Store+Deliver+Logistics Pte Ltd *v* Chin Siew Gim (trading as S G Chin and Associates) [2012] SGHC 89

Case Number : Suit No 188 of 2009

Decision Date : 27 April 2012

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : S Gunaseelan (M/s S Gunaseelan & Partners) for the plaintiff; Tan Cheow Hin (M/s CH Partners) for the defendant.

Parties : Store+Deliver+Logistics Pte Ltd — Chin Siew Gim (trading as S G Chin and Associates)

building and construction contracts, contractors' duties

27 April 2012 Judgment reserved.

Lee Seiu Kin J :

1 The plaintiff company is the owner of a warehouse at 7 Gul Drive ("the Warehouse") which was constructed by Expedite Construction & Development Pte Ltd ("Expedite") in three phases. The last phase was completed in October 2003. The defendant, an architect practising in his own firm of S G Chin and Associates ("S G Chin"), was appointed by the plaintiff to design and supervise construction of the Warehouse. The terms of appointment are set out in the defendant's letter to the plaintiff dated 15 May 2001. It is the common position of the parties that this constitutes the contract between them ("the Contract").

2 The defendant had been engaged as the architect for an earlier warehouse project at 7 Clementi Loop known as Scandinavia Warehouse Pte Ltd ("Scandinavia Warehouse"). It was in connection with that project that the defendant met Lee Ah Teng ("AT Lee"), a director and shareholder of the company that owned Scandinavia Warehouse. AT Lee was also a director of the plaintiff and it was on the strength of the defendant's work in the Scandinavia Warehouse project that the plaintiff appointed him to undertake work for the Warehouse. This entailed a 3-phase reconstruction of an existing warehouse into a new warehouse cum office. Part of the Warehouse was intended to store hazardous chemicals. The defendant carried out the design of the Warehouse and preparation of the tender documents. Tenders were called, which closed on 8 February 2002. On 22 February 2002, the defendant produced his tender report to the plaintiff in which he recommended awarding the warehouse project ("Warehouse Project") to the lowest tenderer, Kin Lin Builders Pte Ltd, at $4.19m.

3 However the plaintiff did not proceed as the defendant had recommended. Instead they brought one S K Goh ("Goh"), the director of Expedite, to meet the defendant. Goh said that Expedite was prepared to undertake the construction for a much smaller sum. On AT Lee's instruction, the defendant handed the tender documents to Goh. About a week after that, Goh submitted a quote of about $3.5m, some $677,000 lower than Kin Lin Builders' price. The defendant wrote to the plaintiff on 13 May 2002, advising against awarding the project to Expedite because the price was too low, Expedite's past record was not impressive and it did not have the financial strength to undertake the Warehouse Project. However, after two rounds of interview with Expedite, the Warehouse Project was awarded to Expedite.

Award of Building Contract to Expedite

4 There were some disagreements on the exact circumstances regarding the award of the Warehouse Project to Expedite. It was not disputed that the plaintiff was the one who procured Expedite to submit a quote. The defendant claimed that he had no choice over the matter and that the plaintiff's problems with the Warehouse were caused by their choice of Expedite. However I note that there were two interviews with Expedite conducted by, among others, the defendant and AT Lee, on 17 May and 6 June 2002 and, in the event, the defendant sent the letter of acceptance to Expedite on plaintiff's behalf. The defendant had obviously been swayed by the plaintiff's budget constraints and had decided that he could work with Expedite. However as a professional architect, it was his duty to advise the plaintiff as to whether he was satisfied with Expedite's capability to undertake the project. The plaintiffs pointed out that the defendant did not complain about Expedite's work during the construction period, and had done so well after the work had ceased. I therefore find that the defendant's assertion that the selection of Expedite was the sole responsibility of the Plaintiffs has no basis. Furthermore, the plaintiff and Expedite had referred their disputes to arbitration ("the Arbitration") which resulted in an award by the arbitrator ("the Arbitrator") against the plaintiff of the sum of $331,097.55. In his award, the Arbitrator did not make any adverse finding in relation to the work of Expedite under the Building Contract. Therefore the defendant's allegations that he was not responsible for any shortcoming in performance on the part of Expedite also had no basis in that the Arbitrator made no finding that Expedite had failed to carry out the building works satisfactorily (other than in respect of certain defects set out in the plaintiff's claims against Expedite in the Arbitration for which the Arbitrator awarded damages to the plaintiff for their rectification). It is therefore not relevant whether the award of the contract for the construction of the Warehouse to Expedite was or was not solely the decision of the plaintiff.

5 By way of a letter of award dated 17 June 2002 issued by the defendant on behalf of the plaintiff, the contract for the construction of the Warehouse was awarded to Expedite for about $3.5m. The documents constituting the contract between the plaintiff and Expedite were, in accordance with normal practice in the building industry, compiled in a bundle which was signed by representatives of the plaintiff and Expedite sometime in September 2002. This bundle was produced in court and marked as 8AB and referred to hereafter as the "Building Contract".

6 Under the Building Contract, Messrs Tenwit Engineering Consultants was appointed the structural engineer and HPS Consulting was appointed the mechanical and electrical engineer ("M&E Engineer"). No quantity surveyor ("QS") was named in the Building Contract under Article 4 of the Articles and Conditions of Building Contract. The defendant's firm of S G Chin was named as the firm from which the QS would be appointed. It was common ground that the parties had agreed to use the in-house QS in S G Chin, but as that person may change over the duration of the project, it would be expedient to leave the name blank. The in-house QS in S G Chin at the time was one Lam, but after he resigned in December 2003, the defendant did not employ another QS for the remaining duration of the construction of the Warehouse.

Construction of the Warehouse

7 Construction commenced on 1 July 2002 and the construction period was to be 11 months, *ie* the completion date would be 31 May 2003. The work was to be completed in three phases: phase 1 comprised the office block, phase 2 was the smaller part of the Warehouse that would store flammable, toxic and corrosive substances, and phase 3 was the larger part of the Warehouse. Phase 1 was completed and handed to the plaintiff on 20 February 2003. Expedite commenced work on phase 2 on 6 February 2003 and on phase 3 on 29 June 2003.

8 Royston Chow Kwai Yeow ("Chow") had been employed by the defendant since 1980 and at the material time he was a senior project manager. The defendant tasked Chow to supervise the construction, which included coordinating and supervising activities at the site, ensuring builder's works were executed in accordance with the drawings and the requirements of the Building Contract. Chow said that his work only covered the architectural works. He gave evidence that he was the main person on site representing the architect and that he received reports from the clerks-of-works ("CW") and reported regularly to the defendant regarding the progress of the works. Chow was the defendant's right hand man for the project; he would consult the defendant on every matter and draft the documents for the defendant to sign which the defendant did after reviewing them and satisfying himself that they were in order to do so. One Ho Cheow Thatt was appointed the CW. Under the Contract, where constant supervision was required by the plaintiff, a CW is to be employed, which shall be paid by the plaintiff but shall work under the architect's direction and control. The defendant tried to dissociate himself from any responsibility for oversight of the CW, but it is patently clear from the terms of the Contract that supervision of construction is his responsibility and that the CW worked under his direct control even if he was employed by the plaintiff.

9 On 17 November 2003, the defendant certified that the works for the Warehouse were completed by Expedite on 15 October 2003, save for the defects detailed in his letter of 13 November 2003. The latter had listed 12 defects, one of which was "uneven floor inside the warehouse (phase 3 area)". The defendant also certified that the maintenance period would commence on 15 October 2003.

10 Throughout the contract period, the plaintiff made progress payments to Expedite pursuant to the architect's certificates issued by the defendant. The defendant also issued a number of variation orders pursuant to the Building Contract for builder's works in relation to various omissions and additions required by the architect's instructions.

Fire to the Warehouse

11 On 27 December 2003, some two months after completion, a fire broke out in the Warehouse that damaged most of the phase 2 area and part of the phase 3 area. In particular, the roof of the phase 2 area was completely destroyed and part of the roof of the phase 3 area was damaged. The cost of rectification works for the damaged portion of the Warehouse, including the roof, was repaired by a third party and paid for by the insurers.

Defects rectification

12 The defects rectification process was somewhat drawn out, no doubt complicated by the fire in December 2003, but also by a number of other factors. On 5 January 2004 Expedite wrote to the defendant and provided a schedule for the rectification of the defects listed in the defendant's letter of 13 November 2003. Expedite noted that the fire in December 2003 may have caused damage to the Warehouse and asked for the details of such damage. On 27 January 2004, the defendant responded to this letter and instructed Expedite, among other things, to proceed with rectification of the "unlevelled floor as soon as possible". On 29 January 2004 Expedite wrote to the defendant stating that water had leaked from the fire-damaged roof and this had caused water ponding on the floor of the Warehouse and claimed that time for performance of phase 2 and phase 3 was at large for various reasons. On 3 February 2004 the defendant wrote to Expedite setting out a further list of defects, raising the total to 16 items. On 18 May 2004 the defendant wrote to Expedite setting out a new list of defects with a new total of 36 items.

Call on performance bond

13 On 8 April 2004 the defendant wrote to Expedite and advised that the plaintiff would make a call on the performance bond ("the Bond") for the entire sum of $351,247.45. The call was made on 14 April 2004 and all rectification works by Expedite came to a halt. On 20 April 2004, Expedite filed Suit 309 of 2004 in the High Court ("Suit 309") against the plaintiff for an order to restrain the issuer from making payment to the plaintiff under the Bond and the plaintiff from receiving payment. The suit was eventually settled on 19 July 2004 and the court approved a consent order, the material terms of which are as follows:

(a) Expedite will withdraw Suit 309 with no order as to costs.

(b) Expedite and the plaintiff will appoint T J Chiam Surveyors ("T J Chiam") as independent quantity surveyor to evaluate and determine the rectifications "to an industrial standard" of the defects as set out in the defendant's letter of 3 February 2004.

(c) The report of T J Chiam, which is to be completed within three weeks of appointment unless extended, will be final and binding on the parties. The plaintiff will be entitled to call on the Bond up to an amount determined by T J Chiam.

(d) The Bond shall be extended until the outcome of the Arbitration or settlement of all disputes arising from the project.

T J Chiam Report

14 The plaintiff and Expedite duly appointed T J Chiam which produced its report on 31 August 2004 entitled "Independent Quantity Surveyor's Report on Defective Works at No 7 Gul Drive" ("the T J Chiam Report"). The T J Chiam Report valued the cost of rectification at $203,185.11 which was then revised downwards to $192,468.31 following an addendum of omission. A sum of $192,468.31 was released to the plaintiff under the Bond and a new performance bond for the balance of $158,779.14 was procured by Expedite.

Franklin + Andrews Report

15 On 30 August 2004, the defendant issued a letter to Expedite stating that new defects have surfaced and listed 36 defects. On 23 September 2004, the defendant wrote to Expedite and gave a list of 13 new defects. In November 2004 the plaintiff engaged Franklin + Andrews Pte Ltd, an international construction consultant, to prepare a cost estimate for the total replacement or rectification of the defects in the Warehouse listed in the defendant's letters of 30 August 2004 and 23 September 2004. The report that eventually came out ("the Franklin + Andrews Report") estimated those costs at $670,763.

Extension of Time

16 In the course of the construction of the Warehouse, Expedite had submitted various claims for extension of time. However the defendant did not make a decision on them until almost a year after he had certified completion. On 6 September 2004, the defendant issued a delay certificate extending the date of completion by 69 days thereby revising the contract completion date to 8 August 2003. Expedite replied on 7 October 2004 to state that it disagreed with the defendant's evaluation of its entitlement to an extension of time.

Statement of Final Account

17 On 10 January 2005, Expedite submitted its final claim to the defendant for works carried out under the Building Contract and claimed the sum of $252,153.52 as the sum due after taking into account variations, additions and omissions. The defendant replied on 31 January 2005 to point out that the claims were not substantiated and reminded Expedite to submit its claims with relevant documents. The defendant added that if he did not receive any response within one week, he "will assume that there is no ground for [Expedite] claims".

18 On 11 March 2005 the defendant issued the "Statement of Final Account" which showed that a net amount of $667,888.71 was due from Expedite to the plaintiff. This took into account the $192,468.31 received by the plaintiff from the Bond. In the statement of final account the defendant valued the work done by Expedite at $3,640,416.45 while the claim by Expedite valued it at $3,707,688.37, a difference of $67,271.92. Furthermore, the defendant had included the sum of $863,231.31 as being due from Expedite to the plaintiff, which is the total of the amounts in the T J Chiam Report and the Franklin + Andrews Report.

Arbitration

19 The plaintiff and Expedite agreed to refer their disputes to arbitration and appointed Mr Goh Phai Cheng SC as sole arbitrator on 13 April 2005. Hearings were conducted between June 2006 and February 2007. On 16 November 2007, the Arbitrator issued his award and held that Expedite succeeded under its claim in the sum of $418,231.91 whereas the plaintiff succeeded under its counterclaim in the sum of $87,134.36. The result was a net sum of $331,097.55 due from the plaintiff to Expedite, along with interest at 6% per annum.

The plaintiff's claims

20 The plaintiff's claims in this suit against the defendant, totalling $1,438,559.39, are for damages for breach of contract and negligence in relation to the performance of the Contract under the following heads:

(a) $151,917.50, being the professional fees paid to the defendant;

(b) $170,000, being the liquidated damages that the plaintiff had failed to recover from Expedite at the Arbitration;

(c) $95,000, being the cost of grinding the floor of the Warehouse;

(d) $268,577, being the cost of replacing the roof insulation of the Warehouse;

(e) $4,500, being the cost of as-built drawings;

(f) $398,564.89, being the sum awarded by the Arbitrator in favour of Expedite;

(g) $100,000, being the value of the warranty which the defendant failed to obtain from the supplier of the roof material and other suppliers; and

(h) $250,000, being the costs that the Arbitrator ordered the plaintiffs to pay Expedite.

(a) Professional fees: $151,917.50

21 The plaintiff's claim under this head is that the defendant had wholly failed to carry out his

duties under the Contract and therefore he is liable to refund the sum of $151,917.50 paid to him as his fees. The relevant parts of the defendant's letter to the plaintiff dated 15 May 2001 which constitutes the Contract provide as follows:

S cope of Services

1 Collecting information and Client's requirements and Sketch Plans (Schematic Design).

2 Preparation of plot ratio and quantum calculations to coincide with planning parameters in compliance with JTC and URA requirements.

3 Preparation and submission of plans to JTC for approval and endorsement.

4 Preparation and submissions of plans to Urban Redevelopment Authority (Planning Department) for Planning Approval.

5 Preparation of Working Drawings.

6 Preparation of Amendment Plans.

7 Preparation of Specifications and Tender Documents.

8 Calling of Tender and Tender Evaluation.

9 Preparation and submission of plans to Building Control Unit (JTC) for Building Plan Approval.

10 Preparation and submission of structural drawings and calculations to Building Structural Branch (JTC) for record and approval.

11 Preparation and submission of culvert & road details to JTC & Land Transport Authority (Roads Branch).

12 House number application to Inland Revenue Authority of Singapore (Property Tax Division).

13 Clearance Form from Building Control Unit (JTC) Fire Safety Bureau.

14 Clearance Form from Building Control Unit (JTC) Sewerage Department.

15 Clearance Form from Building Control Unit (JTC) Drainage Department.

16 Clearance Form from Building Control Unit (JTC) Pollution Control Department.

17 Clearance Form from Building Control Unit (JTC) Environmental Health Department.

18 Clearance Form from all other relevant Departments, ie, Mindef, if any.

19 Updating of As-Built drawings and submission of Amendment Plans (applicable for one amendment submission only).

20 Application for Temporary Occupation Permit from Building Control Unit (JTC).

21 Application for Certificate of Statutory Completion from Building Control Unit (JTC).

Scope of Supervision which forms part of the duties undertaken by us as follows:

(i) Organizing and presiding at site meetings at least once every alternate week during the initial stage of construction and once a week if it is deemed necessary. Attendants shall include the Client, Architect, Structural Engineer, M & E Engineer, nominated Sub-Contractor and the Clerk-of Works/Resident Engineer.

(ii) Supervision and control of the works until practical completion and to ensure that the works are being executed in accordance with the Contract Specifications and to enable the Client to obtain the Temporary Occupation Permit and Certificate of Statutory Completion from Building Control Unit (JTC).

Our Structural Engineer's Supervision work will be carried out as follows:

(i) Checking & approving of reinforcement prior to concreting work being carried out.

(ii) Checking on concrete quality & ordering of test cubes to be carried out to ensure quality control.

(iii) Checking on formwork with regards to design strength, alignment, rigidity and stability (this work maybe assisted by the Clerk-of-Works).

(iv) Checking cleanliness before concreting proceeds (this work maybe assisted by the Clerk-of Works)

(v) Advising on remedial measures if quality of structural work is below the required standard

Our M & E Consultant's Scope of Duties will be carried out in accordance with local PUB Standard & Governmental requirements.

Our Accredited Checker's Scope of Works will be conformed to the duty as implemented by the Building Structural Branch (JTC).

Professional Fees

Our Professional Fee will be 6% ***(Six Percent)*** of the total construction cost. Please note that the fees are inclusive of payment to the Structural Engineer, Accredited Checker, Registered Inspector for FSB's inspection and the M & E Consultant.

Terms of Payment

Our professional fees will be due as follows:

...

We shall provide periodical supervision and inspection as may be necessary to ensure that the works are being executed in general accordance with the Contract. Where constant supervision is required by the Owners, a Clerk-of-Works shall be employed for this purpose. The Clerk-of-Works shall be nominated by the Architect but appointed and paid for by the Owner and shall be under the Architect's direction and control.

[emphasis in original]

22 The parties subsequently agreed to vary the term relating to professional fees. The sum of 6% was intended to cover the fees for the structural engineer, accredited checker, registered inspector for fire safety bureau inspection and M&E Consultant. The parties agreed that the plaintiff would pay the fees to the other parties directly and the defendant would receive 4.55% for his fees. In the event, the plaintiff paid the defendant the sum of $151,917.50.

23 It can be seen from the terms of the Contract set out at [21] above that one of two major tasks of the defendant was to undertake the architectural design of the Warehouse. This would entail taking instructions from the plaintiff as to its requirements, coming up with a design in conjunction with the structural and M&E consultants, preparing architectural plans and obtaining approval for those plans from all relevant authorities. The other major task was to see through the construction of the Warehouse by calling tenders and supervising the construction such that it conforms with the design and requirements of all relevant authorities in order to obtain approval to use the building as a Warehouse.

24 The Warehouse was built and approval obtained for it to be used as a warehouse and it was in fact so used. The plaintiff claimed to have suffered losses as a result of the defendant's breaches of the Contract, and those losses are the subject of the other heads of claim in this suit. There is therefore no basis for the plaintiff to claim a full refund of fees paid to the defendant as consideration for the fees was given. The plaintiff's true claim is for damages and this head of claim is therefore dismissed.

(b) Liquidated damages: $170,000

25 In his statement of final account dated 11 March 2005, the defendant had certified that liquidated damages ("LD") for delayed completion amounted to $170,000. This was one of the plaintiff's counterclaims in the Arbitration, which was based on the original contract completion date of 31 May 2003, the extension of time of 69 days certified by the defendant, and the actual completion date of 15 October 2003. The Arbitrator found that the 69 days granted were insufficient primarily because a number of installations by other contractors were not completed in time, namely the fire rated roller shutter, the racking system and the fire sprinkler systems. The Arbitrator held that a fair extension of time would be one that extended it to the actual completion date of 15 October 2003. Therefore the plaintiff would not be entitled to LD and this claim was dismissed.

26 It is not clear on what basis the plaintiff claimed the defendant to be liable for its failure to recover LD in the Arbitration. The defendant had made an assessment that Expedite was entitled to an extension of time of 69 days which, if upheld, would have meant that Expedite would be liable to LD of $170,000. However the Arbitrator had determined that Expedite was entitled to an extension that would vary the contractual completion date to the actual completion date and therefore Expedite would not be liable for LD. There was no evidence that the defendant had caused the delay and therefore he was liable for losses due to the delayed completion. Furthermore, the LD clause is contained in the Building Contract between the plaintiff and Expedite; the parties to that agreement agreed that damages of $2,500 is a pre-estimate of the losses that the plaintiff would suffer as a result of each day of delay in completion. It was not part of the Contract between the plaintiff and the defendant. Therefore even if the plaintiff had suffered losses arising from the delayed completion which can be attributed to the defendant, the plaintiff cannot claim this in the form of LD but must prove actual losses it had incurred as a result of the delay. This was not done.

27 For the reasons given above, the plaintiff's claim for $170,000 under head (b) is dismissed.

(c) Grinding of Floor: $95,000

28 The plaintiff had intended to use the very narrow aisle ("VNA") racking system in the Warehouse. This system provides a higher total storage area for a given floor area of a warehouse through the utilisation of aisles that are narrower than normal. But it entails the use of retrieval trucks that require the floor to be constructed to a high degree of evenness, described as a "superflat" floor, because of the size and floor clearance of such trucks. The floor constructed by Expedite did not meet the specification and the plaintiff had to engage a specialist contractor, Concrete Grinding (Asia Pacific) Pte Ltd, to grind it to the superflat standard. The cost of this work came to $95,000.

29 The plaintiff made a claim for this from Expedite in the Arbitration. However the Arbitrator found that the Building Contract did not contain any requirement for Expedite to provide a superflat floor to the Warehouse. Before me, the defendant was unable to point to any provision in the Building Contract that called for a superflat floor. Therefore, he could not submit that the Arbitrator was wrong in concluding that the Building Contract did not specify a superflat floor.

30 The only issue then is whether the plaintiff had made known to the defendant that it required a superflat floor. Although the defendant denied it, there is ample evidence in the documents provided by the plaintiff to the defendant that the use of the VNA system was envisaged and indeed that was what the basis upon which the defendant designed the Warehouse. Furthermore, as the architect for the project, it was the defendant's duty to take into account the plaintiff's requirements for the Warehouse so that he would be able to put up a design that suited it. It is therefore surprising that the defendant would make such a denial. In the event, I find that the defendant was aware of the plaintiff's requirement for the VNA system and had negligently omitted to specify a superflat floor to be constructed by Expedite. This was a breach of his duty under the Contract to design and oversee the construction of the Warehouse that would meet the requirements of the plaintiff. As a result of this breach, the plaintiff had to incur costs of $95,000 to rectify the deficiency. There was no submission that the sum incurred was not a reasonable sum. I would point out that had the requirement for a superflat floor been provided in the Building Contract, it may well be that Expedite would have put in a higher cost. However there is no evidence of this, and equally this requirement might not have affected Expedite's price. Therefore I hold that the sum of $95,000 incurred by the plaintiff to grind the floor amounts to the damages incurred by the plaintiff as a result of the defendant's breach.

31 An alternative defence of the defendant was that Expedite had in fact made an offer of $70,000 as compensation for the defect to the floor. The defendant claimed that had the plaintiff accepted this offer, its losses would have been mitigated by that amount. However it was based on the defendant's advice that the plaintiff did not accept the settlement and the defendant cannot now claim that the plaintiff had failed to mitigate damages.

(d) Roof insulation: $268,577

32 The roof required a radiant barrier, which comprises reflective sheeting to impede the heat of any fire from being transferred to the structural steel members of the roof and causing them to weaken. The specifications in the Building Contract contained references to two brands, Parsec and Sisalation. The Sisalation radiant barrier did not have sufficient strength to span the purlin spacing and required a wiremesh to provide support. The Parsec material on the other hand had embedded structural elements that made itself supporting. The plaintiff's position was that they had instructed the defendant to specify Parsec. This was because the exposed wiremesh in the Sisalation system which would rust in the harsh environment of the Warehouse, part of which was to be used to store corrosive and hazardous chemicals. Although the defendant denied that he had been given such

instructions, there was no doubt that he was aware that the Warehouse would store corrosive chemicals as it was part of his brief and this is evidenced by the fact that during the design stage, the plaintiff had provided the defendant with copies of permits from the Ministry of the Environment for storage of hazardous substances. Furthermore, when he gave evidence in the Arbitration, the defendant took the position that exposed wiremesh was not acceptable due to the harsh corrosive environment. Indeed the defendant had written a letter dated 19 May 2004 to Expedite wherein he had taken the same position. It is clear that installation of the Sisalation material was contrary to the plaintiff's instructions and requirements.

33 The Arbitrator held, correctly in my view, that the Building Contract was ambiguous on this matter and found that, in supplying the Sisalation material, Expedite had complied with the requirements of the Building Contract. He also found that Expedite had installed Sisalation in full view of the CW and Chow and there had been no instruction to Expedite rejecting the use of Sisalation. In the event, the Arbitrator found, again correctly in my view, that the architect was not entitled to require Expedite to replace Sisalation with Parsec.

34 In my view, there were two levels of failure on the part of the defendant in relation to his duty as architect. One was failure to clearly specify Parsec, thereby enabling Expedite to be entitled under the Building Contract to install Sisalation instead of Parsec.

35 The second failure was in not ensuring during construction that Expedite installed Parsec instead of Sisalation. The defendant claimed that at the tender stage, Expedite had asked whether the Building Contract called for Sisalation or Parsec and that he had clarified that it was to be Parsec. As a result of this, Expedite provided for Parsec in its tender proposal. However, in the event, Expedite installed the Sisalation material. It is quite common in construction contracts for contractors to change to a material required by the architect if the one he was proposing to use was not satisfactory, especially if there is no increase in cost, or such increase is not substantial. In the present case, the Building Contract provided for both Parsec and Sisalation and it is not inconceivable that, had the defendant requested Expedite to change to Parsec before installation, Expedite would in all likelihood have acceded to the request. However the defendant was not aware of the installation of Sisalation material until after he had certified completion. By that time it would entail great cost to undertake the replacement, not just in terms of material cost but also installation cost. This was a failure on the part of the defendant, who had the CW full time on site, as well as Chow as project manager, to supervise the construction.

36 I therefore find the defendant to be in breach of his duty under the Contract to properly specify the correct material and to properly supervise Expedite in respect of the roof insulation.

37 As damages, the plaintiff claimed the sum of $268,577, which was for total replacement of the Sisalation material with the Parsec material. This is not the amount spent but that estimated in the Franklin + Andrews Report. However this is not an appropriate measure of the damages in this situation. The complaint is not that the Sisalation material is not suitable for the primary function of heat retardation. It is that the exposed wiremesh in that system is liable to rust in the harsh environment of part of the Warehouse, and which will require replacement at a date earlier than would have been the case if Parsec had been used. No evidence was led as to how much earlier would replacement be required. In addition, there would be value to the plaintiff during the period that the Sisalation material was in use and this would reduce the extent of the damages. The plaintiff did not adduce any evidence on this. As the plaintiff had failed to discharge its burden of proof of quantum of damages, I can only award the plaintiff nominal damages of $1 for this head of claim.

38 I should also add that after the fire (see [11] above), the entire roof in the phase 2 area and

part of the roof in the phase 3 area were replaced. The insulation used for the replacement roof appeared to be the Parsec material. This would have further reduced the damages to the plaintiff. There was no evidence adduced of which part of the Warehouse roof at the phase 3 area that still had Sisalation insulation material installed.

(e) As Built Drawings: $4,500

39 The Contract set out the scope of services to be provided by the defendant thereunder. Item 19 is for "Updating of As-Built drawings and submissions of Amendment Plans (applicable for one amendment submission only)". The plaintiff claimed that these were not delivered by the defendant, which assertion the defendant did not deny. The plaintiff claimed that it would cost them $4,500 to get those drawings prepared by another firm of architects. The defendant did not dispute this. I find that the defendant is liable to compensate the plaintiff the sum of $4,500 for his failure to meet his obligation under the Contract to provide as-built drawings, and I so order.

(f) Arbitration award to Expedite: $398,564.89

40 The Arbitrator had awarded to Expedite the sum of $418,231.91 in respect of its claims against the plaintiff, with the breakdown as follows:

Original contract sum:	$3,512,474.54
Value of variation orders for builder's works:	$ 140,515.22
Value of variation orders for M&E works:	$ 40,316.00
Adjusted contract sum:	$3,693,305.76
Less total paid under architect's certificates	($3,467,542.16)
Amount due to Expedite (excluding GST)	$ 225,763.60
Amount paid to the plaintiff under the Bond	$ 192,468.31
Total award:	$ 418,231.91

41 It is not clear on what basis the plaintiff makes this claim. Certainly in respect of the return of the $192,468.31 received by the plaintiff under the Bond (see [14] above), there is no basis for claiming this as damages from the defendant. The Arbitrator had made a finding that the plaintiff was liable for an additional sum of $180,831.22 which was his valuation of variation orders for builder's works and M&E works. The difference between that sum and the award of $225,763.60 is $44,932.38, which is the shortfall due to Expedite under the original contract sum of $3,512,474.54. Therefore the enhancement in the contract sum awarded by the Arbitrator was only $180,831.22, which were in respect of variation orders for builder's and M&E works.

42 The Arbitrator's award of $40,316.00 for M&E works merely affirmed the defendant's amount in his statement of final account. The Arbitrator's award of $140,515.22 for builder's works was in respect of variation orders 1 to 34 and 36 to 45 issued by the defendant. Some of them were omissions, although most were additions to the contract sum and the net result was an increase of $140,515.22. The defendant had, in his statement of final account, recognised a sum of $87,625.91 as being due to Expedite under those variation orders. Therefore the Arbitrator had only increased the defendant's valuation of all variation orders by $52,889.31. This award was in respect of works carried

out by Expedite that the Arbitrator had determined was of a certain value. There is no basis for the plaintiff to claim this sum from the defendant.

(g) Loss of Warranty: $100,000

43 The claim for loss of warranty is a bare statement at para 18 of the statement of claim ("SOC") which provides as follows:

> As a consequence of the Defendant's breach of contract and/or professional negligence, the Plaintiffs have suffered loss or damage.
>
> **PARTICULARS OF THE DAMAGES**
>
> ...
>
> (g) Loss of Warranty $100,000.00
>
> ...

44 There is no other mention in the SOC of any warranty. Presumably the plaintiff's cause of action is in breach of contract or negligence. As there is no express duty under the Contract for the defendant to provide any warranty, the cause of action for this head of damage is presumably in negligence. The problem for the plaintiff was that there was no evidence from any of their witnesses as to what warranties the plaintiff was entitled to under the Building Contract that were not provided. Nor (not unsurprisingly, since the missing warranties were not even identified) was there any evidence that the costs of such failure amounts to $100,000. Therefore this aspect of the plaintiff's claim fails for lack of evidence.

(h) Party/Party Costs in Arbitration: $250,000

45 The plaintiff had gone into the Arbitration with a claim against Expedite totalling about $700,000. This comprised essentially the $192,468.31 worth of rectification works set out in the T J Chiam Report, the $670,763 worth of rectification works in the Franklin + Andrews Report and the $170,000 LD claim. The Arbitrator deducted the $192,468.31 received by the plaintiff from the Bond and a sum of about $173,000 which was the shortfall in the progress payments against the architect's certificates.

46 The Arbitrator dismissed the LD claim on the basis that Expedite was entitled to an extension of time. In respect of the T J Chiam Report, the Arbitrator found that, while that report had made a determination on the costs of the rectification for the defects listed therein, it did not deal with the issue of liability for those defects. The Arbitrator stated that the plaintiff had elected not to call Mr Chiam, the author of the report to give evidence on this aspect. Bearing in mind that the burden of proof on this rested on the plaintiff, the Arbitrator held that there was no evidence that the T J Chiam Report made any finding that Expedite was liable for the defects. The Arbitrator held that it was left to him to make a determination as to whether Expedite was liable for the defects listed in the T J Chiam Report. He proceeded to do so and found that Expedite was liable in respect of some of the defects and determined that the total amount came to $37,653.36. As concerns the Franklin + Andrews Report, the Arbitrator held that it also did not deal with liability and proceeded to consider that issue in relation to each of the defects. He made a finding that Expedite was liable for defects totalling $49,481.00.

47 The sum total of the rectification works in both the T J Chiam Report and Franklin + Andrews Report that the Arbitrator held Expedite to be liable for was $87,134.36, which amount the Arbitrator awarded to the plaintiff.

48 The plaintiff claimed that it had proceeded with the Arbitration due to the negligent advice of the defendant and, had the defendant not given such wrong advice, the plaintiff would not have proceeded to Arbitration but would have settled with Expedite. However there was no written advice from the defendant on this. What we have is the fact that the defendant had identified the defects that were considered in the T J Chiam Report and Franklin + Andrews Report. Although there is no evidence of this, presumably the plaintiff sought their solicitors' advice on the strength of the claims. There is no evidence of the nature of the advice given by the solicitors, neither is there any evidence that the defendant had tilted the legal advice towards arbitration rather than settlement. I find that the plaintiff had not produced sufficient evidence to support its claim under this head.

Summary

49 For the reasons set out above, I order the defendant to pay the plaintiff the sum of $99,501.00 comprising the following:

Grinding of floor:	$95,000.00
Roof insulation:	$ 1.00
As-built drawings:	$ 4,500.00
Total:	$99,501.00

50 I will hear counsel on the question of costs.