Keng & Keong Construction Pte Ltd *v* Swee Hong Engineering Construction Pte Ltd [2011] SGHC 78

Case Number	: Suit No 744 of 2009
Decision Date	: 31 March 2011
Tribunal/Court	: High Court
Coram	: Andrew Ang J
Counsel Name(s)	: Christopher Yap Hock Heng (Christopher Yap & Co) for the plaintiff; S Thulasidas (Ling Das & Partners) for the defendant.
Parties	: Keng & Keong Construction Pte Ltd — Swee Hong Engineering Construction Pte Ltd

Contract

31 March 2011

Andrew Ang J:

Introduction

1 The plaintiff, Keng & Keong Construction Pte Ltd, was the subcontractor of the defendant, Swee Hong Engineering Construction Pte Ltd. The plaintiff was engaged by the defendant to carry out structural works for the Northern and Southern Colonnades ("the Colonnades") and the Food & Beverage ("F&B") areas in a construction project known as "Garden By The Bay Marina South Singapore" in Marina Bay ("the Site") owned by the National Parks Board. The plaintiff's director is Chai Chee Keng ("Chai") and the defendant's managing director is Ong Hock Leong ("Ong"). The plaintiff had two sub-subcontractors, *viz*, Companion Construction & Engineering Pte Ltd ("Companion") and Silver Sea Contractor Pte Ltd ("Silver Sea"), the representatives of which are Loy Chin Huat ("Loy") and Tay Ching Chye ("Tay") respectively.

Agreed facts

2 The plaintiff had been in a contractual relationship with the defendant since 7 October 2008 when the defendant issued a letter of award to the plaintiff.

3 On 24 July 2009, the plaintiff wrote a letter to the defendant stating that it had been unable to proceed with the works according to schedule due to the defendant's delay in providing the plaintiff with materials that were essential to the plaintiff's work. The plaintiff stated in its letter that:

> ... the magnitude of the delay and the estimated time for us to complete our scope of works thereafter (even assuming that the work in progress are [*sic*] proceeded with regularly and diligently) are not proportional to the contractual period as agreed.

The plaintiff further asked the defendant what it intended to do in the circumstances.

4 Subsequently, both parties attended a meeting on 29 July 2009. As the sub-subcontractors were not present at that meeting, another meeting was arranged for the next day and the plaintiff informed the sub-subcontractors that they were to be present at that meeting.

5 On 30 July 2009, the plaintiff, defendant and both sub-subcontractors attended the meeting at the defendant's office. After the meeting, Chai, Loy and Tay went to a coffee shop adjacent to the defendant's office. Ong then joined them. What exactly transpired during the parties' discussion at the coffee shop is in dispute, the plaintiff and the defendant offering conflicting accounts.

6 After the discussion at the coffee shop, Pandian, an employee of the defendant, sent the plaintiff an e-mail at 10.46pm that evening. The e-mail set out a revised schedule for the works pertaining to the Colonnades and requested that the plaintiff increase its manpower on the Site.

7 On 31 July 2009, the plaintiff sent the defendant a letter stating as follows:

> ... you have clearly evinced the intention that you have repudiated the contract for this project and we hereby accepted [*sic*] your repudiation.

Plaintiff's version of events

8 Chai alleged that the meetings on 29 and 30 July 2009 were convened as a direct result of his letter on 24 July 2009 because the defendant was well aware that its own delay had caused the project to fall so far behind schedule. Chai claimed that the plaintiff's obligations were prematurely terminated when Ong repudiated the contract on 30 July 2009 at the coffee shop by telling Chai that the defendant would take over the plaintiff's obligations under the contract. Chai stated that Ong told him that Ong wanted to deal directly with the plaintiff's subcontractors and that Ong would make an announcement at the site office after 4pm on 31 July 2009 that the defendant would take over the plaintiff's obligations. Chai did not contest the fact that the parties agreed, at the 30 July 2009 meeting, on doubling the manpower and materials to expedite the schedule for the works pertaining to the Colonnades. However, he asserted that Ong subsequently appeared at the coffee shop and abruptly announced the contrary intention to terminate the plaintiff's contract altogether.

9 The plaintiff further alleged that it was not paid Progress Claims Nos 17 and 18 dated 16 July 2009 and 1 August 2009 respectively ("the unpaid Progress Claims") for work already done and for materials sold to the defendant. The plaintiff submitted that the reason it was not able to commence work as per the schedule was the defendant's delay in providing the requisite drawings the plaintiff needed to commence work, which amounted to an act of prevention on the part of the defendant.

10 The plaintiff sought to recover the unpaid Progress Claims and the retention sum, damages in the form of loss of profit arising from the premature termination of the contract, and the price of the materials it sold to the defendant. The unpaid Progress Claims amounted to $91,000 and the retention sum was $22,575.73. The plaintiff claimed damages representing the difference between the amount the defendant would have paid the plaintiff if the contract had been duly performed, and the amount that the plaintiff would have paid its subcontractors for doing the work under the contract. The price of the materials was $30,716.77.

Defendant's version of events

11 The defendant argued that it was withholding payment of the unpaid Progress Claims in view of its counterclaim against the plaintiff for repudiatory breach of contract in wrongfully purporting to terminate the contract pursuant to the plaintiff's letter of 31 July 2009. The defendant claimed that it was the plaintiff who proposed that the defendant should work directly with the sub-subcontractors during the meeting on 30 July 2009. Ong told Chai that he was prepared to think about it if the plaintiff submitted a formal proposal, but instructed the plaintiff to proceed with the work on the Colonnades in accordance with the schedule they had just discussed in light of the urgency of the

matter. Ong then instructed his employee, Pandian, to send out an e-mail containing the contents of this discussion at 10.46pm that evening. This version of events was supported by Tay. Tay further asserted that during the discussion at the coffee shop, it was Chai who suggested to the sub-subcontractors that they deal directly with the defendant and that Chai appeared very keen to give up the job.

12 The defendant also denied that it made an announcement at the Site on 31 July 2009 to the effect that it wanted to terminate the plaintiff, and claimed that it was only after the plaintiff's repudiation by its letter of 31 July 2009 that the defendant made an announcement on 5 August 2009 that the plaintiff had terminated the contract. Again, the defendant's account was supported by the testimony of Tay.

13 The defendant further argued that the dates in the schedule were merely general guidelines and that the plaintiff was only meant to commence work once the various materials were made available to it. The defendant alleged that the meetings were also convened to address the plaintiff's constant poor performance of work throughout the duration of the contract, and adduced a documentary trail of correspondence between the parties in support thereof.

Whether the defendant's managing director said at the coffee shop that the defendant would take over the plaintiff's obligations in the contract and deal directly with the plaintiff's subcontractors.

The plaintiff's letter to the defendant on 24 July 2009

14 In the plaintiff's letter to the defendant dated 24 July 2009, the plaintiff claimed that he was unable to meet the original schedule owing to the defendant's delay in giving essential drawings to the plaintiff. However, if the slow progress in the construction works was indeed due to the defendant's delay, it would naturally follow that the defendant could not expect the plaintiff to have completed his portion of the works in accordance with the original schedule; the defendant would simply revise the schedule and allow the plaintiff an extension of time to complete the works. Indeed, this is exactly what happened during the meeting on 30 July 2009: Tay testified before me that all parties present were in agreement that the delay was not in issue, and that an extension of time was expected and would be given to the plaintiff and the sub-subcontractors.

15 As such, it struck me as puzzling that the plaintiff would write to the defendant stating that:

> ... the magnitude of the delay and the estimated time for us to complete our scope of works thereafter (even assuming that the work in progress [*sic*] are proceeded with regularly and diligently) are not proportional to the contractual period as agreed.

and ask the defendant "what [it] intend[ed] to do in the circumstances", when it was clear that the defendant could hardly fault the plaintiff for slow progress caused by its own delay. The tone and content of the plaintiff's letter seemed to indicate that the plaintiff was contemplating that it would not be able to discharge its obligations under the contract, and asking what the defendant wanted to do about the contract in such event.

16 Indeed, there are various other pieces of evidence that suggested that the plaintiff wanted to withdraw from the project. In response to the defendant's criticism of its work, the plaintiff stated in its letter dated 7 May 2009 that "we [*sic*] also afraid that you have to replace us with a new sub contractor if we still cannot meet the requirements for future super structure works." This statement suggested that the plaintiff was at the very least contemplating the possibility of leaving the project

in light of the defendant's continuing dissatisfaction with the standard of the plaintiff's work throughout the performance of the contract.

Pandian's e-mail to the plaintiff on 30 July 2009

17 At 10.46pm on 30 July 2009, Pandian sent out an e-mail confirming the schedule on which the plaintiff was to proceed with the Colonnades work and requiring the plaintiff to implement the measures agreed on during the meeting. However, item 2 of the e-mail stated thus: "SHEC [defendant] will look for other [*sic*] another contractor for F&B areas due to K&K shortage of manpower and materials." Additionally, the defendant's letter to the plaintiff on 13 August 2009 reiterated that:

> ... because of [plaintiff's] lack of manpower, we have offered to look for alternative sub contractor for a portion of the works to mitigate your lack of resources to maintain the planned progress of the works.

These statements suggested that the defendant intended to terminate at least that portion of the contract pertaining to the work on the F&B areas. The plaintiff's case, however, was that the defendant terminated the plaintiff's contract altogether.

18 Ong explained that what had been discussed at the meeting was that the defendant was to look for an additional sub-subcontractor on top of the existing ones to assist the defendant for the F&B areas, in the light of the plaintiff's shortage of supplies and materials. This account was supported by the testimony of Tay, who stated that the parties had discussed the option of the defendant and the plaintiff looking for an additional sub-subcontractor.

19 Be that as it may, the fact that the defendant sent this e-mail immediately after the meeting suggested that it had every intention to carry on with the contract, and was actually urging the plaintiff to intensify its efforts in discharging its obligations by increasing manpower and arranging for various moulds to be delivered without further delay. In the course of the trial, the plaintiff tried to suggest that Pandian, who was present at the meeting but not at the coffee shop, sent out this e-mail unaware of Ong's subsequent repudiation of the contract at the coffee shop. However, I found this argument to be somewhat strained as the plaintiff failed to provide any possible explanation for the sudden about-face on the part of the defendant. It seemed highly improbable that Ong would have appeared in the coffee shop to abruptly tell Chai that the entire contract was to be terminated when the defendant had just laid out the schedule which the plaintiff was to proceed with to intensify its works. Furthermore, it was also rather unlikely that Ong would have omitted to tell Pandian that the entire contract had been terminated when the former returned to the office, as Ong would have been well aware that he had earlier instructed Pandian to send out an e-mail to the plaintiff on an entirely different basis.

20 As such, I found that Pandian's e-mail to the plaintiff supports the conclusion that Ong did not repudiate the contract at the coffee shop.

The plaintiff's letter to the defendant on 31 July 2009

21 It struck me as unusual that the plaintiff would choose to accept in writing an alleged repudiation of the contract by the defendant that was merely verbal. Would not a reasonably prudent plaintiff have required the termination to be in writing in order that he might safely act in reliance upon it? Besides, when further considered against the backdrop that the defendant had hitherto been highly systematic in documenting all its complaints about the plaintiff's work and following up on each

meeting by setting down the contents of the discussion in black and white over e-mail, it seemed quite unlikely that the defendant would have taken such a drastic step purely verbally. It was much more likely that the defendant would have served a written notice backed up by its justification of such a decision. After all, there had earlier been much dissatisfaction with the plaintiff's work as evidenced in the correspondence (see *infra*[24] and [25]).

Quotations sent to the defendant by the sub-subcontractors

22 There were two letters from both sub-subcontractors to the defendant with quotations for the work that the plaintiff had been doing. Both were dated shortly after the discussion at the coffee shop took place – Companion's letter was sent just two days later (1 August 2009) and Silver Sea's letter was sent on 13 August 2009. The plaintiff sought to rely on the argument that as Companion sent the letter on 1 August 2009, it must have learnt about the termination on 31 July 2009 during the day of the alleged announcement. The defendant argued that Companion's sending of the letter on 1 August 2009 was equally consistent with its having learned about the plaintiff's termination at the coffee shop on 30 July 2009 and deciding to get a head start by sending out a quote quickly. However, no evidence was given by either party in support of their respective assertions. In particular, both parties failed to call relevant witnesses, like Pandian and the managing director of Companion, who might have been able to shed light on what actually transpired. As such, it was difficult to draw firm conclusions from the dates of the quotations or the fact that they were sent out.

23 I would have expected that if the defendant had terminated the contract, he would have wanted work to continue without any disruption. He would therefore have sought to contract with the sub-subcontractors quickly. However, Silver Sea was not asked to provide a quotation immediately. Tay said he only learnt about the termination of the plaintiff's obligations on 5 August 2009, so that it took him up to 13 August 2009 to come up with the quotation. It followed that not too much reliance could be placed on the fact that Companion sent its quotation on 1 August 2009. To my mind, it was unlikely that the defendant would have approached Companion but not Silver Sea on the same day or very soon thereafter.

Correspondence between the parties throughout the project

24 An examination of the e-mail and documentary correspondence between the plaintiff and the defendant revealed a difficult and often fractious working relationship right from the onset of the project. The defendant had given negative feedback to the plaintiff on multiple occasions concerning the poor quality of the plaintiff's work. In May 2009, the working relationship had deteriorated to the point where an employee of the plaintiff threw his helmet at the defendant's safety supervisor and the defendant demanded that the plaintiff remove its employee.

25 In particular, an e-mail from Pandian to the plaintiff dated 15 July 2009 was of note:

> All of the above items you did not meet the target. We knew there was [*sic*] some minor problems, but you did not put the effort to resolve those issues. Most of the items failed to meet the target due to your improper arrangement of manpower and materials on time.
>
> ***All the delays we keep in record, we will act on you as per contract*** .
>
> [emphasis added in bold italics]

The strained nature of the working relationship caused by the plaintiff's inability to meet the deadlines

and the defendant's constant complaints provided the background for the finding that the plaintiff wanted to extricate himself from his contractual obligations.

The alleged announcement on 31 July 2009

26 The plaintiff alleged that on 31 July 2009 the defendant's managing director made an announcement at the Site that the defendant would be taking over the plaintiff's contract. The defendant denied the plaintiff's claims and alleged that on 5 August 2009 a meeting was called at the site office to announce that the plaintiff was unwilling to continue work and, as such, the defendant had no choice but to take over the plaintiff's contract. Ong, Leong, Lau and Tay confirmed the defendant's account.

27 There was scant direct evidence before me to support either party's allegation, apart from the oral testimony. However, in the light of the entire backdrop of the case and the documentary evidence discussed above, it was more probable that the defendant's account was true.

28 Overall, I found on a balance of probabilities that the defendant's version of the events that led to the defendant's termination of the contract was true. In my view, the plaintiff was trying to find a way out of the contract, and the letter he sent to the defendant on 24 July 2009 was intended as the opening gambit of his strategy to extricate himself from continuing under the contract. As such, the plaintiff's claim for damages for the premature termination of the contract failed, and I allowed the defendant's counterclaim for breach of contract. However, the plaintiff was still entitled to recover the unpaid progress claims, retention sum and price of the materials, for reasons I have enumerated below.

Whether the plaintiff was entitled to the $30,716.77, the price of the materials

29 From the documentary evidence including the receipts and invoices, it was clear that the defendant had purchased the stocks of materials from the plaintiff. The stocks were verified by the representatives of both the plaintiff and the defendant, as evidenced by the plaintiff's delivery order No KKPL 2009/07 dated 5 August 2009. It followed that the plaintiff was entitled to payment of $30,716.77 from the defendants for the materials.

Damages

30 Having allowed the defendant's counterclaim, the next issue that arose was the quantification of damages. The defendant's in-house quantity surveyor, Ms Peng Hong Zi ("Ms Peng") had prepared a Scott Schedule in exhibit D7 ("the Scott Schedule") in which she set out a comparison of the costs incurred by the defendant in completing the work left undone by the plaintiff and what the plaintiff would have been paid if the contract between them had not been terminated. From the Scott Schedule, the additional cost allegedly incurred by the defendant was shown to be $463,867.20. This constituted the quantum of the defendant's damages.

31 The bulk of the claim for damages arose from two main items: the cost of the scaffolding and the cost of formwork material. However, there were serious gaps in the evidence on the part of both parties. In the light of the unsatisfactory state of the evidence on both items, I was unable to decide with precision the quantification of damages. Nevertheless, I endeavoured to do my best to quantify the damages based on the available evidence.

Access scaffolding

32 Item B(1) of the Scott Schedule showed the sum of $254,973.92 incurred for: "Supply scaffold equipment on rental basis including labour for erection and subsequent dismantling of shoring scaffold for slab/beam and access scaffold for lift shaft & staircase." There was no breakdown for the cost of sub-items.

33 The plaintiff contended that access scaffolding was never within its scope of work. The defendant, on the other hand, argued that the plaintiff was responsible for the costs of erecting access scaffolding under the contract. It was unclear whether the plaintiff was responsible for the costs of erecting and dismantling access scaffolding under the contract, owing in part to the ambiguity of certain key expressions.

34 On the first page of its quotation of 29 September 2008, the plaintiff had indicated that the charges for supplying labour and material for erecting timber formwork for the RC Super Structure was "inclusive of scaffolding". On the second page of the quotation under the heading "Remark", the plaintiff originally excluded "all external works and *external scaffolding*" from its scope of work; it also stipulated in condition 3(g) that the defendant would provide "*external scaffolding*" without any monetary charge to the plaintiff. (See p 2 of the quotation at p 484, exhibits, Ms Peng's affidavit.) However, both references to "*external scaffolding*" was subsequently deleted by two handwritten amendments to the quotation, such that the defendant appears to have disclaimed the obligation to provide *external scaffolding*. Nevertheless, the defendant allowed the exclusion of "*external works*" from the plaintiff's scope of work to remain. These expressions are not terms of art. No evidence was adduced to explain the effect of deleting "*external scaffolding*" but nevertheless retaining *external works*. For example, could it be that *external scaffolding* was but a part of the *external works*? If so, by excluding *external works* from its scope of work the plaintiff would have also excluded *external scaffolding*.

35 The defendant tried to argue that *access scaffolding* as described in item B(1) of the Scott Schedule was the plaintiff's responsibility by equating "external scaffolding" with access scaffolding. In contrast, the plaintiff's counsel tried to make a distinction between "access scaffolding" and what he termed "normal scaffolding", arguing that access scaffolding did not fall under the definition of "external scaffolding" and that the plaintiff was only responsible for "normal scaffolding" for the erection of timber formwork as per the first page of the quotation. If that was the sole question, I would have been inclined to agree with the defendant that external scaffolding was the same as access scaffolding. However, as I pointed out, the larger question remained unanswered: was external scaffolding part of external works?

36 It seemed to me that the expression "external works" could not simply have been intended as reference to other parts of the defendant's main contract not subcontracted to the plaintiff. That would be a totally otiose truism. In the construction of contracts, one presumes against redundant words. It seems to me more probable that "external works" referred to penumbral areas of work over which there might otherwise be contention in the absence of such exclusion. Significantly, in cross-examination, the plaintiff counsel managed to get Ms Peng to agree that access scaffolding was the defendant's responsibility after showing her an e-mail from the plaintiff to the defendant. The next day she attempted to retract her agreement that access scaffolding was the defendant's responsibility on the pretext that she was tired when she gave her testimony the previous day. However, I found her explanation unconvincing as she had given testimony during the morning session and not at the end of the day; from my observation she did not appear to be at all tired. The other reason she offered for her retraction was that she was under the impression that the allocation of responsibility was between the employer and the defendant as main contractor. That did not seem plausible given that, as she well knew, the dispute was between the plaintiff and the defendant, and the e-mail she was shown was apropos the allocation of responsibility between the plaintiff and the

defendant. I was more inclined to believe that she decided to retract her statement because she realised it was not in the defendant's favour. This was not Ms Peng's only about-face; when the plaintiff's counsel suggested to her during cross-examination that the higher rate that had been agreed between the plaintiff and Silver Sea for erecting the superstructure as compared to that for the substructure was due to the need for erection of access scaffolding in the case of the former, she initially disagreed; she claimed that it was because more labour was needed owing to the increased complexity of the work. Subsequently, she changed her mind and agreed that the higher costs arose from the need to erect access scaffolding. However, she later reverted to her original position and strenuously disagreed that the extra costs arose from the access scaffolding.

37 Additionally, there was evidence that the defendant did provide access scaffolding but did not at any time backcharge the plaintiff for the same. This led to the inference that the defendant accepted by conduct that it was responsible for providing access scaffolding. As the access scaffolding was used by many other people on the Site, apart from the plaintiff's employees, it would be strange that the plaintiff alone was indeed to bear the cost of the access scaffolding. For all the foregoing reasons, I therefore concluded that the plaintiff did not have to bear the cost of the access scaffolding.

38 As was noted earlier, the scaffolding costs alleged to have been incurred by the defendant in the Scott Schedule included both access scaffolding and support scaffolding without differentiation. No evidence was tendered before me concerning the breakdown of costs between them. Indeed, there was a complete lack of evidence even on the preliminary question of what proportion of the total scaffolding used was access scaffolding. As such, it was impossible to ascertain what proportion of the scaffolding costs was for access scaffolding. For want of any guidance, I took the costs of access scaffolding to be half of the total amount of $254,973.92. That left the costs properly incurred by the defendant to be $127,486.95 rounded up to $127,500.

Formwork material

39 The figure of $411,456.47 produced by Ms Peng (in exhibit D7) for formwork material was arrived at by adding together invoices that J S Timber Pte Ltd ("J S Timber") had issued to the defendant. However, I found that this resulted in what appeared to be a severely inflated figure: there was no evidence to satisfy me that all the material had been used for the scope of work contracted for by the plaintiff. When she was asked whether she considered that the cost of the formwork material was grossly in excess for an area of 15,984m^2, Ms Peng replied that based on her *experience* there was no excess. (This claim to having experience sounded hollow when it emerged that she had not taken into account the fact, confirmed by the defendant's own witnesses Ong and Tay, that plywood is usually used two to four times.)

40 Ms Peng was then asked whether in collecting all the invoices issued by J S Timber she had assumed that they were used for the plaintiff's work. She replied that she truly believed that the figure of $411,456.47 was the cost. When it was suggested to her that she had no idea how much material had been used when she prepared the Scott Schedule and that she had merely added up the invoices, Ms Peng said she based her *calculation* on the actual quantity incurred. The plaintiff's counsel then again asked whether she was sure all the material in those invoices had been used for the project (*ie*, the plaintiff's scope of work). She finally replied that she could only say that the materials were used in the project "*in my opinion*". Ms Peng's persistent refusal to admit to a simple fact (that she had simply added up J S Timber's invoices to the defendant without verifying whether the material covered by the invoices had all been used for the plaintiff's scope of work) gave me no confidence in her testimony.

41 The plaintiff's counsel worked out how much plywood would have been required to erect 15,984m^2 of formwork. In arriving at the quantity of plywood, he assumed that each piece was used four times. That resulted in the cost of plywood being only $27,750. Adding the timber required to hold up the plywood (such timber being re-usable many more times than the plywood), counsel showed convincingly that the figure of $411,456.47 was grossly in excess of what was required. When Ms Peng was asked to explain, she had to admit that she could not. Neither was the calculation re-visited in re-examination.

42 In arriving at my estimate of the true cost incurred by the defendant, I followed the methodology of the plaintiff's counsel but with regard to the number of times the plywood was used, I took the middle ground of three times. This yielded a figure of $41,625. Adding the cost of timber and allowing for wastage, I estimated the total cost of formwork material to be $60,000. This was a far cry from Ms Peng's figure of $411,456.47.

43 In any event, if there were any incremental costs, they came from the defendant having to do catch-up work. The defendant should not be allowed to pass on to the plaintiff the costs of using more material for this purpose. At the meeting at the defendant's premises on 30 July 2009, the defendant was prepared to accept a fresh quote from the plaintiff necessitated by the defendant's request to the plaintiff to double the manpower and material.

44 I found attractive the plaintiff's argument that it was illogical for the defendant to suffer loss when the defendant was hiring the same sub-subcontractors directly at a lower cost than the defendant had agreed to pay the plaintiff under the contract.

45 On the basis of $127,500 for scaffolding and $60,000 for plywood and timber, the defendant failed to show that it suffered loss. I therefore awarded the defendant nominal damages in the amount of $100.

Liquidated damages

46 The defendant's claim for liquidated damages was also completely groundless in light of the fact that there was no stoppage of work. After the plaintiff left the Site, Companion and Silver Sea simply carried on the work in a seamless transition. This was confirmed by the defendant's site supervisor.

Conclusion

47 In the result, I dismissed the plaintiff's action for wrongful termination of contract save for the recovery of Progress Claims Nos 17 and 18 (dated 16 July 2009 and 1 August 2009 respectively) amounting to $91,000, the retention sum of $22,575.73, and the price of the materials, $30,716.77. The plaintiff was entitled to recover these sums as the defendant had been holding onto them with a view to setting them off against damages which it hoped to recover in the counterclaim. As I found that the defendant failed to prove that it had suffered loss as a result of the plaintiff's breach, the defendant had no more reason to retain the sums.

48 I allowed the defendant's counterclaim for repudiatory breach of contract. However, in view of the fact that it failed to satisfy the court that it suffered any damages, liquidated or otherwise, I awarded the defendant nominal damages of $100. For the same reason, I also awarded the defendant only half its costs (such costs to be taxed).