Rotor Mix Pte Ltd *v* Feng Ming Construction Pte Ltd
[2012] SGHC 131

Case Number : Suit No 478 of 2011

Decision Date : 25 June 2012

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Ranjit Singh (Francis Khoo & Lim) for the plaintiff; Tan Kah Hin (Choo Hin & Partners) for the defendant.

Parties : Rotor Mix Pte Ltd — Feng Ming Construction Pte Ltd

Contract – Breach

25 June 2012 Judgment reserved.

Lai Siu Chiu J:

Introduction

1 This dispute involved the supply of ready-mixed concrete by Rotor Mix Pte Ltd. ("the plaintiff") to Feng Ming Construction Pte Ltd ("the defendant"). The issue was whether the defendant had breached the supply agreement in not ordering enough concrete from the plaintiff. In addition, the defendant counterclaimed against the plaintiff based on a subletting agreement entered into by the parties wherein the plaintiff set up a batching plant on land leased from the Jurong Town Corporation ("JTC") by the defendant.

The background

2 The plaintiff is a company that supplies ready-mixed concrete, and was one of several such suppliers to the defendant for the latter's construction projects in Singapore. The defendant, a construction company, does not produce ready-mixed concrete and hence is dependent on its suppliers for the same.

The facts

3 The defendant had leased a plot of land of about 3000m^2 at Jalan Bahar ("Jalan Bahar land") from JTC for the purposes of storing its construction and building materials, equipment and machinery. The plaintiff claimed that in or about early 2008, the defendant had informed the plaintiff that it could sublet the Jalan Bahar land to the plaintiff to set up a concrete batching plant. The plaintiff also claimed to have been informed that the defendant would be tendering for a contract at Jurong Port for the construction of a drainage system ("the JP project").

4 On or about 1 August 2008 the plaintiff and the defendant entered into a subletting agreement ("the subletting agreement") whereby the plaintiff sublet to the defendant 2350m^2 of the Jalan Bahar land in order to set up a batching plant to produce ready-mixed concrete.

5 The relevant clauses of the subletting agreement are set out below:

1) General Clauses

a) The total land area is 3000m² and the temporary occupation land (TOL) fee is currently at $2.26 per m². It was agreed that Rotor Mix Pte Ltd will take up 2350m² land area and the monthly fee shall be $5,311.00 excluding GST (inclusive of property tax). This fee is based on current rate of $2.26 per m² and is subject to change if there is any amendment in the calculation by JTC Corporation.

b) The period of concrete batching services shall start with effect from 01 August 2008 and expires on 31 March 2009 and shall subject to any extension of TOL by JTC Corporation. There shall be no claim from either party in the event that extension is not granted by JTC Corporation.

…

f) Rotor Mix Pte Ltd shall pay Feng Ming Construction Pte Ltd a total cash deposit of:

TOL deposit: 2350m² x $10/m²=$23,500.00

SP Services Ltd: $410.00

These (sic) deposit will be refundable to Rotor Mix Pte Ltd once reinstatement work for TOL premise upon expiry are done and handed over to the relevant authorities. However, Feng Ming Construction Pte Ltd reserves the right to forfeit any of the deposit should Rotor Mix Pte Ltd fails (sic) to carry out any reinstatement work till satisfaction.

g) Feng Ming Construction Pte Ltd shall invoice Rotor Mix Pte Ltd the TOL fee, waste management fee, pest control fee, water fees (according to the meter reading taken by both parties' representatives) and any others on the 30th of every month. The terms of payment shall be 07 days from date of invoice.

Eg: On 30/9/08 – Feng Ming Construction Pte Ltd will invoice:

TOL fee for Oct 08, water fee for usage between 18/8/08 to 17/9/08, waste management fee for Sep 08, pest control fee for Sep 08.

2) Administrative Fees

a) With effect from 01 September 2008, Feng Ming Construction Pte Ltd will charge Rotor Mix Pte Ltd an administrative fee of $1 per cubic meter on the total production of every month or a minimum charge of $2,000.00 per month if the production falls below 2000m³. Rotor Mix Pte Ltd shall submit the monthly sales tabulation to Feng Ming Construction Pte Ltd no later by the 5th of the following month. Feng Ming Construction Pte Ltd will then issue a sales invoice to Rotor Mix Pte Ltd within the next 07 days. The terms of payment shall be strictly 30 days from date of invoicing.

6 The subletting agreement was to continue until the Temporary Occupation Licence ("TOL") of the Jalan Bahar expired, and would only continue for the duration of the renewal period of the TOL, if so granted by JTC. The TOL then in effect was to expire on 31 March 2009, but was subsequently renewed until 12 January 2011. The plaintiff claimed that the subletting agreement was entered into on the understanding that the defendant would purchase the bulk of ready-mixed concrete required

for the JP project from the plaintiff. In a letter to the Central Building Pollution Unit of the National Environment Agency ("NEA") dated 26 February 2008, the defendant stated:

> The setting up of the concrete batching plant would greatly assist to:-
>
> i) Facilitate a more efficient delivery of concrete with reduction in idling time.
>
> ii) Facilitate regular and continuous supply of concrete.
>
> iii) Ensure consistency in quality of concrete as the concrete will be batched from our batching plant.

7 Approval for the batching plant was granted by JTC on 24 March 2008. The plaintiff paid the defendant $23,500.00 as security deposit for the subletting agreement. The batching plant was fully set up by December 2008 at a cost of $163,318.35.

8 On 13 October 2008, the defendant secured the contract for the JP project. On 1 April 2009, the plaintiff entered into an agreement to supply ready-mixed concrete to the defendant for the JP project ("the supply agreement") over a period of 27 months (*ie*, 24 March 2009 to 23 June 2011). The agreement dated 24 March 2009 was written on the plaintiff's letterhead and was accepted by the defendant on 1 April 2009. The plaintiff started supplying ready-mixed concrete to the defendant in that month. The relevant clauses of the supply agreement are as follows:

> 10. Estimated Total Quantity: 10,000 cubic metre
>
> 11. Estimated Duration of Contract: 27 months, inc. (sic) any extension of time.
>
> 16. Price remained fixed throughout the whole contract duration as specified under item 11.

9 Subsequently, due to falling concrete prices and the defendant's request, the plaintiff reduced the price of ready-mixed concrete by $18.00 per m^3 via a letter dated 16 March 2010, stating that this was notwithstanding cl 16 of the supply agreement. By March 2010, the plaintiff alleged that the defendant had stopped its purchase of ready-mixed concrete, due to the latter's ability to buy the same at a cheaper price elsewhere. At that point, the defendant had purchased a total of 2,532m^3 of ready-mixed concrete from the plaintiff. The plaintiff discovered that the defendant was ordering ready-mixed concrete from other suppliers. Francis Chooi ("Chooi"), the plaintiff's manager, wrote emails and letters to remind the defendant that it was obliged to purchase ready-mixed concrete from the plaintiff.

10 The plaintiff notified the defendant via email on 26 April 2010 of its intention to terminate the supply agreement and the subletting agreement. The defendant did not respond to that email. The plaintiff handed over the site to the defendant's storeman on 31 May 2010. Following the plaintiff's vacation of the Jalan Bahar land, the defendant carried out some reinstatement work and handed the land back to JTC in December 2010.

The plaintiff's case

(i) The supply agreement

11 The plaintiff argued that in failing to purchase the contractual quantity of 10,000m^3 of ready-mixed concrete as stipulated under cl 10 of the supply agreement, the defendant was in breach and

the plaintiff should be entitled to the loss of profits occasioned thereby.

12 Under cross-examination, Lim Hong Beng ("Lim"), the managing director of the defendant, admitted to informing the plaintiff that the defendant required 10,000m^3 of ready-mixed concrete:

> Q: But nevertheless, Mr Lim, you would have told him that you would require 10,000 cubic metres of concrete for the Jurong Port project. Correct?
>
> A: I did tell him that I would require 10,000 cubic metres for the entire project.

13 Lim agreed that "estimated" was inserted into the supply agreement due to the inherent impossibility of predicting the exact amount of concrete required.

> Q: Wouldn't you agree then, it's normal to use the word "estimated" because you cannot say the exact amount of ready mixed concrete you would require?
>
> A: Yes.

14 The plaintiff contended that the insertion of cl 16, which fixed the price of ready-mixed concrete for the entire duration of the supply agreement, further showed the defendant's commitment to buying the bulk, if not all, of its ready-mixed concrete requirements for the JP project from the plaintiff. Koh Yen Peng ("Koh"), the manager of the defendant's tenders and contracts department, confirmed that this clause was unique to the supply agreement, but was unable to explain why it was only inserted into this particular agreement.

15 It appeared that the only logical explanation for the unique clause must be that the defendant intended to purchase 10,000m^3 of ready-mixed concrete from the plaintiff. In *Turner (East Asia) Pte Ltd v Pioneer Concrete (Singapore) Pte Ltd* [1994] 3 SLR(R) 452 ("*Turner*") at [15] and [19], the Court of Appeal stated:

> 15 …the nature and effect of a contract must primarily be sought from the provisions of the contract themselves, having regard at the same time to the circumstances in which the contract came into being.
>
> …
>
> 19 The fact that a price is fixed in advance, incorporating an increase for the year…, adds to the certainty of the contractual undertaking…

16 In that case, the Court of Appeal at [10] referred to the case of *Percival, Lim v London County Council Asylums and Mental Deficiency Committee* (1918) 87 LJ KB 677 ("*Percival*"), where Atkin J listed three types of contracts for the supply of goods and materials:

> (a) where the purchaser undertakes to buy a definite quantity of the supplier's goods;
>
> (b) where the supplier merely offers to supply goods at a price, but unless and until the purchaser chooses to place an order, there is no binding contract;
>
> (c) where, though the purchaser is not bound to order any definite quantity, he is bound to buy all the goods that he in fact needs; such a contract is broken if the purchaser does need the goods in question but gets his suppliers from some other supplier.

17 The plaintiff submitted that *Turner* showed that the parties intended by cl 16 for the defendant to purchase 10,000m³ of concrete from the plaintiff, and therefore the current case fell into category (c) of the *Percival's* case.

18 In the case of *Chong Ah Kwee and another v Viva Realty Pte Ltd* [1990] 1 SLR(R) 244 ("*Chong Ah Kwee*"), the High Court remarked at [19]:

> …That being the case, it is, in my view, perfectly reasonable to construe the word "estimated", assuming it is a warranty, to mean that the defendants have estimated the area but that if a mistake is made, the plaintiffs will not be entitled to annul the contract or to compensation unless the estimation has resulted in misdescription which is of a serious/vital nature or affects the value of the flat.

19 Citing the above passage, the plaintiff argued that "estimated" in cl 10 can be construed as a warranty as well. Hence the defendant's failure to abide by cl 10 meant that the plaintiff should be able to recover the loss of profits occasioned by the defendant's failure to order 10,000m³ of ready-mixed concrete from the plaintiff.

(ii) The subletting agreement

20 It was the plaintiff's case that the parties' intention behind the subletting agreement was for the plaintiff to produce and supply the bulk of ready-mixed concrete that the defendant required for the JP project, as well as for the defendant's other contracts. If this were not so, the plaintiff would not have expended $163,000.00 to set up the batching plant. According to the plaintiff, it was Lim who first approached Chooi with a view to setting up the plant. Moreover, those reasons were explicitly stated in the defendant's letters to the National Environment Agency ("NEA"). Chooi's email to Ooi Boon Yen ("Ooi"), the defendant's manager of logistics, on 26 April 2010 revealed such intentions:

> As you know that we set up the concrete batching plant at Jalan Bahar primarily to supply to your projects. Now that you have chosen to buy the ready-mixed concrete from other suppliers, we have no option but to discontinue the production.

21 The plaintiff submitted that the subsequent lack of response from the defendant to the above email showed that the defendant was well aware of the fact that the subletting agreement was entered with the expectation that the plaintiff would supply ready-mixed concrete for the JP project and for the defendant's other contracts.

(iii) Termination of both agreements

22 The plaintiff argued that the current case fell within the fourth category of situations listed in *RDC Concrete Pte Ltd v Seto Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 at [99] where a breach of a term in the contract deprived the innocent party of substantially the whole benefit which it was intended to obtain from a contract. While well aware that the plaintiff would not be able to continue operating the plant if the defendant failed to order ready-mixed concrete from the former, the defendant's actions clearly showed it had repudiated the supply agreement from March 2010 onwards. As a result, the plaintiff evinced a clear intention to terminate the subletting agreement by writing to the defendant and returning the site to the defendant on 31 May 2010.

23 In summary the plaintiff's claim against the defendant was as follows:

(a) Loss of profit from a shortfall of orders: $238,976.00;

(b) Return of the deposit paid to the defendant under the subletting agreement: $23,500.00 and

(c) Ready-mixed concrete supplied previously: $44,440.48.

(iv) The counterclaim

24 The plaintiff pointed out that based on the defendant's evidence that it took 22 days to clear and reinstate the plaintiff's portion of the Jalan Bahar land, it would be unfair and unjust of the defendant to claim the outgoings of the land against the plaintiff for the months of June to September 2010, as it was the defendant's delay in clearing the land that led to the charges being invoiced. Moreover, given that the plaintiff moved out and handed the site over to the defendant on 31 May 2010, it was even more certain that the defendant's claim for the invoices from June to December 2010 should fail. The defendant did not call the storeman to testify in order to refute the plaintiff's claim that the storeman had called the defendant's office to take over the site. Hence the site must be regarded as having been properly handed over to the defendant on 31 May 2010.

25 Allowing the defendant to claim the administrative fee for which no work had been done would also be unjust and unfair. The plaintiff submitted that in fact, the fee was a penalty and not a genuine pre-estimate of damages.

26 In addition, the plaintiff pointed out that no evidence for the cost of reinstatement was submitted by the defendant. Hence, with no documentary evidence that $55,553.60 was actually incurred for the plaintiff's portion of the land, this amount could not be claimed against the plaintiff.

The defendant's case

(i) The supply agreement

27 It was contended by the defendant that it was not contractually obliged to buy all 10,000m³ of ready-mixed concrete from the plaintiff as the quantity stated in the supply agreement was only an estimate. The plaintiff's assertion that there existed a mutual understanding which required the defendant to procure the "bulk" of its ready-mixed concrete needs from the plaintiff was neither set out as a preamble nor recited in the subletting agreement itself. Given that this mutual understanding was attributed to one William Chua who did not testify, the allegation was at best hearsay. During cross-examination, Chooi himself was uncertain as to what "bulk" meant, and eventually volunteered it to be 90%. In addition, there was nothing in the supply agreement that provided for fixed monthly orders and delivery of ready-mixed concrete.

28 The defendant also pointed out that it was the plaintiff, not the defendant, who unilaterally and wrongfully abandoned the supply agreement on 5 April 2010, when there were still a few more months before the supply period expired.

(ii) The subletting agreement

29 It was alleged by the defendant that the plaintiff had also breached the subletting agreement in vacating the sublet portion in May 2010 when the subletting agreement only expired on 12 January 2011. In fact, there were 3 orders in July 2010 for ready-mixed concrete which the plaintiff failed to fulfil. Hence, the defendant argued, the deposit of $23,500.00 was rightfully forfeited due to the

plaintiff's failure to reinstate the sublet portion pursuant to cl 1(f) of the subletting agreement. The basis for the plaintiff's unilateral termination of the subletting agreement was the fact that the defendant had been obtaining ready-mixed concrete from the plaintiff's competitors, and not derivative of the agreement itself. The plaintiff had conceded that the supply agreement was never meant for the plaintiff to be the sole exclusive supplier for the JP project.

30 The defendant suggested that the real reason the plaintiff took up this action was to recover its losses which arose from a bad business decision to invest in the batching plant at the sublet portion of the JTC land after having decided to exit from the ready-mixed concrete supply business. All it was trying to do was to get out of the two agreements and the ready-mixed concrete business.

(iii) The counterclaim

31 Given that the plaintiff had admitted to the defendant's counterclaim of $78,031.19 for the plaintiff's share of the outgoings and charges from January to April 2010, $33,590.71 ($78,031.19 less $44,440.48) was still due to the defendant (even with the defendant's admission to the outstanding claim of $44,440.48 for ready-mixed concrete previously supplied by the plaintiff.

32 As for the disputed liability for outgoings and charges for the period of subletting in the interval between the plaintiff's vacation of the sublet portion in May 2010 and the surrender of the land to JTC in December 2010 totalling $87,909.70, the plaintiff was liable since it had prematurely terminated the subletting agreement.

33 The defendant argued that the reinstatement claim of $55,553.69 (this figure being the plaintiff's share of the total cost of $70,919.60 in the ratio of 2350:3000) was not arbitrary and exorbitant, as the plaintiff claimed, but was backed by quotations, and must be paid by the plaintiff following Chooi's own admission of failing to reinstate the sublet portion:

> No the fact is true. We did not reinstate the land during the last day of the inspection.

34 In summary, the defendant's counterclaim was as follows:

(a) Plaintiff's share of outgoings from January to May 2010: $78,031.19;

(b) Cost of reinstatement: $55,553.69; and

(c) Plaintiff's share of outgoings had the plaintiff remained on the sublet portion as contracted and not left in May 2010: $87,909.70.

The decision

35 On a simple interpretation of the supply agreement, it was clear that unlike what the plaintiff claimed, the defendant did not breach the contract by failing to place orders for the shortfall of 7,468m^3 of ready-mixed concrete. Both parties agreed that the use of the word "Estimated" should be given its literal meaning and that 10,000m^3 was merely an approximation and not a strict entitlement of the plaintiff to supply the quantity.

36 It seemed to me that the plaintiff was confused over its expectation of the defendant. While the statement of claim clearly listed the loss and damage of $238,976.00 due to the shortfall of 7,468m^3, *ie*, the defendant was obliged to order all 10,000m^3 of ready-mixed concrete from the plaintiff, Chooi repeatedly stated in both his affidavit of evidence-in-chief ("AEIC) and during cross-

examination that the defendant had agreed to buy the "bulk" of ready-mixed concrete for all their projects. This understanding was attributed to William Chua, who unfortunately did not testify, and hence could not be proven. This confusion between having to order the exact amount of 10,000m³ or just the "bulk" of 10,000m³ can be gleaned from Chooi's response during cross-examination:

> Q: …what constitutes "a bulk", you see?
>
> A: Okay. Normally when we sign contract with the contractors, er, for this case, like the Jurong Port project, the contractor will tell us what is the quantity for the whole project that---and that they will order the concrete from us. So when we say the "main bulk", we expect at least 90%...
>
> ...
>
> Q: …So you are saying that the plai[sic]---the---the defendant will have to purchase the bulk of their concrete requirement if they have obtained 90% from you, correct?
>
> A: Yes.
>
> Q: That's what you said ... did you tell the defendant that "You must take 90% from me?"
>
> A: No, we have entered into a black and white written agreement that they will take 10,000 metre cube from us ---
>
> ...
>
> A: ...at least you take 90%, I will consider contented, happy. If you take 90% of the so-called quan---agreed quantity of 10,000 metre cube. But, of course, if you take 10,000 and above, I will be far more happier, lah.

37 Chooi vacillated between expecting the defendant to adhere to the "black and white" requirement of 10,000m^3 and being "contented, happy" with 90% of 10,000m³. His response to the prospect of the defendant ordering "10,000 and above" was telling: he would be "far more happier" if the defendant did, suggesting that ordering 10,000m^3 or more would actually be over and above what the defendant was obliged to take. Hence it was clear both from the wording of the supply agreement and Chooi's evidence that there was never an expectation that the defendant had to order exactly 10,000m^3 of ready-mixed concrete from the plaintiff. As for the requirement to at least order the "bulk", not only was the figure of 90% quoted by Chooi plainly arbitrary, more crucially, there was no evidence that this understanding was part of the agreement between the parties. In the absence of such evidence, I find that there was neither an agreement by the defendant to buy 10,000m^3 of ready-mixed concrete nor an understanding that there was an obligation to purchase the "bulk" of that amount.

38 Hence, the defendant's failure to do so was not a breach of the supply agreement. Accordingly, the plaintiff is not entitled to the claim of $238,967.00 for the supposed loss of profits had all 10,000m^3 of ready-mixed concrete been ordered by the defendant.

39 What seems to be the main bone of the plaintiff's contention was not the fact that the defendant did not order enough ready-mixed concrete from it, but the fact that the plaintiff found out that the defendant was ordering the same from other suppliers, who were its competitors. This was

evident from Chooi's evidence during cross-examination:

Q: So if, by chance, a defendant had completed the whole project, the whole project, all right, in 2010, and took only 7,000 cubic metres of RMC, you will not be suing them for the balance of the 3,000, isn't it?

A: Yes.

Q: You will?

A: If we know that *they only take from us* and no other body.

Q: Never mind the---never mind whether they---let---let's---let's forget about this---all these quibbles. Focus on my example to you.

A: No, if the contract is 10,000 metre cube, end of the project you only take 7,000 metre cube from me and of course after some---some discovery, I realise that it's true that you have take 100% from me but ended up it's only total 7,000 metre cube, although there's a shortfall of 3,000, I think we will not take any action. We'll say "Thank you very much for your support because you only required 7,000 you take for the project."

Q: True, but then let me---

A: But if the project required 10,000 metre cube, but *you also take from other people although you committed to me 10,000*, of course I'm not happy.

[emphasis added]

40 It was clear that Chooi's unhappiness stemmed from the fact that the plaintiff was not the exclusive supplier of ready-mixed concrete to the defendant and not the fact that the latter had ordered less than 10,000m^3 from the plaintiff. In fact, Chooi would have been happy with an order of 7,000m^3. However, it was never part of the supply agreement that the defendant should be restricted to ordering ready-mixed concrete only from the plaintiff. In fact, Chooi plainly conceded that "we are not the exclusive supplier" during cross-examination. The plaintiff tried to couch its displeasure at the defendant's ordering the product from others as a claim that the defendant was liable to order from it 10,000m^3 of ready-mixed concrete.

41 Given that the contract would only have run out by 23 June 2011, there was nothing to preclude the defendant from ordering more ready-mixed concrete from the plaintiff until that time. Instead, by terminating the agreement eight months before the stipulated 27 months had run its course, leaving the ready-mixed concrete industry and refusing to supply ready-mixed concrete to the defendant despite three orders that came its way, the plaintiff was in breach of the supply agreement, not the defendant. The plaintiff was unable to prove through a supposed conversation with one 'Mr Tony' that the defendant intended not to order any more ready-mixed concrete from the plaintiff. Additionally, there was no indication in the supply agreement of a fixed minimum amount to be ordered by the defendant periodically. As such, the plaintiff's mere contention that the defendant's orders were falling was not a sufficient ground to show that the defendant had breached the supply agreement.

42 The plaintiff could not argue that the subletting agreement was somehow tied to the supply agreement, thereby claiming that the subletting agreement could be terminated along with the supply

agreement. The defendant's letter to the NEA stating the reasons for setting up the batching plant cannot be relied on by the plaintiff to show that the defendant was somehow responsible for the commercial viability of the batching plant. This was essentially what the plaintiff was alleging in order to justify its exit from the Jalan Bahar land. The plaintiff's reliance on orders from the defendant was only one of the factors that the plaintiff should have taken into consideration when making a commercial decision to set up the batching plant at the Jalan Bahar land.

43 To enter into a subletting agreement with the defendant on the basis of reliance on the defendant's orders for survival *without* explicitly contracting for this understanding in the agreement was, in any case, not a prudent move on the plaintiff's part. Mere cognizance on the defendant's part of the plaintiff's intention to set up the batching plant primarily to supply concrete to the defendant did not impose a responsibility on the defendant to keep the batching plant afloat. The decision to set up the batching plant was a commercial one that the plaintiff made, and it cannot avoid its error of judgement by pushing the blame onto the defendant. As pointed out by the defendant, if the defendant had taken delivery of 10,000m^3 of ready-mixed concrete within a short span of time instead of spreading it out over 27 months, the batching plant would be standing idle for months thereafter. Hence, the subletting agreement and the supply agreement are separate and the failure of the defendant to order 10,000m^3 of ready-mixed concrete had nothing to do with whether the plaintiff could terminate the subletting agreement.

44 As to whether the defendant should return the $23,500.00 deposit under the subletting agreement to the plaintiff, it appeared clear that the defendant was entitled to forfeit the sum under cl 1(f). The sentence "Feng Ming Construction Pte Ltd reserves the right to forfeit any of the deposit should Rotor Mix Pte Ltd fails (sic) to carry out any reinstatement work *till satisfaction*" is clear enough: the plaintiff must reinstate the land to the defendant's standards. This, the plaintiff did not do, as admitted by Chooi:

> Court: What is---makes---ex---the correspondence between the two sets of lawyers seems to suggest that you have not reinstated the land as you claimed. What is your answer?
>
> Witness: No, the fact is true. *We did not reinstate the land during the last day of the inspection*.
>
> [emphasis added]

45 Hence the deposit was rightfully forfeited by the defendant.

46 As for the claim of $78,031.19 that was accepted by the plaintiff for the outgoings from January to April 2010, Ms Wang Tong Moi, the defendant's financial controller, stated under cross-examination that the corresponding invoices were actually for the period till May, not April:

> Q: ...would I be right to say they're actually from January to May and not April?
>
> A: Yah, I will say, "Yes" if you refer to the invoice date.

47 An additional "missing" invoice for the administrative, refuse and pest control fees of May 2010 was found, adding another $2,684.81. Hence, what the defendant should be entitled to is in fact the full amount of outgoings from January to May 2010, given that the plaintiff vacated at the end of May 2010. This would make a total of $80,716.00, based on the invoices submitted.

48 Additionally, the defendant made a counterclaim for the outgoings from the time the plaintiff

vacated the land to the time when the Jalan Bahar land was handed back to JTC. The amount claimed was $87,909.70 (for the period of May to December 2010), yet as the plaintiff submitted, the conceded amount above already covered the month of May, so that period should rightfully start from June 2010 instead. Moreover, the last invoice submitted was for the month of November 2010, with no invoice for December 2010. Hence the right period that the defendant could claim for outgoings would be June to November 2010. The total amount of the invoices for this period was $55,682.30. The plaintiff's argument that its handover on 31 May 2010 to the defendant's storeman precluded any liability for the outgoings thereafter, *ie*, from June 2010 onwards, cannot stand. By unilaterally leaving the site before the contractual period expired, the plaintiff wrongfully terminated the subletting. Hence, the defendant was entitled to claim for the pro-rated outgoings incurred on the Jalan Bahar land, which the plaintiff would have had to bear had it not prematurely returned the site.

49 As for the reinstatement costs, the defendant was unable to produce evidence to substantiate the figure of $55,553.69. First, the breakdown of the figures $70,919.00 (total cost of reinstatement) and $55,553.69 (the plaintiff's share, in the ratio of 2350:3000) given by the defendant's site manager, Png Kang Eng ("Png"), in his AEIC, did not even tally with the figures:

[a] Use of the SK235 excavator c/w breaker and operator to break concrete ground for 8 days [9/10/10 – 18/10/10].

Estimated market rate: $300 x 8 days = $2,400.00

Diesel consumption: 50 litres x $0.80 x 8 days = $320.00

Towing to/ fro: $120 x 2 = $240.00

[b] Use of SK200 excavator c/w operator to clear site for 22 days [7/10/10 – 1/11/10].

Estimated market rate: $250 x 22 days = $5,500.00

Diesel consumption: 60 litres x $0.80 x 22 days = $1,056.00

Towing to/ fro: $90 x 2 = $180.00

[c] Use of SK60 excavator c/w breaker and operator to break concrete access for 2 days.

Estimated market rate: $180 x 2 days = $400.00

Diesel consumption: 40 litres x $0.80 x 2 days = $64.00

Towing to/ fro: $70 x 2 = $140.00

[d] Total of 6 men to clear site: $25 x 6 x 26 days = $3,900.00

[e] Total trips of hardcore to dispose: $160 trips x $138.00 = $22,080.00

[f] Turfing: $10/m x 300m = $30,000.00

50 The above figures did not add up to either $70,919.00 or $55,553.69. It was unclear how those figures were derived. The documents submitted by the defendant which were supposedly quotations for the reinstatement works did not match the breakdown detailed in Png's AEIC. For instance, an invoice dated 30 September 2010 for diesel was included, whereas the timeframe referred to in Png's

above breakdown was only for certain days in October. Further, during cross-examination, Png was unable to point to any evidence before the court for the figures stated in the above breakdown:

Q: Mr Png, do you have any documentary evidence to show that the defendants consumed $320 worth of diesel under 14(a); 14(b) is 1,056; and 14(c), $64? Do you have any documentary evidence?

A: Mm, at present now I cannot show. Can show you a catalogue showing that they consume for this excavator SK235.

Q: The catalogue is not found in your documents, correct?

A: Er, is not---is not ...

...

Q: Mr Png, at 14(d) of your affidavit ---

A: Mm.

Q: ---you say six men to clear the site for 26 days.

A: Yes.

Q: Do you have a record of these 26 days that you took to clear the site?

A: Mm, for this six worker (sic)?

Q: Yes.

A: Yah, we have.

Q: And is it found in your documents there?

A: Er, no. We have a time card, okay? We have the time card this worker is located where for work.

Q: Mr Png, before this Court, there---those documents are not produced, correct?

A:

Q: You don't have those documents here?

A: Er, no, this---

...

Q: Mr Png, refer to 14(e) now.

A: Mm.

Q: You say, total trips, you took 160 trips. Do you have any documentary evidence that the

defendants took 160 trips to dispose of materials?

A: Yes.

Q: And is it before this Court today?

A: Mm---

Q: You have to answer. You can't nod your head.

A: Yah. No. We have---but we have the records of all this 160.

Q: In other words, there is no documentary evidence before this Court today that the defendants have undertaken 160 trips, correct?

A: Correct.

51 Hence, without proper documentary evidence and accurate calculations, the defendant is not entitled to the sum of $55,553.69 for the plaintiff's share of the reinstatement costs.

Conclusion

52 In the light of my findings, I dismiss with costs the plaintiff's claim against the defendant for failing to order ready-mixed concrete amounting to 10,000m³; there was no express provision in the supply agreement that the defendant must order a certain amount of ready-mixed concrete.

53 The defendant is awarded judgment with interest on its counterclaim against the plaintiff for the outstanding outgoings on the Jalan Bahar land, but only to the extent that the sums tallied with the invoices submitted *viz* $91,957.82 ($80,716.00 + $55,682.30 - $44,440.48). The defendant's counterclaim on reinstatement costs fails as it did not produce any evidence to substantiate such expenses. The defendant shall also have costs of the counterclaim. Costs are on a standard basis and are to be taxed unless otherwise agreed.

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