IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 110

Suit No 120 of 2014

Between

Goh Eng Lee Andy

… Plaintiff

And

Yeo Jin Kow

… Defendant

GROUNDS OF DECISION

[Building and Construction Law] — [Building and construction contracts] — [Design and build contract] — [Lump sum contract]

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Goh Eng Lee Andy
v
Yeo Jin Kow

[2016] SGHC 110

High Court — Suit No 120 of 2014
Kannan Ramesh JC
13–16, 20–21, 23, 30 October, 6 November, 3 December 2015; 16 March 2016

2 June 2016

Kannan Ramesh JC:

Introduction

1 Is a lump sum contract a feature of a "design and build" contract? This is the interesting legal issue that this case threw up. It was also the key issue before me.

2 The plaintiff wanted to build a new house on a parcel of land which he owned with his wife. He approached the defendant, a building contractor, for this purpose. The quotation issued by the defendant, which the plaintiff accepted, contained the term "design and build". The plaintiff alleged that the building contract was of the "design and build" variety, evidenced by the use of the term in the quotation. The defendant joined issue with the plaintiff on this critical issue. Work commenced on the project but appeared to have been abandoned some 17 months later over payment issues. The plaintiff terminated

the building contract and employed a replacement contractor to complete the construction work. The defendant alleged that the termination was wrongful. In this action, the plaintiff sued the defendant for recovery of damages and the defendant counterclaimed for the cost of variation works undertaken by him. Strangely, the defendant did not counterclaim for damages arising from the plaintiff's alleged wrongful termination of the building contract.

3 On 16 March 2016, I gave judgment, allowing most of the claims made by the plaintiff and dismissing the bulk of the defendant's counterclaims. These are the grounds of my decision.

The background facts

4 The plaintiff and his wife purchased a property located at 71 Jalan Bumbong ("the Property"). The couple wanted to reconstruct the Property. They approached the defendant, a contractor trading as JK Building Maintenance, to furnish quotations for the reconstruction of the Property. The defendant and the plaintiff were friends. As is commonly (and unfortunately) the case, the friendship between the parties seemed to have led to a less than desired degree of formality in the documentation of their legal relationship.

5 The defendant provided a number of quotations for the construction work: a first quotation dated 16 August 2011 ("the first quotation") and two subsequent quotations dated 20 October 2011 ("the second quotation") and 10 December 2011 ("the final quotation"). At the time of the first quotation, the architectural design for the Property was not ready.

6 On 24 September 2011, the defendant's wife, Zann Loo ("Zann"), who assisted the defendant with administrative matters relating to the construction of the Property, sent a schematic design of the Property ("the Schematics") to

an architectural firm, TAS Design Studio ("TAS"), which the defendant formally engaged on 27 September 2011 to undertake the architectural design for the Property.[1] TAS then retained a firm named JAL Atelier as the project architect. Significantly, the plaintiff was not a party to the contract between the defendant and TAS. The contractual obligation to pay TAS' fees therefore fell squarely on the defendant.

7 The Schematics were prepared by the defendant's in-house designer to be used by TAS as a reference to draft the construction drawings.[2] On 7 October 2011, Zann sent another email to the plaintiff attaching 3-dimensional drawings of the proposed layout of the Property. It would appear that these drawings were prepared by the defendant and Zann.[3] The second quotation was sent to the plaintiff shortly thereafter, on 20 October 2011. Both the second quotation and the final quotation were for the "erection of a 3-storey semi-detached house with an attic and swimming pool".

8 The main difference between the second quotation and the final quotation lay in the section setting out the fees for professional services. The second quotation contained a section on professional services fees which included, amongst other items, architectural fees, civil and structural professional engineering consultancy services, and mechanical and electrical consultancy service fees. This section on professional fees was not present in the final quotation. The total contract price for the second quotation was $841,300 while the total contract price for the final quotation was $934,500.

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[1] Andy Goh's Supplemental AEIC, pg 106–110.

[2] NE 16 October 2015, pg 98.

[3] NE 20 October 2015, pg 25.

The salient terms and conditions in the final quotation are reproduced here, as follows:

> **Terms and conditions:-**
>
> 1.) All construction price including workmen com. Site coordinator, site safety supervisor & technical controller.
>
> 2.) [Resident Technical Officer] to be engage[d] by developer owner.
>
> 3.) If there are substantial design changes after the completion of design and/or during construction, additional fees shall be chargeable and decided on a case by case basis.
>
> …
>
> 7.) Any other works not mentioned in this contract shall not be included and fee involved shall be borne by client.

9 Significantly, the final quotation also included an acknowledgment portion that read as follows:

> ACKNOWLEDGEMENT
>
> PROPOSED NEW ERECTION OF A 3-STOREY SEMI-DETACHED HOUSE WITH AN ATTIC AND SWIMMING POOL ON [THE PROPERTY] (***DESIGN & BUILD***)
>
> [emphasis in underline in original, emphasis in bold italics added]

10 The plaintiff agreed to accept the final quotation but refrained from executing the same pending the preparation of construction drawings. On the basis of the final quotation, the defendant proceeded to obtain a construction loan from United Overseas Bank Ltd ("UOB"). By a letter dated 19 January 2012, UOB agreed to furnish a loan in the sum of $646,800. Sometime in February 2012, the construction drawings were finalised and accepted by the plaintiff ("the Construction Drawings"). The Construction Drawings were prepared by TAS in collaboration with JAL Atelier. It was common ground that this was the only set of architectural drawings for the works.[4] The

defendant conceded that the Construction Drawings were "very similar" to the Schematics of 24 September 2011.[5] After the Construction Drawings were finalised, the plaintiff formally accepted the final quotation on 6 March 2012 by executing the same. Prior to the plaintiff's formal acceptance of the final quotation, the plaintiff had already paid the defendant a sum of $60,000 on 23 February 2012 to signify his decision to proceed with the project.

11 Work commenced on the Property in March 2012. Under the final quotation, it was stated that the "estimated completion date" was March 2013. It was not disputed that the defendant had not completed the construction work by 31 March 2013. In September 2013, the plaintiff took the view that the defendant had abandoned construction. Thereafter, by a notice dated 11 October 2013, the plaintiff terminated the defendant's services. Replacement contractors were appointed and the Temporary Occupation Permit ("TOP") for the Property was obtained on 15 January 2015.

Summary of the pleadings

The plaintiff's claims

12 On 28 January 2014, the plaintiff commenced the present proceedings alleging that the defendant was in breach of contract by:

(a) failing, refusing or neglecting to carry out the works in accordance with the contract;

(b) delaying the progress or completion of the works and being unable to complete the works by the stipulated completion date;

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[4] NE 16 October 2015, pg 14.

[5] NE 16 October 2015, pg 100.

(c) abandoning the works; and

(d) seeking and obtaining payment from the plaintiff in excess of his entitlement under the terms of the contract.

13 As a result of the defendant's delay and abandonment of the works, the plaintiff brought the contract to an end on 11 October 2013. Thereafter, he appointed replacement contractors to carry out the remaining works, which cost the plaintiff $655,500. The project was eventually completed on or about June 2014, a delay of 15 months from the "estimated completion date" in the final quotation of March 2013. For lodging in the interim, the plaintiff stayed at his sister's property, allegedly paying rent for such occupation at $2,000 a month, incurring a total of $30,000 in rental charges in the process. The defendant's delay also allegedly caused the plaintiff to incur storage and warehouse charges in respect of the storage of materials purchased on behalf of the defendant for the construction of the Property. These materials were stored in the premises of Mega Metal Pte Ltd ("Mega Metal"). The plaintiff is a director of Mega Metal.

14 In line with [12(d)] above, the plaintiff also pleaded that the defendant had been paid over and above his entitlement under the contract. This came about as a result of, *inter alia*, the defendant's delay in the progress of the works, the plaintiff's purchase of construction materials on the defendant's behalf, and payments made by the plaintiff directly to the defendant's workers. In the light of the above, the plaintiff particularised his loss and damage as follows:

(a) overpayment to the defendant and additional costs incurred of a total of $688,867.53;

(b) warehouse charges of $4,815;

(c) rental charges of $30,000; and

(d) the cost of appointing an independent quantity surveyor to undertake a valuation of the works allegedly completed by the defendant as at the date of termination (*ie*, 11 October 2013) of $4,000.

The defendant's defence and counterclaims

15 The defendant pleaded that the final quotation stipulated only an *estimated* completion date of 31 March 2013. Time was not of the essence of the contract between the parties. Further, the defendant carried out variation work which set the time for completion at large.

16 According to the defendant, it was the plaintiff who had breached the contract by neglecting to make progress payments. The defendant did not abandon the work and the plaintiff had terminated the contract without basis.

17 The defendant alleged that he carried out variation works for the plaintiff's benefit, and claimed compensation by way of *quantum meruit* being the costs of the variation works undertaken by him. These so-called variation works included professional fees for architects and engineers, the Resident Technical Officer ("RTO") fee, insurance payments and approval fees. A 15% increase for what was described as "profit and attendance" was also included.

18 The defendant also pleaded that he had paid for the cost of plane tickets and accommodation when the parties went to China to source for materials for the construction of the Property. He claimed reimbursement of the sum of $1,595. Separately, the defendant claimed for a sum of $517.50 being the cost of installation of a gate at the plaintiff's sister's house.[6]

19 In total, the defendant counterclaimed for the sum of $166,817.06.[7] The counterclaim was bifurcated. I therefore only had to address the issue of liability.

The arguments

20 The plaintiff contended that the parameters of the contract between the parties were set by the Schematics, the final quotation and the Construction Drawings, and that it was a "design and build" contract as well as a lump sum contract. Hence, the defendant agreed to undertake and complete the construction works for the contract sum of $934,500 as defined in the Schematics, the final quotation and the Construction Drawings. The works carried out by the plaintiff's replacement contractors were consistent with the Construction Drawings. There was no basis for the defendant's counterclaim as no additional or variation works were carried out. Furthermore, the delay in the completion of the works was solely attributable to the defendant. The defendant abandoned the works, which entitled the plaintiff to terminate the contract on 11 October 2013.

21 The defendant denied that the parties contemplated a "design and build" contract. He submitted that his contractual obligation was to carry out and complete the works expressly set out in the final quotation. By virtue of the substantial variation works which the defendant was required to undertake, the time for completion of the contract had been set at large. There was no abandonment or repudiation of the contract. Thus, the plaintiff's termination of the contract was wrongful. Finally, the defendant contended that the

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[6] Yeo Kin Kow's AEIC at para 117.

[7] Defendant's Closing Submissions at para 108.

plaintiff had not made prompt payment, which contributed to the delay in the completion of the works. It was relevant that despite alleging that the plaintiff was in breach of contract in terminating his services, the defendant did not counterclaim as damages loss of profits on the unperformed work.

The decision

The scope of the contractual relationship between the plaintiff and the defendant

22 In my judgment, the contractual relationship between the parties was delineated by three important documents: the Schematics, the final quotation, and the Construction Drawings. I had observed earlier that the Construction Drawings were produced by the architect in February 2012, and the final quotation was accepted shortly after that by the plaintiff in March 2012 (see [10] above). The defendant agreed that the Construction Drawings were intended to define the scope of works under the final quotation, and the contract sum of $934,500 was binding on both parties in relation to the scope of work under the final quotation.[8] The evidence was clear that the plaintiff only executed the final quotation after he was satisfied with the Construction Drawings which set out the details of the design that he had approved.[9] Additionally, the final quotation itself referred to "PE drawing[s]", and the defendant's evidence appeared to be that this was a reference to the Construction Drawings drawn up by the architect. The Construction Drawings thus formed part of the contract between the parties. The defendant acknowledged under cross-examination that if he had carried out the works in accordance with the Construction Drawings, he would not have been entitled

[8] NE 20 October 2015, pg 6–8.

[9] NE 20 October 2015, pg 9.

to claim for any additional charges.[10] As the Construction Drawings were prepared on the basis of the Schematics, I found that the Schematics also formed part of the contractual relationship. Hereafter, the Schematics, the final quotation, and the Construction Drawings shall be collectively referred to as "the Contract".

23 The main dispute between the parties centred on whether the Contract was a "design and build" contract and a lump sum contract as the determination of this central question affected the parties' respective rights and obligations, such as whether the defendant had performed the contract works and was entitled to payment for the variation works claimed. I begin by setting out a brief description of a "design and build" contract and the rights and obligations of the respective parties thereunder, before turning to consider whether the plaintiff and the defendant had entered into such a relationship.

"Design and build" contracts generally

24 A "design and build" contract is one where the functions of design and construction are integrated and entrusted primarily to the contractor. Under such a contract, the design architect, structural engineer and other design consultants are typically employed by the contractor, and *not* by the owner (see generally Chow Kok Fong, *Law and Practice of Construction Contracts (Volume 1)* (Sweet & Maxwell, 4th Ed, 2012) ("*Chow Kok Fong*") at pp 119–125). In *Greaves & Co (Contractors) Ltd v Baynham Meikle & Partners* [1975] 1 WLR 1095, Lord Denning MR termed such a type of contract a "package deal" (at 1098).

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[10] NE 20 October 2015, pg 56.

25 In *Hudson's Building and Engineering Contracts* (Nicholas Dennys QC, Mark Raeside QC, Robert Clay gen eds) (Sweet & Maxwell, 12th Ed, 2010) ("*Hudson's*"), the learned authors explain (at para 3–105):

> In [design and build] contracts *the essential feature is that the Employer does not employ their own professional advisers to produce the complete or final design of the building or project which they require*. Either by negotiation, or by outline specification to tendering Contractors, the Employer makes known their requirements and the Contractor then produces the design, in the form of drawings, a specification and sometimes a schedule of rates to cover possible variations. Bills are not usually used in such contracts, *which will generally be lump sum.*
>
> [emphasis added]

26 Parties enter into "design and build" contracts for a number of reasons. These include cost savings arising from the fact that the contractor is in charge of the design *and* the construction of the work, which contributes to the efficiency of the design and construction process. Another perceived advantage of "design and build" contracts is the convenience and accountability that comes from the owner having a single point of contact for the delivery of the project. This is explained in Julian Bailey, *Construction Law (Volume 1)* (Informa Law, 2011) ("*Julian Bailey*") as follows (at para 1.50):

> A design and build contract is an agreement between an owner and a contractor, under which the contractor takes responsibility for both the design and the construction of the relevant structure. One of the primary advantages of "design and build" over the "traditional" form of procurement is that *it gives the owner the benefit of single-point responsibility for problems arising from design, construction or both*. Under "traditional" procurement arrangements, the owner must look to its designer and contractor *separately* for problems arising respectively from design and construction, and doing so may not always be straightforward from an evidential point of view. A design and build agreement is in the nature of a "*package deal*", in that the owner is not required to engage designers and contractors separately. …

> [emphasis added]

27 Besides the benefits of cost savings and single-point accountability, it is also observed that parties enter into "design and build" contracts as these are typically lump sum contracts (see the passage from *Hudson's* quoted at [25] above). A similar point is made in *Julian Bailey* as follows (at para 1.51):

> *Design and build contracts are often "lump sum" or "fixed price" contracts.* If so, the owner also obtains not only the benefit of single-point responsibility for the provision of goods and services, but it obtains certainty as to the price it will pay for those goods and services. …
>
> [emphasis added]

In this regard, a lump sum contract is defined as "a contract to complete a whole work for a lump sum" (*Keating on Construction Contracts* (Stephen Furst and Vivian Ramsey gen eds) (Sweet & Maxwell, 9th Ed, 2012) at para 4–002).

28 The position of a contractor concerning claims for additional payments under a "design and build" contract is set out in *Chow Kok Fong* (at para 2.41):

> In most situations, ["design and build" contracts] will operate as a fixed price or "lump sum" contract. The contractor is only entitled to claim for additional payments where it is demonstrated that the works, as defined in the project brief or client's requirements, have been varied or where there has been breach of the obligations by the owner and, as a result of which, the contractor had to incur additional expense.

Simply put, the contractor will have no recourse to the owner for additional payments unless it can be shown that the works undertaken were substantially different from the original design or that the additional expense came about as a result of the owner's breach. This is because a key ingredient of the "design and build" contract is that it operates as a lump sum contract.

29 In my view, a "design and build" contract, in the absence of any terms to the contrary, necessarily incorporates a lump sum contract. A "design and build" contract and a lump sum contract have in common the feature that the contractor has to do all that is necessary to achieve the contractual scope of works without an adjustment in price. The additional feature of a "design and build" contract is that the contractor is also responsible for formulating and implementing the design of the project – including the engagement of professionals for that purpose – within the brief that is given by the owner and turning that design into reality by doing all that is reasonably necessary for that purpose at the agreed price. It is also noted in *Chow Kok Fong* that "design and build" contracts by default give the owner little latitude to change or alter the design once the contract has been awarded, without incurring additional cost (at para 2.35). The owner is willing to bind himself to such limited latitude because he, *inter alia*, has the advantage of price certainty that arises from the fact that the "design and build" contract contemplates and incorporates a lump sum payment. In the same vein, the contractor will insist on conforming strictly to the contractual specifications because he has negotiated a lump sum payment for the construction and delivery of a project in accordance with an agreed design. In short, by entering into a "design and build" contract without more, the owner and the contractor have agreed on a lump sum payment by the former in return for the construction and delivery of a project by the latter that is in accordance with an agreed design which has been formulated by the contractor.

30 It follows from the above that the implications of finding that the Contract was a "design and build" and therefore also a lump sum contract were that (a) the defendant had no basis to counterclaim for professional fees where these concerned the design of the Property (unless specifically carved

out), and (b) the defendant could not claim for additional payment for variation work unless the variation work was extraneous to the work contemplated under the Contract. It is to the issue of whether the Contract was of the "design and build" variety that I now turn.

Was the Contract a "design and build" contract?

31 The question of whether the Contract was a "design and build" contract is a matter of interpretation of the Contract. This requires the court to ascertain the meaning of expressions in, *inter alia*, the final quotation and, in this regard, it is accepted that the court applies the contextual approach to contractual interpretation (see *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [132]; *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 and [34]).

32 On a consideration of all the objective evidence, I held that the parties had intended to, and did, enter into a "design and build" contract, in that under the Contract, the functions of design and construction were entrusted to the defendant for an agreed sum. I explain the reasons for my conclusion.

33 First and foremost, the term "design and build" was expressly referred to in the final quotation although the term was not present in the first or second quotations. It must be remembered in this regard that the term "design and build" is a legal term of art carrying a defined meaning in law. Thus, the inclusion of the term in the final quotation which was then executed by the parties was *prima facie* evidence that the parties intended to, and did, enter into a contract having the relevant rights and obligations under a "design and build" contract, as detailed at [24]–[29] above. Indeed, it is clear from the

evidence that both parties broadly understood and were *ad idem* on the meaning of the term "design and build". The plaintiff intended that prescribed meaning and the defendant by including the term in the final quotation accepted the same.

34 Further, the context surrounding the plaintiff's acceptance of the final quotation was critical in understanding the intentions of the parties. It will be recalled that the final quotation though issued and dated 10 December 2011 was only formally executed by the plaintiff on 6 March 2012. The evidence revealed that the plaintiff deliberately refrained from accepting the final quotation until he was satisfied with the Construction Drawings. Those drawings were prepared by the defendant using the services of professionals which he had engaged. Clearly, the plaintiff refrained from accepting the final quotation until the design was sorted out by the defendant and the scope of works was clearly delineated in the architectural drawings. Prior to that date, the objective evidence showed that the defendant undertook a course of conduct that was consistent with the obligations a contractor entering into a "design and build" contract would undertake.

35 One such course of conduct concerned the defendant's preparation of the design of the Property. As seen above, the defendant entered into a contract directly with TAS on 27 September 2011. Notably, the contract between the defendant and TAS referred to the contract between the plaintiff and the defendant as a "design and build" contract, and further stated that "the [defendant] [would] be responsible for all direct coordination with the [plaintiff]".[11] This was entirely in line with the concept of single-point responsibility referred to at [26] above. The defendant had also provided

[11] AB pg 635–638.

drawings to TAS for the project architect, Mr Tow Tuan Juay ("Mr Tow") (who was at the material time practising under JAL Atelier), to prepare the Construction Drawings (see [6]–[7] above). As noted earlier, it was only after the Construction Drawings were finalised that the plaintiff formally executed the final quotation (see [10] above).

36 Besides the defendant's preparation of the design of the Property, the defendant also dealt directly with other professionals in preparing to execute the design and construction of the Property. I refer to a few examples. First, the defendant dealt directly with the professional engineer for the project, making payments to the professional engineer even prior to the plaintiff's acceptance of the final quotation.[12] The defendant also contracted directly with a number of project consultants which included the following:

(a) The structural consultants, TK Lee Consulting Engineers, who quoted a lump sum of $3,750 as structural consultant fees. The defendant accepted the quotation on 13 February 2012.

(b) The topographical surveyors, T H Lim Registered Surveyor, who quoted a lump sum of $1,180 as professional survey fees. The defendant accepted the quotation and made payment of the sum of $1,180 on 23 November 2011.

(c) The soil investigators, GeoSpecs Pte Ltd, who quoted a lump sum of $1,800 for the soil investigation work. The defendant accepted this quotation on 20 October 2011.

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[12] AB pg 316 and 551.

(d) The impact assessors, A&O Consultants, who quoted a lump sum of $1,200 for, *inter alia*, the provision of an impact assessment report. The defendant accepted the quotation on 15 February 2012.[13]

It was also pertinent to note that the defendant agreed that the plaintiff would not have any recourse for defective work against the project consultants.[14] These facts were all hallmarks of a "design and build" contract and it was again in line with the concept of single-point responsibility referred to above.

37 That the plaintiff and the defendant had entered into a "design and build" contract was corroborated by the evidence of Mr Tow. He affirmed an affidavit where he stated that he understood the Contract to be a "design and build" contract and that throughout the course of the works no changes were made to the original design of the Property. Although Mr Tow did not testify, having unfortunately passed away shortly before the commencement of the trial, parties mutually agreed to admit Mr Tow's affidavit into evidence. Given that his evidence was not tested under cross-examination, I did not place undue weight on it. However, his evidence was consistent with my finding based on the objective evidence that the Contract was intended by parties to be a "design and build" contract and accordingly served to strengthen my conclusion.

38 At the trial, the defendant asserted that there was an *oral* agreement between him and the plaintiff where the plaintiff authorised the defendant to make payments on his behalf, *inter alia*, to the architect, the professional engineer, and the regulatory authorities on the basis that the plaintiff would

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[13] DB pg 363, 358, 166 and 22.

[14] NE 20 October 2015, pg 43.

reimburse the defendant for them later. I found that this was clearly an afterthought on the defendant's part as it was not pleaded in the defence or referred to in the defendant's affidavit of evidence-in-chief. It only came up when the defendant was being cross-examined. Further, something as fundamental as this would surely have been documented in writing. It was not. Finally, the allegation goes against the introduction of the term "design and build" in the final quotation. Therefore, I did not accept the defendant's assertion that such an oral agreement existed between him and the plaintiff.

39 A comparison between the second quotation and the final quotation further augmented the conclusion that the Contract was of the "design and build" variety. In the second quotation, the defendant explicitly set out the fees which the plaintiff was required to pay for the design professionals, including the architect and professional engineer. Although these items were not present in the final quotation, the price of the final quotation was significantly higher than the second quotation. On the totality of the evidence, I found that the scope of works that the defendant was required to undertake under the second quotation and the final quotation were largely the same. This again provided the context for understanding the parties' objective intention in expressly stipulating in the final quotation the term "design and build" (*viz*, to enter into a "design and build" contract). Consistent with this intention, the prices for individual items in the final quotation such as the construction of the swimming pool and the lift were marked-up (when compared to the second quotation) to take into account the defendant's responsibility as a "design and build" contractor. The defendant was not able to provide any credible explanation for the significant increase in prices of these items between the second quotation and the final quotation.

40 There was therefore no reason to depart from the *prima facie* position that the parties had intended to, and did, enter into a "design and build" contract with the defendant undertaking responsibility for both the design and construction of the Property in line with the Construction Drawings for a fixed price. Both the language of the final quotation and the surrounding context supported this interpretation. For these reasons, I held that the Contract was a "design and build" contract and that the defendant had agreed to be paid a lump sum of $934,500 for the design and construction of the Property as delineated in the Construction Drawings.

The defendant's counterclaims

41 It followed from the above that the defendant could not claim for additional payment for variation work unless the variation work was extraneous to the work contemplated under the Contract. In my judgment, none of the defendant's counterclaims for "variation work" was extraneous to, or deviated from, the scope of the Contract. In fact, some of the items such as architectural fees and professional engineering services were not, strictly speaking, variation works at all. It was noteworthy that Mr Tow certified that as at 17 January 2013 there had been no variation works carried out.[15] This was confirmed by Mr Tow on affidavit. However, many of the items which the defendant raised in his counterclaim were expenses which were incurred prior to 17 January 2013. It was highly significant that the defendant had never made any claims for additional payment until the commencement of this action on 28 January 2014. This made perfect sense as the defendant had agreed that no substantial design changes were made after the completion of

[15] AB pg 16.

the design and/or during construction.[16] Thus, there was no basis for any of the defendant's claims for variation work.

42 The defendant also sought to claim fees for "profit and attendance". Conventionally understood, fees for profit and attendance are sought and paid in the construction industry where the main contractor supervises the work of a sub-contractor. This is usually contractually provided for in cases where the sub-contractor is nominated by the employer. The profit component is a form of compensation to the main contractor for the lost profit that would have otherwise been earned had the contractor appointed the sub-contractor, while the attendance element is provided to cover the expenses incurred by the contractor in supervising and/or accommodating the sub-contractor. In the present case, I found that there was no legal basis for the defendant's claim for profit and attendance. Generally speaking, many of the claims made by the defendant were not claims for profit and attendance over work of such a nature. More importantly, as a "design and build" contract, any claim for such sums would have been included in the contract price. Neither was there any agreement between the parties that the plaintiff would pay a 15% mark up for profit and attendance generally, a point which the defendant conceded.[17]

43 I therefore dismissed the defendant's counterclaim for variation works and profit and attendance, save for the RTO fee, which the plaintiff had, by cl 2 of the final quotation, agreed to pay (see [8] above). For the avoidance of doubt, the defendant's claim was only allowed with respect to the RTO fee and *not* any claim from profit and attendance over and above this fee.

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[16] NE 21 October 2015, pg 5.

[17] NE 23 October 2015, pg 21.

44 The defendant's claims for reimbursement for the air tickets and hotel accommodation were rejected. The trip to China was made in early November 2011. However, the defendant did not raise a claim for the cost of the air tickets and accommodation until the commencement of the trial. In my judgment, this was cost which the defendant had agreed to bear as part of his effort in securing material for the construction of the Property and was part of the defendant's responsibility under a "design and build" contract.

45 Finally, I come to the defendant's claim for the installation of the gate. The plaintiff's case, as it was put during cross-examination, appeared to be that the plaintiff had already paid the defendant $517.50 for the installation of the gate. However, as there was no documentary proof of this payment, and as these works did not fall within the scope of the Contract, I allowed the defendant's claim. Again, as there did not appear to be any agreement between the parties as to the defendant's entitlement to be paid profit and attendance, I did not allow a claim for profit and attendance for this item.

46 To be clear, my decision on the defendant's counterclaims dealt only with liability and not quantum, which was to be proved at an assessment. However, as regards the claim for the installation of the gate, it seemed that as the plaintiff's case was that he had already paid the sum of $517.50, the quantum for this item was not in dispute. To that extent, there appeared to be little or no basis for parties to dispute the amount. Further, the amount of fees incurred as regards the RTO could surely be established by proof of payment. I therefore invited parties to agree on these items, upon production of satisfactory proof of payment, rather than resort to taking further steps in these proceedings just to have this amount assessed. Sensibly, the parties accepted my invitation (see below at [60]).

The breach of the Contract

47 The applicable rules for when a construction contract may be terminated were set out in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413. The plaintiff submitted that he was entitled to terminate the contract on the basis that the defendant, by abandoning the works, repudiated the Contract. The defendant contended that he did not abandon the works as his equipment and workers were still on site in September 2013. Instead, the defendant argued that time was set at large because the plaintiff prevented him from carrying out works on the Property and failed to make prompt payment under the Contract when he was required to do so.

48 I found that the defendant had breached the Contract by failing to complete the works by 31 March 2013 notwithstanding that it was stated in the final quotation to be an "*estimated completion date*". The evidence showed that it was agreed between the parties that the completion date for the construction works was 31 March 2013. This was clearly both the plaintiff's and defendant's intention. On the defendant's part, it had been stated in Progress Claim No 6 (which had been submitted by Zann, on behalf of JK Building Maintenance, to Mr Tow) that the completion date was March 2013.[18] The defendant had also arranged for, *inter alia*, insurance, noise monitoring and pest control on the basis that the works would be completed by March 2013.

49 Even if I was wrong in finding that 31 March 2013 was a fixed completion date, I would have held that the defendant nevertheless breached

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[18] AB pg 16–19.

the contract by failing to complete the construction by September 2013. Literally, the term "estimate" means an approximate or rough and ready gauge of a particular value or time and inherently allows for slight deviations where reasonable. In the context of the present facts, a six to seven month delay in the completion of works, bearing in mind that the estimated contract period was 12 months, clearly amounted to a breach of contract in the absence of alleviating factors. There were no such factors.

50 The defendant argued that the time for completion was set at large because of the variation works which he had to carry out. As I had found that the defendant did not carry out any works that deviated from the contractual requirements (see [41] above), this argument was without foundation. The argument on variation works was premised on the Contract *not* being of the "design and build" variety. Separately, the defendant also alleged that the plaintiff breached the Contract by failing to make timeous payments. The defendant's case for delay in payment was based on an entitlement to be paid in excess of the contract price. Again, this was an argument that was premised on the court rejecting the plaintiff's submission that the Contract was a "design and build" contract. Having determined otherwise, the defendant's case in this regard collapsed. Moreover, the defendant had no general right in law to suspend work even if payment was wrongfully withheld unless the parties had expressly conferred such a right on the defendant or it could be established that the delay in payment made it *not* possible for the defendant to continue with the contract works (see *Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* [2004] 3 SLR(R) 288 at [55]–[57] and [65]). The defendant failed to come within either of these exceptions. In any event, the evidence showed that the plaintiff made payment promptly and there was no basis for the defendant's allegation that he was financing the works. As will be

demonstrated below at [56], I found it more likely that the plaintiff paid the defendant an aggregate sum over and above the contract price. Hence, I rejected the defendant's argument that time for completion was set at large.

51 The defendant agreed, under cross-examination, that he was principally responsible for the delay in the completion of the construction works.[19] He also admitted that the plaintiff had, from 1 August 2013 onwards, made payment of his workers' wages. The defendant maintained that there were other workers on site, but was forced to confess that he had no evidence to prove this. When asked whether his workers had stopped work by 5 September 2013, the defendant could only answer limply that: "They did not stop work. They were just waiting for further instructions." This was an answer of semantics as no reason was offered for why instructions were not given in the first place. The overwhelming and undisputed evidence showed that from sometime in mid-2013, the plaintiff began to foot the bill for the bulk of the expenditure for the works, making payments on behalf of the defendant. It also appeared that from July 2013, the plaintiff had difficulty contacting the defendant on a number of occasions. Hence, I found, on a balance of probabilities, that the defendant had abandoned the works in October 2013, thereby repudiating the Contract. In the circumstances, the plaintiff was entitled to validly terminate the defendant's services.

Quantification of damages

52 It is hornbook law that contractual damages are generally intended to place the party who sustained the loss in the same situation as if the contract had been performed (*Robinson v Harman* (1848) 1 Ex Rep 850 at 855). The

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[19] NE 21 October 2015, pg 86–87.

plaintiff's claims were consistent with this general principle. It is also well-established that an innocent party to a breach of contract is required in law to take steps to mitigate losses. In *The "Asia Star"* [2010] 2 SLR 1154, the Court of Appeal summarised the general principles relating to the innocent party's requirement to mitigate as essentially imposing a bar to the recovery of "avoidable or avoided loss" with the burden being on the defaulting party to prove that the innocent party had failed to mitigate. And this is a reasonably taxing burden. As the Court of Appeal stated in *The "Asia Star"* at [24], the burden on the defaulting party to prove that the plaintiff failed to mitigate is one that is not easily discharged. It should also be observed that the defendant did not plead that the plaintiff had failed to mitigate his losses, which the defendant was required to (see *Yip Holdings Pte Ltd v Asia Link Marine Industries Pte Ltd* [2012] 1 SLR 131 at [23]–[24]). With these general principles and observations in mind, I now deal with each head of the plaintiff's claims.

Additional costs incurred to complete the work

53 The plaintiff's claim for additional cost was made out. It was clear that the plaintiff had incurred more costs to obtain what he would otherwise have been entitled to under the Contract. The defendant was therefore liable to the plaintiff in damages for sums which the plaintiff has incurred over and above the contract price subject to mitigation and remoteness.

54 There was no available list of outstanding work as at the date of termination which the court could have reference to. However, the defendant had admitted on affidavit that the following work remained outstanding as at the date of termination: installation of aluminium windows, floor tiling works, wall tiling works, timber flooring works and other touch-up works. Under

cross-examination, the defendant also stated that the aluminium doors, electrical, glazing, staircase, gate, air-conditioning, swimming pool and lift works were incomplete as of September 2013.[20] These were all works which were undertaken by the plaintiff's replacement contractors, as evidenced from the quotations which were submitted and accepted. The defendant agreed under cross-examination that the scope of the replacement contractors' work related to the defendant's outstanding work under the Contract.[21]

55 The alternative quote which the plaintiff had obtained from Builders Alliance dated 26 November 2013, which also covered similar areas of work, was for a much larger amount of $804,846. The plaintiff accepted the lower of the two quotations (for the full works required). In the circumstances, I accepted that the plaintiff had reasonably mitigated his loss. The defendant had not proved otherwise. The plaintiff was thus entitled to claim for $655,500 being the sum paid to the replacement contractors for the outstanding work.

56 The parties were not agreed on the aggregate amount which the plaintiff had paid to the defendant for the works. There were two items in dispute: a reimbursement of $15,000 from the defendant to the plaintiff on 27 April 2012[22], and a payment of $25,000 from the plaintiff to the defendant on 13 June 2012[23], both of which were evidenced by cash cheques. On balance, I found that these payments were made and received by the respective parties. Therefore, I held that under the Contract, the plaintiff had paid a net amount of $937,867.53 to the defendant as of October 2013. The amount awarded to the

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[20] Plaintiff's Closing Submissions, para 107.

[21] NE 23 October 2015, pg 30.

[22] AB 320, AB 327.

[23] AB 396.

plaintiff for additional cost incurred to complete the work was $658,867.53. This sum was arrived at by subtracting the original contract sum of $934,500 from the sum of (a) the total amount paid by the plaintiff to the defendant under the contract and (b) the costs of the replacement contractors.

Storage charges

57 I allowed the plaintiff's claim for storage charges of $4,815 which were the defendant's responsibility under the "design and build" contract. The materials stored were meant for performing the Contract. There was no contrary agreement that the plaintiff would bear these costs. The fact that the plaintiff was a director of Mega Metal was not relevant.

Rental charges

58 As stated above (at [13]), while the Property was under construction, the plaintiff stayed at his sister's place, allegedly incurring rental charges. There was no evidence that the payment of $2,000 a month was unreasonable or higher than the market rate, and the plaintiff would be entitled to claim for the market rate had he rented accommodation from an independent third party. I had no reason not to accept the evidence of the plaintiff and his sister, Mdm Goh Bee Choo, that payment was made and received. Therefore, the plaintiff's claim for rental payable from April 2013 to June 2014 (*ie*, from the time of the defendant ought to have completed to the works to the time the works were eventually completed) of $30,000 was allowed.

Cost of appointing an independent quantity surveyor

59 I noted that the quantity surveyor's report did not appear to have played a role in the formulation of the scope of works for the replacement

contractors.[24] Neither had the plaintiff relied on the quantity surveyor's report in this action. Thus, I did not grant this head of claim.

Conclusion

60 After I delivered oral judgment, counsel for the plaintiff accepted my invitation to reach agreement with the defendant on the quantum for the items of the defendant's counterclaims which I had allowed (see [46] above). Following discussion, parties reached agreement that the total sum of $1,550 be allowed for those items which would in turn be set off against the plaintiff's claims which I had allowed. Accordingly, I varied the amount allowed for the plaintiff's claims from **$**693,682.53 to $692,132.53.

61 On the issue of costs, counsel for the plaintiff produced an offer to settle dated 11 August 2015 ("the OTS") issued pursuant to O 22A of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). The OTS was for the defendant to pay the plaintiff the sum of $500,000 within seven days of the date of receipt of acceptance of the offer, in full and final settlement of the plaintiff's claim and the defendant's counterclaim. In light of the amount I had allowed on the plaintiff's claim and my conclusions on the defendant's counterclaim, counsel for the plaintiff submitted that I should order costs on the claim and counterclaim on the standard basis until 11 August 2015, and thereafter on an indemnity basis, to be taxed if not agreed.

62 Accordingly, in light of the agreement referred to in [60] above and the OTS, I made the following further orders:

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[24] NE 13 October 2015, pg 47.

(a) save for the items of the defendant's counterclaim which had been allowed, and in respect of which the parties had reached an agreement on quantum, the counterclaim was dismissed; and

(b) the defendant shall bear the cost of the claim and the counterclaim on the standard basis until 11 August 2015, and thereafter on an indemnity basis, to be taxed if not agreed.

Kannan Ramesh
Judicial Commissioner

Michael Por and Li Jiaxin (Michael Por Law Corporation) for the plaintiff;
Ho Chye Hoon and Ryan Tan Yang (Kel LLC) for the defendant.
