IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 41

Suit No 1155 of 2013

Between

Mansource Interior Pte Ltd

… Plaintiff

And

CSG Group Pte Ltd

… Defendant

And

CSG Group Pte Ltd

… Plaintiff in Counterclaim

And

Mansource Interior Pte Ltd

… Defendant in Counterclaim

GROUNDS OF DECISION

[Building and Construction Law] — [Statutes and regulations] — [Building and Construction Industry Security of Payment Act]

[Building and Construction Law] — [Building and construction contracts] — [Measurement contracts]

[Building and Construction Law] — [Sub-contracts] — [Claims by sub-contractor]

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Mansource Interior Pte Ltd
v
CSG Group Pte Ltd

[2017] SGHC 41

High Court — Suit No 1155 of 2013
Vinodh Coomaraswamy J
19, 20, 21, 22 January; 21, 28 March; 26 July 2016

8 March 2017

Vinodh Coomaraswamy J:

Introduction

1 The plaintiff seeks judgment against the defendant in the sum of $904,530.53 (including goods and services tax), being the amount by which the plaintiff has overpaid the defendant under two subcontracts between the parties in relation to a project at Changi Business Park.[1] The defendant, in response, has mounted a counterclaim principally for variations under the subcontracts.

2 I have found in favour of the plaintiff and against the defendant.[2] I have therefore entered judgment in the plaintiff's favour for the principal sum

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[1] Statement of Claim (Amendment No. 3) at paragraph 23.

[2] NE (26 July 2016) at page 10 (lines 7-8).

of $904,530.53 (including goods and services tax). I have also dismissed the defendant's counterclaim in its entirety.

3 The defendant has appealed to the Court of Appeal against my decision. I therefore now set out my reasons.

Background facts

The parties and their subcontracts

4 The plaintiff is an interior renovation company.[3] The defendant is a building contractor specialising in glazing works.[4]

5 In December 2012, Shimizu Corporation Pte Ltd as the main contractor awarded to the plaintiff the subcontract[5] for interior fitting out works for a section of the Changi Business Park project.[6] By two subcontracts, the plaintiff subcontracted to the defendant the wall finishes work and the joinery work for the same section of the project.[7] The wall finishes subcontract had a value of $1,252,750.[8] The joinery subcontract had a value of $1,550,000.[9]

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3 Statement of Claim (Amendment No. 3) at paragraph 1.

4 Statement of Claim (Amendment No. 3) at paragraph 2; Defence and Counterclaim (Amendment No. 2) at paragraph 4.

5 Defendant's Bundle of Documents (volume 1) at page 225.

6 Statement of Claim (Amendment No. 3) at paragraph 3.

7 Statement of Claim (Amendment No. 3) at paragraph 4.

8 Agreed Bundle of Documents at pages 5-11.

9 Agreed Bundle of Documents at pages 12-19.

6 Both subcontracts are re-measurement contracts by express provision. The effect of the re-measurement clause is that each subcontract sum was subject to re-measurement and recalculation when drawing up the final account. The re-measurement clause reads as follows:[10]

> **22) <u>Others</u>**
>
> …
>
> This Sub-Contract is a re-measurement contract. Accordingly, the amount stated as Sub-Contract Sum shall be subject to re-measurement and recalculation in the event that the actual quantities of the work executed and materials supplied differ from the quantities or estimates provided by either party prior to the letter of award. In the event there is material which deviate in the specification and approved by Consultant, we reserve our right for the cost adjustment.

7 Each subcontract also provides expressly that it is back-to-back with the main contract. One consequence of that is that the defendant was precluded from advancing a variation claim under either subcontract unless the main contractor authorised and approved the variation:[11]

> **17) <u>Variation Claim</u>**
>
> This Sub-Contract shall be on a back-to-back basis to the contract between [the plaintiff] and [the main contractor] and there shall be no claim whatsoever unless it is a variation work authorised and approved by [the main contractor] only.

8 The defendant duly commenced work under each subcontract.[12]

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[10] Agreed Bundle of Documents at pages 11 and 18.

[11] Agreed Bundle of Documents at pages 9 and 17.

[12] Statement of Claim (Amendment No. 2 and 3) at paragraphs 6 and 13; Defence and Counterclaim (Amendment No. 2) at paragraphs 10 and 21.

Payment claims

The wall finishes subcontract

9 On 5 August 2013, the defendant served on the plaintiff a payment claim under the wall finishes subcontract for the sum of $322,536.65.[13] On 21 August 2013, the plaintiff certified the sum of $93,732.10.[14] (This, like all sums of money which I set out in this judgment, excludes goods and services tax unless otherwise stated.)

10 On 28 August 2013, the defendant made an adjudication application under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the Act") for the sum of $228,804.55 said to be due under the wall finishes contract.[15] That sum was the difference between the defendant's payment claim and the plaintiff's certificate for the wall finishes work.

11 On 12 September 2013, the defendant obtained an adjudication determination in its favour in the sum of $223,956.50 for wall finishes work.[16]

The joinery subcontract

12 Also on 5 August 2013, the defendant served on the plaintiff a payment claim under the joinery subcontract for the sum of $324,812.68.[17] The plaintiff issued a payment certificate dated 9 July 2013 certifying the sum of

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[13] Agreed Bundle of Documents at pages 129-130.

[14] Agreed Bundle of Documents at page 194.

[15] Agreed Bundle of Documents at page 197.

[16] Agreed Bundle of Documents at page 210.

[17] Agreed Bundle of Documents at pages 21-22.

$56,267.90.[18] On 28 August 2013,[19] the defendant made an adjudication application under the Act for the sum of $268,544.78 said to be due under the joinery subcontract. That sum was the difference between the defendant's payment claim and the plaintiff's certificate for the joinery work.[20]

13 On 12 September 2013, the defendant obtained an adjudication determination in its favour in the sum of $296,719.58 for joinery work.[21]

The defendant enforces the adjudication determinations

14 A little over a week after securing the two adjudication determinations, the defendant applied for[22] and secured leave to enforce each determination as a judgment of the court.[23] The plaintiff was therefore adjudged liable to pay the defendant – albeit only with interim finality – the sum of $243,485.46 for the wall finishes work and $323,909.95 for the joinery work.[24]

15 The plaintiff attempted to set aside both judgments and both determinations. Both attempts ultimately failed.

16 The plaintiff has paid to the defendant the sum of $317,992.62 (including goods and services tax) under the adjudication determination on the joinery claim.[25] The defendant also recovered from the plaintiff by levying

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[18] Agreed Bundle of Documents at pages 20 and 201.

[19] Agreed Bundle of Documents at page 215.

[20] Agreed Bundle of Documents at page 201.

[21] Agreed Bundle of Documents at page 214.

[22] Agreed Bundle of Documents at pages 223-226.

[23] Agreed Bundle of Documents at pages 227-234.

[24] Agreed Bundle of Documents at pages 227 and 231.

execution the sum of $26,405.73 (including goods and services tax) under the judgment arising from the adjudication determination on the wall finishes subcontract.[26]

17 The plaintiff commenced this action on 18 December 2013, claiming that the final account between the parties showed that the plaintiff had paid the defendant under each subcontract more than the defendant was contractually entitled to and seeking judgment for the amount of the overpayment.[27]

The parties' claims and counterclaims

18 I now set out a breakdown of the sums that the parties claim against each other.

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[25] Bundle of AEICs at pages 12 (Lee Mie Ling) and 156 (Low Ching Kew).

[26] Statement of Claim (Amendment No. 3) at paragraph 17; Bundle of AEICs at page 9 (Lee Mie Ling).

[27] Writ of Summons (S 1155/2013).

The plaintiff's claim

The wall finishes subcontract

19 The plaintiff claims that it has overpaid the defendant a sum of $567,793.76 (including goods and services tax) under the wall finishes subcontract.[28] That overpayment arises because the plaintiff's interim payments to the defendant were made on the basis that the plaintiff was obliged to pay for openings in the walls even though there was no finish involved. However, the plaintiff now takes the position that the wall finishes contract permits it to exclude openings in the walls when calculating the defendant's entitlement to payment.

20 The sum of $567,793.76 (including goods and services tax) claimed under the wall finishes contract is computed as follows:[29]

Item	**Amount** (including goods and services tax)
Amount paid under the wall finishes subcontract	$1,352,029.86
Amount recovered by the defendant in execution proceedings	$26,405.73
Total paid (A)	$1,378,435.59
LESS	

[28] Statement of Claim (Amendment No. 3) at paragraph 21.

[29] Plaintiff's Closing Submissions at page 9; Statement of Claim (Amendment No. 3) at paragraph 21.

Sum actually due under the contract on re-measurement	($787,521.71)
Direct supply item which the plaintiff agreed to pay for	($22,221.32)[30]
Agreed variation	($898.80)
Total due (B)	($810,641.83)
Amount overpaid (= A – B)	**$567,793.76**

The joinery subcontract

21 The plaintiff also claims that it has overpaid the defendant a sum of $336,736.77 (including goods and services tax) under the joinery subcontract.[31] That sum is computed as follows:

Item	**Amount** (including goods and services tax)
Amount paid under the joinery subcontract	$1,607,537.93
Payment pursuant to adjudication determination	$317,992.62
Total paid (C)	$1,925,530.55
LESS	

[30] Statement of Claim (Amendment No. 3) at paragraph 20.

[31] Plaintiff's Closing Submissions at page 10; Statement of Claim (Amendment No. 3) at paragraph 12.

Sum actually due under the contract on re-measurement (D)	($1,588,793.78)
Amount overpaid (= C – D)	**$336,736.77**

22 The plaintiff adds these two sums together and claims that it has overpaid the defendant a total of $904,530.53 (including goods and services tax) under both subcontracts.[32]

The defendant's counterclaim

Counterclaim arising from the subcontracts

23 The defendant's counterclaim is for monies said to be due from the plaintiff under both subcontracts.

24 Under the wall finishes subcontract, the defendant's counterclaim in substance is for:

(a) The sum of $4,848.05 being excess back charges deducted by the plaintiff for rectification of mosaic tiling;[33] and

(b) The sum of $38,141.94 being the 2.5% of retention sum held by the plaintiff.[34]

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[32] Plaintiff's Closing Submissions at page 10.

[33] Defence and Counterclaim (Amendment No. 2) at paragraph 40; Defendant's Closing Submissions at paragraph 49.

[34] Defence and Counterclaim (Amendment No. 2) at paragraph 42; Defendant's Closing Submissions at paragraph 51.

25 Under the joinery subcontract, the defendant's counterclaim in substance is for the sum of $44,141.32, being the 2.5% of retention sum held by the plaintiff under the joinery subcontract.[35]

26 In the general alternative, the defendant claims damages to be assessed in respect of the work done, services rendered, and material that it supplied to the plaintiff on the account of both the wall finishes and the joinery subcontracts.[36]

Counterclaim arising from the payment claims

27 In addition to the defendant's counterclaims under the subcontracts which I have summarised at [23] – [26] above, the defendant also attempts to assert by way of counterclaim one of the following three alternative counterclaims: (i) its original payment claims issued under each subcontract; (ii) the adjudication determinations issued in its favour under each subcontract; or (iii) the judgments under s 27 of the Act founded on those adjudication determinations.

28 The defendant also seeks to recover by way of counterclaim:

(a) Damages to be assessed or taxed, in the form of costs and expenses incurred by the defendant in the adjudication applications, including solicitors' fees, pursuant to s 30(4) of the Act;[37]

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[35] Defence and Counterclaim (Amendment No. 2) at paragraph 47; Defendant's Closing Submissions at paragraph 55.

[36] Defence and Counterclaim (Amendment No. 2) at paragraphs 43 and 48.

[37] Defence and Counterclaim (Amendment No. 2) at paragraph 49; Defendant's Closing Submissions at paragraph 56.

(b) Damages to be assessed or taxed, in the form of costs and expenses, including solicitors' fees, in respect of the litigation resulting from the defendant's applications to enforce the adjudication determinations and consequential applications;[38] and

(c) Damages arising from having to engage Mr Lim Yan San ("Mr Lim"), the defendants' project manager for the subcontracts, from August 2013 to December 2013, at a sum of $5,000 per month.[39]

29 The heads of the defendant's counterclaim which I have summarised at [27] and [28] above are all non-starters for reasons which I will explain in due course.

The issues

30 The parties' evidence and submissions gave rise to the following six issues:

(a) Whether the parties agreed that the openings in the wall finishes were to be included in the measurements for the wall finishes subcontract and therefore paid for by the plaintiff;[40]

(b) Whether the plaintiff is bound by its interim certificates and, in particular, whether the plaintiff is estopped from relying on the re-measurement clause (*ie,* cl 22) in each subcontract;[41]

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[38] Defence and Counterclaim (Amendment No. 2) at paragraph 50.

[39] Defence and Counterclaim (Amendment No. 2) at paragraphs 51 and 55; Defendant's Closing Submissions at paragraph 57.

[40] Defence and Counterclaim (Amendment No. 2) at paragraphs 6D, 34A, 34E, 34L-34R.

[41] Defence and Counterclaim (Amendment No. 2) at paragraphs 34, 34F-34G.

(c) Whether the quantities as re-measured by the plaintiff are accurate;[42]

(d) Whether the plaintiff has overpaid the defendant;[43]

(e) Whether the plaintiff waived the requirement under the parties' subcontracts that any variation works carried out by the defendant had to be authorised and approved by the main contractor;[44] and

(f) Whether s 9 of the Act renders void any of the contractual provisions on which the plaintiff relies.[45]

31 The defendant has also pleaded four issues relating to what is said to be:

(a) the plaintiff's wrongful conduct (including deceiving and misleading the court) in both adjudication applications and in the associated litigation;[46]

(b) the plaintiff's wrongful failure to pay the costs awarded against it in that litigation;[47]

(c) the plaintiff's unconscionable failure to pay for variations;[48] and

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42 Defence and Counterclaim (Amendment No. 2) at paragraph 34S.

43 Defence and Counterclaim (Amendment No. 2) at paragraphs 34C and 34D.

44 Defence and Counterclaim (Amendment No. 2) at paragraphs 9 and 34U.

45 Defence and Counterclaim (Amendment No. 2) at paragraph 9A.

46 Defence and Counterclaim (Amendment No. 2) at paragraphs 14, 26, 28 and 33.

47 Defence and Counterclaim (Amendment No. 2) at paragraph 18.

48 Defence and Counterclaim (Amendment No. 2) at paragraph 34T.

(d) the plaintiff's wrongful motive in commencing this action, rendering it an abuse of the process of the court.[49]

32 These four issues are incapable of being a defence to the plaintiff's claim. They are also unconnected to any aspect of the defendant's counterclaim. They appear to me to be gratuitous allegations, which ought never to have been pleaded. I need not deal with them further.

33 The only issues which I need to decide to determine the outcome of both the claim and the counterclaim are therefore the six issues listed above at [30].

Issue (a): The openings in the wall finishes

The parties' submissions

34 The plaintiff takes the position that, under the wall finishes subcontract, it is obliged to pay the defendant only for materials actually used in finishing the walls. The consequence of the plaintiff's position is that all of the openings in the walls – to which by definition no finishing material would have to be applied[50] – must be excluded in calculating the defendant's contractual entitlement to payment under the subcontract.[51] The plaintiff's case is that not only is this what the subcontract stipulates, it is also what the parties agreed and understood.

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[49] Defence and Counterclaim (Amendment No. 2) at paragraph 1A.

[50] Plaintiff's Closing Submissions at paragraph 42.

[51] Plaintiff's Closing Submissions at paragraphs 46 and 49.

35 The defendant responds that, at the time the parties entered into the contract, the plaintiff expressly agreed that it would measure all openings and pay for them at the wall finishes rate.[52] Without that agreement, the defendant would not have entered into the wall finishes subcontract.[53] The materials required for the wall finishes work had to be cut to fit the installations, thus entailing substantial wastage. If the openings were to be excluded, the defendant's profit margin would be unreasonably compressed or might even turn into substantial losses.[54] In that event, it would have priced the wall finishes subcontract differently.[55]

36 According to the defendant, the parties entered into the subcontracts on an urgent basis[56] as the plaintiff was in a "critical need" for both wall finishing services and joinery services.[57] This is seen from the fact that the plaintiff accepted the defendant's quotation for the wall finishes subcontract, which was submitted on 20 December 2012, and issued its letter of award and the wall finishes subcontract document within a day of receiving the quotation (*ie*, 21 December 2012).[58] Further, cl 2 of the subcontract provides that the subcontract period was to commence on the same day, 21 December 2012.[59] Ordinarily, time would be needed to procure materials, mobilise the necessary equipment, and to organise the manpower.[60] Because of the urgency, the

[52] Defendant's Closing Submissions at paragraph 286.

[53] Defendant's Closing Submissions at paragraph 298.

[54] Defendant's Closing Submissions at paragraphs 298, 327-328.

[55] Defence and Counterclaim (Amendment No. 2) at paragraph 34P and 34Q; Defendant's Closing Submissions at paragraphs 297-8, 318, 329-330.

[56] Defence and Counterclaim (Amendment No. 2) at paragraph 34I and 34J.

[57] Defendant's Closing Submissions at paragraph 322.

[58] Defendant's Closing Submissions at paragraph 322.

[59] Agreed Bundle of Documents at page 6.

plaintiff would have agreed to include the openings in the measurements for the wall finishes subcontract. The defendant would not have otherwise entered into the subcontract for the reasons mentioned above at [35].

37 The plaintiff argues that there was no such urgency when entering into the subcontracts.[61] While the wall finishes subcontract was dated 21 December 2012, it was more likely to have been signed and entered into around 14 January 2013 and backdated.[62] Clause 4 of the wall finishes subcontract, which sets out the payment schedule, states that 10% of the contract sum has to be paid upon confirmation.[63] The defendant adduced evidence at trial that the plaintiff paid this 10% on 18 January 2013, four days after it had issued the relevant invoice to the plaintiff on 14 January 2013.[64] If the wall finishes works were indeed urgent, it makes no sense for the defendant to wait more than three weeks before issuing its invoice to get its initial payment.[65]

38 The defendant argues that if the openings were to be excluded from the subcontract, the plaintiff should have included a term to that effect in the subcontract because the subcontract was drafted by Ms Lee Mie Ling ("Ms Lee") as the plaintiff's representative.[66] A term to that effect cannot be implied into the subcontract because there is no industry practice for openings to be excluded from measurements.[67]

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60 Defendant's Closing Submissions at paragraph 323.

61 Plaintiff's Reply Closing Submissions at paragraph 21.

62 Plaintiff's Reply Closing Submissions at paragraphs 22 and 24.

63 Agreed Bundle of Documents at page 6.

64 NE Day 5 at pages 27-29; Defendant's Bundle of Documents (volume 3) at page 1208.

65 Plaintiff's Reply Closing Submissions at paragraph 23.

66 Defendant's Closing Submissions at paragraph 291.

My decision

39 I accept the plaintiff's submissions. I find that the parties did not agree that the openings in the wall finishes were to be included in the measurements for calculating the defendant's contractual entitlement to be paid under the wall finishes subcontract.

40 I take as my starting point that the wall finishes subcontract is expressly stipulated to be, by cl 22 (see above at [6]), a re-measurement contract. Even the defendant accepts this characterisation of the subcontract. Clause 22 expressly provides that the contract sum is subject to "re-measurement and recalculation".[68] The effect is that the defendant's contractual entitlement to payment under the subcontract depends on the "actual quantities of the work executed and materials supplied". If those actual quantities differ from the pre-contractual estimates, the total sum payable to the defendant will rise or fall, as the case may be.[69]

41 I am unable to accept the defendant's case that the parties expressly agreed that the openings were to be included in the measurements for this subcontract. What the defendant is suggesting is that the plaintiff agreed to pay for wall-finish material which the defendant did not actually supply and did not actually install in the as-built works. Any such agreement would directly contradict the parties' express agreement in cl 22 to re-measure and recalculate the amount due under the subcontract based on "actual quantities of the work executed and materials supplied". It is of course possible that the

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[67] Defendant's Closing Submissions at paragraphs 320-321.

[68] Agreed Bundle of Documents at page 11.

[69] NE (26 July 2016) at page 3 (lines 19-25).

parties could have agreed to vary the subcontract to oust the operation of cl 22. There is, however, no allegation let alone evidence of any such variation.

42 It is the defendant's case that the agreement to depart from the re-measurement basis of this subcontract is fundamental. Thus, it says, it priced the wall finishes work based on the bills of quantities ("BQ")[70] and certain drawings which the plaintiff provided.[71] According to the defendant, the drawings do not enable the defendant to measure the openings and do not demarcate the openings.[72] They furnish only the gross area for the purposes of pricing the work.[73] The drawings were not to scale and therefore could not be used for measurement.[74] Also, the BQ reflected only "gross quantities"[75] and made no mention as to whether these quantities accounted for the openings.[76] The plaintiff therefore cannot now assert that the openings should be excluded from the measurements and omitted from calculating the defendant's entitlement to be paid. This, according to the defendant, would be "tantamount to a drastic fundamental variation" of the wall finishes subcontract.[77]

43 That argument, in my view, is a telling point *against* the defendant's case. If that agreement was indeed fundamental, it is to my mind more likely

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[70] Agreed Bundle of Documents at pages 1-4; Defendant's Closing Submissions at paragraphs 294-5.

[71] Defendant's Closing Submissions at paragraphs 259 and 301; Plaintiff's Bundle of Documents (volume 3) at pages 3-6.

[72] Defendant's Closing Submissions at paragraphs 306-307.

[73] Defendant's Closing Submissions at paragraphs 266 and 303.

[74] Defendant's Closing Submissions at paragraph 306.

[75] Defendant's Closing Submissions at paragraphs 266 and 295.

[76] Defendant's Closing Submissions at paragraph 296.

[77] Defendant's Closing Submissions at paragraph 266.

than not that the defendant would have insisted on including an express provision recording that agreement in the subcontract before signing it. Even if the defendant did not do that for whatever reason, one would expect there to be some extrinsic evidence of such an agreement, such as an e-mail or a text message. That extrinsic evidence would be some evidence of a factual agreement of the sort alleged by the defendant. Enforcing that factual agreement would, of course, be subject to the parol evidence rule and the exceptions thereto. Nonetheless, the absence of such extrinsic evidence indicates that more likely than not, the parties never did reach a factual agreement on measuring the openings. The absence of a factual agreement obviously precludes the existence of a legally binding agreement.

44 The defendant argues that because the plaintiff secured the defendant's commitment to the wall finishes subcontract in circumstances of urgency, the plaintiff would have agreed to include the openings in the measurements. But the defendant was unable at trial to establish the urgency. Mr Low Ching Kew ("Mr Low") testified that the defendant had been "chasing [the plaintiff] for payment" since the subcontract was entered into on 21 December 2012. Yet, he was unable to explain satisfactorily why the defendant issued the invoice for the initial payment under the subcontract only on 14 January 2013, more than three weeks later. His evidence was that the defendant chased for payment by telephone before 14 January 2013.[78] He also explained that the defendant did not issue the invoice in December 2012 to avoid having to pay goods and services tax for the transaction in December 2012.[79]

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[78] NE Day 5 at page 28 (lines 18-26).

[79] NE Day 5 at page 28 (lines 6-15).

45 I find his explanations unconvincing. If the subcontract was indeed entered into under circumstances of urgency, and the defendant was therefore required to commence work urgently, it is unlikely that the defendant would have issued the invoice for the 10% confirmation fee so many weeks after the contract was signed. A company that urgently required the 10% initial payment is more likely to chase for payment with an invoice issued and in hand, so as to impress upon the plaintiff that a debt is contractually due and claimed. Further, even if the defendant would have had to pay goods and services tax in December 2012 if it had issued the invoice in December, Mr Low was unable to explain why the invoice was not issued as soon as December had ended, *ie* on 1 January 2013. His evidence was simply that it did not cross the defendant's mind to do so.[80] I find that difficult to accept.

46 I therefore accept that the wall finishes subcontract was entered into around 14 January 2013 and dated 21 December 2012[81] to reflect when the defendant actually commenced work. It is not unusual in the construction industry for work to start without the parties' contract being documented and for the contract documentation to follow weeks or even months later. It is also not unusual for the contract documentation, when it is ready, to be dated to reflect the date on which the parties reached their undocumented agreement or the date on which the work started.

47 Therefore, in my view, the defendant is unable to rely on the date of the contract to establish that the wall finishes subcontract was entered into under urgent circumstances. Even if there was urgency, the defendant is

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[80] NE Day 5 at page 28 (lines 16-17).

[81] Statement of Claim (Amendment No. 2 and 3) at paragraphs 6 and 13; Defence and Counterclaim (Amendment No. 2) at paragraphs 10 and 21.

unable to show that the urgency led the plaintiff to agree to include the openings in the measurements.

48 Further, the defendant's case as to the identity of the plaintiff's representative with whom it arrived at this agreement is less than credible. Mr Low's oral evidence is that Ms Lee agreed that openings would be included in the measurements.[82] In his supplemental affidavit of evidence in chief, however, Mr Low's evidence is that the plaintiff's director, Mr Kelvin Lee, agreed that openings would be included in the measurements.[83] Mr Low's principal affidavit of evidence in chief makes no mention of an agreement with Ms Lee[84] or with Mr Kelvin Lee. When these matters were raised during cross-examination, Mr Low said that the agreement was reached during a meeting with Mr Lim, Mr To Chai Kiat ("Mr To"), Mr Kelvin Lee, Ms Lee, and himself.[85]

49 In my view, Mr Low's evidence of an agreement to include the openings is unreliable. The identity of the plaintiff's representative who allegedly agreed to include the openings in the measurements for this subcontract is a critical fact. The defendant's evidence on this critical fact is far from satisfactory. I do not accept on the balance of probabilities that any such agreement was indeed reached.

50 The defendant relies on the evidence of Mr To, a director of KK Décor Pte Ltd (a company that collaborated with the defendant on both subcontracts)

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[82] NE Day 4 at pages 42 (lines 10-18) and 48 (lines 28-31).

[83] NE Day 4 at page 48 (lines 10-27); Bundle of AEICs at page 601 (Low Ching Kew).

[84] Bundle of AEICs at page 601 (Low Ching Kew); NE Day 4 at page 48 (lines 25-27).

[85] NE Day 4 at pages 19 (line 20) and 48 (line 31).

who was present at the preliminary meetings, to support its case.[86] But Mr To's actual evidence in his affidavit of evidence in chief is stated in the negative: "it was never the intention of the parties before they entered into the [sub]contract(s) that in respect of measurement of works, the dimension [*sic*] of "openings" [were] to be excluded".[87] His evidence does not go so far as to assert a positive: that the parties agreed – or even intended subjectively – that the openings were to be measured for payment. At best, Mr To's evidence suggests merely that the parties did not consider the issue of the openings before they entered into the contract. That evidence is flatly contradicted by the presence of an express clause stating quite the opposite in cl 22. The defendant has not provided any other evidence to support its claim that any such agreement was reached.

51 Whether or not openings were to be measured is an issue only for the wall finishes subcontract. Mr Low accepted in cross-examination that measurement of openings is not an issue for the joinery subcontract.[88]

52 Since I have found that there was no agreement that openings would be included in the contract sum in the wall finishes subcontract, there is no need for me to consider whether the defendant's measurements underlying its claim are accurate.

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[86] Bundle of AEICs at pages 181 (Low Ching Kew) and 593 (To Chai Kiat).

[87] Bundle of AEICs at page 593 (To Chai Kiat).

[88] NE Day 4 at page 35 (lines 20-25).

Issue (b): The interim certificates and estoppel

The parties' submissions

53 The defendant submits that the plaintiff is bound by its previous interim certificates as they were based on measurements on-site as required by cl 4 of the subcontracts.[89] These measurements included the dimensions of the openings. In the final re-measurement, however, the plaintiff unilaterally excluded openings.[90]

54 The defendant submits also that the plaintiff is estopped from relying on the re-measurement clause (*ie*, cl 22) in the wall finishes subcontract. The defendant argues that the plaintiff's conduct in certifying the defendant's interim claims on the basis of measurements which included the openings gives rise to an estoppel by convention preventing the plaintiff from asserting now that the openings should be excluded from the measurements. Clause 4 expressly provides that progress claims shall be "base[d] on progressive on-site measurements".[91] Ms Lee also testified that progress payments were based on these measurements.[92] The parties therefore "by the course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it" (*China Construction (South Pacific) Development Co Pte Ltd v Spandeck Engineering (S) Pte Ltd* [2005] SGHC 86 at [46], citing *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84 at 120-121).[93] It would be unjust to allow the plaintiff to go back on its agreement to include the openings in the measurements.[94]

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89 Defendant's Closing Submissions at paragraphs 140-141.

90 Defendant's Closing Submissions at paragraph 152.

91 Defendant's Closing Submissions at paragraph 143.

92 NE Day 2 at page 5 (lines 22-25).

55 The plaintiff submits that it is not bound by the interim certificates as the certified sums were always contractually subject to final re-measurement. This is so for the following reasons:[95]

(a) Mr Low conceded at trial that it is the final measurements which must be conclusive;

(b) The payment claims upon which the interim certificates were made were themselves merely estimated percentage claims;

(c) The defendant has failed to show that the difference between the interim measurements and the final measurements was due to the omission of the openings in the final measurements. The evidence in fact shows that for certain items, the amount calculated after final re-measurement is higher than the amount certified on the interim certificates. If the openings were consistently included during the interim measurements and were excluded only in the final measurements, the final amounts after re-measurement could not have been more than the interim amounts; and

(d) The wall finishes subcontract is a re-measurement contract. This is not disputed by both parties. Hence, the interim certificates are subject to re-measurement (*LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2011] 4 SLR 477 at [44]).[96] They are of no

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[93] Defendant's Closing Submissions at paragraphs 454-455.

[94] Defendant's Closing Submissions at paragraph 456.

[95] Plaintiff's Reply Closing Submissions at paragraph 32.

[96] Plaintiff's Reply Closing Submissions at paragraph 42.

consequence to the final amounts due under the wall finishes subcontract.

My decision

56 I find that the plaintiff is not bound by its interim certificates and is not estopped from relying on the re-measurement clause in the wall finishes subcontract (*ie*, cl 22).

57 The Court of Appeal set out the requirements for estoppel by convention in *MAE Engineering Ltd v Fire-Stop Marketing Services Pte Ltd* [2005] 1 SLR(R) 379 at [45]. The requirements are (i) that there must be a course of dealing between the two parties in a contractual relationship; (ii) that the course of dealing must be such that both parties must have proceeded on the basis of an agreed interpretation of the contract; and (iii) that it must be unjust to allow one party to go back on the agreed interpretation.

58 In my view, the parties' course of dealing does not suggest that they proceeded on the understanding that the interim certificates would be final measurements, not subject to re-measurement. This is especially the case because the wall finishes subcontract, as previously mentioned above at [39], is expressly a re-measurement contract.

59 Chow Kok Fong explains the nature of an interim certificate in his *Law and Practice of Construction Contracts* (Sweet & Maxwell Asia, 3rd Ed, 2004) (at p 338):

> Interim certificates are certifications of payments made in accordance with a timetable in the contract … These certifications are never intended to be a precise determination of the value of the works … A more accurate view of the amount certified in an interim certificate is to treat them as

> estimates of the value of the work done up to the date shown in the certificate. Thus, while the employer or owner is obliged to pay what is certified, the amounts certified are not binding on the parties in the sense that they are subject to adjustment on completion …

60 The evidence suggests that the parties have the same understanding of the nature of the interim certificates. The factual evidence of Ms Lee is that the interim certificates were issued subject to adjustment in the final certificate. At trial, Ms Lee testified that the progress measurements referred to in cl 4 served only to "facilitate [her] payment" to subcontractors.[97] She added that "final payment [was] still subject to site measurement".[98] It is also the evidence of Mr Low, the defendant's own witness, that there would be a "final measurement", which is "different from the interim progress measurements" because it "is taken as conclusive".[99] This evidence is consistent with the scheme of a re-measurement contract. Unlike a lump sum contract, a re-measurement contract – perhaps tautologously – requires the re-measurement and therefore recalculation of the subcontract sum payable by the plaintiff to the defendant upon taking a final account.

61 In any case, the defendant's reliance on an estoppel to found a counterclaim for payment from the plaintiff amounts in substance to using estoppel as a cause of action, *ie,* a sword instead of a shield. That is because this is a re-measurement contract. The defendant is therefore not merely using the estoppel argument to resist repaying to the plaintiff what the plaintiff characterises as an overpayment. The defendant is using the argument to justify its entitlement to receive the payments in the first place.

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[97] NE Day 1 at page 77 (lines 18-19).

[98] NE Day 1 at page 77 (lines 19-20).

[99] NE Day 5 at page 35 (lines 1-11).

62 Singapore law has not yet accepted the view that an estoppel can be used as a cause of action (*Rudhra Minerals Pte Ltd v MRI Trading Pte Ltd (formerly known as CWT Integrated Services Pte Ltd)* [2013] 4 SLR 1023 at [50]). The Court of Appeal in *Sea-Land Service Inc v Cheong Fook Chee Vincent* [1994] 3 SLR(R) 250 stated at [23] that "[i]t is trite law that promissory estoppel can only be used as a shield and not as a sword to enforce any rights". What is true of promissory estoppel is equally true of estoppel by convention. The position taken by the defendant would allow assumptions to be enforced as promises, and even then without consideration. That would subvert the entire law of contract.

63 Insofar as the defendant is relying on estoppel to justify work done based on measurements that include the dimensions of the openings against the backdrop of a re-measurement contract, it is using the doctrine of estoppel as a sword. This is something the defendant cannot do.

Issue (c): The accuracy of the plaintiff's re-measurements

The parties' submissions

64 The plaintiff's submission is that after re-measurement, the amounts payable to the defendant for work done was $787,521.71 for the wall finishes subcontract and $1,588,793.78 for the joinery subcontract (both sums including goods and services tax).[100] The quantities for the sums due under each subcontract (see above at [20] and [21]) are based on final measurements by the plaintiff and the main contractor. Both Ms Lee, a quantity surveyor and the plaintiff's project director for this contract,[101] and Ms Srima Erin Lakmalie

[100] Plaintiff's Closing Submissions at paragraph 33.

[101] Bundle of AEICs at page 3 (Lee Mie Ling).

Adikari ("Ms Erin"), the main contractor's senior quantity surveyor,[102] were involved in taking the measurements.[103]

65 The plaintiff submits that its re-measurements are accurate. First, the quantities set out in the main contractor's payment response sheet, which represent the final quantities due under both subcontracts, tally with the calculation sheets exhibited in Ms Lee's affidavit of evidence in chief.[104] Second, the re-measurements are supported by the evidence at trial of Ms Lee and Ms Erin, who were able to show and explain the basis of the plaintiff's calculations and measurements.[105] At trial, Ms Lee testified that her conclusion that the plaintiff had overpaid the defendant was based on the as-built drawings for both the wall finishes works and joinery works.[106] She also maintained that none of the interim certificates contained the final measurement figures.[107] Ms Erin further confirmed at trial that the re-measurements were the final measurements undertaken for this project.[108]

66 The plaintiff submits that because Ms Lee and Ms Erin are reliable witnesses, their measurements should be taken as accurate.[109] In any case, during the course of trial, the defendant did not contest or question the measurements or quantities which they derived.[110] Accordingly, based on the

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[102] NE Day 3 at page 2 (line 25).

[103] Plaintiff's Closing Submissions at paragraphs 18-20.

[104] Plaintiff's Reply Closing Submissions at paragraph 58.

[105] Plaintiff's Closing Submissions at paragraphs 21-24.

[106] NE Day 2 at pages 61 (line 28), 63 (lines 26-31) and 64 (line 1); Plaintiff's Bundle of Documents (volume 1) at pages 5-9 and 10-14.

[107] Plaintiff's Closing Submissions at paragraph 28.

[108] NE Day 3 at pages 58-59; Plaintiff's Closing Submissions at paragraph 24.

[109] Plaintiff's Closing Submissions at paragraph 20.

re-measurements, the total contract sum due for work done under the wall finishes subcontract is $787,521.71 and for the joinery subcontract is $1,588,793.78 (see above at [20] and [21]).[111]

67 The defendant, however, questions the credibility of Ms Lee and Ms Erin.[112] Neither of them could explain credibly why the measured quantities in the interim certificates varied so drastically from the re-measured quantities.[113] The defendant also alleges that Ms Lee's evidence asserting that the documents relied upon for measurements[114] were "as-built drawings issued by [the main contractor]" is false.[115] That is because there is no endorsement, signature, or stamp on the drawings indicating that they were approved as final as-built drawings by the main contractor.[116]

68 With respect to Ms Erin, the defendant claims that her evidence is unreliable as her testimony is inherently contradictory and inconsistent.[117] Ms Erin testified that she prepared the entire final account statement[118] dated 27 March 2014 on behalf of the main contractor.[119] This contradicts Ms Lee's evidence. Ms Lee testified that she prepared some of the documents in the final account statement.[120] Eventually, Ms Erin agreed that the documents

[110] Plaintiff's Closing Submissions at paragraph 27.

[111] Plaintiff's Closing Submissions at paragraph 33.

[112] Defendant's Closing Submissions at paragraphs 83 and 334.

[113] Defendant's Reply Closing Submissions at paragraph 79.

[114] Plaintiff's Bundle of Documents (volume 1) at pages 5-14.

[115] Defendant's Reply Closing Submissions at paragraph 70.

[116] Defendant's Reply Closing Submissions at paragraph 67.

[117] Defendant's Reply Closing Submissions at paragraph 71.

[118] Bundle of AEICs at pages 82-101 (Lee Mie Ling).

[119] Defendant's Closing Submissions at paragraph 336.

reflect a compilation of information furnished to her by the plaintiff and verified by the main contractor.[121] Ms Erin also testified that the as-built drawings would be prepared by the main contractor and approved by a consultant quantity surveyor. But as previously mentioned, the defendant rejects the as-built drawings because they do not bear the consultant's signature or stamp to signify that he has approved them as the project's as-built drawings.[122]

69 Because both Ms Lee and Ms Erin's testimony is unreliable, the defendant submits that the plaintiff cannot rely on them to support its position that the documents in the final account statement are the finalised versions.[123]

70 In response, the plaintiff argues that the defendant has not adduced any evidence supporting their calculations and measurements under both subcontracts.[124]

71 With respect to the wall finishes subcontract in particular, the plaintiff submits that it is unclear how the defendant arrived at the figure of $1,525,677.75.[125] Mr Low admitted at trial that the defendant did not include the calculation sheets or any other documents to support the quantities it alleged.[126] Mr Low also did not prepare the documents upon which the defendant relies to support its claims. His evidence with respect to the

[120] Defendant's Closing Submissions at paragraph 336.

[121] Defendant's Closing Submissions at paragraph 337.

[122] Defendant's Closing Submissions at paragraph 339.

[123] Defendant's Reply Closing Submissions at paragraph 71.

[124] Plaintiff's Closing Submissions at paragraphs 64 and 76.

[125] Plaintiff's Reply Closing Submissions at paragraphs 17-18.

[126] Plaintiff's Closing Submissions at paragraph 52.

calculations and measurements is therefore hearsay.[127] In any case, Mr Low is not a qualified quantity surveyor. There is therefore no basis upon which the court can rely on his evidence to justify the defendant's measurements and therefore its counterclaims.

72 Mr Low testified that Mr Lim of the defendant undertook the measurements for work done under the wall finishes subcontract[128] and submitted further measurements after the alleged final payment claims were submitted.[129] On 30 August 2013, however, Ms Lee e-mailed Mr Lim and Mr Low to inform them that the plaintiff had "not received all [the] revised [quantities]" of the measurements submitted by Mr Lim.[130] In any case, any measurements provided by Mr Lim would be hearsay evidence as he was not called as a witness in the proceedings.[131]

My decision

73 I find that the quantities as re-measured by the plaintiff are accurate.[132] Both Ms Lee and Ms Erin testified that they arrived at the quantities together using the as-built drawings.[133] These drawings are graphic representations of the actual work finally done by the defendant.[134] They formed the basis of the

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[127] Plaintiff's Closing Submissions at paragraph 76.

[128] Plaintiff's Closing Submissions at paragraph 53; NE Day 5 at pages 45 (line 28) - 46 (line 10).

[129] NE Day 5 at pages 44 (line 15) - 45 (line 24).

[130] Defendant's Bundle of Documents (volume 1) at page 251.

[131] Plaintiff's Reply Closing Submissions at paragraphs 18 and 65.

[132] NE (26 July 2016) at page 4 (lines 30-31).

[133] NE Day 2 at page 62 (line 10).

[134] NE Day 2 at page 62 (line 8).

final account agreed between the plaintiff and the main contractor.[135] The wall finishes subcontract between the parties was back-to-back with the subcontract between the plaintiff and the main contractor. Both Ms Lee and Ms Erin are quantity surveyors themselves. I accept that they were both reliable and honest witnesses experienced in their field.

74 The factors the defendant has raised (see above at [67] – [69]) to question their credibility carry little weight. The defendant is unable to show that the as-built drawings used by Ms Lee and Ms Erin in their measurements are not the finalised versions used for measurements. The first page of the drawings for the wall finishes subcontract clearly states "As Built Plan for Wall Finishes".[136] The defendant has not adduced any evidence that this was falsified by the plaintiff or the main contractor. The defendant merely rejects these as as-built drawings because they do not bear a stamp or signature from the plaintiff's consultant quantity surveyor approving them as as-built drawings.

75 Although Ms Erin may have been inaccurate in stating that she prepared *all* the documents in the final account statement, she later clarified that she prepared those documents with Ms Lee's contributions.[137] As the main contractor's subcontractor, the plaintiff would have to prepare its own list of items claimed and a computation of those items before sending them to the main contractor to be verified.[138] Although Ms Erin did not generate all the data in the final account statement by herself, I accept her evidence that she

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[135] Plaintiff's Reply Closing Submissions at paragraph 58.

[136] Plaintiff's Bundle of Documents (volume 1) at page 5.

[137] NE Day 3 at page 9 (lines 3-13).

[138] NE Day 3 at page 10 (lines 21-23).

used Ms Lee's input to prepare all the documents after verifying the items claimed by the plaintiff.[139] She thereafter sent the final account statement on behalf of the main contractor to Ms Lee of the plaintiff.[140]

76 In any case, I agree with the plaintiff that the defendant did not challenge Ms Lee and Ms Erin's evidence on the re-measurements in cross-examination.[141] At trial, counsel for the defendant did not once put it to Ms Lee or Ms Erin that the re-measurements were inaccurate. Counsel for the defendant instead focused on issues such as whether the parties agreed that the dimensions of the openings were to be deducted from the measurements,[142] and on getting Ms Lee and Ms Erin to explain the accuracy of the final account statement as between the plaintiff and the main contractor.[143]

77 The defendant has failed to produce any reliable alternative means for measuring the appropriate quantities under both subcontracts. I cannot accept the defendant's measurements for two reasons. First, I have found that the parties did not agree to include the openings in the measurements for the wall finishes subcontract (see [52] above). The defendant's measurements include the openings and must be rejected. Second, I agree with the plaintiff that the evidence of any measurements by Mr Lim would be hearsay evidence. Mr Lim did not testify as a witness at trial and could not be cross-examined on how he derived his measurements (see above at [72]). The defendant has not

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[139] NE Day 3 at pages 10 (line 28) - 11 (lines 1-22).

[140] Bundle of AEICs at page 82 (Lee Mie Ling).

[141] Plaintiff's Closing Submissions at paragraph 25.

[142] NE Day 2 at page 16 (lines 11-24); Defendant's Reply Closing Submissions at paragraph 17.

[143] NE Day 2 at pages 28 (line 17) - 31 (line 31); NE Day 3 at pages 29 (line 5) - 57 (line 25).

provided any other means of measuring the quantities under the wall finishes subcontract.

78 The defendant is likewise unable to substantiate its claim for $268,544.78 under the joinery subcontract (see above at [12]). No evidence of calculations or testimony of witnesses was provided to corroborate the final payment claim issued for that subcontract.

79 For these reasons, I find that the quantities re-measured by the plaintiff are accurate and accept them.

Issue (d): Whether the plaintiff has overpaid the defendant

80 Having found that the parties' subcontracts were re-measurement contracts and that the plaintiff's re-measurements are accurate, the next question which arises is whether the plaintiff has overpaid the defendant.

81 I find that the plaintiff has indeed overpaid the defendant by the sum of $904,530.53.[144] Based on the plaintiff's re-measurements, the sums actually and contractually due to the defendant were:

(a) Wall finishes subcontract: $787,521.71

(b) Joinery subcontract: $1,588,793.78

Wall finishes subcontract

82 The table set out at [20] above shows how the plaintiff computes $567,793.76 (including goods and services tax) as the overpayment under the

[144] NE (26 July 2016) at page 5 (lines 10-11).

wall finishes subcontract.[145] It is not disputed that the plaintiff made a partial payment of $93,732.10 in response to the defendant's payment claim under the wall finishes subcontract,[146] in addition to the sum of $1,169,847.21 which the plaintiff had previously paid.[147] The defendant recovered the sum of $26,405.73 by levying execution on the judgment arising from the adjudication determination under the wall finishes contract.[148] The plaintiff has therefore paid a total of $1,378,435.59 (including goods and services tax) to the defendant.

83 The plaintiff accepts that $898.90 (including goods and services tax) is due to the defendant pursuant to an agreed variation.[149] It also agrees that it is liable to pay for a direct supply item amounting to $22,221.32 (including goods and services tax).[150] Therefore, after deducting the total sum due from the plaintiff from the re-measured contractual sum, the net overpayment that the plaintiff is entitled to under the wall finishes subcontract is $567,793.76 (including goods and services tax).

Joinery subcontract

84 The table set out at [21] above shows how the plaintiff computes $336,736.77 (including goods and services tax) as the overpayment under the

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[145] Plaintiff's Reply Closing Submissions at page 12.

[146] Statement of Claim (Amendment No. 3) at paragraph 15; Defence and Counterclaim (Amendment No. 2) at paragraph 38; Bundle of AEICs at page 165 (Low Ching Kew).

[147] Agreed Bundle of Documents at page 130.

[148] Statement of Claim (Amendment No. 3) at paragraph 17; Bundle of AEICs at page 9 (Lee Mie Ling).

[149] Statement of Claim (Amendment No. 3) at paragraph 20; Bundle of AEICs at page 9 (Lee Mie Ling).

[150] Bundle of AEICs at page 9 (Lee Mie Ling).

joinery subcontract.[151] It is not disputed that the plaintiff made a partial payment of the sum of $56,267.90 in response to the defendant's payment claim for works done pursuant to the joinery subcontract,[152] in addition to the sum of $1,446,104.00 previously paid.[153] The plaintiff also paid the defendant a sum of $317,992.62 (including goods and services tax) pursuant to the adjudication determination on the joinery contract.[154] After deducting the re-measured sum of $1,588,793.78 (including goods and services tax), the total amount of overpayment in respect of the joinery subcontract is $336,736.77 (including goods and services tax).

The defendant's counterclaims

The adjudication determinations

85 As mentioned above, the defendant's counterclaim takes the position that the plaintiff is obliged to pay to the defendant the sums due under the two adjudication determinations.[155] The plaintiff disagrees and argues that the adjudication determinations are of no relevance to the present proceedings as they carry only interim finality. They therefore do not constitute final and binding judgments on the amounts to be awarded under the two subcontracts.[156]

86 I agree with the plaintiff. Section 21(1) of the Act states that an adjudication determination is binding on the parties unless or until the parties'

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[151] Plaintiff's Reply Closing Submissions at page 13.

[152] Bundle of AEICs at page 172 (Low Ching Kew).

[153] Agreed Bundle of Documents pages 20 and 22.

[154] Bundle of AEICs at pages 12 (Lee Mie Ling) and 156 (Low Ching Kew).

[155] Defence and Counterclaim (Amendment No. 2) at paragraphs 39 and 45.

[156] Plaintiff's Reply Closing Submissions at paragraph 16.

dispute is finally determined by a court. That is what I am now doing: I am determining the parties' dispute with full finality. The adjudicator's determination of the parties' dispute with interim finality is of no relevance to the exercise I am undertaking. The dollar value of his determination has no relevance to my ascertainment with full finality of the sums due from one party to the other.

Counterclaim for $4,848.05

87 The defendant also counterclaims a sum of $4,848.05 for excess back charges which the plaintiff deducted under the wall finishes subcontract for rectification of mosaic tiling.[157] The defendant claims that the plaintiff initially deducted a sum of $10,295.75 from the monies due to the defendant but later agreed to reduce the deduction to $5,447.70. Because this sum was not awarded in the adjudication determination, the defendant takes the position that the plaintiff should now refund the difference between those two sums, *ie,* $4,848.05.[158]

88 I agree with the plaintiff that it is unclear how the defendant arrived at this sum of $4,848.05.[159] Mr Low admitted at trial that the defendant did not include the calculation sheets or any other documents to support the quantities it alleges.[160]

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[157] Defence and Counterclaim (Amendment No. 2) at paragraph 40; Defendant's Closing Submissions at paragraph 49.

[158] Defence and Counterclaim (Amendment No. 2) at paragraph 40; Defendant's Closing Submissions at paragraph 49.

[159] Plaintiff's Closing Submissions at paragraphs 51-52.

[160] Plaintiff's Closing Submissions at paragraph 52; NE Day 5 at pages 51 (line 31) - 54 (line 7).

89 I accordingly reject the defendant's claim of $4,848.05 worth of back charges under the wall finishes subcontract.

Counterclaim for the retention sums

90 The defendant also counterclaims: (i) the sum of $38,141.94,[161] being the retention sum held by the plaintiff under the wall finishes subcontract; and (ii) the sum of $44,141.32,[162] being the retention sum under the joinery subcontract respectively.

91 Clause 4 of each subcontract provides that the retention sum will be released only upon the plaintiff's receipt of the maintenance certificate from the consultant.[163] I accept Ms Lee's evidence that the plaintiff has asked the main contractor for the maintenance certificate but the main contractor has yet to respond because its consultant has yet to issue the certificate to it.[164] The plaintiff has therefore yet to receive the maintenance certificate. That is a contractual condition precedent to the defendant's entitlement to have the retention sum released to it.[165] Until that condition is satisfied the defendant has no contractual entitlement to the retention sum or to bring into account against the plaintiff. I cannot take this sum into account in order to reduce the defendant's liability to the plaintiff.

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[161] Defence and Counterclaim (Amendment No. 2) at paragraph 42; Defendant's Closing Submissions at paragraph 51.

[162] Defence and Counterclaim (Amendment No. 2) at paragraph 47; Defendant's Closing Submissions at paragraph 55.

[163] Agreed Bundle of Documents at pages 6 and 13.

[164] NE Day 1 at page 108 (lines 26-29).

[165] NE Day 1 at page 107 (lines 13-17).

Conclusion on overpayment

92 I therefore find: (i) that the plaintiff has indeed overpaid the defendant by the sum of $904,530.53 (including goods and services tax); and (ii) that the defendant has no contractual entitlement to set up any sums against the plaintiff to diminish or extinguish that overpayment.

Issue (e): the defendant's counterclaim for variation works and waiver of requirement of authorisation and approval

Parties' submissions

93 The defendant's payment claims (dated 5 August 2013) were claims for alleged variations under both subcontracts. The defendant claimed the sum of $256,669.66[166] for variations under the wall finishes subcontract and $187,559.65[167] for variations under the joinery subcontract.[168] Although there were six variation orders under the wall finishes subcontract and 12 variation orders under the joinery subcontract,[169] the plaintiff accepts only Variation Order No. 1 under the wall finishes subcontract, amounting to $898.80 (including goods and services tax).[170]

94 According to the defendant, it carried out these variation works[171] on the plaintiff's instructions[172] to do so. Ms Lee confirmed at trial that

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[166] Agreed Bundle of Documents at page 132.

[167] Agreed Bundle of Documents at page 24.

[168] Bundle of AEICs at pages 162 and 171.

[169] Agreed Bundle of Documents at pages 24 and 132.

[170] Statement of Claim (Amendment No. 3) at paragraph 20.

[171] Defendant's Closing Submissions at paragraph 380.

[172] Defence and Counterclaim (Amendment No. 2) at paragraph 9.

instructions for variations were generally given verbally, and admitted that the works under Variation Order No. 2 under the wall finishes subcontract were pursuant to verbal instructions given by the plaintiff.[173] She also accepted that the variation works in Variation Order No. 2 were in fact carried out.[174] The amounts claimed by the defendant after the defendant submitted its payment claim (dated 5 August 2013) for work done under the wall finishes subcontract were also certified by the plaintiff.[175] The adjudicator acknowledged this in the adjudication proceedings under the wall finishes subcontract.[176]

95 The defendant argues that the present factual situation is similar to the case of *Hi-Amp Engineering Pte Ltd v Technicdelta Electrical Engineering Pte Ltd* [2003] SGHC 316 ("*Hi-Amp Engineering*").[177] As in *Hi-Amp Engineering*, almost all the variations were underpinned by some form of written instructions or directions from the defendant to the plaintiff (see *Hi-Amp Engineering* at [103]). Because the High Court granted the variation claim in *Hi-Amp Engineering*, the defendant submits that the same should be done for the present case.

96 The defendant also submits that it is significant that the plaintiff does not deny that the works were carried out. Instead, the plaintiff contends that the defendant cannot recover because the main contractor did not authorise or approve the works as required by the parties' subcontract.[178] In effect, the

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[173] NE Day 1 at page 89 (lines 13-21).

[174] Defendant's Closing Submissions at paragraphs 378-379; NE Day 1 at page 82 (lines 3-4).

[175] Defendant's Closing Submissions at paragraph 372.

[176] Defendant's Closing Submissions at paragraph 373.

[177] Defendant's Closing Submissions at paragraphs 449-452.

[178] Defendant's Closing Submissions at paragraph 374.

plaintiff's contention is the defendant carried out the variation works *ex gratia*. The defendant says that this position is untenable.[179]

97 The defendant adds that the plaintiff has the burden of showing that the main contractor did not authorise or approve the variation works carried out by the defendant. The plaintiff has failed to discharge this burden as it has not exhibited any documentary proof showing submission of the progress claims and final claims to the main contractor.[180]

98 The plaintiff submits in response that it is for the defendant to show that the main contractor authorised or approved the variation works.[181] It is unable to do so. It is also for the defendant to show that the works which the defendant alleges to be variations were indeed variations and not within the original scope of the subcontract. There is also no evidence to establish that.[182]

99 During cross-examination, Mr Low admitted that he did not have any evidence to prove that the main contractor authorised or approved the variation works.[183] He also did not have any evidence to prove that these items were variations (*ie*, there was no document such as the original drawings to show how the items claimed constituted variations).[184]

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[179] Defendant's Closing Submissions at paragraph 375.

[180] Defendant's Closing Submissions at paragraphs 376-377.

[181] Plaintiff's Reply Closing Submissions at paragraph 85.

[182] Plaintiff's Closing Submissions at paragraph 72(b).

[183] Plaintiff's Closing Submissions at paragraphs 69 and 71.

[184] Plaintiff's Closing Submissions at paragraphs 70 and 72(c); NE Day 5 at page 66 (line 4) – 68 (line 29).

100 The defendant argues that the wall finishes subcontract (dated 21 December 2012) was entered into before the main contract (dated 26 December 2012). As such, it cannot be back to back with the main contract. Clause 17 of the subcontract, which requires the main contractor's approval for any variation works claimed by the defendant, should not therefore apply to the wall finishes subcontract.[185]

My decision

101 In my view, the defendant's variation claims are without merit. It is not disputed that the wall finishes subcontract contains an express term conditioning the defendant's entitlement to recover payment for variations on the main contractor's authorisation and approval. Neither is it disputed that the main contractor did not authorise or approve any of the variation works which form the basis of the defendant's counterclaim against the plaintiff, whether under the wall finishes subcontract or the joinery subcontract.[186] It is therefore clear that the contractual conditions agreed between the plaintiff and defendant for a successful variation claim are not satisfied.

102 The case of *Hi-Amp Engineering* is distinguishable. In that case, MPH Rubin J held that the main contract was not capable of being read back-to-back with the subcontract. He doubted (at [98]) that the subcontractor had even seen the main contract before entering into the subcontract (see also *GIB Automation Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd* [2007] 2 SLR(R) 918 at [47]). For the reasons mentioned above at [44], I have found that it is likely that the wall finishes subcontract was signed in January 2013 but dated

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[185] Defendant's Closing Submissions at paragraph 451.

[186] NE (26 July 2016) at page 5 (lines 21-24).

December 2012. Clause 17 of both subcontracts expressly states that the main contract and the subcontracts are to be on a "back-to-back" basis (see above at [7]). The subcontract in *Hi-Amp Engineering* did not contain a clause requiring authorisation and approval from the main contractor before variation claims could be made.

103 The defendant asserts in paragraph 9 of its Defence and Counterclaim that the plaintiff had, by its conduct and actions in respect of these variations, waived strict compliance with cl 17 (referred to above at [101]).[187] This argument was not pursued in the defendant's written submissions.[188] Instead, the defendant claims that if it is not able to recover, the plaintiff would have secured the benefit of the variations *ex gratia*.[189] That may be true, and that may be unjust, but it does not advance the contractual right to payment which the defendant asserts as the sole basis for its counterclaim.

104 The defendant has not pleaded and did not submit that an alternative basis for its counterclaim was a *quantum meruit*. I cannot award compensation to the defendant on a cause of action which it has not pleaded (*Ong Seow Pheng and others v Lotus Development Corp and another* [1997] 2 SLR(R) 113 at [41]).

105 Thus, in the absence of any attempt by the defendant to make good in its submissions its case on waiver, and in the absence of a pleaded counterclaim seeking a *quantum meruit* in the law of unjust enrichment, the defendant's counterclaim for variations must be dismissed.[190]

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[187] Defence and Counterclaim (Amendment No. 2) at paragraph 9.

[188] No oral submissions were required of the parties.

[189] NE (26 July 2016) at page 5 (lines 25-29).

Issue (f): Section 9 of the Act and the terms of the Subcontract

106 In paragraph 9A of the defendant's Defence and Counterclaim, the defendant argues that cl 17 of the subcontracts is void under s 9 of the Act. Clause 17 provides that each "Sub-contract shall be on a back-to-back basis to the contract between [the plaintiff] and the [Main Contractor]".[191]

107 The defendant did not pursue this argument in its written submissions. That is understandable. This argument is entirely without merit. Section 9 of the Act does not render void any of the contractual provisions on which the plaintiff relies. Section 9 of the Act reads as follows:

> **Effect of "pay when paid provisions"**
>
> 9.—(1) A pay when paid provision of a contract is unenforceable and has no effect in relation to any payment for construction work carried out or undertaken to be carried out, or for goods or services supplied or undertaken to be supplied, under the contract.
>
> (2) In this section —
>
> "money owing", in relation to a contract, means money owing for construction work carried out, or for goods or services supplied, under the contract;
>
> "pay when paid provision", in relation to a contract, means a provision of the contract by whatever name called —
>
> (*a*) that makes the liability of one party (referred to in this definition as the first party) to pay money owing to another party (referred to in this definition as the second party) contingent or conditional on payment to the first party by a further party (referred to in this definition as the third party) of the whole or any part of that money;

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[190] NE (26 July 2016) at pages 5 (line 31) - 6 (line 3).

[191] Defence and Counterclaim (Amendment No. 2) at paragraph 9A.

> (*b*) that makes the due date for payment of money owing by the first party to the second party contingent or conditional on the date on which payment of the whole or any part of that money is made to the first party by the third party;
>
> (*c*) that otherwise makes the liability to pay money owing, or the due date for payment of money owing, contingent or conditional on the operation of any other contract or agreement; or
>
> (*d*) that is of such kind as may be prescribed.

Section 9 renders void a "pay when paid" clause. No aspect of the plaintiff's case relies on a "pay when paid" clause.

108 All that the plaintiff says is that, because the contracts are expressly back-to-back, the court can draw the inference that it agreed to pay the defendant on the same basis on which it agreed to be paid by the main contractor (*ie*, based on the same measurements taken in the same way).[192]

109 Clause 17 is not relied on for any contractual effect, either by way of incorporating the terms of the main contract into the subcontract or otherwise. The plaintiff relies on it simply as the grounds for inviting me to draw a factual inference about the basis on which the plaintiff and the defendant contracted, *ie*, whether openings were to be included or excluded.

110 I have not relied on that inference in finding that there was no agreement between the parties that openings were to be included in the measurements. I have rejected the defendant's case that there was such an agreement on an analysis of the facts. I have, however, accepted that that

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[192] Plaintiff's Closing Submissions at paragraph 11.

inference is available in relation to the basis of measurements and the accuracy of the measurements, and I have drawn that inference.

The remaining aspects of the defendant's counterclaim

111 As previously mentioned (at [27]), the defendant also counterclaims:

(a) The costs and expenses incurred in the adjudication applications;

(b) The costs and expenses incurred in the litigation arising from the adjudication applications; and

(c) Damages for the expenses incurred by the defendant in extending the employment of Mr Lim.

112 There are considerable difficulties in law in the counterclaim for costs and expenses arising from the adjudication applications and the resulting litigation succeeding. In *Maryani Sadeli v Arjun Permanand Samtani and another and other appeals* [2015] 1 SLR 496, the Court of Appeal held at [20] that "[t]he general rule on the recovery of costs of previous legal proceedings as damages in subsequent proceedings is clear: such costs which were unrecovered previously *cannot* be recovered in a subsequent claim for damages, at least in so far as it involves a *same-party* case." [emphasis in original]

113 Quite apart from the legal difficulties in claiming costs as damages and quite apart from the fact that the defendant has asserted no cause of action which would it allow it to do so, the fact that the plaintiff's position in the adjudication has been vindicated at trial indicates that the plaintiff was

justified in resisting the adjudication proceedings. If that is correct, the defendant's claim for the costs incurred in the adjudication and the associated litigation cannot succeed on the facts.

114 The defendant also counterclaims damages for the expenses it incurred in extending Mr Lim's employment. The defendant relies on Mr Lim's service invoice dated 3 January 2014 allegedly reflecting his charges for his services in connection with this action from August 2013 to December 2013.[193]

115 There is no basis on which the defendant can recover Mr Lim's salary. First, the defendant has produced no agreement between the plaintiff and Mr Lim in support of this invoice. Second, although the service invoice indicates that Mr Lim charged a fee of $5000 per month, the payment vouchers produced involved payments of more than $5000 per month.[194] I therefore cannot be sure of the basis on which these sums have been charged. Finally, and most importantly, there is no reason to allow this aspect of the defendant's counterclaim because the plaintiff's position has been vindicated entirely.

Conclusion

116 I have therefore adjudged that the defendant is liable to pay the plaintiff the sum of $904,530.53 (including goods and services tax) and interest on the said sum at the rate of 5.33% per annum from the date on which the plaintiff commenced this action up to the date of judgment.[195]

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[193] Bundle of AEICs at page 573 (Low Ching Kew).

[194] Bundle of AEICs at pages 573-582 (Low Ching Kew).

[195] NE (26 July 2016) at page 10 (lines 7-12).

117 The defendant shall also pay the plaintiff the costs of and incidental to the claim and the counterclaim in these proceedings. Having heard the parties, and at their invitation, I have fixed those costs at $172,500. Those costs cover the entire costs of the action, save only for those costs which I have separately assessed and awarded in interlocutory proceedings. The costs I have awarded therefore include the costs of any interlocutory matters in this action for which costs were reserved.[196]

Vinodh Coomaraswamy
Judge

Edwin Lee, Poonaam Bai and Charles Tay (Eldan Law LLP) for the plaintiff and the defendant (by counterclaim);
A Rajandran (A Rajandran) for the defendant and the plaintiff (by counterclaim).

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[196] NE (26 July 2016) at page 10 (lines 13-14).