Shanghai Tunnel Engineering Co Ltd *v* Econ-NCC Joint Venture
[2010] SGHC 252

Case Number : Originating Summons No 226 of 2009

Decision Date : 26 August 2010

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Tan Chee Meng SC, Josephine Choo and Lesley Tan (WongPartnership LLP) for the appellant; P Balachandran (Robert Wang & Woo LLC) for the respondent.

Parties : Shanghai Tunnel Engineering Co Ltd — Econ-NCC Joint Venture

Arbitration

Building and construction law

26 August 2010 Judgment reserved.

Judith Prakash J:

Introduction

1 This originating summons is one of two appeals arising out of arbitration proceedings between Shanghai Tunnel Engineering Co Ltd ("STEC") and Econ-NCC Joint Venture ("ENJV") which resulted in a partial award dated 29 December 2008 ("Partial Award") and a correction award dated 28 January 2009 ("Correction Award"). Both parties were dissatisfied with certain aspects of the arbitrator's decision, albeit on different grounds, and therefore agreed pursuant to s 49(3)(*a*) of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the Act") to appeal to the court on the questions of law they considered to arise from the decision. This originating summons ("OS 226/2009") is STEC's appeal and ENJV's appeal is encompassed in Originating Summons No 235 of 2009 ("OS 235/2009").

2 STEC is a Chinese public company which carries out engineering and construction activities. At all material times during its dealings with STEC, ENJV was a joint-venture registered in Singapore as a partnership between a Singapore construction company, Econ Corporation Pte. Ltd (now known as Econ Piling Pte Ltd) ("ECON"), and a Swedish company, NCC International Aktiebolag. By the time OS 235/2009 was filed, the joint-venture had been terminated. As both sets of proceedings relate to events that occurred during the subsistence of the joint-venture, however, it is convenient to refer to ENJV rather than to the individual partners.

3 The parties were engaged in works relating to the construction of part of the Circle Line of the Mass Rapid Transit System. ENJV was the main contractor employed by the Land Transport Authority ("LTA") and it in turn employed STEC as a sub-contractor for part of the works. The disputes that arose subsequently were, in accordance with the contract, referred to arbitration by a sole arbitrator, Mr George Tan ("the Arbitrator"). STEC was the claimant in the arbitration but ENJV both defended the proceedings and put in a counter-claim.

The Background

4 The main contract between LTA and ENJV was dated 1 August 2002 ("Main Contract"). It was

ENJV's task to construct and complete the MRT stations at MacPherson and Upper Paya Lebar as well as the tunnels at this section of the Circle Line ("Main Contract works"). There were 13 phases under the Main Contract. In Phase 3, the basic structure of the rail tunnels should have been completed. The completion date stipulated in the Main Contract for Phase 3 was 31 December 2004.

5 By a Letter of Award dated 5 December 2002 ("LA"), STEC was awarded a sub-contract by ENJV for the bored tunnelling works in Phase 3 of the Main Contract at the price of $20,172,966.00 ("Sub-Contract"). By virtue of cl 2.0 of the LA, the following documents were incorporated into the Sub-Contract:

(a) The LA;

(b) General Terms and Conditions for Domestic Subcontract Work ("GTC"); and

(c) Main Contractor's Programme, referred to in the arbitration proceedings as the "22B3 Programme".

Broadly speaking, the works under the Sub-Contract ("the Sub-Contract works") comprised tunnelling works for both north-bound ("NB") and south-bound ("SB") tunnels, including the installation of precast reinforced concrete segments in strict compliance with, *inter alia*, the 22B3 Programme.

6 The commencement and completion dates for the Sub-Contract works were stipulated at cl 4.0 of the LA as 15 December 2002 and 31 December 2004 respectively. In particular, STEC was to complete the installation of tunnelling works including First Stage Concrete by 16 November 2004. As the issues arising in this appeal relate to the completion of the Sub-Contract works, the clauses in the LA and GTC which are pertinent to completion are reproduced below.

(a) Clause 4.0 of the LA states:

> **4.0 Commencement Date and Completion Date**
>
> The Domestic Subcontract shall commence on **15 December 2002** and shall complete on **31 December 2004**. However, the completion dates for each part or section of the Domestic Subcontract Works shall be in accordance with the Main Contractor's Programme as revised from time to time or as instructed by the Main Contractor.
>
> In particular the Domestic Subcontractor shall complete the installation of the tunnelling works (last segment lining) including First Stage Concrete by **16 Nov 04**. The Domestic Subcontractor shall then demobilize within 2 weeks, all plant, equipment, tools, surplus materials, temporary works out of the tunnels & shafts including cleaning the tunnels and shafts.
>
> In the event of a revision of the Main Contractor's Programme, the original duration of the programmed activity of the Domestic Subcontractor shall not be diminished.
>
> [emphasis in original]

(b) Clause 17.0 of the LA provides for completion, delay and time extension as follows:

17.0 Completion, Delay & Time Extension

The Domestic Subcontractor is fully aware that liquidated damages for the Basic Structure Completion in the Main Contract is $49,000 per day and Completion of the Whole of the Main Contract Works is $66,000 per day.

In the event that the Domestic Subcontractor delays the completion of the tunnelling works beyond the 16 November 2004, the Main Contractor shall retain the following additional sums:

Delay	First 10 Days	Next 10 Days	Final 10 Days
Retention Per Day	$20,000	$30,000	$50,000

The total additional amount retained shall be limited to $1,000,000 after which the Main Contractor reserves the right to terminate the Domestic Subcontract in accordance with clause 14 of the General Terms and Conditions for Domestic Subcontract Work. The Main Contractor shall have the right to recover whatever costs from the Domestic Subcontractor.

The Domestic Subcontractor's attention is also directed [*sic*] Clause 15, 16, 17 and 18 of the General Terms and Conditions for Domestic Subcontract Work.

(c) Clauses 17 and 18 of the GTC impose the following terms for completion:

17 Completion

Should the Domestic Subcontractor fail to complete the Domestic Subcontract Works by the completion date or any extended date or dates as may be granted under this Domestic Subcontract and such delay results in delay to the completion of the Main Contract Works, then the Domestic Subcontractor shall pay or allow to the Main Contractor a sum equivalent to any loss or damage suffered or incurred by the Main Contractor which is attributable to the delay caused by the Domestic Subcontract Works. Such sum or sums shall be deducted or recovered by the Main Contractor from monies due or which may become due to the Domestic Subcontractor under this or any other subcontract.

When the whole of the Domestic Subcontract works have been substantially completed in accordance with the Domestic Subcontract, the Main Contractor shall issue a Certificate of Substantial Completion to the effect that the Domestic Subcontract Works shall be deemed for all purposes of the Domestic Subcontract to have been completed on the day named in the Certificate. The Main Contractor shall not unreasonably delay or withhold the issue of the Certificate of Substantial Completion. The issue of the Certificate of Substantial Completion for the Domestic Subcontract Works shall be on a "Back-to-Back" basis i.e. it shall be subject to the issue of a similar certificate by the Engineer to the Main Contract unless otherwise provided in the Letter of Award.

…

Any Certificate of Substantial Completion issued shall not relieve the Domestic Subcontractor

of his obligations under the Domestic Subcontract for the completion of all of the Domestic Subcontract Works relating to or ancillary to that section or part. The Defects Liability shall commence from the date named in the Certificate of Substantial Completion for the whole of the Main Contract Works and not for any section or part thereof unless otherwise provided in the Letter of Award.

18 Rate of Progress

If for any reason which does not entitle the Domestic Subcontractor to an extension of time, the rate of the progress of the Domestic Subcontract Works or any section is [*sic*] at any time in the opinion of the Main Contractor is too slow to ensure completion by the time for completion or any extended time or further extended time, the Main Contractor shall so notify the Domestic Subcontractor in writing and the Domestic Subcontractor shall thereupon take such measures and actions as are necessary and as the Main Contractor may require to expedite progress so as to complete the Domestic Subcontract Works or such section by the time for completion of extended time or further extended time. The Domestic Subcontractor shall not be entitled to claim for any additional payment for taking such measures or actions.

Should the Domestic Subcontractor fail to complete the Domestic Subcontract Works by the completion date or any extended date or dates as may be granted under this Domestic Subcontract and such delay results in delay to the completion of the Main Contract Works, then the Domestic Subcontractor shall pay or allow to the Main Contractor a sum equivalent to any loss or damage suffered or incurred by the Main Contractor which is attributable to the delay caused by the Domestic Subcontract Works. Such sum or sums shall be deducted or recovered by the Main Contractor from monies due or which may become due to the Domestic Subcontractor under this or any other subcontract.

7 Pursuant to cl 9.0 of the LA and Appendix V of the GTC, ENJV was to complete preparatory works before STEC could carry out the boring works. These preparatory works included:

(a) design and construction of launch shaft;

(b) construction and preparation of launch shaft surface area for STEC to construct the crane foundation and to assemble the gantry crane; and

(c) casting of base slab in the launch shaft and removal of temporary struts to enable STEC to lower the tunnel boring machine ("TBM") cradle into the launch shaft and assemble the TBM cradle and the TBM.

8 Based on the 22B3 programme, the dates for handing over of the SB and NB launch shafts to STEC for commencement of work were 24 April 2003 and 8 May 2003 respectively. Tunnelling works for SB and NB tunnels were to be carried out concurrently. The sequence of works was to be as follows:

(a) Assemble TBM on site C7, complete SB Drive B1, then dismantle TBM and transport it to site C4.

(b) Assemble TBM on site C4, complete SB Drive B2, dismantle TBM and transport it to site C3.

(c) Assemble TBM on site C3, complete SB Drive B3, and south-bound tunnelling works and final dismantling of the TBM.

9 For various reasons, ENJV could not complete the requisite preparatory works according to schedule. The SB launch shaft was handed over to STEC on 27 June 2003 whilst the NB shaft was handed over on 11 August 2003.

10 STEC alleged that the late handover of the launch shafts by ENJV entitled it to 84 days of extension of time. This was disputed by ENJV, which claimed that despite the late handover of the launch shaft, STEC had not commenced installation of its site offices and had not mobilised the necessary labour and resources to commence the Sub-Contract works as at the date of actual handover of the launch shafts. Thus, the late commencement of the Sub-Contract works could not be wholly attributable to the delay in the handover of the launch shafts.

11 Ostensibly to alleviate these problems, STEC and ENJV entered into an agreement on 26 July 2003 which both parties referred to as the second supplemental agreement ("2nd SA"). Under the 2nd SA, ENJV was to advance to STEC $1,008,648.30 as an out-of-sequence progress payment for sums invoiced by STEC's sub-contractors in respect of equipment procured from such sub-contractors (*eg*, locomotives, gantry cranes, liquid grout, ventilation equipment and muck cars) as well as for general expenses incurred by STEC. Clause 1.2 (ix) stated that the 2nd SA did not relieve STEC of its obligation to furnish a performance bond as required under the Sub-Contract.

12 Two clauses of the 2nd SA bear quoting:

4.0 Waiver of claims

4.1 STEC hereby unconditionally and irrevocably withdraws and waives all current claims related to the Sub-Contract Works howsoever arising and whether for the recovery of financial loss, reimbursement of damages or time loss through extension of time.

4.2 Further, STEC hereby agrees unconditionally and irrevocably not to levy to ENJV any claims for Loss of Profit as a direct consequence of any changes to the Sub-Contract Sum and arising under the General Terms and Conditions of Sub-Contract.

...

7.0 Entirety

7.1 Save as expressly provided herein, the terms of the Letter of Award incorporating the General Terms and Conditions of Sub-Contract shall remain in full force and effect. In the event of any conflict between this Agreement and any other document comprising the Sub-Contract, this Agreement shall take precedence.

13 On 20 May 2005, STEC gave notice to ENJV of its intention to commence arbitration proceedings pursuant to cl 32 of the GTC. STEC's position was that it was not at fault for failing to meet the contractual deadlines but was entitled to extensions of time while ENJV disputed this and

claimed that the delay in the completion of the Sub-Contract works had caused it substantial loss for which STEC should be held liable. There was also a dispute over whether ENJV was entitled to withhold certain monies from STEC.

The arbitration proceedings

14 On 6 December 2005, STEC made an application to the Arbitrator for an interim award to be made summarily in its favour. This application was dismissed on 3 April 2006 by the Arbitrator's interim award ("Interim Award"). Following this decision, STEC re-amended its statement of case.

15 In its final pleadings ("Final Statement of Claimant's Case") and closing submissions, STEC claimed the following:

(a) $7,101,036.18, being sums due and payable under the Sub-Contract and variation claims;

(b) An extension of time in the duration of 156 days or alternatively 112 days or such duration as determined by the Arbitrator;

(c) $1,347,931.00, being delay-related expenses or such sums as determined by the Arbitrator to be due to STEC as a consequence of the delaying events entitling it to extension of time;

(d) A declaration that the defects liability period ("DLP") commenced on 8 March 2005 or on such date determined by the Arbitrator;

(e) $1,008,648.30 paid out under the demand guarantee pursuant to the 2nd SA;

(f) $166,868.64, being a sum paid to SP Services Ltd on behalf of ENJV; and

(g) Interest and GST on the above claim amounts and costs.

16 In its amended pleading ("Counterclaim"), ENJV made a counterclaim against STEC for the following:

(a) $1,000,000, being liquidated damages pursuant to cl 17 of the LA;

(b) $10,682,000, being ENJV's liability to LTA under the Main Contract in respect of STEC's failure to complete the Sub-Contract works on time;

(c) $1,778,150.33 in respect of ENJV's prolongation costs incurred by reason of ENJV's attendance in relation to STEC's execution of Sub-Contract works beyond 31 December 2004;

(d) $303,408.00, being damages arising from STEC's breach of the Sub-Contract for failure to install tunnel lining segments and rings within the construction tolerance specified therein;

(e) $52,955.09, being the reduction in actual quantities of works performed by STEC;

(f) $1,193,143.09, being contra charges; and

(g) Interest, costs and GST.

17 The hearing of the arbitration commenced in March 2007. Further hearings took place in April and May 2007 and oral evidence was completed on 24 May 2007. Thereafter, both parties filed closing submissions and written replies to the same. The Arbitrator subsequently granted the parties leave to make further submissions and the fifth and final set of submissions from ENJV was received on 14 August 2008. On 15 December 2008, the Arbitrator denied ENJV's request to put in a sixth set of submissions and declared the close of the hearing of the arbitration. He issued the Partial Award on 29 December 2008.

18 In January 2009, solicitors for both STEC and ENJV wrote to the Arbitrator to seek clarification and correction on various points of the Partial Award. On 28 January 2009, the Arbitrator issued the Correction Award.

19 Apart from the various claims and counterclaims, the Arbitrator also made determinations on the following:

(a) Submissions on costs for interlocutory applications relating to:

(i) STEC's application for discovery against ENJV which was allowed;

(ii) STEC's application to amend the Statement of Claimant's Case which was allowed; and

(b) ENJV's submission that the scheme of arrangement concerning ECON approved by the court on 27 October 2004 ("the Scheme") had the effect of discharging ENJV from all its liabilities to STEC owing to STEC's failure to file a proof of debt pursuant to the Scheme.

20 The Arbitrator's determinations are summarised in the following table:

Claim	**Determination**
STEC ' s claims	

$7,101,036.18 for work done and variations under the Sub-Contract	$6,106,852.14 allowed after setting off amounts admitted by STEC as being due to ENJV
Extension of time of 156 or 112 days or such duration determined by Arbitrator	Substantial completion of Sub-Contract works on 8 March 2005 44 days' extension of time allowed STEC liable for 68 days of delay
$1,347,931 delay-related expenses	$183,186.84 based on 44 days' extension of time
Declaration that DLP commenced on 8 March 2005	DLP commenced on 8 March 2005, 112 days after 16 November 2004
$1,008,648.30 paid under demand guarantee	No jurisdiction on matters relating to the demand guarantee
$166,868.84 paid to SP Services Pte Ltd	Claim allowed
Interest, costs, GST	Interest at 6% per annum from date of Notice of Arbitration (20 May 2005) to payment of sums awarded Costs to be determined separately
ENJV's counterclaims	
$1,000,000 as liquidated damages	Dismissed
$10,682,000 in reimbursement of ENJV's liability to LTA for delay	No order made
$1,778,150.33 prolongation costs	$42,057.11 awarded
$303,408.00 as rectification costs	Dismissed
$52,955.09 as reduction in value of Sub-Contract works	Dismissed because actual value of Sub-Contract works greater than initial sum contracted for
$1,193,143.09 for contra charges	$999,834.68 admitted by STEC and awarded
Interest, costs and GST	Interest at 6% per annum from date of Notice of Arbitration (20 May 2005) to payment of sums awarded Costs to be determined separately
Further submissions on scheme of arrangement	Rejected, disregarded for purposes of Partial Award
Costs awards for interlocutory applications	
Discovery	ENJV to pay STEC costs, fixed at $5,500.00
Amendment of STEC's pleadings	STEC pays ENJV costs fixed at $12,000.00
Clarification request	
STEC made a clarification request on 14 January 2009 for reduction of number of days in delay	The clarification request was made pursuant to s 43(1)(*a*) of the Act

STEC's Questions of Law

21 The questions of law raised by STEC in OS 226/2009 relate to the following findings of the Arbitrator:

(a) Substantial completion of the Sub-Contract works was effected on 8 March 2005;

(b) STEC was allowed 44 days extension of time;

(c) DLP (i.e. the Defects Liability Period) commenced on 8 March 2005, 112 days after 16 November 2004; and

(d) That he would make no order in respect of ENJV's claim for reimbursement of $10,682,000 being ENJV's alleged liability to LTA for delay.

These questions have been described by STEC as the "Complete Decision" question and the "Commercial Purpose – Reciprocity" question.

22 The Complete Decision question is whether the Arbitrator was obliged to and has rendered a complete decision in respect of all issues which were referred to him for resolution. It arises in relation to ENJV's claim for damages allegedly caused by STEC's delay in completing the Sub-Contract works. It is STEC's position that the Arbitrator has not rendered a complete decision in relation to this claim notwithstanding the fact that this was a matter which the parties had referred to him for his determination.

23 The Commercial Purpose – Reciprocity question is whether in relation to the 2nd SA, the Arbitrator has considered all relevant factors permissible in law in arriving at his decision and whether the principles in the cases of *Yamashita Tetsuo v See Hup Seng Ltd* [2009] 2 SLR(R) 265 ("*Yamashita*") and *Gay Choong Ing v Loh Sze Ti Terence Peter and Another Appeal* [2009] 2 SLR(R) 332 ("*Gay Choong Ing*") have any application in determining the intent and true effect of the 2nd SA which was to reach a compromise between the parties arising from the late handover of the Sub-Contract works by ENJV to STEC.

The Complete Decision question

24 As stated, the Complete Decision question arises in relation to ENJV's counterclaim. It had sought the following reliefs pursuant to cll 17 or 18 of the GTC:

> 118.1 an order that STEC is to pay ENJV all loss and damage incurred or to be incurred by ENJV to the LTA which is attributable to STEC's delay in completing the Subcontract works. As at the date of this Counterclaim, ENJV's assessment of such loss and/or damage stands at **S$10,682,000.00** on the basis only of the liquidated damages that ENJV is liable to LTA arising from the delays;
>
> 118.2 a declaration that STEC is obliged to reimburse ENJV for any further liquidated damages imposed by the LTA on ENJV under the Main Contract over and above the **S$10,682,000.00** claimed, in the event the LTA succeeds in showing that the B1, B2 and/or B3 tunnels had not been substantially completed on 16 August 2005; …
>
> [emphasis in original]

ENJV's claim therefore was for $10,682,000 to be paid immediately and a declaration that STEC was liable for sums above that amount in the event that further liquidated damages were imposed by LTA in the future. ENJV did not include as part of its pleading an alternative prayer that the quantum of loss and damage under this head of claim be assessed by the Arbitrator or deferred for determination by another forum or tribunal.

25 ENJV's claim for $10,682,000 was premised on its own liability to LTA under the Main Contract in liquidated damages for 218 days of delay (from 11 January 2005 to 16 August 2005) at the rate of $49,000 per day. ENJV had obtained 10 days' extension of time from LTA, so the date of completion for Phase 3 was extended to 10 January 2005. Its position in the counterclaim was that STEC had only substantially completed the Sub-Contract works on 16 August 2005.

26 The Arbitrator found (at para 447 of the Partial Award) that in order to hold STEC liable under this counterclaim, the following requirements had to be satisfied:

(a) There must be a delay to the completion of the Sub-Contract works;

(b) STEC must have caused delay to the Sub-Contract works;

(c) The delay to the Sub-Contract must result in delay to the completion of the Main Contract works; and

(d) ENJV must suffer or incur losses and damages as a result of this delay.

He was satisfied on the evidence that (a), (b) and (c) had been satisfied (he found STEC liable for 68 days of delay).

27 He then went on to consider the loss and damage allegedly suffered by ENJV. At para 474 of the Partial Award, the Arbitrator held that although actual payment to LTA or deduction by LTA was not necessary before ENJV could recover the same against STEC, it was still necessary to establish what the loss or damage suffered or incurred by ENJV had been; it was not enough to show that LTA had a "viable claim" against ENJV in liquidated damages. Therefore, it was necessary for ENJV to establish its liability to LTA first.

28 He rejected ENJV's argument that ENJV's liability to LTA was established since liquidated damages were payable once the contract completion date had passed. Such an argument, he held, ignored consideration of any extension of time that may be given by LTA or that ENJV may be entitled to. He found that ENJV had not placed any evidence before him as to whether it had asked for any extension of time or of the duration asked for in relation to the Phase 3 works or the Main Contract works. In particular, there was no evidence of any contract supervisor's or superintending officer's evaluation or assessment of the quantum of liquidated damages supposedly payable to LTA by ENJV under the Main Contract. Therefore, the Arbitrator was not persuaded that ENJV had established its liability to LTA for liquidated damages. In particular, he found that on the evidence before him, ENJV had failed to establish the loss or damages amounting to $10,682,000 that it sought to recover from STEC.

29 The Arbitrator noted (at para 480 of the Partial Award) that ENJV, perhaps anticipating the outcome, had proposed that what it described as "an assessment of the quantum of liability" could be "reserved until such time" as the Arbitrator thought fit and in the meantime, he should nevertheless rule in favour of ENJV and declare STEC liable to compensate ENJV for ENJV's liability to LTA in respect of delays to the completion of the Main Contract works. The Arbitrator refused to do this. He held it was necessary for ENJV's liability to LTA for liquidated damages and the amount of such damages to be established before it could recover the same from STEC. This was not an assessment of quantum but an establishment of liability. Failing this, ENJV may well be entitled to only nominal damages. Secondly, he was not convinced he had the same jurisdiction as the court to defer an inquiry as to damages to an indefinite date in the future.

30 Having said this, the Arbitrator did not award nominal damages or dismiss the counterclaim. Instead, he proposed that ENJV's counterclaim be resolved by another forum or tribunal. He said at para 486 of the Partial Award:

> ENJV can consider seeking and pursuing, before the appropriate forum or tribunal, any action, inquiry, proceedings or assessment that may be appropriate to establish and quantify the loss and damages (if any) that it contends result from STEC's delay. *Until then, ENJV has suffered no loss or damages for which it needs to be compensated. In the circumstances, I make no order or direction on the sum of S$10,682,000.00 claimed by ENJV under this head of claim*. [emphasis added]

He further held at para 584.2 of the Partial Award that:

> Nothing in this award shall prohibit ENJV from seeking or pursuing, before the appropriate forum or tribunal, any action, inquiry, proceedings or assessment that may be appropriate and competent to establish and quantify the loss and damages (if any) that it contends result from STEC's delay; …

31 It is these paragraphs of the Partial Award that have aroused STEC's ire. It submitted that it is a basic principle that a tribunal must determine all issues raised for its determination and may not leave any claim unresolved or delegate the same to a third party for consideration. An award should be "final" insofar as parties ought to be able to discern their respective obligations and liabilities from it without having to go to any other source.

32 Responding to these arguments, ENJV emphasised that the Arbitrator had found STEC to be in delay and that such delay must have caused delay to the Main Contract works. It cited para 448 of the Partial Award which reads:

> 448. Except for some issues relating to the duration of the delay, there is no dispute that there was in fact delay to the completion of the Sub-Contract Works. *It is not disputable that delay to the Sub-Contract must result in delay to the completion of the Main Contract Works*. What is in dispute are (a) STEC's culpability for the delay and (b) the loss and damages alleged to be suffered by ENJV. In other words, *the argument for STEC is that the requirements set out in paragraphs 447.2 and 447.4 above have not been met*. [emphasis added]

33 ENJV pointed out that under cl 17 of the GTC, if delay in the Sub-Contract works resulted in delay to the completion of the Main Contract works, then STEC would have to pay or allow to ENJV a sum equivalent to any loss or damage incurred by ENJV which was attributable to the delay caused by the Sub-Contract works. In its counterclaim, ENJV had only claimed damages from STEC on the liquidated damages payable to LTA due to delay in completion of Phase 3 of the Main Contract works

which was calculated at the rate of $49,000 per day. It had not claimed damages for delay in completion of the Main Contract works which were calculated at the rate of $66,000 per day.

34 Regarding liability to LTA, ENJV repeated the submission that it had made to the Arbitrator that such liability for liquidated damages had accrued once the extended Phase 3 Basic Structure Completion Date, *ie*,10 January 2005, had passed. It asserted that it had sufficiently pleaded the relief sought by asking for a ruling by the Arbitrator that STEC be ordered to pay ENJV the sum of $10,682,000 "being a reasonable assessment" of ENJV's liability to LTA arising out of STEC's delay. The substantive relief having been claimed, it did not matter whether the assessment took place or was deferred; STEC would still have to pay damages to ENJV. Even if STEC was correct *ie*, that the deferment of the assessment of damages ought to be prayed for, the Arbitrator was not precluded from ordering further relief. Under s 34 (2) of the Act, the arbitral tribunal may award any relief or remedy that could have been ordered by the court in civil proceedings before it and, as noted in Jeffrey Pinsler, *Civil Practice in Singapore and Malaysia* (LexisNexis, 2009) at para [138], "[t]he court is not restricted in its power to grant relief by the remedies pleaded, and may grant alternative or additional relief if this is justified by the facts".

35 ENJV submitted that after the Arbitrator made his declaration that STEC was liable for 68 days of delay, he was empowered to make a direction for any loss and damages incurred by reason of STEC's delay to be assessed at a later date. This power came from s 34 (2) of the Act as well as from Rule 22.3 of the Domestic Arbitration Rules of the Singapore International Arbitration Centre (2nd Ed, 1 September 2002) ("SIAC Rules") (which, as agreed by the parties, applied to the arbitration) which reads:

> The Tribunal otherwise has the widest discretion within the law to give orders and directions in respect of or in connection with the arbitration and for the just, expeditions, economical and final determination of the dispute.

36 In my opinion, ENJV's submissions do not deal with the essential point of this part of the Partial Award. The Arbitrator had, correctly in my view, directed himself that it was not sufficient to find STEC in delay and that such delay resulted in the delay of the Main Contract works. In order for ENJV's counterclaim to succeed, it had to show that its potential liability to LTA arising from such delay had been translated into an actual liability. The Arbitrator found as a matter of fact that the evidence before him did not establish such actual liability. Therefore, he could not award ENJV any relief for the same whether in the amount of $10,682,000 or in the amount of $3,332,000 (representing 68 days of delay at $49,000 per day) or in any other amount. The powers of the Arbitrator under s 34 (2) of the Act and Rule 22.3 of the SIAC Rules relate to reliefs that can be granted after liability has been established. Since the Arbitrator could not establish liability on the evidence before him, there was no question of granting any relief whether deferred or otherwise and therefore these provisions do not assist ENJV. The question of law that STEC had raised was whether the Arbitrator was entitled to allow ENJV another bite of the cherry by not dismissing its claim but instead stating that ENJV could pursue a further action before a different tribunal or forum to establish its liability to LTA and therefore STEC's liability to it. This question was not really dealt with by ENJV. I now turn to it.

37 In David Sutton *et al*, *Russell on Arbitration* (Sweet & Maxwell, 23rd Ed, 2007), the authors write (at para 6-078):

> **A complete decision**. An award must be final in the sense that, in relation to the issues or claims with which it deals, it is a complete decision on the matters requiring determination. *A tribunal cannot reserve to itself, or delegate to another, the power of performing in the future*

any act of a judicial nature in relation to matters dealt with in the award. The tribunal's duty is to make a complete and final decision by its award, and it is a breach of that duty to leave any part of the decision to be determined subsequently or by another. [emphasis added]

38 In *Ronly Holdings Ltd v JSC Zestafoni G Nikoladze Ferroalloy Plant* [2004] 1 CLC 1168 ("*Ronly Holdings*"), the claimant applied for relief against an arbitral award in which the respondent was ordered to pay to the claimant a sum less than the amount claimed as due and payable under the agreement in question. The arbitrator had taken account of amounts for which the claimant had previously been willing to give credit under other contracts with the respondent ("the shortfall amount"). The respondent objected, with the claimant's agreement, to the arbitrator's consideration of these other contracts and the pleadings were amended to delete all references to the same. Despite finding that the respondent was liable to pay the full sum due under the agreement forming the subject-matter of the arbitration, the arbitrator directed that the sum immediately payable to the claimant should be the contractual sum less the shortfall amount. On appeal, Gross J granted the application, holding that the arbitrator had wrongly left the matter of the shortfall amount in limbo. The exact terms of the arbitrator's determination were as follows (quoted in *Ronly Holdings*, at [17]):

> 50. … my jurisdiction is constrained by the terms of the … Agreement, and by the terms of my appointment, and, accordingly, I can make no determination binding upon the parties concerning the sums in respect of which the Claimants were previously prepared to give credit. So far as the directory part of my Award is concerned, however, I propose to take those sums into account, leaving it to the parties to resolve by other means any outstanding differences that may remain concerning the contracts and arrangements from which they were derived.
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> 51. … I can now summarise the sums outstanding under the … Agreement …
>
> [Total] US$16,083,772.40
>
> 52. According to their (unamended) Points of Claim, the Claimants had been willing to give credit for the total sum of US$5,994,937.83 [the shortfall amount]. I shall therefore direct that the capital sum immediately payable to the Claimants by the Respondents amounts to US$10,088,834.57.

Gross J (at [23]) referred to the principles set out in *Russell on Arbitration* (see [35] above) and held that the arbitral award could not stand (at [26]):

> Pulling the threads together, the arbitrator was appointed to determine the issues arising on the reference. On one view, he has failed to deal with an issue put to him, namely, the fate of the shortfall amount. Alternatively, having determined the sums outstanding under the agreement, he has taken upon himself a power to withhold payment of the shortfall amount pending a resolution of its fate by the parties or third parties. On either analysis the award cannot stand; the right answer, in the light of what had gone before in the arbitration, is that the arbitrator ought to have gone on to order payment of the shortfall amount to Ronly [*ie*, the claimant].

39 On the present facts, as the Arbitrator had decided not to make any order or direction on ENJV's counterclaim for $10,682,000, he has effectively left the determination of that head of counterclaim to be resolved by some future forum or tribunal. This is despite his finding at para 484 of the Partial Award that:

> I am of the view that the real question is not whether I am empowered to grant the relief sought (i.e. to direct an inquiry or assessment to be held at a later date) but whether I can defer the

> inquiry or assessment to an indefinite date in the future, leaving me with an open-ended jurisdiction over the dispute (or part of the dispute) that continues into the unknown future. Even if I have such a power (*which I find I do not*), I am not prepared to exercise it under the present circumstances. There is not enough tangible information, much less, evidence available to me to enable me to make a reasonable judgment when such an inquiry or assessment can take place. [emphasis added]

Although he found that he had no power to defer the inquiry or assessment of STEC's liability to ENJV for $10,682,000, he also found that until such assessment is carried out to establish and quantify the loss and damages (if any), ENJV had suffered *no* loss or damages for which it needed to be compensated. This went against his decision *not* to make any order or direction on ENJV's counterclaim for $10,682,000. Since he had found that, on the evidence before him, ENJV had failed to establish any loss or damage for which it should be compensated by STEC, he should have dismissed the counterclaim instead of making no order or direction with respect to this head of ENJV's counterclaim.

40 Accordingly, I find in relation to the first question of law that the Arbitrator did not render a complete decision in respect of all issues that were referred to him for arbitration.

The Commercial Purpose – Reciprocity question

41 The parties entered into the 2nd SA to vary the terms of the Sub-Contract. The question raised by this issue of law relates to the true construction of the 2nd SA and whether the Arbitrator should have construed it as a compromise agreement.

42 In the Partial Award, the Arbitrator found that under the terms of the 2nd SA, STEC had waived its claims against ENJV for, *inter alia*, extension of time. Therefore, he found that STEC was not entitled to the 84 days' extension of time which STEC had claimed in respect of ENJV's late handover of the launch shafts. STEC had claimed that the late handover was one of the delaying events which should entitle it to an extension of time.

43 STEC contended that the 2nd SA is in effect a compromise agreement between STEC and ENJV. Thus, it submitted, the Arbitrator had failed to give proper consideration to the commercial purpose of such a compromise agreement. According to STEC, if the 2nd SA resulted in its waiving its claim for 84 days' extension of time against ENJV, then the 2nd SA should also have the reciprocal result that ENJV had waived its claims against STEC for damages in respect of 84 days' delay to the completion of the Sub-Contract works.

44 In response, ENJV maintained that as the language of the 2nd SA was clear and unambiguous, the factual matrix leading up to the execution of the agreement was not a relevant consideration. In any event, the factual matrix would show that the 2nd SA was not meant to be a compromise agreement. Thus, the Arbitrator was correct in finding that in entering into the 2nd SA, STEC had assumed the risks of any delay to the Sub-Contract works by events prior to the date of the 2nd SA, *viz*, 26 July 2003.

45 In view of my finding on the Complete Decision question, the second question of law has been rendered academic. Even if I decided the second question in favour of STEC, it would not be necessary for the Arbitrator to reconsider the issue and hold that ENJV had waived its claims against STEC for the 84 days' delay since ENJV's counterclaim has to be dismissed in any case. However, in

view of the lengthy submissions made by both sides, I will consider the issue.

46 STEC's submissions are based on the principles enunciated in the cases of *Yamashita* and *Gay Choon Ing* which it argued should have been applied by the Arbitrator in determining the effect and intent of the 2nd SA. *Yamashita* was a case concerning the construction of a deed of settlement entered into between the respondent and one of its major shareholders and creditors, SHS Holding (Pte) Ltd ("SHSH"). The appellant was the assignee of certain rights of SHSH under the deed. In a judgment for the majority of the Court of Appeal, V K Rajah JA set out the following principles on the interpretation of contracts:

(a) The court's fundamental task in interpreting a contract is to ascertain the objective intention of the parties (at [62]);

(b) The court should adopt a "contextual approach" to the interpretation of contracts. Rajah JA adopted (at [63]) the following passage from the Court of Appeal judgment of *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*"), at [122]:

> The courts are allowed to depart from the plain and ordinary meaning of the contract to some extent. The very recognition that surrounding circumstances may create ambiguity about the language used in a contract involves acceptance that words do not have fixed and clearly delineated meanings. Rather, words are sometimes penumbral; *the context of the contract breaks down the rigidly-defined boundaries of meaning, introduces hues and shades, and defines the contours and limits of the penumbra.* Thus, even in its ostensibly conservative reasoning in *Citicorp Investment Bank (Singapore) Ltd [v Wee Ah Kee* [1997] 2 SLR(R) 1], the Court of Appeal only required that the meaning imputed by the court be one which 'the words are reasonably adequate to convey' ... The question of whether this restriction has been breached is one of degree. [emphasis added]

The contextual approach involves, in appropriate cases, a consideration of, *inter alia*, the commercial purpose of the contract in question (at [64]);

(c) Extrinsic evidence is admissible under proviso (*f*) to s 94 of the Evidence Act (Cap 97, 1997 Rev Ed) to aid in the interpretation of written words. Such extrinsic evidence is admissible so long as it is relevant, reasonably available to all contracting parties and relates to a clear or obvious context. However, the principle of objectively ascertaining contractual intention(s) remains paramount. Thus, such admissible extrinsic evidence must always go towards proof of what the parties, from an objective viewpoint, ultimately agreed upon. Where extrinsic evidence in the form of prior negotiations and subsequent conduct is concerned, there should be no absolute or rigid prohibition against such evidence although in the normal case such evidence is likely to be inadmissible for non-compliance with the requirements of relevance, ready availability to parties, and clarity and obviousness of the context of the contract (at [65]); and

(d) A court should always be careful to ensure that extrinsic evidence is used to explain and illuminate the written words, and not to contradict or vary them (at [65]).

47 In *Gay Choon Ing*, the Court of Appeal dealt with the question of whether there was a valid compromise agreement between the parties by virtue of the contemporaneous execution of points of agreement and a waiver letter by both parties. In his judgment, Andrew Phang JA set out the principles on the law of compromise as follows:

(a) Compromise can be defined as the settlement of dispute by mutual concession, its essential foundation being the ordinary law of contract (at [41]);

(b) Where parties have demonstrated that they intend to dispose of their dispute by reaching an amicable resolution agreeable to both parties, this compromise or settlement will be recognised and given effect to by the courts (at [42]);

(c) Before a compromise can be reached between two parties, there must, of necessity, be an actual or potential dispute between parties that can be disposed of (at [43]); and

(d) A compromise will not arise unless the following requirements are fulfilled (at [46]):

(i) An identifiable agreement that is complete and certain;

(ii) Consideration; and

(iii) An intention to create legal relations.

48 STEC contended that applying the principles governing the interpretation of contracts to the 2nd SA, it can be seen that the commercial purpose of the 2nd SA was to effect a compromise agreement between STEC and ENJV such that both parties would release each other from their liabilities to each other as at the date of the 2nd SA in the spirit of reciprocity that necessarily accompanied compromise agreements. STEC claimed that it had submitted a claim to ENJV for an extension of time because ENJV had handed over the SB and NB launch shafts 95 days later than planned whilst the Phase 3 tunnelling works had already been in delay by 117 days according to the target dates in the 22B3 Programme. Thus, according to STEC, by the time the 2nd SA was executed, there was a difference between ENJV and STEC which both parties had agreed to resolve by way of a compromise arrangement. ENJV denied that the commercial purpose of the 2nd SA was to effect a compromise arrangement between the two parties.

49 Although STEC sought to rely on certain "contemporaneous documents" to show that the 2nd SA was intended to be a compromise agreement, such extrinsic evidence can only be resorted to when words of the contract are not clear and unambiguous or when the circumstances make ambiguous what would otherwise be plain. I must therefore look first at the language of the 2nd SA.

50 Under the 2nd SA, ENJV's basic obligation was to advance to STEC the sum of $1,008,648.30 ("Advance Payment"). Clause 1.0 of the 2nd SA provides for this obligation as follows:

1.0 Advance Sums and Repayment of Suppliers 'Deposit' Payments

1.1 Notwithstanding Item 11.0 of the Letter of Award, ENJV shall advance to STEC the sum of S$1,008,648.30 (One million and eight thousand six hundred and forty eight dollars and thirty cents) in consideration of the following.

1.2 This advance payment, made to STEC as an *out of sequence progress payment*, is to be

released immediately and in any event no later than 26th July 2003 subject to the fulfilment of all the provisions contained herein.

(i) It is hereby agreed that the total of the S$1,008,648.30 is a payment of which *one part is to repay the amounts already paid by STEC as well as to pay, where possible, for any sums recently invoiced by STEC's sub-contractors (or required by the STEC Sub-contractor under the payments terms of their sub-contract as the next payment) for individual items of equipment procured from STEC's sub-contractor's and identified under Appendix 1 attached, and the other part is for general expenses, salaries, office costs and the like*.

(ii) The advance payment described herein will be provided to STEC by ENJV in two amounts. *The first cheque in the sum of S$700,000 (Seven hundred thousand dollars) to allow STEC to secure the continuation of the manufacturing of the equipment from the STEC sub-contractors*, and secondly upon receipt of the proof from those payments made to the STEC sub-contractors, ENJV will release the balance payment of S$308,648.30 (Three hundred and eight thousand six hundred and forty eight dollars and 30 cents).

(iii) STEC hereby unconditionally guarantees to undertake the payments to each STEC Sub-contractor in the amounts specified in Appendix 2, towards the cost of the Equipment within the Scope of Work from each STEC sub-contractor such amounts within 7 calendar days from the receipt of the advance sum from ENJV.

(iv) In consideration of the advance payment as aforesaid, STEC agrees to unconditionally assign their rights and benefits fully to ENJV for those equipments under the STEC sub-contractors Scope of Works.

(v) For the avoidance of any doubt, the payment advanced against those items for assignment and referred to in Item 1.2 herein shall be Items 1, 2, 4, 5 and 6 (Locomotives, Gantry Cranes, Liquid Grout, Ventilation equipment and Muck Cars, etc) referred to under Appendix 1.

…

(ix) The provisions of this Supplemental Agreement shall in no way relieve STEC of the obligation to furnish a Performance Bond required under the Sub-contract.

(x) STEC hereby expressly undertakes to furnish the Performance Bond within 14 calendar days from the date of this Supplemental Agreement.

2.0 Direct Payment to Sub-contractors

2.1 Subject to the provisions of the assignment stated in Item 1.2 herein, ENJV may make direct payments to each respective Sub-contractor identified in Item 1.2 (v) and Appendix 1, until that equipment is fully and finally paid for. In consideration of such direct payments, and pursuant to this Supplemental Agreement, all such equipment shall become and remain the property of ENJV until full recovery of the advance sum and all the amounts paid directly to the Sub-contractors by ENJV has been recovered. The recovery of the advance sum and amounts paid directly by ENJV shall be by way of deductions from payments made through the mechanism of the Interim Progress Payments provided for under Item 6.0 of the Letter of Award issued to STEC by ENJV and dated 05th December 2002.

[emphasis added]

51 In consideration of the Advance Payment, STEC was to waive all current claims (*ie*, up to the date of the 2nd SA) related to the Sub-Contract works. It can be seen from the language of cl 4.0 (at [12] above) that there is absolutely no mention of any waiver of claims on ENJV's part. Only STEC had agreed to waive its claims for, *inter alia*, extension of time.

52 The next clause which is relevant to the current inquiry is cl 7.0 (also at [12] above) which provides that the 2nd SA should take precedence in the event of any conflict between it and any other document comprising the Sub-Contract. This means that the parties had agreed that to the extent that other provisions of the Sub-Contract concluded prior to the 2nd SA were contrary to the provisions of the 2nd SA, they would be superseded by and subject to the provisions of the 2nd SA.

53 Looking at the 2nd SA in its entirety, it seems reasonably clear that it was not intended as a compromise agreement. First, one obvious indicator of lack of such intention to compromise is the fact that *only* STEC was obliged to waive its claims against ENJV in respect of extension of time. There is nothing in the plain unambiguous wording of the 2nd SA that provides for a similar waiver of claims against STEC by ENJV. This is quite different from the facts of *Gay Choon Ing*.

54 In that case, the points of agreement provided that (at [30]):

> Mr Gay Choon Ing and Mr Terence Loh Sze Ti have agreed that Mr Terence Loh will sell to Mr Gay Choon Ing the entire 27.5% held in trust for SGD1,500,000/-, made up of SGD1,400,000/- original investment plus SGD100,000/- dividends not received. …
>
> On completion of payment of the purchase price, the Trust Document will be surrendered to Mr Gay Choon Ing by Mr Peter Chua as stakeholder.

On the "exact same day" (*Gay Choon Ing*, per Andrew Phang JA at [31]), a waiver letter was sent by the plaintiff to the defendant, stating as follows:

> Dear Mr Gay
>
> Further to our meeting today, we thank you for accepting that it was your decision to leave and bearing in mind the financial position of the company, you have accepted to leave on 31 October 2004 after your notice period *without claims on the company whatsoever*.
>
> *In turn, the company acknowledges that it has no claims against you whatsoever*.
>
> …
>
> Please sign a copy of this letter as your acknowledgement and acceptance.
>
> [emphasis as added in the judgment]

55 Unlike the 2nd SA, the words of the waiver letter in *Gay Choon Ing* indicated clearly and unambiguously that each party to the compromise arrangement had agreed that he had no claims against the other party to the same. Certainly, the Court of Appeal in *Gay Choon Ing* had thought it necessary to consider not just the words but the context of the points of agreement and the waiver

letter; this was clear from Phang JA's observations that (at [39]):

> The key inquiry, **having regard to the events that transpired and led to the present proceedings** as mentioned above, was whether or not the POA [*i.e.*, points of agreement] and the Waiver Letter constituted a valid compromise agreement between the parties. Running slightly ahead of the story, so to speak, it was in fact clear to us, **from a close analysis of these documents as well as the context furnished by the course of correspondence between the parties from October 2004 to February 2005**, that both the plaintiff and the defendant, for all intents and purposes, acted and proceeded on the basis that there was a concluded compromise. [emphasis in original in italics; emphasis added in bold]

56 Secondly, it is expressly stated in the preamble that the 2nd SA was entered into out of a "desire to amend the Domestic Sub-contract". The main amendment is as to the provision of a performance bond by STEC to ENJV and the sequence of progress payments by ENJV to STEC. Under cl 11.0 of the LA, STEC was supposed to furnish ENJV with a performance bond equivalent to 5% of the Sub-Contract sum within 4 weeks from the date of the LA. Under cl 7.0 of the LA, ENJV was supposed to make an advance payment of 5% of the Sub-Contract sum within 14 days of the presentation of the performance bond.

57 Thus, contractually, STEC was obliged to furnish ENJV with a performance bond by 2 January 2003, being 4 weeks from the date of the LA. This bond was not furnished by then and was still outstanding when the 2nd SA was concluded (26 July 2003). Therefore, ENJV's obligation to pay the 5% advance payment to STEC had not arisen and no monies at all were due from it to STEC. These facts support ENJV's submission that the 2nd SA was intended to vary the terms of the LA in order to provide financial assistance to STEC so that it could fund procurement of labour and materials to commence the Sub-Contract works. The fact that STEC had not managed to provide the performance bond by the time of the 2nd SA is a further indication that it was facing some financial difficulty at that time.

58 It was stated in the 2nd SA at cl 1.2(i) that part of the Advance Payment was to pay for sums recently invoiced by STEC's sub-contractors for individual items of equipment procured from them. Under cl 1.2(iv) STEC was also to assign its rights and benefits to ENJV for those equipment under the STEC sub-contractors' scope of works. In particular, the equipment referred to specifically included (at cl 1.2(v)) locomotives, gantry cranes, liquid grout, ventilation equipment and muck cars. These were items which STEC was under the obligation to provide as part of the Sub-Contract works (*per* cl 3.0 of the LA). That part of the Advance Payment would go towards paying STEC's sub-contractors for individual items of equipment and that in consideration of such payment ENJV would enjoy the rights and benefits for those equipment under the various sub-contract scope of works indicate that STEC needed financial assistance in order to procure the equipment necessary for its commencement of the Sub-Contract works.

59 With regard to the effect of cl 7.1 of the 2nd SA, STEC contended that since cl 4.0 of the LA had not been amended by the 2nd SA, it was entitled to the benefit of the portion of cl 4.0 of the LA which states that:

> *In the event of a revision of the Main Contractor's Programme*, the original duration of the programmed activity of the Domestic Subcontractor shall not be diminished. [emphasis added]

However, this does not aid STEC in forwarding its argument that the 2nd SA was a contract effecting

a compromise arrangement. ENJV acknowledged that it had handed over the launch shaft areas late. However, STEC had not shown that there was any corresponding *revision* to the Main Contractor's Programme, *ie*, the 22B3 Programme. Delay in the handing over of the launch shaft site cannot by itself without other evidence imply that there was a consequent revision of the 22B3 Programme.

60 Further, in my view, there was nothing in the surrounding circumstances that rendered the otherwise plain language of the 2nd SA ambiguous. Looking at the extrinsic evidence, the contemporaneous documentary evidence referred to by both parties supported ENJV's position rather than STEC's. In the first place, while STEC contended that it had submitted a claim to ENJV for extension of time and related costs arising from the late handover by ENJV of the launch shafts, the documents that it referred to did not indicate so. In two letters dated 19 April 2003 and 2 May 2003 by STEC's Liu Chun to ENJV's Choo Ket Weng, it is merely stated that STEC's engineers had been to the proposed new SB and NB shaft construction site and found that "excavation and strutting work has not been started", attaching photographs indicating the work progress in the respective areas. The letters ended off with STEC's statement that "[w]e will keep you informed of the on-going situation and submit the cost and time impact of this event on the project when they are known to us". These letters did not indicate that STEC was making a claim against ENJV for extension of time.

61 In its appellant's case, STEC also referred to four other letters from ENJV which purportedly showed ENJV's consistent acknowledgment that STEC should keep to the Contract Duration provided in the 22B3 Programme. The first, ENJV's letter dated 4 April 2003, in essence showed that ENJV had reservations as to whether STEC would be able to complete the Sub-Contract works on time because of lack of experienced workers and insufficient detail in the schedule that it had provided. The next letter, dated 16 June 2003, asked STEC to explain why its programme was longer than the contract duration; for example, STEC's programme showed that 41 days were required to assemble the tunnel boring machine whilst the contract duration for this task was 35 days. The letter also showed ENJV's continuing dissatisfaction with STEC's proposed schedule for the tunnelling works. In its letter of 17 June 2003, ENJV indicated that it was not willing to accept any claims or extension of time due to the late handover of the SB launch shaft. Finally, ENJV made the following complaints on 21 June 2003:

> Further to our fax … dated 16th June 03 regarding STEC's programme for the initial drive for which we are still waiting for a reply.
>
> We have requested an updated detailed programme from STEC many times (latest request being our fax … dated 17th June 03) and were disappointed to receive your reply … dated 18th June 03 in which you had clearly not updated your original programme.
>
> We would like to point out that your original programme **does not** follow the tunneling sequence and method as detailed in your method statements and is therefore *of no practical use*.
>
> …
>
> We have met with your site staff and indicated several methods that STEC may adopt *to meet the construction schedule durations*, however, we feel that this issue is of high importance and therefore, we request your presence in a meeting before Wednesday 25th June 03 in our UPL office. Please confirm by return fax.
>
> [emphasis in original in bold; emphasis added in italics]

62 The overall impression given by these letters was not that ENJV had consistently asserted that

the Contract Duration should be adhered to. Rather, they show that STEC had consistently been remiss in its obligations to provide a proper method statement or detailed programme to ENJV's satisfaction that it *could* in fact complete the Sub-Contract works according to the 22B3 Programme. ENJV also pointed out in the respondent's case that the first three letters that STEC had cited only referred to the Drive B1 tunnels and not to the rest of the Sub-Contract works. Therefore, these letters did not show ENJV's willingness to compromise on its claims against STEC for the delay in completion of the Sub-Contract works. Instead, much of the correspondence exhibited in support of ENJV's witness statement of Choo Ket Weng served to justify ENJV's position that the 2nd SA was intended as a record of the arrangements by which ENJV would provide financial assistance to STEC for the procurement and continued maintenance of the equipment needed to commence the Sub-contract works.

63 It is not necessary to cite all the correspondence. Only two further letters need to be referred to. First, in a letter from STEC to ENJV dated 30 June 2003, STEC had submitted a payment request for $864,806.77 in respect of tunnelling work including installation of segment lining. ENJV was requested to "treat this request as part of the staged payment in accordance with Clause 6.0 of the Letter of Award". STEC further stated:

> We wish to inform you that we are in the process of procuring the Performance Bond as required under the Sub-Contract. Thus, your early approval of payment in relation to the request would certainly assist us in our cash flow, site operations and smooth running of the Sub-Contract works.

Second, ENJV's response of 9 July 2003 stated:

> We cannot agree to the reasons for your issue of such a letter and record that the poor cash-flow you are presently encountering and causing the distress of not being able to provide the payments for your own equipment, is entirely due to your own default in failing to issue the Performance Bond.
>
> Such issue of that Bond by your company would have released to you an advance payment which would likely cover for [*sic*] the present cash flow shortfall you claim.
>
> However, we are presently reviewing this position presented to us by your letter and will inform you of our decision in due course.

The 2nd SA was concluded 17 days later.

64 The evidence thus supported ENJV's submission that the purpose of the 2nd SA was to give financial assistance to STEC and was not to effect a compromise arrangement between the parties. The commercial purpose of the 2nd SA was not what STEC tried to make it out to be. Therefore it would be wrong to interpret the agreement to mean that ENJV had waived its claims against STEC for delay in completion of the Sub-Contract works. There is no express provision in the 2nd SA to that effect and it should not be implied into that agreement because the factual matrix in which the 2nd SA was concluded makes it plain that the objective intention of the parties had nothing to do with effecting a compromise.

65 If STEC's interpretation of the 2nd SA is correct, that ENJV had released STEC from its liabilities under the Sub-Contract for delay in the completion of the works under the Sub-Contract, then

STEC's waiver of claims for extension of time under cl 4.1 of the 2nd SA would have no real effect. In respect of any delay caused to the completion of the Sub-Contract works, either STEC was responsible for the delay or it was not. If it was not responsible for the delay, it would be entitled to an extension of time for the duration of that delaying event. Since it had waived its claim for extension of time under the 2nd SA, no extension of time was claimed and none was given so it should be held responsible for any delay that may have arisen through events that occurred prior to and up to 26 July 2003.

66 The Arbitrator's findings on this issue cannot therefore be criticised. He held that:

(a) STEC had waived its claim for 84 days of delay under cl 4.1 of the 2nd SA (at para 130 of the Partial Award);

(b) One consequence of such waiver was that STEC was not entitled to any delay related expenses or additional compensation for the 84 days of delay (at para 131 of the Partial Award);

(c) STEC's waiver of a claim for extension of time must mean that STEC was conceding any argument that ENJV (or its related parties such as agents, or sub-contractors) could have caused the delay or that there were any neutral events for which it had not assumed any risks of delay. In other words, STEC's waiver resulted in its assumption of any risks of delay (at para 462 of the Partial Award);

(d) The effect of a waiver of a claim for extension of time was the same as the effect of a failure to obtain an extension of time (at para 463 of the Partial Award); and therefore

(e) STEC was responsible for the 84 days of delay that were waived by the 2nd SA, subject to the adequate establishment of ENJV's loss or damages (at para 464 of the Partial Award).

67 The Arbitrator had, therefore, considered the relevant legal factors in arriving at his decision. Even if he had applied *Yamashita* and *Gay Choon Ing*, he would have come to the conclusion that the objective intention of the parties in executing the 2nd SA had nothing to do with a compromise and that there was no compromise to which he could give effect. It is also important, as ENJV submitted, that STEC's present argument that the 2nd SA was meant to be a compromise was never put forward at the arbitration proceedings. In fact *Yamashita* was decided on 30 December 2008 while *Gay Choon Ing* was decided on 8 January 2009, so neither of these authorities could have been included in the parties' closing submissions before the Arbitrator, the last of which was submitted in October 2008. The argument on a compromise agreement was a belated one. In the events that happened, STEC may have considered that it made a bad bargain by entering into the 2nd SA but this was not its view point at the time when it needed ENJV's assistance. If the 2nd SA had the effect that STEC contended, it would have made even less commercial sense for ENJV to enter into an agreement which obliged it to make an advance to STEC to which STEC was not entitled and in exchange absolve STEC from possibly being liable for damages for delay when ENJV could be asked to pay LTA $49,000 a day for delays arising from STEC's default. In this context, the following observation of the Court of Appeal in *MAE Engineering Ltd v. Fire-Stop Marketing Services Pte Ltd* [2005] 1 SLR(R) 379 at [27], which was also cited by the Arbitrator, is apposite:

> Two points arise herefrom. First, the perceived "commercial sense" of the court cannot be allowed to override the words of a contract where they are clear and unambiguous. We had earlier stated that on a plain and ordinary reading of the words and figures in the sub-contract,

payment should be based on the area of the uncladded duct. Even if the court below was of the view that First-Stop had entered into an improvident bargain, one cannot ignore the plain meaning of the words used and hold in favour of what the judge perceived to be a more commercially sensible arrangement. The court's task is to ascertain what the parties mean by the words they use in a contract and enforce it according to its terms: it should not rewrite the contract. In *Charter Reinsurance Co Ltd v Fagan* [1997] 3 AC 313, Lord Mustill noted (at 388):

> [T]o force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for a court. Particularly in the field of commerce, where the parties need to know that they must do and what they can insist on not doing, it is essential for them to be confident that they can rely on the court to enforce their contract according to its terms.

68 In the event, I am satisfied that there is no merit in the second question of law raised by STEC.

Conclusion

69 As I have found in favour of STEC in relation to the first question of law, the Partial Award and the Correction Award must be remitted to the Arbitrator for his reconsideration on the issue of ENJV's counterclaim for damages for loss and damage incurred by reason of STEC's late completion of the Sub-Contract works. The appeal is therefore allowed and there shall be an order to such effect. As for costs, since I have found in favour of STEC on one issue and against it on the other, I will hear further arguments on costs.