TTJ Design and Engineering Pte Ltd *v* Chip Eng Seng Contractors (1988) Pte Ltd [2011] SGHC 12

Case Number	: Suit No 563 of 2010 (Registrar's Appeal No 460 of 2010)
Decision Date	: 14 January 2011
Tribunal/Court	: High Court
Coram	: Steven Chong J
Counsel Name(s)	: Chung Khoon Leong John (Kelvin Chia Partnership) for the plaintiff; Chew Chang Min (Chancery Law Corporation) for the defendant.
Parties	: TTJ Design and Engineering Pte Ltd — Chip Eng Seng Contractors (1988) Pte Ltd

Civil Procedure

14 January 2011

Steven Chong J:

Introduction

1 The defendant was at all material times the main contractor of the iconic award winning public housing project known as The Pinnacle@Duxton. One of the distinctive features of this housing project is the unique design in linking the seven apartment blocks with twelve steel link bridges ("the link bridges"). The plaintiff was engaged as the sub-contractor by the defendant for the supply, fabrication, delivery and installation of the link bridges ("the Sub-Contract"). The dispute in the present suit arose in connection with the balance sums due from the Sub-Contract.

2 The defendant applied to strike out 33 paragraphs of the Statement of Claim ("the allegedly offending paragraphs") under O 18 r 19(1)(a) and (c) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("*the Rules*") on the grounds that the paragraphs did not disclose a reasonable cause of action or alternatively may prejudice, embarrass or delay the fair trial of the action. The principal premise relied on by the defendant in support of the application was that the allegedly offending paragraphs were in the nature of "*forest pleadings*" in that they failed to draw a causal nexus between the breach and the losses. The Assistant Registrar ("AR") dismissed the application with costs and observed that the defendant should instead have applied for Further and Better Particulars ("F&BP"). The defendant being dissatisfied with the AR's decision filed an appeal which was heard before me on 6 December 2010. Like the AR, I arrived at a similar conclusion that the defendant should *at best* apply for F&BP if it was minded to do so. Accordingly, I dismissed the appeal. As the defendant has filed a Notice of Appeal against my decision for which the leave application is pending, I now state my full grounds for dismissing the appeal. For reasons which will be apparent below, it is clear to me that the defendant's "*forest pleading*" point is misconceived. In advancing this argument, the defendant has plainly "*missed the woods for the tr*ees".

Background

3 The plaintiff's claim is for the sum of $9,384,577.31 being the balance due for work done on the Sub-Contract and for the additional works and/or variations as a result of changes in the design of the link bridges. The plaintiff alleged that the project consultants issued more than 900 new/revised drawings for the link bridges. Essentially the plaintiff claimed that the new/revised drawings

fundamentally altered the original design from a simple flat truss frame corbel to an "A" framed triangular truss with telescopic support system.

4 The original award for the Sub-Contract was for a lump sum of $10,290,000.00. To-date, the defendant has already approved and paid the plaintiff the sum of $17,243,948.10 under the Sub-Contract. It is immediately obvious that the sum paid by the defendant is about 70% *above* the original lump sum award. Therefore, there can be no legitimate dispute that additional works and/or variations were in fact performed by the plaintiff under the Sub-Contract. The dispute involves the scope, extent and consequently the value of the additional works and/or variations.

5 The present suit was commenced on 2 August 2010. On 13 September 2010, the defendant applied for and obtained an extension of time to file their defence and it was duly filed on 20 October 2010 following the grant of the extension. The plaintiff filed their reply on 10 November 2010. The defendant's application was filed on 16 November 2010 not only after the defence was filed, but also after pleadings had already closed.

Relevant clauses of the Sub-Contract

6 The clauses which are relevant to the present dispute are reproduced below for ease of reference:

Clause 1.1 In consideration of the payments to be made by the Main Contractor to the Sub-Contractor as hereinafter mentioned the Sub-Contractor hereby covenants with the Main Contractor to execute and complete the Sub-Contract Works and remedy any defects therein in conformity in all respects with the provisions of the Sub-Contract for the Lump Sum of Singapore Dollars Ten Million Two Hundred and Ninety Thousand (S$10,290,000.00) only as per Letter of Award ref: CES/P@D/CONT/003 dated 8th Jul 2005. All information furnished by the Main Contractor shall be exhaustive. The Sub-Contractor shall be deemed to have a thorough knowledge of the site conditions and shall solicit all other relevant information from the Sub-Contractor's own sources/arrangement and make all necessary provisions in the total agreed lump sum.

Clause 1.4 This is a fixed price lump sum contract not subject to measurement or recalculation even should the actual quantities of work and materials differ from any estimates available at the time of contracting, except in regard to variations which may be ordered by the Employer/Consultants/Main Contractor, which shall be valued in accordance with the terms of the Sub-Contract.

Clause 11 Variations

11.1 Main Contractor reserve the right to issue instructions to Sub-Contractor to carry out any variation orders or addition/omission to the works if instructed or directed by the Employer's Agent. No claim for loss and expenses, loss of profits, etc will be entertained in the event of any instructed omission of part or whole of the work.

11.3 The Main Contractor may, before confirming in writing to the Sub-Contractor the variation of the Sub-Contract Works, require a written quotation by the Sub-Contractor for any proposed variation and the Sub-Contractor shall be obliged to submit such a written quotation at his own costs within such period as required by the Main Contractor.

Clause 12 Valuation of Variations

12.1 The value of all variations shall be determined in accordance with the Sub-Contract Price Schedule, the Sub-Contract Schedule of Rates and the Schedule of Man-Hour Rates, in this order of priority (which order of priority shall apply in all other relevant cases). Where the variation is similar but not identical to the items in the Sub-Contract Schedule of Rates, an adjustment with fair allowance for minor differences will be made. But if the foregoing methods are not applicable, the value shall be agreed between the Sub-Contractor and the Main Contractor based on fair market rates. Provided always that the Schedule of Man-Hour Rates shall not be applied unless specifically instructed in writing by the Main Contractor prior to the commencement of the relevant works. The Sub-Contractor shall then keep detailed records of the relevant works that shall be submitted weekly to the Main Contractor. These records shall require endorsement by the Main Contractor for payment to be made.

12.2 The Main Contractor may, if in his opinion it is necessary or desirable, order in writing that any work to be carried out as a result of any variation order, shall be executed on a daywork basis. This Sub-Contractor shall then be paid for such work under the terms and conditions and at the day works rates set out in the Sub-Contract or if no such conditions and rates have been included, under such conditions and at such rates as the Main Contractor shall determine as reasonable and acceptable by both parties.

12.3 Where the Sub-Contractor intends to claim for any additional payment as a result of a variation, then the Sub-Contractor shall notify the Main Contractor in writing of his intention to do so within 14 days after the event giving rise to his claim has first arisen. Within 30 days after the notification to the Main Contractor or such other times as may be agreed by the Employer (if any) and the Contractor, the Sub-Contractor shall give to the Main Contractor a statement which shall identify the variation upon which the claim is based, state the reason why the variation entitles the Sub-Contractor to make a claim for additional payment, and the estimated additional payment claimed by the Sub-Contractor and provide all supporting documents substantiating the claim. The Main Contractor may require the Sub-Contractor to provide such further information as the Contractor may require in determining the Sub-Contractor's claim for additional payment. The Main Contractor may stipulate in his request for the provision of further information such time limits which the Main Contractor feels is reasonable in the circumstances within which the Sub-Contractor shall provide the further information requested or required by the Main Contractor.

12.4 The Sub-Contractor shall be entitled to such additional payment in respect of any variation claim as the Main Contractor may consider due to the Sub-Contractor. If the Sub-Contractor fails to supply the Main Contractor with sufficient particulars to substantiate the whole of the said claim, the Sub-Contractor shall be entitled in respect of such part of the claim as the particulars may substantiate to the satisfaction of the Main Contractor.

The defendant's submissions

7 The defendant's submissions were unnecessarily prolix with copious references to various authorities covering the same points. In brief, their key points are as follows:

(a) The allegedly offending paragraphs in the Statement of Claim are embarrassing because the plaintiff had failed to draw a causal nexus between the breach and the alleged damage/loss. Specifically, the defendant alleged that the plaintiff had failed to identify how the revised drawings led to the variations and/or additional works and consequently the claim.

(b) The defendant also alleged that it was not clear whether the plaintiff's claim is based on clause 11.1 of the Sub-Contract. Assuming that the claim is premised on clause 11.1, it was then incumbent on the plaintiff to comply with the procedure set out under clause 12 of the Sub-Contract to claim for the additional works and/or variations. In that regard, the defendant alleged that it was not clear from the Statement of Claim how the requirements under clause 12 had been satisfied by the plaintiff.

The plaintiff's response

8 The plaintiff submitted that it was too late in the day for the defendant to strike out the allegedly offending paragraphs since the application was only filed after close of pleadings.

9 The plaintiff also submitted that the defendant has failed to understand that its claim is not for damages for delay and/or disruption but is instead a claim simply for additional works arising from the numerous changes in the design drawings. Accordingly, there is no need to establish any causal nexus between the breach and the loss since no breach has been alleged against the defendant to begin with.

10 Finally, it was submitted that the question whether clause 12 of the Sub-Contract constitutes a condition precedent to justify a claim for additional works is a question of fact to be decided at the trial. In any event, the defendant has clearly waived strict compliance of clause 12 or is estopped from asserting otherwise given that it has paid an additional sum of about $7 million over and above the contractual lump sum amount of $10,290,000.00.

The court's decision

11 While it is good practice that striking out applications should always be made promptly, and as a rule preferably before the close of pleadings, there is strictly no bar for such an application to be made after close of pleadings. O 18 r 19(1) of *the Rules* provides that:

> The Court may *at any stage of the proceedings* order to be struck out or amended any pleading...
>
> [emphasis added]

12 Whether a striking out application should be entertained after close of pleadings is a matter of discretion to be decided on a variety of factors such as proximity of the trial dates, alteration of position by the parties and the merits of the application. Obviously this list is not intended to be exhaustive but serves only as a guide in the exercise of the discretion. In this case, as there was no indication that the trial dates were around the corner and since the application was filed some five days after close of pleadings, I proceeded to hear the merits of the application.

13 Before dealing with the merits, I pause to note that although the main ground of the defendant's application was made under O 18 r 19(1)(a) of *the Rules*, the defendant's submissions were instead entirely in support only of the alternative ground under O 18 r19(1)(c) of *the Rules*. The application under O 18 r 19(1)(a) of *the Rules* is clearly misconceived. The remedy to strike out for no

reasonable cause of action is only available in plain and obvious cases without embarking on any serious or lengthy inquiry into the relative strengths of the parties' positions. That may well explain the defendant's decision to focus on the alternative ground. There is a further and more fundamental impediment to the defendant's application. It seeks only to strike out 33 paragraphs of the Statement of Claim either totally or in part out of a total of 223 paragraphs. Implicit in the defendant's application is its recognition that the other 190 paragraphs in the Statement of Claim do give rise to a reasonable cause of action. However in the present case, there is only one cause of action for additional works and/or variations. We are hence not concerned with a case where there are multiple pleaded causes of action and the application seeks only to strike out part thereof. The allegedly offending paragraphs are part of the factual background that gave rise to the plaintiff's claim. In such a situation, it is wholly inappropriate to strike out some paragraphs of the Statement of Claim ostensibly on the ground that they do not disclose a reasonable cause of action in the context where there is only one pleaded cause of action.

Forest Pleadings

14 This expression was employed by Judge Humphrey Lloyd QC in *Bernhard's Rugby Landscapes Ltd v Stockley Park Consortium Ltd* (1997) 82 BLR 39; (1998) 14 Const LJ 329 ("*Bernhard's Rugby*"), wherein he observed at 51A that:

> The pleading was therefore of the type customarily known as a "forest" pleading since the statement of claim was virtually no more than a vehicle for the relaunch of the plaintiff's original contractual claim submissions.

15 To the best of my knowledge, the term "*forest pleading*" has not been used in any other case apart from *Bernhard's Rugby*. Leaving aside the issue of proper labelling, the objectionable nature of "*forest pleading*" is that it is merely a relaunch or rehash of the original contractual claim documents submitted by a claimant typically after the completion of a project. In *Bernhard's Rugby*, the claimant had presented the construction manager with detailed and lengthy claims for the delay. Before the construction manager could arrive at his decision on the dispute between the claimant and the employer, the claimant issued court proceedings and essentially reproduced the same claim submissions. In the present case, although the defendant purported to claim that the allegedly offending paragraphs were in the nature of "*forest pleadings*", it has not suggested that they were merely a rehash of the claim documentation submitted by the plaintiff following the completion of the Sub-Contract.

16 When I dismissed the appeal on 6 December 2010, I intimated to the defendant's counsel that there were sufficient particulars in the Statement of Claim to permit the defendant to understand the nature of the plaintiff's claim and more importantly to enable the defendant to plead a defence to the claim. Indeed, the Defence was filed on 20 October 2010 prior to the filing of the striking out application. In my view, the Statement of Claim is sufficiently clear that the claim against the defendant is premised on the following:

(a) The original design for the link bridges was a simple flat truss frame corbel system. [note: 1]

(b) The project consultants issued more than 900 new/revised drawings which changed the design of the link bridges to "A" framed triangular truss with telescopic support system. [note: 2]

(c) As a result of the changes in design, the plaintiff had to incur additional costs and expenses. Such additional costs and expenses include: [note: 3]

(i) additional cutting and joints;

(ii) additional site welding;

(iii) additional wrap-around plates;

(iv) additional built-up sections; and

(v) additional end bearing supports for the telescopic support system and the use of "Macalloy bars".

(d) The losses arising from the changes in design drawings were particularised. [note: 4]

17 It was plainly wrong for the defendant to describe the allegedly offending paragraphs as "*forest pleadings*".

Causal Nexus

18 The crux of the defendant's objection to the allegedly offending paragraphs is its perceived requirement to establish a causal nexus between the *breach* and the claim. This understanding is also borne out by paragraph 13 of the Defence:

> 13. Paragraphs 11 to 31 deal with the Plaintiffs' allegations of design changes ("new/revised designs"). A review of the relevant paragraphs show that:
>
> 13.1 the Plaintiffs have failed to disclose the real nature of their claims;
>
> 13.2 the schedules provided by the Plaintiffs in the SOC are not susceptible to immediate causal connections in respect of contractual duty, *a breach of which leads to a claim for loss* and damages or other monetary relief or compensation;
>
> 13.3 the Plaintiffs have *failed to link the contractual terms in the Sub-Contract with the alleged breaches of contract or claims for additional costs* and expenses or other monetary relief or compensation;
>
> 13.4 the SOC assumes issues which have to be proved;
>
> 13.5 the Plaintiffs have set out repetitive and/or argumentative pleadings.
>
> [emphasis added]

19 This perceived understanding led the defendant's counsel to cite various authorities in support of the necessity to establish the causal nexus between the *breach* and the alleged loss, such as *Bernhard's Rugby at [104] and [113]*:

> The defendant attacked the pleading on the grounds that such an allegation was embarrassing since it *did not establish a causal link between the breach and the damage alleged*.
>
> …
>
> Nevertheless, the point of logical weakness inherent in such claims, *the causal nexus between*

the wrongful acts or omissions of the defendant and the loss of the plaintiff, must be addressed.

[emphasis added]

20 The defendant's counsel also cited *Wharf Properties and another v Eric Cumine Associates, Architects, Engineers and Surveyors* [1991] 52 BLR 1 ("*Wharf Properties*") and reproduced a quote purportedly made by Lord Oliver of Aylmerton that: [note: 5]

> Wharf should establish a nexus between the contract, it's breach, the events immediately consequent upon this breach and that this led to the financial losses claimed.

No page reference was provided for the above quote. In attempting to locate the page reference, I discovered that this statement was nowhere to be found in *Wharf Properties*. Instead the actual holding by his Lordship with respect to the need for Wharf to establish a nexus at pp 20–21 is reproduced below:

> This has, however, no bearing upon the obligation of a plaintiff to plead his case with such particularity as is sufficient to alert the opposite party to the case which is going to be made against him at the trial. ECA are concerned at this stage not so much with quantification of the financial consequences – the point with which the two cases referred to were concerned – but with the specification of the factual consequences of the breaches pleaded in terms of periods of delay. *The failure even to attempt to specify any discernible nexus between the wrong alleged and the consequent delay provides, to use Mr. Thomas' phrase, "no agenda" for the trial*.
>
> [emphasis added]

21 The defendant also cited *Petromec Inc v Petroleo Brasileiro SA* [2007] EWHC 1589 ("*Petromec*") in support of its argument that a causal nexus must be established by the plaintiff even in respect of claims for additional works.

22 My own research has revealed that the defendant's submission with respect to *Wharf Properties* (at paragraph 40 of the defendant's Written Submissions) was taken verbatim from an online article written by one Jeff Whitfield [note: 6] without any acknowledgment of its source. The defendant's "analysis" on *Petromec* at paragraph 27 of the defendant's Written Submissions was likewise lifted from another online article. [note: 7] It is not good practice for counsel to copy verbatim summaries of case law with quotes purportedly from the judgment without conducting appropriate checks on the accuracy of the source. Where it is proper and apt to quote extracts from any article, counsel should acknowledge the source. There is no "shortcut" to proper research. I should add that such "cut and paste" jobs are not helpful and in fact render the submissions disjointed without sufficient co-relation to the facts of the case.

23 In my judgment, both *Petromec* and *Wharf Properties* do not assist the defendant's case:

(a) First, both cases were concerned with the advancement of what was described as "global" or "rolled up" claims where the claims were hopelessly unparticularised. In *Petromec*, the claimant's approach was to claim the difference in the total costs in building the rig based on the revised specifications compared with the costs that would have been incurred under the original specifications. The court held that such an approach was flawed because there may be other reasons for the increase in costs which were unrelated to the variations. In contrast, as explained at [16] above, the plaintiff has set out the nature of its claim for the balance due for the additional works and/or variations carried out as a result of the changes in the design of the

link bridges and has particularised its losses which arose as a result of the additional works and/or variations.

(b) Second, *Wharf Properties* was concerned with a breach of contract for the completion of a residential and commercial development, with the alleged breach being the failure to properly supervise contractors and sub-contractors, thereby causing the delay. *Wharf Properties* is not helpful as it was not concerned with a claim for additional works.

24 Finally, even if there is a need for the plaintiff to identify a nexus between its claim for additional works and its loss, in my view, the plaintiff has done so in setting out the nature of its claim and particularising its losses that arose as a result of the additional works.

Alleged non-compliance with clause 12 of the Sub-Contract

25 In deciding the merits of the defendant's application, the court is entitled to take into account the Reply filed by the plaintiff: *Singapore Civil Procedure 2007* (G P Selvam gen ed) (Singapore: Sweet & Maxwell Asia, 2007) at p 256. At paragraph 8 of the Reply, the plaintiff has clearly pleaded that by certifying and paying the sum of $17,243,948.10 (far more than the lump sum of $10,290,000.00 payable under the Sub-Contract), the defendant has either waived strict compliance with clause 12 of the Sub-Contract or, in any event, is estopped from asserting otherwise.

26 Accordingly, it is disingenuous of the defendant to claim that the allegedly offending paragraphs of the Statement of Claim may prejudice, embarrass or delay the fair trial of the action when it was its own conduct which approved and paid for the additional works without reference to clause 12 of the Sub-Contract. It is noteworthy to highlight that it is not the defendant's pleaded case that the additional sum was paid for variation orders and/or additional works that were carried out in strict compliance with clause 12 of the Sub-Contract. Instead the defendant's pleaded explanation for the additional payment at paragraph 35 of the Defence is that it "is evidence of the Defendant's reasonable interim position based on the best possible evaluation of the Plaintiff's claims *despite the Plaintiff's failure to adhere to the Sub-Contract in particular Clause 12*". From the pleaded defence, the defendant has clearly admitted by its own "*best possible evaluation*" that additional works were carried out and that payment over and above the original contractual lump sum is due and owing to the plaintiff.

27 Ultimately, whether the plaintiff will succeed in its claim for the additional works is not a matter for this court to decide at this stage of the proceedings. Suffice it to say that I am satisfied that the facts of the present case do not meet the high standard required to strike out the allegedly offending paragraphs *in limine*. Having said that, it is beyond doubt from the pleadings that additional works and variations were performed by the plaintiff in respect of the link bridges under the Sub-Contract. There can be no other explanation for the "*overpayment*" of some $7 million by the defendant.

28 Accordingly, I dismissed the appeal with costs fixed at $2,500.00 to be paid by the defendant to the plaintiff.

[note: 1] See paragraphs 10 and 12 of the Statement of Claim.

[note: 2] See paragraph 12 of the Statement of Claim.

[note: 3] See paragraphs 13 to 31 of the Statement of Claim.

[note: 4] See paragraphs 45 to 217 of the Statement of Claim.

[note: 5] See paragraph 40 of the Defendant's Written Submissions.

[note: 6] See http://trett.com/EN/media/Documents/Digest%20issue%207.pdf, at pp 3-4.

[note: 7] See http://www.brewerconsulting.co.uk/cases/CJ0735CL.htm.