Geocon Piling & Engineering Pte Ltd (in compulsory liquidation) *v* Multistar Holdings Ltd (formerly known as Multi-Con Systems Ltd) and another suit
[2015] SGHC 111

Case Number	: Suit No 65 of 2011 (Summons No 6292 of 2014) consolidated with Suit No 500 of 2011
Decision Date	: 04 May 2015
Tribunal/Court	: High Court
Coram	: Vinodh Coomaraswamy J
Counsel Name(s)	: Leo Cheng Suan and Teh Ee Von (Infinitus Law Corporation) for the plaintiff in Suit No 65 of 2011 and for the defendant in Suit No 500 of 2011; Govindarajalu Asokan (Gabriel Law Corporation) for the defendant in Suit No 65 of 2011 and for the plaintiff in Suit No 500 of 2011.
Parties	: Geocon Piling & Engineering Pte Ltd — … Defendant

Civil Procedure – Pleadings – Amendment

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 28 of 2015 was dismissed by the Court of Appeal on 21 October 2015. See [2016] SGCA 1.]

4 May 2015

Vinodh Coomaraswamy J:

1 The plaintiff in this suit has applied for leave to amend its statement of claim. Its application comes after trial and after the parties have exchanged written closing submissions, but comes just before the parties present their oral closing submissions. The defendant resists the plaintiff's application. It argues that granting leave at this late stage will cause it prejudice for which it cannot be compensated by costs.

2 Having heard the parties' submissions, I have granted the plaintiff leave to make its amendments. I have done so for four reasons:

(a) The amendments serve merely to: (a) incorporate into the pleadings two undisputed facts known at all times to both sides and which they have both dealt with at trial; and (b) adopt as a n alternative element of the plaintiff's case the defendant's pleaded case on liability while putting in issue certain elements of the defendant's case on quantum.

(b) The only new issues which the amendments raise are issues of law, not of fact. The amendments therefore do not alter the plaintiff's case in any way which is unfair to the defendant even though they come after the conclusion of the evidential phase.

(c) The plaintiff does not seek to reopen the evidential phase of this suit to adduce or elicit evidence to support any of its amendments. It is prepared for its amended case to stand or fall on the evidence already adduced. I have also allowed the defendant an opportunity to address me on any specific points arising from the amendments which it says necessitates reopening the evidential phase.

(d) I have ordered the plaintiff to pay to the defendant the costs of and incidental to this application and the costs thrown away by the amendments. These costs include not only the defendant's costs associated with the application itself but also the defendant's consequential costs of responding to and dealing with the plaintiff's amendments. The latter costs, in turn, will include a reasonable amount for costs which the defendant reasonably incurs in reopening the evidential phase, if the defendant is able to establish that it needs to do so.

3 I have also rejected a belated submission by the defendant – made by way of a request to present further arguments – that I should not have granted leave to the plaintiff to amend its statement of claim because the relevant limitation period has expired. I do not consider there is any merit in that submission, on whatever basis it may have been made.

4 The defendant has appealed against my decision. I now set out my grounds.

Factual background

The parties and their contractual relationship

5 The defendant in this suit is Multistar Holdings Limited ("Multistar"). Multistar is the parent company of a group of companies in the engineering and construction business.

6 The plaintiff in this suit is Geocon Piling & Engineering Pte Ltd ("Geocon"). Geocon is a wholly-owned subsidiary of Multistar. Until Geocon went into compulsory liquidation in 2006, it was the specialist piling sub-contractor in the Multistar group of companies.

7 In 2001, the Land Transport Authority awarded a contract known as C421 to SembCorp Engineers and Constructors Pte Ltd ("SembCorp"). SembCorp's scope of work under C421 was to construct a part of the Kallang Paya Lebar Expressway ("KPE") from the East Coast Parkway ("ECP") to Nicoll Highway. Its scope of work included, but was not limited to, the bored piling at all locations along this stretch of the KPE.

8 SembCorp subcontracted to Multistar the entire scope of its bored piling works under C421. The SembCorp/Multistar subcontract was a lump sum contract subject to variations. Its value was $27.48m.

9 Multistar subcontracted the entire scope of its work under the SembCorp/Multistar subcontract to Geocon. The Multistar/Geocon subcontract stipulated a price of $26m, but was otherwise expressly on the same terms as the SembCorp/Multistar subcontract. Therefore, it too was a lump sum contract subject to variations.

10 Geocon then subcontracted its entire scope of work under the Multistar/Geocon subcontract to Resource Piling Pte Ltd. The nominal value of the Geocon/Resource Piling subcontract was $18.7m. Multistar and Geocon accounted for the $7.3m difference between this value and the value of the Multistar/Geocon subcontract as a project management fee to be paid by Multistar to Geocon.

Multistar and Resource Piling bypassed Geocon

11 Given this chain of subcontracts, the flow of progress claims and payments under last two subcontracts ought to have been between Multistar and Geocon on their subcontract; and between Geocon and Resource Piling on their subcontract. But Multistar and Resource Piling treated each other from the outset as direct contractual counterparties. They bypassed Geocon entirely. What actually

happened was that Resource Piling presented its progress claims directly to Multistar and Multistar made its progress payments directly to Resource Piling. As Multistar made each of these payments, Multistar would back charge that payment to Geocon and Geocon would recognise an indebtedness to Multistar in the amount of that payment.

12 From time to time, Geocon rendered its own progress claims to Multistar under the Multistar/Geocon subcontract. These progress claims included Geocon's costs. Geocon, of course, did not actually incur any actual direct costs in performing its subcontract. Multistar was paying these costs directly to Resource Piling on Geocon's behalf. These costs claimed by Geocon were therefore incurred only in a notional sense. Geocon included these notional costs in its progress claims to Multistar purely to be in a position to set them off against its back charged indebtedness to Multistar, leaving only the project management fee due from Multistar to Geocon.

Litigation in 2004 with Resource Piling

13 Resource Piling's work did not proceed smoothly. It encountered especially difficult soil conditions at a location known as the ECP South Location. By late 2002, Resource Piling had stopped all work at that location. Despite this, Resource Piling continued its work at other locations during 2003 and into 2004. By the end of April 2004, however, Resource Piling had stopped all work at all locations.

14 Multistar took the position at that time that it was Multistar (and not Geocon) who was Resource Piling's contractual counterparty. In April 2004, Multistar commenced proceedings against Resource Piling alleging that it had abandoned the bored piling works in repudiatory breach of a contract between Multistar and Resource Piling.

15 Resource Piling rejected Multistar's position. It responded by commencing suit against both Geocon and Multistar. Its case was that its contract was with Geocon (not Multistar), that it had a contractual right to stop work because Geocon was in repudiatory breach of the Geocon/Resource Piling subcontract and that Geocon was therefore liable to it in damages.

16 All of this litigation was eventually consolidated and tried together before Tay Yong Kwang J. I shall refer to it as "the 2004 litigation". Resource Piling won the 2004 litigation. Tay J held that Resource Piling's subcontract was with Geocon and not with Multistar. He found Geocon to be in repudiatory breach of contract. He adjudged it liable to pay damages to Resource Piling. He assessed those damages in the net sum of $3.3m.

A liquidator takes control of Geocon

17 Geocon did not pay its judgment debt to Resource Piling. As a result, in June 2006, Resource Piling secured an order placing Geocon in compulsory liquidation on grounds of insolvency. Mr Tam Chee Chong was then appointed – and remains today – Geocon's liquidator.

18 The Multistar group captured all costs ultimately referable to the Multistar/Geocon subcontract in two cost ledgers maintained in its computerised accounting books and records. These two cost ledgers are known as GC1063 and GC1077. Broadly speaking, GC1063 captures Geocon's costs incurred from the very outset of the Multistar/Geocon subcontract in January 2002 until the end of April 2004, [note: 1] when Resource Piling stopped all work. GC1077 captures costs incurred from the beginning of May 2004 until the end of 2005. [note: 2]

19 The liquidator, as is his duty, has taken control of Geocon's accounting books and records.

Having reviewed them, and having taken expert advice, he has formed the view that Multistar still owes Geocon money under the Multistar/Geocon subcontract. He has therefore caused Geocon to bring this suit against Multistar. The net recoveries in this suit will go ultimately to benefit Geocon's creditors. Those creditors include, of course, Resource Piling.

20 This background makes it clear that, although this suit is in form an action brought by a wholly-owned subsidiary against its parent, it is in substance a suit brought on behalf of the creditors of an insolvent company against those who own it and who previously controlled it. I make this observation not because there is anything wrong in any of this. Multistar and Geocon are separate legal entities and have separate sets of debtors and creditors. Each is entitled in law to pursue its own interests, whether before liquidation or after liquidation. I make this observation only to explain why Multistar knows far more than Geocon itself about the Multistar/Geocon subcontract and about the manner in which Geocon accounted in its books and records for the financial aspects of the subcontract (see, *eg*, [32] below).

Geocon sues Multistar in 2011

Geocon's case

21 The liquidator ultimately quantified Multistar's debt to Geocon at $10.9m. Geocon demanded payment of $10.9m from Multistar in 2009. No payment was forthcoming. Geocon therefore commenced this suit in 2011.

Geocon's case on liability

22 Geocon's original case on liability in this suit is that, following Resource Piling's exit in April 2004, Geocon took over and completed Resource Piling's unfinished work on the basis that Multistar would reimburse Geocon for all costs incurred thereby. Geocon's case is that it is therefore entitled to recover these costs in full and that Multistar's liability to Geocon is not limited by the $26m lump sum price stipulated in the Multistar/Geocon subcontract.

Geocon's case on quantum

23 Geocon's statement of claim pleads three claims against Multistar which together total the $10.9m which Geocon demanded of Multistar in 2009. I need give only the briefest summary of each claim for present purposes. In doing so, I have rounded off the figures, even though this results in some small discrepancies in the arithmetic. I have also left out of account all amounts added or payable for goods and services tax.

24 Geocon's first claim against Multistar is for the sum of $1.8m [note: 3] being the sum due to Geocon on GC1063 which is said to remain unbilled and unpaid. Geocon's second claim is for the sum of $6.75m, [note: 4] being the total due to Geocon on GC1077, which is said to remain unbilled and unpaid. Geocon's third claim is an assertion that it is entitled to recover from Multistar the amount of $2.3m, [note: 5] being an amount overcharged by Multistar. Geocon's total claim of $10.9m is the sum of these three claims.

25 In addition to these three claims, Geocon advances a fourth claim. The fourth claim is that Geocon has never, as alleged by Multistar, agreed to bear a discount of $1.8m [note: 6] out of a total discount of $1.9m which Multistar agreed to give SembCorp under the SembCorp/Multistar contract. Geocon's fourth claim is not a component of the total of $10.9m which Geocon claims in this suit.

That is because the fourth claim is not a claim in the true sense of the word. It is, in fact, the pre-emptive rejection of an anticipated set-off.

Multistar's defence and counterclaim

26 Multistar's defence to Geocon's claim runs along two lines.

Limitation defence

27 Multistar's threshold point is that all of Geocon's claims are time-barred under s 6(1)(a) of the Limitation Act (Cap 163, 1996 Rev Ed), the causes of action having accrued more than 6 years before these proceedings were commenced. If Multistar succeeds on this point, of course, Geocon's claim fails entirely.

Two alternative claims

28 In case Geocon's claims are held not to be time-barred, Multistar sets up two alternative claims against Geocon, both as a defence and as a counterclaim. Both claims assert that it is actually Geocon who owes Multistar money. The first claim is that Geocon owes Multistar $0.86m. [note: 7] The second claim is that Geocon owes Multistar $0.66m. [note: 8]

29 Both of these alternative claims rest on the same fundamental point: Multistar never agreed to pay Geocon on the reimbursement basis for any of the work ultimately referable to the Multistar/Geocon subcontract. The result, Multistar says, is that Geocon was at all times contractually bound to deliver its entire scope of works under the Multistar/Geocon subcontract at a lump sum price of $26m [note: 9] subject only to the accepted variations. [note: 10]

30 Multistar's first alternative claim is not material for present purposes.

31 Multistar's second alternative claim adopts as its starting point the statement in Geocon's own audited accounts that Multistar owed Geocon $0.05m as at 31 December 2005. Multistar then deducts from that figure additional costs of $0.71m which it says it incurred after 31 December 2005 and which it claims to be entitled to back charge to Geocon. Multistar thus arrives at the sum of $0.66m [note: 11] which Geocon is said to owe Multistar.

32 The figure of $0.05m which appears in Geocon's audited accounts for the year ended 31 December 2005 is arrived at by taking the lump sum value of the Multistar/Geocon subcontract, adding the value of all variations accepted by Multistar and then deducting all of Multistar's actual payments to Geocon as well as the $1.8m discount (see [25] above) and certain back charges, set offs and cross claims asserted by Multistar. The detailed calculations which underlie this figure of $0.05m are not now material. It suffices to say that Multistar knows precisely how this figure is calculated even if Geocon – or more accurately, its liquidator – does not. Thus, even though this figure is taken from Geocon's audited accounts and is therefore ostensibly Geocon's figure, it is Multistar and not Geocon who first pleaded the detailed underlying calculations.

33 Only one of these underlying calculations is material for present purposes. If one starts with the lump sum value of the Multistar/Geocon subcontract plus accepted variations, and one then deducts only Multistar's *actual payments* to Geocon – thus leaving out of account the $1.8m discount as well as all of the back charges, set-offs and cross-claims asserted by Multistar – the result is that Multistar owes $6.8m to Geocon.

Geocon's reply

34 In its reply, Geocon pleads that even if, contrary to Geocon's primary case, its work under the Multistar/Geocon subcontract was not done on the reimbursement basis, Multistar nevertheless owes it the intermediate figure of $6.8m (see [33] above). The effect of this plea is implicitly to accept that Multistar's liability to Geocon is limited by the lump sum price under the Multistar/Geocon subcontract plus variations but to assert that Multistar has no right to deduct anything from that amount other than its actual payments to Geocon. As an alternative, Geocon claims in its reply the sum of $0.05m [note: 12] plus any of the discounts, back charges, set-offs or cross-claims which are implicit in that sum and which the court determines that Multistar is not entitled to apply.

35 Although Geocon's reply and defence to counterclaim is a single composite pleading, the averments I have summarised at [34] above are found only in Geocon's reply. Geocon does not repeat these averments or incorporate them by reference in its defence to counterclaim. But it is clear from the general tenor of Geocon's composite pleading that Geocon relies upon and pleads these averments not only by way of reply to Multistar's defence but also by way of defence to Multistar's counterclaim. Any submission that this pleading does not suffice for Geocon to rely on these averments as a defence to Multistar's counterclaim would be the height of arid technicality.

The trial

36 This suit was tried before me over 7 days in the course of 2014. Geocon adduced evidence from four witnesses of fact, two of whom gave evidence upon subpoena, and one expert witness. Multistar adduced evidence from two witnesses of fact and one expert witness. Following the conclusion of the evidential phase, the parties in due course filed their written closing submissions. A date was then fixed for the parties to attend before me for oral submissions. Before I could hear the oral submissions, however, Geocon filed the present application seeking leave to amend its statement of claim.

Points taken by Multistar in closing submissions

37 Geocon's application to amend its statement of claim is prompted by two points made in Multistar's written closing submissions.

38 First, Multistar submits [note: 13] that Geocon's alternative claim for $6.8m (see [33] and [34] above) must fail on the pleadings alone. The effect of this alternative claim is to adopt Multistar's case that the Multistar/Geocon subcontract is a lump sum contract, and is subject to a lump sum price of $26m. This, Multistar submits, is inconsistent with Geocon's case advanced in its statement of claim. That case is that Geocon is entitled to be paid for the cost of completing Resource Piling's unfinished work on the reimbursement basis. Multistar submits that a plaintiff cannot, as a matter of pleading, advance two alternative claims which are wholly inconsistent with each other, let alone advance one claim in its statement of claim and the wholly inconsistent alternative claim only in its reply. Multistar therefore argues that Geocon's alternative claim for $6.8m must necessarily be dismissed.

39 The second point which Multistar raises is that Geocon has failed to adduce any evidence to support its pleaded case that Multistar engaged Geocon in April 2004 to complete Resource Piling's unfinished work on the reimbursement basis. This submission arises, at least in part, from a disconnect between Geocon's pleaded case that that engagement took place in April 2004 and the evidence which Geocon pleads in support of that case. I set out the background necessary to understand this

submission at [52]–[59] below.

Geocon applies to amend its pleadings

40 Geocon's amendments to its statement of claim respond to both of these points made by Multistar's. They fall into two broad categories.

41 The first category of amendments acknowledges for the first time in Geocon's pleadings that Resource Piling ceased work in two stages (see [13] above). These amendments therefore draw a distinction between Resource Piling ceasing work at the ECP South Location at the end of 2002 and at all other locations in April 2004.

42 The second category of amendments puts forward four additional alternative claims against Multistar. These additional alternative claims are as follows:

(a) Geocon's first additional alternative claim is for the sum of $8.6m. This amounts to nothing more than withdrawing [note: 14] its third claim. Thus, Geocon derives the $8.6m simply by adding its first claim to its second claim and omitting its third claim.

(b) Geocon's second additional alternative claim pleads that Multistar is indebted to it in the sum of $0.05m (see [31] above). That figure is Multistar's indebtedness to Geocon as recorded in Geocon's own accounts for the year ended 31 December 2005. This claim is founded on the same basis as Multistar's counterclaim for $0.66m but rejects Multistar's entitlement to deduct $0.71m (see [31] above).

(c) Geocon's third additional alternative claim transplants without any change its claim for $6.8m (see [34] above) from its reply into its statement of claim. Geocon thus claims in its statement of claim that Multistar is indebted to it in the sum of $6.8m.

(d) Geocon's fourth alternative claim pleads expressly, in the body of the statement of claim, the content of an existing prayer that Geocon's damages be assessed.

43 Of these four additional alternative claims, it is only the second and third which are material. These two now advance in Geocon's statement of claim the alternative case that Geocon is entitled to be paid on the lump sum basis. That case has been found until now only in its reply.

44 To explain why I have granted Geocon leave to make the amendments to its statement of claim in both categories, I begin by setting out the principles of law which I have applied in exercising my discretion.

Geocon's application for leave to amend

The law on amending pleadings

45 In the typical case, a party will be allowed to amend its pleadings if the amendments enable the real issues between the parties to be tried and will not cause any prejudice to the opposing party for which it cannot be compensated by costs. As the Court of Appeal said in *Wright Norman and another v Oversea-Chinese Banking Corp Ltd* [1993] 3 SLR(R) 640 at [6]:

> It is trite law that an amendment which would enable the real issues between the parties to be tried should be allowed subject to penalties on costs and adjournment, if necessary, unless the

amendment would cause injustice or injury to the opposing party which could not be compensated for by costs or otherwise: see *Cropper v Smith* (1884) 26 Ch D 700; *Tildesley v Harper* (1878) 10 Ch D 393. This is so even though the omission was caused by carelessness or the application for amendment was made very late in the day: per Brett MR in *Clarapede & Co v Commercial Union Association* [1883] 32 WR 262 at 263.

46 The present case is not, however, the typical case. Geocon's application to amend comes at a very late stage. It comes after a seven-day trial at which both parties adduced extensive factual and expert evidence. It comes after the parties have exchanged their principal and reply written closing submissions. It comes while the parties are waiting for an opportunity to make oral submissions. Further, the amendments have been proposed to meet and deflect two specific attacks on Geocon's case which Multistar set out in its closing submissions.

47 Geocon submits that even though the evidential phase in this suit has closed, I ought to grant it leave to make these amendments. Geocon does not seek to reopen the evidential phase of the trial to adduce or elicit further evidence to support the amendments. Geocon argues that the amendments do not change its case in any way which takes Multistar by surprise. Multistar can be readily compensated by costs for any prejudice it may suffer.

48 Multistar rejects this submission.

49 Geocon relies for its submission on *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594 ("*Digilandmall.com*"). In that case, VK Rajah JC (as he then was) granted a defendant leave to amend its pleadings after the evidential phase had concluded. He held that the lateness of the application was not determinative in itself but was only one factor for the court to consider in exercising its wide discretion to allow amendment. The overarching consideration was whether, in all the circumstances, the amendment operated unfairly to the opposing party. Thus, he said at [84]–[88]:

> 84 It is axiomatic that a court will generally be cautious if not reluctant to effect any amendments once the hearing has commenced; even more so once the evidential phase of the proceedings has been completed. Lord Griffiths in *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 220 stated:
>
> > [T]o allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.
>
> 85 Having stated the general rule, it is imperative that the rationale underlying this approach be understood. Rules of court which are meant to facilitate the conduct of proceedings invariably encapsulate concepts of procedural fairplay. They are not mechanical rules to be applied in a vacuum, devoid of a contextual setting. Nor should parties regard pleadings as assuming an amoeba-like nature, susceptible to constant reshaping. Rules and case law pertaining to amendments are premised upon achieving even-handedness in the context of an adversarial system by:
>
> > (a) ensuring that the parties apprise each other and the court of the essential facts that they intend to rely on in addressing the issues in controversy or dispute;
> >
> > (b) requiring that an amendment should be attended to in the usual course of events, at an early stage of the proceedings, to ensure that no surprise or prejudice is inflicted on or

caused to opposing parties;

(c) requiring careful consideration whether any amendments sought at a late stage of the proceedings will cause any prejudice to the opposing party. Prejudice is to be viewed broadly to encompass any injustice and embraces both procedural and substantive notions;

(d) recognising that while a costs award against the party seeking late amendments can frequently alleviate any inconvenience caused, this may not always be appropriate;

(e) taking into account policy considerations that require finality in proceedings and proper time management of the courts' resources and scheduling. From time to time there will be cases where this is an overriding consideration.

In short, where does the justice reside? There is constant tension in our legal system to accommodate the Janus-like considerations of fairness and finality.

86 In cases where the facts raised in the proposed amendments have been addressed during the evidence and submissions and, particularly, where the opposing side has also had an opportunity to address the very same points, there can hardly ever be any real prejudice. The pleadings, in such instances, merely formalise what is already before the court. As a matter of fairness, allowing amendments at a late stage should usually go hand in hand with granting leave to the other party to adduce further evidence, if necessary. Altogether different considerations may arise if a party, at a late stage, seeks through an amendment to adduce further evidence to support that same amendment. A court is not likely to take a sympathetic view of such manner of amendment. The point is, there is a chasm between a clarification amendment and a new or distinct issue being raised at a later stage.

87 ... The essential point remains: will prejudice be caused and/or are any policy considerations called into play. *The essence is not so much in the nature of the amendment but rather in the consequences flowing from any amendment to the pleadings*. There is often, but not inexorably, a co-relationship between the timing when the amendment is sought and the adverse consequences for the other party. The later the amendment, the greater the adverse consequences.

88 The fact that the amending party has been tardy or even negligent is a factor that a court can (and in some egregious cases, should) take into account but this is by no means a decisive factor (*cf Ketteman v Hansel Properties*). The current general approach is correctly stated in Professor Jeffrey Pinsler's *Singapore Court Practice 2003* (LexisNexis, 2003) at para 20/5/7:

An amendment may be allowed even after both parties have made their closing submissions.

[emphasis in original]

50 The Court of Appeal dismissed the plaintiff's appeal against VK Rajah JC's decision. In doing so, it applied and therefore implicitly endorsed the principles set out in the passage I have cited (see *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502 at [101]–[103]).

51 I accept that this passage accurately summarises the principles that I must apply to determine Geocon's application to amend. Applying these principles, I accept Geocon's submission that allowing these amendments causes no prejudice to Multistar for which it cannot be compensated by costs. I shall explain why I have arrived at this conclusion, taking each category of amendments in turn.

First category: Geocon's case on the reimbursement basis

Geocon's original case

52 Geocon's original case is that Multistar engaged Geocon in April 2004 to complete Resource Piling's unfinished work on the reimbursement basis. The heart of Geocon's claim is set out in paragraphs 11, 12 and 14(ii) of its statement of claim. The first category of amendments affects each of these paragraphs. But none of these amendments changes the fundamental nature of this aspect of Geocon's case.

53 Paragraphs 11, 12 and 14(ii) of Geocon's unamended statement of claim read as follows:

> 11. Sometime around April 2004, disputes arose between Resource Piling / the Defendants over the Resource Piling Sub-contract. As a result, Resource Piling ceased work for Contract C421.
>
> 12. Following Resource Piling's exit, the Defendants engaged the Plaintiffs to complete the remaining work at Contract C421. This contract was referred to internally between the Plaintiffs and the Defendants as GC1077.
>
> ...
>
> 14. In [the 2004 litigation], the following evidence was given by Tan in his Affidavit of Evidence in Chief dated 8 November 2005 ("Tan's AEIC"):
>
> ...
>
> (ii) After Resource Piling ceased the works for Contract C421, the Defendants engaged the Plaintiffs to complete the remaining works for Contract C421 "*on a purely reimbursement basis*" (Paragraph 47 of Tan's AEIC).
>
> [emphasis in original]

Mr Tan Hang Meng

54 The "Tan" referred to in paragraphs 14 and 14(ii) is Mr Tan Hang Meng. "Tan's AEIC" is a reference to Mr Tan's affidavit of evidence in chief filed on 8 November 2005 in the 2004 litigation.

55 I should say something now about Mr Tan's role at the material time. Mr Tan wore many hats. He was the managing director of Multistar. He was the Multistar group's project director for its work for SembCorp on the KPE. He signed the SembCorp/Multistar subcontract on behalf of Multistar. [note: 15] He also signed the letter of award for the Multistar/Geocon subcontract on behalf of Multistar. At the same time, he was a director of Geocon. Although he was not Geocon's managing director, he signed the letter of award [note: 16] for the Geocon/Resource Piling subcontract ostensibly in that capacity. Both Multistar and Geocon relied on Mr Tan's evidence in the 2004 litigation.

The disconnect in Geocon's original pleading

56 In its original statement of claim, Geocon cites Mr Tan's words "purely reimbursement basis" taken from paragraph 47 of his 2005 affidavit as evidence supporting its case that Multistar engaged Geocon in April 2004 to complete Resource Piling's unfinished work on the reimbursement basis. In full,

paragraph 47 of Mr Tan's 2005 affidavit reads as follows:

> In the end, it was decided that [Multistar] would engage Geocon to carry out the [works at the ECP South Location] at a lower and more competitive rate than that quoted by [a third party]. This was possible because [Multistar] was able to leverage on its status as Geocon's parent company to *engage Geocon on a purely reimbursement basis*. Accordingly, [Multistar] was only liable to reimburse Geocon for all costs and expenses directly incurred by Geocon in the course of carrying out the [works at the ECP South Location].
>
> [emphasis added]

57 There is a disconnect between paragraphs 11 and 12 of Geocon's original statement of claim and paragraph 14(ii)'s citation of paragraph 47 of Mr Tan's 2005 affidavit. Paragraphs 11 and 12 plead that Resource Piling stopped work altogether in April 2004, following which Multistar engaged Geocon to complete Resource Piling's unfinished work. That is factually accurate: Resource Piling did stop work altogether in April 2004, following which Multistar did arrange for Geocon to complete Resource Piling's unfinished work.

58 The disconnect arises because paragraph 47 of Mr Tan's 2005 affidavit has nothing to do with Multistar engaging Geocon in or around *April 2004* to complete *all* of Resource Piling's unfinished work. Instead, it describes Multistar engaging Geocon to complete Resource Piling's works at the *ECP South Location* in *late 2002*. That is not the point of time or the scope of the engagement pleaded in paragraphs 11 and 12 of the statement of claim.

59 It is in paragraph 54 of his 2005 affidavit, not paragraph 47, that Mr Tan deals with the basis on which Multistar engaged Geocon to complete Resource Piling's unfinished work in April 2004. He says there:

> Given the lack of other viable alternatives and the urgency of the situation, [Multistar's] only practical recourse was to engage Geocon to take over the balance works, as Geocon was ... also carrying out the [works at the ECP South Location]. Accordingly, Geocon already had manpower mobilized at the Project site, and by that time also already had the necessary equipment and machinery to carry out bored piling works. The completion of the balance works abandoned by Resource Piling *was carried out at additional costs to [Multistar]*.
>
> [emphasis added]

Multistar's expert understands Geocon's original case

60 Despite this disconnect, however, Multistar clearly understood from the outset that Geocon's claim on the reimbursement basis is that Multistar is not entitled to rely on a lump sum price but is obliged to pay Geocon on the reimbursement basis for completing *all* of Resource Piling's unfinished work, whether in 2002 or in 2004. [note: 17]

61 Multistar's expert, Mr Ian Ness, is well aware that Geocon's original case is pleaded in paragraph 12 of its statement of claim and is that Multistar engaged Geocon on the reimbursement basis. He thus says in his report (with footnotes omitted):

> 26. ... Geocon makes a claim against [Multistar], in its pleadings, for its work done based on the actual cost of the works as shown in its books (i.e. the cost reimbursable method) whereas [Multistar] pays Geocon a fixed amount for the work done (i.e. the lump sum method) in

accordance with the terms of the [Multistar/Geocon subcontract].

27. For clarity, 'the cost reimbursable method' is a payment methodology in which all costs actually incurred in undertaking the work are paid to that party, whilst 'the lump sum method' is a payment methodology in which an agreed, predetermined fixed sum is paid for the work.

28. Thus, whilst the actual cost of the work is critical to Geocon's case, this is not relevant at all to [Multistar's] case.

29. Conversely, whilst maintaining the lump sum price expressly shown in the [Multistar/Geocon subcontract] is critical to Multistar's case, this is not at all relevant to Geocon's case.

62 Further, Mr Ness also clearly understands that Geocon's original case is that Multistar agreed to reimburse Geocon for any extra costs incurred in completing Resource Pilings' work, *whenever and wherever those extra costs were incurred*. Thus, at paragraphs 41 to 44 of his expert report, Mr Ness says this (footnotes again omitted) with reference to Geocon's original pleading:

41. By the pleading of Geocon, the [Multistar/Geocon subcontract] it may appear was varied/changed from the fixed lump sum remuneration expressly described in [that contract] to a cost reimbursable contract, and hence all costs incurred to complete the works (as taken into Geocon's books) are also income directly payable by [Multistar] to Geocon.

42. At first blush, this pleading by Geocon is, in the industry, very surprising since it means that whilst the [Multistar/Geocon subcontract] made Geocon liable to complete the 'entire' bored pile works for the lump sum of $26 million (and any extra costs incurred by Geocon to do this because of Resource Piling's departure would be to Geocon's account), Geocon's position is that now with GC 1077 [Multistar] had agreed in May 2004 to invert this arrangement and transfer the entire risk of any extra costs caused by Resource Piling's departure onto itself, with no consideration at all, *and to backdate that arrangement to the start of work in January 2002*.

43. With no consideration, from my years and experience in this industry, I cannot see any reason why [Multistar] would have had [sic] willingly accepted such an arrangement. I am instructed that [Multistar] did not agree to such an arrangement.

44. Further, from my review of the contemporaneous documents, based on industry practice, it would seem that Geocon and [Multistar] did not have such an arrangement and the only arrangement was a lump sum contract. …

[emphasis added]

63 I draw particular attention to Mr Ness's understanding, expressed in the last sentence of paragraph 42 of his report, that Geocon's case was that Multistar arranged for Geocon to complete *all* of Resource Pilings' unfinished work on the reimbursement basis and "backdate[d] this arrangement to the start of work in January 2002".

64 Mr Ness expresses his expert opinion, in this passage, that Multistar would have had no reason to agree to any such arrangement willingly. After this passage, he sets out a series of detailed reasons why it is his expert view that Multistar did not in fact agree to this arrangement. To the extent that that evidence is relevant and admissible, it is therefore already before me.

Geocon's amended case

65 Geocon now proposes to amend its case on the reimbursement basis. Geocon's amendments to paragraphs 11, 12 and 14(ii) of the statement of claim read as follows:

> 11. Sometime around October 2002 ~~April 2004~~, disputes arose between Resource Piling and the Plaintiffs / the Defendants over the Resource Piling Sub-contract. As a result, Resource Piling ceased work at the ECP South Location of the works. Further disputes arose in April 2004 after which Resource Piling ceased work for Contract C421 altogether.
>
> 12. Following Resource Piling's exit in April 2004, the Defendants engaged the Plaintiffs to complete the remaining work at Contract C421. This contract was referred internally between the Plaintiffs and the Defendants as GC1077.
>
> ...
>
> 14. In [the 2004 litigation], the following evidence were [sic] given by [Mr Tan] in his Affidavit of Evidence in Chief dated 8 November 2005 ("Tan's AEIC"):
>
> ...
>
> (ii) After Resource Piling ceased the works ~~for Contract C421~~, the Defendants engaged the Plaintiffs to complete the works at the ECP South Location ~~remaining works for Contract C421~~ "*on a purely reimbursement basis*" (Paragraph 47 of Tan's AEIC) and the remaining works for Contract C421 " *at additional costs to [Multistar]* " (Paragraph 54 of Tan's AEIC).
>
> [emphasis in original]

Amendments to paragraph 11

66 It is an undisputed fact that Resource Piling ceased work at the ECP South Location in October 2002. Pleading that undisputed fact in paragraph 11 does not change Geocon's case for reimbursement. It is merely additional factual background. Whether under the original or the amended statement of claim, Geocon's case for reimbursement does not turn on a distinction between reimbursement for completing Resource Piling's work left unfinished at the ECP South Location in late 2002 and reimbursement for completing Resource Piling's work left unfinished at all other locations in April 2004. Instead, Geocon's case – both before and after the amendment – is that Multistar agreed to reimburse Geocon for the cost of completing *all of Resource Piling's unfinished work, whenever and wherever incurred*. Mr Ian Ness well understood that aspect of Geocon's original case (see [63] above). These amendments do not change that case.

67 By the same token, Multistar's defence too does not turn on any distinction in Geocon's claims for reimbursement for work done to complete Resource Piling's unfinished work at the ECP South Location starting at the end of 2002 or to complete Resource Piling's unfinished work at all other locations starting in April/May 2004. Multistar's defence is simply that the basis of the parties' contractual relationship did not change at *any* time and that Multistar *never* engaged Geocon on the reimbursement basis. [note: 18] On Multistar's case, Geocon did all of the bored piling work at all of the locations and at all times subject to the lump sum price stipulated in the Multistar/Geocon subcontract, save only for variations. This is Multistar's defence both for the work which Geocon did through Resource Piling as its subcontractor and for the work which Geocon later did itself to complete Resource Piling's unfinished work.

68 The worst that can be said of the amendment to paragraph 11 is that it is unnecessary

background. It clearly gives rise to no prejudice for which Multistar cannot be compensated by costs.

Amendments to paragraph 12

69 Inserting "April 2004" by amendment into paragraph 12 of Geocon's statement of claim also does not change Geocon's claim for reimbursement. Read unamended and in its original context, paragraph 12 clearly refers to an engagement at a point in time *following* Resource Piling's exit in *April 2004*, the only date which is pleaded in the original paragraph 11. The references to the events of 2002 inserted by amendment into paragraph 11 make it necessary to restate the April 2004 date in paragraph 12 to ensure that it retains its original meaning.

70 The worst that can be said of the amendment to paragraph 12, therefore, is that it is a necessary restatement Geocon's *unaltered* case arising from the unnecessary background pleaded in paragraph 11. It gives rise to no prejudice for which Multistar cannot be compensated by costs.

Amendment to paragraph 14

71 Citing paragraph 54 of Mr Tan's 2005 affidavit (see [59] above) by amendment in paragraph 14(ii) also does not change Geocon's case. This amendment serves only to address the disconnect I identified at [57] above. That disconnect is the discrepancy between the date of April 2004 on which Geocon says Multistar engaged Geocon on the reimbursement basis as pleaded in paragraph 12 and the time to which Mr Tan refers in paragraph 47 of his 2005 affidavit. This is merely a matter of evidence: all that the disconnect means is that the original paragraph 14(ii) refers to evidence which fails to support Geocon's case. It is not a disconnect in the internal logic of Geocon's case.

72 Addressing this evidential disconnect by amending paragraph 14(ii) to cite both paragraphs 47 and 54 of Mr Tan's 2005 affidavit changes nothing in Geocon's case. First, Geocon's statement of claim pleads that Multistar engaged Geocon to complete Resource Pilings' unfinished work in only one paragraph and at only one point in time: in paragraph 12 and in April 2004. That remains the case even after the amendments. There is no new pleading, for example, that Multistar *also* engaged Geocon *separately* to finish Resource Pilings' unfinished work at the ECP South Location in late 2002. The amendment to paragraph 14(ii) does not ascribe any contractual effect to either paragraph 47 or to paragraph 54 of Mr Tan's 2005 affidavit. It merely pleads those paragraphs as *evidence* that Multistar engaged Geocon in April 2004. That is an allegation of fact already pleaded in paragraph 12 of its statement of claim. That is so both before and after amendment.

73 Second, Geocon does not contend that there is any difference in meaning between the words it cites from paragraph 47 of Mr Tan's 2005 affidavit and those it cites from paragraph 54. [note: 19] Its amended pleading relies on both paragraphs as evidence that Multistar engaged Geocon on the reimbursement basis. The only difference between those two paragraphs, on Geocon's case, is the point in time referenced in each paragraph. It has been Geocon's case throughout that Multistar agreed to reimburse Geocon for its costs incurred in completing *all* of Resource Piling's unfinished work. The amendment merely cites paragraph 54 as additional evidence of this.

74 There is one further amendment in this category which Geocon proposes. That amendment is to paragraph 33 of its statement of claim. The amendment is as follows:

> … There appears to have been no commercial reasons for the Plaintiffs to agree to the alleged discount $1,802,901.51 as the Plaintiffs were engaged by the Defendants '*on a purely reimbursement basis*' and ' *at additional costs to [Multistar]* as stated in Tan's AEIC (refer to paragraph 14(ii) above). [emphasis in original]

The insertion of the underlined phrase merely echoes in paragraph 33 of the statement of claim the same words which are quoted from paragraph 54 of Mr Tan's 2005 affidavit and which are to be inserted into paragraph 14(ii). It is Geocon's case that the words "at additional costs to [Multistar]" mean precisely the same thing as "on a purely reimbursement basis". The same analysis I have applied to the proposed amendment to paragraph 14(ii) applies also to the proposed amendment to paragraph 33.

These amendments raise only issues of law, not fact

75 The only effect of these amendments is to introduce additional issues for me to resolve in coming to a final determination on whether Multistar engaged Geocon in April 2004 to complete Resource Pilings' unfinished work on the reimbursement basis. But all of these additional issues are issues of law, both procedural and substantive.

76 The amended pleadings require me to determine the following additional issues of law: (i) whether what Mr Tan said in paragraph 54 of his 2005 affidavit has been proven and is properly in evidence before me; and if so, (ii) whether those words said in 2005 describe a new contractual relationship between the parties entered into in 2004; (iii) what that contractual relationship is; (iv) whether that contractual relationship entitles Geocon to claim reimbursement from Multistar for the costs of completing Resource Piling's unfinished work; and (v) which costs fall within the scope of that contractual relationship. All of these are issues of law. I can determine all of these issues of law without reopening the evidential phase. All that I require are additional submissions from the parties.

Geocon does not seek to adduce fresh evidence

77 It is a crucial point that Geocon does not ask for an opportunity to adduce further evidence to support its amended case. It merely seeks leave, after the close of the evidential phase, to incorporate additional material in its pleadings. Geocon is therefore prepared for its case to stand or fall on the evidence which is now before me.

78 This is a significant factor in Geocon's favour (see *Digilandmall.com* at [86]) and one which I place significant weight upon.

Multistar does not need to adduce fresh evidence

79 I now consider whether Multistar (as opposed to Geocon) needs to adduce any additional evidence of fact or opinion in order to deal with this first category of amendments. It is my view that Multistar does not.

No factual evidence needed

80 No additional evidence is required on the factual background to be introduced by amendment to paragraphs 11 and 12. Those facts are undisputed. Indeed, it is counsel for Multistar who took pains during the evidential phase to elicit in his cross-examination of both the factual and the expert witnesses the fact that Resource Piling stopped work in the two stages described at [13] above. That issue has therefore been fully explored in cross-examination.

81 It is only in relation to the amendments to paragraph 14(ii) – and the echo in paragraph 33 – that Multistar may have to adduce additional evidence. Geocon's pleaded case, even after the amendments, is not a model of clarity. In particular, it is not clear whether Geocon's case is advanced on the basis that Multistar engaged Geocon to complete Resource Piling's unfinished work pursuant to

a fresh contract, separate and distinct from the Multistar/Geocon subcontract, or by way of a variation to the Multistar/Geocon subcontract. That is a matter which Multistar has already picked up on in its written closing submissions and is at liberty to expand upon in supplemental written submissions or in its oral closing.

82 Whatever Geocon's case on the mode of engagement, the only witness of fact whose evidence could conceivably be relevant to the terms of this engagement is Mr Tan himself. Mr Tan's evidence, however, is neither relevant nor admissible on the additional issues raised. Assuming in Geocon's favour that paragraph 54 of his 2005 affidavit is properly in evidence before me and is found to be evidence of the terms on which Multistar engaged Geocon in April 2004 to complete Resource Pilings' unfinished work, Geocon's case then requires me to ascertain those terms. But that is a question of law. My task in construing any contract is to ascertain objectively the intention of the parties. The evidence of Mr Tan as to the subjective contractual intent he meant to capture in paragraph 54 as at April 2004 is irrelevant and inadmissible.

83 Even if evidence from Mr Tan about what he meant in paragraph 54 of his 2005 affidavit were relevant and admissible, that evidence is already before me. Geocon called Mr Tan at trial upon subpoena as its own witness. Counsel for Geocon sought and obtained leave under s 156 of the Evidence Act (Cap 97, 1997 Rev Ed) to cross-examine Mr Tan. In the course of that cross-examination, Geocon's counsel put to Mr Tan these specific words in paragraph 54 of his 2005 affidavit. [note: 20] Mr Tan, in response, denied that he meant by those words that Multistar agreed in April 2004 to reimburse Geocon for completing Resource Piling's unfinished work. He expanded on his answer by reference to a particular paragraph of a new affidavit which he affirmed in January 2014 for the purposes of these proceedings. The result is that, even if Multistar were to submit that it is necessary to cross-examine Mr Tan on paragraph 54 of his 2005 affidavit and to put that paragraph to him, counsel for Geocon has already done that. All of that material is on the record, although its admissibility has not yet been ruled upon. The relevance, admissibility and weight of all of that evidence are ultimately matters for the parties to make submissions to me upon.

No expert evidence needed

84 No expert evidence is required or admissible on the additional issues of law raised. In their joint list of issues, both experts identify the following as the first issue before them on both GC1063 [note: 21] and GC1077: [note: 22] "[w]hether, upon a reading of [Mr Tan's 2005 affidavit], the original lump sum contract was varied to a cost reimbursable contract". Geocon's case on this issue in relation to both GC1063 and GC1077 is then summarised as follows:

> ... Geocon asserts that according to paragraph 47 of [Mr Tan's 2005 affidavit], [Multistar] engaged Geocon to complete the remaining works... 'on a purely reimbursement basis' i.e. that Geocon would be reimbursed all costs incurred on the project from the very first day of the project to the last day. ...

Both experts accept the obvious point that these are issues of law for me to decide. Their joint view is:

> The assertion is a legal issue and one, primarily, of evidence. This is outside the Experts' jurisdiction. However, the Experts have made comments and [expressed] views as to the various evidential elements of the assertion in their respective [affidavits of evidence in chief] ...

85 The comments which the experts have made and the views which they have expressed on this

issue are more in the nature of submissions than expert evidence. I have received them *de bene esse*, for what they are worth, rather than because I have concluded that they are strictly speaking admissible. To the extent that the views of the experts on this issue of law can legitimately be of any assistance to me at all, those views are already before me insofar as they relate to paragraph 47 of Mr Tan's 2005 affidavit. Geocon does not rely on paragraph 54 of Mr Tan's 2005 affidavit for any meaning different from t that which it attaches to paragraph 47.

86 I do not consider that I need any additional expert evidence at all on the legal significance of Geocon's reliance on paragraph 54 of that affidavit in addition to its initial reliance on paragraph 47 of that affidavit.

87 I turn now to the second category of amendments.

Second category: alternative claims on the lump sum basis

88 I have summarised at [42] above the four new additional alternative claims which Geocon's amendments put forward. I deal with the first and fourth additional alternative claims before turning to the second and third.

89 There is no rational basis on which to object to Geocon's first or fourth additional alternative claims. The first is simply an alternative quantification of Geocon's original claim on the reimbursement basis. It amounts simply to omitting Geocon's third claim for $2.3m by presenting an alternative case on quantum which comprises only its first claim and second claim (see [24] above). This amendment effects no change to Geocon's original case on liability. It is entirely within Geocon's prerogative to present an alternative case on quantum in this way.

90 The fourth additional alternative claim simply repeats, in the body of the statement of claim, the content of Geocon's existing prayer that damages be assessed. It does not, in itself, advance any positive case against Multistar, whether on the reimbursement basis or the lump sum basis, or any change in Geocon's case.

91 None of these amendments cause any prejudice to Multistar for which it cannot be compensated by costs.

Alternative inconsistent case does not offend common sense

92 It is only the second and third additional alternative claims to which any rational objection can be taken. The objection is that they are premised not on Geocon's existing case advanced on the reimbursement basis but instead adopt as part of Geocon's positive case the defence advanced by *Multistar* that the Multistar/Geocon subcontract is a lump sum contract subject only to variations. The effect of the amendments, Multistar submits, is that Geocon is attempting impermissibly to put forward a new alternative positive case which is inconsistent with its existing positive case.

93 Multistar's submission is misconceived. A plaintiff may legitimately plead inconsistent cases in the alternative so long as the inconsistency does not offend common sense. An obvious example which offends common sense is where the pleader asserts two inconsistent versions of the facts in a situation where he knows or must know that one version is false: *Ng Chee Weng v Lim Jit Ming Bryan and another* [2012] 1 SLR 457 at [37] following *Brailsford v Tobie* (1888) 10 ALT 194.

94 It does not offend common sense for Geocon to advance a claim on the lump sum basis in the alternative to its existing claim on the reimbursement basis. The point of divergence between the two

claims is a question of law, not a question of fact. The question of law will turn on the view I take of the legal significance and consequences of the largely undisputed facts before me. Because this is a question of law, it does not offend common sense for Geocon to say, in the same pleading, that Multistar engaged Geocon on the reimbursement basis for this work, alternatively that Multistar engaged Geocon on the lump sum basis for this work.

Alternative claims do not take Multistar by surprise

95 Multistar cannot object to Geocon's second and third alternative additional claims on the basis that they take Multistar by surprise. The figures comprised in both these claims are, in fact, aspects of Multistar's second alternative claim advanced in its own defence and counterclaim (see [31]–[32] above).

96 Thus, Geocon's second additional alternative claim for $0.05m is simply the figure taken from its own audited accounts for the year ended 31 December 2005 (see [31] above) which is the starting point for Multistar's second alternative claim. Geocon's decision to advance by amendment a positive case that Multistar owes Geocon $0.05m is simply the mirror image of Geocon losing its case on the reimbursement basis but succeeding in resisting Multistar's claim to be entitled to deduct $0.71m from this figure under its second alternative claim.

97 Similarly, Geocon's third additional alternative claim for $6.8m is simply an intermediate figure embedded in Multistar's own second alternative claim (see [32] above). Again, this positive case is simply the mirror image of Geocon conceding the deduction of all actual payments but successfully resisting the deduction of all discounts, back charges, set-offs and cross claims from the value which Multistar itself attaches to the Multistar/Geocon subcontract. Geocon joined issue on all of these figures in its reply and defence to counterclaim.

Witnesses have already dealt with these figures

98 Each figure comprised in Multistar's second alternative claim has been fully presented, attacked and defended at trial. They have each been expounded upon in the factual evidence, opined upon in the expert evidence, cross-examined upon in open court and submitted upon in the parties' written closing submissions.

99 Admittedly, all of this has taken place in the context of Multistar advancing its second alternative claim and Geocon resisting it by way of defence. But that cannot make a substantive difference. The result of either of these two additional alternative claims advanced by Geocon succeeding is equivalent to Geocon successfully defending in part against Multistar's second alternative claim. Thus, whether asserted by way of claim, counterclaim or defence to counterclaim, it remains the case that each party has applied all necessary rigour and vigour to test each figure.

Conclusion on amendments

100 For all the reasons given above, therefore, I am of the view that Geocon's amendments to its statement of claim will not cause any prejudice to Multistar for which it cannot be compensated by costs. Indeed counsel for Multistar was unable [note: 23] to specify in oral submissions just how his client could suffer any such prejudice. This is not due to any lack of opportunity to consider the amendments and to take instructions from Multistar or to consult Multistar's expert witness. Close to a month elapsed between the date on which Geocon filed and served its application on Multistar and the date of its hearing. [note: 24]

101 Instead of pointing to a specific instance of prejudice, counsel for Multistar attempted to rely on six general heads of prejudice. I cannot accept his submissions on any of the six. They are:

(a) Geocon is adding a case that Multistar is liable on a lump-sum basis as an alternative to its original case that it is liable on a reimbursement basis. [note: 25] I have dealt with and disposed of this argument at [92]–[98] above. Common sense is not offended. There is no prejudice caused.

(b) Multistar may have to reopen the evidential phase of this suit because all of the evidence that is now before me has gone in on Geocon's original case as pleaded. [note: 26] Specifically, Multistar's expert may have to be recalled and Geocon's expert may have to be cross-examined again. [note: 27] I have dealt with and disposed of this at [79]–[84] above. I do not consider it necessary to reopen the evidential phase of this suit. However, I am prepared to hear Multistar's counsel further on this point. If he can persuade me that Geocon's amendments make it necessary to revisit a specific witness's evidence on a specific point for a specific purpose, I am prepared to direct that that evidence be taken. That can be very easily dealt with without significant delay or cost. If that course proves to have been necessitated by the amendments, the costs order I have made will require Geocon to pay Multistar's associated costs, to the extent that they are reasonable in amount and reasonably incurred. There is either no prejudice to Multistar under this head or no such prejudice for which it cannot be compensated by an award of costs.

(c) There must be finality to any litigation and to Geocon's changes of position in the course of this litigation. [note: 28] I accept that there must be finality to litigation. I accept also that Geocon's application, coming just before oral submissions, comes at a late stage. It is also true that this application to amend follows another late application by Geocon to amend its reply and defence to counterclaim in the course of trial. But I bear in mind that this is Geocon's first application to amend its statement of claim. I bear also in mind that the case for Geocon is being advanced by liquidators, who have less knowledge about the factual background than Multistar. Finally, for the reasons I have set out above, Geocon's changes to its case are nowhere near as fundamental as Multistar complains.

(d) Multistar would have to amend its closing submissions. [note: 29] This is the quintessential type of prejudice for which Multistar can be compensated by costs. I have ordered that Geocon pay all of these costs to Multistar, to the extent that they are reasonable in amount and reasonably incurred.

(e) Multistar is not certain about the period of time covered by Geocon's alleged agreement by Multistar to reimburse Geocon. [note: 30] As I have shown at [62] and [84] above, Multistar has understood throughout that Geocon's case has been that Multistar is obliged to reimburse Geocon for Geocon's costs of finishing all of Resource Piling's unfinished works from 2002 onwards. That case has not changed. How well Geocon has captured that case in its pleadings, even after the amendments, is a question of law and a matter for submission. There is no prejudice here.

(f) The amendment comes at a very late stage. [note: 31] *Digilandmall.com* (at [88]) shows that lateness is not a decisive factor. I consider that the lateness is far outweighed by all of the other factors I have identified in my analysis above.

102 In short, it appears to me that the present case is one where the parties have already placed before me all the evidence necessary to deal with the amended case. The amendments merely

formalise what is already in play in this suit so that the submissions and decision can concentrate on the real dispute rather than being distracted by technical points of pleading. This case is squarely within the principle in [86] of *Digilandmall.com*.

103 It seems to me that Multistar's counsel's true objection to Geocon's application to amend its statement of claim is that, once the amendments are allowed, he will be deprived of the two fairly technical points which he has taken in his written closing submissions (see [37]–[39] above). That may be so. No doubt, Geocon seeks leave to make these amendments precisely in order to address those very points. But that fact alone cannot, on the principles set out in *Digilandmall.com*, be a reason for refusing leave to amend.

104 Nevertheless, to ensure that the amendments do not operate unfairly to Multistar, I have imposed the following terms, amongst others, on the leave granted to Geocon to amend its pleadings:

(a) I have ordered Geocon to pay Multistar the costs of and incidental to its application to amend, such costs fixed at $3,000 including disbursements.

(b) I have ordered Geocon to pay the costs occasioned by these amendments, which will include at least the costs of Multistar's consequential amendments to its pleadings and the costs of amending or supplementing its written submissions.

(c) As a matter of fairness, bearing in mind the principle set out in *Digilandmall.com* at [86], I have given Multistar leave to consider and address me on the extent to which, if at all, it wishes to reopen the evidential phase of this suit. If I am persuaded to reopen the evidential phase and if, having heard the evidence, I accept that taking that further evidence was necessitated by these amendments, Geocon will have to pay to Multistar its associated costs. But, if I do not accept that the further evidence was necessitated by these amendments, Multistar is at risk of bearing those costs and perhaps even Geocon's costs.

(d) I have also secured confirmation from Geocon's counsel that the present application to amend has been made as a result of a considered decision by Geocon to put forward a final list of amendments such that there will be no further need to amend its statement of claim. [note: 32]

Further arguments on the effect of limitation

105 Ten days after granting Geocon leave to amend its statement of claim, Multistar sought an opportunity to present further arguments to me on Geocon's amendment application. [note: 33] In its further arguments, Multistar argues – for the first time – that Geocon ought not to be granted the leave it seeks because the amendments add a new cause of action which is time-barred.

106 Multistar puts its further arguments this way:

"a. The Plaintiffs' [sic] claims are time barred [as pleaded in] the Defence and Counterclaim (Amendment No. 4);

b. Notwithstanding the time limitation as set out in the Defendants' [sic] Defence and Counterclaim (Amendment No. 4), the Plaintiffs' [sic] are, by way of the amendments proposed, introducing a brand new cause of action on purported evidence that are [sic] allegedly already within the trial; and/or

c. By reason of the foregoing, the Plaintiffs are changing their case theory and presenting a

new cause of action on purported evidence that are [sic] already before the Court beyond the limitation period as provided under s 6(1)(a) of the Limitation Act (Cap 163)."

107 Multistar's request for further arguments suggests that I should not have granted Geocon leave to amend its statement of claim under O 20 r 5(1) of the Rules of Court (Cap 332, R 5, 2014 Rev Ed) ("the Rules") because its application to amend is in fact governed instead by O 20 r 5(2) read with O 20 r 5(5). Those rules read as follows:

> 5(2) Where an application to the Court for leave to make the amendment mentioned in paragraph ... (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.
>
> ...
>
> 5(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.

108 I have declined to hear Multistar's further arguments. It does not appear to me that any argument based on r 5(2) and r 5(5) can succeed.

109 In its request for further arguments, Multistar suggests that the claims advanced in Geocon's amendments are time-barred without specifying precisely when they became time-barred. There are only two alternatives. One is that they became time-barred *before* the writ in this suit was issued. The other is that they became time-barred *after* the writ in this suit was issued.

110 On either alternative, Multistar's limitation argument cannot succeed.

Claims time-barred before the writ was issued

111 On the first alternative, Geocon's application to amend does not even come within r 5(2). That rule applies only if a "relevant period of limitation *current at the date of issue of the writ* has expired" (emphasis added). The premise of r 5(2) is therefore a writ issued *within* the limitation period and an application to amend the statement of claim issued *outside* the limitation period. On this alternative, that is not the position before me: *ex hypothesi*, the relevant limitation period had expired even before the writ was issued.

112 On this alternative, therefore, Geocon's amendment application falls to be analysed under r 5(1) as though there were no limitation issue at all. That is in fact how Multistar and Geocon argued it. I have explained above why, on the analysis under r 5(1), these amendments ought to be allowed.

113 It is clear why an application to amend in these circumstances falls entirely outside r 5(2). Permitting the amendments does not deprive a defendant of the benefit of a limitation defence. To put it another way, the amending plaintiff derives no benefit from the relation back afforded by amending under r 5(5). Returning to the facts of the present case, if Multistar's limitation defence succeeds on this alternative, it will defeat Geocon's claim entirely. That will include both the original claims and the claims inserted by amendment. So too, if the limitation defence fails, it fails against both Geocon's original claims as well as the claims inserted by amendment.

Claims time-barred after the writ was issued

114 I now consider the situation if Multistar's argument is that Geocon's claims inserted by amendment were not time-barred when the writ was issued but became time-barred *after* it had been issued.

115 On this alternative, r 5(2) and r 5(5) are clearly engaged. When those rules are engaged, the court has to determine four questions:

(a) Does the plaintiff's proposed amendment add or substitute a new cause of action?

(b) Has the period of limitation applicable to that new cause of action expired? (I deal at [134] below as to the standard to which this question must be determined.)

(c) If so, does that new cause of action arise out of the same facts or substantially the same facts as a cause of action in respect of which the plaintiff has already claimed relief in the action?

(d) If so, is it just to grant the plaintiff leave to make the proposed amendment?

116 Authority for these four questions, if authority is needed, can be found in the decision of our Court of Appeal in *Lim Yong Swan v Lim Jee Tee and another* [1992] 3 SLR(R) 940 ("*Lim Yong Swan*") at [28] and of the English Court of Appeal in *Ballinger v Mercer Ltd and another* [2014] 1 WLR 3597 ("*Ballinger*") at [15]. Note, however, that in the former case, it was not necessary for the Court of Appeal to articulate separately the first two questions which I have set out because it was common ground there that the answer to both questions was yes (see *Lim Yong Swan* at [10]). In the latter case, the fourth question was not separately articulated. It is, however, clearly a distinct question to be addressed before the court grants leave.

117 The sequence in which the questions have been put at [115] above is not the way in which they usually appear. The usual sequence inverts the first and second questions. But that cannot, as a matter of strict logic, be correct. It is not possible to determine whether a relevant limitation period has expired before identifying the cause of action with respect to which that question is asked. Thus, whether the amendments add or substitute a new cause of action must be determined first. It is only after ascertaining that the amendments do introduce a new cause of action, and only after that new cause of action has been identified, that the question of whether the limitation period applicable to that new cause of action has expired can be posed and answered.

118 If the answer to either the first or second questions is no rather than yes, r 5(2) is not engaged at all. The amendment application is governed by the general principles under r 5(1). If the answer to the third question is yes, the court is obliged to go on to consider the fourth question. But if the answer to the third question is no, the application to amend must be dismissed. The court has no residual discretion to go on and consider whether it would be just to permit the amendment in these circumstances: *Abdul Gaffer bin Fathil v Chua Kwang Yong* [1994] 3 SLR(R) 1056 at [11] and [12]; *Chandra v Brooke North (a firm) & Brooke North LLP* (2013) 151 Con LR 113 ("*Chandra*") at [98]. To put it another way, the only way in which the court can go on to consider the justice of permitting the amendment is if the answer to the third question is yes.

Does the amendment add a new cause of action?

119 The first question is whether Geocon's amendments add or substitute a new cause of action.

GP Selvam JC (as he then was) considered the meaning of "cause of action" as it is used in r 5(5) in *Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd and others* [1992] 2 SLR(R) 382. In that case, the plaintiff commenced suit against a defendant to recover $2.4m as money lent to the defendant or as money held by the defendant on resulting trust for the plaintiff. After the relevant limitation period had expired, the plaintiff sought leave to amend its statement of claim to plead that the defendant had received the $2.4m in breach of s 76 of the Companies Act (Cap 50, 1990 Rev Ed) and was therefore a constructive trustee of that sum.

120 Selvam JC held that "cause of action" referred to the relief or remedy which the plaintiff seeks and not to the factual basis underpinning it. He thus held that the plaintiff's proposed amendments did indeed seek to add a new cause of action because they relied on a breach of statute or on a constructive trust. Selvam JC went on to determine the remaining questions against the plaintiff and dismissed the plaintiff's application (see [35]–[36]). The plaintiff's appeal to the Court of Appeal was also dismissed: *Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd* [1993] 1 SLR(R) 220.

121 Thus, a plaintiff clearly puts forward a new cause of action when its amendment seeks a relief or remedy which carries a different label from that which is sought in its unamended pleading. That is so even if the new relief or remedy is claimed based on the same underlying facts. The inquiry into the facts is properly the subject-matter of the third question.

122 Even if the amendment seeks a relief or remedy which carries the same label as an existing relief or remedy, however, it may nevertheless be a new cause of action within the meaning of r 5(5). It will be a new cause of action if the plaintiff advances a case which is substantially different from its existing case. In that sense, the inquiry into whether a plaintiff is seeking to present a new cause of action in the context of r 5(5) is somewhat wider than the inquiry which Selvam JC found it necessary to undertake on the facts of *Multi-Pak*. In that case, the inquiry did not need to go beyond noting the change in the label attached to the relief or remedy claimed. In other cases, the label may remain the same, but the inquiry on the first question may necessitate considering the manner in which the plaintiff has presented his unamended case.

123 Thus, in *Steamship Mutual Underwriting Association Ltd v Trollope & Colls (City) Ltd* [1986] 33 BLR 77 ("*Steamship Mutual*"), an owner issued within the relevant limitation period a generally indorsed writ drafted in wide terms (at 96) against its architects, contractors and engineers arising from defects in the construction of the owner's building. The owner focused in its statement of claim on defects in the building's air-conditioning. Three years later, after the limitation period had expired, the owner attempted to amend its statement of claim to include a claim for defects in the brickwork. The owner submitted that the amendments did not add a new cause of action or a new case, but simply added particulars of the manner in which the defendants had breached the same duty arising under the same contract as formed the basis of the cause of action pleaded in its existing statement of claim.

124 The English Court of Appeal held that the amendments did add a new cause of action within the meaning of O 20 r 5(5) of the Rules of the Supreme Court 1965 (UK) ("English RSC 1965"). The fact that the amendments claimed the same remedy of damages arising from a breach of the same duty under the same contract was not determinative. The court held that it was necessary to take a broader view and look beyond the duty breached to the nature and extent of the breaches and the damage alleged thus far on the pleadings. Thus, May LJ said (at 98):

> "In the present case, if one remembers what a cause of action is (for instance, to refer back to the dictum in *Letang v Cooper* [1965] 1 Q.B. 232, 242–243), if one looks to the size of this particular building, to its complexities, to other matters of degree, to the statement of claim

> before the proposed re-amendment … I feel bound to agree with the learned judge where he concluded, having referred to the cases on what is a cause of action, the statement of claim … related only to the air conditioning. I think that its effect was to narrow the causes of action so that they became confined to breaches of contract concerned with air conditioning and negligence resulting in damages [sic] to the air conditioning. In the light of the definitions of a cause of action already referred to, I do not think one can look only to the duty on a party, but one must look also to the nature and extent of the breach relied upon, as well as to the nature and extent of the damage complained of in deciding whether, as a matter of degree, a new cause of action is sought to be relied upon. The mere fact that one is considering what are, as it is said, after all only different defects to the same building, does not necessarily mean in any way that they are constituents of one and the same cause of action."

125 At the other end of the spectrum, though, there is a valid, albeit sometimes fine, distinction to be drawn between a plaintiff who seeks to put forward a substantially different case and a plaintiff whose case remains the same but whose amendment merely invites the court to approach it from a new angle. In *Dornan v JW Ellis & Co Ltd* [1962] 1 QB 583, an employee was blinded by a drill bit which shattered while another employee was operating the drill. The injured employee brought suit against his employer within the limitation period alleging that it had been negligent in failing to provide him protective eyewear. The limitation period expired. At trial, the employee applied for leave to amend the statement of claim to allege that the employer was vicariously liable for the other employee's negligence in operating the drill. The English Court of Appeal held (at 593) that:

> ...what is now sought to be done is not to make out a new case of negligence, but to persist in the old story and invite the judge at the trial to approach it, to interpret it, from a different angle or aspect. It is a different approach to the same main story of the accident.

1 2 6 *Dornan* was, of course, decided at a time when the court had no power at all to allow a plaintiff to amend its pleadings to add a new claim after the limitation period applicable to that new claim had expired (see *Lim Yong Swan* at [14]). That may explain the somewhat generous approach taken towards the employee in *Dornan*. But it remains the case that *Dornan* taken together with *Steamship Mutual* are useful reminders that the approach to the first question is holistic rather than formalistic or formulaic.

127 To apply these principles to the present case, I consider Geocon's amendments in the two categories into which I have divided them (see [40]–[42] above).

128 The amendments in the first category do not advance a new cause of action. For the reasons I have set out above, these amendments simply insert by amendment additional factual material into the statement of claim as support for Geocon's existing cause of action on the reimbursement basis. That factual material does not, in itself, give rise to any new cause of action. Geocon's cause of action, both before and after the amendments, is that Multistar engaged Geocon on the reimbursement basis to complete all of Resource Piling's unfinished work.

129 The amendments in the second category also do not advance a new cause of action within the meaning of r 5(5). The second and third additional alternative claims advance a case that the Multistar/Geocon subcontract remained throughout a lump sum contract. This was an existing aspect of Geocon's case at the time of Geocon's present application, although it appeared only in its reply. It is true that I granted Geocon leave to insert that pleading into its reply relatively late – in the course of trial. But it has nevertheless been inserted there by amendment, and is now an integral component of Geocon's case in this suit.

130 Rule 5(5) does not require the court to look only at a plaintiff's statement of claim in order to determine whether a cause of action which the plaintiff proposes to insert by amendment is a new cause of action. I consider, therefore, that I can take into account the fact that these amendments merely transplant an existing case put forward by Geocon in its reply into the statement of claim. It is not new.

131 Because I have held that Geocon's amendments do not amount to adding a new cause of action, I do not have to consider the remaining questions. This is an ordinary case of amendment to be determined – as Multistar was initially content to argue it – by reference to the usual principles applicable to amendments under r 5(1).

132 In case I am wrong in my conclusion on this question, however, I shall nevertheless go on to consider the remaining questions.

Has the relevant period of limitation expired?

133 A court which hears a plaintiff's application to amend its pleadings may direct this question – whether the relevant period of limitation has expired – to be tried as a preliminary issue. The court will then determine that question finally, then and there, before going on to determine the remaining three questions and before the suit is tried on its merits. This course will, however, rarely be appropriate: *Chandra* at [70]. I have not adopted this course in the present suit.

134 In the typical case, the court ought to consider this question in the course of the interlocutory application to amend: *Chandra* at [67]. In doing so, the court ought to limit itself to considering only whether the defendant has a reasonably arguable case on limitation: *Welsh Development Agency v Redpath Dorman Long Ltd* [1994] 1 WLR 1409 at 1425H. It is for the defendant to show that it has a *prima facie* limitation defence. The burden of persuasion then rests on the plaintiff, as the party who is seeking to amend and thereby to have the benefit of the relation back, to persuade the Court that the defence of limitation is not reasonably arguable: *Ballinger* at [27]–[28]. This low threshold causes no prejudice to the party seeking to amend: so long as it is reasonably arguable that the limitation period has expired, that question ought to be addressed separately and explicitly in a fresh suit rather than determined summarily in the amending party's favour on an interlocutory application.

135 Having set out the principles which govern how I should address and determine this question, I find myself unable to form or express any view on it. This is because I declined to hear Multistar's further arguments on limitation and therefore do not know what arguments Multistar would have presented. I shall therefore assume, for the purposes of further analysis, that Geocon is unable to show that there is no reasonably arguable case that the limitation period applicable to its new causes of action has expired.

Does it arise from the same or substantially the same facts?

136 The third question requires me to consider whether the causes of action in Geocon's amendments, assuming them to be new, arise "out of the same facts or substantially the same facts" as Geocon's existing cause of action.

137 I consider it appropriate to draw guidance on the purpose of the test encapsulated in these words from English authorities on s 35(5) of the English Limitation Act 1980 (c 58) (UK) and r 17.4(2) of the English Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) ("English CPR 1998"). These in both our O 20 r 5(5) and in the now repealed O 20 r 5(5) of the English RSC 1965 have a clear historical and linguistic connection with these two more recent English provisions. To establish that connection,

it is necessary to go into the history of r 5(5).

138 Our r 5(5) is taken verbatim from O 20 r 5(5) in the English RSC 1965. Limitation periods in England, as in Singapore, are laid down by primary legislation. Despite this, the English O 20 r 5(5) was not supported at the time of its introduction by any primary legislation. When the English limitation legislation was updated in 1980, a new statutory provision was enacted to put the English r 5(5) on a statutory footing. That provision is now section 35 of the English Limitation Act 1980. Sections 35(4) and 35(5) read as follows:

> (4) Rules of court may provide for allowing a new claim ... to be made ..., but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.
>
> (5) The conditions referred to in subsection (4) above are the following: (a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; (b) ...

139 It has not been thought necessary in Singapore to provide legislative support for our r 5(5). Our Limitation Act, which is otherwise in *pari materia* with the English Limitation Act, therefore contains no equivalent of s 35 of the English Act: see *Lim Yong Swan* at [25].

140 When the English CPR 1998 came into force, the English r 5(5) was replaced by r 17.4(2) of the English CPR 1998. This new rule is virtually identical to r 5(5) of the English RSC 1965 save that it has been recast in the active voice and the words "claim" and "remedy" have been substituted for "cause of action" and "relief". Rule 17.4(2) reads as follows:

> The Court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.

141 Although there is a significant difference in the wording of s 35(5)(a) which makes it wider in scope than both r 5(5) and r 17.4(2) (see *Goode v Martin* [2002] 1 WLR 1828 at [37]–[41]), I do not consider that this difference affects in any way the purpose underlying these words.

142 That purpose is to ensure that any new claim allowed by amendment under r 5(5) does not have the effect of requiring the defendant to investigate, after the limitation period has expired, a substantially new set of underlying facts. In *BP plc v AON Ltd* [2006] 1 Lloyds Rep 549 ("*BP plc*") at [52]–[54], Colman J considered the purpose of s 35(5) and said this:

> 52 At first instance in *Goode v Martin* [2001] 3 All ER 562, I considered the purpose of section 35(5) [of the English Limitation Act 1980] in the following passage:
>
> > 'Whether one factual basis is "substantially the same" as another factual basis obviously involves a value judgment, but the relevant criteria must clearly have regard to the main purpose for which the qualification to the power to give permission to amend is introduced. That purpose is to avoid placing a defendant in the position where if the amendment is allowed he will be obliged after expiration of the limitation period to investigate facts and obtain evidence of matters which are completely outside the ambit of and unrelated to those facts which he could reasonably be assumed to have investigated for the purpose of

defending the unamended claim.

53 In *Lloyds Bank v Rogers* [1997] TLR 154, Hobhouse LJ said of section 35:

> 'The policy of the section [is] that, if factual issues were in any event going to be litigated between the parties, the parties should be able to rely on any cause of action which substantially arises from those facts.'

54 The substance of the purpose of the exception in subsection (5) is thus based on the assumption that the party against whom the proposed amendment is directed will not be prejudiced because that party will, for the purposes of the pre-existing matters [in] issue, already have had to investigate the same or substantially the same facts.

143 The English Court of Appeal cited this passage with approval in *Ballinger* at [34] and went on to say (at [35]–[37]):

> 35 In the *Welsh Development Agency* case [1994] 1 WLR 1409 Glidewell LJ said, in an often quoted passage at p 1418, that whether or not a new cause of action arises out of substantially the same facts as those already pleaded is substantially a matter of impression.
>
> 36 Less well known perhaps is the cautionary note added by Millett LJ in the *Paragon Finance* case [1999] 1 All ER 400, 418, where he said, after citing the passage from Glidewell LJ to which I have just referred: "In borderline cases this may be so. In others it must be a question of analysis."
>
> 37 I would also point out, as did Briggs LJ in the course of the argument, that 'the same or substantially the same' is not synonymous with 'similar'. The word 'similar' is often used in this context, but it should not be regarded as anything more than a convenient shorthand. It may serve to divert attention from the appropriate inquiry.

144 In the present case, of course, Geocon has brought its application to amend after the evidential phase rather than before it. But that makes no difference to the principles identified in these passages, which I adopt and apply.

145 Even if Geocon's amendments do put forward new causes of action, I consider that they "arise out of the same or substantially the same facts" as its existing causes of action. I arrive at this conclusion both as a matter of analysis and in light of the purpose of this third question. My reasons are largely the same reasons I have relied on to conclude that Multistar is not prejudiced in having Geocon's amended case determined on the factual and expert evidence that is already before me, subject to Multistar having an opportunity to persuade me otherwise.

146 I deal with Geocon's amendments insofar as they relate to advancing an alternative claim on the lump sum basis. There are no new facts pleaded in connection with this cause of action. These amendments simply recharacterise the legal significance of the facts already before me. I am therefore satisfied that that cause of action, even if it is new, arises out of *precisely* the same facts as Geocon's existing cause of action.

147 The amendments relating to Geocon's original claim on the reimbursement basis plead only two new facts. The first is that Resource Piling stopped work in late 2002 at the ECP South Location. The second is that Mr Tan gave the evidence in the 2004 litigation which is set out in paragraph 54 of his 2005 affidavit. Both of these facts are undisputed. Both of these facts were at all times within

Multistar's knowledge. Both of these facts have, for what it is worth, been explored at trial through the evidence in chief, the cross-examination and the re-examination of the factual and the expert witnesses. The dispute is not over these facts as facts but over the legal significance of these facts. That dispute raises issues of law. Those issues are matters for submission. I am therefore satisfied that this category of Geocon's amendments arise out of substantially the same facts as its existing pleading.

148 My decision is entirely consistent with the purpose encapsulated in these words taken from r 5(5). None of these amendments place Multistar in the position "where it is obliged, after expiration of the limitation period, to investigate facts and obtain evidence of matters which are completely outside the ambit of and unrelated to those facts which it could reasonably be assumed to have investigated for the purpose of defending the unamended claim" (see *BP plc* at [52]). These amendments raise issues of law for submission rather than issues of fact for investigation.

Is it just to grant leave to amend?

149 Finally, I consider it eminently just to grant Geocon the leave which it seeks. The amendments will allow me, once and for all, to determine the true state of the accounts between Multistar and Geocon. The amendments permit me to deal with the underlying issues without being distracted by technical points and without causing any prejudice to Multistar for which it cannot be compensated by costs.

150 The application is admittedly made late. But it is not made too late. The lateness of the application is not a weighty factor when placed against the fact that Multistar, as I have found, will be adequately compensated by an award of costs and the liberty which I have given it to address me on the necessity of reopening the evidential phase of these proceedings, and to do so at Geocon's cost.

Conclusion

151 For all of these reasons, I have granted Geocon leave to amend its statement of claim in the manner proposed and have determined that I do not need to hear any further arguments from Multistar on the limitation issue.

[note: 1] Affidavit of evidence in chief of Lau Wei Koon, paragraph 8.1.

[note: 2] Affidavit of evidence in chief of Lau Wei Koon, paragraph 9.1; Ian Ness's expert report, paragraph 37.

[note: 3] Paragraph 22 and 37(a) of the statement of claim.

[note: 4] Paragraphs 23 to 25 and 37(b) of the statement of claim.

[note: 5] Paragraphs 26 to 29 and 37(c) of the statement of claim.

[note: 6] Paragraph 32 of the statement of claim.

[note: 7] Paragraph 29 of the defence and counterclaim (amendment No. 4).

[note: 8] Paragraph 31 of the defence and counterclaim (amendment No. 4).

[note: 9] Paragraphs 18 and 21 of the defence and counterclaim (amendment No. 4).

[note: 10] Paragraph 19 of the defence and counterclaim (amendment No. 4).

[note: 11] Paragraph 31 of the defence and counterclaim (amendment No. 4).

[note: 12] Paragraph 17(c) of the reply and defence to counterclaim (amendment No. 4).

[note: 13] Defendant's closing submissions dated 27 October 2014, paragraph 37.

[note: 14] Transcript, 16 January 2015, page 8, line 16 to 26.

[note: 15] Defendant's Bundle of Documents, page 36.

[note: 16] Defendant's Bundle of Documents, page 6.

[note: 17] Paragraphs 24 to 29 of his expert report.

[note: 18] Affidavit of evidence in chief of Lau Wei Koon, paragraph 10.8.

[note: 19] Transcript, 16 January 2015, page 7, lines 19 to 21.

[note: 20] Transcript, 27 February 2014, page 71 line 6 to page 72, line 10.

[note: 21] Affidavit of evidence in chief of John Dudley Baker filed on 1 September 2014 at page 2 of Exhibit JDB-3.

[note: 22] Affidavit of evidence in chief of John Dudley Baker filed on 1 September 2014 at page 11 of Exhibit JDB-3.

[note: 23] Transcript, 16 January 2015, page 12 line 16 to page 16 line 14.

[note: 24] Affidavit of Chua Seng Kiat filed on 23 February 2015, paragraph 5.

[note: 25] Transcript, 16 January 2015, page 12 lines 18 to 30.

[note: 26] Transcript, 16 January 2015, page 13 lines 25 to 30.

[note: 27] Transcript, 16 January 2015, page 22 line 2 to 8.

[note: 28] Transcript, 16 January 2015, page 15 lines 13 to 26.

[note: 29] Transcript, 16 January 2015, page 15 lines 27 to 29.

[note: 30] Transcript, 16 January 2015, page 15 lines 5 to 9.

[note: 31] Transcript, 16 January 2015, page 17 lines 22 to 28.

[note: 32] Transcript, 16 January 2015, page 29 line 12 to 26.

[note: 33] Gabriel Law Corporation's letter dated 26 January 2015.

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