of the above offer;
>
> 1) Validity of offer : 30 days
>
> 2) Payment terms : 60 days L/C from equipment delivery
>
> 3) Equipment delivery : approx 8-12 weeks from order confirmation
>
> 4) Price quoted does not include GST charges
>
> We hope we have shown our fullest support to Deluge and trust the above is in order for your issuance of the respective purchase orders to us. Please do not hesitate to contact the undersign should you have further queries. Thank you.

24 The plaintiff's pleaded case is that the object of this letter was to confirm the defendant's acceptance of the contract for the Marina Line project and it therefore contends that the agreement was subject to the payment term that provided "60 days Letter of Credit".

25 There was no dispute that the plaintiff had submitted an even earlier letter of 6 March 2002 which was clearly a letter of offer. It was also evident on the face of that letter that the plaintiff required payment by "L/C at sight". There was also no dispute that a meeting took place on 24 May 2002. The key question however is whether the contract was concluded on that day and if so whether the terms of the contract was evidenced in the plaintiff's letter of 28 May 2002.

26 Mr Cheo testified under cross-examination that he did not know how a letter of credit operated. In my judgment, this was clearly untenable because he also said he eventually agreed to make payment on one of the contracts awarded to the plaintiff by letter of credit because he took pity on Mr Gan. This made no sense at all if he had no idea how a letter of credit operated and when I asked him this, Mr Cheo was unable to explain this. In any case, nothing ultimately turned on this.

27 There followed few written communications between the parties until 21 October 2002 when the defendant wrote to the plaintiff. This letter is captioned "Letter of Award". The letter makes

reference to the plaintiff's letter of 28 May 2002 and to subsequent discussions and confirms the award of the sub-contract to the plaintiff for a fixed sum of $1,315,000. Various terms are set out in the letter. I refer to this letter as the "letter of award".

28 Mr Tan's first contention was that it was not even open to the plaintiff to contend that the contract between the parties had been concluded orally given that it had in fact been reduced into writing. He maintained that I should confine myself to considering the documents. In my judgment, there was ultimately no issue on this because the plaintiff's position was that the agreement was in fact evidenced in the letter of 28 May 2002. It is to this that I now turn.

29 In my judgment, it is plain on the terms of the letter of 28 May 2002 that it does not purport to evidence a concluded agreement. I say this because:

(a) the plaintiff had set out the prices for various projects which were expressly stated to be subject to the defendant's *verification*;

(b) the plaintiff referred to the letter as its *offer* and further set out terms and conditions applicable to the offer. First among these was the stipulation that the offer would be valid for 30 days which makes no sense at all if an agreement had already been reached; and

(c) the letter came with a *quotation* which set out the plaintiff's quoted prices.

30 All of this is inconsistent with a concluded contract having come into being. In my judgment, the meeting on 24 May 2002 seen in the light of the subsequent letter is consistent with a commercial discussion having taken place on the broad terms, especially as to price. At the end of that meeting, the parties may have thought they were close to a deal but I do not see how the letter of 28 May 2002 could have been written in the way it was, had a deal already been struck.

31 Under cross-examination, Mr Gan was hard-pressed to give a convincing explanation when he was confronted by Mr Tan with these points. It is also noteworthy that the letter of 21 October 2002 is captioned as the letter of award. It refers to the plaintiff's letter of 28 May 2002 as the plaintiff's quotation. Further, the plaintiff countersigned its acceptance of the award of the sub-contract on the terms and conditions stated in the letter of 21 October 2002. I also note that the plaintiff did not dispute that the contract between the parties was entered into on a back-to-back basis with the defendant's contract with the employer ("the main contract") although it did dispute the precise significance of this fact. What is important to note is that the back-to-back provision is included only in the letter of 21 October 2002 and not in the plaintiff's letter of 28 May 2002. In my judgment therefore, the contract was constituted by the defendant's letter of 21 October 2002 which was countersigned by the plaintiff. I refer to the concluded contract between the parties as "the sub-contract".

32 This gives rise to the question of what the terms of the sub-contract were. It was clear that the sub-contract was awarded for a fixed lump sum of $1,315,000.

33 It was also clear that the plaintiff was to complete the supply portion of its works within the defendant's installation work program having regard to the fact that the main contract period commenced on 28 June 2001 and at that time was scheduled for completion on 30 January 2006.

34 Furthermore, it was expressly stated that the sub-contract documents included the documents set out in the letter of award.

35 The letter of award also stated that the sub-contract had been awarded on a back-to-back basis with respect to the main contract. This is not a term of art even though it is a term found with some regularity in sub-contracts in the construction industry. In my judgment, the construction to be placed upon this will depend on the interpretation of the sub-contract document as a whole. In the present case, Mr Gan contended that the back-to-back arrangement applied in relation only to the specifications, drawings and the completion schedule. I do not accept that contention, not least because there is already an express provision dealing with the need to interface the plaintiff's completion obligations with those of the defendant (see [33] above). The object of a party in the position of the defendant who occupies an intermediate position between two parties with each of whom he has separate contractual relations, is to avoid an exposure under either contract which cannot be passed on. I consider this more fully at [45] to [55] below.

36 As to variations, it was clearly spelt out in the letter of award that because this was a design and build project, revisions were to be expected and the plaintiff was not to expect any compensation on account of any revisions. A change would only be recognised as a compensable variation if the employer changed the performance specification.

37 A key dispute between the parties as to the terms of the contract turned on whether the defendant was required to make payment by letter of credit. There were two separate strands to this issue. The first was whether this was a requirement under the express terms of the sub-contract. The second was whether it was excluded by reason of the "back-to-back" provision. I deal with each of these strands.

38 The plaintiff's primary contention rested on the fact that this had been mentioned in both its letters of 6 March 2002 and 28 May 2002. To the extent the plaintiff relies on these letters to say that this was a factor it considered to be important, I would accept that. However, there is an obvious difference between an aspiration or desire that a particular term be included in a contract because a party considers it commercially important and successfully having it so included. The question ultimately turns on the effect of the plaintiff's letter of 28 May 2002 even if, as I have found, it was not itself a document that evidenced the sub-contract.

39 The letter of award of 21 October 2002 refers to the plaintiff's letter of 28 May 2002 in two instances:

(a) It is referred to as the plaintiff's revised quotation in the first sentence; and

(b) Paragraph 5 states: "Notwithstanding your letter … dated 28 May 2002 on equipment breakdown list, your scope of supply shall include namely *(sic)* all items stated parts *(sic)* "A" and part "B" etc and any items relating to the successful completion of the project".

40 In my judgment, neither of these references amounts to an incorporation of the terms of the letter of 28 May 2002 as part of the sub-contract between the parties. The references in the letter of award to the plaintiff's letter, when seen in context, clearly were directed at the quotation of the price and the scope of services to be supplied for that price. There is no express incorporation of the plaintiff's letter in its entirety, and there is nothing to indicate that the stipulation as to payment terms being by a 60-day letter of credit had been incorporated.

41 Mr Tan also submitted that the term, such as it was reflected in the plaintiff's letter of 28 May 2002, was insufficient to constitute a binding obligation because there was nothing to specify the type of letter of credit to be furnished; or how the letter of credit was to be operated; or what the terms of the letter of credit were to be. He submitted that these issues further undermined the

plaintiff's argument that there was a binding obligation upon the defendant to make payment by way of letter of credit.

42 Finally, Mr Gan testified that it was his practice in all his projects with the defendant to require payment to be made by letter of credit but under cross-examination it emerged that in the course of around a dozen projects with the defendant, there had only been one instance where payment had been made by letter of credit.

43 I am satisfied that the payment term as alleged by the plaintiff was not incorporated in the sub-contract. This makes it unnecessary to address the second strand of the argument which is that the alleged requirement for payment to be made by letter of credit was excluded by virtue of the back-to-back term. Mr Kanagavijayan referred to provisions in the main contract whereby the defendant was entitled to certain advance payments. He submitted that if one were to extend the effect of the "back-to-back" provision to its logical conclusion, then to the extent the defendant had been able to get an advance payment it should have extended that to the plaintiff even if this was not something contemplated under the sub-contract. In my judgment, this was beside the point. The plaintiff's claim was that the requirement for payment to be made by letter of credit was incorporated into the sub-contract. I have found that on a proper construction of the sub-contract, it was not.

44 It is then unaffected by the ambit of the back-to-back provision. Had I been of the view that such a payment term had been specifically incorporated into the sub-contract, I would not have thought that it could then be excluded by virtue of a general back-to-back provision.

45 Nonetheless, the ambit of the back-to-back provision is relevant to a related issue as to whether the plaintiff's right to be paid under the present sub-contract depended upon the payment arrangements under the main contract and I turn to consider the proper construction of this provision. A clause providing for a particular contract to be entered into on a "back-to-back" basis to another is commonly found in construction *sub*-contracts in Singapore. To the extent this is intended to incorporate all the terms of some other contract into that containing the back-to-back stipulation, it may not always be successful. The commercial reality as I have noted above at [35] is that a party seeking to invoke the clause is usually an intermediate contractor who has undertaken certain obligations under a head contract and then attempts to pass on those obligations to a sub-contractor. However, it would be overly simplistic to conclude that such a desire can always be so easily achieved. In the present case, as Mr Kanagavijayan noted, the fact is that the defendant had a certain scope of work under the head contract for which it stood to be paid a sum in excess of $8.6m, whereas the contract between the parties in this case was for a consideration that was just a fraction of this. It is true that the scope of work under the two contracts need not be identical but equally, there may be other relevant considerations.

46 In *Hi-Amp Engineering Pte Ltd v Technicdelta Electrical Engineering Pte Ltd* [2003] SGHC 316, MPH Rubin J in dealing with an argument that the contract in question had been entered on a back-to-back basis with another contract to which the defendant was party had this to say at [98]:

> In the case before me, leaving aside the ambiguous and not so precise phraseology of cl 4 of the letter of award from the defendants, there is a raging dispute as to whether the plaintiffs had sight of the main contract at all until 6 February 2002. If what the plaintiffs contended were true, then it would be unreasonable to conclude that the conditions of the main contract were incorporated as part of the Hi-Amp contract. In this connection, the evidence of TKS and Hoe appeared to me to be more cogent than that of what was painted by the defendants. In relation to this particular issue, I am inclined to accept their evidence that the defendants, for reasons known to them, did not furnish the plaintiffs with the AMEC contract documents except for some

in dribs and drabs. Inasmuch as the defendants chose not to provide the AMEC contract to the plaintiffs, I am of the view that the defendants' present contention that the Hi-Amp contract was to be qualified by the terms of the AMEC contract, was without merit.

47 It is apparent that Rubin J considered that the fact that the plaintiff may not even have seen the head contract was a relevant factor in his holding that it had not been incorporated into the contract between the parties. This was also considered relevant in *Lam Hong Leong Aluminium Pte Ltd v Lian Teck Huat Construction Pte Ltd and Another* [2003] SGHC 53 at [91].

48 The weight to be attached to the fact that a party had not seen the main contract must be considered in the light of the factual matrix as a whole. It may not be decisive if the circumstances are such that the terms said to be affected by the back-to-back provision are matters that would fall within the general appreciation and knowledge of the parties to the sub-contract. On the other hand , if the terms are highly technical and particular, it may be more important. Further, consideration should be given to the sub-contractor's ability to ask for a copy of the main contract. It may also be overcome with sufficiently explicit language making it clear that the head contract was being incorporated and that the sub-contractor was deemed to have acquainted itself with its terms.

49 In my judgment a back-to-back provision is to be construed in the light of the factual matrix known to the parties at the time they contracted. Such language may quite often not have the effect of incorporating the main contract in its entirety. Mr Kanagavijayan drew my attention to the judgment of Tay Yong Kwang J writing for the Court of Appeal in *Spandeck Engineering (S) Pte Ltd v China Construction (South Pacific) Development Co Pte Ltd* [2005] SGCA 59 where he said as follows at [16]:

> The appellant also submitted before the trial judge that para (2) of the 27 January 1995 letter provided that the subcontract was to be back to back with the HDB contract and since the HDB contract was on a firm price basis, the subcontract had to be on the same basis. The judge noted that the 26 January 1995 letter also had a similar provision in its para (3) and yet, in that letter, the contract was expressly stated to be on a re-measurement basis. In his view, therefore, the words "back to back" had to bear a narrower meaning than full incorporation of all the HDB terms and conditions. We agree with his view and would add that whatever had been incorporated from the main contract with HDB was qualified in any event by the clear terms of the 26 January 1995 letter which made it explicit that the contract sum was an estimated one subject to re-measurement, which could result of course in one or the other party having more money than originally anticipated. If the words "back to back" were taken absolutely literally, the subcontract would end up having the same contract sum as the main contract, an interpretation that the appellant no doubt would reject immediately.

50 Just what is incorporated will depend in each case upon such things (among others) as what was objectively known to the parties at the time they entered into the contract, what specific references were made to the main contract document, and whether the terms of the main contract relevant to the back-to-back provision were of such a nature that they should have been and were specifically brought home to the sub-contractor or whether they were sufficiently general that it would fall within the general appreciation and knowledge of the parties. By way of example, it may be generally known to a sub-contractor that the main contractor would in due course make an application for payment to the employer in respect of works done by the sub-contractor. On the other hand, it may not be generally known to the sub-contractor that requests have to be in a very particular format.

51 Mr Kanagavijayan submitted that the reference to the present sub-contract being entered into on a back-to-back basis with the main contract did not have the effect of importing such things as the

detailed payment procedures or the payment provisions contained in the main contract. The evidence did show that the main contract had not been shown to the plaintiff.

52 In my judgment, having regard to the express terms of the letter of award, the plaintiff's right to make a claim for variations or for loss and expenses due to revisions as well as its obligations as to performance and compliance with specifications were to be on a back-to-back basis. Thus the plaintiff would be entitled to make such claims to the extent the defendant had an entitlement to do so and it would be liable for inadequate performance or non-compliance with the specification in question to the extent it had done the work and the defendant was liable.

53 Furthermore, the plaintiff was specifically required to provide all items stated in Parts A and B of the letter of award and any other items needed for the successful completion of the project. Part A listed documents under the main contract which set out certain technical requirements.

54 Part B also referred to certain documents under the main contract that the plaintiff was to comply with. It also required the plaintiff to ensure that its works were properly interfaced and integrated with certain aspects of the overall project works. In my judgment, taking all this into account, the plaintiff's right to payment was in fact to be on a back-to-back basis, in the sense that the plaintiff would be entitled to be paid within a reasonable time after the work it did had been accepted or certified for payment following an application for payment for such work having been made by the defendant under the main contract. Clearly, the defendant would have been obliged to make such applications in good faith and in a timely manner but this was not raised before me.

55 The point simply is that any other approach would mean that the plaintiff would be entitled to payment regardless of whether the party for whom and to whose standards the work was ultimately being done accepted it as such. If this were so then the defendant would have taken a significant risk in that it would be obliged to pay the plaintiff regardless of whether the works were acceptable to the employer having regard to the plaintiff's obligation to comply with the employer's requirements and therefore regardless of whether the defendant was going to be paid by the employer. In the context of this contract, I consider that would have been directly contrary to the intent underlying the incorporation of the back-to-back provision in this contract. It is artificial in this regard to separate the question of payment from that of compliance with the requirements of the main contract as the plaintiff sought to do. I note in passing that the approach I have taken is consistent with that of Lai Siu Chiu J in *Choon Construction Pte Ltd v L&M Concrete Specialists Pte Ltd* [1999] SGHC 228 at [57].

56 Finally, in connection with the terms of the sub-contract, I turn to one other issue and that relates to the plaintiff's argument that the price of the sub-contract had been increased to $1,590,331.95. This reflected an increase of $275,331.95. According to the plaintiff, this was premised on some additional equipment that was to be supplied by the plaintiff to the defendant as well as the additional cost of a price of equipment known as an LIGP panel.

57 The plaintiff relies on two emails of 30 July and 7 August 2002 by which a preliminary quote of the increase in costs was drawn up based on some revised designs. The defendant did not accept this increased cost but said it would continue in its efforts to persuade the LTA not to revise the designs. According to Mr Cheo, the issue was raised again on 28 October 2002 at about the time the plaintiff was countersigning the letter of award and it was left on the basis that if a variation was issued due to the requirements of the employer of the project, then this would be extended to the plaintiff.

58 The fact remains though that the letter of award was executed without any adjustment or any mention being made in respect of this. After the letter of award had been signed, the plaintiff wrote on 30 October 2002 seeking to clarify or confirm an understanding as to the increase but this was

never forthcoming.

59 In my judgment, there could not have been an agreement to increase the price in respect of these items prior to the letter of award. If there had been, then this should have been reflected in the letter of award but was not. It is noteworthy that this also was not mentioned in Mr Gan's affidavit of evidence-in-chief and was raised for the first time under cross-examination. I therefore do not accept that the contract price was validly altered.

Breach of the sub-contract

60 The material events in this connection move to the period in mid-2004. Sometime, in the latter half of 2004, discussions took place between Mr Benjamin Gan and Mr Bvan Leong who was the defendant's project manager. Mr Leong testified that sometime in August 2004 he handed to one Mr K K Foo, one of the plaintiff's representatives who did not give evidence, a copy of a draft delivery schedule that set out estimates of the equipment required for the project with a view to enabling the plaintiff to make preparations for delivery.

61 Mr Leong maintained that this was only a draft and was not meant to be conclusive as the working drawings had not yet been prepared. The plaintiff took issue with this but I do not consider that anything turns on this. Mr Leong also testified that subsequent to that, there were certain changes in the equipment required. The delivery schedule contemplated that equipment for the various stations were to be procured with a target date of 30 October 2004 in some cases and 30 November 2004 in others. This was broadly consistent with Mr Leong's evidence-in-chief. In cross-examination, there was some suggestion that this only applied to the panels and not to the rest of the equipment.

62 With delivery imminent, the discussion turned to payment and this is where the difference between the parties crystallised. A series of letters was exchanged between the parties with their positions getting polarised and it came down to this: the plaintiff insisted that it would only deliver the equipment upon receiving a letter of credit in its favour. In its letter of 5 January 2005, it required this to be for a sum of $118,793.29 which later emerged was the amount it maintained was payable for the equipment being delivered for one station. On 27 January 2005, Mr Leong responded to say that the project "is based on a payment term of back-to-back basic *(sic)*". Mr Leong added in that letter that failing confirmation, the defendant would consider engaging another supplier. There followed further exchanges of letters. It was clear from these further letters and from the evidence that:

(a) the plaintiff maintained all along that it was acting on the basis of its belief that payment on letter of credit terms had been agreed and that it had not even had sight of the main contract terms;

(b) as late as 2 March 2005, the plaintiff was requesting a copy of the main contract; and

(c) Mr Leong himself was amenable to making a recommendation to his superiors that some percentage of the amount in question be paid by a letter of credit.

63 On 2 March 2005, the defendant terminated the sub-contract and informed the plaintiff that it reserved the right to bring a claim against the plaintiff for delay. The defendant maintains that it was entitled to do so on the basis that the plaintiff had unilaterally sought to increase the contract price (see [56]-[59] above) and on the basis that the plaintiff unlawfully refused to make delivery except upon payment being effected on its terms. No issue was raised as to whether the plaintiff in fact was

in a position to deliver the limited quantity of equipment that was in issue at this stage and as it may have a bearing on the quantification of damages, I make no finding on this.

64 The plaintiff's position at the material time was as set out at [62a and b] above. It contended that payment by letter of credit was the appropriate means based on its view of the sub-contract. Further, the plaintiff maintained in its closing submissions that the defendant's actions in terminating the sub-contract are to be seen in the context of the fact that the defendant had been advised by the Land Transport Authority sometime in late February 2005 that due to the collapse of Nicoll Highway in April 2004, the completion date for the project as a whole had been postponed to 30 November 2009. The plaintiff was not informed of this vital fact even though the sub-contract was on a back-to-back basis. Furthermore, the plaintiff asserted that by the end of 2004, the defendant was purchasing equipment directly from EST and alleged that the defendant improperly took advantage of the fact that the project deadline had been extended to terminate the sub-contract with a view to purchasing the equipment directly from EST at a lower cost.

65 The defendant did not deny many of the essential factual points made by the plaintiff especially as to the extension of time and its subsequent dealings with EST directly, save to say that it had given the plaintiff every opportunity to deliver the equipment in accordance with the requirements of the contract and that its failure to do so amounted to a repudiatory breach. The defendant maintained that in those circumstances, it was not obliged to inform the plaintiff of the letter from the Land Transport Authority stating that the time for completion of the project had been extended and that it was entitled to rescind the sub-contract.

66 As to the first point, namely the plaintiff's claim that the sub-contract price had been unlawfully increased, I do not see this as a breach much less one of such a nature as to evince an intention no longer to be bound by the sub-contract or to warrant the defendant rescinding the sub-contract. It is significant that this did not feature in the termination letter as a basis for the same. Rather, as will shortly become apparent, that letter was based on the plaintiff's failure or refusal to deliver. Nor did it feature in the correspondence leading up to that. Moreover, in that correspondence, the defendant was calling on the plaintiff to perform by delivering the equipment and this was well after the plaintiff's claim had been made that the price had been increased. Accordingly, I do not think this avails the defendant.

67 The real issue is whether the plaintiff's refusal to deliver the equipment amounts to a breach of such a nature in such circumstances as would entitle the defendant to rescind the sub-contract. In making this assessment, it is useful to recall the circumstances in which a party faced with a breach may lawfully bring a contract to an end. One such instance is where the term that is breached is a condition so that breach of it gives the innocent party a right to bring the contract to an end without regard to the consequences of that breach. It was not suggested that the present case falls within this.

68 Another instance is where the consequence of the breach is such as to deprive the innocent party of substantially the whole benefit which it was intended he should obtain : see *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at 70. The analysis in such cases tends to focus on the consequences of the breach.

69 Yet another instance is where there has been a renunciation by one party such that by its words or conduct it evinces or expressly declares that it will not or is unable to perform its obligations in some substantive aspect.

70 The defendant's case rests on either of the latter two bases but in this regard, it is relevant in my

judgment to have regard to all the circumstances of the case. In this context, it is also clear that until the contract has been brought to an end, its terms continue to apply and to enure to the benefit of both parties: see *Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* [2004] 3 SLR 288 at [65-66].

71 In this light, I turn to the facts. The material portion of the plaintiff's letter of 21 February 2005 states:

> Our understanding of your letter of award on clause 2 based on "back to back basis against the main contract" is referred to other terms & conditions of this main contract (which we do not have a copy or attached to us upon the letter of award) except we do not agree to your payment terms, design and additional Bill of Material which you have mentioned in your earlier letter.
>
> In order for our review of your this letter of demand. We would appreciate if you can forward the main contract or others as stated in your letter of award for our review and reply.
>
> ..
>
> We do not have and copy of the main contract which you are referred to clause 67.1.1of the head contract.
>
> Kindly please forward a copy of the complete main contract for our review.
>
> We only request Deluge for the payment terms against delivery by way of letter of credit or Cash-On-Delivery to ease our cash flow which is essential in our Company operation.
>
> ..
>
> We hope you will take a positive approach to grand our payment request for this project delivery.

72 On 2 March 2005, the plaintiff wrote as follows:

> We have been request repeatedly to you to get a copy of "Main Contract" for our review and reference. Unfortunately, we have not received until today.
>
> We would like to request again that it is fair that GIB should have the copy for our reference that we can make our fruitful decision of your previous letter of demand. We are highly appreciate of your immediate attention and we do not wish to delay our goods delivery.

73 On the same day, the defendant wrote as follows:

> We acknowledge receipt of your correspondence dated 21st February 2005 with regard to the above project and note that you are still disputing the terms and conditions of contract which you have freely entered into and further that you are still refusing to deliver the required materials without first receiving advance payment.
>
> We have instructed you in writing on two occasions (5th & 16th February 2005) that you are in 'default of contract' and instructed you to deliver the equipment without delay however you failed to comply with this instruction. We therefore advise, in accordance with Clause 67.1.1 of the head contract, without further notice that you are hereby released from your obligations

> under this contract. We also reserve the right to seek compensation from your company for any delay this may cause to the project by your lack of action.
>
> We again dispute and reject all of your assertions regarding this project; we refer you to the Letter of Award ref no CN/18/MRT/02/01(27) dated 21 October 2002, which included your signed acceptance of the terms and conditions contained therein on 28 October 2002.
>
> We are intending to retender the Fire Alarm System works for this project and if you would like to participate please contact the writer to obtain a set of tender documents, it should be noted that a copy of the Main Contract for this project remains available at our office for examination at any time.

74 In my judgment, by the time of these exchanges, the plaintiff's position was such that it was not evincing a renunciation of the sub-contract. Rather, it was apparent that the plaintiff was attempting to understand the defendant's position which appeared to suggest that the terms of the main contract had been incorporated into the sub-contract in their entirety. The defendant referred for instance to Clause 67.1 of the main contract which appeared to be a provision relating to termination of the contract. I have dealt with the proper construction of the back-to-back provision in this case. On any basis, I do not regard it as effecting a wholesale incorporation of the terms of the main contract into the sub-contract. Yet this was the basis upon which the defendant was acting and on which it purported to bring the contract to an end.

75 Furthermore, the defendant itself recognised in its letter of 2 March 2005 that the plaintiff was in fact disputing the terms of the sub-contract and the extent to which the main contract had in fact been incorporated into it.

76 In these circumstances, where there was a manifest difference between the parties as to the terms of the sub-contract and the extent to which the main contract terms had been incorporated into the sub-contract, the defendant in my judgment was acting at its own peril in electing to terminate the contract on the basis of *its* view of what the terms of the sub-contract were. This is to be contrasted with the position of the plaintiff which did not purport to terminate the sub-contract based on its view. The following passage from *Chitty on Contracts* (Sweet & Maxwell 29th Ed 2004) ("*Chitty*") at 24-019 is instructive:

> The renunciation must be "made quite plain". In particular where there is a genuine dispute as to the construction of a contract, the courts may be unwilling to hold that an expression of an intention by one party to carry out the contract only in accordance with his own erroneous interpretation of it amounts to a repudiation; and the same is true of a genuine mistake of fact or law.

77 *Chitty* cites the decision of the House of Lords in *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277 among others in support of this proposition. It is a question of fact in each case whether the party in question has acted in such a way that it may reasonably be taken to have renounced the contract. In particular, where the parties are divided over the proper interpretation of the contract and each is acting in a manner that purports to uphold the contract rather than to renounce it, albeit that it is on each party's own perspective of what the contract requires, the situation potentially becomes more difficult. There is a wide range of possible scenarios and it would be inappropriate for me to lay down any particular rule since, as I have said, it is a question of fact whether the conduct of any party in fact amounts to a renunciation. In the present case, what is critical is that there was a genuine difference as to what the terms of the sub-contract were and to what extent the provisions of the main contract had been incorporated into the sub-

contract. At the material time, the plaintiff was seeking disclosure of portions of the main contract by which the defendant alleged it was bound. In these circumstances even though the plaintiff had set out its view of its contractual obligation, I do not consider that it was renouncing the contract because its particular concern at that stage was to see the main contract documents. Furthermore, in both the letters that I have referred to from the plaintiff, especially the latter, there is a clear indication that it was open to reconsidering its position after it had seen the main contract. In my judgment, in terminating the sub-contract in these circumstances, the defendant was acting at its own peril.

78 Nor could the defendant rely upon the dire effects of the plaintiff's actions to justify its own. Whatever may have been the position before the deadline had been extended by the Land Transport Authority, by the time the defendant in fact terminated the contract, it was aware that a very substantial extension of time to complete the work had been granted. Further, I consider that it was under an implied obligation to communicate that to the plaintiff but it did not do so. Given this extension, it could not be said that the consequence of making the main contract documents available to the plaintiff were so dire that it would have deprived the defendant of substantially the whole benefit of the sub-contract. Indeed, given the extension of time, it is not even clear that there was any contractual basis for the defendant to have insisted upon immediate delivery at that time.

79 In the premises, I consider that the defendant was not entitled to treat the contract as having been discharged by the plaintiff's actions and in purporting to do so, it wrongfully terminated the contract.

80 Both parties agreed that in respect of this issue, I was to enter interlocutory judgment in favour of the party that was not in breach with an order for damages to be assessed. I therefore make an order in favour of the plaintiff for interlocutory judgment to be entered against the defendant for wrongful termination, with damages to be assessed.

Mitigation of damages

81 However, there is a further issue. The defendant claimed that even if it was found to be in breach, the plaintiff had failed to mitigate its damages. It was not in dispute that following the termination of the sub-contract, the parties met to discuss the resolution of the matter and that the defendant agreed in principle to purchase the equipment in question at the plaintiff's direct cost plus 6%. The mark-up apparently included some allowance for the plaintiff's indirect costs for such things as freight, handling and financing. Had this been acted upon, this would clearly have limited the extent of the plaintiff's losses.

82 Such an agreement was reached in principle. The defendant then wanted to conduct a check to ascertain if the goods were in fact in the possession of the plaintiff. Under cross-examination, it was apparent that Mr Gan had not reacted warmly to this idea. It became apparent during the trial that the defendant believed that the items which the plaintiff claimed it had ordered and held available for delivery were not in fact there. The plaintiff's case was that by November 2004, it had already ordered from EST and held in its warehouse virtually the entire set of equipment covered by the sub-contract.

83 During the trial, further applications were made by the defendant for certain documents produced by the plaintiff to be sent for forensic analysis and for an inspection to be conducted under the supervision of an independent advocate and solicitor so that an inventory could be taken of the items covered by this sub-contract in the possession of the plaintiff. According to the plaintiff, it still retained the entire lot of the equipment in its warehouse. To be fair to the plaintiff, it may be noted

that it did not resist this initiative to have the inspection done or the inventory taken. However, the results of the forensic analysis and of the inspection were disturbing.

84 As I have noted above, the plaintiff maintained that by September 2004, it had ordered all of the equipment required for the project and had stored it in its warehouse by November 2004. The plaintiff exhibited some photographs of boxes allegedly containing the equipment. Mr Gan specifically stated that he had tried to sell the equipment and failed. He produced some letters dated in March 2006 more than a year after the termination and maintained that the items could not be sold. The plaintiff's pleaded case is that none of the equipment could be sold. Perhaps for this reason, the plaintiff's claim was initially framed as being for the entire contract price though it was later amended to be a claim for damages to be assessed.

85 The plaintiff also produced a commercial invoice for a sum of US$632,400.54 which it allegedly paid to EST for the equipment.

86 Mr Gan first maintained during cross-examination that he received 441 boxes of equipment and that they were all in the warehouse. However, it became apparent following the inspection and the independent stock-take carried out under the supervision of Ms Suja Sasidharan, an advocate and solicitor unconnected with the parties or counsel in this matter, that:

(a) there were only 106 boxes bearing the number corresponding to the purchase order allegedly issued in respect of these items which was P4090253; and

(b) of these, at least 94 had been opened.

87 Mr Gan then explained that there were other boxes bearing different purchase order numbers but which allegedly contained equipment for this project. However, it was apparent that the equipment in such other boxes related to purchase orders that in some cases had been issued as late as May 2006.

88 The plaintiff then contended that it operated a "first-in first-out" policy so that items acquired and received for this project might be used for other projects as and when these were needed. This was inconsistent with what the plaintiff had said up to this point. Further, if that were true, then it would follow that the plaintiff had been able to use in other projects at least some of the equipment ordered for this project which again was inconsistent with what the plaintiff had said up to this point.

89 Further, it is relevant to note in this regard that the inspection done by Ms Sasidharan found in respect of certain items of equipment, discrepancies between the number of such items that were in fact found during the inspection and the number that was listed on the inventory list and ought therefore to have been there based on what Mr Gan had said.

90 There were further irregularities. It appeared that some of the boxes bearing the purchase order number for this project (P4090253) had labels freshly torn off. The labels that were torn off related to items of equipment that were not even included in the purchase order allegedly issued for this project. This takes on greater significance in the light of what I have set out at [94] and [95] below.

91 With reference to the commercial invoice allegedly issued by EST (see [85] above) Mr Gan claimed that the document produced in court was the original. It contained a signature in blue ink. It also contained some handwritten annotations which Mr Gan said were original marks made in Singapore after the invoice arrived. The document was sent for testing by the Health Sciences Authority. They concluded that the document was in fact a reproduction generated using a colour printer. I gave the plaintiff an opportunity to engage its own expert. That expert concurred that it was a reproduction

but he suggested it was a photocopy. On either basis, the common objective view was that this was not an original document with the original handwritten annotations allegedly made in Singapore.

92 This was never satisfactorily explained by the plaintiff. I suggested that the plaintiff might seek the assistance of EST to obtain their copy of the invoice but this was not done. On 12 October 2006, Mr Cheo filed an affidavit in which he exhibited a letter from an entity related to EST which said it would provide such assistance in relation to producing its copy of the original invoice if required by a court order. The plaintiff did not apply for this.

93 Further, under cross-examination, Ms Tan Siew Geok, who was the plaintiff's director of administration and finance was unable to explain why according to the plaintiff's own financial statements, the value of the stock in the warehouse as at 31 May 2005 was shown as valued at $610,997 when according to the plaintiff it had paid a sum in excess of $1 million when these items were allegedly delivered in November 2004, some six months or so earlier.

94 The defendant also adduced the evidence of Ms Tan Sze Sze, a former employee of the plaintiff. She testified that while working for the plaintiff, she had been instructed by Mr Gan to produce 2 copies of a purchase order both dated 7 September 2004 and both bearing the number P4090253. The first was for items to the value of US$632,400.54. The second was for items valued at US$127,673.51.

95 The former was the document produced and relied on by the plaintiff. However, it was the latter but not the former that included items with the same catalogue number as had been on the labels that Ms Sasidharan found were torn off (see [90] above). This casts serious doubts on the authenticity of the version of the purchase order in question that was relied on by the plaintiff. Ms Tan was not seriously challenged in cross-examination and I accept her evidence.

96 On the evidence, I am satisfied that the plaintiff did try to inflate the value of the items it had ordered. I am also satisfied that the plaintiff at the material time did not have all the items that it purported to have ordered and paid for.

97 This in turn sheds light on the plaintiff's unwillingness to permit an inventory check after the in-principle agreement was reached because I am satisfied that such a check would have revealed that the equipment in question was not there.

98 The principle that a party has a duty to mitigate its losses prevents it from claiming such damages as may be avoided by reasonable steps: see *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railway Co of London* [1912] AC 673, 689. The recoverable damages are thus computed as if the plaintiff has taken such steps to minimise or mitigate his losses. The defendant has the burden to prove that the plaintiff has failed to mitigate his losses and I am satisfied that it has done so.

99 Accordingly, the damages that the plaintiff would be entitled to have assessed would on any basis exclude any reliance loss since the plaintiff could have avoided such loss had it accepted and acted upon the defendant's mitigation efforts. As to any other consequences that may flow from my findings on this issue, these are matters I leave to the assessment.

Costs

100 It will be apparent that the plaintiff's prospective recovery on the Marina Line project will be a far cry from the amount it initially claimed. Furthermore, it has failed wholly in respect of the two other

claims. Finally, I have found that the plaintiff was involved in improperly inflating its claims.

101 In *The Karting Club of Singapore v David Mak and others* [1992] 2 SLR 483, Chan Sek Keong J (as he then was) held, at 485, [6] that the power to award costs conferred on the High Court by s 18 of the Supreme Court of Judicature Act (Cap 322, 1985 Rev Ed) and O 59 r 2(2) of the Rules of the Supreme Court (1970) is "completely unfettered".

102 In *Tullio v Maoro* [1994] 2 SLR 489, the Court of Appeal endorsed the following passage from*Re Elgindata Ltd (No 2)* [1993] 1 All ER 232 at 237:

> The principles on which costs were to be awarded were (i) that costs were in the discretion of the court, (ii) that costs should follow the event except when it appeared to the court that in the circumstances of the case some other order should be made, (iii) that the general rule did not cease to apply simply because the successful party raised issues or made allegations that failed, but that he could be deprived of his costs in whole or in part where he had caused a significant increase in the length of the proceedings, and (iv) *that where the successful party raised issues or made allegations improperly or unreasonably the court could not only deprive him of his costs but could also order him to pay the whole or part of the unsuccessful party's costs.* The fourth principle implied, moreover, that a successful party who neither improperly nor unreasonably raised issues or made allegations which failed ought not to be ordered to pay any part of the unsuccessful party's costs … [emphasis added]

103 Where a party acts unethically, for example by relying on false evidence, he may be penalised in costs: see *Baylis Baxter v Sabath* [1958] 1 WLR 529 at 533-534. In all the circumstances, I am satisfied the plaintiff should not have any of its costs. On the contrary, I am satisfied that it is within my discretion to and I accordingly do award the defendant the costs of this action.

104 Finally, the defendant had earlier applied for an order that it and/or its solicitors be at liberty to use or produce the documents that emerged in the course of discovery to third parties for the purposes of criminal investigations or prosecution. I had reserved this to the end of the trial and the defendant subsequently revived its request. The burden is upon the party seeking to be released from the implied undertaking not to use such documents for collateral purposes, to provide persuasive and cogent reasons to warrant the discharge of the implied undertaking: see *Anex Electrical Co Ltd v Kingsland International Ltd* [1998] 1 HKLRD 947. I do not think any such ground has been shown. It is a matter for the defendant if it wishes to take its complaint further on the basis of what I have set out here. I therefore make no order on this application.

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