Burwill Trading Pte Ltd v Panwah Steel Pte Ltd
[2005] SGHC 234

Case Number : Suit 928/2004

Decision Date : 27 December 2005

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Prem Gurbani and Bernard Yee (Gurbani and Co) for the plaintiff; Josephine Chong and Aqbal Singh (UniLegal LLC) for the defendant

Parties : Burwill Trading Pte Ltd — Panwah Steel Pte Ltd

27 December 2005 *Judgment reserved.*

Woo Bih Li J:

Introduction

1 In this action the plaintiff, Burwill Trading Pte Ltd ("Burwill"), claims $1,400,403.54 for the supply of reinforcing steel bars ("rebars") to the defendant, Panwah Steel Pte Ltd ("Panwah"). Burwill's claim relates to three contracts:

Date	Contract No	Description
23.5.02	C020483(03)	Changi Term Agreement
11.3.03	C030107	First Term Contract
4.12.03	C030626	Second Term Contract

2 In the course of the trial, Panwah accepted liability for $1,394,953.65 in respect of these three contracts. As the balance was for a relatively small sum of $5,449.89, Burwill decided not to pursue the balance. Accordingly, the remaining disputes revolve around Panwah's counterclaim against Burwill for non-delivery of rebars under the following four contracts:

Date	Contract No.	Description
23.5.02	C020483(03)	Changi Term Agreement
10.10.03	C030520	Yung Sheng Term Agreement

18.6.04	C040283	First Agreement	Burmese
2.7.04	C040329	Second Agreement	Burmese

3 At the trial, the following witnesses gave evidence:

For Burwill:

(a) Chang Meng – Executive Vice President

(b) Jeffrey Ng Chang Sin ("Jeffrey Ng") – Accounts Manager

(c) Jonathan Soh Wit Chee ("Jonathan Soh") – Senior Vice President

(d) Michael Thio Sin Chang ("Michael Thio") – General Manager

For Panwah:

Lim Seow Yi ("Lisa Lim") – Manager (although in her Affidavit of Evidence-in-Chief ("AEIC") she had referred to herself as Deputy Manager).

Although Lim Hua Seng ("Mr Lim"), the Managing Director of Panwah, had started to give evidence, Panwah decided not to require him to continue to do so as he was ill. Accordingly, it was agreed that his entire evidence would not be admissible.

The Changi Agreement

4 By an agreement dated 23 May 2002 ("the Changi Agreement"), Burwill agreed to sell to Panwah 39,000mt of rebars for a proposed Changi Water Reclamation Plant C3A at Tanah Merah Coast ("C3A"). Panwah had purchased the rebars in order to supply the same to the main contractor of C3A, Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd ("Koh Brothers"). I will refer to Panwah's contract with Koh Brothers as "the KB Agreement". Although it was dated 26 April 2002, it was signed by Panwah on 31 May 2002, some seven days after the date of the Changi Agreement. For reasons best known to Panwah, the duration of the supply under the Changi Agreement was for one and a half years from 1 June 2002 to 31 December 2003 whereas the duration of the supply under the KB Agreement was for two years from June 2002 to June 2004.

5 Consequently, in December 2003, Panwah sought an extension of the Changi Agreement up to 30 June 2004. The respective representatives met on 8 December 2003. As Burwill was not aware of the terms of the KB Agreement, Burwill requested that Panwah obtain a written confirmation from Koh Brothers that the KB Agreement was until June 2004. Panwah obtained the confirmation on or about 12 December 2003 and Burwill then agreed to the extension at the prevailing prices under the Changi Agreement even though the prices of raw materials had increased from January 2003 and steel prices were soaring from December 2003. Panwah suggested that if Burwill had not done so, Panwah would have immediately purchased the outstanding balance then and Burwill would have suffered an immediate loss. It was suggested that by agreeing to the extension, Burwill was hoping that the price of steel would drop so that Burwill's losses would not be severe. In my view, this suggestion ignored the point that the price of steel could also go up. Indeed, this was more likely because as at

December 2003, the price was trending upwards, not downwards. Furthermore, if Panwah had issued an immediate order for the balance before the end of December 2003, Panwah would have had to fork out more than $9m based on the then outstanding balance of 22,000mt and using the price of US$415 per metric tonne as it was the lower of two prevailing prices under the Changi Agreement. Also, the rebars would have to be stored at the C3A site because Burwill made its deliveries to the site or Panwah would have had to store the rebars until Koh Brothers issued their purchase orders for the same. I am of the view that Burwill had extended the Changi Agreement to 30 June 2004 at the prevailing prices under the Changi Agreement as a favour to Panwah in view of the business relationship between them.

6 In any event, whatever the reason might have been, there was no dispute that the Changi Agreement was extended to 30 June 2004 at the prevailing prices. Burwill's position was that the extension was on the basis stated in its telefax to Panwah dated 15 December 2003 which states, *inter alia*, that the supply "shall be as per the progress requirement of the site" ("the Condition"). The Condition was not stated in Panwah's earlier telefax of the same date to Burwill. Up to the commencement of the trial, Panwah did not accept that they had agreed to the Condition. However, in the course of the trial, Panwah accepted this. The primary dispute regarding the Changi Agreement was what the Condition meant or entailed.

7 In my view, it is clear what the Condition meant but it is less clear what it entailed. In other words, how would Panwah show that the purchase orders it was to issue after 31 December 2003 would be in accordance with the progress requirements of rebars at the C3A site? The parties had not discussed this when the extension was agreed.

8 At a meeting on 16 January 2004 at the C3A site involving representatives from Burwill, Panwah and Koh Brothers, Koh Brothers agreed to provide structural drawings and details to Burwill so as to allow Burwill to monitor the progress of the works and in particular the rebar requirements of the site. However, the drawings were not forthcoming. Subsequently, Burwill requested for additional documents all of which were not provided. A CD-ROM which was provided by Koh Brothers yielded no information as it was corrupted.

9 Problems arose regarding the Condition because Burwill had noticed that the amounts being ordered by Panwah was increasing greatly in 2004. For example, for the whole of 2003, Panwah had ordered 17,975mt of rebars. However, between April and June 2004, Panwah ordered 13,739mt. When representatives from Burwill visited the site, they noticed rebars being stocked up, unused, at various locations at the site. This aroused their suspicions even further and they thought that Panwah was intent on stocking up the rebars. Eventually, Burwill ceased delivery of rebars on 25 June 2004, although the formal notification of cessation was dated 1 July 2004. By then, the extension had expired on 30 June 2004 and the remaining balance undelivered was 8,126.459mt (using Koh Brothers' figure which was less than the figures provided by Burwill and by Panwah). Burwill was not satisfied that the purchase orders of Panwah were indeed as required by the progress of works at the site.

10 As it turned out, Burwill was correct in that the rebars which Koh Brothers had ordered from Panwah and which Panwah had in turn ordered from Burwill were not required for the works at the site. What had happened was that Koh Brothers had a surplus of rebars from another site and it had deployed the surplus to the C3A site. As a result, it did not require the balance of about 8,000mt for the C3A site but wanted the same for redeployment to other job sites. At all material times, Burwill was unaware of this and had suspected that it was Panwah who was stockpiling the rebars. At all material times, Panwah was apparently also unaware of Koh Brothers' real intentions.

11 As between Koh Brothers and Panwah, Koh Brothers were insisting on delivery of the balance.

The KB Agreement did not specifically have the Condition. Consequently, Koh Brothers withheld payment to Panwah of about $1.4m for rebars already delivered and also claimed damages of about $3m against Panwah. This is the subject of Suit No 746 of 2004 which was heard also by me after the trial of the present action. Although Panwah denied liability to Koh Brothers for reasons which I shall state in my judgment for that action, Panwah has sought, *inter alia*, an indemnity from Burwill for any sum which Panwah may be found to be liable to Koh Brothers in respect of the omission by Burwill to deliver the balance of the rebars. For the Changi Agreement, Panwah claims:

(a)	Loss of profit	$ 216,867.00
(b)	Non-payment by Koh Brothers for rebars already delivered to site	$1,447,833.83
(c)	Claim by Koh Brothers	$2,961,365.94
		(plus interest and costs)

Item (b) above is the sum withheld by Koh Brothers and item (c) above is the claim for which Panwah seeks an indemnity from Burwill.

12 Panwah asserted that the Condition was satisfied each time Panwah received a purchase order from Koh Brothers. Panwah said that it was not disputed that Koh Brothers had issued purchase orders for the balance. They relied on the practice, before the extension was agreed, whereby upon issuance of Koh Brothers' purchase orders, Panwah would issue its own purchase orders and Burwill would deliver to the site whereupon Koh Brothers would then acknowledge receipt of the delivered rebars. Panwah submitted that since Burwill's fear was of Panwah profiteering from the extension, Burwill should have no problem with delivering the rebars to the site since the site was under the control of Koh Brothers and not Panwah. Also, if there was any ambiguity in the Condition, it should be construed *contra proferentem* against Burwill who had imposed the same.

13 I note that although it is true that Burwill's primary concern was that Panwah should not profiteer from the extension, the Condition was not worded in those terms. It stipulated that Burwill's supply would be "as per the progress requirement of the site". Secondly, although delivery to the site might at first blush address Burwill's fear that Panwah might profiteer, there was nothing to stop Panwah and Koh Brothers making their own deal to resell the delivered rebars and splitting the profit. Thirdly, although the previous practice was that Burwill would deliver to the site after receipt of Panwah's purchase orders and Koh Brothers would acknowledge receipt of the delivered rebars, Burwill had based its deliveries on Panwah's purchase orders and not Koh Brothers' which Burwill had not seen.

14 I am also of the view that there was no ambiguity as to what the Condition means. There could be some question as to what would satisfy the Condition but that was a different point. Would the Condition be fulfilled merely if Koh Brothers said so? For all the arguments of Panwah, would the Condition have been satisfied if, soon after 31 December 2003, Koh Brothers had issued a single purchase order for all the balance at one go? It would then have been obvious that such a purchase

order would not be in accordance with progress requirements of the site. Yet, according to Panwah's arguments, the Condition would have been satisfied. In my view, this cannot be right. There must be something more than the subjective word of Koh Brothers. Would structural drawings and details alone be sufficient or would, for example, bar-bending schedules, work progress charts and progress claims be also necessary? The latter set of documents had been sought by Burwill after its request on 16 January 2004 for structural drawings and details. It is not necessary for me to decide what objective evidence would have been required because even without any of the documents requested, Burwill was able to tell then and also to establish at the trial that there was more than enough rebars on site to fulfil the progress requirements of C3A up to 30 June 2004.

15 There is one other point of Panwah I would like to address. Panwah submitted that Burwill was looking for an excuse to get out of its obligations to supply during the period of extension because Burwill would be making losses if it continued the supply at the prevailing prices under the Changi Agreement. In my view, the truth was quite the opposite. I have already mentioned in [5] above that, Burwill had agreed to the extension as a favour to Panwah. Moreover, notwithstanding Burwill's visits to the site where its representatives noted that rebars were being stockpiled, Burwill had continued for some time after December 2003 to meet some of Panwah's purchase orders while discussions were ongoing about the documents which Burwill was seeking in order to establish the progress requirements. Burwill did not suddenly cease its supply. It was only after some time when its requests for documents to ascertain the progress requirements were not met that Burwill then ceased its supply on 25 June 2004. By then, the outstanding balance under the Changi Agreement had been reduced from 22,000mt to just over 8,000mt.

16 In the circumstances, I am of the view that Burwill was entitled to cease supply under the Changi Agreement.

The credit limit argument

17 In order to avoid liability under the Changi Agreement and the other three agreements, Burwill submitted that it was also entitled to cease delivery because Panwah had failed to keep to its credit limit.

18 I now refer to Burwill's Standard Terms and Conditions of Sale ("Standard Terms") which were on the reverse of each agreement. However as there are some differences between the Standard Terms of some of the agreements, I will set out the different terms where relevant. There was also an argument by Panwah that because there was no clause incorporating the Standard Terms, such terms are not applicable even though they are found on the reverse side of each agreement. Each of the front of the agreements stated that Panwah's order was accepted subject to the "TERMS AND CONDITIONS OF SALES shown on this contract". The heading of the Standard Terms on the reverse side is "STANDARD TERMS AND CONDITIONS OF SALE". So, there was a difference in that the heading on the reverse had the word "STANDARD". There was also no specific provision on the front referring to the terms on the reverse side. On the other hand, Lisa Lim accepted that when she signed the Changi Agreement, she was aware that there were terms on the reverse side. I conclude that she must have been similarly aware of the existence of such terms for the other agreements. In the circumstances, I am of the view that the Standard Terms were binding on Panwah as part of each of the agreements. I would, however, like to make one observation. The Standard Terms were in such small print that they were barely legible. On the other hand, Panwah did not ask for a more legible version. As no argument was presented on this point, I will say no more except to suggest that businesses should not be operated in this manner and standard terms should be clearly legible.

19 Clause 5.5 of the Changi Agreement states:

5.5 Without prejudice to any other right or remedy which the Seller may have, Seller shall be entitled (without suffering any penalty whatsoever and without being in breach of the Contract or any other contract) to withhold delivery of the Goods and/or to stop the Goods in transit at any time should the Buyer:-

(i) fail to observe any of the terms, conditions and/or provisions of the Contract and/or these Terms and Conditions; or

(ii) fail to make any payment under the Contract or under any other contract that the Buyer may have with the Seller from time to time.

20 In dealing with the issue of the credit limit, it is necessary for me to refer to various agreements, including the First Term Contract and the Second Term Contract, even though Panwah's claims do not extend to the First Term Contract and the Second Term Contract. To avoid confusion, it bears repeating that it is Burwill which is claiming, *inter alia,* under the First Term and the Second Term Contracts which claims have since been admitted by Panwah as I have mentioned in [2] above.

21 The Changi Agreement was dated 23 May 2002. The credit limit for Panwah was $1.5m.

22 The First Term Contract was dated 11 March 2003. The credit limit for Panwah under this Contract was stated to be $800,000. Clause 2 of this Contract, under "Default In Payment", stated:

> In the event the total credit limit of $800,000 granted to the Buyer under this contract and/or in conjunction under/taking into account any of the Buyer's other projects (not the subject matter of this contract) in respect whereof the Seller has supplied the commodity has been reached, the Seller shall be fully entitled to cease further supply of the commodity for all projects undertaken by the Buyer … with immediate effect … without giving the Buyer any prior notice.

23 The parties disputed on the interpretation of this provision. Burwill submitted that the $800,000 referred to in this cl 2 was the total credit limit extended to Panwah under all its contracts with Burwill. Panwah submitted that the total credit limit referred to both the sum of $800,000 and any other credit extended to Panwah under any of its other agreements.

24 I agree that there was ambiguity and using the *contra proferentem* rule, Panwah's interpretation should prevail for the First Term Contract. Accordingly, the total credit limit for Panwah under the First Term Contract was $800,000 and any other credit extended to Panwah under other agreements. Indeed, bearing in mind that the credit limit under the Changi Agreement was already $1.5m, it would be odd if by signing another agreement about ten months later, Panwah and Burwill had intended to reduce the total credit limit to $800,000 when the original duration of the Changi Agreement (up to 31 December 2003) had not yet expired.

25 The Yung Sheng Agreement was dated 10 October 2003. The credit limit for Panwah under this agreement was stated to be within the credit limit of the First Term Contract, which was $800,000. The Yung Sheng Agreement had the same cl 2, under "Default In Payment", *ie*, specifying the total credit limit of $800,000 in conjunction with any other project of Panwah. Again, adopting Panwah's submission, the total credit limit for Panwah under the Changi Agreement, the First Term Contract and the Yung Sheng Agreement should be:

$1.5m + $800,000 + $800,000 = $3.1m

Yet, Panwah did not assert that the total credit limit was $3.1m. Indeed, Lisa Lim's AEIC had referred

to a total credit limit of between $2.3m to $3m, not $3.1m. In any event, in the course of the trial, Lisa Lim said that the total credit limit was $2.3m.

26 I now come to the Second Term Contract dated 4 December 2003. The credit limit for this agreement was also stated to be within the credit limit of the First Term Contract, *ie*, $800,000. However, cl 2, under "Default In Payment", stated that the total credit limit was $1.5m (and not $800,000 as was the case under the First Term Contract and the Yung Sheng Agreement). Clearly, the $1.5m figure was not the credit limit for the Second Term Contract alone which was $800,000. Accordingly, the $1.5m figure mentioned in the said cl 2 must mean the total credit limit for Panwah under the Second Term Contract as well as any other existing agreement between Panwah and Burwill, as at the date of the Second Term Contract.

27 I add that even if, for the sake of argument, the total credit limit was $2.3m, Panwah had in any event exceeded this sum. According to Burwill's letter to Panwah dated 16 April 2004, the total amount owing by Panwah to Burwill as at 14 April 2004 was $3,749,696.55. This sum was not disputed. I therefore find that Burwill has established that Panwah had exceeded its total credit limit as at 14 April 2004, whether the total credit limit was $1.5m or $2.3m.

28 By a letter dated 19 May 2004, Burwill purported to reduce Panwah's total credit limit to $1m. Panwah did not accept that Burwill was entitled to do so. In any event, the parties had a meeting on 16 June 2004. Burwill's version was that at this meeting, Burwill agreed to raise Panwah's total credit limit to $1.3m. This revised figure was then mentioned in Burwill's letter to Panwah dated 17 June 2004. However, Panwah's position was that this letter was also a unilateral revision by Burwill.

29 I prefer Burwill's version to that of Panwah. Generally, I found the witnesses from Burwill like Jeffrey Ng, Jonathan Soh and Chang Meng to be more credible than Lisa Lim. Panwah's position in refusing to admit Burwill's claims until the trial had gone underway also reflected poorly on its overall credibility. Panwah's earlier allegation of conspiracy between Burwill and Koh Brothers also had to be dropped in the midst of the trial. Again, this reflected poorly on Panwah's overall credibility.

30 Subsequent to 16 June 2004, Burwill's Chang Meng met Mr Lim at a lunch on 25 June 2004. This was followed by a telephone call between the two on the same day. Jonathan Soh and Michael Thio were with Chang Meng during the call. The evidence of all three was that Burwill had agreed to increase the total credit limit to $1.5m and resume delivery under the Second Term Contract provided Panwah brought its outstandings down to the credit limit.

31 Lisa Lim was not a party to this telephone conversation nor was she present then. She was in no position to say what was discussed in this conversation. However, Panwah sought to challenge Burwill's version by relying on a letter dated 7 July 2004 from Panwah to Burwill. This letter did not refer to the telephone conversation of 25 June 2004. Instead, it referred to a meeting on 7 July 2004 and stated that Burwill had agreed to deliver 230mt for a purchase order under the Second Term Contract in exchange for a cheque for $182,861.43. Michael Thio of Burwill had signed at the bottom of the letter as a confirmation thereof. Panwah's position was that as there was no reference to a $1.5m credit limit in its letter which Michael Thio had countersigned, Burwill's version about the $1.5m credit limit agreed to during the telephone conversation of 25 June 2005 was untrue.

32 On the other hand, Michael Thio also subsequently sent a letter dated 16 July 2004. His letter referred to the telephone conversation of 25 June 2004, the credit limit of $1.5m and Panwah's agreement to reduce its outstandings to $1.5m. In his letter, he said the cheque for $182,861.43 was received "as a wager of the agreement". Michael Thio disagreed that Panwah's letter which he had countersigned was inconsistent with Burwill's version of what had transpired during the telephone

conversation of 25 June 2004. He said that after that telephone conversation, Panwah still had not reduced its outstandings and so Jeffrey Ng and he visited Mr Lim's office on 7 July 2004 which then resulted in Panwah's letter of the same date.

33 In my view, Panwah's letter of 7 July 2004 was not necessarily inconsistent with the alleged conversation of 25 June 2004. As mentioned, that letter was silent on the issue of the total credit limit and bringing the outstandings down to that limit. I am of the view that Michael Thio had signed the 7 July 2004 letter as there was no direct contradiction of the telephone conversation and he was anxious to receive the cheque for $182,861.43 (which was in any event post-dated). He did not realise that it could be used to challenge the telephone conversation of 25 June 2004. In his mind, the $182,861.43 was a part payment to reduce the outstandings although Panwah's letter had mentioned that the sum was in exchange of deliveries under the Second Term Contract. Michael Thio was not concerned about the reference to deliveries under the Second Term Contract as Burwill was making such deliveries.

34 In addition to the evidence of Jonathan Soh, Michael Thio and especially Chang Meng about the conversation of 25 June 2004, there were two draft letters prepared by Jeffrey Ng. Jonathan Soh had told him about the conversation and to prepare a letter to confirm the conversation. According to Jeffrey Ng, Chang Meng eventually decided it was unnecessary to engross and send the final draft. The terms of the drafts were generally consistent with the version given by Burwill's witnesses. The authenticity of the drafts was not challenged.

35 I am of the view that Burwill's version about the conversation of 25 June 2004 was true. This meant that Panwah had breached its agreement to reduce its outstandings to the agreed credit limit of $1.5m. However, Panwah submitted that there was no consideration for the agreement on this limit, had I found the total credit limit as at the date of the Second Term Contract to be $2.3m. I do not agree with that submission. The consideration was in Burwill's continuation of deliveries for the time being even though Panwah's outstandings had exceeded $2.3m.

36 As Panwah had failed to keep to the total credit limit, this was another valid reason justifying the cessation of supply under the Changi Agreement.

37 Burwill also used the credit limit argument for the Yung Sheng Agreement and the two Burmese Agreements which were the subject of Panwah's claim. As for the Yung Sheng Agreement, the evidence of Jonathan Soh was that deliveries had ceased in February 2004, *ie*, way before an issue about the credit limit for Panwah had arisen. Accordingly, Burwill cannot use Panwah's failure to reduce its outstandings to $1.5m to justify its cessation of supply under the Yung Sheng Agreement. It is therefore not necessary for me to set out the terms of cl 5.5 of the Standard Terms of the Yung Sheng Agreement.

38 I would add that although Jonathan Soh had said in para 59 of his AEIC that Burwill had cancelled the Yung Sheng Agreement in view of Panwah's failure to reduce its outstandings to $1.5m, there was no concrete evidence of this cancellation. Burwill's letter dated 16 July 2004 had merely threatened to terminate all deliveries. There was no follow-up letter to terminate the Yung Sheng Agreement, although there was another letter also dated 16 July 2004 to terminate the Burmese Agreements which were referred to as the "export contract". Although Burwill's submission relied on a letter dated 30 July 2004 from its solicitors as constituting the termination of, *inter alia*, the Yung Sheng Agreement, that submission is not valid. That letter alleged that Burwill had cancelled various agreements. It was not itself the notice of termination. There were also other notifications for payments of outstandings and even a demand for payment of $500,000 under a back guarantee but still no concrete evidence of the termination of the Yung Sheng Agreement. Burwill had mixed things

up, besides having poorly drafted terms of contracts.

39 As for the two Burmese Agreements, no credit was extended and payment was to be by cash on delivery. Furthermore, there was no term in the Burmese Agreements allowing Burwill to terminate the same if Panwah failed to reduce its outstandings to meet its credit limit under other agreements. Clause 5.5 of the Standard Terms of the Burmese Agreements stated:

> 5.5 Without prejudice and in addition to any of the other terms, conditions and/or provisions hereof or to any of the other rights or remedies of the Seller, the Seller shall have the right to:-
>
> (i) declare that the credit period granted by the Seller to the Buyer in respect of any and/or all invoice(s) already issued to the Buyer shall be cancelled and the invoice(s) due and payable immediately;
>
> (ii) limit or vary the credit as to term and/or amount; and/or
>
> (iii) require payment from the Buyer in advance of delivery for all Goods;
>
> and upon such notification by the Seller to the Buyer, the terms of payment under the Contract shall be duly amended in accordance with the notification.

40 In any event, cl 5.5 of the Burmese Agreements was not applicable for various reasons. First, the reverse of the Second Burmese Agreement (which contained cl 5.5) was deleted. As for the First Burmese Agreement, cl 5.5(iii) of the Standard Terms merely stated that Burwill might require payment from the buyer in advance and, upon notification, the terms of payment would be duly amended. Clauses 5.5(i) and 5.5(ii) of the Standard Terms of the agreement are irrelevant because they referred to the cancellation, limitation or variation of credit and, as mentioned, no credit was extended to Panwah under the Burmese Agreements.

41 As I have mentioned, the payment term for the Burmese Agreements was cash on delivery. There was no prior notification from Burwill that payment was to be made before delivery until Burwill's letter dated 16 July 2004 to Panwah. Even then, that letter stated:

> Based on contract C040283 [which is the First Burmese Agreement] you are to provide cash payment before delivery of material.

42 Although Lisa Lim agreed that that letter was a notification, she did not say that it was a notification under cl 5.5. Indeed, that letter gave the impression that the requirement to pay cash before delivery was already part of the original terms and not an amendment. I am of the view that a notification under cl 5.5(iii) must notify Panwah that it is an amendment to the original terms, otherwise it is misleading and invalid as an amendment. As it was, Panwah's reply dated 17 July 2004 reminded Burwill that the contractual payment term was cash payment on delivery. Accordingly, cl 5.5(iii) does not help Burwill in respect of the Burmese Agreements. The fact that Panwah had been late in some earlier payments under the Burmese Agreements is irrelevant because Burwill had accepted the payments without reserving its right to act on the delays. Furthermore, Burwill's letter dated 16 July 2004, while stating that cash payment was to be made before delivery, proceeded in the next paragraph to rely not on the failure to pay cash but on the credit limit, referred to in earlier correspondence, to terminate "the export contract" without waiting for payment to be tendered. As a termination notice, it was also invalid.

Breach of contract – cl 10.1(i) of the Standard Terms

43 Burwill also relied on cl 10.1(i) of the Standard Terms to avoid liability under the Changi Agreement and the Burmese Agreements. Clause 10.1(i) stated:

> 10.1 In the event that:-
>
> (i) the Buyer makes default or commits any breach of the Contract, these Terms and Conditions and/or any of its obligations to the Seller;
>
> …
>
> then, without prejudice to any other right or remedy available to the Seller, the Seller shall be entitled to cancel the Contract or suspend any further deliveries under the Contract without any liability to the Buyer, and if the Goods have been delivered but not paid for the price shall become immediately due and payable notwithstanding any previous agreement or arrangement to the contrary.

44 As regards the Changi Agreement, Burwill submitted that Panwah was in breach:

(a) in failing to satisfy Burwill on the Condition; and

(b) in failing to reduce its outstandings to the total credit limit of $1.5m.

45 I have already given my view as regards the Condition. If I am correct on that point, Burwill does not need to rely on cl 10.1(i). If I am incorrect on that point, then Panwah would not have failed to satisfy the Condition which in turn would then not enable Burwill to rely on cl 10.1(i).

46 As for Panwah's failure to reduce its outstandings to the total credit limit of $1.5m, I am of the view that Burwill is entitled to rely also on cl 10.1(i) to cease its supply under the Changi Agreement.

47 As for the Burmese Agreements, I construe cl 10.1(i) of the Standard Terms of each agreement to relate to a breach of that agreement only. Any breach of the total credit limit does not apply to the Burmese Agreements which have no credit terms.

48 The late payments of earlier deliveries under the Burmese Agreements were accepted by Burwill without reservation of its rights, and, in my view, Burwill has waived its right to rely on the past late payments. Indeed, Burwill did not act on the past late payments but on the alleged existing obligation to pay before delivery. I have ruled against Burwill on that point. Accordingly, the late payments cannot be used by Burwill to activate cl 10.1(i).

Non-importation clause – cl 3

49 Burwill also relied on cl 3, under "Other Terms & Conditions", of each of the agreements, to avoid liability. As cl 2 thereof may have a bearing on the meaning of cl 3, I set out below cll 2 and 3:

> 2) Buyer shall order the total contractual supplies from Burwill Trading Pte Ltd. If Burwill Trading Pte Ltd is unable to deliver the goods as agreed in this contract then with Burwill Trading Pte Ltd written consent, Buyer can purchase from other supplier and deduct whatever additional costs incurred by Buyer from the money due to Burwill Trading Pte Ltd.
>
> 3) In the event the Buyer imports bars from any sources, Burwill Trading Pte Ltd shall be

fully entitled to cease further supply of the commodity and the Buyer shall settle all current and outstanding balances with immediate effect and the exclusive supply agreement will automatically lapse.

50 The evidence showed that by an agreement dated 26 May 2003 (part of Exh P2), Panwah had contracted to import rebars into Singapore although Lisa Lim said the quality thereof was different. Lisa Lim suggested that the cargo had been actually transhipped to another country but the evidence she relied on, being cargo clearance permits and a bill of lading in Exh D4, only dealt with a portion of the quantity contracted for. So, even if there was some transhipment, the other portion of the quantity contracted for was imported into Singapore. The evidence in the form of a bill of lading and an invoice suggested that that portion was brought into Singapore in or around July 2003. A number of questions arises in the construction of cl 3:

(a) Would it apply only to the importation of rebars in respect of the project which was the subject of the agreement?

(b) Would it apply also to past transactions of importation?

(c) Would it apply when the contract of sale for importation was signed or when the rebars were physically brought into Singapore?

51 Again, the terms were not well drafted. It seems to me that there was ambiguity and, using the *contra proferentem* rule, I am of the view that cl 3 is confined only to the importation of rebars in respect of the project which was the subject of the agreement. That is sufficient to deal with Burwill's reliance on cl 3. However, for completeness, I will also deal with the other two questions of construction set out above.

52 I am of the view that cl 3 did not apply to past transactions of importation by Panwah, otherwise, how far back would cl 3 extend to? Secondly, cl 3 referred to "import" in the present tense. Thirdly, the *contra proferentem* rule of construction leads me also to this conclusion. As the rebars, under Exh P2, had already been physically imported before the Burmese Agreements were executed, they cannot be used to justify the cessation of supply thereunder.

53 Furthermore, I would add that cl 3 could not be used to justify the cessation of supply under the extension of the Changi Agreement as the agreement to extend was made in December 2003 and the rebars under Exh P2 had already been brought into Singapore before then.

54 As for the Yung Sheng Agreement dated 10 October 2003, cl 3 also did not apply since the rebars under Exh P2 had been brought into Singapore before 10 October 2003.

55 As for two other examples of importation of rebars by Panwah, the contracts for the same were signed on 15 June 2004 and 5 July 2004 respectively. However, the physical importation under these contracts was in August 2004 or later. Hence, the "relevance" of the third question in relation to the construction of cl 3.

56 Panwah's position was that cl 3 only applied to the physical importation of the rebars and not the date the contract for the same was signed. Burwill's position was that it applied when the contract was signed. If Panwah had signed a contract to import rebars into Singapore but then changed the destination before the rebars were brought into Singapore, should Burwill be entitled to act on cl 3? I do not think so. In any event any ambiguity would be read against Burwill using the *contra proferentem* rule again. Accordingly, I conclude that cl 3 applied only when the rebars were

brought into Singapore. As this was after the date of cessation of supply by Burwill in respect of the agreements in question, Burwill is not entitled to rely on cl 3 to justify such cessation.

The Yung Sheng agreement

57 Although there was no formal termination of the Yung Sheng Agreement, delivery thereunder had ceased since February 2004. According to Jonathan Soh, the main contractor of the Yung Sheng Road project was Leap Hong Construction Co Pte Ltd ("Leap Hong") which was wound up in May 2004. In para 146 of its Closing Submissions, Panwah accepted that goods from Burwill were to be used for the named project under each agreement. Panwah's contract to supply rebars from Burwill under the Yung Sheng Agreement was with Leap Hong. As Leap Hong was wound up, there was no further order for rebars to Panwah and consequently Panwah did not place any further order with Burwill for rebars. Indeed, Michael Toh's unchallenged evidence was that Mr Lim wanted to place orders under the Yung Sheng Agreement for another project but Mr Thio had rejected this request. In the circumstances, I am of the view that Burwill is under no liability to Panwah under the Yung Sheng Agreement.

Burmese Agreements

58 As for the Burmese Agreements, Burwill would have been liable to Panwah for damages but for cl 14.7 of the Standard Terms which Burwill also relied on. I come now to cl 14.7.

No liability – cl 14.7 of the Standard Terms

59 Clause 14.7 of the Standard Terms stated:

> 14.7 The Seller shall not be liable for loss of profit, loss of use, loss of contracts, delay in construction of building projects, or any consequential, economic or indirect loss whatsoever and in particular (but without prejudice to the generality of the foregoing) the Seller shall not be responsible for any form of damages, liquidated or otherwise, imposed by developers on main contractors and/or sub-contractors, whether the Buyer is a main contractor or sub-contractor or otherwise.

60 I am of the view that cl 14.7 enables Burwill to avoid liability for loss of profit and consequential losses. This provision applies to all the agreements in issue.

Damages

61 For completeness, I will say something about the quantum of damages if Burwill had been found liable to Panwah under any of the agreements in question.

62 For the Changi Agreement, Lisa Lim was not able to explain how the $216,867 sum for loss of profits, as pleaded by Panwah, was derived. Panwah's submission claimed $200,256 based on a shortfall of 8,344mt (using Panwah's figure instead of Koh Brothers' figure of 8,126.459mt) multiplied by $24 per metric tonne. However, the submission did not elaborate as to how the $24 figure was derived. I note that under the Changi Agreement, Burwill's prevailing price for standard length rebars was $415 per metric tonne. For special length, it was $430 per metric tonne. Under the KB Agreement, Panwah's price for January to June 2004 was $454 per metric tonne. It appears that Panwah had used the difference between the $454 figure and the $430 figure to derive the difference of $24 per metric tonne. I might have given Panwah a larger difference since the price for standard length rebars was lower. However, as Panwah was prepared to accept $24 per metric tonne as its

loss of profit, I would have multiplied it by Koh Brothers' figure of 8,126.459mt = $195,035.02. I am not adopting Panwah's figure of 8,344mt as the undelivered quantity because Panwah has not established the same. Neither did Burwill establish its figure of 8,134mt. I have adopted Koh Brothers' figure because it is the lowest and in Suit No 746 of 2004, I will be adopting that figure as between Koh Brothers and Panwah.

63 On the claim by Koh Brothers, I would then have ordered Burwill to indemnify Panwah for whatever Panwah may be liable to Koh Brothers under the KB Agreement as a result of Burwill's breach. As for Burwill's submission that Panwah should have obtained the balance of undelivered rebars from alternative sources when Burwill had ceased delivery, this submission assumed that, at the material time, prices from alternative sources would be the same as the prevailing prices under the Changi Agreement. However, that assumption has not been established and this submission must fail.

64 For the Yung Sheng Agreement, there were two versions which were signed. One had handwritten amendments thereon and the other neater version appeared to have taken into account some of the handwritten amendments. However, the handwritten amendment of "(± 10% at buyer's option)" was not included in the neater version. I am of the view that the neater version reflected the parties' agreement and therefore the 10% option was not available to Panwah. Burwill would then probably be liable for the difference between the contractual quantity of 1,100mt and the 146.674mt delivered, making a balance of 953.326mt. Although Lisa Lim's AEIC claimed that 977.143mt were undelivered under this agreement, there was no elaboration as to how she derived this figure. I should also mention that although Burwill has learnt that Panwah's contract with Leap Hong was for 400mt, Panwah's damages would not be restricted to the 400mt if I am wrong on the issue of Burwill's liability.

65 Although Burwill submitted that the Yung Sheng Agreement was terminated on 30 July 2004, this is factually incorrect as I have said in [38] above. Burwill's breach would then have occurred in February 2004 because delivery had ceased since then. The damages should be determined based on the market price as at March 2004.

66 For the quantum of damages, Panwah had used the Building and Construction Authority's ("BCA") annual average price for steel for 2004 being $863.40 per metric tonne.

67 On the other hand, Burwill had referred to the price of steel obtained from International Enterprises Singapore which was formerly the Trade Development Board. This showed import prices to be $586.96 per metric tonne for March 2004. However, there was no evidence that import prices were the same as prices for local delivery.

68 Burwill also suggested an alternative of a median price using the prices under the two Burmese Agreements which were executed in June and July 2004. However, this alternative is not appropriate for two reasons. First, it wrongly assumed that the Yung Sheng Agreement was cancelled on 30 July 2004 and ignored the fact that delivery thereunder had ceased in February 2004. Secondly, the Burmese Agreements were for export and there was no evidence that export prices were the same as prices for local delivery.

69 I note from the BCA documents exhibited in Lisa Lim's AEIC at p 131 that from February 2004, the BCA's Construction Material Prices were based on current market prices for new material supply contracts which was a change from the previous methodology of average market prices which was the average of prices based on existing contracts and new material supply contracts. The change was to reflect the latest material price trends in the construction industry. I am of the view that the

BCA figures are preferable in the absence of any better evidence. Also, as the BCA prices were indicated on a monthly basis, there is no need to use an average price for the entire year of 2004.

70 For March 2004, the BCA price was $958.13 per metric tonne. The difference between this and the contract price under the Yung Sheng Agreement is $958.13 – $545 = $413.13 per metric tonne. Panwah's damages would then be:

953.326mt x $413.13 = $393,847.57

71 As for the First and Second Burmese Agreements, Burwill's breaches would have been on 16 July 2004 which was the date of termination thereof under Burwill's letter of that date. I do not think the BCA figures are helpful here because the Burmese Agreements are export contracts. In the absence of better evidence, I will adopt the contract price under the Second Burmese Agreement of US$400 per metric tonne as the market price for damages under both the Burmese Agreements as the Second Burmese Agreement was dated 2 July 2004. Consequently, no damages would have been awarded under the Second Burmese Agreement since the contract price thereof was the same as the market price. For the First Burmese Agreement, I would have awarded Panwah damages based on the difference between the US$400 per metric tonne under the Second Burmese Agreement and US$388 per metric tonne under the First Burmese Agreement = US$12 per metric tonne.

72 The contracted quantity under the First Burmese Agreement was 2,000mt. There were two versions of the First Burmese Agreement. One with a ± 10% beside the 2,000mt figure and the other with that information deleted. Lisa Lim had said that pursuant to an oral agreement, Panwah had the option to increase the contractual quantity by 10%. She, however, conceded that aside from the oral agreement, Burwill could supply 90% of the contractual quantity. That oral agreement was not pleaded and was also not proved. In the light of Ms Lim's concession, Burwill would have been entitled to deliver 90% of the contracted quantity amounting to 1,800mt. As 1,212.258mt had been delivered, the difference would be 587.742mt. I would then have awarded damages to Panwah of 587.742mt x US$12 = US$7,052.90.

Summary

73 I grant Burwill judgment against Panwah for $1,394,953.65 with interest thereon at the rate of 6% per annum from 24 November 2004 being the date of the Writ of Summons until the date of this Judgement. I dismiss Panwah's Counterclaim. I will hear the parties on costs.