IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 45

District Court Appeal No 29 of 2020

Between

Tan Peng Kwang (trading as
Europe Mini Holiday)

… *Appellant*

And

Zimerick LLP

… *Respondent*

In the matter of DC/DC 2997/2015

Between

Zimerick LLP

… *Plaintiff*

And

Tan Peng Kwang (trading as
Europe Mini Holiday)

… *Defendant*

GROUNDS OF DECISION

[Contract] — [Breach] — [*Quantum Meruit*]
[Evidence] — [Admissibility of evidence] — [Hearsay]

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v
Zimerick LLP

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24 February 2021

Kwek Mean Luck JC:

Introduction

1 This is an appeal against the decision of the District Judge ("the DJ") in *Zimerick LLP v Tan Peng Kwang t/a Europe Mini Holiday* [2020] SGDC 248 allowing 95% of the respondent's claim for work done on a mobile travel app ("the app") for the appellant and dismissing the appellant's counterclaim.

2 At the end of the hearing, I dismissed the appeal and provided my brief reasons. I now set out my reasons in full.

Facts

3 The appellant is a sole proprietor running a business specialising in holidays to Europe.[1] The respondent is a limited liability partnership specialising in building mobile applications. The parties entered into Customer Services Agreement Contract #00001114 ("the Agreement") and Work Order #00001114 ("the Work Order"), dated 8 October 2013. They collectively form the contract ("the Contract") between the parties for the respondent to develop the app for the appellant, for the total price of $134,122.[2]

4 There were 3 payment milestones under the Contract, set out in Clause 9 of the Work Order:[3]

(a) 50% of the contract value ($67,061) was payable on signing of the Work Order;

(b) 40% of the contract value ($53,649) was payable on the app being ready for the User Acceptance Test ("UAT"), and

(c) 10% of the contract value ($13,412) was payable on the passing of the UAT.

The parties' cases

5 The appellant's case is that while the respondent had developed the app for use on Android and iPad platforms, they failed to produce the app for use on

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1 Affidavit of Tan Peng Kwang dated 21 February 2019 at [1].

2 Statement of Claim (Amendment No. 2) ("Statement of Claim") at [1], [3].

3 Affidavit of Heidi Khew Su-Wei dated 13 March 2019 at page 22.

iPhones. The appellant was hence entitled to hold the respondent in breach of the Contract and terminate it.[4]

6 The appellant also counterclaimed for $32,916 in damages for the unilateral revocation of the Contract by the respondent, $42,129.80 for expenses incurred in hiring the photographer and extra staff, $48,255.60 for loss of income, and an indeterminate sum for "damages for embarrassment, loss of reputation and estimation by the [appellant's] clients and business associates" and "other general and/or special damages to be assessed".[5]

7 The respondent's case is that they had substantially performed their obligations under the Contract in developing the app for use on the Android and iPad platforms. They did not dispute that they were contractually required to develop the app for use on the iPhone and had not done so, but contended that they had informed the appellant that they were able and willing to develop the app for use on iPhones. The appellant hence wrongfully terminated the Contract.[6]

8 The respondent rendered invoices for $134,122, which is the total sum payable under the Contract. It was undisputed that the appellant had already paid $32,916.[7] The respondent commenced an action in the District Court, for the balance that they claim is due to them under the Contract, in the sum of $101,206.

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4 Appellant's Case ("Appellant's Written Submissions") at [18]–[24].

5 Defence and Counterclaim at [48].

6 Respondent's Case at [76].

7 Statement of Claim at [6].

Decision below

9 The DJ held that the appellant was not entitled to hold the respondent in breach of the Contract. He found that it was the appellant who was in breach when they failed to pay the respondent for the work already done to develop the app for the Android and iPad platforms, and that the appellant ought to have allowed the respondent to develop the app for iPhones.[8]

10 The DJ found that the UAT had been passed, satisfying the last payment milestone under the Contract.[9] At the trial, the appellant sought to rely on the documentary evidence of one Derique Yeo ("Derique") regarding the quality of the app. Derique was not willing to give evidence in court. There was no evidence that the appellant sought a subpoena to compel him to come to the court. The DJ found that Derique's documents were inadmissible, and even if admissible, very little weight would be ascribed to them given Derique's absence from court.[10]

11 The DJ relied on the evidence of the respondent's expert witness in finding that the value of the missing iPhone component was about 5% of the total project cost.[11]

12 The DJ gave judgment for the respondent for 95% of the sum claimed, giving a 5% deduction for the non-development of the app for use on iPhones.

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8 *Zimerick LLP v Tan Peng Kwang t/a Europe Mini Holiday* [2020] SGDC 248 at [10].

9 *Zimerick LLP v Tan Peng Kwang t/a Europe Mini Holiday* [2020] SGDC 248 at [23].

10 *Zimerick LLP v Tan Peng Kwang t/a Europe Mini Holiday* [2020] SGDC 248 at [26].

11 *Zimerick LLP v Tan Peng Kwang t/a Europe Mini Holiday* [2020] SGDC 248 at [24].

The DJ found that the appellant was unable to prove their counterclaim and dismissed it.[12]

Issues arising in the appeal

13 According to the appellant, the appeal should be allowed as the DJ erred in:

(a) finding that the appellant did not give the respondent a chance to develop the omitted iPhone application and that it was the appellant who was in breach of the Contract;

(b) finding that the UAT had indeed been carried out;

(c) finding that the value of the iPhone component was 5% of the total project cost;

(d) disregarding the evidence of Derique; and

(e) accepting the evidence of the respondent's expert witness.[13]

My decision

14 In my view, the points of appeal raised by the appellant fold into three main questions:

(a) whether the appellant had the right to terminate the Contract;

(b) whether the app has passed the UAT; and

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12 *Zimerick LLP v Tan Peng Kwang t/a Europe Mini Holiday* [2020] SGDC 248 at [30].

13 Appellant's Written Submissions at [17] and [35].

(c) whether the respondent was entitled to 95% of the project cost.

Whether the appellant had the right to terminate the contract

15 The first question is whether the appellant had the right to terminate the Contract, simply because of the missing iPhone app.

16 The appellant submits that the failure to develop the iPhone app was a material breach of the Contract, as Clause 2.1 of the Work Order requires the respondent to "[d]evelop Europe Mini Holiday mobile app for iOS 7.0 – 7.0.2 for iPad, iPad mini and iPhone."[14]

17 While Clause 2.1 of the Work Order requires the development of the app for iPhone use, there is no clause in the Contract stating that the non-development of this would be a material breach. The respondent did not refuse to develop the iPhone App. They stated that they were willing and able to do so, but also asked for payment for the work already done.[15]

18 Further, the respondent's expert witness testified that the iPhone app could have been added in with minimal costs, in March to April 2015, when the Android and iPad apps were developed, and that the value of the iPhone component was about 5% of the total project cost.[16]

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14 Appellant's Written Submissions at [18].

15 Affidavit of Quek Choon Yang dated 13 March 2019 at page 178; Record of Appeal at page 452.

16 Affidavit of Tung Kum Hoe, Anthony dated 13 March 2019 at [6].

19 In their submissions, the appellant raised questions about the assumptions underlying the evidence of the respondent's expert. These questions could have been put to the expert had the appellant chosen to cross-examine him, but the appellant did not. The appellant could also have called his own expert to testify, but the appellant did not. While a trial judge is not duty bound to accept unchallenged evidence, neither is he constrained from doing so. I saw no reason to disturb the DJ's acceptance of the expert's evidence on these points.

20 On the evidence, the omission of the iPhone component did not affect the appellant's substantial benefit under the Contract. I agree with the DJ that the appellant did not have the right to terminate the Contract, simply because of the missing iPhone app.

Whether the app passed the UAT

21 The main issue raised by the appellant was the DJ's award of 95% of the respondent's claim for work done for the Android and iPad platforms. The appellant initially submitted that the key legal question for this issue is whether the Contract is divisible, so as to allow for partial payment.

22 In my judgment, there is a more straightforward starting point from which to address this issue, namely whether the payment milestones under Clause 9 of the Work Order have been met. In particular, has the app passed the UAT? If it did, the respondent would have met all the payment milestones under the Contract and be entitled to 100% of his claim, with deductions for work not done for the iPhone app. I note that in the course of their oral submissions, both counsel agreed that this is the key question for this issue, not the question of whether the Contract is divisible.

23 The DJ found that the app had passed the UAT. Was he wrong in making this finding?

24 The appellant pointed to the absence of a signed UAT acceptance form. It is undisputed that a UAT form would be signed by both parties, upon the testing of the app, to indicate that the app was developed and was usable.[17] While the presence of a signed UAT acceptance form is evidence that the UAT was carried out, its absence, without more, does not affirm that the UAT was not carried out. This is where the rest of the evidence is relevant.

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17 Transcript dated 28 January 2020, Record of Appeal at page 788, lns 17-23.

25 Both counsel verified in the course of oral submissions, that the following are undisputed:

(a) Clause 5 of the Work Order, which sets out the preliminary project schedule as agreed by the parties, indicates that the "User acceptance test" will take place in Week 23, following which there is the "[c]ompletion of system and 'go live'" in Week 24;[18]

(b) the respondent sent an email to the appellant on 9 February 2015, stating that "since the app is live", the appellant "may create contents and set the Access to 'Hidden' so that [his] draft contents will not be visible in the app";[19]

(c) from 9 February 2015 to 9 April 2015, the appellant logged into the app at least 302 times;[20]

(d) the app went live on the Apple App store for the iPad platform on 3 March 2015;[21] and

(e) there were no communications from the appellant saying that the UAT had not been passed or that the app was not live. Instead in his email dated 17 April 2015, the appellant asked for the missing iPhone app and for the respondent to complete it by 4 May 2015 with the UAT test.[22]

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18 Record of Appeal at page 198.

19 Record of Appeal at page 474.

20 Respondent's Core Bundle at pages 214–231.

21 Record of Appeal at page 442.

22 Record of Appeal at page 639.

26 The respondent also pointed out that the missing iPhone app came to light on 3 March 2015 and the log sheets show that since 10 March 2015, the appellant actively used the app. For example, the log sheet showed the following activity by the appellant on 26 March 2015 at 18:36 hours: "Johnny Tan";"Add TopLevel"; "Tag Remembering Lee Kuan Yew for TopLevel".[23]

27 A related issue to the question of whether the app had passed the UAT is the admissibility of Derique's evidence. Derique was the respondent's project manager. At the trial, the appellant sought to admit Derique's WhatsApp messages and emails regarding the quality of the app. The DJ declined to admit these documents on the ground that they are hearsay evidence. The DJ observed that even if Derique's evidence were admissible, very little weight would be ascribed to such documentary evidence in the absence of Derique from the court.

28 The appellant relied on *Gimpex Ltd v Unity Holdings Business Ltd and others and another appeal* [2015] 2 SLR 686 ("*Gimpex*"). There the Court of Appeal had admitted hearsay evidence under s 32(1)(j)(iv) of the Evidence Act (Cap 97, 1997 Rev Ed) ("Evidence Act"), which is an exception to the hearsay rule and provides that the statement is admissible where the maker of the statement "being competent but not compellable to give evidence on behalf of the party desiring to give the statement in evidence", refuses to do so. The respondent rightly pointed out that in *Gimpex,* the Court of Appeal noted at [127] that there was evidence of Gimpex Ltd's attempts to procure the attendance of the witness at trial. In contrast, while Derique had informed the

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[23] Record of Appeal at page 320.

appellant that he "would like to be excluded", the appellant did not follow up with him, nor seek a subpoena. The burden is on the person seeking to rely on s 32(1)(*j*) of the Evidence Act to prove the ground of unavailability and a mere allegation of unavailability is not acceptable (see *Gimpex* at [97]). The appellant has not discharged this burden of proof. I agree with the DJ's assessment that Derique's evidence was inadmissible and even if admissible, would carry very little weight.

29 Having reviewed the evidence, I agree with the DJ's finding that the app has passed the UAT.

Whether the respondent was entitled to 95% of the project cost

30 Pursuant to Clause 9 of the Work Order, the appellant is obliged to pay 40% of the project cost when the app is ready for the UAT. Once the app has passed the UAT, an obligation then arises on the part of the appellant to pay the last 10% of the project cost.[24]

31 At the same time, the respondent had also warranted under Clause 4.2 of the Agreement that if they are not able to correct non-compliance with the Specifications, the respondent:[25]

> … may refund an equitable portion (e.g., having regard to the value of Customer's actual use already made of, or any benefits received by Customer …) of the fee paid by Customer for such Deliverables, whereupon the same will be deleted from the Deliverables.

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24 Record of Appeal at page 199.

25 Record of Appeal at page 193.

32 The DJ's decision to award 95% of the respondent's claim is in line with these two clauses of the Contract. The question of whether the DJ was right to award 95% of the respondent' claim, can hence be resolved as a matter of contractual interpretation, relying on clauses squarely within the confines of the Agreement, without getting into the appellant's question about the divisibility of contracts.

Quantum meruit

33 For completeness, I also examined the appellant's argument against a claim by the respondent for *quantum meruit*. The appellant relied on *Rabiah Bee bte Mohamed Ibrahim v Salem Ibrahim* [2007] 2 SLR(R) 655 ("*Rabiah*"), citing the portion at [123] which states that there cannot be a claim in *quantum meruit* if there exists a contract for an agreed sum, and that there cannot be a claim in restitution parallel to an inconsistent contractual promise between parties. The appellant submits that since Clause 9 of the Work Order already sets out the payment due on meeting specified payment milestones, the respondent should not be allowed an inconsistent parallel claim in restitution for *quantum meruit*.[26]

34 However, *Rabiah* also states at [123] that "where there is a contract which states that there should be remuneration but does not fix the quantum, the claim in *quantum meruit* will be contractual in nature." In this case, Clause 6.4(d) of the Agreement states that in the event any Work Order is terminated, the appellant is liable to "pay to Zimerick any fees, reimbursable expenses … payable for Services performed under the terminated Work Order prior to the

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[26] Appellant's Written Submissions at [42]–[44].

effective date of the termination".[27] Clause 6.4(d) of the Agreement thus contractually provided for remuneration, without fixing the quantum. The appellant submitted that Clause 6.4(d) should be read with Clause 9 of the Work Order, which fixed the quantum based on the milestones achieved, and hence there is only a fixed quantum of remuneration. I am unable to agree with this, as such a limited reading of Clause 6.4(d) would go against the plain language of Clause 6.4(d) and render it otiose.

35 The effect of Clause 6.4(d) is to place the respondent's claim within the proposition stated in [123] of *Rabiah*, of a *quantum meruit* claim that is contractual in nature. Hence, *Rabiah* provides another legal basis for the DJ to award the respondent partial payment for work that has been done, in a manner that is aligned with the terms of the Contract.

Counterclaim

36 The appellant counterclaimed for various losses, but these are not supported by evidence of the alleged loss. For example, the claims for staff expenses were for existing staff. Neither was there evidence of engagement of a photographer to support the claim for the same. The appellant also claimed for losses arising from the withdrawal of the SPRING Singapore grant of $17,916. However, it was the appellant who unilaterally decided to withdraw from the SPRING Singapore grant.[28]

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27 Record of Appeal at page 194.

28 Record of Appeal at page 692–694.

37 In any event, the appellant's counterclaim is directly defeated by Clause 5.2 of the Agreement, which states that:

> **5.2 No Consequential Damages.** EXCEPT WITH RESPECT TO A PARTY'S FRAUD, WILFUL MISCONDUCT OR A BREACH OF THE CONFIDENTIALITY PROVISION OF THIS AGREEMENT NEITHER PARTY'S [*sic*] WILL BE LIABLE FOR ANY INCIDENTAL, CONSEQUENTIAL, OR INDIRECT DAMAGES OR FOR ANY LOSS OF PROFIT …

38 There is no evidence of fraud, wilful misconduct or breach of confidentiality on the part of the respondent, that renders this clause nugatory.

Conclusion and costs

39 Having reviewed the decision of the DJ, I affirmed the DJ's award of 95% of the respondent's claim, factoring in a reduction of 5% for the non-development of the app for iPhones. I also dismissed the appeal on the appellant's counterclaim.

40 I heard the parties on costs and awarded $5,000 to the respondent excluding disbursements. I also ordered the security for the respondent's cost of appeal to be released to the respondent.

Kwek Mean Luck
Judicial Commissioner

Choh Thian Chee Irving, Oei Su-Ying Renee Nicolette and Melissa Kor (Optimus Chambers LLC) for the appellant;
Alain Abraham Johns (Alain A Johns Partnership) for the respondent.
