IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 277

Suit No 1255 of 2016

Between

P & P ENGINEERING & CONSTRUCTION PTE LTD

… *Plaintiff*

And

KORI CONSTRUCTION (S) PTE LTD

… *Defendant*

JUDGMENT

[Contract] — [Breach] — [Damages for breach]

[Contract] — [Variation]

P & P Engineering & Construction Pte Ltd
v
Kori Construction (S) Pte Ltd

[2018] SGHC 277

High Court — Suit No 1255 of 2016
Tan Lee Meng SJ
17-20 October 2017, 12 March 2018; 14 May 2018

31 December 2018 Judgment reserved.

Tan Lee Meng SJ:

Introduction

1 The plaintiff, P & P Engineering & Construction Pte Ltd ("PPE"), provides manpower and other services for the construction industry. The defendant, Kori Construction (S) Pte Ltd ("Kori"), is involved in construction activities.

2 PPE sued Kori to recover $376,334.93 for supplying manpower to the latter and $893,273.36 for steel fabrication work allegedly done by it at the latter's request. The manpower supplied and the steel fabrication work done by PPE was for Kori's construction works as a sub-contractor in relation to the Thomson Mass Rapid Transit ("MRT") Line in Singapore.

3 Kori, which contended that PPE owed it $719,165.83 for the purchase of 560.098 metric tonnes of excess fabricated steel materials to PPE in July 2016, counterclaimed for this amount and also sought to recover a small sum of $543.73, which relates to various charges paid by it on behalf of PPE.

Background

4 The dispute between the parties concerns construction work carried out in relation to the Marina Bay MRT Station, which is a part of the Thomson MRT Line.

5 The main contractor for the Marina Bay MRT Station was Taisei Corporation ("Taisei"), a Japanese company. In 2015, Taisei appointed Kori as its sub-contractor for construction work at the Marina Bay MRT Station. Kori was required by the sub-contract to supply, fabricate, lease and remove temporary walers, struts, utilities supports and kingposts and to undertake ancillary works.

6 Under its sub-contract with Taisei, Kori was entitled to employ sub-sub-contractors to perform its contractual obligations. Kori entered into two contracts with PPE. The first contract was a "Manpower Contract" for the supply of manpower to Kori for construction work. The second was a "Fabrication Contract" for the fabrication of steel materials required by Kori to fulfil its contractual obligations to Taisei.

7 The terms of the Manpower Contract are partly set out in the former's quotation dated 30 March 2015 and in Kori's Purchase Order dated 25 September 2015. The agreed rates of payment for manpower provided by PPE were $11.50 per hour for welders and fitters, $9.50 per hour for riggers and

signalmen and $9.00 per hour for general workers. Not all the workmen supplied to Kori by PPE under the Manpower Contract were its own workers. A number of the said workers were supplied to PPE by another company, Sha Engineering & Contractors Pte Ltd ("Sha Engineering"), which is managed by Kori's own employee, Mr Nallusamy Ramados ("Mr Ramados"). Kori claimed that it was unaware until after the commencement of the present action that some of the workers supplied under the Manpower Contract had in fact been supplied by its own employee.

8 Disputes arose between the parties regarding payments due to PPE under the Manpower Contract. Kori blamed PPE for discrepancies in the names of workers supplied to it and for charging it twice for the same workers or at higher rates than those provided in the Manpower Contract. It also complained that PPE had not given it sufficient information on whether or not the workers supplied to it under the said contract were legally permitted to work in Singapore. The differences between the parties in relation to claims under the Manpower Contract formed an important part of PPE's claim in this action.

9 The second contract ("Fabrication Contract"), which concerned steel fabrication work to be done by PPE, is evidenced by Kori's Letter of Award dated 21 October 2015 to PPE. The scope of work under this contract involved fabrication, loading and unloading in relation to steel strutting works. It was agreed that Kori would pay PPE at the rate of $350 per metric tonne for main members fabricated by the latter and that all accessories, as shown in the construction drawings, were deemed to be inclusive.

10 Under cl 5 of the Fabrication Contract, PPE was required to submit progressive claims monthly to Kori for the latter's verification and certification. Clause 5 of the said contract required Kori to pay PPE within 45 days of the certification. PPE did not follow the procedure and Kori issued interim payment certificates as and when a stack of so-called "delivery orders" were received from the former. Although the claim documents submitted by PPE to Kori for verification and certification were described as "delivery orders", these documents did not record the actual delivery of fabricated steel materials to Kori and none of them contained any acknowledgement of delivery of the said goods. As such, PPE's delivery orders are not to be confused with the usual delivery orders. As there was no contemporaneous verification of the actual quantity of fabricated materials delivered, Kori verified the quantities that PPE claimed to have delivered to it against the construction drawings and issued interim certificates to PPE. Thereafter, PPE issued its tax invoices on the basis of the said certificates.

11 The delivery orders submitted by PPE to Kori in December 2015 and February 2016 were duly certified by Kori for the sums of $86,028.00 and $52,323.00, inclusive of GST in March 2016, after which PPE issued its tax invoices to Kori. PPE was paid $86,028.00 in May 2016 but Kori retained the remaining $52,323.00 to set off its counter-claim in relation to the excess fabricated steel materials sold to the latter in July 2016.

12 Although the Fabrication Contract provided that Kori was to pay PPE $350 per metric tonne of fabricated steel materials, Kori used the rate of $300 per metric tonne when it certified PPE's December 2015 and February 2016 claims because PPE did not have a license to fabricate the steel materials. PPE agreed to the lower rate of payment at the material time and issued its tax

invoices in relation to the said claims on the basis of $300 per metric tonne of goods supplied.

13 After March 2016, PPE submitted many delivery orders for verification and certification on four occasions, namely on 7 May 2016, 12 July 2016, 7 October 2016 and 7 November 2016. These delivery orders covered steel fabrication work that was carried out after March 2016. Kori retained all the delivery orders but took no steps to verify or certify the claims. Strangely, although PPE was making claims in these delivery orders for several hundred thousand dollars in relation to fabricated steel materials that Kori subsequently claimed were never delivered to it, the latter did not write to PPE to question the validity of the said delivery orders or return the documents to PPE until 18 November 2016, more than six months after receiving the first set of the said delivery orders in May 2016.

14 On 14 November 2016, PPE's lawyers, Andrew LLC, sent a letter of demand to Kori in relation to unpaid sums due to it under the Manpower Contract.

15 A few days later, on 18 November 2016, Kori, which, as mentioned, had never written to PPE about the delivery orders for steel fabrication work done after March 2016, finally wrote to PPE to ask the latter to take back the delivery orders that were forwarded to it in May, July, October and November 2016 on the ground that the goods were not received by it.

16 After legal proceedings were started by PPE, Kori claimed in para 7 of its Defence and Counterclaim filed on 21 December 2016 that it had terminated the Fabrication Contract on 3 April 2016 by way of a letter dated 31 March 2016. PPE, which asserted that it never received the said

termination letter, contended that the alleged termination was concocted after the commencement of legal proceedings to avoid liability for steel fabrication work done by it after March 2016.

17 Another dispute between the parties, which is the subject of Kori's counterclaim, concerned the sale by Kori to PPE of a quantity of excess steel materials in July 2016. The parties agreed that the cost of the said excess materials, which weighed 560.098 metric tonnes, was to be set off against the amount owed by Kori to PPE. According to PPE, it agreed to purchase the said excess steel materials only because Kori was not able to pay its bills at the material time, an assertion denied by Kori. The price for the excess fabricated steel materials is disputed. Kori's case is that the goods were sold to PPE at $1,200 per metric tonne and that PPE owed it $719,165.83 for the goods. On the other hand, PPE contended that it had agreed to purchase the goods for only $245 per metric tonne and that the total amount owed by it to Kori for the said goods is $137,224.01. PPE also contended that it is entitled to set off this sum against the amount owed to it by Kori under the Manpower Contract and the Fabrication Contract.

18 Yet another dispute between the parties, which is also the subject of Kori's counterclaim concerns a rather small sum of $543.73 for various charges and expenses paid by it on behalf of PPE, administrative charges on such payments and 7% Goods and Services Tax. The sum claimed is with respect to expenses incurred by Kori for two security passes for PPE's employees, the payment of monthly inspection fees for electrical tools used by PPE in January 2016 and the medical fees of one of PPE's employees.

The issues

19 At the commencement of the trial, the issues were as follows:

(a) whether PPE is entitled to $376,334.93 for the cost of manpower supplied to Kori under the Manpower Contract;

(b) whether PPE fabricated steel materials for Kori after 3 April 2016 and, if so, whether it is entitled to have its claims for payment verified and certified by the latter;

(c) whether the rate of payment for the fabricated steel materials is $350 per metric tonne or $300 per metric tonne;

(d) whether the excess fabricated steel materials were sold by Kori to PPE at $1,200 per metric tonne, as alleged by Kori or at $245 per metric tonne, as alleged by PPE; and

(e) whether Kori is entitled to $543.73 for various charges and expenses incurred on behalf of PPE.

20 During the trial, two of the above issues were settled. The first is the manpower claim by PPE. It was agreed that Kori would pay PPE the sum of $236,731.48 instead of the $376,334.93 claimed by the latter at the commencement of the trial. However, the parties could not agree on who was liable for the costs in relation to the manpower claim and this will have to be considered later.

21 The second issue that was settled during the trial concerns the counterclaim by Kori for the sum of $543.73 for various charges and expenses. On the second day of the trial, PPE finally confirmed that it would

pay the sum claimed by Kori. PPE must be taken to task for not admitting this claim earlier and for agreeing to pay the $543.73 only after time was wasted on the cross-examination of PPE's director, Mr Krishnamoorthy Pugaz (Mr Pugaz") on the charges and expenses in question.

Costs in relation to PPE's claim under the manpower contract

22 As mentioned, PPE's claim under the Manpower Contract was settled during the trial but the parties could not agree on the costs relating to this claim.

23 PPE contended that it is entitled to costs for this claim and to interest on the amount finally agreed upon from the date of the writ until the date of judgment. However, Kori submitted that it should be awarded costs in relation to this claim because it was willing to pay the correct amount due to PPE for manpower costs and the delay in certifying the amount payable for manpower supplied to it by PPE was due to problems created by the latter.

24 To begin with, Kori complained that there were discrepancies in the names of the workers allegedly supplied to it and that it was billed twice for some of the workers. Secondly, Kori contended that it could not process PPE's manpower claims because the latter did not furnish evidence that the workers supplied to it had valid work permits to work in Singapore. Thirdly, there was a problem of claiming the right amount for each worker. Under the Manpower Contract, higher rates are payable for qualified workers than unqualified workers. The wrong rate had been claimed by PPE for some unqualified workers. Kori submitted that as PPE provided the required documents for verification of the manpower claim only shortly before the trial

although its action was commenced nearly a year ago, the latter is not entitled to costs in relation to the claim for the cost of manpower supplied.

25 In regard to the identity of some of the workers, Kori put its position at para 16 of its Opening Statement as follows:

> Some time in May 2016, [Kori] realised that there were numerous workers listed in [PPE's] progress claims that [Kori] was unfamiliar with. [Kori] realised … there were numerous new names appearing in [PPE's] progress claims that had not appeared in previous progress claims. [PPE] had not given [Kori] prior notice of the change in workers and [Kori] did not want to have any workers onsite who did not have the requisite approvals to work in Singapore or the requisite qualifications to carry out their work, particularly on an MRT project site. Therefore, on or about 31 May 2016, [Kori] wrote to [PPE] to request such details and supporting documents for all of its current workers and to continue to supply such details and supporting documents whenever there was a change of workers. Despite repeated requests, [PPE] did not supply the requested documents for what appeared to be about 30 of its workers. [PPE] have [*sic*] since clarified that the 30 names correspond with about 20 of its workers. After nearly half a year of chasing for these documents with no response, [Kori] finally reassessed its verification on [PPE's] claims on or about 19 November 2016, disallowing all claims for workers for whom [PPE] had failed, neglected and/or refused to provide the necessary supporting documents. [PPE] commenced the action herein 6 days later without providing these documents.

26 The dispute between PPE and Kori on the particulars of the workers supplied to Kori was complicated by the fact that some of the workers supplied by PPE to Kori were in fact the workers of Sha Engineering, which, as mentioned earlier, is run by Kori's own employee, Mr Ramados, who has been with Kori for 19 years and is presently its site supervisor. PPE contended that as far as proof of valid work permits was concerned, the problem related primarily to workers supplied to it by Sha Engineering. In its Opening Statement, PPE stated its position at para 15 as follows:

> The workers supplied by the Plaintiff to the Defendant comprised the Plaintiff's own workers and workers from Sha Engineering & Contractors Pte Ltd ("Sha"). The Plaintiff did not have the work permits for the Sha workers as Sha had never given these to the Plaintiff. Sha's lawyers are also the lawyers for the Defendant, ie. Central Law Chambers Corporation and they provided the 20 work permits and trade qualifications on 12 September 2017. Upon receipt of these documents, a supplementary List of Documents was filed on 19 September 2017 disclosing these documents. The Defendant would have had time to examine these documents and to realise that all Sha's workers had valid work permits and trade qualifications and that the unilateral reduction of the Plaintiff's invoices were without merit. It should also be pointed out that the sole director of Sha, Mr Ramados, is also a long time employee of the Defendant, and both Sha and the Defendant would have known that Sha's workers had been provided to the Defendant and the Defendant could have obtained the documents directly from Sha much earlier, had they wanted to do so. This was a dubious defence with Sha and the Defendant acting in concert.

27 Kori's managing director, Mr Hooi Yu Koh ("Mr Hooi"), claimed that his company did not know that Mr Ramados' workers were supplied to PPE to work at Kori's work site until after legal proceedings in this case had been commenced. He pointed out there is no evidence that his company and Sha Engineering were acting in concert and that the fact that Sha Engineering is run by Kori's employee is irrelevant to the contractual obligations of PPE under the Manpower Contract.

28 Kori further asserted that a request for evidence of valid work permits for the workers supplied to it is not unreasonable. It is pertinent to note that Kori had to apply for an order requiring PPE to disclose important documents relating to the latter's manpower claim. On 15 February 2017, Assistant Registrar Scott Tan ordered PPE to disclose the following documents within seven days:

(a) all documents showing that all the workers supplied to Kori had the necessary regulatory approval to work in Singapore; and

(b) all documents showing that all the workers supplied to Kori had the relevant qualifications for the claimed category of work.

29 PPE was also ordered to pay Kori $3,200 as costs incidental to the application for disclosure of documents.

30 PPE contended that whatever may have happened in the past, Kori "admitted" liability on the manpower claim on the second day of the trial on 19 October 2017 and that the latter should thus be liable for the costs of this head of claim. However, Kori rightly pointed out that there was no admission of liability on its part and what was recorded by the court on that day was a "settlement" of the claim for manpower costs. This is confirmed by the record of the proceedings on the second day of the trial,[1] which is as follows:

> Kori's counsel: … Before we resume cross-examination, we would just wish to record the agreement between the parties on certain aspects of the claim. Firstly, with regard to the manpower claim, it has been agreed between the parties that the defendant … agrees to pay a sum of $236,731.48 to the plaintiffs in respect of that claim and this takes into account the claim and payments previously made. There's also the issue of the counterclaim for the debit note. And for that, the … plaintiff has confirmed that they are conceding the sum of $543.73.
>
> PPE's counsel: Your Honour, I confirm that *settlement* on the manpower claim and the *settlement* on the counterclaim in respect of the administrative fees.

[1] Notes of Evidence ("NE"), Day 2, 19 October 2016, p 1, lines 10-22.

[emphasis added]

31 Kori pointed out that as PPE's counsel had confirmed to the court that a "settlement" in relation to the manpower claim was reached, the latter cannot assert that it had "admitted" liability on this claim. In the context of the settlement reached by the parties in relation to the manpower claim, the question of awarding PPE interest on the settlement amount does not arise.

32 Had PPE co-operated earlier on by furnishing the details of the workers required to verify its claim and by claiming the correct amount for some of the workers, the dispute on manpower costs could have been resolved much earlier. On balance, the better approach is to make no order as to costs dealing specifically with the manpower claim.

PPE's claim under the Fabrication Contract

33 PPE claimed that Kori owes it $893,273.36 for steel fabrication work undertaken for the latter under the Fabrication Contract from April 2016 onwards.

34 Kori, which rejected PPE's claim, contended that it did not receive the goods and added that it had terminated the Fabrication Contract on 3 April 2016, after which it gave no instructions to PPE to fabricate steel materials.

35 PPE has the burden of proving that it fabricated the steel materials on Kori's behalf under the Fabrication Contract after the alleged termination of the said contract on 3 April 2016. It is highly disturbing that the parties should have such different versions as to whether or not steel fabrication work under the Fabrication Contract was carried out after April 2016. At the outset, it must be pointed out both parties' cases were beset with evidential problems.

Deficiencies in PPE's evidence

36 PPE adduced no evidence of any request or instruction by Kori to fabricate steel materials after 3 April 2016. Neither did it adduce any evidence of any acknowledgement by Kori that it had carried out any steel fabrication work or delivered steel fabricated materials to the worksite after March 2016. Surely, some of the supervisors and workers who undertook the steel fabrication work could and should have been called as witnesses to testify that they were on site to carry out steel fabrication work for Kori between April and September 2016.

37 PPE's director, Mr Krishnamoorthy Pugazendhi ("Mr Pugaz"), testified that he had time cards to show that his workers were at Kori's yard to carry out welding work during the relevant period. Why these documents were not included as evidence to support PPE's claim for fabrication work done after March 2016 cannot be readily understood. When cross-examined,[2] Mr Pugaz stated as follows:

> Q: So, do you have any record of the workers that you used for the fabrication works?
>
> A: Yes, I have.
>
> Q: You do. And –
>
> A: In my office.
>
> Q: In your office. Okay. This will be time cards?
>
> A: Yes, time cards.
>
> Q: But you have not put them into evidence in Court?
>
> A: I need to check.
>
> Q. Okay.

[2] NE, Day 2, p 7, lines 1 – 29.

> A: It's all in --- this is during our toolbox meetings. We make a record of it so at each morning. So, these are all in those meetings.
>
> …
>
> Q: Have you put them in evidence before the Court?
>
> A: No, I didn't keep.
>
> Q: You didn't keep?
>
> …
>
> A: I did not put the time cards into this affidavit.

38 Although Mr Pugaz offered to check his records and produce the documents in question, Kori's counsel, Mr Twang Kern Zern ("Mr Twang"), objected to the introduction of the documents at such a late stage.

39 Shortly before the second tranche of the trial, PPE attempted to bolster its case by furnishing a third Supplementary List of Documents filed on 22 January 2018. The said documents did not advance PPE's case as they concerned work permits, qualifications and work records for a group of workers listed in various tables dated January 2016 to November 2016 that were entitled "Workers Work Under P & P Engineering Construction Pte Ltd". Although Kori's counsel, Mr Twang, had objected to the introduction of new documents by Mr Pugaz, he did not wish to prolong any argument on whether or not the introduction of the Third Supplementary Bundle should be allowed because he found that the documents were in any case totally irrelevant to the issues at hand. Kori pointed out as follows in para 48 of its closing submissions:

> … Save for the index to SBD 1-208, there is nothing in these documents which indicate that these documents are in relation to the claim under the Fabrication Contract. The Defendants submit that the documents in SBD 1-208 are meaningless. The documents in SBD 209-320, on the other hand, related to the Manpower Claim for a period that does not fall within the ambit

> of this action. The Defendants submit that the documents in SBD 209-320 are also meaningless.

40 PPE also furnished an invoice for lifting gear and another invoice for oxygen and cutting equipment, all of which were delivered to the Marina Bay MRT worksite after the alleged termination of the Fabrication Contract on 3 April 2016. This, PPE claimed, showed that it must have continued fabrication work at the said Worksite. In his AEIC, Mr Pugaz explained at para 9 as follows:

> The fabrication work required cutting and welding of steel structures and oxygen and acetylene cylinders are necessary materials that are needed for the jobs. The Plaintiff ordered lifting gear, welding equipment, oxygen, acetylene from WKS Industrial Gas Ltd and I exhibit the delivery orders, invoices and statement of accounts for the period December 2015 to June 2016 … which shows that these supplies were delivered to the Plaintiff at an area next to Marina Bay MRT station, which was one of the Defendant's job sites.

41 Although Mr Pugaz stated in para 9 of his affidavit that PPE ordered lifting gear from WKS Industrial Gas Pte Ltd ("WKS"), he appeared bewildered when he was cross-examined and admitted that he did not order any such equipment from WKS. The relevant part of the proceedings[3] is as follows:

> Q: … Here, this is your affidavit, you said:
> [Reads] "The Plaintiff ordered lifting gear, welding equipment, oxygen, acetylene from WKS Industrial Gas Pte Ltd".
>
> Yes?
>
> A: Yes.
>
> …

[3] NE, Day 1, 17 October 2017, p 20, lines 27-31, p 21, lines 6 – 16.

> Q: So, my point it these are documents you put in evidence yourself, correct?
>
> A: Yes.
>
> Q: And I presume you put this in evidence to show that lifting gears was obtained from WKS for the fabrication contract, am I correct?
>
> …
>
> A: *I did not obtain lifting gear from WKS.*
>
> Q: Sorry, Mr Pugaz, you say you did not obtain lifting gear from WKS. So, paragraph 9 of your affidavit where you said … "Plaintiff ordered lifting gear from WKS Industrial Gas Pte Ltd" is wrong?
>
> A: *I did not order lifting gear from WKS.*
>
> [emphasis added]

42 Mr Pugaz then claimed that he ordered lifting gear from other companies instead. However, no evidence was furnished to the court with respect to this matter.

43 As for the order for oxygen and cutting equipment that was furnished to the court, which was intended to show that the said equipment was required for steel fabrication work for Kori, such equipment was also required by PPE for non-fabrication work at the site and could have been used for such work instead of steel fabrication work. Kori explained in its reply submissions at para 17 as follows:

> With regard to the Plaintiffs' reliance on delivery orders for oxygen and cutting equipment that were delivered by the Plaintiffs' suppliers to the Marina Bay MRT Station (T226) worksite, the Defendants say that there is no merit whatsoever to the Plaintiffs' contention … that *"There would have been no need for oxygen cylinders and cutting equipment to be delivered to T226 if the Fabrication Contract had ended*". The Court will note that the Plaintiffs had been submitting progress claims for the T226 Project up to October 2016. For each of these progress claims, the Plaintiffs had claimed for some workers at the T226

> Project at the rate of S$11.50 per man-hour. … [T]he Court will note that S$11.50 per man-hour is the rate for welders and fitters. The Court will also note that the Plaintiffs' invoices under the Manpower Contract were for "*Labour, Tools & Materials*". Oxygen cylinders and cutting equipment would still need to be delivered to the T226 worksite for the Manpower Contract (which was still ongoing) and does not, in any way, show that any fabrication work was carried out on the T226 worksite.
>
> [emphasis in original)

Kori's silence and inaction after receiving PPE's delivery orders

44 While PPE certainly could have done more in advancing its claim that it carried out steel fabrication work for Kori after March 2016, it strongly argued that the latter's silence and inaction after receiving its delivery orders for certification of such work done after March 2016 showed that there was more than meets the eye and that the Fabrication Contract had not, as alleged by Kori, been terminated on 3 April 2016.

45 After the alleged termination of the Fabrication Contract, PPE submitted delivery orders for completed steel fabrication work to Kori on four occasions. The relevant dates are 7 May 2016, 12 July 2016, 7 October 2016 and 7 November 2016. Kori, which did not deny that it received the said documents, did not verify the claims or certify them. However, although the delivery orders indicated that PPE was claiming several hundred thousand dollars from Kori, the latter retained the delivery orders and did not challenge their validity until after PPE's lawyers, Andrew LLC, sent it a letter of demand on 14 November 2016 to settle the outstanding manpower charges incurred under the Manpower Contract. Why Kori held on to the delivery orders without writing to PPE early in the day to state that the contract had

already been terminated and the goods in question had not been received cannot be fathomed.

46 Undoubtedly, Kori's thundering silence and inaction for such a long time after receiving from PPE a large number of delivery orders must be taken into account, and especially so since the former's explanation for its silence and inaction after receiving the numerous delivery orders as early as May and July 2016 only served to undermine the credibility of its defence.

47 In relation to the first set of delivery orders, which were handed over by PPE to Kori on 7 May 2016, Mr Hooi claimed that Kori had not taken any action to disclaim liability for payment of the fabricated steel materials referred to therein because one of its unnamed employees failed to notice that these documents were placed below another document called "Material Checklist". As such, the whole set of documents, including the delivery orders, was allegedly filed away in a file on technical matters without anyone realising that the delivery orders in question were also filed in that file. However, Mr Hooi could not name the employee who failed to separate the delivery orders from the top technical document and Kori did not call the employee who made the alleged filing mistake as a witness. As such, PPE's counsel, Mr Andrew Hanam ("Mr Hanam"), took Mr Hooi to task for giving hearsay evidence. In any case, even if the delivery orders were placed below a document that showed that it was a "Material Checklist", someone in the office must have had the task of looking at the contents of the checklist and if he or she had gone through the stack of documents, it would be evident that the stack contained delivery orders. Interestingly, although the delivery orders had been allegedly filed in the wrong file by some employee who did not check the stack of documents, Mr Hooi refused to acknowledge that there had

been a mix-up of documents at his office. The relevant part of the cross-examination is as follows.[4]

> Q: So you are saying some mess up in your office resulted in you not seeing the document?
>
> A: *This is not a mix up.* Obviously, the document shows "Material Checklist", "T206". It is not a mix up.
>
> Q: But there's also a delivery order for you to certify. Why didn't you certify the delivery order or at least tell him to take it back… since the contract has been terminated?
>
> A: It is in one stapled stack of document. … It cames in one stack of document which is stapled.
>
> Q: Mr Hooi, are you saying that just because it's stapled, you could not flip through the documents to see what was behind the first page?
>
> A: I don't do that because my staff would sort out the document for me.
>
> Q: So why didn't your staff sort out the documents … on this occasion?
>
> A: The staff obviously saw this is a T206 document.
>
> Q: Which staff? Again, this is hearsay evidence. You are saying the staff saw this, the staff saw that … What's the name of the staff?
>
> A: *In particular, the name of the staff who sort I can't know for sure at this particular time. But I can inform you that this document did not reach me because it went to the T206 file. This is a fact.*
>
> Q: *Mr Hooi, your evidence is incredulous. You can't even tell me the name of the staff who went through the documents and you can tell me what the staff, whose name we don't know, did and did not do. Incredible.*
>
> A: Most of the documents who come to me from Joanne, but Joanne has her tasks. …
>
> [emphasis added]

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[4] NE, Day 2, 19 October 2017, p 29 lines 13-30, p 30 lines 1-7.

48 The next set of PPE's delivery orders dated 4 July 2016 were submitted to Kori on 12 July 2016, some three months after the latter had allegedly terminated the Fabrication Contract on 3 April 2016. When cross-examined on why Kori did not return the documents to PPE immediately and make it clear to the latter that the contract had already been terminated and that the goods covered by these delivery orders had not been not been received, Mr Hooi was rather combative but did not advance Kori's position in any way. He claimed to have called for a meeting with Mr Pugaz on 27 July 2016 to tell the latter to take back the delivery orders. The relevant part of the proceedings[5] is as follows:

> Q: … Now, here we are on July 2016, it's about 3 months after you terminated the contract apparently. Why didn't you call up, Mr Pugaz? Why didn't you tell him, "Hey, why are sending me these delivery orders for? I've terminated your contract?"
>
> A: I did. …
>
> Q: Show me one letter, one email. I want a letter or an email.
>
> A: *Why did I call for the 27th July meeting?*
>
> Q: Mr Hooi, answer my question. Did you send an email or a letter?
>
> …
>
> A: We called by phone.
>
> Q: So the answer is "no", you did not send a letter or email to Mr Pugaz to collect back this document.
>
> A: We asked him to come to our office.
>
> [emphasis added]

[5] NE, Day 2, 19 October 2016, p 30, lines 12-26.

49 Although Mr Hooi claimed to have called a meeting on 27 July 2016 to discuss, among other things, the delivery orders submitted by PPE to Kori, there was no reference to this in his AEIC. Instead, what was stated therein was that the meeting concerned the sale by Kori to PPE of scrap steel, which is the subject matter of Kori's counterclaim.

50 Mr Pugaz testified that he only dealt with the scrap metal issue at this meeting. His testimony in relation to the said meeting on 27 July 2016 is as follows:[6]

> Q: And I am told by Mr Hooi that when he met you on 27th July 2016, he had actually asked you why you had sent the delivery orders. Do you agree with that?
>
> ….
>
> A: I only spoke about the scrap metal at the office.
>
> Q: Okay. So you … in response to my question about whether Mr Hooi asked you why you had continued to submit delivery orders after 31st March, you are saying that was not discussed.
>
> A: He did not ask that question.

51 I prefer the evidence of Mr Pugaz. PPE's counsel, Mr Hanam, cross-examined Mr Hooi on this new revelation on the additional purpose for the 27 July 2016 meeting. The relevant part of the cross-examination is as follows:[7]

> Q: … [T]he stories just don't add up. Now let's go to this meeting that you are talking about. You are saying that he came to your office and you told him to take it back?
>
> A: No. There was two reasons why we asked him to come for the meeting. One was to discuss about whether

[6] NE, Day 1, 17 October 2017, p 29, lines 1-19.

[7] NE, Day 2, 19 October 2016, p 30, lines 27-31, p 31, lines 1-32. P 32, lines 1-3.

there's a possibility for us to sell again to him. *Two, ask him why is he creating all these … delivery orders that was sent to us. I wanted to clarify what are all these things*.

Q: Let's look at page 14 of your affidavit at paragraph 32. … Now, contrary to what you said that there was two purposes for your meeting, I can only see one here, Mr Hooi. There's absolutely no mention of the fact that you asked him why was he sending you delivery orders and that you were asking him to take it back.

A: … The first stage of the meeting works like what was stated here. The second part where I was about to say, "Why are you sending me this July then? Straightaway, Mr Pugaz said, "I want to prepare to take the material." And he leave the meeting.

Q: Mr Hooi, stop giving me evidence that is not in your affidavit and just answer my question. *My question is very simple. ... Why is there no mention of that in your affidavit?*

A: *The affidavit for this part is for fabrication materials*.

Q: So we --- anywhere in your affidavit where you have mentioned that on the 27th of July, you had a discussion with him about the delivery orders? Show me.

A: I wanted to have a discussion.

Q: No, no, no. Just show me.

…..

A: *My lawyer did not put it in.*

[emphasis added]

52 Had Mr Hooi called a meeting on 27 July 2016 to ask PPE to take back the delivery orders, this would have surely been mentioned in his AEIC. This is a very material point and had he informed his lawyers about the dual purpose of the meeting on that day, his lawyers would not, as he alleged, have advised that this be left out in his AEIC.

53 It also appears from Mr Hooi's testimony that he did not ask Mr Pugaz to take back the May 2016 and July 2016 delivery orders on 27 July 2016. When cross-examined, he stated as follows:[8]

> I didn't ask [Mr Pugaz] to take it back. Can I clarify with the counsel? The first stage of the meeting works like what was stated [in the AEIC]. The second part where I *was about to say, "Why are you sending me this July then?"* Straightaway Mr Pugaz said, "I want to prepare to take the material." And he leave the meeting.

54 As for what Mr Hooi claimed to have said to Mr Pugaz on 27 July 2016 about the delivery orders for goods that were allegedly not received, he testified as follows:[9]

> As I mentioned to the counsel, the first part was on the material sales … The second part when I start to ask him, "What is all this coming on?" I bear in mind, counsel, is that the fact is that we have been working so many years together. In a relationship, we still treat … each other as partners. We don't come to a situation where I bring up these issues very coarse. So I bring it up to say that "There is this purchase orders which you have in mind. Why are all this coming in?" Straightaway he start to talk about other things and then he say he wants to prepare for material certification. And we did note he say it like that and he moved out from the meeting room, said he needs to get ready to take the materials tomorrow. It is --- he moved out from the meeting room when I highlight all these document issues. I did say that, but he moved out.

55 If Mr Hooi had indeed called the meeting on 27 July 2016 to discuss the May 2016 and July 2016 delivery orders for goods which he claimed were never delivered to Kori, a question arises as to why he did not stop Mr Pugaz from leaving as the delivery orders involved a grave matter that should have

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[8] NE, Day 2, 19 October 2017, p 31, lines 20-23.
[9] NE, Day 2, 19 October 2017, p 32, lines 28-32, p 33, lines 1-7.

been sorted out urgently. I believe Mr Pugaz's evidence that there was no conversation between the parties about the delivery orders on 27 July 2016.

56 After the meeting of 27 July 2016, PPE delivered to Kori yet another set of delivery orders for steel fabrication work on 7 October 2016. Again, Kori did not ask PPE to take back these delivery orders or make any reference in any contemporaneous correspondence to the alleged termination of the Fabrication Contract. All that Mr Hooi could say to justify Kori's inaction in relation to these delivery orders in October 2016 was that he was "accumulating all the documentation to see how far this is going". His testimony is as follows:[10]

> Q: … This time you get one shot, 26 delivery orders, all dated 4th September received 7th October 2016. Now these are a lot of delivery orders, 26th. By now you are quite familiar with what this means. It means he wants payments, he wants you to certify and yet according to you, no work was done. Why did you not in October 2016 write to him and tell him, "I thought I made myself clear to you. You didn't do any work. I'm not paying you." Why didn't you do that in October 2016?
>
> A: *By October 2016, we were having doubts, yes, and we were accumulating all these documentations* because Mr Pugaz has been coming to the office on and off and asking our staff to sign. As all the DOs, you can see are signed by our office staff. *We were already suspecting something suspicious because why is he coming to the office and asking the office staff to sign on the DO* which, if it is done, it should have signed aside. And we were definitely suspicious then and it confirmed that there is issues when on the 5th of November, I personally was there when he came up and asked my staff to sign and I did ask him. I was there when the 5th November, it was a Saturday.
>
> Q: Mr Hooi, you are not answering my question. … Why did you not write to him and tell him, "I'm not paying you.

[10] NE, Day 2, 19 October 2017, p 35 lines 24-32, p 36, lines 1-17.

> You didn't do any work. Why are you giving me 26 delivery orders?" I'm asking you, why you did not do that.
>
> A: I did in November.
>
> Q: I'm asking you for October.
>
> A: *We were accumulating all the documentation to see how far this is going.*
>
> Q: *Is that the only answer?*
>
> A: *Yes, it is.*
>
> [emphasis added]

57 Mr Hooi's explanation on why Kori did not reject the delivery orders submitted in October 2016 timeously is most unpersuasive. There is no basis for Mr Hooi to say that "[b]y October 2016, we were having doubts" because by October 2016, PPE had already submitted what must, by Kori's reckoning, be numerous blatantly fraudulent delivery orders in May and July 2016, and had claimed hundreds of thousands of dollars for steel fabrication work that, according to Kori, had not been done. It is thus baffling that Kori's position was that it would sit back and accumulate documentation "to see how far this is going". As such, it cannot be believed that Kori only became "suspicious" of Mr Pugaz's actions by October 2016.

58 It is also quite unbelievable that if the delivery orders submitted by PPE to Kori in May and July 2016 were indeed fraudulent, the latter would continue to deal with Mr Pugaz as if things were normal.

59 Strangely, Mr Hooi testified that in July 2016, he still regarded Mr Pugaz as a "partner"[11] and that he believed that Mr Pugaz was not a person

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[11] NE, Day 2, 19 October 2017, p 34, line 9.

who wanted to "cheat" his company. The relevant part of his testimony is as follows:[12]

> Q: Don't you agree that this man is out to cheat you if no work was actually done and he was then issuing delivery orders for you to certify?
>
> A: *In July,* at that point of time, *I did not even think that he's cheating me. He just bought material from me. Would he cheat me then*? …
>
> Q: But, Mr Hooi, you have this conversation apparently on 27th July where you specifically talked to him about the delivery orders. Now so at this point in time, you can't pretend that you didn't know about the delivery orders. You can't pretend that it was underneath stapled documents. You had this knowledge to it … in your mind, that he was asking for certification on these delivery orders. Why didn't you tell him and write to him, write, importantly, put it … in black and white that the contract be terminated and that he should not be claiming any sums from Kori?
>
> A: *At July, no.* When the next one came, I did.
>
> [emphasis added]

60 Despite the allegedly blatant attempt by PPE to charge Kori large amounts of money for goods that were not delivered to the latter, Mr Hooi went so far as to testify that Kori still trusted Mr Pugaz in September 2016, as the latter was allowed in that month to take delivery of excess fabricated steel materials from his company. Mr Hooi testified that if he did not trust Mr Pugaz, "would we have allowed him to collect [the] material?"[13] Subsequently, when cross-examined on why Kori did not ask PPE to confirm the price of the excess steel materials that the latter agreed to buy from it on 27 July 2016, Mr Hooi returned to the theme of a partnership with PPE despite

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[12] NE, Day 2, 19 October 2017, p 34, lines 30-31, p 35, lines 1-13.
[13] NE, Day 2, 19 October 2017, p 36, lines 24-25.

the latter's presentation of allegedly bogus delivery orders. He testified as follows:[14]

> Q: … I would have thought that someone like you would have thought that since the price is $1,200 per metric ton; that you would have wanted to make sure that it is either acknowledged by him or that you have proved that [the quotation] was delivered to him.
>
> A: *We don't ask partners to do such thing, partners has [sic] a trust in it.*
>
> [emphasis added]

61 On 7 November 2016, PPE handed over to Kori the final set of delivery orders. A week later, on 14 November 2016, its lawyers. Andrew LLC, wrote to Kori regarding the non-payment of amounts due under the Manpower Contract. It was after receiving Andrew LLC's letter that Kori finally stirred and wrote to PPE for the first time on 18 November 2016 to ask the latter to collect back the numerous delivery orders submitted to it after March 2016 on the ground that it did not receive the goods covered by the said delivery orders.

62 Evidently, Kori had no credible explanation as to why it did not return or dispute the delivery orders submitted by PPE from April to November 2016 until 18 November 2016 despite the fact that PPE would have been guilty of fraud if Kori's assertion that no steel fabrication work had been carried out by PPE after March 2016 is to be believed. The irresistible inference must be that steel fabrication work was carried out by PPE after that date.

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[14] NE, Day 2, 19 October 2017, p 51, lines 24-30.

Whether the Fabrication Contract was terminated by Kori

63 Kori sought to advance its case on the ground that there could not have been any steel fabrication work done by PPE after March 2016 because it terminated the Fabrication Contract on 3 April 2016. However, this assertion was not supported by the evidence presented to the court and also served to undermine Kori's defence.

64 Mr Hooi testified that the termination letter was posted to PPE, which claimed that it did not receive the said letter. PPE pointed out that although Kori had been put on notice in its pleadings that it did not receive the letter of termination, the latter took no steps to call the employee who allegedly sent out the termination letter to testify that the said letter had indeed been posted.

65 Further, PPE questioned why the termination notice was not sent to it by email in the same way other documents were usually sent to it. In his AEIC, Mr Pugaz stated at para 8 that Kori "usually sends by email notification to me" and "[i]t is curious that this notice was not send [*sic*] by email". When cross-examined on this matter, Mr Hooi could give no convincing answer. The relevant part of the proceedings is as follows:[15]

> Q: Why was [the termination notice] not sent by email as well?
>
> A: This letter was set out in each --- the individual time in which you have the documentation which is like a debit note or an invoice or an information in which that it needs to be posted out to confirm that he has reached his office, because Mr Pugaz doesn't come to collect documents. And this document was sent together with a debit note.

[15] NE, Day 2, 19 October 2016, p 26, lines 17-27.

> Q: I fail to understand your answer. My question is quite simple, why couldn't you have emailed this as well as posted this to Mr Pugaz?
>
> A: …. We do not email documents such importance like this *because we do not want our staff to see what documents is this*. The official ones like important documents are all posted.
>
> [emphasis added]

66 Mr Hooi's testimony that the letter of termination was not emailed to PPE because Kori did not want its staff to see the contents of the said notice made no sense whatsoever. He did not claim to have typed the letter himself and as such, the employee or employees involved in the preparation and posting of the alleged letter of termination would have known about its contents regardless of whether it was sent by post or email.

67 As Mr Hooi testified that Kori preferred to send important documents, such as a letter of termination, by post, he was asked why the termination letter was not sent by registered post. Again, he had no answer. The relevant part of the proceedings is as follows:[16]

> Q: But this is such an important document, you said. It's a termination letter. Why didn't you send it by registered post?
>
> A: He has already been informed. He was the one who called up to Joanne informing about this.
>
> Q: Mr Hooi, stop there. I didn't ask you that question … Answer the question: It's such an important document. Why couldn't it be sent by registered post?
>
> A: We don't have policy of sending registered post. This is our company policy. We don't send by registered post.

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[16] NE, Day 2, p 27, lines 22-31.

68 Kori is a large company and while it has the discretion whether or not to send a particular letter by registered post, it is quite unlikely that a company will have a blanket policy not to send any letter, regardless of its importance, by registered post.

69 In its closing submissions, Kori contended that PPE must have received the termination letter because Mr Hooi testified that the said letter was posted together with Kori's Debit Note No KDN/2016-0304 and Mr Pugaz admitted that PPE received the said debit note. This argument lacks foundation unless it was proven that the termination letter was actually posted together with the debit note. Mr Hooi, who admitted that he did not post Kori's letters, had no actual knowledge of what was posted to PPE, and it cannot be assumed that both the letter of termination, if posted, and the debit note were posted together in the same envelope. Furthermore, while Mr Pugaz admitted that PPE received the said debit note, he was not asked how that document came into his hands and whether it was sent to him by post or email or whether it was handed over to him when he called at Kori's office.

70 As mentioned, Kori did not ask PPE to take back the numerous delivery orders for work done after March 2016 until 18 November 2016. Significantly, in its letter of 18 November 2016, Kori's stated reason for asking PPE to take back the delivery orders was that the goods in question had not been received. The crucial fact that Kori had allegedly terminated the Fabrication Contract on 3 April 2016 was not, as one would have expected, stated in the said letter, the contents of which are as follows:

> **RETURNING OF DOCUMENTS**
>
> Please be advised that you have forwarded to us the following documents:

> 1) D.O. Number: P & P/T226/002 (forwarded to our office on 7 May 2016)
>
> 2) D.O. Number: P & P/T226/004 (forwarded to our office on 12 July 2016)
>
> 3) D.O. Number: P & P/T226/005 (forwarded to our office on 7 October 2016)
>
> 4) D.O. Number: P & P/T226/007 (forwarded to our office on 7 November 2016)
>
> *As no such goods were received, kindly collect back the documents from our office.*
>
> Thank you.
>
> [emphasis added]

71 Undoubtedly, if the Fabrication Contract had been terminated on 3 April 2016, this would have been stated in Kori's letter of 18 November 2016. When questioned as to why there was no reference to the termination of the Fabrication Contract in the said letter, Mr Hooi avoided the question by saying that it was unnecessary for such a reference to be made. The relevant part of the proceedings is as follows:[17]

> Q: Now very interesting. Can you tell me why in this letter, it does not state that the contract had been terminated on the 31st March 2016?
>
> A: *Why do we need to? We already confirmed that these deliveries were not received …*
>
> ….
>
> Q: I would have thought it obvious that if you are returning the documents which he had --- the delivery orders which he had sent to you for certification for payment, and that the reason why you are sending it back is

[17] NE, Day 2, 19 October 2017, p 38, lines 28-32, p 19, lines 5-14.

> because the contract had been terminated. You would have said so in this letter.
>
> A: *I pointed it out to him and this letter to me, legally, this is the way to write.*
>
> Q: And it didn't occur to you that you should mention in this letter that the contract had been terminated?
>
> A: I believe this is … legally correct way to put it in writing.
>
> Q: And it didn't occur to you not to mention that it had been terminated?
>
> A: No, I do not think so.
>
> [emphasis added]

72 I find that Kori's assertion that the Fabrication Contract was terminated on 3 April 2018 was not supported by the evidence. As the evidence regarding Kori's purported termination of the Fabrication Contract was rather contrived, it was detrimental to the credibility of Kori's case and clothed PPE's claim with a measure of respectability.

Whether Kori can rely on proceedings in third party discovery application

73 To advance its case that PPE did not undertake steel fabrication work under the Fabrication Contract after March 2016, Kori sought to rely on proceedings in a third party discovery application by PPE against Taisei, the main contractors in the Marina Bay MRT worksite, to show that PPE could not have fabricated steel materials at the said site. In its closing submissions, Kori pointed out that after the first tranche of the trial was completed, PPE made an application for third party discovery in HC/SUM 5237/2017 against Taisei for the latter to disclose documents that showed that its workers were at the Marina Bay MRT station yard, which was under Taisei's control, from June to October 2016 to carry out steel fabrication works. Kori added that Taisei's response to the said application undermined PPE's claim against it in

relation to steel fabrication work allegedly carried out at the said worksite from April to September 2016. PPE withdrew its application on 1 December 2017 and paid costs totalling $2,300 to Taisei and $500 to Kori.

74 PPE asserted that Kori was not entitled to rely on the matters raised in its application for third party discovery and on the affidavit filed by Taisei's Project Manager at the Marina Bay MRT Station worksite, Mr Takeshi Hara ("Mr Hara"), in those proceedings because these were not introduced as evidence during the trial. As neither PPE nor Kori called Mr Hara as a witness to test the assertions in his affidavit and neither this affidavit nor Mr Pugaz's affidavit in HC/SUM 5237/2017 were introduced as evidence at the trial, no reliance is placed in this judgment on the respective positions taken by Taisei and PPE in the said third party discovery proceedings.

Conclusion on the claim under the Fabrication Contract

75 While the cases advanced by both PPE and Kori were hampered by evidential shortcomings, I am satisfied after considering all the circumstances of the case that it is more probable than not that the Fabrication Contract was not terminated by Kori on 3 April 2016 and that PPE did undertake steel fabrication work for Kori under the said contract after March 2016. As such, PPE's delivery orders for steel fabrication work done under the said contract that have not been verified and certified must be verified and certified by Kori in accordance with the terms of the Fabrication Contract and the procedure previously adopted by the parties. The parties may apply to the court for further orders if there are problems arising from this.

Price of the fabricated steel materials

76 For the purpose of settling the accounts between the parties in relation to the steel fabrication work under the Fabrication Contract, a question arises as to the price that has to be paid for the fabricated steel materials supplied by PPE to Kori.

77 Although the Fabrication Contract fixed the price for the fabricated steel materials at $350 per metric tonne, PPE invoiced Kori at the rate of $300 per metric tonne in relation to the delivery orders already certified by the latter. PPE alleged in its Statement of Claim that Kori had failed to certify the progress claims made by it correctly and sought to recover the additional $50 per metric tonne. On the other hand, Kori insisted that the parties had reached an agreement for the reduction of the price of the fabricated steel materials from $350 to $300 per metric tonne.

78 Apparently, Kori informed Mr Pugaz that as PPE had no licence to undertake steel fabrication work, the contract price would be reduced by $50 per metric tonne. For this reason, Kori certified the amounts payable to PPE for the fabricated steel materials at $300 per metric tonne for the goods. PPE did not object to the reduction of the price at the material time and it issued its tax invoices to Kori on the basis of the certified amounts.

79 In considering whether PPE is entitled to payment for the fabricated steel materials supplied to Kori, a distinction ought to be made between two types of delivery orders. The first concerns the delivery orders that have been verified and certified by Kori at the rate of $300 per metric tonne, in respect of which PPE had issued tax invoices at the lower rate of $300 per metric

tonne (the "first category"). The second relates to the delivery orders that have yet to be certified by Kori (the "second category").

80 I will deal with the first category of delivery orders at this juncture. The pleadings and evidence as to why PPE is entitled to recover the difference between what it had already invoiced Kori and the contract price left much to be desired. The decision to make this claim was obviously made because of the decision of the Court of Appeal in *Nam Hong Construction & Engineering Pte Ltd v Kori Construction (S) Pte Ltd* [2016] 4 SLR 604 ("*Nam Hong*") in July 2016. In that case, the Court of Appeal, which overruled the court below, held that the licensing requirements under the Building Control Act (Cap 29, 1999 Rev Ed), which prohibit the carrying out of specialist building works without a licence, did not apply to sub-contractors. PPE relied on this decision, which involved a dispute between Kori and another sub-sub-contractor, and contended that as it is now clear that it did not require a license to fabricate the steel materials for Kori, it is entitled to claim from Kori an additional $50 per metric tonne with respect to the goods covered by delivery orders that have been verified and certified. Mr Pugaz testified that when he agreed to the reduction of the price for the fabricated steel materials, he believed that Kori was entitled to deduct $50 from the contract price because he had no licence to fabricate the said materials. However, now that the law is clear that he does not require a license, he wants to claim back the $50 per metric tonne from Kori.

81 Whatever the reason for Mr Pugaz's agreement to accept $300 per metric tonne as the price for the fabricated steel materials and notwithstanding the fact that the decision of the Court of Appeal in *Nam Seng*, it is incumbent on PPE to make clear its legal basis for reneging on the said agreement and

claim another $50 per metric tonne for the goods in respect of which its own tax invoices had been issued. In relation to the claims that have already been verified and certified, all that PPE pleaded at para 9 of its Statement of Claim was that Kori had failed to certify the progress claims "correctly". In its Reply and Defence to Counterclaim, PPE further pleaded at para 2 as follows:

> The Defendant issued their interim payment certification with *unilaterally imposed reductions* without justification and the Plaintiff is entitled to claim for the full contractual rate for the fabrication works.
>
> [emphasis added]

82 Although PPE contended that Kori failed to certify the first category of delivery orders correctly and had unilaterally imposed reductions without justification, the fact remains that Mr Pugaz testified that he had agreed to the said reductions. When re-examined by his counsel, Mr Hanam, Mr Pugaz testified[18] as follows:

> Joanne called … my handphone. She asked me to … meet the boss. Mr Hooi, the boss … they say that … I do not have the licence to do fabrication. And under Kori's regulation, they deducted $50. So I agreed to what they said. I believe what they said and I agreed with this amount.

83 Parties who make arrangements on the basis of what they perceive the law to be at the material time cannot, without more, renege on the arrangements merely because a court of law subsequently takes a different view of what the law actually is. PPE did not plead that Mr Pugaz's agreement to accept the lesser sum cannot be enforced on the ground of lack of consideration or that it was vitiated by duress. Furthermore, PPE asserted that Mr Pugaz agreed to the reduction of $50 per metric tonne for the two

[18] NE, Day 2, p 13, lines 8-12.

certifications by Kori because he had the mistaken belief that Kori was legally entitled to the reduction, PPE did not allege in its pleadings that there was any mistake, misrepresentation or any other vitiating factor in relation to what Mr Pugaz admitted was his agreement to accept $300 per metric tonne as the rate of payment for delivery orders in the first category.

84 In the face of PPE's pleadings, I have no basis whatsoever to interfere with the rate of payment in relation to the first category of delivery orders, in respect of which tax invoices had already been issued by PPE.

85 I now turn to the second category of delivery orders. In respect of the price of the fabricated steel material in this category, much depends on what was agreed upon by the parties when Kori proposed that the price of the fabricated steel materials be reduced to $300 per metric tonne. While Kori claimed that the agreement covers all delivery orders, including those to be issued in the future, this was vehemently denied by PPE.

86 It ought not be overlooked that PPE pleaded in para 3 of its Statement of Claim that the contract price for the fabricated steel was $350 per metric tonne and that Kori's response to this plea in para 2 of its Defence is as follows:

> *Paragraph 3 of the Statement of Claim is admitted* … The Defendants further aver that the Letter of Award more specifically states that the Fabrication Contract was for structural steelworks on the Thomson Line Contract T226 … and that *the contract rate for fabrication was S$350.00 per metric tonne of main members only.*
>
> [emphasis added]

87 Despite its pleadings, Kori asserted that the agreement to reduce the price to $300 per metric tonne was made in relation to all present and future claims under the Fabrication Contract. This would necessarily involve a variation of the Fabrication Contract. However, such a variation was not pleaded by Kori. In fact, even in relation to the already certified claims, Kori did not plead any variation to the Fabrication Contract in its Defence and Counterclaim. Instead, it merely pleaded at para 13 of its Defence and Counterclaim that PPE was estopped from saying that it had failed to certify the December 2015 and February 2016 claims correctly because no objections had been made to its interim payment certificates for these claims and PPE had submitted tax invoices to it on the basis of the certifications in question. Kori's focus in its pleadings was thus only on the December 2015 and February 2016 claims made by PPE and on the assertion that the certification for these claims must be correct since the latter did not object to the said certification and issued its tax invoices on the basis of the said documents.

88 After taking all circumstances into account, I find that it was not established that PPE had agreed to amend the Fabrication Contract and reduce the price of the fabricated steel materials to $300 per metric tonne for future claims as well. As such, in relation to the second category of delivery orders that have not been certified by Kori, PPE is entitled to be paid at the contractual rate of $350 per metric tonne.

Kori's counterclaim

89 As mentioned, one aspect of Kori's counterclaim, namely, its claim for the sum of $543.73 for various charges and expenses incurred on PPE's behalf, was settled during the trial. This meant that the more important part of Kori's counterclaim, which concerns the cost of the excess fabricated steel

materials sold to PPE in July 2016, is the only issue in the counterclaim that has to be determined by the court.

90 It is common ground that at a meeting on 27 July 2016 between Mr Hooi and Mr Pugaz, Kori offered to sell PPE a quantity of the said goods. It was not disputed that PPE accepted the offer and took delivery of 560.098 metric tonnes of the excess fabricated steel materials. It was also not disputed that both parties agreed that the amount due to Kori for the goods would be set off against amounts payable by Kori to PPE under their contracts.

91 What is disputed is the price of the excess fabricated steel materials sold by Kori to PPE. While Kori claimed that the agreed price was $1,200 per metric tonne, PPE asserted that it was only $245 per metric tonne.

92 In its Opening Statement, Kori outlined its counterclaim with respect to the price of the excess steel materials as follows:

> The Defendants' Mr Hooi Yu Koh met the Plaintiffs' Mr Krishnamoorthy Pugazendhi on 27 July 2016 at the Defendants' office for the purpose of discussing the sale of the materials … At the meeting, Mr Hooi explained that the Defendants had excess fabricated steel materials in its possession that it was offering for sale to the various contractors that they worked with. Mr Hooi expressly told Mr Pugazendhi that the Defendants were offering these fabricated steel materials at a standard price of S$1,200.00 per metric tonne to all contractors. Mr Hooi and Mr Pugazendhi agreed at the same meeting that the amounts due and owing by the Plaintiffs to the Defendants for the supply of the fabricated steel materials would be set off against any amounts due and owing by the Defendant to the Plaintiffs under the Fabrication Contract and the Manpower Contract and the Plaintiffs would pay the Defendants the outstanding balance. Following from the meeting, the Defendants sent the Plaintiffs a formal written quotation by post confirming the price of the materials on the same day.

93 In support of Kori's version of events, Mr Hooi stated in his AEIC (at paras 32 to 35) as follows:

> 32. Some time on or about 27 July 2016 at about 1.00 pm, I met with Mr Pugaz at the Defendants' office to discuss the sale of excess fabricated steel materials. These were not "*scrap beams*", as described by the Plaintiffs in their Statement of Claim, but were fabricated steel beams and decks which the Plaintiffs could use for construction projects which they were involved in. The Defendants had excess stock of fabricated steel beams and decks at the time and were offering these to contractors it was then working with at a discounted price of S$1,200.00 per metric tonne.
>
> 33. Following from our meeting, I sent a formal written quotation with our price to the Plaintiffs on the same day by post. It was a term of the quotation that the quotation would be accepted upon collection of materials.
>
> 34. The Plaintiffs took up the Defendants' offer and collected 560.098 metric tonnes of fabricated steel materials between July and September 2016. Upon each collection, the Defendants drew up a delivery order and most of these were acknowledged by Mr Pugaz himself. In any event, the Plaintiffs themselves acknowledge, by their pleadings, that they had taken 560.098 metric tonnes of material.
>
> 35. The Defendants duly rendered their Tax Invoice No. KCB/2016-1019 on 31 October 2016 to the Plaintiffs for the 560.098 metric tonnes of fabricated steel beams and decks that they had collected. This Tax Invoice for the sum of S$719,165.83 remains unpaid to-date.

94 Kori asserted that there was no reason for it to sell the excess steel materials to PPE if it was to enable the latter to re-sell it as scrap metal as it could easily have sold the said goods directly to NatSteel Recyling Pte Ltd ("NatSteel") and fetch a higher price by eliminating two middle-men, namely, PPE and Neo Hardware Pte Ltd ("Neo Hardware").

95 PPE's account of the discussions between Mr Pugaz and Mr Hooi on the price of the excess fabricated steel materials differed markedly from the latter's account. Mr Pugaz claimed that he did not receive from Kori the

quotation for the excess steel materials dated 27 July 2016 and alleged that the said quotation was manufactured after this action was commenced. He asserted that the agreed price for the excess steel materials was only $245 per metric tonne and that PPE was required to pay Kori only $137,244.01 for the 560.098 metric tons of excess fabricated steel materials supplied by Kori. In para 22 of his AEIC, Mr Pugaz, who claimed that he agreed to take over the goods only because Kori was unable to pay his bills, stated as follows:

> When the Defendant was unable to pay the Plaintiff, the Defendant then proposed to the Plaintiff to sell part of its scrap beams at S$245 per metric tonne and to use the money to set-off on the sums owing by the Defendant to the Plaintiff. The Plaintiff agreed to this and took possession of the Defendant's scrap beams of about 560.098 tonnes and sold it at S$245 per metric tonne for about S$137,224.01. This sum is to be set-off from the Plaintiff's claim against the Defendant.

96 Regardless of whether or not Kori's quotation was sent to PPE or received by the letter, it is for Kori to prove its case that the agreed price for the excess fabricated steel materials was indeed $1,200 per metric tonne and it clearly failed to do so. Kori could have asked PPE to confirm its acceptance of the offer to sell the goods at $1,200 per metric tonne by signing the quotation and returning it but it did not do so.

97 Kori submitted that it is not possible that it had agreed to sell the excess metal to PPE for only $245 because it had offered the same type of excess metal to other buyers for $1,200 per metric tonne. However, Kori could only point to one other company, namely Fuchiang Construction Pte Ltd ("Fuchiang"), which, according to it, had purchased its excess fabricated steel materials at $1,200 per metric tonne. A copy of Kori's delivery order and tax invoice with respect to this sale to Fuchiang, a company in which Kori's holding company was formerly a shareholder, was furnished to the

court. However, no one from Fuchiang was called by Kori to prove the documents. When cross-examined on why no one from Fuchiang was called to testify and prove Kori's claim that excess fabricated steel materials were sold to that company at $1,200 per metric tonne, Kori's Mr Hooi's testimony was not helpful as he merely stated as follows:[19]

> Q: Now, in your affidavit you mentioned that you sold similar steel to Fuchiang Corporation for $1,200 per metric ton.
>
> A: Yes, we did.
>
> …
>
> Q: And why haven't you call anyone from Fuchiang Corporation to Court to confirm that they bought it for $1,200?
>
> A: Because the company now is in default or should I say in liquidation.
>
> Q: Well, you're still entitled to call the liquidator to come to Court.
>
> A: Oh, yes, I could do that, yes.
>
> ….
>
> Q: Yes, and my question is: Why haven't you done so?
>
> A: I don't see a need … now.
>
> Q: Okay, you don't see a need, that's fine.
>
> A: Yes.

98 Kori could have called an expert witness to testify that the excess fabricated steel materials that it sold to PPE was worth $1,200 per metric tonne in the market or any amount near this figure.

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[19] NE, Day 2, 19 October 2017, p 52, lines 18-19 and 28-32, p 53, lines 3-6.

99 PPE contended that the excess fabricated steel materials were used for scrap steel of such short lengths that they were only useful if they were melted down. As such, the scrap steel could not have been sold at the price suggested by Kori. It introduced evidence to show that it sold the goods to Neo Hardware for only $245 per metric tonne and asserted that it could not have agreed to pay $1,200 per tonne as this would have resulted in a massive loss to it.

100 PPE's witness, Mr Neo Cheng Kang ("Mr Neo"), the director of Neo Hardware, who has been in the business of buying and selling scrap metal for 40 years, stated in paras 5 and 6 of his AEIC as follows:

> 5. In July and August 2016, I purchased the scrap steel from [PPE] at $245 per ton and on one occasion I purchased at $220 per ton. I buy scrap metal from about 20-30 suppliers and in July and August 2016, the rate that I paid for scrap metal was around $245 per ton. It varies slightly due to the quality of the steel. I confirmed that I paid $245 per ton for [PPE's] scrap steel and exhibit the weigh tickets produced by my Company for each consignment purchased which shows the unit price per ton paid.
>
> 6. I sell the scrap steel to NatSteel and for the consignment from [PPE], this was sold at about $280 per ton. I understand that the Defendant in this case has alleged that they sold the scrap steel to [PPE] at $1,200 per ton. I find that unlikely to be true as the Defendant's scrap steel could not be sold for such an amount.

101 When cross-examined on his purchase of the excess fabricated steel materials from PPE, Mr Neo explained that after inspecting the goods that PPE wanted to sell to him, he found that the steel was only fit to be sold as scrap. He also explained that most of the pieces of steel were shorter than 7 metres and that the steel was less valuable as they were not "clean" in the sense they had attachments such as welded joints and brackets. The relevant part of his evidence during cross-examination[20] is as follows:

> Q. Then if I turn you to page 403 or 142, if you looking at small number, the first item is 7.2 metres in length, yes?
>
> A: Yes, first one.
>
> Q: So this is something that you could reuse and resell. Because you say anything above 7 metres.
>
> A: Actually, if we buy for reuse, should be big quantity, maybe 100 number, 200 number. Few piece will not get the price. Like that. Should be big quantity.
>
> Q: So, now you are saying that whether you buy it for reusing doesn't depend on the size alone?
>
> A: Actually, all these he sell me are all scrap one because got attachment. What we buy is new one, no attachment.
>
> Court: What do you mean by "got attachment"?
>
> Witness: "Attachment" that mean that got may welding, weld, all cannot be used one, that's why.
>
> Q: The welding is … the reinforcement to the beams, isn't it?
>
> A: Yah yah, this one are all weld attachment. That means they will put bracket, H-beam, angle bar. Cannot be used one. Yah.

102 Admittedly, Mr Neo was not consistent on some matters. For instance, he initially accepted that he only bought and sold scrap but subsequently said that when he gets good steel, he would also buy and sell the same. Notwithstanding this, I accept that there would be no reason for a professional scrap metal dealer such as Mr Neo to sell the excess steel materials in question to Natsteel for $280 per metric tonne if the said materials were, as Kori claimed, worth as much as $1,200 per metric tonne.

103 I find that Kori did not prove that the excess steel was sold to PPE at $1,200 per metric tonne and I accept PPE's evidence that the price of the

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[20] NE, 12 March 2018, p 20 lines 12-28, p 21, lines 1-8.

excess fabricated steel materials was $245 per metric tonne. As such, the sum of $137,224.01 payable by PPE to Kori for the said goods should be taken account in determining the amount payable by Kori to PPE for the steel fabrication work under the Fabrication Contract.

Costs

104 PPE's claim under the Manpower Contract was settled during the trial while it succeeded in its claim for work done after March 2016 under the Fabrication Contract. As for Kori, it settled its claim for $543.73 in respect of disbursements made on behalf of PPE but failed to prove that the entire sum claimed under its counter-claim for the sale of excess steel to PPE was due to it. After taking all the circumstances into account, I order Kori to pay PPE 80% of the costs of the action.

Tan Lee Meng
Senior Judge

Andrew J Hanam (Andrew LLC) for the plaintiff;
Twang Kern Zern and Simone B Chettiar (Central Chambers Law Corporation) for the defendant.