Panwah Steel Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd [2005] SGHC 235

Case Number : Suit 746/2004

Decision Date : 27 December 2005

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Josephine Chong and Aqbal Singh (UniLegal LLC) for the plaintiff; Lai Kwok Seng (Lai Mun Onn and Co) for the defendant

Parties : Panwah Steel Pte Ltd — Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd

Contract – Contractual terms – Express terms – Seller contracting to supply goods to buyer – Interpretation of minus 10% tolerance provision as to quantity of goods to be delivered – Whether option may be exercised by buyer or by both buyer and seller

Contract – Contractual terms – Implied terms – Seller contracting to supply goods to buyer – Seller failing to deliver expected quantity of goods to buyer – Whether implied term that agreement "project-specific" existing

Contract – Remedies – Remoteness of damage – Seller contracting to supply goods to buyer – Seller failing to deliver expected quantity of goods to buyer – Buyer seeking damages based on difference between cost of replacing undelivered goods and contract price – Whether damages too remote to be claimable

27 December 2005 *Judgment reserved.*

Woo Bih Li J:

Introduction

1 In this action, the plaintiff, Panwah Steel Pte Ltd ("Panwah"), claims $1,447,833.83 for the supply of reinforcing steel bars ("rebars") to the defendant, Koh Brothers Building & Civil Engineering Contractor (Pte.) Ltd ("Koh Brothers"), under an agreement between the parties dated 26 April 2002 but signed by Panwah on 31 May 2002 ("the KB Agreement"). Panwah's claim is not disputed.

2 The dispute centres on Koh Brothers' counterclaim for Panwah's omission to deliver 8,126.459mt being the balance of the contractual quantity of 39,000mt under the KB Agreement. Panwah had in turn entered into a contract to obtain rebars from Burwill Trading Pte Ltd ("Burwill") and as Burwill declined to deliver the balance, Panwah did not deliver the same to Koh Brothers. There are also disputes between Panwah and Burwill which are the subject of Suit No 928 of 2004 ("Suit 928/2004"), the primary dispute being on Burwill's refusal to deliver the balance to Panwah under their own agreement dated 23 May 2002 which I have referred to in my judgment for Suit 928/2004 as "the Changi Agreement".

3 There were two primary issues as between Panwah and Koh Brothers:

(a) Was the KB Agreement "project-specific" in the sense advocated by Panwah, *ie*, that the rebars must be used only for the intended project, *ie*, Changi Water Reclamation Plant C3A at Tanah Merah Coast ("C3A")? Put in another way, was Koh Brothers precluded from using rebars supplied under the KB Agreement for other projects? This issue arose because the evidence was

that Koh Brothers did not require the balance of the rebars for C3A. As between Burwill and Panwah, Burwill had refused to deliver the balance.

(b) Was Panwah entitled to deliver 10% less than 39,000mt? I should elaborate that although I initially mentioned above that the contractual quantity was 39,000mt, the KB Agreement referred to a "-10% tolerance" as well. I will elaborate on the actual words used and this issue later.

4 At the trial, the following witnesses gave evidence:

For Panwah

Lim Seow Yi ("Lisa Lim")	Manager

For Koh Brothers

Choo Siew Meng ("Mr Choo")	Executive Director
Tan See See ("Rina Tan")	Purchasing Manager

The "project-specific" issue

5 It was not in dispute that the supply of rebars under the Changi Agreement and under the KB Agreement was intended to be used for the C3A project. However, while Panwah had conceded *vis-à-vis* Burwill that the Changi Agreement was "project-specific", Koh Brothers did not concede the same. In addition, when Burwill agreed to extend the Changi Agreement in the circumstances I have stated in my judgment for Suit 928/2004, Panwah had agreed that the supply under the extension would be "as per the progress requirement of the project". I referred to this as "the Condition" in my judgment for Suit 928/2004 and I will do likewise here. The KB Agreement did not have the Condition. However, Panwah submitted that it was implied that the KB Agreement was project-specific.

6 Before I deal with the arguments on the implied term, I will set out the principles regarding the interpretation of documents and the imposition of an implied term.

7 In *United Lifestyle Holdings Pte Ltd v Oakwell Engineering Ltd* [2002] 2 SLR 308, Lee Seiu Kin JC referred to *Prenn v Simmonds* [1971] 1 WLR 1381, *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989, *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 and *Tan Hock Keng v L & M Group Investments Ltd* [2002] 2 SLR 213. He concluded at [7]:

> Those authorities hold that evidence may be admitted of the factual background known to the parties at the time of contracting, including the genesis and purpose of the transaction, but not of the negotiations or intentions of the parties.

8 In *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583

("*Miller*"), Lord Reid said at 603:

> I must say that I had thought that it is now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later.

I would add that the principle in *Miller* has been applied in Singapore in many cases, although subsequent conduct can constitute a variation or an estoppel in appropriate circumstances.

9 In *Telestop Pte Ltd v Telecom Equipment Pte Ltd* [2004] SGHC 267, Judith Prakash J said at [68]:

> The courts do not lightly imply a term into a written contract. They only do so if, objectively, it is considered necessary for the "business efficacy" of the contract and so obvious that there would be no doubt of the parties' joint answer to the query of the "officious bystander" as to whether that term was part of the contract. *Chitty on Contracts* (29th Ed, 2004) states at (13-004):
>
> > An implication of this nature may be made in two situations: first, where it is necessary to give business efficacy to the contract, and, secondly, where the term implied represents the obvious, but unexpressed, intention of the parties. These two criteria often overlap and, in many cases, have been applied cumulatively, although it is submitted that they are, in fact, alternative grounds. Both, however, depend on the presumed intention of the parties.
>
> In *Hiap Hong & Co Pte Ltd v Hong Huat Development Co (Pte) Ltd* [2001] 2 SLR 458, the Court of Appeal (*per* Chao J at [18]) held that the relationship between the two tests was "probably" correctly summarised in the above passage. Andrew Phang has, however, to my mind, persuasively argued on the basis of the historical development of the tests that they are not alternatives but complementary in as much as the "officious bystander" test is the practical mode by which the theoretical guideline encompassed within the "business efficacy" test is fulfilled: see Phang, "Implied Terms, Business Efficacy and the Officious Bystander – A Modern History" [1998] JBL 1. One highly distinguished authority that gives rise to that view is the oft-quoted statement of Scrutton LJ in *Reigate v Union Manufacturing Company (Ramsbottom), Limited* [1918] 1 KB 592 at 605 that:
>
> > [a] term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, "What will happen in such a case," they would have both replied, "Of course, so and so will happen; we did not trouble to say that; it is too clear."
>
> It is also worth repeating the strictures of the Court of Appeal in the *Hiap Hong* case to the effect that the "business efficacy" test is a convenient means of repairing an obvious oversight, but that the principle should not be overstretched or used indiscriminately; and that the touchstone for the implication of terms is necessity and not merely reasonableness, but that a necessary term to be implied must always be equitable and reasonable. The court further declared that a term would be implied, if, from the language of the contract and the surrounding circumstances, an inference should be made that the parties must have intended the stipulation in question. Finally, the term to be implied must be capable of clear expression and it must not contradict any express term of the contract: see *Phillips Electronique Grand Public SA v British Sky Broadcasting Limited* [1995] EMLR [*Entertainment & Media Law Reports*] 472.

10 As I mentioned, it was not disputed that the supply of rebars under the KB Agreement was intended for the C3A project. However, it is quite a different kettle of fish to say that this necessarily means that it is "project-specific" in the sense advocated by Panwah. During the trial, this expression was bandied about by Panwah as though it was a term of art. However, para 50 of Panwah's Closing Submissions accepted that it was not a term of art.

11 Panwah relied on industry practice to assert that Koh Brothers could not resell the rebars or deploy the rebars for use in other projects as Koh Brothers is not a stockist or seller of rebars but a building contractor. I would add that Koh Brothers was apparently the main contractor for the C3A project. However, Panwah did not adduce any evidence from an independent party in the industry of building contractors or of steel suppliers to support this assertion. Indeed, although the parties in this action were granted leave to cross-examine any of the witnesses in Suit 928/2004 and to make use of evidence adduced there for the present action and *vice versa*, Panwah also failed to seize the opportunity to try and establish its assertion from Burwill's witnesses, beyond accepting Burwill's position that the Changi Agreement was project-specific.

12 Panwah also submitted that to allow Koh Brothers to resell rebars would be to defeat the business of stockists like Panwah. Yet, Panwah itself could buy from other stockists. Would that defeat the business of those other stockists? I do not think so. Also, Koh Brothers had said they wanted to deploy the rebars, if supplied by Panwah, to other projects and not to resell the same.

13 In her Affidavit of Evidence-in-Chief ("AEIC") for the present action, Lisa Lim pointed out that Panwah's quoted prices for rebars varied for different projects to support the "project-specific" assertion. However, I note that the difference in prices as quoted by Panwah for different projects could easily be attributed to:

(a) the different quantities required for each project; and

(b) the different durations of supply for each project.

In my view, while the prices quoted were for specific projects, this fell short of establishing that the KB Agreement was "project-specific".

14 Panwah also submitted that if Koh Brothers could use the rebars supplied by Panwah for other projects, then there was no point in Koh Brothers entering into separate agreements for different projects. I do not agree. As the evidence of Koh Brothers went, the different agreements assisted it to keep track of the supply of rebars for each project. Furthermore, Panwah's own quotation dated 15 April 2002 for various projects revealed that the prices for larger projects of a longer duration were higher than for the smaller ones of a shorter duration. Thus, if Koh Brothers was to lump all its requirements into one contract, it would have less flexibility in negotiations.

15 Panwah pointed out that the heading of another contract between Koh Brothers and a company called Listeel Singapore Pte Ltd ("Listeel") showed clearly that it was a "general supply contract" in contrast with the KB Agreement. The heading of the Listeel contract referred to the supply and delivery of rebars "TO OUR PROJECTS IN SINGAPORE" whereas the heading of the KB Agreement referred to the C3A project specifically. I am of the view that this argument does not help Panwah. As Koh Brothers pointed out, when it was seeking a quotation from Burwill for the C3A project, Burwill's quotation dated 10 April 2002 (Exh D1) had a term stating expressly that "all rebars must be procured from Burwill Trading to carry out the work". Mr Choo said that it was because of this term that Koh Brothers decided not to buy from Burwill. So, if the terms of what other quotations or contracts contain are relevant, the evidence would tilt against Panwah.

16 Furthermore, the contract with Listeel was dated 1 September 2004, *ie*, after the expiry of the KB Agreement in June 2004 and after the dispute with Panwah had been taken into account. Even then, Rina Tan said that subsequent to the Listeel contract, Koh Brothers reverted to identifying a specific project to avoid confusion to its buyers and suppliers.

17 Panwah relied on other terms in the KB Agreement. For example, in addition to the heading of the KB Agreement, the clause on project title referred to the C3A project.

18 Clause 2 stated that the prices of rebars were fixed throughout the project.

19 Clause 6 referred to the possible rejection of rebars by the Public Utilities Board ("PUB"), which was the developer of the project, and Panwah's obligation to replace the same within two working days.

20 I do not see how these provisions assist the "project-specific" argument. As an illustration, although cl 6 referred to the possible rejection of rebars by PUB, it did not mean that Koh Brothers could not deploy the rebars to other projects. All it meant was that if the rebars were deployed to other projects and rejected by other developers, Koh Brothers could not rely on cl 6 to seek recourse against Panwah.

21 Panwah also relied on Koh Brothers' contract with PUB which was subject to the Public Sector Standard Conditions of Contract for Construction Works ("PSSCCCW"). Clause 24.1 PSSCCCW states:

> All … materials and goods provided by the Contractor shall, when brought on to the Site, be deemed to be exclusively intended for the execution of the Works and the Contractor shall not remove the same or any part of such … materials or goods … without the consent in writing of the Superintending Officer.

22 A Guide on the PSSCCCW 1999 published by the Building and Construction Authority ("BCA") states:

> This provision seeks to ensure smooth progress on the site by shutting out third party claims to any construction equipment, plant, material or goods brought to the site.
>
> Condition 24.1 provides that once anything is brought to the site, it cannot leave the site without the Superintending Officer's permission, with the exception of vehicles engaged in transport. However, while this covers the physical disposition of the item, the clause does not deal with the issue of title in respect of these items.

23 As can be seen, that provision does not deal with the rights as between Koh Brothers and Panwah. In my view, cl 24.1 PSSCCCW does not assist Panwah.

24 Panwah placed much emphasis on its argument that if Lisa Lim had been told that Koh Brothers were going to use the rebars supplied under the KB Agreement for other projects, she would not have entered into the agreement. As is evident from the judgment of Prakash J which I have cited, an implied term does not arise just because one side would have said a certain conclusion was obvious but because both sides would have said it was obvious. Besides, it is not as though Koh Brothers had intended not to use any of the contracted rebars for the C3A project right from the time the KB Agreement was signed. In addition, I do not see how business efficacy requires the "project-specific" term to be implied.

25 Furthermore, Panwah's "project-specific" arguments did not deal with the opposite side of the coin. Supposing less steel was needed for the project due to a variation in design or specifications or an overestimation of quantities, and the price of steel was dropping below the contract prices, would Koh Brothers be entitled to say that it would order less steel since a lesser quantity was required for the project? I think Panwah would have said that Koh Brothers was obliged to order the contract quantity (subject to any reduction that might be allowed under the "-10% tolerance" provision which I will deal with later).

26 The burden is on Panwah to establish the implied term. In my view, it has failed to do so.

The "-10% tolerance" point

27 The total quantities in the KB Agreement stated:

> Actual 39,000 Tons (-10% tolerance or actual)

Clause 1 of the KB Agreement states:

> The 39,000 metric tons of rebars with quantity variation of -10% or actual.

28 Koh Brothers' position was that the minus 10% tolerance was at its option. Panwah's position was that since there was no express stipulation that the tolerance was at the buyer's or seller's option, it was open to both buyer and seller to act on the tolerance position, meaning either could exercise the option. Panwah asserted that it was therefore within Panwah's contractual rights to deliver 90% of 39,000mt, *ie*, 35,100mt and, consequently, the extent of its liability would in any event be correspondingly reduced.

29 I note from the documentary evidence that a tolerance provision is not uncommon in such contracts without specifying whose option it is to exercise the tolerance. The provision commonly used refers to both a plus or minus figure, *eg*, "+/- 10% tolerance".

30 Panwah relied on the negotiations leading to the executed agreement but such negotiations are not admissible as an aid to construction. In any event, the negotiations would not have helped me to reach a conclusion because while Rina Tan emphasised that she wanted to stick to 39,000mt, she nevertheless included the tolerance provision in the KB Agreement. Also, while Rina said she had cancelled any reference to the tolerance being "at seller's option", it appears that it was Lisa Lim who still wanted a tolerance provision included, even though without any express provision referring to the buyer's option.

31 Leaving the negotiations aside, there was unfortunately a dearth of evidence as to what such a provision would mean given that it is not uncommon in the industry. Again, no independent evidence was adduced thereon. Also, the parties did not ask Burwill's witnesses in Suit 928/2004 to explain it. Lisa Lim was not even cross-examined on this issue. It was only when Koh Brothers' witnesses were on the stand that more attention was placed on the issue.

32 Panwah relied on *In Re An Arbitration between Thornett and Fehr and Yuills, Limited* [1921] 1 KB 219 where the seller agreed to sell "200 tons, 5 per cent. more or less" of Australian beef tallow. The Earl of Reading CJ said at 229:

> It is a provision which is inserted into the contract for the sellers' protection, and it gives them a margin within which to deliver, so that they are not bound to deliver exactly 200 tons, but within

5 per cent. of that quantity, whether more or less. Their legal obligation under the contract was to deliver at least 190 tons, and if they had delivered 190 tons they would have performed the contract, that is to say they would have delivered the quantity which could be enforced against them under the contract. In my opinion the damages which can be claimed against the sellers in this case are not damages for non-delivery of 39 tons, the balance between 161 and 200 tons, but for non-delivery of 29 tons allowing for the 5 per cent. less than the 200 tons. Although one is naturally much impressed by the view of the Board of Appeal who are familiar with contracts of this kind I do not think we can give effect to their view that the phrase "5 per cent. more or less" operates only to cover accidental or unimportant variations from the quantity stated in the contract. There could not be an inquiry if the sellers had delivered within 5 per cent. more or less of the 200 tons as to whether the delivery of the 5 per cent. more or less was occasioned by accident or inadvertence or whether it was a deliberate act.

33 That case did not involve a sale and purchase of steel rebars and it is not clear to me what the evidence was on such a term. Accordingly, I am hesitant to give much weight to that judgment. Here, the provision is "-10% tolerance or actual". So what would have happened if more had been supplied? Also, the reference to a tolerance and to "actual" quantities creates an inherent tension. At the end of the day, I conclude that the tolerance provision should not be ignored. The question then is whether either side had the option to call for or to supply 10% less than 39,000mt or only Koh Brothers had the option. Another interpretation was that the tolerance provision was meant to apply only to an inadvertent shortfall. I would have thought that the tolerance is usually silent as to whether it is at the option of the buyer or seller because it is meant to cover an inadvertent shortfall or excess where it is "+/- 10% tolerance". Likewise, in the present case, I would have thought that the provision in question covered an inadvertent shortfall. However, neither side asserted this interpretation.

34 Mr Choo of Koh Brothers was initially prepared to accept Panwah's interpretation that either side could exercise the tolerance provision. His evidence as reflected in the transcript of 22 July 2004 at p 241 was:

Q Okay. Now, what does the word "negative 10% tolerance" mean?

A It means could be less 10% of 39,000 tons.

Q It means that Koh Brothers can order 10% less of 39,000 tons, a lesser amount by 10%. My instructions are it also means that Panwah can supply the amount, if they so elect, 10% less than 39,000 tons. You agree?

A Yes, I agree.

Court: No, that means when he says "election" it means …

Witness: Choose to.

Court: Even if Koh Brothers orders 39,000 tons, Panwah is entitled to say, "No, I am going to deliver you 39,000 less 10%". Is that Panwah's right?

Witness: Based on this particular clause, yes. I think he has the right because it is quite vague. I quite agree.

Court: I just wanted to understand what your position is.

Witness: I am fair to this. This particular clause is quite vague.

Q So thanks for …

A Yes, I agree with you that you can choose to deliver 36,000 tons, less 10% whatever it is.

Q It is about 35,100 tons.

A Okay.

35 Although Mr Choo retreated from this position in his later evidence, I think Koh Brothers should do the fair thing as Mr Choo himself suggested. In any event, I am of the view that there is no logical reason why the buyer only should have the option to order less. The seller here also had the option to supply 10% less than the 39,000mt, *ie*, 3,900mt. Since Koh Brothers said 8,126.459mt was not supplied, Panwah would be liable for not supplying 8,126.459mt – 3,900mt = 4,226.459mt. I will now deal with the remainder of the issues.

Remoteness of damages

36 Panwah submitted that the damages claimed by Koh Brothers, being the difference between the cost of replacing undelivered rebars and the contract price, was too remote to be claimable. Relying on *Victoria Laundry (Windsor) Ld v Newman Industries Ld* [1949] 2 KB 528, Panwah submitted that such damages could not fairly and reasonably be considered as arising naturally from Panwah's breach and could not reasonably be supposed to have been in the contemplation of both parties at the time the KB Agreement was made. This submission was premised on the "project-specific" argument again, *ie*, that Koh Brothers was not entitled to buy rebars for use in other projects and Panwah was unaware that Koh Brothers would deploy rebars under the KB Agreement to other projects.

37 I have ruled against the "project-specific" argument. In my view, Koh Brothers are entitled to claim for the difference in the cost of replacement as such replacement arises naturally from Panwah's breach and must have been in the contemplation of both parties at the time the KB Agreement was made. Whether the replacement bars were used for C3A or other projects is not the legitimate concern of Panwah.

38 Clause 5 of the KB Agreement states "[m]ust be able to meet to our deliveries, failing which Panwah Steel will be liable for the difference in the costs of rebars purchased by us". Koh Brothers rested its claim for damages on cl 5. Panwah submitted that cl 5 referred to a situation where the replacement rebars were to be used for the C3A project. In my view, there is nothing in cl 5 which suggests this restriction. If there was, the "project-specific" argument would have succeeded. Panwah cannot succeed by a backdoor argument what it failed to achieve through its main argument.

Quantum of damages

39 Koh Brothers had tabulated their calculation of damages in Annexure B of its Answer to Interrogatories filed on 20 April 2005. However, the purchases therein included purchases before 7 July 2004 which was the date of Koh Brothers' notification to Panwah that it would be obtaining rebars from alternative suppliers. What Koh Brothers apparently did for this table was simply to include contracts at random so long as the total of the quantities added up to the quantity claimed, without trying to identify which of the purchases in the table were actually to replace the undelivered rebars.

Koh Brothers also did not produce sufficient evidence to identify the post-7 July 2004 purchases as replacement for the undelivered rebars.

40 However, I do not think it right to simply remove all the pre-7 July 2004 purchases from the table as Panwah suggested. Even if this was to be done, Panwah did not clarify whether the remainder would amount to more or less than the 4,226.459mt which Panwah is liable for.

41 In the circumstances, I think that the better approach is to use the July 2004 price indicated in BCA's Construction Material Prices. Such information was available from Lisa Lim's AEIC in Suit 928/2004. This was $813.13 per metric tonne. As the price under the KB Agreement was $454 per metric tonne, the difference is $813.13 – $454 = $359.13 per metric tonne. The additional cost for 4,226.459mt is therefore $1,517,848.22.

Summary

42 I would have granted Panwah judgment against Koh Brothers for $1,447,833.83 and Koh Brothers judgment against Panwah for $1,517,848.22. However, I allow Koh Brothers to set off what it is liable to Panwah for against what Panwah is liable to it for. Therefore, I grant judgment to Koh Brothers for the balance being $70,014.39 with interest at 6% per annum from 4 October 2004 being the date of the Counterclaim. I will hear parties on costs.