Multiplex Constructions Pty Ltd v Sintal Enterprise Pte Ltd
[2005] SGCA 10

Case Number : CA 61/2004

Decision Date : 03 March 2005

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Judith Prakash J

Counsel Name(s) : Vinodh S Coomaraswamy and Pradeep Pillai (Shook Lin and Bok) for the appellant; Andre Maniam and Paul Sandosham (Wong Partnership) for the respondent

Parties : Multiplex Constructions Pty Ltd — Sintal Enterprise Pte Ltd

Arbitration – Stay of court proceedings – Grounds – Main contractor exercising right to set off damages for delay from sums due to sub-contractor – Whether liquidated damages sole remedy for delay – Whether set-off notices reasonably accurate – Whether such issues amounting to disputes to be referred to arbitration – Section 6 Arbitration Act (Cap 10, 2002 Rev Ed)

3 March 2005 *Judgment reserved.*

Judith Prakash J:

Introduction

1 Multiplex Constructions Pty Ltd ("Multiplex"), an Australian company, has a branch in Singapore that provides building, construction and engineering services. In January 2001, it was employed by Great Eastern Life Assurance Company Ltd ("the employer") to build a housing development at Haig Road. In due course, the employer nominated Sintal Enterprise Pte Ltd ("Sintal"), a company engaged in the supply and installation of stonework, as the contractor to supply and install the stonework required by the project.

2 Multiplex entered into two sub-contracts with Sintal in relation to the project. The first was for the supply and delivery of stone finishes, specifically marble, and the second was for the supply of labour and material for the installation of the marble.

3 In March 2004, Sintal sued Multiplex in the High Court for various sums of money and damages that it claimed were due to it under both sub-contracts. Multiplex applied for a stay of those proceedings on the basis of an arbitration clause in each of the sub-contracts. It was successful before the assistant registrar in obtaining a stay of all but one of the claims made by Sintal. Multiplex then appealed to a judge in chambers against the refusal to stay that claim which was a claim made under the first sub-contract. Justice Lai Siu Chiu dismissed that appeal in June 2004. Multiplex has now made a further appeal to this court.

The legal position

4 The issues that arise on this appeal are substantially the same as those considered below. The main point that has to be determined by this court is whether there is a dispute between the parties that should be stayed in favour of arbitration.

5 The application made by Multiplex to stay the High Court action was brought under s 6 of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the Act"). This section provides that a court may stay

proceedings brought contrary to an arbitration agreement, if the court is satisfied that "there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement" (see s 6(2)(a)). It is well established that if the court finds that there is no dispute between the parties, then generally there will be no sufficient reason to stay court proceedings as there will be nothing to refer to arbitration.

6 The parties are in substantial agreement on the legal principles that guide the court when it hears an application under s 6 of the Act. Both parties cited the decision in *Kwan Im Tong Chinese Temple v Fong Choon Hung Construction Pte Ltd* [1998] 2 SLR 137 ("the *Kwan Im Tong* case"). There, while this court accepted the principle enunciated in *Tradax Internacional SA v Cerrahogullari TAS* (*The M Eregli*) [1981] 2 Lloyd's Rep 169 that if the claim is indisputable then the court has jurisdiction to hear the matter instead of referring it to arbitration, it also sanctioned a holistic and common-sense approach towards determining the existence of a dispute. In so doing, this court adopted the following observation of G P Selvam JC (as he then was) in *Uni-Navigation Pte Ltd v Wei Loong Shipping Pte Ltd* [1993] 1 SLR 876 at 879, [16] and [17]:

> The common form arbitration agreement provides for disputes to be decided by arbitrators. In such a case the court should, save in obvious cases, adopt a holistic and commonsense approach to see if there is a dispute. The justification for this approach is that it is important to hold a party to his agreement and avoid double and split hearing of matters. …
>
> If the defendant, therefore, makes out a prima facie case of disputes the courts should not embark on an examination of the validity of the dispute as though it were an application for summary judgment.

This court in the *Kwan Im Tong* case (*per* Karthigesu JA at [10]) also indicated that while O 14 summary judgment principles aided the court in determining whether a claim should be immediately allowed in very obvious cases, it was not entirely safe to apply them in determining whether the parties should be bound by their agreement to arbitrate. His Honour agreed with the observation of Parker LJ in *Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd* [1990] 1 WLR 153 at 158 that, except in a very clear case, in a situation where there was an arbitration clause, full-scale argument should not be permitted since the parties had agreed on their chosen tribunal and the defendant would be entitled, *prima facie*, to have the dispute decided by that tribunal in the first instance. This court concluded, on the basis of the authorities it had discussed, that it was the party resisting the stay of proceedings who had the burden of showing that the other party had no defence to the claim.

Background

7 We now turn to the facts of this case. The sub-contract in question was contained in various documents. These included a letter of acceptance dated 23 April 2001 that was signed by both parties, and the Conditions of Sub-Contract for use in conjunction with the Main Contract (2nd Ed, 2000, published by the Singapore Institute of Architects) ("the Conditions") which in turn incorporated two Bills of Quantities, the first being entitled Bill 1 – General Conditions and Preliminaries ("the GCP"). Under the sub-contract, Sintal was required to complete the sub-contract works by 29 July 2002. That date was also the original completion date for the main contract but it was subsequently extended by agreement between Multiplex and the employer.

8 In the course of the works and between 29 April 2003 and 11 August 2003, the architect for the project issued interim certificates nos 27, 28, 29 and 30 for a total amount of $485,268.55 in respect of marble supplied by Sintal. Although Multiplex received payment from the employer under

the four certificates, it did not pay Sintal the amounts certified due. Instead, it sought to set off against the certified sums losses that it claimed it had sustained by reason of Sintal's delay under the sub-contract. Pursuant to cll 11.4 and 11.5 of the Conditions, Multiplex issued four set-off notices against Sintal's claim for the certified sums, one notice for each of the interim certificates.

9 In the first three notices, Multiplex claimed that Sintal's delay in performance under the sub-contract had caused the project to be delayed by 154 days between 2 December 2002 and 4 May 2003. Appendix H to each of the three notices stated that Multiplex's site overheads and running costs were $10,825.45 per day and these totalled $1,667,118.73 for the full period. The fourth notice stated that Sintal's delay had caused the project to be delayed by 196 days between 18 December 2002 and 1 July 2003. Using the same daily rate applied for the first period of delay, the damages claimed by Multiplex for the extended period amounted to $2,121,787.48.

10 Sintal included its claim for $485,268.55 in its High Court suit. This was the only claim that the assistant registrar refused to stay. The assistant registrar considered that there were no disputes that could be referred to arbitration. On appeal, Multiplex argued that there were disputes that had to go to arbitration. The first dispute arose because it was unclear from the contractual documents whether Multiplex was entitled to both general damages and liquidated damages or whether liquidated damages was the sole remedy for delay. Multiplex referred to cl 11.4 of the Conditions and Item I at p B1/11 of the GCP ("Item I") as evidence that general damages for delay were available under other provisions of the sub-contract. Secondly, there was a dispute over the validity of the set-off notices. Whilst Sintal had claimed that there were defects in the notices, the position taken by Multiplex was that cl 11.5(i) of the Conditions only required reasonable accuracy in particularising loss and this requirement had been amply satisfied. It submitted that these disputes relating to Sintal's claim under the interim certificates and Multiplex's set-off of the certified sums should be properly resolved in arbitration, along with the remaining disputes between the parties.

The decision below

11 Before we go to the judge's findings (reported at [2004] 4 SLR 841), it would be helpful for the relevant contractual provisions to be set out. These are:

(a) cl 10.00 of the letter of acceptance:

> **CONTRACT PERIOD AND LIQUIDATED DAMAGES**
>
> The commencement date shall be 16th January 2001 and the completion of the Sub-Contract Works shall be as follows:
>
> 1. Blk 1 – 12th Sept 2001 till 26th Jan 2002
>
> 2. Blk 2 – 22nd Sept 2001 till 6th Feb 2002
>
> 3. Blk 3 –22nd Sept 2001 till 22nd Feb 2002
>
> 4. Blk 4 – 22nd Sept 2001 till 22nd Feb 2002
>
> 5. Mock up – by 15th June 2001
>
> Liquidated and ascertained damages of S$30,000.00 per calendar day will be imposed for late

completion of the Sub-Contract Works.

(b) cll 11.4, 11.5 and 15.1 of the Conditions:

General Damages for Delay

11.4 The Contractor may set off against any monies due to the Sub-Contractor under the Sub-Contract, such loss or damage suffered or incurred by him as a result of the failure of the Sub-Contractor to carry out the Sub-Contract Works with diligence or due expedition or to complete the Sub-Contract Works by the date or dates specified in Schedule III hereto or the date or dates as extended until such date as may be certified by the Contractor in his Sub-Contract Completion Certificate.

Conditions for Set-Off

11.5 Without prejudice to the Sub-Contractor's rights under general law to dispute any set off by the Contractor, it shall be a condition precedent for such set off by the Contractor that:

(i) the set-off has been quantified in detail with particulars and with reasonable accuracy

(ii) the Contractor has given to the Sub-Contractor written notice specifying his intention to set-off the amount so quantified together with the required details under clause 11.5(i) of this Sub-Contract and the grounds on which such set-off is made

and

(iii) such notice shall be given to the Sub-Contractor not less than 7 days before the date of issuance of the interim certificate for payment which includes in the amount stated as payable, the amount due to the Sub-Contractor from which the Contractor intends to make the set-off.

Disputes to be referred

15.1 Any dispute between the parties hereto as to any matter arising under or out of or in connection with this Sub-Contract or under or out of or in connection with Sub-Contract Works … shall be referred to the arbitration and final decision of a person to be agreed by the parties …

(c) Item I:

DAMAGES FOR NON-DELIVERY

If the Supplier fails to commence, carry out or complete delivery of the materials or goods in accordance with Clause 11 of the Conditions of Sub-Contract … and such non-compliance … causes delay in completion of the Main Contract, then the Supplier shall indemnify the Contractor against any loss or damage suffered or incurred including liquidated damages which may be imposed by the Employer on the Contractor under the Main Contract.

12 The judge accepted the principles in the *Kwan Im Tong* case as her guidelines for determining whether there was a dispute between Multiplex and Sintal for the purposes of the arbitration clause.

She also considered, in some detail, the case of *JDC Corporation v Lightweight Concrete Pte Ltd* [1999] 1 SLR 615 ("the *JDC Corp* case") where a similar issue had arisen as to the type of damages claimable by a contractor from his sub-contractor under the provisions of a construction contract. In the *JDC Corp* case, this court had held that there had been some tension between two contractual clauses providing for damages and that this tension had to be resolved by the arbitrator.

13 The judge declined to follow the *JDC Corp* case. She distinguished it from the situation before her on the basis that, unlike the conflicting contractual provisions in the *JDC Corp* case, there was no ambiguity or room for doubt in this case because (as she said at [45]):

> Clause 10.00 [of the letter of acceptance] clearly spelt out that liquidated and ascertained damages of $30,000 per calendar day (reiterated in the Notices) would be imposed for late completion of the sub-contract works. I could not see any "tension" (to borrow Thean JA's word in [the *JDC Corp* case]) between this clause and any provision in any other document which formed part of the contract between the parties. Counsel's submission (that it was not so straightforward that liquidated damages were intended to be the sole remedy) was not made out.

The judge rejected the argument put to her that Item I provided for general damages to be recovered by Multiplex. She considered that this provision would only come into play if the employer imposed damages (whether general or liquidated) on Multiplex due to Sintal's late or non-delivery of materials. The provision would come into play only when the employer imposed damages on Multiplex due to Sintal's actions. It was an indemnity provision, not a condition whereby Multiplex had the right to impose general damages on Sintal.

14 As for cl 11.4 of the Conditions, the judge took the view that that clause, together with cl 11.5, related to the exercise of the right of set-off and set out the various steps that had to be followed if such a right was to be properly invoked. In that connection, she considered the set-off notices issued by Multiplex and found that they had not met the requirements of cl 11.5. Appendix H, which was attached to each of the notices, indicated Multiplex's site overheads and running costs, which Multiplex claimed amounted to $10,825.45 per day. The judge found, however, that Appendix H did not provide a breakdown of the daily rate. Multiplex had merely totalled up the monthly site overheads and running costs comprising 22 items, and divided the total figure by 30 days to give the daily average of $10,825.45. She found that this was, at best, inaccurate, and, at worst, arbitrary, as every conceivable expense had been factored into that figure, which was totally unfair to Sintal.

15 Lastly, the judge ruled that the law required Multiplex to prove that Sintal's delay under the sub-contract was the sole cause for the delay under the main contract. Otherwise, Multiplex's failure to apportion the damages arising from the delay would be fatal to its set-off. Since Multiplex had made a counterclaim against another party (whom I shall call "LKC") for the liquidated damages paid to the employer, Multiplex had failed to discharge its burden of proof.

The appeal

16 The issues that arise on the appeal are:

(a) whether it is arguable that Multiplex has a right to claim general damages for delay under the sub-contract; and

(b) if it is so arguable, whether it is also arguable that the set-off notices given by Multiplex comply with cl 11.5 of the Conditions.

In order for Multiplex to succeed on this appeal, both those issues must be answered in the affirmative. If they are not, the refusal of the stay must be maintained.

Claim for damages

17 What types of damages for delay are claimable under the sub-contract is a matter of construction. Before we go on to construe this contract, we think it would be helpful to consider the facts of the *JDC Corp* case.

18 In that case, a sub-contractor made a claim against the main contractor for the recovery of two sums due to it under interim certificates issued by the superintending officer of the project. The main contractor applied for a stay of the proceedings, claiming that under cl 12 of the sub-contract conditions, it was entitled to set off against the two sums general damages arising from alleged delay in completion of the sub-contract. The sub-contract consisted of various documents including a standard form of conditions of sub-contract and the particular specifications of the project. Under cl 5.1 of the specifications, it was provided that failure to complete the work within the specified period would render the sub-contractor liable to pay to the main contractor "liquidated and ascertained damages". These liquidated and ascertained damages were fixed at $2,000 a day. On the other hand, cl 19 of the standard-form conditions provided that if the sub-contractor failed to complete his works within the period provided by the contract, he was to pay the main contractor "any damage or loss suffered or incurred" by the main contractor as a result of the delay.

19 The issue that arose for the Court of Appeal was whether or not a genuine dispute existed under the sub-contract in that case as to the main contractor's right to claim general damages. The judge of first instance had held that the parties had committed themselves to liquidated damages as being the remedy for delay, and therefore no right to claim general damages arose. Upon examining the contractual provisions, the Court of Appeal considered that the matter was not so clear-cut. It stated (at [15] *per* L P Thean JA):

> There appeared to be some tension between cl 5.1 of the specifications and cl 19 of the conditions. Without seeking to delve too deeply into these provisions, it seemed to us that they raised the issue of whether the liquidated damages of $2,000 per day were the sole remedy for the delay under the sub-contract. It should be noted that the meaning and effect of any clause for payment of liquidated damages depends on its express terms and turns on the true construction of the clause. Therefore, whether liquidated damages of $2,000 per day were an exhaustive remedy for the appellants in the event of a delay by the respondents would depend on the true construction of the terms of the sub-contract, in particular cl 5.1 of the specifications and cl 19 of the conditions. In this connection, we bore in mind cl 30 of the conditions which explicitly provided that any dispute as to, inter alia, the 'construction of the terms of the sub-contract, or as to any matter or thing arising thereunder' was to be referred to arbitration. Accordingly, the appropriate forum for the resolution of this issue was an arbitral tribunal.

The clear message of the above passage is that in a situation like the present, if there appears to be a conflict between two provisions of a contract and such conflict cannot be settled without delving deeply into the contract, then the resolution of the question of construction that is raised by the conflict is a dispute which should go to arbitration.

20 Turning to the present contract, the argument put forward by Multiplex was that despite the presence of cl 10 of the letter of acceptance stating that liquidated damages for late completion would be $30,000 a day, a right to general damages still arose under the contract, and even if it was

not so clear that such a right could exist in view of the presence of cl 10, there was a dispute on the construction of the contract which had to go to arbitration. The main submission in this regard was that it was cl 11.4 of the Conditions that gave Multiplex a right to general damages and that the same sort of tension existed between cl 11.4 of the Conditions and cl 10 of the letter of acceptance as existed in the *JDC Corp* case between cl 5.1 of the specifications and cl 19 of the conditions there.

21 Multiplex emphasised that cl 11.4 of the Conditions was entitled "General Damages for Delay". It was the result of amendments made to the first edition of the Singapore Institute of Architects' Conditions of Sub-Contract to abolish the provision relating to liquidated damages which existed in that edition. The intention of the amendments is also shown in the *Guidance Notes on Conditions of Sub-Contract* issued by the Singapore Institute of Architects. That states that under the present cl 11.4, the contractor can only recover general damages for delay from a dilatory sub-contractor and that these damages may include liquidated damages imposed by the employer against the contractor.

22 The body of the clause refers to "such loss or damage suffered or incurred by [Multiplex] as a result of the failure of [Sintal] to carry out the Sub-Contract Works *with diligence or due expedition or to complete the Sub-Contract Works* by the date or dates specified" [emphasis added]. In contrast, cl 10 of the letter of acceptance refers to the imposition of liquidated damages for the "late completion" of the sub-contract works. Multiplex submitted that cl 10 would only apply after the sub-contract works had been completed and it was clear that there had been late completion. On the other hand, cl 11.4 of the Conditions implicitly refers to two types of delays: those causing late completion and those arising while the sub-contract was still executory. Clause 11.4 expressly allows for the set-off of losses caused by delays during the progress of the sub-contract works. A finding, like that made in the court below, that cl 10 of the letter of acceptance had the consequence that only liquidated damages were recoverable at any stage, would make cl 11.4 meaningless.

23 Our reading of cl 11.4 is different. Whilst its title seems to imply that it is conferring a right to claim general damages on the contractor, that is not what the clause actually does. Instead, cl 11.4 assumes that general damages would be claimable (and capable of set-off) as an incident of general contract law. This assumption would be correct under general law if there is no contractual provision that restricts the contractor's right to general damages. In the absence of such restriction, the contractor would be entitled to general damages and cl 11.4 then provides the mechanism whereby such damages may be set off against certified sums. The clause allows the contractor to set off any loss or damage suffered as a result of the sub-contractor's failure to act diligently or to complete the sub-contractor's works by the completion date, against moneys certified as due to the sub-contractor. The procedure to be followed when exercising the right of set-off is then spelt out in cl 11.5 of the Conditions.

24 In the situation where the parties specifically agree to displace the common law right to general damages by adopting a liquidated damages clause, cl 11.4 would be inapplicable, but not meaningless. There is no need to give cl 11.4 a strained reading in order to give meaning to it. It is part of a standard-form set of conditions and the parties who incorporate that standard form as part of their contract are entitled to vary its provisions and effect by agreeing to specific clauses that may displace the provisions of the standard form. Further, we agree with the submission made by Sintal that the purported distinction made by Multiplex between "delays caused for late completion" and "delays caused whilst the [sub-contract] is still executory" is unsound. Where there is a stipulation for liquidated damages for late completion, such damages are payable once the relevant contract completion date is passed. At the point that liquidated damages can be claimed, it matters not whether the works have been completed or are still executory.

25 Whilst we see no tension between cl 10 and cl 11.4, the situation is different in regard to the meaning to be given to cl 10 when it is read in conjunction with Item I. The judge did not find Item I to be a problem as she considered that it was an indemnity provision that could only be invoked if the employer imposed general or liquidated damages on Multiplex in respect of a delay caused by Sintal. We, however, consider that, arguably, there may be a different interpretation of Item I. Although it uses the word "indemnify" when referring to the sub-contractor's responsibility to the main contractor for loss or damage, it is not a clause that triggers a liability only when such liability is imposed by the employer. It can be contended that this clause confers on Multiplex a right to claim all loss or damage which it has suffered arising from Sintal's delay, and it explains that such loss or damage may include liquidated damages imposed on Multiplex by the employer. One reason for this explanation could be an abundance of caution so that it is not thought that the term "loss or damage" does not include liquidated damages. Further, the word "indemnify" may be used to indicate the extent of damages that may be claimed rather than to limit the liability to a situation where the employer has made a claim against Multiplex. In our opinion, therefore, an argument can possibly be made that Item I confers a contractual right on Multiplex to claim general damages for Sintal's delay. As a result, there is a possible tension between cl 10 and Item I and this is an issue to be determined by the arbitrator.

26 In making the argument that, in any case, the specific agreement in the letter of acceptance regarding liquidated damages should override the standard- form condition of cl 11.4, Sintal cited *Homburg Houtimport BV v Agrosin Private Ltd* [2004] 1 AC 715. There, the House of Lords held that greater weight should attach to terms which the contracting parties had chosen to include in the contract than to pre-printed conditions. We accept that position. It, however, does not apply with regard to the contradiction that may exist between cl 10 of the letter of acceptance and Item I. Both of those documents were specifically drafted for the purposes of the sub-contract between Multiplex and Sintal. The drafters do not appear to have realised that the provisions have the potential to conflict with each other so that it is not immediately clear whether the liquidated damages provided for by cl 10 of the letter of acceptance is an exhaustive remedy for delay, or whether the two provisions can co-exist, or whether Item I prevails.

27 We have, therefore, come to the conclusion that there is a dispute that must go to arbitration on the proper interpretation of the damages provisions of the sub-contract.

The set-off notices

28 Clause 11.5 of the Conditions sets out three conditions precedent that have to be complied with by a contractor seeking to set off damages against certified sums due to the sub-contractor. The first condition, which is set out in cl 11.5(i), is that the set-off has been quantified in detail with particulars and with reasonable accuracy. The second condition is that written notice of the intention to set off has to be given and the third relates to the time period for such notice. In the present case, the second and third conditions have been complied with. The judge held that the notices were bad because there was no breakdown of the daily rate of $10,825.45 and the total monthly costs were inaccurate, if not arbitrary, and, secondly, Multiplex had failed to apportion the damages claimed between Sintal and another sub-contractor against whom it had made a claim for delay.

29 Multiplex cited the English case of *Archital Luxfer Limited v AJ Dunning and Sons (Weyhill) Limited* (1989) 5 Const LJ 47 ("*Archital*"), where a dispute revolved around a similarly-worded procedural requirement which had to be satisfied before a set-off could be exercised. In *Archital*, the defendant main contractor engaged the services of the plaintiff sub-contractor. Clause 23.2 of the sub-contract allowed the defendant to set off its loss and expense against moneys owed to the plaintiff. One condition for set-off under cl 23.2.2 was that "the amount of such set-off has been quantified in detail and with reasonable accuracy by the Contractor". The defendant issued a set-off

notice that quantified what was termed as the "AJD loss and expense" as follows:

2. AJD loss and expense:

(a)	Scaffold:	£9,000.00	(approx)
(b)	Plastering:	£4,800.00	"
(c)	Carpentry:	£3,100.00	"
(d)	Painting:	£500.00	"
(e)	Asphalting:	£400.00	"
(f)	Roofing:	£500.00	"

3. AJD site offices, overheads and expense: £1,400.00 "

£19,700.00

The notice further contained the qualification that "these monies are only a provisional assessment of costs at the present time, and that full details will be made available once all facts are known and substantiated".

30 One of the plaintiff's objections to the notice was that it did not comply with the requirement under cl 23.2.2 that the set-off be quantified in detail and with reasonable accuracy. In the English Court of Appeal, May LJ held at 53–54 that:

> … I think that the letter contains at least arguably a sufficient quantification of the defendant's loss within the requirements of clause 23.2.2. The principal purpose of the procedure envisaged by clause 23 as a whole is to enable a sub-contractor to operate the adjudication provisions of clause 24. Amongst these is one requiring the sub-contractor to send to both main contractor and adjudicator a written statement setting out his reasons for disagreeing with the contractor's notice under clause 23.2.2. and 23.2.3. Looked at in this light, I think that it is arguable that there was sufficient in the defendant's letter … to enable the plaintiff to answer, to plead to the defendant's contentious and claims to bring the issues adequately before the adjudicator. With some hesitation therefore, I think that the defendant's contention that the letter relied on did comply with clause 23.2.2. is sufficiently arguable.

31 Relying on the authority of *Archital*, Multiplex submitted that the purpose of the procedure set out in cl 11.5 of the Conditions was to allow the sub-contractor, upon receipt of the set-off notice, to formulate his reasons for objecting to the set-off. It was not, said Multiplex, the purpose of cl 11.5(i) to require Multiplex to substantiate the figures given in the notices by way of exact arithmetic, especially since the set-off notices were issued when the sub-contract was executory. All that was required to comply with cl 11.5(i) was a quantification of the loss (as opposed to a general statement of loss), particulars of the loss (*ie*, how it came about) and the manner in which the delay caused such a loss. Once a notice complied with those three requirements it would be a notice that stated the claim "with reasonable accuracy". To impose a more stringent requirement to the extent that the notices should be exact in arithmetic and form would be too onerous an obligation on a main contractor like Multiplex.

32 Sintal did not disagree that only reasonable accuracy and not exact arithmetic was required

by cl 11.5(i). Its argument was that the notices presented by Multiplex were far from being reasonably accurate. Firstly, cl 11.4 only allowed a set-off of loss or damage "suffered or incurred" by Multiplex. Prospective losses could not be the subject of a set-off under this clause as they had yet to be "suffered or incurred". In respect of the very first set-off notice, however, Multiplex had claimed to set off its site overheads and running costs for the period between 2 December 2002 and 4 May 2003 when the notice itself was issued on 17 April 2003, *ie*, approximately 18 days before the end of the period. Secondly, Multiplex had sought arbitrarily to claim every conceivable expense and not just what it had actually suffered or lost. It had even factored in overtime for the clerk of works. Multiplex was seeking to pass on to Sintal every component of its monthly costs. Thirdly, the set-off notices were premised on Sintal being entirely responsible for delaying the project, whereas Multiplex was also blaming the other sub-contractors for the delay. In Suit No 42 of 2004 filed by LKC against Multiplex, Multiplex had pleaded that delays on the part of LKC had caused delays to other parts of the works and had made a counterclaim against LKC for, *inter alia*, $2m as costs incurred by way of paying liquidated damages to the employer, and $927,790 as costs incurred in maintaining the worksite. If both Sintal and LKC had caused delays to the project, Multiplex should have apportioned the loss between the two. As it did not do so despite the fact that there were overlapping periods of delay, its set-off notices were inaccurate.

33 The set-off notices that Multiplex sent Sintal were detailed documents. Each notice was in the form of a three-page letter which explained the delay and the basis for the set-off. Each was accompanied by an average of 90 documents divided into eight appendices that provided information and particularised and quantified the losses due to the delay in completion. We consider that they provided sufficient information to enable Sintal to ascertain the quantum of the set-off, to understand the bases of Multiplex's claims against it and how the same were calculated and finally, to challenge such claims in any arbitration proceeding. In that context, the notices were reasonably accurate. As regards the specific objections to them raised before us, we deal with these below.

34 First, as regards the objection that the damages claimed in the set-off notice must have been incurred and sustained before the date of the notice, we consider this objection to be well founded in view of the phraseology of cl 11.4 of the Conditions. That clause follows the common law position that one debt can only be set off against another if both debts have already accrued. The common law does not allow the set-off of prospective debts. Accordingly, the first set-off notice could only claim a set-off for expenses that had been incurred prior to 17 April 2003. Since it purported to include expenses to be incurred thereafter, it did not contain a reasonably accurate quantification of Multiplex's claim.

35 We do not think that the second objection is equally well founded. Multiplex was entitled to make a claim for every component of its monthly costs as long as it could prove that those costs would not have been incurred had Sintal not delayed the completion of the works. Nor was it wrong to divide the monthly costs by 30 so as to get an average daily rate, since what was required was reasonable accuracy and not exactitude. Multiplex gave details of its calculations. If these details were not sufficient to prove its claim, then Sintal would be perfectly justified in taking that point before the arbitrator. Having put the calculations in the set-off notices, Multiplex would have to establish the truth and reasonable basis of the same in the arbitration. In any case, disputes as to the ability of Multiplex to recover any particular item in its claim and the extent to which such item was recoverable (if only partial recovery were permissible) would be matters to be sorted out by the arbitrator in the arbitration.

36 As for the third objection, the position taken by Multiplex was that the delay which was the subject of the set-off notices was solely attributable to Sintal. At the hearing, we were told by counsel that Multiplex had dropped its claim against LKC for delay. Multiplex also submitted that even

if there was concurrent delay by other sub-contractors and therefore the delay was not solely attributable to Sintal, the issue of the effect of concurrent delay (if any) ought to be determined in accordance with the parties' agreement by an arbitrator. We agree. We also agree that because there is a substantive dispute on concurrent delay, it cannot be said to be indisputable that the set-off notices are not reasonably accurate. This is an issue to be determined by the arbitrator.

37 For the reasons given above, we find that apart from the first set-off notice, the set-off notices complied with cl 11.5(i). There are, therefore, in respect of the second, third and fourth set-off notices, disputes which should be referred to arbitration.

Conclusion

38 The first set-off notice was in respect of interim certificate no 27 dated 29 April 2003 in the amount of $285,592.28. The amounts due under the other three interim certificates total $199,676.27. In the result, therefore, we allow the appeal in part and set aside the decision below. We grant Multiplex a stay in respect of the interim certificates no 28 dated 3 June 2003, no 29 dated 9 July 2003 and no 30 dated 11 August 2003. There will be no stay in respect of the interim certificate no 27.

39 As for costs, it is relevant that Multiplex, whilst succeeding on most of the issues in the appeal, has not succeeded in obtaining a complete stay of the claim, and the amount stayed, as a result of its success, is less than 50% of the total amount of the four certificates. In these circumstances, we set aside the costs order made by the judge below and award Multiplex two thirds of its costs here and before the judge.