Compact Metal Industries Ltd v Enersave Power Builders Pte Ltd and Others [2008] SGHC 201

Case Number : Suit 182/2006

Decision Date : 10 November 2008

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Por Hock Sing Michael and Krishnasamy Siva Sambo (Tan Lee & Partners) for the plaintiff; Maniam Andre Francis, Liew Yik Wee and Chan Jia Hui Jacelyn (WongPartnership LLP) for the 1st defendant

Parties : Compact Metal Industries Ltd — Enersave Power Builders Pte Ltd; DBS Bank Ltd; AVIVA Ltd (formerly known as the Insurance Corporation of Singapore Limited)

Contract

10 November 2008 Judgment reserved.

Andrew Ang J:

Introduction

1 The plaintiff, Compact Metal Industries Ltd ("Compact") commenced this present action against the first defendant, Enersave Power Builders Pte Ltd ("Enersave"), on 29 March 2006, claiming payment for work done and damages for alleged wrongful termination of a sub-contract between them. Enersave, on the other hand, maintained that its termination of Compact was fully justified, and counterclaimed in respect of delays in Compact's works.

Background Facts

The parties involved

2 This case concerns certain Aluminium Cladding and Glazing works ("the Main Contract Works") undertaken for Ventilation Block E ("VBE") and Ventilation Block F ("VBF") of the Kallang/Paya Lebar Expressway project ("the Project"), of which the Land Transport Authority ("LTA") was the employer.

3 The main contractor for the Project (under LTA Main Contract No 424) was Taisei Corporation ("Taisei"). Enersave was a nominated sub-contractor of the Project and was appointed by Taisei under a contract between them ("the Enersave Contract").

4 By a Letter of Award dated 21 May 2004 ("the Sub-contract"), Enersave (then known as United Constrade Pte Ltd) in turn appointed Compact as the domestic sub-contractor for the external cladding works to VBE and VBF ("the Sub-contract Works") for a sub-contract sum which was later revised upwards from S$2,091,916 to S$2,214,916.95. The Sub-contract Works, which were part of the Main Contract Works, amounted in the aggregate to just below 20% of the original monetary value of the Enersave Contract.

Provision of performance bond

5 On 27 October 2004, and pursuant to cl 18.0 of the Sub-contract, Compact provided Enersave with a performance bond (Performance Bond No 26393 603 BON) for the sum of S$105,000 (*ie*, 5% of

the initial contract sum of S$2,091,916) issued by the third defendant, Aviva Ltd ("Aviva"), in favour of Enersave ("the Performance Bond").

The Advance Payment and the Advance Payment Bond

6 At Compact's request, sometime in August 2004, and prior to the commencement of the Sub-contract Works by Compact, Enersave provided Compact with an advance sum of S$313,787.40 (described in cl 3.6 of the Sub-contract as an "initial deposit"), this being 15% of the initial contract sum of S$2,091,916 ("the Advance Payment"). On 18 August 2004, and in consideration of this Advance Payment, Compact provided Enersave with a banker's guarantee (Banker's Guarantee No. 550-XX-XXXXXXX), issued by the second defendant, DBS Bank Ltd ("DBS") for an equivalent sum of S$313,787.40, to secure the repayment of this Advance Payment ("the Advance Payment Bond") in the event of Compact breaching its contractual obligations under the Sub-contract. By mutual agreement, the Advance Payment Bond was extended to expire on 27 September 2005.

The Payment Terms in the Sub-contract

7 Before 30 September 2005, payment to Compact by Enersave was to be by monthly progress payment where, *inter alia*, Enersave was bound to certify Compact's progress claims within 21 days of submission and to honour such certification within 30 days thereof ("the Payment Terms"). These payment obligations were set out in cll 3.7 and 10.1 of the Sub-contract. Enersave would normally certify Compact's progress claims based on Taisei's certification of the Main Contract Works under Enersave's own progress claims submitted to Taisei.

The Settlement Agreement

8 Before the expiry of the Advance Payment Bond on 27 September 2005, a dispute arose between Enersave and Compact over, *inter alia*, the progress of the works, certification and the lack of progress payments from Enersave to Compact in accordance with the Payment Terms. By September 2005, based on Taisei's certification of 14 September 2005 and the agreed unit rates under the Sub-contract, Compact was entitled to payments which exceeded the Advance Payment. Compact was not aware of the state of Taisei's certification and no certification of payment was done nor was any progress payment made to Compact. Despite this, Enersave threatened to call on the Advance Payment Bond.

9 This led to settlement negotiations between Enersave and Compact. Compact and Enersave eventually entered into a settlement on 30 September 2005 ("the Settlement Agreement") which was recorded in an exchange of correspondence between their respective solicitors. The terms of this Settlement Agreement included the following:

(a) Enersave would discharge the Advance Payment Bond forthwith;

(b) Compact would furnish Enersave with another banker's guarantee to be issued by DBS in the sum of S$60,000; and

(c) Enersave would certify and pay Compact in accordance with the Payment Terms upon due certification and acceptance by Taisei or LTA of the Main Contract Works.

10 Pursuant to this Settlement Agreement, Enersave returned the Advance Payment Bond to Compact for cancellation whilst Compact procured the issuance of a banker's guarantee (Banker's Guarantee No 550-XX-XXXXXXX) on 12 October 2005 by DBS in favour of Enersave in the sum of

S$60,000 ("the Guarantee").

11 Following the Settlement Agreement, Enersave made the following two payments to Compact, which are not in dispute in the case before me:

(a) A cheque for S$24,076.82 for work done up to 31 August 2005, which was issued by Enersave on 22 October 2005 and presented by Compact for payment on 11 November 2005; and

(b) A cheque for S$76,822.49 for work done up to 30 September 2005, which was issued by Enersave on 16 November 2005 and presented by Compact for payment on 6 December 2005.

Termination of Sub-contract with Compact by Enersave

12 Although the Settlement Agreement of 30 September 2005 was meant to resolve the dispute between Enersave and Compact over, *inter alia*, the progress of the works, certification and the lack of progress payments from Enersave to Compact in accordance with the Payment Terms, the relationship between Compact and Enersave worsened, culminating in Enersave terminating the Sub-contract on 23 March 2006.

13 The parties have conflicting accounts of the circumstances leading to the termination.

Compact's version

14 Compact's claim in this action is for loss and damages arising from the alleged wrongful termination of the Sub-contract by Enersave. Compact's claims are based on its interpretation that, in breach of the Sub-contract and/or the Payment Terms and/or the Settlement Agreement, Enersave had:

(a) failed to certify the Sub-contract Works on a monthly basis based on Compact's progress claims which, as at 26 February 2006, amounted in total to 15 progress claims. (This failure was despite the fact that Taisei had consistently certified Enersave's progress claims under the Enersave Contract);

(b) failed to pay Compact regularly for the part of the Sub-contract Works completed as reflected in the progress claims submitted;

(c) failed to pay Compact the full contractual sum due for the part of the Sub-contract Works completed based on Taisei's certification of the Main Contract Works in Enersave's own progress claims, despite having received payment for the same from Taisei; and

(d) wrongfully terminated the Sub-contract on 23 March 2006.

15 Compact's case is that notwithstanding its submission of progress claims monthly to Enersave since November 2004, Enersave only started to issue interim certifications of Compact's regular progress claims sometime in September 2005.

16 Compact asserts that based on Taisei's certification of the Works, vis-à-vis Enersave's own progress claims up to 2006, Compact was entitled to payment of a sum of S$826,784.59 computed on the agreed unit rates in the Sub-contract. Taking into account the Advance Payment and the two payments from Enersave (see [11]), a shortfall of S$416,902.61 still remained outstanding. By February 2006, the shortfall had increased to S$458,627.49. However, notwithstanding the increasing shortfall, on 17 March 2006, Enersave confirmed to Taisei and Compact that it was ready to pay only

an aggregate sum of S$141,320.90. Even this sum of S$141,320.90 was never paid because Enersave withdrew the payment on 24 March 2006, in view of its purported termination of the Sub-contract on 23 March 2006.

17 Compact's position is that initially Enersave had agreed (subject only to the payment of a 5% processing fee) to assist in the procurement of letter of credit facilities for the purchase of certain cladding materials from Korea costing US$256,022.09 (the "Korean Materials") that were required for the Sub-contract Works at VBF. However, Enersave subsequently changed its position on this matter. It sought additionally to impose a condition precedent that Compact was to "remain contractually and fully liable for *any* delay that has been caused" ("the Condition Precedent"). This Condition Precedent effectively meant that Compact was to take responsibility for Enersave's own delay in the Main Contract Works. Compact refused to accept the Condition Precedent and contends that Enersave's purported termination of the Sub-contract on 23 March 2006 was in fact triggered by Enersave's failure to compel Compact to agree to the Condition Precedent (Compact having informed Enersave on 22 March 2006 that they would be paying for the Korean Materials directly) and in the face of Compact's demands for progress payments for the Sub-contract Works.

18 So far as VBF was concerned, the progress of the Sub-contract Works was to accelerate upon the delivery of the Korean Materials, when installation of those materials would have proceeded in earnest. Enersave purported to terminate the Sub-contract on 23 March 2006 on the grounds of an alleged lack of manpower on the site, despite knowing that substantial work requiring more manpower could only proceed upon the delivery of the Korean Materials, the procurement of which was in fact delayed by Enersave's imposition of the Condition Precedent.

Enersave's version

19 Enersave's position is that there were delays on Compact's part and defects in Compact's work at VBE and VBF that required rectification even before the Settlement Agreement.

20 After the Settlement Agreement, Enersave had hoped that the progress of the Sub-contract Works would improve as Enersave had asked that a new team from Compact handle the Sub-contract Works. Compact had agreed to this and, Eric Lo, the general manager of Compact's subsidiary, FaçadeMaster Pte Ltd, took the lead. However, the Sub-contract Works went into further delay. Taking into account the delays, Compact submitted revised schedules ("the Latest Schedules"), the last of which were:

(a) schedule for VBE submitted on 20 January 2006; and

(b) schedule for VBF submitted on 10 February 2006.

21 Compact, however, failed to meet the revised schedules. Both Enersave and Taisei's manpower records showed that Compact had employed insufficient manpower. Moreover, Compact did not have adequate site supervision. The situation deteriorated, with Compact in effect abandoning the Sub-contract Works sometime from 10 to 15 March 2006.

22 Enersave claims that Compact had breached cll 17.1.2 and 17.1.3 of the Sub-contract. In respect of cl 17.1.2 of the Sub-contract, Enersave claims that Compact had failed "to proceed regularly and diligently with the Sub-contract Works". And, in respect of cl 17.1.3 of the Sub-contract, Enersave's position is that Compact had "refuse[d] and persistently neglect[ed] to work according to the Contractor's [*ie*, Enersave's] instructions, specifications or any requirement of the Sub-contract".

23 On 13 March 2006, Enersave sent a letter to Compact giving Compact a "final opportunity to 'catch up' with the works". In this letter, Enersave also threatened to exercise its contractual rights, which included its rights of termination. The situation, however, failed to improve.

24 On 18 March 2006, Enersave issued a notice of default pursuant to cl 17.1 of the Sub-contract, which Compact acknowledged as receiving by 20 March 2006. However, Compact failed to direct its attention to the manpower situation and the delays in the Sub-contract Works. Compact's focus at that time was merely on the purchase of external cladding panels for VBF (*ie*, the Korean Materials), which was but one aspect of the Sub-contract Works. There was no significant improvement in the manpower situation and in the progress of the Sub-contract Works and Compact failed to reply to Enersave's notice of default of 18 March 2006.

25 Given those circumstances, Enersave asserts that it rightfully terminated Compact's employment on 23 March 2006. Enersave argues that although Compact claims that it only received the notice of termination on 24 March 2006, this had no bearing on the validity of the termination. The Sub-contract had prescribed a three-day "cure period", which Compact was duly afforded but did not make full use of.

Events after the termination of the Sub-contract

The injunction

26 Pursuant to the termination, Enersave purported to call on both the Guarantee and the Performance Bond for payment of the sums of S$60,000 and S$105,000, from DBS and Aviva respectively, on 23 March 2006. Compact sought an interim injunction to restrain payment under the Performance Bond and the Guarantee. On 29 March 2006, Compact obtained an *ex parte* injunction to this effect but this was set aside on 19 December 2006 upon Enersave's application. In discharging the injunction, Sundaresh Menon JC ordered that the question whether there ought to be an inquiry into any damages suffered by Enersave by reason of the injunction was to be reserved to the trial judge. Compact made payment of the sums secured under the Performance Bond and the Guarantee in the aggregate sum of S$165,000 on 27 December 2006. Accordingly, the actions vis-à-vis DBS and Aviva no longer served any purpose and were duly discontinued by Compact on 2 February 2007 leaving only the substantive issues as between Compact and Enersave to be determined at trial before me in the present case.

Termination of Enersave and re-employment of Compact by Taisei

27 On 11 December 2006, some nine months after Enersave had terminated the Sub-contract with Compact, the Enersave Contract itself was terminated by the main contractor (Taisei) on account of Enersave's persistent delay in the completion of the remaining Main Contract Works and/or inability to undertake and complete the same within the schedule required by Taisei. In fact, Taisei claimed that there was a sum of more than S$1m owing from Enersave in respect of loss and damages suffered by Taisei as a result of Enersave's delay to the Main Contract Works.

28 Sometime after Taisei's termination of the Enersave Contract, Compact accepted Taisei's invitation to carry out, *inter alia*, part of the remaining Main Contract Works directly with Taisei which covered primarily rectification works as well as some additional works for VBE and the remaining outstanding works for VBF.

The trial

29 Pursuant to agreement between the parties and a direction made by the court on 7 April 2008, the proceedings at trial were bifurcated with issues of liability to be determined first at trial and issues of quantum to be deferred to a later stage, to be determined by the Registrar with the assistance of an assessor appointed by the President of the Singapore Institute of Surveyors and Valuers ("SISV").

30 At trial, Enersave also chose not to pursue delays in the Works that were historical but instead to focus on delays to the works as set out in the Latest Schedules. I will comment on the significance of Enersave's stance in this respect later in this judgement.

Issues to be determined

31 There are two key issues before this court, both of which are largely factual in nature:

(a) whether Enersave breached the Payment Terms in the Sub-contract and/or the Settlement Agreement in relation to its certification and payment of Compact's progress claims; and

(b) whether Enersave wrongfully terminated the Sub-contract on 23 March 2006.

The facts and the evidence

32 I heard evidence from two witnesses on behalf of Compact. They were:

(a) Mr Por Choon Seng ("Por"), a manager of Compact at the time the Sub-contract was awarded to Compact. He was actively involved in the Project and was a senior figure on Compact's side. He was promoted to the post of assistant general manager sometime in January–February 2007.

(b) Mr Bernard Chan Men Wah, ("Bernard Chan"), an operations manager in Compact's employment when Compact was performing the Sub-contract with Enersave for the Sub-contract Works. He had also been actively involved in design drawing and developments on site.

33 I also heard evidence from three witnesses on behalf of Enersave:

(a) Mr Danny Chen Ming Lien ("Danny Chen"), an executive director of Enersave;

(b) Mr Wang Jun Yi (also known as Jimmy Wang) ("Jimmy Wang") who was Enersave's former project manager. As project manager he was in charge of site planning and coordination of the works at the site. These included Enersave's works and the works of the sub-contractors and the main contractor; and

(c) Ms Mok Lee Teng ("Ms Mok") who was Enersave's former quantity surveyor for the works at VBE and VBF from May 2005. As quantity surveyor, Ms Mok was in charge of assessing and verifying the claims submitted by Enersave's sub-contractors (including Compact) to Enersave, as well as preparing Enersave's claims for submission to Taisei. Ms Mok left Enersave's employment in May 2007.

The decision of this court

Preliminary issue

34 Before proceeding further, it is necessary for me to deal first with a technical objection made

by Enersave.

35 Enersave argues that Compact had raised new matters at the trial which were not supported by the pleadings. Those "new matters" related primarily to manpower issues and delays to the progress of the Sub-contract Works and were raised by Bernard Chan and Por during the trial. Enersave further alleges that those "new matters" were not put to Enersave's witnesses to give them an opportunity to respond.

36 I am, however, of the opinion that Enersave's technical objections are unsustainable for several reasons. First, if these were indeed "new matters" which unfairly prejudiced Enersave's case, one would have expected Enersave's counsel to have raised his objections to such adduced evidence *during* the trial itself and not belatedly *after* the conclusion of the trial. In any case, I found that these "new matters" were actually already matters contained in Compact's pleadings (*viz*, its Amended Statement of Claim, Further and Better Particulars, Amended Reply and Defence to Counterclaim). Also, contrary to Enersave's assertions, both Danny Chen and Jimmy Wang were given ample opportunity to address these "new matters" during the trial itself. It is my view, therefore, that Enersave's belated technical objections are not sustainable.

The termination provision in the Sub-contract

37 During cross-examination, Danny Chen confirmed that the Sub-contract had been entered into on a "back-to-back" basis with the Enersave Contract. Accordingly, most of the material terms in the Enersave Contract were reflected in the Sub-contract. This included the termination clause (cl 17 in the Sub-contract) pursuant to which Enersave had terminated Compact's appointment. This clause reads as follows:

> **17.0 Termination**
>
> 17.1 If the Sub-Contractor shall be in default in any of the following respects such as:
>
> 17.1.1 Without reasonable causes [sic] wholly suspends in carrying out the Sub-Contract Works before completion thereof:
>
> 17.1.2 Fails to proceed regularly and diligently with the Sub-Contract Works:
>
> 17.1.3 Refuses and persistently neglects to work according to the Contractor's instructions, specifications or any requirements of the Sub-Contract:
>
> 17.1.4 Refuses to carry out any variation to the Sub-Contract Works as required by the Contractor:
>
> Then, if such default shall continue for 3 days after a notice specifying the default has been issued in writing by the Contractor, the Contractor shall without prejudice to any other rights or remedies available to him:
>
> – Terminate this Sub-Contract and employ in place of the Sub-Contractor, another supplier / Sub-Contractor and claim the difference in fees and/or costs charged by the said new supplier / Sub-Contractor; and
>
> – Stop the Sub-Contract Works and claim damages, loss, compensation and/or penalty.

The Payment Terms provision in the Sub-contract

38 It was also confirmed by Ms Mok during cross-examination that the Settlement Agreement neither amended nor superseded the Payment Terms vis-à-vis the Sub-contract. In other words, the original Payment Terms continued to apply; there was no difference between how Compact's progress claims would be certified by Enersave *before* and *after* the Settlement Agreement. The only difference seemed to be that whereas Taisei's certifications were a factor to be considered before the Settlement Agreement, thereafter certification and payment by Enersave would be based on Taisei's or LTA's certification/acceptance of Compact's Main Contract Works. At trial, both Danny Chen and Ms Mok confirmed that the said certifications of the Works by Taisei were a "reference" or "guideline" for Enersave's own certification of Compact's progress claims.

Whether Enersave had breached the Payment Terms in the Sub-contract and/or the Settlement Agreement in relation to the certification and payment of Compact's progress claims

39 Enersave had instructed Compact to commence installation works as early as October 2004, after Enersave had belatedly completed part of the structural works for VBE. As Danny Chen and Jimmy Wang confirmed during cross-examination, Enersave had given its instructions notwithstanding the fact that the Building and Construction Authority ("the BCA") had not given the requisite permit (which was only received on 26 April 2005) to commence the installation work and notwithstanding Taisei's objections to the work starting before any such permit was given.

40 Danny Chen also confirmed that Enersave would not certify any work that occurred off-site, such as the procurement of materials and fabrication works. In other words, in order for Compact to be paid, it had to carry out the installation works on the site. Compact complied with Enersave's instructions to commence installation works without BCA approval and then submitted its first progress claim to Enersave on 30 November 2004. However, because Enersave had not obtained Taisei's consent to its commencing works before the BCA's approval, Taisei only provided minimal certification for the installation works carried out by Compact up to 30 April 2005. The state of such affairs was reflected in Taisei's Certification No 19 of 7 June 2005 to Enersave. Taisei's progress certifications only improved significantly from May 2005 after the BCA permit was obtained on 26 April 2005. Between 30 November 2004 and 30 April 2005, Compact submitted five progress claims for the total amount of S$485,659.58. This was in marked contrast to Taisei's progress certifications in the same period which amounted to only S$35,745.06. Given Taisei's nominal certifications during this period, Compact was never fully paid for the installation works it had carried out during those months. In fact, it appears that Enersave only credited Compact with the meagre sum of S$330.17 for all work done up till 30 April 2005, a sum even less than what Taisei had itself certified. It was plainly unfair and unreasonable on Enersave's part not to make due payment to Compact, given that Compact had commenced works early, without the BCA permit, only because Enersave had instructed them to do so in order to hasten progress in a Project which had been delayed by Enersave's *own* slow progress in completing the structural works for VBE. As Ms Mok agreed in the course of the trial, Enersave was a lot less "generous" with Compact than Taisei had been with Enersave vis-à-vis the certification of the installation works.

41 In fact, the same cycle would appear to have been repeated even after the BCA permit was obtained. As matters stood on 23 March 2006 (the date of Enersave's purported termination of the Subcontract) and as evident from Enersave's own records, Compact had already submitted 15 progress claims (for the period November 2004 to February 2006) for the amount of S$868,509.47. As things stood on 23 March 2006, however, Enersave had only paid Compact the sum of S$430,376.03 (inclusive of goods and services tax ("GST")) thus giving rise to a shortfall of almost S$400,000 when

Taisei's aggregate certification up to 31 January 2006 was S$828,953.20 (inclusive of GST).

42 Enersave asserts that after the Settlement Agreement it was in fact ready to pay Compact the total amount of S$141,320.90 and refers to its two cheques of SS71,317.79 (dated 1 January 2006) and SS70,003.11 (dated 7 February 2006) as evidence of its readiness to make payment. Enersave claims that although it had asked Compact to collect the cheques from its office, Compact had failed to do so. Aside from the fact that it was not a contractual stipulation that Compact had to attend at Enersave's office to collect the payment, I also do not find Enersave's contention convincing for the following reasons:

(a) First, the payment of S$141,320.90 was in respect of certifications that Enersave should have *already* promptly paid earlier (but which it did not).

(b) Second, even if I took into account the amount of S$141,320.90, a substantial sum of S$257,256.27 still would have remained outstanding from Enersave.

(c) Third and more fundamentally, Enersave's contention that Compact failed to collect payment, even when such payment was ready, does not comport with common sense.

43 Compact had asked Enersave to assist in the procurement of letter of credit facilities for the funding of the purchase of the Korean Materials because Compact did not have the funds available for such a purchase. Despite that, Enersave would have the court believe that when money was readily available Compact was not willing to step forward to receive such money. Besides, if non-payment had become such an issue between the parties and Compact failed to collect the cheques despite Enersave's oral reminders and letter, why could Enersave not have mailed them to Compact? Enersave's alleged policy of not mailing out cheques is beyond comprehension, or, should I say, belief, especially in view of the fact that non-payment had become such a bone of contention between the parties and was threatening to halt the progress of the entire Project. Enersave could not have been unaware that if it did not make the payment of S$141,320.90 it would be in breach of the Sub-contract. In fact, Danny Chen himself admitted to this during the trial:

Q: Okay. I put it to you, Mr Chen, in view of the non-payment of these two sums, certified sums, Enersave was in breach of the subcontract payment term. Do you agree?

A: Non-payment?

Q: Non-payment of these two certified sums. Ultimately, these … sums were never paid.

A: Yes.

Court: "Yes" what?

Witness: Yes, if it's not paid, it would be in breach.

(NE, p 670.)

Enersave's reason for its failure to make any serious effort to make the payment is all the more incredible in the face of Compact's *two* written demands for such payment on 17 and 22 March 2006. I therefore find that Enersave was in breach of its payment obligations under the Sub-contract, despite Enersave's assertions otherwise.

44 It would appear that even after the Settlement Agreement, Enersave failed to rely on Taisei's progress certifications and instead persistently under-certified and underpaid Compact. It would also seem , and as Ms Mok herself testified under cross-examination, that Enersave did not make any payment to Compact for work completed from 10 October 2005 to the day Enersave purported to terminate the Sub-contract (*ie*, 23 March 2006), a period of almost six months:

Q: Okay. So that would be three … well, almost 6 months no payment from you, correct? Answer?

A: Yah.

(NE, pp 902–903.)

The alleged Advance Payment Agreement

45 Enersave sought to exonerate itself from its earlier failure to certify Compact's progress claims before the Settlement Agreement on the ground that there was an alleged agreement with Compact that certifications and/or payment would only be made *after* the value of Compact's completed works exceeded the Advance Payment ("Advance Payment Agreement"). In paragraph 6(e) of its Defence and Counterclaim (Amendment No 1), Enersave contended:

> Payment to the Plaintiffs was also subject to the Advance Payment of S$313,787.40 made by the 1st Defendants [*ie*, Enersave] and the interim settlement agreement reached between parties on or about 30 September 2005. Pursuant to clauses 3 and 10 of the Sub-Contract, the value of such work done by the Plaintiffs [*ie*, Compact] was subject to a 10% retention sum *and the balance thereof was to be set-off against the Advance Payment until such time the Advance Payment was exhausted, before the Plaintiffs would be entitled to any progress payments*. [emphasis added]

In paragraph 10 of its closing submissions, Enersave repeated its position in the following terms:

> Prior to 30 September 2005, Compact's entitlement to payment was based on certification by Enersave of Compact's progress claims, pursuant to Clauses 3 and 10 of the Sub-Contract, with a 10% retention and *taking into account the Advance Payment*. [emphasis added]

46 Enersave did not adduce any evidence in support of its assertion. An examination of cll 3 and 10 of the Sub-contract, which Enersave relies on to claim the existence of this Advance Payment Agreement, show clearly that there was no such stipulation:

> **3.0 Prices and Payment**
>
> 3.1 This Sub-Contract shall be administered as a fixed rate contract and the quantities subject to final measurement on site.
>
> 3.2 All prices and rates shall be fixed and shall not be subjected to fluctuation due to any increase or decrease in labour, materials or any other related costs.

3.3 All prices and rates quoted shall be deemed to include for all items indispensably necessary to carry out and to bring the Sub-Contract Works to completion.

3.4 All prices and rates quoted shall be deemed to include all payment payables to employees and the cost of such working hours as may be deemed necessary to complete the Sub-Contract Work within the period(s) stated in this Sub-Contract and when required by the Contractor. Any works carried out outside the normal working hours must be notified and approved by the Contractor. Such cost incurred shall be deemed to be included in the Sub-Contract Sum.

3.5 The Quantities in the Bills are indicative only and do not form part of the Sub-Contract. Where applicable, the rates stated therein shall be used for the valuation of variations ordered by the Contractor.

3.6 An initial deposit of 15% of the contract sum will be payable upon official Letter Award and a banker's guarantee of 15% of the contract sum will be provided to cover the period of eight (8) months for the works in relation to the deposit amount. A corresponding 5% performance bond/ insurance bond will be provided to cover the full contract period of the works.

3.7 The Contractor agrees to certify Sub-Contractor's progress claim within 21 days from their progress claim and period for honoring [*sic*] certificates shall be 30 days from the date of certificate.

...

10.0 Progress Payment

10.1 Payment shall be monthly progress payment. The Sub-Contractor shall submit for the Contractor's evaluation a monthly statement of claim before the 25th day of each calendar month for the progress of the Sub-Contract Works of the month. The Contractor shall certify Sub-Contractor's progress claim within 21 days from their progress claim and period for honoring [*sic*] certificate shall be 30 days from the date of certificate.

10.1 The certified amount shall be subjected to retention of 10% up to a maximum of 5% of the contract sum. Upon practical completion (TOP), an [*sic*] retention money of 2.5% of the contract sum will be released and the final 2.5% shall be released upon the expiring of the defects liability period (18 months) after the satisfactory completion and acceptance of the Sub-Contract Works.

10.2 No interest will be paid by the Contractor on any sum of money retained nor on any sum of money claimed by the Sub-Contractor on the account of the Sub-Contract Works.

10.3 All Sub-Contract Works carried out including variation works shall be valued using, relevant prices or rates in the priced schedule. No adjustment to the prices or rates will be allowed for carrying out any work in small quantities, difficult, conditions, increased resources or for any other reasons.

10.4 The Contractor shall be entitled to deduct from or set off against any money due to the Sub-Contractor for labour, materials and/or services provided by the Contractor including other money recoverable from the Sub-Contractor in connection with the Sub-Contract.

Clauses 3 and 10 refer only to the provision of the Advance Payment and the corresponding furnishing of the Advance Payment Bond. No reference is made at all to the so-called Advance Payment Agreement. Indeed, Enersave's Danny Chen admitted, and confirmed under cross examination, that there was no such reference in the Sub-contract to such an Advance Payment Agreement:

Q: Now, in this subcontract, okay, para … clause 10 at page 49, do you agree that there is no provision or no reference in this clause 10 governing payment? There's no reference in this clause 10 to this so-called "Advance Payment Agreement", do you agree?

A: Yes.

(NE, p 481.)

47 During cross-examination, Ms Mok also attempted to rely on the existence of the alleged Advance Payment Agreement. However, I am of the view that her evidence is not reliable given that the alleged agreement, if it had existed, was *before* her period of employment with Enersave and more so because the source of her knowledge of the alleged agreement was Danny Chen:

Q: The banker's guarantee is to cover the deposit, isn't it?

A: Yah. But the purpose of we phrasing it … er, we … to my understanding of why this one to cover the period of 8 months of the … for the works is we expect you all to, I mean, catch up, to do more than 15% after 8 month has gone. And then after that, you all of course will be, say, work done will be as, say, 20% or 30%, then of course we will be paying you 20 minus the 15, so the payable amount will be 5% lah. We expected it to be that way.

Q: You weren't there when they negotiated these terms and prepared the contract, right?

A: Yah, but that … the … to my understanding, it's like that lah. That's …

Q: That's what … you were told when you joined the company, is it?

A: Yah.

Q: Okay. Told by who?

A: Erm, my boss.

Q: Danny Chen?

A: Yah.

Q: So he … then instructed you that, well, you don't have to make any payment to Compact until you have assessed the value of their work to be more than 313,000?

A: Yup.

Q: He instructed you to do that?

A: Yah. He guided us, er, along this.

Q: He instructed you to do that, is it?

A: Yah.

(NE, p 870.)

48 I am satisfied that the alleged Advance Payment Agreement did not exist and that the Payment Terms remained intact. It was precisely Enersave's failure to abide by the Payment Terms that led to the original dispute between the parties and the resultant Settlement Agreement. It was also Enersave's persistent under-certification and under-payment as compared with Taisei's certifications and payments that led to the Settlement Agreement incorporating a term that expressly required Enersave to certify and pay Compact in accordance with the Payment Terms upon due certification and acceptance by Taisei or the LTA of the Main Contract Works. If the Advance Payment Agreement indeed existed, one would have expected it to have been incorporated in the Settlement Agreement, which it was not. In any case, following the Settlement Agreement, while Enersave did make *some* payment, this did not cover the total amount outstanding to Compact.

49 I am further of the view that given the foregoing evidence, Enersave was also in breach of the Settlement Agreement.

50 Before proceeding further, I pause here to note from the evidence of Ms Mok that whilst Enersave persistently deprived Compact of due certification and/or payment even after Enersave itself had been paid by Taisei vis-à-vis the completed works, Enersave had pressed Taisei for even higher certification (and hence payment) for the works than what they had already received from Taisei.

51 On the evidence, Enersave seemed intent on withholding from Compact due payment for the work done but insisted on the Sub-contract Works being completed expeditiously nevertheless. At the same time, Enersave sought to impose on Compact its Condition Precedent when approached by Compact for financial assistance in the procurement of the Korean Materials. I do not regard as far-fetched Compact's allegations that those acts were calculated to drive Compact into desperation in the hope that Compact would then accept financial assistance from Enersave, with the onerous Condition Precedent attached.

Whether Enersave had repudiated the Sub-contract in not duly certifying and making payment to Compact

52 It bears repeating that cash flow is the life blood of the business of the contractor. Both the regularity and the amount of progress payments are essential to the contractor. As noted by Warren

L H Khoo J in *SG Industrial Pte Ltd v Eros Electrical Engineering & Construction Pte Ltd* ("*SG Industrial*") in Suit No 1187 of 1997 (unreported) at [69]:

> 69. Progress payments are meant to give the contractor regular and periodical allowances for work done and material delivered to site to enable him to have the necessary cash flow to continue. They have been well described as the life blood of the business of a contractor. *The regularity of progress payments is as essential to a contractor as their amount*. Here, in this case, SG seems to have taken liberties with its obligation to certify Eros' claims. The evidence shows that SG's own monthly claims were certified promptly by the HDB, usually within days. But when it comes to certifying Eros' claims, SG would sit on them for weeks and months on end. This alone was quite unfair. [emphasis added]

53 The facts of *SG Industrial* resemble those in the present case. Although Taisei duly and regularly certified and paid Enersave's progress claims, Enersave consistently failed to certify and pay Compact's progress claims. As in *SG Industrial*, Enersave was also claiming from Taisei more than what Enersave itself was certifying in favour of Compact in respect of the *same items* of the Sub-contract Works.

54 In *SG Industrial*, it was found that the main contractor's failure to ensure prompt and regular progress payments to the sub-contractor adversely affected the ability of the sub-contractor to carry out its works:

> **Effect on Eros**
>
> 71. The tight rein on progress payments must have had unfortunate consequences for a contractor in Eros' position. Eros was working on tight margins. Its tender was bargained down to a point where, if everything had gone smoothly, its profit margin would have been only about 10%. However, with the provision for a 10% retention sum, even if Eros got paid regularly and fully for work done, it would have been barely enough to reimburse its outlays. *The tight certification practices were not at all helpful. They amounted to increasing the retention*.
>
> 72. The *crash programme that SG put in place from January 1997 called for intensified work. That means more manpower, more outlays. Mr Soo complains that Eros had only a few workers on site, and he demanded that it put on at least 30. It seems to me that SG, being in breach of its payment and other obligations (as dealt with earlier), was hardly in a position to make such demands*.
>
> [emphasis added]

55 As in *SG Industrial*, it is my view that Enersave's procrastination in the certification and payment of Compact's progress claims precluded Enersave from demanding that Compact increase its manpower to accelerate the Sub-contract Works as that would have meant that Enersave would have had to incur even more costs on its side, without the prospect of receiving due and prompt payment on any work that it did. I will say more about Enersave's allegations against Compact for failure to deploy adequate manpower later in this judgment.

56 It was for Enersave to show that Compact had committed breaches of a repudiatory character which justified Enersave's termination of the Sub-contract. Ultimately, however, Compact's alleged breaches of the Sub-contract appear to have been largely brought about by Enersave's own breaches of the Sub-contract in failing to make due certification and payments on Compact's progress claims. Enersave has therefore failed to discharge its burden of justifying the purported termination of the

Sub-contract.

57 In *AL Stainless Industries Pte Ltd v Wei Sin Constructions Pte Ltd* ("*Wei Sin*") in Suit No 221 of 2000 (unreported), a case also involving the arbitrary withholding of payments due to a sub-contractor by the main contractor on progress claims submitted by the sub-contractor, as well as delay in payment and under-payment, Woo Bih Li JC remarked at [196]–[199]:

> 196. I have already set out above in detail the extent of the arbitrary conduct of Wei Sin regarding the progress claims by AL for N2 resulting not only in delay in payment but also in under-paying AL even when payment was paid. Indeed, initially, AL did not know that Wei Sin had been paying less than what its own QS had recommended as there was no indication from Wei Sin that it was withholding sums, beyond the 5% retention, for delay or defects. This culminated in Wei Sin withholding the entire $90,000 for Progress Claim No 3 even after it was (a) recommended for payment by the QS, (b) due for payment and (c) after Wei Sin had agreed to pay the same.
>
> 197. The entire $90,000 was withheld without any attempt by Wei Sin to assess at the material time the impact of AL's delay on the main contract works or the cost of rectifying defects.
>
> 198. I find that while Wei Sin wanted AL to carry out its obligations, it was content to exercise its obligations in its own way substantially inconsistent with such obligations. Wei Sin had acted in an arbitrary and, indeed, oppressive manner and was quite content not to abide by such obligations as and when they fell due if this suited its purpose.
>
> 199. I find that Wei Sin's conduct prior to HEP's notice dated 10 September 1999 was repudiatory in nature.

58 On the facts of the present case, Compact had continued to work for a period of six months, without any progress payments, and the aggregate payments Enersave made to Compact were less than half of what Taisei had already certified and paid to Enersave in respect of the Sub-contract Works. Accordingly, as in *Wei Sin*, I am of the view that Enersave's breach of the Payment Terms in the Sub-contract was repudiatory in nature as it showed a lack of intention to be bound by the Sub-contract to pay Compact what it was entitled to based on the progress claims submitted.

59 This repudiation was accepted by Compact's solicitors pursuant to their letter of 27 March 2006.

60 Given my finding that Compact's alleged breaches of the Sub-contract were brought about by Enersave's own breaches of the Sub-contract, it would strictly not be necessary to examine in detail the instances in which Compact was alleged to have breached the Sub-contract. Be that as it may, I shall go on to consider Enersave's justification for terminating the Sub-contract.

Enersave's justification for terminating the Sub-contract on 23 March 2006

61 Although Enersave's exercise of its alleged contractual right of termination against Compact under cl 17 of the Sub-contract was, of course, not dependent upon Enersave itself having first received a notice of default from Taisei under the Enersave Contract, I am of the opinion that whether there had been such a notice of default from Taisei to Enersave could nevertheless shed light on Enersave's true intentions and the validity of its reasons for terminating the Sub-contract on 23 March 2006.

62 At trial, Danny Chen confirmed that no notice of default had been issued by Taisei to Enersave under the Enersave Contract prior to Enersave issuing its notice of default to Compact under the Sub-contract:

> Q: Okay. Would I be correct to say that as of 23rd of March 06, the date of this letter, right, Enersave was not at any risk of being terminated by Taisei for delay pursuant to clause 17 of the main contract? Would I be correct?
>
> A: Yes, there's no such notice.
>
> Q: And … this was the position notwithstanding that you have shown us two letters, one on the 14th of March, the other one on the 15th March 2006, that contains complaints about the lack of manpower on site, correct? From Taisei, letters from Taisei, correct?
>
> A: That's right, we received the letter on the 14th, you know, stating their … what they call threat of the … replacing the sub-contractor for that.
>
> Q: In fact, Taisei's letter of 23rd March 06 expressed a hope that both EnerSave and Compact can resolve … their outstanding … [Reads] "… long outstanding issues amicably and … put in more effort to recover … lost time and delay caused …" Well, they … say caused by EnerSave, of course. Right?
>
> …
>
> A: Yah.
>
> (NE, p 435.)

In fact, the evidence points to the opposite – that Taisei wanted Enersave and Compact to carry on with the Sub-contract.

63 Like Danny Chen, Jimmy Wang also confirmed that no notice of default had been issued by Taisei to Enersave under the Enersave Contract prior to the notice of default from Enersave to Compact under the Sub-contract. In fact, the Enersave Contract was *only* terminated by Taisei, some *nine months later*, on 11 December 2006 because of *Enersave's* persistent delay.

64 In attempting to justify its termination of the Sub-contract, Enersave sought support from Taisei's two letters of complaints dated 14 March 2006 ("the first letter") and 15 March 2006 ("the second letter) to Enersave about the lack of manpower on the site, both of which were copied to Eric Lo.

65 In the first letter to Enersave which was in relation to VBF, Taisei had noted:

> Your specialist subcontractor [*ie*, Compact] has committed to us during the meeting on 9th February 2006 that minimum 8 workers, maximum 16 workers shall be deployed to expedite the works and to recoup time loss, to our disappointment it was [*sic*] never been fulfilled. We would like to warn you that you are far beyond reaching the status of expediting the works and to make the situation worse, you have been reducing your manpower for the past few days on no ground.

…

This letter shall serve as a warning to you to accelerate the cladding works, we expect to observe improvements for the next week or so, failing which we shall have no alternative but to take immediate action to engage another specialist subcontractor to carry out the works, all additional cost incurred shall be recovered from your progress payment [*sic*] accordingly.

(Plaintiff's Core Bundle of Documents ("PCBD"), vol 1, p 1274.)

66 This first letter had referred to a meeting on 9 February 2006 where Compact had informed Taisei that the work force assigned for VBF would range from a minimum of eight workers to a maximum of 16 workers (at full swing) to expedite the works on site and recoup time loss. No similar undertaking appears to have been made in relation to VBE.

67 In the second letter to Enersave which was in relation to VBE, Taisei had noted:

We observed with great concern that you have no worker working on site since yesterday at Ventilation Building E. Please be reminded that you have committed to all parties during works session on 18th February 2006 that you will accomplish all rectification works by end of March 2006 without further delays. With the present manpower resources, we doubt the target date can be achieved. We urge you to look into this matter seriously and to put in more effort in completing the Aluminium Composite Cladding works in Ventilation Building E, which has been an eye-sore to all parties especially LTA, for a long time.

We expect your fullest commitment to achieve timely completion and deliver high quality workmanship of your Sub-Contract works to the satisfaction of LTA.

(PCBD, vol 1, p 1281.)

68 As can be seen, while Taisei had threatened in the first letter "to take immediate action to engage another specialist subcontractor to carry out the works" at VBF, no similar threat was made in the second letter in relation to the works at VBE. The second letter, where Taisei had expected Enersave's "fullest commitment to achieve timely completion and deliver high quality workmanship of your Sub-Contract works to the satisfaction of LTA", contained no similar threat to engage "another specialist subcontractor", but expressed a desire that the works nevertheless continue. In any case, it must be noted that Taisei's first and second letters of complaint were sent *before* its meeting with Enersave and Compact on 17 March 2006. Taisei's letter dated 23 March 2006, which set out what had transpired at this meeting on 17 March 2006, show clearly that Taisei was unaware of the delay in the procurement of the Korean Materials (which would have affected the progress of works at VBF) and that Enersave had not been making progress payments to Compact for the past few months (which would have affected the progress of works at both VBE and VBF). In other words, Taisei's two letters of complaint must be read in light of the fact that it was ignorant of the problems facing Compact, namely, non-availability of the Korean Materials and persistent under-certification and non-payment of Compact's claims by Enersave. Whether responsibility for failure to deploy a minimum of eight workers should be laid at Compact's door is separately dealt with later in [81].

69 It can be safely said that Taisei exerted no pressure on Enersave to terminate the Sub-contract. This was clearly evident in another two of Taisei's letters. In the letter dated 23 March 2006 (the very day that Enersave had sought to terminate the Sub-contract) from Taisei to Enersave, Taisei had expressed its wish that:

> [Enersave] and [Compact] *will resolve this long standing issue amicably and to put in more effort to recover the lost time and delay caused by your side,* so that the delays caused this far can be mitigated to avoid complication with the client and other implications to the project completion. [emphasis added]
>
> (PCBD, vol 1, p 1299.)

70 In another letter dated 24 March 2006 from Taisei to Enersave, Taisei expressed its shock, upon learning that Enersave had terminated Compact, in the following terms:

> During the daily site meeting in your office today, your Project Manager – Mr Jimmy Wang has yet again shocked us in releasing the breaking news that you have terminated M/s Compact Engineering contract for C424 project and cease their further execution of the works on site on the same day. We are utterly disappointed that at this crucial period and after going through all meetings in regards [*sic*] to this matter, instead of putting more effort in resolving conflicts between your sub-contractor and yourselves, and improving the progress of Aluminium Cladding works, you have made the situation worse that [*sic*] it has been. [emphasis added]
>
> (PCBD, vol 1, exhibit "D5".)

71 It is also significant that *after* termination of the Enersave Contract, Taisei appointed Compact directly to carry out, *inter alia*, part of the Main Contract Works for the project (see [27]–[28]).

Whether Compact was in delay vis-à-vis the Sub-contract Works

72 Interestingly, Danny Chen, who had made the decision to terminate the Sub-contract, expressed the view at trial that Compact could have completed the Sub-contract Works on the VBE in two weeks based on his estimate of the extent of the outstanding works then. Yet, rather than allow Compact the two weeks to do so, Enersave preferred to issue a 3-day notice of default and subsequently appointed a replacement sub-contract who, in the event, required 11 months to complete the Sub-contract Works on the VBE! Even if Compact was truly in delay as alleged, the sensible thing to do would have been to just allow Compact to finish the work than to engage an entirely new contractor with attendant delay multiplied many times over. Such conduct on Enersave's part belied its assertion that it had terminated the Sub-contract because it was concerned about the alleged continuing delay on Compact's part. Not surprisingly, Taisei was "shocked" that Enersave had chosen to terminate the Sub-contract at such a crucial period.

73 Just before the date of the notice of default, Taisei had become aware of the under-certification and under-payment by Enersave vis-à-vis Compact's progress claims and had pressed Enersave to resolve the issue with Compact. This was evident in the meeting between the parties on 17 March 2006 which was recorded in Taisei's letter of 23 March 2006. Against the backdrop of this, Compact was also making demands for payment of the sum of S$141,320.90 (see [16]).

74 I note also that Compact's behaviour was hardly consistent with that of a party lacking interest in the progress of the Sub-contract Works. Despite the lack of progress payments for almost six months, Compact persevered with the Sub-contract Works. In spite of its already heavy financial strain, Compact withdrew its request to Enersave for financial assistance and indicated that it would purchase the Korean Materials on its own. Such behaviour showed that Compact was anxious to hasten the progress of the Sub-contract Works.

75 Given the foregoing facts, I conclude that Enersave's purported termination of the Sub-

contract was motivated not by any desire to expedite the Sub-contract Works but by its eagerness to avoid having to certify and pay Compact on its progress claims and to use Compact as a scapegoat for its own delay. The termination also allowed Enersave to obtain a further extension from Taisei until December 2006, which, in the event, was to no avail as it was eventually terminated by Taisei for delay in the Main Contract Works.

Whether Compact had deployed insufficient manpower

76 Enersave had issued the notice of default on 18 March 2006 (pursuant to cl 17 of the Sub-contract) on the basis that Compact had deployed insufficient manpower to the works at VBE and VBF. Enersave had stated in its notice of default that Compact had breached cl 17.1.3 of the Sub-contract in that Compact had allegedly stopped work and had not complied with Enersave's instructions pertaining to the level of deployment of manpower at the work sites. Clause 17.1.3 states that Compact would be in breach if it "[r]efuses and persistently neglects to work according to the Contractor's instructions, specifications or any requirements of the Sub-Contract". In the default notice, Enersave had complained that there were no workers at VBE and only three workers at VBF, and had given Compact three days to rectify the situation.

77 On the basis of the same allegations, Enersave also sought to rely on cl 17.1.2 of the Sub-contract to argue that Compact was unable to proceed with the Sub-contract Works "regularly and diligently". Compact was given three days to rectify this alleged lack of deployment of manpower at the work sites.

78 Compact contended that it had responded positively during the three days by deploying four, seven and three workers respectively at VBE and one worker at VBF (where only minimal work could be done pending the procurement of the Korean Materials). It argued therefore that the situation referred to and relied upon to Enersave did not continue in the three days following the notice of default so that Eversave's termination of the Sub-contract a day later (on 23 March 2006) was without legal basis. In the absence of evidence as to the number of workers that would have been required to cure the alleged under-deployment then (assuming *arguendo* that it was a breach), it is difficult to say whether the situation had been put right by Compact. However, there are more fundamental issues. Firstly, was Enersave entitled to dictate to Compact the manpower to be deployed? Secondly, even if it were entitled so to do, did the circumstances permit or require Compact to deploy a particular level of manpower at the work sites?

79 In regard to the first issue, Danny Chen and Jimmy Wang agreed during cross-examination that the deployment of manpower on the site and the sequence of work were matters within the discretion of Compact as specialist, independent contractors.

80 An independent contractor has a basic right to plan its work and to carry it out in a manner it thinks best, having regard to efficiency and cost effectiveness. It is entitled to decide the manner in which any item of work is to be carried out and the detailed sequences in which it should be carried out, having regard to the fact that its ultimate responsibility is to get it done (see *SG Industrial* at [49]). Enersave was not entitled to order Compact to work whenever and wherever it was physically (or perhaps only theoretically) possible for the contractor to do work. Where there was little or no work capable of being done, it was not open to Enersave to insist nevertheless that Compact maintain a certain level of manpower at the site (which it sought to do via its several letters of complaint to Compact). Continuity is an important factor in efficiency and cost effectiveness and it would be quite unreasonable for Enersave to order Compact to do bits and pieces of work as and when they became available.

81 On the second issue, I am of the view that a lack of manpower on site is not conclusive evidence of the breaches alleged by Enersave. With regard to VBF, it will be recalled that the Korean Materials had yet to be procured. In such circumstances, the works at VBF could not have proceeded in earnest. With regard to VBE, the bulk of the remaining work was in relation to the first storey. As Jimmy Wang admitted during cross examination, there was an agreement between Enersave and Compact that this first storey would only be done last *after* the dismantling of *all* the scaffoldings from the second storey onwards. As Bernard Chan testified during re-examination, as long as the scaffoldings remained no cladding could be done to the first storey. In fact, up to the date of termination of the Sub-contract, as evident from the photographic evidence, there were still scaffoldings in place at VBE. Because the sub-frame had to be re-designed and was only approved by the LTA sometime between 16 and 17 March 2006, Compact could only proceed to fabricate the materials needed for the installation of the AL26 louvers after this date. Eventually, the materials needed for the installation of the AL26 louvers were only delivered to the site on 22 March 2006, *after* the Notice of Default was issued. As it appears then, on many occasions, even up to the date of termination of the Sub-contract, Enersave's complaints about a lack of deployment of manpower at the sites were made when site conditions and/or the stage of Enersave's own work simply did not allow Compact to do meaningful work. Given this, I am of the view that even if Compact had informed Taisei and Enersave that it would deploy a minimum of eight workers at VBF, this undertaking was made on the assumption that the work could progress in a meaningful way with all the necessary materials available and with no obstructions. Where site conditions and the stage of Enersave's work simply did not permit Compact to do meaningful work, it would be unreasonable to expect Compact nevertheless to deploy a minimum of eight workers at VBF where they would have had little or nothing to do and could have been better utilised elsewhere.

82 Similarly, failure to keep to the Latest Schedules is not conclusive of fault on Compact's part. As Simon Brown LJ in *West Faulkner Associates v London Borough of Newham* [1994] 71 BLR 6 at 12 said, quoting a passage from a professional journal:

> *[F]ailure to comply with an agreed programme may be some, but certainly is not conclusive, evidence of failure to proceed regularly and diligently*. Thus the failure to comply with the programme may be due to the contractor's default, or a cause of delay (warranting an extension), or it may be that the contractor is proceeding at a rate and in a manner which satisfies his obligation to proceed regularly and diligently even though it differs from the programme. [emphasis added]

83 In other words, even if Enersave could show a failure on Compact's part to comply with an agreed schedule or schedules, this in itself is not conclusive evidence that Compact had failed to proceed regularly and diligently. No evidence was adduced as to any agreed completion date for the Sub-contract Works. The Sub-contract was silent on this. Enersave sought to rely on the Latest Schedules to allege that Compact was in delay.

84 However, it appears that even the Latest Schedules could not be relied on. Danny Chen himself admitted during cross-examination that Enersave had asked Compact for *further* revised schedules when it became evident that, owing to project and site conditions, the Latest Schedules could not be adhered to. This admission supports Compact's contention that project and site conditions prevented Compact from progressing steadily in the Sub-contract Works.

85 Accordingly, I do not believe that the Latest Schedules were cast in stone. Enersave itself was given almost nine additional months to complete the Sub-contract Works after Compact's termination. Although it is perhaps not apropos, I cannot help remarking that Compact would in all likelihood have finished well within the time allowed for the completion of the Sub-contract Works had the Sub-

contract not been terminated on 23 March 2006.

86 Before moving on, there is another point that I should touch on. It emerged at trial that Enersave's flurry of letters alleging delay and a lack of manpower prior to termination were not new. Up to late 2005, when Por was in charge of the Sub-contract Works, there had already been allegations of delay and lack of manpower by Enersave. Those allegations were strenuously and effectively rebutted by Por in the period up to late 2005. However, from the end of 2005 and into 2006, there were few (if any) contemporaneous responses from Compact to Enersave's allegations. Por was asked to explain this during re-examination:

> Q: Yes. Can you tell us why there was such a change, you know, from up to … late 05, you were diligently writing letters in response to all of [*sic*] 1st defendants' correspondence, complaints, all right, and at the … by the end of 2005 and into 2006, you were no longer writing such letters in response to … well, we've seen quite a few letters from the 1st defendants.
>
> A: Because sometime in December 05 or November, the 1st defendant, Mr Danny Chen … had a meeting with my boss. And he told my boss that all out previous correspondence are [*sic*] to be taken out and considered null and void. And he also told my boss that he does not want to have any more meetings with me. So my boss put in another management team to managed a balanced vote which is FaçadeMaster.
>
> …
>
> Q: So … then the management took over the writing of correspondences.
>
> A: Yes. Under FaçadeMaster. That's why you can see some letters under FaçadeMaster.
>
> Q: Who from FaçadeMaster?
>
> A: Eric Lo.
>
> (NE, pp 239–240.)

87 As Por's explanations show, Danny Chen had, sometime in late 2005, requested Compact to put in another team to manage the Sub-contract Works, refusing to have any more meetings with Por. Eric Lo was then put in charge. With the change, Compact adopted a much less robust attitude to dealing with Enersave's complaints. According to Bernard Chan, the lack of rebuttals to Enersave's complaints in part arose out of a desire to avoid antagonising Enersave and jeopardising negotiations for assistance in the procurement of the letter of credit facilities for the purchase of the Korean materials, which had commenced in February 2006.

88 Given that Por had roundly refuted Enersave's earlier allegations, it is perhaps unsurprising that Enersave chose not to pursue what it called "historical" delays but preferred instead to focus on alleged delays based on the Latest Schedules.

89 Be that as it may, taking the evidence as a whole, on the balance of probabilities, I am of the

view that Enersave's complaints about inadequate deployment of manpower were unwarranted for the foregoing reasons.

Conclusion

90 In conclusion, and after weighing the evidence and considering counsel's submissions, I find that:

(a) Enersave had breached the Payment Terms in the Sub-contract and the Settlement Agreement by consistently under-certifying and under-paying Compact throughout the Sub-contract Works up to the date of purported termination on 23 March 2006; and

(b) Enersave had wrongfully terminated the Sub-contract on 23 March 2006.

91 Accordingly, I order that judgment be entered in favour of Compact and that Enersave's counterclaim be dismissed, in each case with costs to be taxed. The damages payable to Compact for wrongful termination and the amounts due to Compact in respect of the Sub-contract Works completed up to the date of the purported termination (*ie*, 23 March 2006) are to be assessed before the Registrar, as the parties have agreed. Enersave shall also refund Compact the sum of S$165,000 (being the total sum paid to Enersave vis-à-vis its purported calls on the Performance Bond and Guarantee) and all retention moneys.

92 At [26], I had mentioned that in discharging the injunction to restrain payment under the Performance Bond and the Guarantee which had been earlier obtained by Compact, Sundaresh Menon JC had ordered that the question whether there ought to be an inquiry into any damages suffered by Enersave by reason of the injunction was to be reserved to the trial court. Given my finding on the evidence that Enersave had wrongfully terminated the Sub-contract, there is no need for such inquiry.