Stone World Sdn Bhd *v* Engareh (S) Pte Ltd
[2013] SGHC 22

Case Number : Suit No 146 of 2011

Decision Date : 24 January 2013

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Ong Lian Yi Gregory and Lim Lay See (David Ong & Co) for the plaintiff; Lim Tong Chuan and Lee Wei Qi (Tan Peng Chin LLC) for the defendant.

Parties : Stone World Sdn Bhd — Engareh (S) Pte Ltd

Contract – Formation

24 January 2013 Judgment reserved.

Lai Siu Chiu J:

Introduction

1 This was a case where Stone World Sdn Bhd ("the Plaintiff") made a claim for an outstanding sum of $481,031.63 from Engareh (S) Pte Ltd ("the Defendant") for goods sold and delivered and services rendered. The Defendant, on the other hand, contended that it had overpaid the Plaintiff and counterclaimed the sum of $84,453.09 from the Plaintiff.

The facts

2 The Plaintiff is in the business of supplying, fabricating and/or distributing various types of marble, stone and other related products. The Defendant is in the business of supplying natural stone and marble and was, at the material time, the appointed sub-contractor for the installation of fabricated marble and granite stone at the Paiza and Atrium areas of the Marina Bay Sands Integrated Resort ("MBS Project"). Seow Ah Mee ("Seow") was/is the accounts manager of the Plaintiff, while Ali Baygan ("Baygan") is the managing director and Amir Ranjbar ("Ranjbar") the financial manager of the Defendant.

3 Before the MBS Project, the Plaintiff had had previous business dealings with an associated company of the Defendant *viz*, Engareh (M) Sdn Bhd ("Engareh (M)") and the marketing representative of Engareh (M), which was BS Stone Sdn Bhd ("BS Stone"). Engareh (M) and BS Stone would engage the Plaintiff's services in stone-processing and fabrication for various residential projects in Malaysia. The pricing for the Plaintiff's services for these transactions was based on the rates set out in the Plaintiff's letter of quotation to BS Stone dated 8 January 2008 ("the 8 January 2008 Quotation").

4 In November 2007, one Michele Volpato ("Volpato") contacted the Plaintiff in relation to the MBS Project. The Plaintiff and Volpato had incorporated Volpato-Stone World (S) Pte Ltd ("Volpato-Stone (S)") for the purpose of the MBS Project for which the Plaintiff was the intended sub-contractor supplier of fabricated marble. Letters of quotation together with provisional bills of quantities were sent to ISG Asia (Singapore) Pte Ltd ("ISG"), the main interior design contractor for the MBS Project.

5 However, in or about June 2009, due to the financial crisis in America, the Plaintiff decided against undertaking the MBS Project. The Plaintiff then approached Baygan to see if he was interested in being appointed as the sub-contractor instead, with the Plaintiff being appointed as fabricators of the raw marble. At a meeting in July 2009 between Seow, Baygan and Volpato, Baygan agreed to take on the role of sub-contractor and engage the Plaintiff to process the marble to be supplied for the MBS Project.

6 Baygan then proceeded to incorporate the Defendant in July 2009 as one of the requirements of ISG was that a local Singapore company had to be incorporated to take on the MBS Project. As part of the agreement, Volpato was also employed by the Defendant as its general manager. It was agreed that the Defendant would be the contracting party with ISG for the MBS Project, and the Defendant would also engage the Plaintiff to supply marble and/or granite stone and also provide fabrication work on marble or granite stone for the MBS Project ("the Contract").

7 The Defendant then submitted tender prices to ISG which were based upon a schedule of prices ("Schedule of Prices") that was submitted earlier by the Plaintiff to ISG. The costing and prices in the Schedule of Prices (according to the Defendant) were based on the 8 January 2008 Quotation. ISG accepted the tender of the Defendant and awarded the stoneworks contract for the MBS Project to the Defendant.

8 The Contract between the Plaintiff and Defendant involved the Defendant importing marble or granite stone from overseas and storing them at the Plaintiff's premises in Pasir Gudang, Malaysia ("the Pasir Gudang premise"). The Plaintiff also had its own inventory and supplies of marble and granite stones, which resulted in the marble blocks and granite stone of both the Defendant and the Plaintiff being stored at the Plaintiff's factory at the Pasir Gudang premise. It is not disputed that, pursuant to the Contract, the Plaintiff supplied and rendered goods and services to the Defendant from September 2009 to May 2010.

The Plaintiff's case

9 The Plaintiff's claim against the Defendant for the sum of $481,031.63 was based on the Contract which the Plaintiff alleged was made partly orally and partly by a course of dealings premised on the actions and conduct of the parties. The alleged "actions and conduct" forming the Contract included contemporaneous and surrounding documents such as emails, correspondence, quotations, statement of accounts, delivery orders, purchase orders, invoices, as well as credit and debit notes which were exchanged between the parties from early July 2009 to July 2010.

10 According to the Plaintiff, due to the urgency and fast pace in which the MBS Project was moving, the Plaintiff and Defendant communicated mainly over the telephone or by way of email. When the Defendant's marble blocks were utilised and fabricated by the Plaintiff, the Plaintiff would initially invoice the Defendant on the basis that the marble was supplied and fabricated by the Plaintiff ("the Initial Invoices"). The Initial Invoices were delivered to and received by the Defendant at the MBS Project work site together with the delivery orders. This allegedly took place between 14 September 2009 and 13 May 2010.

11 On 20 May 2010, the Plaintiff issued a set of credit and debit notes to the Defendant ("the Revised Invoices"). The credit notes were issued in favour of the Defendant by reversing the costs of the Defendant's raw marble blocks which were, as conceded by the Plaintiff, mistakenly included in the Initial Invoices. The debit notes, on the other hand, were issued to charge the Defendant for the costs of the fabrication works performed by the Plaintiff for the Defendant as well as for the Plaintiff's

supply of raw marble blocks. The purpose of the Revised Invoices was therefore to *correct* the mistaken amount and reverse the excess charges (totalling $341,243.42) stated in the Initial Invoices which were issued between 14 September 2009 and 13 May 2010.

12 The Plaintiff said that there was no quotation at the start of the working relationship because the Plaintiff did not know the quantity or volume of marble and/or granite to be supplied or the extent and/or special requirements of the fabrication works to be performed. The Plaintiff claimed that the rates it charged on the invoices were nonetheless reasonable and were based on market rates which the Defendant was aware of and had accepted.

13 The Plaintiff also claimed that on or about 1 March 2010, the Plaintiff wanted the comfort of ensuring that the Defendant was aware of the Plaintiff's charges. So the Plaintiff prepared a quotation listing its charges for the Defendant to sign ("the 1 March 2010 Quotation"). The Plaintiff alleged that when Baygan visited the Plaintiff's factory at the Pasir Gudang premise, Seow had shown Baygan the 1 March 2010 Quotation which Baygan told Seow he would sign after he had inspected the Plaintiff's fabrication works. However, after such inspection, Baygan left without signing the document.

14 Finally, the Plaintiff claimed that the Defendant had accepted and ratified the Plaintiff's rates as charged in the invoices by making six "part payments" to the Plaintiff. Those payments (totalling $370,367.50) were undisputedly made on the following dates: 18 March 2010 ($50,082.50), 5 April 2010 ($50,082.50), 30 April 2010 (($50,082.50), 8 June 2010 (($50,000.00), 22 June 2010 ($100,120.00) and 26 July 2010 ($70,000). According to the Plaintiff, the Defendant's witnesses were unable to provide a reasonable explanation as to why the payments were made. The Plaintiff submitted that the truth of the matter was that those part payments were made to reduce the outstanding amount due to the Plaintiff *based on the Plaintiff's invoices received by the Defendant.* This was corroborated by the fact that the Defendant did not query or object to those rates in the course of the MBS Project.

15 The Plaintiff relied on a statement of account dated 1 September 2010 ("Statement of Account") between the Defendant and itself which took into account:

(a) the Initial Invoices;

(b) the debit and credit notes of the Revised Invoices;

(c) the part payments made by the Defendant; and

(d) various invoices charged to the Defendant after May 2010.

The balance of the above items added up to $481,031.63 in the Plaintiff's favour which the Plaintiff claimed remained due and outstanding.

The Defendant's case

16 The Defendant vigorously disputed the amounts stated on the respective invoices relied on by the Plaintiff. The Defendant submitted that the Contract between the parties which was concluded *in early July 2009* could not be based on the rates the Plaintiff decided to charge on the subsequent invoices that it issued, but must be based on the 8 January 2008 Quotation which was previously agreed upon. The Defendant claimed that while the 8 January 2008 Quotation was drawn up between the Plaintiff and BS Stone in January 2008, it was subsequently extended to Engareh (M). Since the Plaintiff had all along treated its dealings with BS Stone, Engareh (M) and the Defendant as being with

one entity, the 8 January 2008 Quotation was also the basis of the contractual relationship between the parties even though negotiations in relation to the MBS Project took place before the incorporation of the Defendant (see above at [6]).

17 The Defendant also claimed that the Initial Invoices were issued only in early May (despite their bearing dates commencing from September 2009) and the amounts raised were arbitrarily and wrongfully in breach of the agreed rates in the 8 January 2008 Quotation. It was only after the Defendant protested that the Plaintiff reduced the amounts charged to $805,081.94 as reflected in the Revised Invoices. However, the Defendant contended that this sum still amounted to overcharging as the Revised Invoices contained the following errors:

(a) they did not conform to the rates in the 8 January 2008 Quotation;

(b) the invoices included items that were never processed and/or delivered by the Plaintiff;

(c) the invoices included items that were never ordered by or were not the responsibility of the Defendant (*eg*, touch-up and repair costs);

(d) the invoices included items such as "packaging" and "workmanship" which were already included in the rates under the 8 Jan 2008 Quotation;

(e) the invoices used arbitrary rates for items such as "waterjet", "profiling" and "transportation" which were never previously agreed upon, and which were based on rates much higher than the average market rate;

(f) some of the invoices were for other projects not related to the Atrium or the Paiza at the MBS project (*eg*, invoices charged to the Defendant after May 2010);

(g) various unit rates for the fabrication processes were also increased in the Revised Invoices from that previously stated in the Initial Invoices even though the subject matters of the invoices remained the same.

18 The Defendant alleged that the 1 March 2010 Quotation relied on by the Plaintiff was only issued in June 2010 and falsely backdated to 1 March 2010. Moreover, the 1 March 2010 Quotation was never accepted by the Defendant, as evidenced by the fact that the column reserved for its counter-signature as confirmation of acceptance was never signed by the Defendant.

19 The Defendant also disputed a number of invoices (totalling $210,480.90 based on the figures stated on the Plaintiff's Revised Invoices) for which corresponding delivery orders were not acknowledged. The Defendant contended that the goods in those invoices were never delivered as the practice was for delivery orders to be signed as acknowledgement by the Defendant's employee(s). Since the disputed delivery orders did not bear any signatures acknowledging receipt, the Defendant claimed that those goods were never delivered and the disputed delivery orders (together with the corresponding invoices) were created by the Plaintiff to inflate the sum payable by the Defendant.

20 Finally, the Defendant contended that the six payments made to the Plaintiff were merely to cover the costs expended by the Plaintiff, and were general payments that were not specific to any of the Plaintiff's invoices. The Defendant submitted that the six part payments should not be construed as a form of acquiescence or ratification of the Plaintiff's charges in either the Initial or Revised invoices.

21 In the result, the Defendant contended that:

(a) the Plaintiff's invoices should have been calculated based on the 8 January 2008 Quotation;

(b) the Plaintiff was not entitled to charge for items/services that were never delivered or performed (*eg*, the invoices for the disputed delivery orders);

(c) similarly, the Plaintiff was not entitled to charge for items/services such as touch-up, repair, packaging and workmanship;

(d) for items/services where the parties had not previously agreed on the price (*eg*, for waterjet and profiling), the market rate should be adopted based on the rates charged by other suppliers.

22 The Defendant alleged that in August 2009, the Defendant had rejected Seow's request for a commission of 5% of the contract sum between the Defendant and ISG. According to the Defendant, Seow started to cause problems for the Defendant thereafter by overcharging the Defendant for the Plaintiff's services in the MBS Project.

23 Based on the Defendant's calculations, the total amount the Plaintiff could charge under the Contract was only $285,914.41. Since it was not disputed that the Defendant has paid the Plaintiff a sum of $370,367.50 (see above at [14]), the Defendant contended it had overpaid the Plaintiff a sum of $84,453.09 ($370,367.50-$285,914.41) which it counterclaimed.

The trial

24 The Plaintiff's witnesses were Seow, Muhammad Rosli Bin Japar, Ishak Bin Abdul Mutalib and Chia Kian Yong. Seow was the Plaintiff's main witness and the cross-examination of Seow took around two days. The other witnesses were former employees of the Defendant/the Engareh Group but their testimonies were not particularly helpful pertaining to the real issues arising in this case.

25 The Defendant's witnesses were Yap Bei Sing, Volpato, Baygan and Ranjbar.

The decision

The Plaintiff's claim

26 Having looked at all the evidence in its totality, I find that the Plaintiff has not proven its claim for the sum of $481,031.63. The Plaintiff's case, at its highest, was that the Contract between the Plaintiff and the Defendant was evidenced by the *subsequent* conduct or course of dealing between the parties, with the Defendant agreeing (by its subsequent conduct) to be bound by the rates charged by the Plaintiff. In my view, the Plaintiff's case faced numerous legal and factual obstacles which are elaborated on below.

The formation of the Contract and its essential terms

27 To advance its case, the Plaintiff had to first establish *when* the Contract was made, and *what were the essential terms agreed upon* between the parties. Seow had admitted during cross-examination that the Contract between the parties was made orally *in early July 2009*:

Q: … Now, can you tell us the contract between the [Plaintiff] and [Defendant], when in your mind were those made?

Court: When was the contract concluded?

Seow: It depends, er, the contract basically, er, concluded until the end [*sic*] of [the MBS Project].

…

Seow: That is somewhere in August or ---

Court: When I say contract is concluded, [what I meant was] when [do] you say the contract was made between you and [the Defendant], not when ---

Seow: Oh.

Court: --- the job is completed, that's different.

Seow: Okay, we started in early July 2009 ---

…

Court: …we are not asking you when you started the job or when you completed the job. We want to know the contract between your company, [the Plaintiff] and [the Defendant]. When did you say it came into being, when was the contract made? You must know.

Seow: We made it orally ---

Court: Yes, never mind … we didn't ask you how it was made, we want to know when it was made?

Seow: In … early July 2009.

28 While Seow had admitted that the contract must have been formed in early July 2009, she was not able to show that the parties had agreed for the *essential terms* of the contract (*ie*, the rates to be charged) *to be subsequently determined* during the period of the MBS Project. This was a fatal flaw in the Plaintiff's case.

29 In *May and Butcher, Limited v The King* [1934] 2 KB 17, the House of Lords established the trite principle in contract law (*per* Viscount Dunedin at 21) that "undoubtedly price is one of the essentials of sale, and if it is left still to be agreed between the parties, then there is no contract." This old English case has been cited with approval by the Singapore High Court in *Norwest Holdings Pte Ltd (in liquidation) v Newport Mining Ltd* [2010] 3 SLR 956 (reversed in *Norwest Holdings Pte Ltd (in liquidation) v Newport Mining Ltd and another appeal* [2011] 4 SLR 617 but not on the following proposition), where it was held that (at [28]):

> [c]ases such as *May and Butcher, Limited v The King* [1934] 2 KB 17 illustrate that an agreement will not be regarded as a binding contract if essential matters, without which the contract is too uncertain or incomplete to be workable, remain to be agreed upon. Conversely put, the parties must reach substantial or essential agreement before a contract can be regarded as concluded.

30 Thus, without solid, independent evidence showing that the parties had, *in July 2009*, mutually determined "for further terms to be subsequently agreed" (see *Foley v Classique Coaches Ltd* [1934] 2 KB 1; *Chitty on Contracts*, vol 1 (H G Beale gen ed) (Sweet & Maxwell, 30th Ed, 2008) at para 2-

128), the Plaintiff's case, that the essential term of the Contract relating to the rates to be charged was to be *subsequently determined* by the Initial Invoices, fails on the basis that there was an incomplete agreement (see *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) ("*The Law of Contract in Singapore*") at para 03.166).

31 The Defendant on the other hand submitted that the essential terms of the Contract must have been based on the 8 January 2008 Quotation, a document known to both the Plaintiff and the Defendant as at July 2009. While the Defendant similarly (and unfortunately) did not tender any strong evidence to support its submission, I find the Defendant's argument on this point to be inherently more probable and logical than the Plaintiff's.

32 In *Hillas & Co v Arcos Ltd* (1932) 147 LT Rep 503, the House of Lords held that the terms of a contract could very well be ascertained from previous transactions between the said parties and the custom of the trade. This proposition was cited with approval in *Grossner Jens v Raffles Holdings Ltd* [2004] 1 SLR(R) 202 ("*Grossner Jens*") at [18], with the Singapore High Court stressing the importance of there being sufficient/successful deals between the parties before the said proposition could be applied. In *The Law of Contract in Singapore*, the learned authors helpfully commented (at para 03.150) that:

> While [the decision *Grossner Jens*] does not provide a definitive number of previous deals between two parties before a "course of dealing" is sufficient for the purposes of remedying an otherwise uncertain term, the better view may be that this is a matter of factual determination and no firm numerical guidelines can be laid down.

33 In my view, the factual determination on this important issue favours the Defendant – *ie*, the Contract was more likely to have been based on the 8 January 2008 Quotation, as this was the latest quotation known to the parties as at July 2009. Unsurprisingly, the Plaintiff advanced several objections against the 8 January 2008 Quotation in its written submissions. However, for the reasons stated below, I am of the view that those objections do not hold water.

34 First, the Plaintiff's claim that the 8 January 2008 Quotation did not apply because it did not refer to the types of marble to be used for the MBS Project has no merit. Seow had admitted during cross-examination that she had no independent evidence to prove that the stones produced for the MBS Project were "of a higher quality than the other projects in [Malaysia]", despite Baygan's testimony that the only variable that was different "from project to project is the type of the stone that you have". Since the Plaintiff was unable to show how the stone or marble to be used for the MBS Project differed from that envisaged in the 8 January 2008 Quotation, this argument fails *in limine.*

35 Second, the fact that the 8 January 2008 Quotation referred to a "10% local sales tax" was not fatal to the Defendant's position because the Plaintiff had not shown why a sales tax imposed in Malaysia could not or did not apply to goods which were subsequently exported outside Malaysia. The Defendant had also correctly pointed out that since the fabrication services of the Plaintiff were provided and carried out in the Pasir Gudang premise in Malaysia, it was not improbable at all for the 10% local sales tax to be applicable to the present Contract.

36 Finally, the Plaintiff's strongest argument that the 8 January 2008 Quotation was one between BS Stone and the Plaintiff (as opposed to between the Plaintiff and the Defendant) was also not fatal to the Defendant's position. The Defendant had alleged that the Plaintiff had a history of treating dealings with all members within the Engareh Group (*ie*, BS Stone, Engareh (M) and the Defendant) as with one entity, and the Plaintiff was not able to contradict this allegation. Therefore, I find it

commercially probable, and even reasonable, that even though the negotiations between Seow and Baygan took place prior to the incorporation of the Defendant, neither party had contemplated any change to the way and basis on which they (*ie*, the relevant individuals) had conducted their business dealings.

37 I should point out that the main witness of the Plaintiff, Seow, did not strike me as a credible and/or honest witness. During her cross-examination, she had to change (even if she did not wish to admit it) the contents of her affidavit of evidence-in-chief ("AEIC") due to her inconsistent testimony. One such instance related to the matter of Volpato's request for a commission as alleged by Seow in her AEIC:

Q: Now, can I refer you to paragraph 21 of your affidavit on page 5? Now you claimed that [Volpato] asked for a commission of 35% on the value of the MBS [Project]. Correct?

Seow: Yes.

Q: Now, according to your oral testimony, you said that based upon the [Plaintiff's] tender for the Atrium project of 6.5 million---

Seow: Correct.

Q: ---the profit is about 35 to 40 percent. Correct? So that will give about 2.2 million of profit. Now, you then mentioned that the [Defendant] submitted a tender … which is … 1 million less than what the [Plaintiff] had submitted. So … are you saying that [Volpato] wanted 35% of the profit which would virtually wipe off any profit that the [Defendant] could get under this project.

Seow: What I came to know is they are talking about profit sharing. After the---

Q: It's---

Seow: ---the project, what ---how much they earn---

Q: Are you --- Ms Seow, are you changing your affidavit now?

Seow: No.

…

Q: Yes, in your affidavit, you said [Volpato] wanted 35%. There's no mention of profit sharing.

Court: There's a difference between profit sharing and commission, Mdm Seow. I'm sure you are aware of it. So will you answer counsel's question? You are not talking about profit sharing, unless you are telling me in your para 21 you are changing your evidence. So what is it now?

Seow: Actually what [Volpato] mentioned to me, commission in the form of profit sharing.

…

Q: …So you are not saying of the contract value now?

Seow: Not contract value at all.

Q: So you are changing your affidavit?

Seow: No, we are talking about value earned [sic].

Q: Ah, Ms Seow, I would invite you to have a look at paragraph 21 again. Cleary, you said: "Volpato wanted commission on a 35% basis based on the value of the MBS project."

Seow: It's value earned [sic].

Q: So you are changing your affidavit now?

Seow: Not to say changing.

Court: No, you didn't say so, did you, in para 21 of your affidavit? So I call that a change…

Seow: I think probably there are some---some issue of, er---

Court: What? Finish your answer. The issue of what?

Seow: Some issue of, erm, typing error or something like that.

Court: Oh, cannot be a typing error. This is your evidence, Mdm Seow, and you are conversant in English. This is your own testimony. So are you changing your evidence or are you saying there's a mistake or you are having second thoughts? Which is it now?

Seow: No, no, it's, er, earned [sic] value.

In another instance, Seow was also caught out when she attempted to rely on a purchase order that was not even related to the MBS Project *between the Plaintiff and the Defendant*:

Q: Right, Ms Seow … how does [the purchase order in AEIC of Seow Ah Me at p 649] show that it is related to either the Paiza or the Atrium?

Seow: Because, er, the express lift way is a con---connection.

Court: You're certain of that? Life lobby is lift---the lobby, you know, Ms Seow, the little I know.

…

Court: …So what has the lift lobby got to do with it… You are talking about the Paiza. So are you certain that's your evidence? [The purchase order] says what it says, even tells you the---the area, "EXPRESS LFIT LOBBY PROJECT". That means it doesn't stop every floor, it goes right up, I think to---

…

Q: SkyPark.

Court: ---that's---the 70th floor, that's right, SkyPark, that's right. So it's not the Paiza.

…

Court: Give me your answer. Or have you made a mistake?

Seow: I think so because I was confused at that time. We were---

Court: …When you say "you think so", meaning what?

…

Seow: ---because, er, at that time we were told that MBS job, we didn't really look into it which part of --- it is.

Court: Oh, you didn't look into it.

Seow: Yah, because, er, at that time through con---telephone conversation, we are asked to request to---to process immediately.

38 Given the ease with which Seow was willing to change her testimony even for minor matters, I am unable to accept her account of what the parties had agreed were the essential terms of the Contract.

39 For the foregoing reasons, and in the absence of any objective countervailing evidence, I find it more likely than not that in July 2009, it was the 8 January 2008 Quotation which formed the basis, and thus constituted the essential terms, of the Contract between the Plaintiff and the Defendant.

40 I now turn to consider whether there is any objective countervailing evidence which supports the Plaintiff's case that the rates as charged in the Initial and Revised Invoices constituted the essential terms of the Contract.

The problems besetting the Initial and Revised Invoices

41 As a preliminary note, I should point out that the Defendant's evidence in relation to whether it had received the Initial Invoices throughout the period of the MBS Project was unreliable. On the one hand, the Defendant's witnesses claimed that they did not receive the Initial Invoices prior to May 2010. However, Ranjbar also appeared to suggest during cross-examination that he had received the Initial Invoices throughout the period of the MBS Project (*ie*, between September 2009 to May 2010) and protested to the Plaintiff on the amounts stated. I find the two positions to be contradictory.

42 Since the Defendant's witnesses had admitted that there were invoices accompanying the (undisputed) delivery orders throughout the period of the MBS Project, it would be reasonable to assume that the Defendant had in fact been receiving the Initial Invoices from the Plaintiff throughout the period of the MBS Project. This must be the case if Ranjbar's claim that he had complained "a lot of times" about the rates charged by the Plaintiff in the Initial Invoices is to be believed.

43 However, I am unable to accept the Plaintiff's position that the Defendant had somehow ratified or agreed to pay the amounts payable on the Initial Invoices. After all, the Plaintiff itself acknowledged the non-finality of the Initial Invoices, as it had issued the Revised Invoices in the middle of May 2010, where the amounts charged were decreased substantially by $341,243.42. Counsel for the Defendant had rightly pointed out, during cross-examination of Seow, that given the number of errors and contingencies in the Initial Invoices as recognized by the Plaintiff, it would be unrealistic and unfair to hold the Defendant to the amounts stated on the Initial Invoices:

Q: If that's the case, won't you agree that you knew that whatever you were going to [bill] will not be an accurate amount?

Seow: We have already [*sic*] informed [*sic*] Ali Baygan at the very, very beginning stage.

Q: What did you inform him?

Seow: I told him, "You --- whatever your material cost, I wouldn't know". He asked me to put in whatever I personally got knowledge on the material cost. Then we bill it in accordingly, then later part we issue credit note to take off whatever material that belongs to them.

…

Q: Then my next question to you is, if you already told [Baygan] that you would be adjusting the figures later, how ---

…

Q: …how would you expect the [Defendant] to be arguing about the [Initial Invoices]. Now in --- in your affidavit, you have said that the [Defendant] never objected [*sic*] to the [Initial Invoices]. So based on what you have said, how would you expect [the Defendant] to be objecting against them when you have told Ali, "Look, we have to adjust these figures later"?

The same point also surfaced during the cross-examination of Seow on the following day:

Q: Now yesterday we have looked at some invoices where the items – the fabrication items were not specified. Do you recall?

Seow: Yes.

Q: Now if those fabrication items are not specified in the --- in [the Initial Invoices], how do you expect the [Defendant] to know what your rates were?

Seow: Based on our understanding ---mutual understanding, the [Defendant] already got a set of what's market price for individual processing.

Q: Now, Ms Seow … in fact the rates in the [Initial Invoices] later changed when the invoice were being revised.

Seow: Correct.

Q: So if you yourself did not know what your rates were when you issued those invoices, how do you expect my clients to know the rates?

44 The Plaintiff had also not provided any objective evidence to substantiate Seow's claim that the act of issuing inaccurate initial invoices and then revising them subsequently was "a very common practice". In the circumstances, given that the Plaintiff up till May 2010 did not even consider the details stated in the Initial Invoices to be accurate and/or binding, it would be contrary to both common sense and commercial fairness to hold that the Defendant must be bound by the amounts stated in the Initial Invoices.

45 The Plaintiff had also submitted that the six payments made to the Plaintiff (totalling $370,367.50) should be construed as the Defendant's agreement to be bound by the amounts stated in the Initial Invoices. I do not share the Plaintiff's interpretation of the Defendant's payments. The Defendant had provided reasons why it made those payments to the Plaintiff despite the alleged inaccuracies in the Initial Invoices. According to the Defendant, the payments were made because:

(a) the Plaintiff was in financial difficulties and had requested for some payment part of which the Defendant assumed would be refunded if there was overpayment, given the working relationship between the parties; and

(b) the Plaintiff had apparently pressured the Defendant to pay and could do so because the Plaintiff had physical possession of some of the raw materials of the Defendant which the latter

needed for other projects.

46 While the above reasons offered by the Defendant are not entirely persuasive or well-substantiated, I note the crucial fact that those payments were made *without reference to any specific invoice*. The Plaintiff failed to produce any evidence suggesting that those payments were *in fact* made by the Defendant *based on the amounts stated on the Initial Invoices.* Therefore, the payments merely evidenced the Defendant's acknowledgement that it was obliged to make certain payments to the Plaintiff, but they do not go as far as to support the Plaintiff's case that the Defendant had acquiesced and had agreed to be *bound by the exact amounts stated* in the Initial and/or Revised Invoices.

47 As for the 1 March 2010 Quotation, I am of the view that this document is wholly unreliable. It also goes to show the questionable approach that the Plaintiff (or Seow) was willing to take in order to advance its case. Simply put, the Plaintiff was unable to prove that the Defendant was aware of the 1 March 2010 Quotation prior to June 2010. The Plaintiff's allegation that Baygan had verbally agreed to sign the Quotation in March 2010 and that the Quotation was faxed to the Defendant were not substantiated by any independent, objective evidence. Clearly, the unsigned document could not advance the Plaintiff's case.

48 In addition, the Plaintiff was unable to provide a coherent explanation as to why "additional costs" should be charged to the Defendant in the Revised Invoices (see above at [17(c)]). Those "additional costs" (such as repair, touch up, packing etc) which, according to the Defendant, added up to a substantial amount of $369,941.07 were never charged to the Defendant prior to May 2010 and the Plaintiff had also not given any quotation for those "services". In fact, Baygan had quite convincingly testified, in my view, as to why charging for "touch up" or "repair" costs was unjustified, given the nature of the job the Plaintiff was contracted to perform:

> Q: Is touch up and repair included as well?
>
> Baygan: There is no possi---because raw material is taken from the mountain, so you cannot say that it's damaged or not, because it's the raw material, it's the big, you know, tunnel they blast, so when you process the material, the responsibility of delivering good quality to the client is on the factory side. So factory has to deliver the goods, processed goods, in the condition which customers can accept.

Since the Plaintiff did not produce any evidence showing that the Defendant, whether for the MBS Project or for previous projects, had agreed to pay for those "additional costs", I agree with the Defendant that such costs were arbitrarily included by the Plaintiff while revising the Initial Invoices and were wrongly charged to the Defendant.

49 Finally, the Plaintiff had also included various *invoices* in the Statement of Account that could not be justifiably attributed to the present Contract at hand. The first category of such invoices relate to those dated after May 2010. I agree with the Defendant that those invoices were not related to the Atrium or the Paiza works in the MBS Project and therefore do not fall under the Contract the Plaintiff relies on, notwithstanding Seow's evasive attempt to admit the obvious:

Q: Now I would like you to turn to page 655 of the same bundle which is your affidavit. Now you will see this is a purchase order by the [Defendant], and Now the description on this purchase order says: "ONYX and BLACK QUARTZ for RECEPTION COUNTER, (B1-T3 skypark) … So do you agree that this two does not relate to either the Paiza nor the Atrium?

…

Seow: Er, what I understand or next ---

Court: Please answer the question.

Seow: For 655, it's related to, er, er, that --- that one is Skypark.

Q: So you agree with me then?

Seow: Skypark, but this is also Marina Bay Sand project.

Q: No, that's not my question. My question is does it relate to the Paiza or the Atrium, do you either agree or don't agree?

Seow: Yes, they put Skypark, so I have to agree as the spy—Skypark.

Court: You disagree or you agree now, please, answer the question, it's so simple.

Seow: I agreed that this is not related to Atrium.

50 The second category of such invoices pertained to those that were accompanied by delivery orders that *were not signed or acknowledged by the Defendant*. Those were the invoices which the Defendant understandably disputed on the ground that the goods recorded therein were never received. As mentioned above at [19], these disputed invoices added up to $210,480.90. The Plaintiff's attempt to push the burden of proof onto the Defendant to explain where it had alternatively received the goods which it claimed not to have received from the Plaintiff is unreasonable and unacceptable.

51 As I had pointed out to counsel for the Plaintiff during his cross-examination of Ranjbar, the Plaintiff cannot claim for the price of goods where there was no independent or objective evidence that the Defendant had indeed received them, pursuant to the terms of the Contract.

Summary

52 Given the foregoing, I am of the view that the Plaintiff's reliance on its Statement of Account (which incorporated the amounts stated in the Revised Invoices) in claiming the sum of $481,031.63 was wholly unjustified. The Plaintiff was unable to produce any objective evidence or sound argument suggesting a credible alternative to the Defendant's primary submission, that the 8 January 2008 Quotation more likely than not constituted the basis and the essential terms of the Contract.

53 Consequently, I dismiss the Plaintiff's claim in its entirety.

The Defendant's counterclaim

54 However, this is not to say that the Defendant's counterclaim for $84,453.09 should be allowed. Crucially, the Defendant did not provide the court with a satisfactory account or evidence as to how it had arrived at the figure of $285,914.41 which it claimed constituted the price of the Contract (see

above at [23]). The Defendant merely stated what the sum of each invoice should be both in its Defence (and in its written submissions), but it failed to convince the court how and why the amounts charged in all 64 invoices should be so adjusted to $285,914.41.

55 Given the lack of details to verify the veracity of the Defendant's counterclaim, I similarly dismiss the Defendant's counterclaim.

Conclusion

56 Consequently, both the Plaintiff's claim for $481,031.63 and the Defendant's counterclaim for $84,453.09 are dismissed with costs to be taxed on a standard basis unless otherwise agreed. For expediency, in the light of the evidence that was presented at the trial, it would be fair to say that the defendant's liability for costs for its unsuccessful counterclaim would equate to 35% of the taxed costs for the Plaintiff's claim. The net result is that the Defendant is entitled to 65% of the taxed costs for the Plaintiff's claim but with full disbursements to the Plaintiff on the counterclaim.

Copyright © Government of Singapore.