Lim Chin San Contractors Pte Ltd v Sanchoon Builders Pte Ltd
[2005] SGHC 227

Case Number : Suit 393/2004

Decision Date : 23 December 2005

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Kelvin Chia (Balkenende Chew and Chia) for the plaintiff; Joseph Liow (Straits Law Practice LLC) for the defendant

Parties : Lim Chin San Contractors Pte Ltd — Sanchoon Builders Pte Ltd

Contract – Breach – Whether breach of subcontract for failing to follow instructions of consultants – Whether breach of obligation to carry out works with reasonable diligence – Whether breach amounted to repudiation entitling defendant to terminate subcontract

23 December 2005 *Judgment reserved.*

Judith Prakash J:

Introduction

1 This is a construction dispute arising from a subcontract for marine works. The project involved the construction of a two-storey Police Coast Guard Sub-Base at Loyang Way/Loyang Crescent ("the project"). The Ministry of Home Affairs ("the employer") employed Sanchoon Builders Pte Ltd ("Sanchoon"), the defendant in this action, as the main contractor for the project. Sanchoon in turn appointed Lim Chin San Contractors Pte Ltd ("LCS Contractors"), the plaintiff herein, as its subcontractor for certain bored piling and marine works connected with the project.

2 LCS Contractors has two heads of claim in this case. First, it claims the sum of $444,878.72, being the value of the work that it did for Sanchoon. Second, it makes a claim for damages arising from Sanchoon's alleged wrongful termination of the subcontract between the parties. Sanchoon has put in a counterclaim in which it claims for damages that it asserts arose from LCS Contractors' alleged repudiation of the subcontract, thereby leading to Sanchoon's termination of the same. It can be seen therefore that the claim and the counterclaim arise out of the same facts and which one succeeds depends on whether I decide that Sanchoon's termination was wrongful or that it was justified by the conduct of LCS Contractors. The parties have agreed that this is the main issue to be determined by me and that the issues as to the value of the work done by LCS Contractors and the damages suffered by the party who succeeds in this case should be referred to the Registrar for assessment and determination.

3 I should point out here, however, that Sanchoon has by its pleadings admitted that the value of LCS Contractors' work carried out under the subcontract amounted to $306,912. It is not in dispute that so far Sanchoon has paid LCS Contractors only $87,000 leaving an amount of at least $219,912 due to LCS Contractors. If the issues in this action are determined in favour of LCS Contractors, then it will be entitled to enter interlocutory judgment for the sum of $219,912. On the other hand, if Sanchoon is successful in its defence, then no judgment can be entered in favour of LCS Contractors until and unless the amount payable by it in damages to Sanchoon has been ascertained and been found to be less than $219,912.

Background facts

4 Part of the works comprising the project involved what were referred to as marine works, *ie*, the construction of a jetty and two piers. These structures had to be built over the sea and piles had to be driven into the sea as support for the structures. Sanchoon had no experience in this type of work and asked for tenders. LCS Contractors was one of the tenderers. It was a company that had much experience in marine works and its quotation was the most competitive one. The quotations submitted by the other prospective subcontractors had been drawn up on the basis that the barge method of piling would be used, *ie*, that the piles would be driven by a piling rig mounted on a barge. LCS Contractors' tender was, however, based on the earth bund method. This involved the construction of a bund into the sea in respect of each of the structures to be constructed. Machines and equipment could then be driven onto the bund from the shore to carry out the required works. After the piling works had been completed, the bund would be removed. This was a much cheaper way of carrying out the work as there would be no costs incurred for the hire of barges.

5 The quotation given by LCS Contractors was submitted on 27 November 2002. Thereafter, there were at least three meetings between LCS Contractors and Sanchoon to discuss the project and the method for the subcontract works. The third meeting was held on 17 February 2003. Present were Mr Lim Chin Leong, the managing director of LCS Contractors; Mr Michael Chew, a director of Sanchoon; and Ms Chew Saw Tin, who was the representative of CPG Consultants Pte Ltd ("CPG"), the structural consultants for the project appointed by the employer. Mr Lim stated that during this meeting, he explained the earth bund method at length and answered queries from Sanchoon and CPG.

6 On 25 February 2003, Sanchoon issued LCS Contractors with a letter of intent. This letter covered two subcontracts that Sanchoon had indicated it intended to award to LCS Contractors. First, there was the subcontract for the bored piling works valued at $495,156. This subcontract is a separate matter and has no connection with any of the issues in this action. The second subcontract was that for the construction of the wharf and jetty works at an estimated contract sum of $2,670,561 subject to final measurement for provisional items. The letter stated that it was necessary for the execution of the subcontract work to commence immediately and that LCS Contractors should start all necessary preparation work in anticipation of the eventual execution of a formal subcontract. As it turned out, the actual subcontract document was not issued until June 2003. It was backdated by Sanchoon to 19 February 2003 but it was actually signed by Mr Lim on behalf of LCS Contractors on 10 June 2003.

7 On 24 March 2003, Sanchoon issued LCS Contractors with a document entitled "Marine Works Programme" which set out the proposed schedule for the works with the various items of work specified alongside the intended start and end dates of the same. I shall refer to this document as the "Original Programme" as, in June 2003, Sanchoon issued a revised Marine Works Programme that made extensive changes to the scheduling. The latter document shall be referred to as the "Revised Programme".

8 By the Original Programme, LCS Contractors was supposed to provide Sanchoon with a "Method Statement and Design Calculation" ("method statement") in respect of the works in March 2003 so that it could be approved on 11 April 2003, and to thereafter commence construction of the bund on 4 June 2003. The method statement was only forwarded to Sanchoon on 16 July 2003. In the meantime, however, LCS Contractors had commenced construction of a bund. CPG had a number of questions on the method statement. These were dealt with by LCS Contractors' professional engineer, a firm called M/s S H Ng Consultants ("SH Ng"), who sent two letters to Sanchoon on 1 and 2 August 2003 and also supplied the latter with a document called "Slope Analysis of Bund Wall". CPG was,

however, not satisfied with the method statement and did not approve the proposed method of construction of the bund. It had concerns regarding the use of a "jointed spun pile" instead of a single-length spun pile of 25m in length.

9 In mid-August, Sanchoon decided to engage one Prof Harry Tan of the National University of Singapore to assist LCS Contractors in putting up the proper calculations and justifications to CPG to satisfy the latter with regard to the jointed spun pile issue. In early September 2003, after receiving a report from Prof Tan that dealt with the technical issues raised regarding the use of jointed spun piles, CPG accepted the bund proposal. It still, however, had doubts as to whether the bund would be able to safely support the loads that would be placed on it. In this connection, it was not only the piling rig that was going to be put onto the bund, but also Sanchoon's own heavy construction equipment. Sanchoon then instructed Prof Tan to analyse the safety aspects of the bund construction and to propose a suitable method of construction. On 12 September 2003, Prof Tan produced an analysis that indicated that the use of a bund would be suitable provided that sand was used to construct it rather than earth. CPG accepted this report. LCS Contractors was not very happy about Prof Tan's engagement regarding the construction of the bund and did not want to be held liable for his fee.

10 In the meantime, there was a certain amount of unhappiness between the parties regarding the progress of the construction. The Revised Programme had moved forward the deadlines of some of the items of the subcontract works. Going by the Revised Programme, Sanchoon claimed that LCS Contractors was in delay. LCS Contractors' position was that it was not bound to adhere to the Revised Programme and in any event the delay was not substantial whether its progress was measured against the Original Programme or the Revised Programme.

11 On 18 September 2003, LCS Contractors wrote to Sanchoon stating that it had not agreed to Prof Tan's report on the method of construction of the bund and asking for Sanchoon to give it particulars of the delay that Sanchoon had accused LCS Contractors of causing. According to Mr Chew of Sanchoon, at that time, Sanchoon was not prepared to release any payment for the work done by LCS Contractors up to that date without some security that the latter would carry out its work. Mr Chew had what he regarded as a "genuine concern that if Sanchoon paid LCS Contractors it would stop work".

12 Mr Lim told me that to meet this concern, he had agreed to provide Sanchoon with a performance bond (in case of defects) in exchange for payment of LCS Contractors' claims. In the event, no performance bond was issued as Sanchoon did not revert on the format of such bond. In the meantime, LCS Contractors had substantially ceased the execution of the subcontract works with the consent or the acquiescence of Sanchoon. When no performance bond format was forthcoming, Mr Lim decided to take further action.

13 On 7 October 2003, solicitors acting for LCS Contractors sent a letter of demand to Sanchoon demanding payment of $444,878.72. Thereafter, Mr Chew had a meeting with Mr Lim. The purpose of the meeting was to try to resolve the issues between the two parties. According to Mr Chew, at that meeting, Mr Lim stated that LCS Contractors wanted to be paid some $200,000 extra if it had to construct the bund from sand, as recommended by Prof Tan, instead of from earth. Mr Chew disagreed with this proposal because he considered that LCS Contractors should have known from the beginning that an earth bund was unsuitable. Mr Chew said that Mr Lim then refused to pay for the sand and it became apparent to Sanchoon that the only solution was for it to take over the remaining works as quickly as possible to avoid the imposition of liquidated damages by the employer. I point out here that Mr Lim denied that he had ever asked for extra money to build the bund. His position was that LCS Contractors was ready and willing at all times to perform its contractual

obligations.

14 There were, thereafter, further settlement negotiations between the parties. On 15 October 2003, Sanchoon produced a draft settlement agreement. This was rejected by LCS Contractors. Basically, the dispute was over the figures. Sanchoon then took the view that an amicable settlement was not possible. On 6 November 2003, it terminated the subcontract and gave LCS Contractors final notice to remove all its machinery and equipment from the site.

15 This action was commenced in May 2004. LCS Contractors claimed $444,878.72 being the alleged value of the work done by it under the subcontract and alternatively claimed the same sum on a *quantum meruit* basis. In its final form, the Defence contained the following allegations of breach of contract on the part of LCS Contractors:

(a) that LCS Contractors had failed to provide an adequate or safe method of temporary access for the jetty and pier works (earth bund-wall method);

(b) that LCS Contractors had failed to apply for the necessary permits and/or grants of approval from relevant governmental bodies and authorities; and

(c) that LCS Contractors had failed to carry out the subcontract works with due diligence, without unnecessary delay and with due expedition.

Sanchoon further pleaded that by reason of the aforesaid breaches by LCS Contractors, the latter had wrongfully repudiated the agreement between the parties. Sometime between 7 October 2003 and 13 October 2003, Sanchoon had offered to allow LCS Contractors to withdraw from the site in consideration of Sanchoon making a payment of $204,566.40 with a retention of the sum of $145,345.60. By this conduct it had accepted the repudiation of LCS Contractors. In its Reply, LCS Contractors denied the breaches asserted by Sanchoon.

Issues

16 The issues posed by the parties are the following:

(a) Did LCS Contractors breach the subcontract?

(b) If so, were the breaches repudiatory in nature, *ie*, so serious as to lead a reasonable person to conclude that LCS Contractors no longer intended to be bound by the provisions of the subcontract, and in this connection, if there was more than one breach, for the purpose of determining the repudiatory nature of such breaches, should they be considered individually or together?

(c) If LCS Contractors was in breach, was Sanchoon required to give adequate notice to LCS Contractors before purporting to terminate the subcontract?

(d) If the foregoing issues are determined in favour of Sanchoon, are the loss and damage claimed by it too remote to be recoverable?

Did LCS Contractors breach the subcontract in relation to the provision of temporary access for the jetty and pier works?

17 Mr Joseph Liow, who acted for Sanchoon submitted that LCS Contractors had warranted that it had the necessary skill and expertise to carry out the marine works. He also asserted that LCS

Contractors had an obligation to produce a method statement for the construction of the bund. This obligation arose from cl 8 of the subcontract which provided for the subcontractor to comply with all directions and instructions of the architect under the main contract in so far as such instructions related to the subcontract works.

18 Mr Liow pointed out that Mr Lim had agreed that during progress meetings at the site in February 2003, he had been informed that CPG required method statements for the various aspects of the subcontract works. However, LCS Contractors had taken a long time to provide the method statement for the bund and the first report submitted by its consultant, SH Ng, was only forwarded on 16 July 2003. That report was inadequate. One major deficiency was that it did not contain a slope analysis. It also prompted a series of questions from CPG. As a result, a supplemental report was put up by SH Ng on 2 August 2003. Sanchoon's case was that notwithstanding the supplemental report, the method statement was still woefully inadequate. In this respect, Mr Liow relied on the evidence given by CPG and Prof Tan.

19 Ms Chew Saw Tin of CPG was not satisfied with the method statement for various reasons including the lack of calculations relating to stability and also because it appeared from the supplemental report that the material to be used for the backfill below the sea level would be dredged from the seabed. Ms Chew's view was that seabed materials would not be sand but rather clayey material and marine clay which could cause pollution and which was unlikely to compact when it was under water. Prof Tan's evidence was that SH Ng's calculations did not address the issue of compaction; its proposed method of compacting the earth at intervals of 500mm was unworkable since it would not be possible to compact earth that was under water. Mr Liow pointed out that Dr Y S Lau, who gave expert evidence on behalf of LCS Contractors, had explained that an earth bund would be constructed in a marine environment by using a bulldozer to push sand into the sea during low tide. Dr Lau had conceded that the method described by SH Ng was not the same but sounded more like the method that would be employed when one built a bund on land. On stability, Prof Tan gave evidence as to why the slope analysis carried out by SH Ng was flawed. According to him, the consultant had not found the critical slip circle to get to the lowest factor of safety for his design. Dr Lau agreed that this was a flaw in SH Ng's analysis. Prof Tan went on to testify that even if sand had been used for the construction, based on SH Ng's design, the safety factor at the point where the bund reached the height of 9m would have been close to failure. He therefore considered it unsafe.

20 Mr Kelvin Chia, who acted for LCS Contractors, did not dispute that his client had given a warranty that it had the necessary skill and expertise to carry out the marine works. He considered that the criticism levelled against LCS Contractors was not that it was unable to construct a safe and usable bund. He pointed out that Mr Lim had testified that at the time of termination, LCS Contractors had already constructed about one third of one bund with no sign of imminent collapse and that this evidence had not been challenged. As Mr Chia saw it, what Sanchoon was taking issue with was that LCS Contractors had been unable to procure a report from SH Ng that was acceptable to Sanchoon and CPG. To Mr Chia, this was a non-issue as, during cross-examination, Mr Lim had conceded that SH Ng's submissions were inadequate. Mr Chia argued that the fact that SH Ng's reports were inadequate did not mean that LCS Contractors had breached the subcontract. There was, he argued, no express provision in the subcontract that stipulated that LCS Contractors was bound to justify the bund method of construction by way of a report from a professional engineer. All that Sanchoon was able to rely on in this regard was cl 8 of the subcontract that required it to comply with the directions and instructions of the architect. There had been no breach of this provision because first, LCS Contractors had been able to procure its consultant's report on the bund only after the subcontract was awarded on 10 June 2003 and it was clear exactly what loading had to be supported by the bund. Second, the report had been submitted on 16 July 2003. A few days after that, CPG had replied

with a series of comments, queries and questions for SH Ng to address and these had been dealt with by SH Ng's letter of 1 August 2003 and its slope analysis of 2 August 2003. Thereafter, neither Sanchoon nor CPG had replied to LCS Contractors on the supplemental report. In fact, Ms Chew's evidence was that she had received the supplemental report only on 15 August 2003 but had rejected the earth bund method before that date and before seeing SH Ng's responses. Ms Chew also testified that she could not remember whether she had informed SH Ng that the employer was concerned that the bund might encroach from the site into neighbouring areas. Four days after the employer had expressed that concern, Sanchoon engaged Prof Tan to do a stage coastal embankment study for the safe construction of a coastal platform for construction purposes.

21 Mr Chia further submitted that the above facts showed that LCS Contractors did not breach cl 8 of the subcontract. It had complied with the directions to produce a method statement and thereafter, no further directions or instructions had been given to it and therefore no breach could have occurred. LCS Contractors could not be accused of not following or not complying with "directions and instructions" when these had not been forthcoming. It was not as though CPG had told LCS Contractors to alter or modify SH Ng's submissions and LCS Contractors had refused to do so. Instead, both parties had kept quiet and then Sanchoon had removed the whole matter from the hands of LCS Contractors by appointing Prof Tan to take over from SH Ng. LCS Contractors had found out about the appointment only on 8 September 2003 which was nearly one week after the event. Mr Chia said that since Sanchoon had unilaterally transferred SH Ng's job to Prof Tan, it did not lie in Sanchoon's mouth to accuse LCS Contractors of "failing" to procure an acceptable method statement.

22 Even after Prof Tan was appointed, it took him nearly one and a half months and two meetings (each lasting about two and a half hours and attended by no fewer than nine representatives from CPG) to produce a report that was acceptable to CPG. Prof Tan was compelled to make two revisions to his report to reach this result. LCS Contractors, therefore, submitted that the production of an acceptable professional engineer's report on the construction of a bund-wall was not something that could be done in one sitting. Detailed feedback had to be given to the engineer involved and sufficient time allotted to him to modify his report if necessary. This was not done in the case of SH Ng. Whilst LCS Contractors was told by one Mr Chooi Yue Chiong, Sanchoon's project manager, in late August 2003, that CPG was unhappy with some aspects of SH Ng's supplemental report, this second-hand information hardly stood on the same footing as the detailed briefings given at the meetings that CPG had with Prof Tan. It was also clear from the letter dated 25 August 2003 from LCS Contractors to SH Ng that LCS Contractors was not privy to much information as to what was wrong with SH Ng's submissions. LCS Contractors still wanted SH Ng's assistance on the matter as was clear from its letter. In any case, even though SH Ng's report was inadequate, Prof Tan himself had admitted that it was "salvageable" if SH Ng had done a lot more work. Dr Lau thought that there would be problems with SH Ng's bund but that properly constructed it would have been stable. He also considered Prof Tan's final proposal to be a modification rather than a substantial change of SH Ng's original design.

23 On the basis of the foregoing summary of facts, Mr Chia submitted that it was premature for Sanchoon to accuse LCS Contractors of breach of contract when the reality of the matter was that SH Ng had not been accorded the same opportunity to rectify its report as Prof Tan had. It was entirely possible that had such opportunity been given to it, SH Ng would have improved on the calculations. Alternatively, LCS Contractors or SH Ng could have engaged another professional engineer to tackle the calculations.

24 I agree that there was no direct obligation under the subcontract for LCS Contractors to produce a justification of the bund method of construction by way of a report from a professional

engineer. LCS Contractors was, however, required to comply with the instructions of the consultants appointed by the employer pursuant to cl 8 of the subcontract. Thus, when CPG required a method statement relating to the construction of the bund, LCS Contractors had to provide one. LCS Contractors did so. CPG was not satisfied with the method statement and it therefore raised a number of queries on the same. These were passed by LCS Contractors to SH Ng which gave its responses. When those responses were sent to Sanchoon, LCS Contractors had again complied with the instructions of CPG. Ms Chew's evidence was that she rejected the bund method before she received the clarification. As far as LCS Contractors was concerned, I do not think it was in breach of contract at that stage as it had done everything necessary to comply with the instructions. It did not refuse to further clarify the matter or to obtain further information and calculations from SH Ng. It was not even asked to do so and Mr Chia made a good point when he submitted that LCS Contractors could not be in breach of instructions when no instructions had been issued. Even though LCS Contractors was aware in general terms, as appears from its letter of 25 August 2003 to SH Ng, why Ms Chew was not satisfied with SH Ng's endorsement of the bund-wall, it was not able to rectify these points without details of the objections being given to it. In any case, Dr Lau was of the opinion that CPG was being over-cautious in many of the queries that it raised because the bund was a very small part of the whole project. As a temporary earth bund, it was not a complicated structure and, in the hands of an experienced contractor, the building of the bund, even though it took place in the sea, would be a straightforward affair. I agree that in this situation, failure on the part of LCS Contractors to completely deal with CPG's concerns and especially when such concerns had not been clearly enunciated to it after the second submission, cannot be treated as a breach of cl 8.

25 Sanchoon submitted that engaging Prof Tan to produce the method statement was a reasonable course of action for it to take because LCS Contractors did not appear to be able to produce a satisfactory method statement or design computation. It would have been more reasonable, in my view, for Sanchoon to have taken this path had it clearly indicated to LCS Contractors the deficiencies in SH Ng's method statement and told the latter that if the same were not corrected by a certain date it would appoint a new structural engineer to produce the documentation. As matters stood, Sanchoon went behind the back of LCS Contractors in relation to this appointment which it need not have done. As it turned out, subsequently, LCS Contractors agreed to construct the bund in accordance with Prof Tan's method though of course there is some dispute as to whether it asked for extra payment in order to do so. It is also relevant that the portion of the bund in fact constructed by LCS Contractors was stable and that LCS Contractors had previously constructed similar bunds without any problem. In my judgment, therefore, the fact that the method statement produced by SH Ng was inadequate did not constitute a breach of contract on the part of LCS Contractors. Even if it had been, I would not consider such breach of contract by itself to be repudiatory in nature.

Was LCS Contractors required to apply for permits from government bodies and authorities and, if so, was it in breach of this requirement?

26 It was alleged by Sanchoon at para 7.2(i) of its Re-Re-Amended Defence and Counterclaim that LCS Contractors had refused to submit and make a formal application to six named governmental authorities and had thereby acted in breach of the subcontract. This pleading was based on a letter dated 22 September 2003 from CPG to Sanchoon. Section A6 of this letter read as follows:

> 6. Statutory Submission and Approval
>
> a) Submission and formal approval shall be made and obtained for [*sic*] the following authorities:

i. MPA (include departments other than Cormet and Port Master);

ii. Pollution Control Department of the Ministry of Environment;

iii. BCA;

iv. URA;

v. JTC;

vi. SLA [Singapore Land Authority].

b) The contractor may require to make a formal presentation to all authorities mentioned with the presence of the CPG unless such authorities/departments do not require such clearances or approval.

Sanchoon submitted that this meant that it had to make applications for the approvals unless the authorities stated that the same were not required.

27 Accordingly, Sanchoon and, in turn, LCS Contractors pursuant to cl 8 of the subcontract, were contractually obliged to follow the instructions of CPG and make the necessary applications. However, LCS Contractors did not comply with this instruction and, as a result, Mr Chooi had to run around to deal with all the required departments. In his evidence, Mr Lim had admitted receiving from Sanchoon a copy of the letter of 22 September 2003. He stated that he had applied for the approval of the Maritime and Port Authority of Singapore ("MPA") but had not applied for the approval of the other authorities because he considered that the instruction had been given by CPG to Sanchoon and that it was not LCS Contractors that had been asked to apply to the other five authorities. Sanchoon submitted that it was not open to Mr Lim to take this position as it was quite clear that section A of CPG's letter dealt with the temporary works for the jetty and piers and it was part 6 of this section that specified the authorities from whom approval had to be sought. Since those instructions were in relation to the proposed bund for the marine piling works, they clearly fell within the scope of works of LCS Contractors and the latter was obliged to comply with the instructions and find out whether approvals from any or all of those authorities were required and, if so, obtain the same. Sanchoon submitted that LCS Contractors had no lawful justification for not complying with the instructions of CPG contained in the letter of 22 September 2003.

28 In its reply to this submission, LCS Contractors emphasised the paragraph in CPG's letter that is quoted in [26] above. Mr Chia submitted that this contained a qualification, to wit, that the formal presentation would not be required if "such authorities/departments do not require such clearances or approvals". He referred to Sanchoon's submission on the point which read, "Sanchoon was to make submissions for approval unless such authorities *state* that they do not require such clearances or approvals" [emphasis added] and argued that Sanchoon had made a subtle alteration of CPG's instruction by introducing the word "state". Sanchoon was therefore interpreting CPG's direction to mean that a formal application had to be made to all the authorities mentioned but that if any authority stated that it did not have to approve the bund construction, Sanchoon need not proceed further with that application. Sanchoon's interpretation, it was argued, was quite different from CPG's original instruction which was simply to make a formal application unless the authority or department did not require the same.

29 Mr Chia further submitted that with the benefit of numerous years' experience in building bunds, it was with great confidence that Mr Lim stated that there was no requirement for any

approval except that of MPA. That was why LCS Contractors did not make the submissions for approval to the other five authorities. In Mr Lim's letter of 22 March 2003 to Sanchoon, he made it very clear that LCS Contractors would only be applying for MPA's approval. In fact, this was obtained for the period of 11 April 2003 to 10 October 2003. The original programme for the subcontract works also contained an item reading "Application of Port Notice from MPA and Approval". No other submissions were mentioned because there was no need for them. In any case, Mr Chooi himself had also stated in his Affidavit of Evidence-in-Chief that none of the stipulated governmental authorities actually issued any kind of permit for marine works or specified that a permit was required for such works. In Mr Chia's submission, therefore, there was no breach on the part of LCS Contractors when it failed to apply for approval from any of the authorities apart from MPA.

30 From the above discussion, it is plain that the basic facts are not in dispute. An instruction was given by CPG to Sanchoon and Sanchoon in turn passed that instruction on to LCS Contractors. LCS Contractors took the view that it only needed to make an application for approval to MPA and, since this had already been done much earlier, did not approach any authorities after receipt of the letter. As there was no specific requirement in the subcontract for LCS Contractors to obtain any particular approval, the only way that LCS Contractors could be required to apply for approvals would be through an instruction issued by CPG that would be binding on it by virtue of cl 8 of the subcontract. The issue therefore is whether CPG's instruction meant that an application had to be initiated and proceeded with until the authority concerned stated it did not have to approve the works or whether an application only had to be made if there was a preceding requirement for such authority's approval. This is a question of interpretation of CPG's letter. In my judgment, the paragraph in question does require the contractor to make an application for approval. I agree with Sanchoon's interpretation that such application would have to be proceeded with until an indication had been given by the authority concerned that its approval was not necessary. Otherwise it would not have been necessary for CPG to list the various authorities in sub-para (a). The purpose of setting out the list was to ensure that a submission for approval was made to those authorities and sub-para (b) made it clear that unless it was ascertained that the authorities did not need to issue their approvals, formal presentations would have to be made to them by the contractor in the presence of CPG itself. As it turned out, only MPA's approval was needed which was what Mr Lim had maintained all along. However, CPG had no experience with marine bund construction works and therefore erred on the side of prudence by listing six authorities which it thought might have some kind of jurisdiction over the bund works.

31 Whilst it may be understandable that LCS Contractors did not act on an instruction that it considered to be unreasonable especially since by the time it was issued, the relationship between Sanchoon and LCS Contractors was no longer good and the parties were negotiating a settlement, LCS Contractors was not entitled to disregard the instruction entirely. CPG needed to be satisfied by formal documentation that the state of affairs on the issue of approvals was as represented by LCS Contractors. Thus, in my view, LCS Contractors was, technically, in breach of contract when it failed to take any steps to implement the instructions given by CPG. That breach did not, however, constitute a repudiation of the subcontract. It was a relatively minor matter and investigation by Mr Chooi showed subsequently that only MPA's approval was really needed for the works. This had been obtained. The project could therefore have gone ahead even if other approvals had not been sought.

Was LCS Contractors in breach of its obligations to carry out works with due diligence?

32 Clause 4(b) of the subcontract reads:

General Obligations

The subcontractor shall upon and subject to these conditions carry out and complete the words diligently and with due expedition and without delay in such order as may be requested from time to time.

Sanchoon's case as set out at para 7(1) of the Re-Re-Amended Defence and Counterclaim was that notwithstanding that Sanchoon had provided LCS Contractors with an alternative method of construction as prepared by Prof Tan, LCS Contractors refused to construct the temporary access for the marine piling works. LCS Contractors was thereby in breach of its duty to carry out the works with due diligence and expedition and had delayed the progress of its own works and, consequently, the main contract programme.

33 In his closing submissions, Mr Liow relied first, on Mr Chew's evidence in relation to his discussions with Mr Lim of LCS Contractors. Mr Chew asserted that after being informed of Prof Tan's report on the bund, Mr Lim stated that he was willing to adopt Prof Tan's method of construction but that LCS Contractors wanted to be paid more than $200,000 extra to use sand (as directed by Prof Tan) instead of earth. This statement was made during the course of the negotiations that took place after Sanchoon received LCS Contractors' solicitors' letter of demand of 7 October 2003. Sanchoon did not, however, record the demand made by LCS Contractors for extra money because the parties were in the course of negotiations. There was also other evidence which suggested that LCS Contractors did not wish to use sand to construct the bund and that it knew that if it did so, its cost would increase. This was as follows:

(a) SH Ng had stated in its letter of 1 August 2003 that the material used in constructing that portion of the bund that would be below sea level would be dredged from the seabed at the side itself. SH Ng therefore assumed that there would be enough sand.

(b) Ms Chew had testified that upon receiving SH Ng's second report, she had consulted a friend who was familiar with marine works and they had arrived at the conclusion that there would not be enough sand at the seaside to do what SH Ng had proposed. When Ms Chew asked Mr Lim whether the site would provide sufficient sand, he had replied that it would not and then told Ms Chew that he would be using soil from other sites to construct the bund.

(c) Ms Chew explained that she had rejected the bund method on 14 August 2003 because LCS Contractors had suggested the use of soil from other sites and this would mean making the sea a dumping ground, a position that was unacceptable to her.

(d) The original intention of LCS Contractors was to use soil from other sites which Mr Lim said he could obtain for free. But when Mr Lim saw Prof Tan's report he thought, erroneously, that he would have to use "washed sand" which was much more expensive than ordinary untreated sand.

34 In view of the foregoing circumstances, it was submitted that, on the balance of probabilities, when one considers how much sand would be required to build the proposed earth bunds (at least 20,625m³ for two bunds) and that this would cost at least $123,750 (at $6 per cubic metre) if unwashed sand was used and more if washed sand (at $20 to $30 per cubic metre) was used, Mr Lim did in fact tell Mr Chew that LCS Contractors would not carry out Prof Tan's recommendation unless it was paid some $200,000 extra. Sanchoon then refused to pay the extra amount demanded by Mr Lim and LCS Contractors refused to carry out the contracted works. As such, LCS Contractors was in breach of contract and by such breach had repudiated the subcontract.

35 In response, Mr Chia submitted that even though LCS Contractors was aggrieved at the time

that SH Ng was not given a further opportunity to rectify its report, it had readily agreed to abide by Prof Tan's recommendations. Mr Lim had said as much in his evidence. During cross-examination also, Mr Lim reiterated that he had agreed to the report; it was only the fee that he had not agreed to pay. As regards the claim that Mr Lim had demanded an extra $200,000 in order to carry out Prof Tan's method of construction and that this demand was a repudiation of the subcontract, LCS Contractors denied this. First, Sanchoon's position was that it had accepted LCS Contractors' repudiation of the subcontract on 7 October 2003, which necessarily meant that the alleged breaches had occurred on or before 7 October 2003. However, Prof Tan's report was only approved by CPG on 13 October 2003. It would therefore be wrong for Sanchoon to say that LCS Contractors had repudiated the subcontract by not proceeding with the works as of 7 October 2003. Second, Mr Lim had never tried to extort any extra money from Sanchoon and this story had been made up by Mr Chew to justify the termination of the subcontract.

36 In substantiation of his submission on the extortion point, Mr Chia made several arguments. First, it was claimed by Mr Chew that LCS Contractors' alleged "extortion" took place at a settlement meeting of 13 October 2003. If Sanchoon were correct, LCS Contractors would be guilty of an express renunciation of the subcontract which would entitle Sanchoon to terminate it. However, Sanchoon, by its pleading, was relying on alleged breaches that arose on or before 7 October 2003 and could not therefore rely on an express breach which allegedly occurred one week after the cut-off date. Second, it had pleaded that LCS Contractors had "refused to carry out [its] works to construct a temporary access for the marine piling works" but had not pleaded that LCS Contractors was prepared to do so on terms as to additional payment. Third, there was a problem of evidence in that there was no record in any letter, minutes of meeting or other document that LCS Contractors had expressly renounced the subcontract at the meeting of 13 October 2003. In cross-examination, Mr Chew agreed that if LCS Contractors had really refused to proceed with the works unless it obtained additional payment which was not due under the subcontract, he would have considered this to be a very serious matter. He agreed this was because such conduct would have shown once and for all that LCS Contractors did not intend to proceed with the work.

37 Whilst it was argued by Sanchoon that it had not put the refusal to pay for the sand in writing as parties were at that time negotiating to reach a settlement, even if that were true, contended Mr Chia, there was nothing to stop Sanchoon from referring to this "express renunciation" in its termination notice of 6 November 2003. In fact, it would be the most natural thing in the world to recite a litany of LCS Contractors' breaches in the termination letter. The position consistently taken by LCS Contractors was that it wanted to proceed with the subcontract works and that is why it insisted on amending the draft settlement agreement to reflect the fact that it was not the desire of LCS Contractors to withdraw from the works. One of Sanchoon's witnesses gave evidence of Mr Lim's state of mind as follows:

> During my discussion with Mr Lim Chin San in the canteen itself, I feel that in his opinions, he feel that he has been cheated in this whole contract itself because his method is one of the cheapest way to carry out to do the constructions. And when we realised that it is such a good way to carry out the constructions, we decided to abandon him and bring in another contractor to carry out his method and take advantage of the extra margins.

This evidence of one Mr Toh Lim Kwee who worked for Sanchoon showed that Mr Lim felt aggrieved at being ousted from the subcontract and that he had wanted to proceed with it. This evidence was consistent with the fact that LCS Contractors had written to Sanchoon in October and November 2003 stating that Sanchoon wanted to take over LCS Contractors' works. In Mr Chia's view, it was significant that this assertion was not subsequently denied in writing by Sanchoon.

38 Having considered all the evidence including Mr Lim's denial in court that he had tried to extract extra money for building the bund according to Prof Tan's method statement, I have come to the conclusion that LCS Contractors must be believed on this point. There was no credible evidence to support Sanchoon's assertion that such an extortion was attempted. Sanchoon's behaviour at the time was not consistent with such a demand having been made. Sanchoon never documented it or used it as a basis to justify its actions. It was only after the commencement of the action that Mr Chew made affidavits asserting the existence of the demand. Further, by the time that the demand was allegedly made, the evidence showed that Sanchoon had already the intention of appointing another subcontractor, M/s Zap Piling, to take over the subcontract works from LCS Contractors. On 7 October 2003, Sanchoon informed CPG that it intended to change the marine subcontractor from LCS Contractors to Zap Piling. Three days later, CPG informed Sanchoon that it had no objection in principle to the appointment of Zap Piling to construct the bund-wall. In these circumstances, had LCS Contractors made the demand it would have been leapt upon by Sanchoon as the perfect excuse to terminate LCS Contractors without risk and substitute Zap Piling in its place. Yet, no such accusation was made at that time, *ie*, on 13 October 2003 or even in the termination letter sent in November 2003. I therefore find that there was no express refusal by LCS Contractors to construct the bund-wall as asserted by Sanchoon.

39 Sanchoon's case that LCS Contractors had not proceeded with the works with due diligence did not, however, rest only on the extortion point. It also contended that, based on the Revised Programme, LCS Contractors had not carried out its works with due diligence nor had it proceeded with due expedition. On 6 November 2003 when the subcontract was terminated, the construction of the bund for the jetty had not started. On the basis of the Revised Programme, this construction was more than three months overdue as it should have been completed by 2 August 2003.

40 The issue here is whether LCS Contractors was bound to follow the Revised Programme rather than the Original Programme. The position taken by LCS Contractors was that the Revised Programme was an accelerated programme. Sanchoon disputed this. It relied on the evidence given under cross-examination by Daniel Thomas Connors, a construction management specialist, who was called as an expert witness for LCS Contractors. He agreed that a programme schedule was a planning guide for a contractor's work and manpower requirements. He accepted that if one looked at such a programme and activities were bunched at one end of the programme there was a possibility that a delay could occur because by the time one reached that point, one might not have enough manpower to carry out all those activities. Therefore, where one anticipated delay because of the bunching up of activities, one should rework the programme to spread out the work more evenly. When taken through the Revised Programme, Mr Connors agreed that it gave LCS Contractors less time to carry out its works in respect of the jetty but gave the latter more time to do the works in respect of the long and short piers. He was then asked whether he agreed that under the Revised Programme, only the jetty works were accelerated. He disagreed because the long and short piers were originally scheduled to be completed on 24 April 2004 but under the Revised Programme, the completion date was brought forward to 4 February 2004, so although LCS Contractors had been given more time to do the works, those works had to be completed earlier in the Programme. Mr Liow submitted that this answer was not consistent with Mr Connors' earlier answer in which he had defined acceleration as being the situation where a contractor was given less time in which to carry out a particular activity.

41 Mr Liow submitted that the revision of a programme occurred in almost every construction project because of the problems that would crop up on site. The project manager would then have to revise the programme to make sure that the contractors could meet their deadlines. He pointed out that Mr Connors had agreed that the sequence of activities that was originally planned might not be possible in practice because of changes on site. He then submitted that the Revised Programme was consistent with a revision of a programme to take into account the circumstances at the site. It was

a programme that was reasonable in that instead of allowing activities to bunch up towards the end of the programme schedule, some activities were moved forward. In any case, under cl 4(b) of the subcontract, LCS Contractors were obliged to do the works "in such order as may be requested from time to time". Sanchoon therefore had the right to direct the order in which the works had to be carried out and LCS Contractors was obliged to follow such direction.

42 The position taken by LCS Contractors was that the Original Programme issued on 24 March 2003 should govern the progress of the subcontract works because:

(a) it was the only programme in existence at the time the subcontract was formally awarded to LCS Contractors on 10 June 2003; and

(b) the Revised Programme which was issued on 28 June 2003 was unreasonable.

Whilst the Original Programme was in effect from 24 March 2003 up to 28 June 2003 and LCS Contractors may well have been planning its works in accordance with that programme, as I see it, there was nothing in the subcontract that prevented Sanchoon from changing the Original Programme if it had a good reason to do so and did not then impose unreasonable time limits on LCS Contractors. In fact, cl 4(b) of the subcontract indicated that the order of the works might be changed from time to time. That of course would not give Sanchoon *carte blanche* and to chop and change the programme as it saw fit regardless of the situation on the ground and the inconvenience to the subcontractor. It would, however, allow Sanchoon to make reasonable changes to the programme. I therefore take the view that if the Revised Programme was reasonable, LCS Contractors would have to follow it.

43 Whilst Sanchoon had pleaded that the Original Programme had to be changed because it was no longer realistic given the fact that LCS Contractors' work was delayed, Mr Chooi testified that the Revised Programme arose not because of such delay, but because he thought that the Original Programme worked out by Mr Marvin Chia, who had been the project manager before Mr Chooi joined Sanchoon, was not realistic. He said the consultants had observed that the scheduling in the Original Programme which provided for the marine works to start sometime towards the end of 2003, might not give the contractors sufficient time to complete the construction. Mr Chooi agreed with this observation and he reviewed the programme and issued the Revised Programme which then specified, *inter alia*, earlier start dates for the subcontract works.

44 Mr Chia submitted that there was no evidence that CPG had in fact said that the Original Programme was unrealistic. Mr Chooi had not been able to point, during cross-examination, to any minutes of meeting where this observation had been recorded. He could not remember if it had been made at a meeting or at an informal discussion.

45 LCS Contractors considered that the Revised Programme was unreasonable because it shortened the time lines available to it within which to do the work. It had also brought forward the commencement date of the work. For example, the works on the long pier were supposed to start in January 2004 and continue until March 2004. Under the Revised Programme, the commencement date was brought forward to October 2003. Then, for the short pier the work was supposed to commence in mid-March 2004 and that date was brought forward to mid-December 2003. Under cross-examination, Mr Chew had agreed that the programme had been accelerated. It was also notable that the Revised Programme was sent to LCS Contractors on a Saturday morning and it was asked to revert on the same by the following Monday morning. LCS Contractors did not have sufficient time to comment and thus the Revised Programme did not reflect any input from it.

46 LCS Contractors submitted that the Revised Programme was unfair and unreasonable because the deadlines for certain aspects of the subcontract works were unreasonably accelerated. Mr Connors gave evidence that the Revised Programme set out entirely new requirements compared with the Original Programme. These new requirements included:

(a) activity commencement dates that were from three to four months earlier than the dates originally approved by CPG;

(b) concurrency between activities that were not envisaged by the Original Programme and which would have required the mobilisation of a second piling rig;

(c) a reduction in the planned duration for various activities; and

(d) a requirement that the jetty and pier works be completed three to four months earlier than under the Original Programme.

In Mr Connors' view, the Revised Programme would be more accurately termed an "accelerated programme".

47 There was evidence that there was some delay under the Original Programme. This was in relation to the wharf spun-pile works. The commencement of these works was delayed because of a change in the dimensions of the wharf sheet piles. Mr Chew agreed that the delay in installing these sheet piles arose from the changes to the specifications for these materials. Mr Connors considered that that delay was the responsibility of Sanchoon. According to the Original Programme, that work was intended to commence in May 2003 but it was only on 30 June 2003 that Sanchoon made changes to that work which had an impact on the layout of the piles. Mr Connors said that until that layout was established with finality, the installation could not proceed. Mr Connors concluded that the Revised Programme was a "catch-up" programme for the spun-pile works but for all other activities it was an acceleration. Further, the evidence was that as between the parties, Sanchoon was responsible for procuring the sheet piles. It placed the orders directly with the suppliers, Hoe Seng Huat Hardware Co (Pte) Ltd, and co-ordinated the delivery schedule. There was some suggestion that Sanchoon placed its order for the sheet piles late for reasons of economy and, whilst this may have been a factor, the primary reason for the late delivery of the sheet piles was that Sanchoon only changed the specifications and dimensions of the piles on 30 June 2003. Thus, the sheet piles were delivered late primarily because of the change in their dimensions.

48 It was clear from Mr Connors' report that he regarded the Revised Programme as an accelerated programme. He did not accept that there were good reasons for the change. Whilst he did give evidence on the necessity for changes in programmes from time to time as quoted in [40] above, when all his evidence is looked at in context, it can be seen that those answers addressed the theoretical possibilities raised by Mr Liow during cross-examination. He did not at any time agree that those answers applied to the Revised Programme.

49 Sanchoon's position regarding the Revised Programme was also undermined by frequent changes. As Mr Chia pointed out, in the pleadings, the Revised Programme was stated as having come about because the work of LCS Contractors had been delayed. In court, however, Mr Chooi's evidence was that the Revised Programme was necessary because the Original Programme was unrealistic but that at the time the revision took place, LCS Contractors was not in delay. Then, when it came to the submissions, Sanchoon changed its position again and submitted that the Revised Programme had to be issued to prevent "bunching up" of activities. Contrary to the pleadings therefore, Sanchoon's final position was that the revision was not actuated by LCS Contractors' delay

but by the anticipation of delay. This was why in the final submissions, Sanchoon used phrases like "a possibility of delay", "where one anticipates delay" and "a potential delay".

50 In my judgment, Sanchoon has not shown that the change in the programme schedule was necessitated by any on-site circumstance created or contributed to by LCS Contractors. It is difficult to determine the reason for the revision in view of Sanchoon's continual changes of position. Perhaps the true answer is to be found in Mr Chooi's evidence that when he took over the project and reviewed the schedule, he was concerned that it was unrealistic and revised it accordingly. If that was the case and since the effect of the revisions was to drastically change the timing of LCS Contractors' works, Sanchoon should have worked with LCS Contractors in drawing up the Revised Programme instead of more or less presenting it with a *fait accompli*. Having given LCS Contractors an accelerated programme, it was not reasonable for Sanchoon to complain a mere three months later that LCS Contractors was in delay. Whilst cl 4(b) of the subcontract stated that the subcontractor was obliged to carry out and complete the works in such order as the main contractor might request from time to time, that did not mean that Sanchoon could compress the time otherwise allocated to LCS Contractors to carry out the works in. As Mr Chia submitted, that clause did not relieve Sanchoon of the burden of showing that the Revised Programme was reasonable. In this respect, it is relevant that para 30.145 of *Halsbury's Laws of Singapore*, vol 2 (LexisNexis, 2003 Reissue) states that the contractor has a right to the amount of time allocated to him by the contract within which to complete his work and that any purported shortening of the completion date would be an infringement of this right.

51 Even if the Revised Programme was reasonable and therefore applicable to the subcontract works, I accept the submission of Mr Chia that Sanchoon had failed to show, on a balance of probabilities, that LCS Contractors had not carried out the subcontract works "with due diligence and expedition [thereby] delay[ing] the progress of their works, and consequently the main contract programme" as asserted in para 7.3(l) of the Re-Re-Amended Defence and Counterclaim. Mr Connors had examined the actual progress of the subcontract works in detail in his expert report. He then proceeded to consider the impact of any "delay" in the said works on the Revised Programme. His conclusion was that the jetty and pier works would still have been completed well before the main contract completion date and that there would have been no delay caused to Sanchoon's main contract works. This analysis was not challenged by Sanchoon during cross-examination.

52 The onus was on Sanchoon to raise and prove the various delaying events, if any, caused by or attributable to LCS Contractors and to show that such events led to an overall delay in the works under the subcontract and the main contract. On this issue, Sanchoon relied substantially on the evidence of Mr Chooi but when his evidence is considered as a whole, it does not establish this point. Sanchoon did not even make a serious attempt to quantify the extent of delay sustained by it. Not every delay can give rise to an inference of lack of due diligence and therefore it is important to quantify the delay and show its impact on the project as a whole. Even though there may have been some delay on the part of LCS Contractors and Sanchoon may have been frustrated at the apparent lack of progress, it was not able in the evidence to show how such delay would have affected the progress of the works as a whole. On a consideration of all of the evidence in the case, I find that Sanchoon has not discharged the burden of proving that LCS Contractors failed to carry out its work with due diligence.

Conclusion

53 I have found that there was only one, relatively minor, breach of contract on the part of LCS Contractors, *ie*, its failure to follow the instructions to obtain approvals from specified government authorities. That breach entitled Sanchoon to make a claim for the damages, if any, it had sustained

by reason of the breach. It did not entitle Sanchoon to terminate the subcontract. The other breaches of contract pleaded by Sanchoon were not established. In the result, LCS Contractors is entitled to judgment for the sum of $219,912 and to interlocutory judgment for assessment of the value of the work done by it and the damages suffered by it by reason of the wrongful termination of the subcontract. However, Sanchoon is entitled to judgment for damages to be assessed in relation to the breach of contract by LCS Contractors as held above. Those damages can be set off against the damages payable to LCS Contractors. I also award 95% of the costs of the claim and the Defence to the Counterclaim to LCS Contractors.