Ho Pak Kim Realty Co Pte Ltd v Revitech Pte Ltd
[2007] SGHC 194

Case Number : Suit 36/2006

Decision Date : 13 November 2007

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Christopher Chong Chi Chuin & Kelvin Teo Wei Xian (Legal Solutions LLC) for the plaintiff; Tito Shane Isaac & Justin Chan Yew Loong (Tito Isaac & Co) for the defendant

Parties : Ho Pak Kim Realty Co Pte Ltd — Revitech Pte Ltd

Contract – Contractual terms – Finding of fact – Whether certain documents were part of the contract

13 November 2007 Judgment reserved.

Lai Siu Chiu J:

1 This was a claim relating to a building contract for the construction of a block of apartments (22 units) with basement car park and a swimming pool at No 89 Kovan Road, Singapore ('the project"). The project was to be constructed by Ho Pak Kim Realty Co Pte Ltd ("the plaintiff") for the owner Revitech Pte Ltd ("the defendant"). The plaintiff was represented by its director Ho Soo Fong or Benson Ho ("Ho") while the defendant was represented by its director Abhishek Murthy ("Murthy").

The facts

2 The plaintiff was appointed the main contractor while the architect of the project was Nguyen Trung Chon ('Nguyen") from ACME Architects ("ACME"). The quantity surveyor appointed for the project was Donald Payne ("Payne"), a director from BKP Associates Pte Ltd ("BKP"), the mechanical and engineering consultants were HY M&E Consultancy Services Pte Ltd ("HYME") while the structural engineers were PEC Consultant ('PEC"). BKP apparently resigned from the project on 31 May 2005 (according to Payne) because the firm was not paid its additional fees.

3 According to the defendant, the building contract comprised of: (i) two volumes (I and II) of tender documents ("the contract documents"), (ii) the Conditions of Contract, (iii) the Supplementary Conditions of Contract, (iv) Preambles to work sections as well as (v) the defendant's letter of award dated 21 November 2002 (see AB196) ("the letter of award"). Save for the letter of award, the contract documents were duly signed on or about 20 November 2003. The contract documents were based primarily on the standard contract of the Singapore Institute of Architects Articles and Conditions of Building Contract for Lump Sum (4th Ed, March 1990), commonly known as the SIA contract. It was the plaintiff's case that the letter of award was the only document that governed the contractual relationship between the parties until 20 November 2003 (which the plaintiff said was the date of the formal contract between the parties). The plaintiff alleged that the contract documents were neither seen nor signed by Ho and that they did not form part of the contract between the parties. (In its closing submissions however (at [17]), the plaintiff seemed to shift its position – it argued that only volume II did not apply). The plaintiff further alleged that the contract documents were only for the purpose of assisting the defendant to obtain release of funds borrowed from Hong Leong Finance Limited ("Hong Leong").

4 Under para 2.0 of the letter of award, the contract sum was $4,257,500.00 ("the contract sum") and the contract period under para 4.0 thereof was to be 15 months from the date of commencement. The commencement date would be 14 days from the letter of award or when the Permit to Commence Work was obtained from the relevant authorities whichever was the later, after which liquidated damages would be imposed for late completion for each day that the works remained uncompleted.

5 As the plaintiff obtained the Permit to Commence Work on 12 December 2002 and did not commence work earlier, the completion period for the project would expire 15 months later on 11 March 2004.

6 By a supplemental agreement made between the parties and dated 2 December 2003 ("the Supplemental Agreement"), it was agreed that the completion date would be extended to 28 August 2004. The defendant further agreed to waive liquidated damages for the period of delay (12 March 2004 to 28 August 2004).

7 It was the defendant's case that from the start of the project, the plaintiff's works encountered delays. Further, although the plaintiff was required under the contract documents to submit a Master programme (for the construction schedule) to ACME for approval seven days before commencement of the works, this was not done. A preliminary Master programme that the plaintiff submitted at the first site meeting on 16 December 2002 was not in order, as the critical dates for testing, commissioning, inspection and handing-over of mechanical and electrical ("M&E") works were omitted. As such, ACME directed the plaintiff to revise and resubmit the Master programme.

8 The revised Master programme that the plaintiff submitted at the second site meeting on 16 January 2003 was again not in compliance with ACME's requirements.

9 However, even without a proper Master programme, ACME could tell from site visits that the plaintiff's works were behind schedule and did not correlate with the revised Master programme. Consequently, on 4 March 2003, ACME issued an Architect's Direction to the plaintiff requiring the plaintiff to submit a 'catch-up' programme for the delayed works.

10 The plaintiff finally commenced work in late March 2003. However, despite various requests and directions from ACME, the plaintiff showed no improvement in its progress. Indeed, the defendant alleged that Ho even showed reluctance to attend site meetings or to take the defendant's telephone calls, prompting ACME to issue a warning letter on 13 March 2003 that such conduct was unacceptable.

11 However, despite Ho's personal assurances to Murthy that the plaintiff would finish the project on time and in compliance with the contract documents, the plaintiff's progress of works worsened. The defendant's litany of complaints against the plaintiff included the following:

(a) failure to comply with the directions from the consultants (including ACME);

(b) delay in submission of documents; and

(c) mismanagement of the site.

The defendant alleged that the plaintiff's disregard for instructions and directions given by the defendant's consultants caused the collapse in April 2003 of a boundary wall that separated the

project from the adjacent site, due to its excavation works being done in an improper manner. Although ACME issued a second Architect's Direction to the plaintiff on 15 May 2003 to rectify the affected portions of the boundary wall, it took the plaintiff more than two months to complete the works.

12 In relation to site management, the defendant cited the inadequate work force of the plaintiff, delays in the delivery of materials on site and a lack of qualified staff to administer and oversee the plaintiff's works. In addition, the defendant complained of the plaintiff's refusal to furnish a performance bond, its refusal to accept a nominated sub-contractor for M&E works (in particular for the lifts) and the plaintiff's lack of diligence in executing the works.

13 On 3 June 2003, Nguyen, on behalf of ACME, wrote to the defendant expressing his concern with the lack of progress at site and with Ho's conduct (for which five complaints were listed). ACME's letter recommended that the defendant seek legal advice on the probable action to be taken. The letter concluded with a request for a proper contract to be in place, without which, ACME would be unable to administer the project properly.

14 According to the defendant, since the first site meeting on 16 December 2002, the plaintiff had been instructed to submit its performance bond. Although the plaintiff agreed to do so together with the insurance policy, it failed to provide the document even six months later. The plaintiff's omission to provide a performance bond was one of the reasons why the Supplemental Agreement was executed.

15 Because of the plaintiff's persistent refusal to carry out the instructions and/or directions of ACME, Nguyen issued the first of two termination certificates to the plaintiff on 27 June 2003 ("the first termination certificate") pursuant to cl 32(4) of the Conditions of Contract. The first termination certificate cited two grounds:

(a) failure to submit a sufficiently detailed make-up of prices pursuant to cl 5 of the contract; and

(b) failure to proceed with the work diligently and with due expedition.

16 Although the defendant accepted that ACME had good reasons to terminate the plaintiff's services, Murthy was also concerned that it would be more costly to find a replacement main contractor. The defendant also knew that the plaintiff was not financially sound as the plaintiff had a Subordinate Courts judgment entered against it. The judgment creditor had attempted to garnish payments due from the defendant to the plaintiff after it failed to garnish the plaintiff's bank accounts.

17 Ho, however, allayed the defendant's fears with the assurance that he would resolve matters with the plaintiff's judgment creditor. Murthy took Ho at his word as the defendant was concerned that terminating the plaintiff's services would cause further delay to the project not to mention the issue of recovering liquidated damages from the plaintiff for the delay already incurred. The defendant subsequently discovered that the plaintiff refused to pay the judgment creditor's claim.

18 The defendant alleged that it entered into the Supplemental Agreement at Ho's behest as the latter wanted changes to the contract documents. These included:

(a) an extension of time until 28 August 2004 for completion;

(b) removal of the lift installation from the plaintiff's scope of works;

(c) downgrading of some materials and items;

(d) removal of the requirement of a performance bond in exchange for which the defendant could withhold $494,000.00 in payment from the plaintiff until issuance of the Temporary Occupation Permit ("the TOP"); and

(e) all works certified beyond $1,064,375.00 would be paid less GST. The remainder of the works as certified would be paid from a construction loan from Hong Leong.

19 It was only at the site meeting on 7 January 2004 that the plaintiff submitted a proper Master programme to ACME. Nguyen's reaction was to write to the plaintiff on 12 January 2004 to say that the plaintiff's timelines for completion of certain works were impossible to achieve, in particular that for structural works to be completed by June 2004. Nguyen requested that the plaintiff submit a revised Master programme with a view to completing the project by 15 August 2004. In addition, at subsequent site meetings held between February 2004 and March 2004, ACME highlighted the impossibility of achieving the timelines set by the plaintiff in the Master programme. However, ACME never received a revised Master programme from the plaintiff.

20 The plaintiff failed to complete the project by 28 August 2004. Ho then requested first Murthy, and later, Murthy's father Dr CK Murthy ("Dr Murthy") for another extension of time, representing to them that the plaintiff would complete the project by 15 November 2004. Father and son reluctantly agreed, imposing the condition that the plaintiff would bear all interest charges incurred by the defendant resulting from the further delay. Ultimately, the interest charges incurred by the defendant were never paid by the plaintiff.

21 Despite the further extension of time granted by the defendant, the plaintiff's work did not improve nor was it expedited. ACME issued a delay certificate on 16 November 2004. The plaintiff eventually completed the project in 2005. The plaintiff contended that it completed the project on 18 March 2005 while the defendant (through ACME) contended that completion was much later - on 18 August 2005, that being the date of issue of the TOP. ACME issued its completion certificate on 26 December 2005.

22 Murthy claimed the defendant encountered problems when the project was handed over by the plaintiff. At the time of the handover (at which Murthy alleged the plaintiff caused chaos) the plaintiff had not yet rectified the many defects in the project. Because of Ho's poor interaction and attitude towards the purchasers of the units, some unit-owners refused to have anything to do with Ho whilst other purchasers decided to do their own repair and rectification works. Ho also took away the main door keys of the units with the result that the defendant's marketing agent (Orange Tee) was unable to show unsold units to prospective purchasers. The defendant changed the locks to all the main doors in order to gain entry and allow viewings by prospective purchasers. It was only after the change of locks that Ho returned the keys on 25 July 2006, by which time the keys were useless.

23 Ho on his part complained that the plaintiff was not paid on its progress claims in full. He alleged that ACME certified 25 interim certificates in the value of $4,109,267.00 when the plaintiff submitted 28 progress payment claims for $4,580,334.50. The plaintiff was only paid $3,337,636.03 (even taking into account the 5% retention sum for every progress payment). Payment was in "dribs and drabs" and was late (see Ho's affidavit of evidence-in-chief ("AEIC") at para 29). The last interim certificate issued by ACME to the plaintiff was dated 31 May 2005 for works completed as of 24 March 2005. Based on certificate no. 25 (and less back charges), the defendant owed the plaintiff $628,887.99.

Ho alleged that ACME failed to certify payment on the plaintiff's progress claims no. 26, 27 and 28 dated 28 April 2005, 28 May 2005 and 28 June 2005 respectively.

24 The plaintiff also claimed for additional works comprising of 12 items of a total value of $320,604.50, asserting that they were outside the scope of the plaintiff's works and done on ACME's instructions.

25 Ho further alleged that at the defendant's behest, he had signed a letter dated 2 March 2004 to Hong Leong to say the plaintiff had been paid $1,023,317.31 when the defendant had only received $670,000.00. Consequently, the plaintiff sent a separate letter to the defendant also dated 2 March 2004 to reflect the true payment position.

26 On 1 February 2006. ACME issued a (second) termination certificate to the plaintiff. Thereafter, the defendant regained control of the site, without which it could not address the concerns of the unit owners properly given the plaintiff's (Ho's) interference.

The pleadings

27 The plaintiff filed the present writ of summons with statement of claim on 24 January 2006. By the time of the trial, its claim had undergone two amendments – the plaintiff's liquidated claim for the balance of the certified sums was increased from $566,167.62 to $771,630.00 while its claim for undervaluation by ACME had been revised from $471,067.50 to $239,337.50. The plaintiff's total liquidated claim was $1,010,967.50.

28 I should point out that the hearing before me in May 2007 was the second tranche (in counsel's words) of this claim. The first tranche was heard on 9 October 2006 before Sundaresh Menon JC. Trial of the first tranche was scheduled to last until 20 October 2006. In the course of giving his evidence at the first tranche, Ho did a *volte face*. Whereas the plaintiff had previously acknowledged that it was bound by the contract documents, Ho claimed on 11 October 2006 that volume I of the contract documents did not apply to the plaintiff.

29 During Ho's cross-examination on 17 October 2006, counsel for the plaintiff confirmed volume I still applied. However, in the course of that day, Ho changed his mind as well as the plaintiff's case. After a hearing in chambers, Menon JC directed the plaintiff to re-amend its statement of claim. Trial was then adjourned to allow the plaintiff to amend its pleadings and costs thrown away were awarded to the defendant.

30 The plaintiff's revised case before me was based on a contract which was partly oral and partly in writing. The plaintiff alleged that the written part of the contract was the plaintiff's quotation for the sum of $4,257,500.00 that was accepted by the defendant (and included in Appendix A) together with the drawings in Appendix B. The quotation was set out in the plaintiff's progress claim no. 1 dated 28 March 2003. The oral terms of the contract were that:

(a) the plaintiff need not provide site supervision such as a site engineer;

(b) the plaintiff need not attend site meetings and instead, the defendant would provide a representative who would attend site meetings and update the plaintiff on what transpired in the meetings;

(c) the plaintiff need only provide a brief construction programme based upon which the defendant would provide a detailed construction programme;

(d) the plaintiff need not provide ground instrumentation;

(e) the defendant (not the plaintiff) would provide calculations for temporary works and make the necessary submissions;

(f) timber flooring would be constructed of Burmese teak instead of Brazilian teak;

(g) roof and basement waterproofing would be constructed with the use of waterproofing concrete (and additives);

(h) the aluminium windows would have 6mm thick glasses;

(i) no plastering was required for basement walls; and

(j) the plaintiff need only carry out M&E works necessary to obtain the TOP for the project.

31 The plaintiff further alleged that the defendant was estopped from demanding six items in the letter of award *viz*,

(a) a performance bond under para 6.1,

(b) a detailed work programme under para 6.3,

(c) site supervision under para 6.4,

(d) monitoring devices under para 8.0,

(e) attendance at site meetings under para 13.00; and

(f) weekly progress reports under para 14.00.

After it received the letter of award, the plaintiff alleged Ho objected to Murthy on the above terms and Murthy had orally assured and represented to Ho that the plaintiff need not provide the above items and would inform ACME accordingly. (The plaintiff referred to this episode as the first representation). In reliance on the first representation which the plaintiff alleged was made fraudulently, Ho had signed the letter of award on the plaintiff's behalf.

32 The plaintiff alleged that it agreed with the defendant on or about 19 September 2003, to some changes in the breakdown of prices in the plaintiff's quotation and this was recorded in Appendix C.

33 On or about 20 November 2003, Ho executed certain pages which were compiled by BKP to form part of the contract documents. These included page 6 of the Form of Tender, page D of the Articles of Contract, page 7 of the Supplementary conditions and page 1 of the Final Summary. At the end of October or early November 2003, Murthy allegedly approached Ho to execute a set of documents based on the tender documents BKP had prepared. Murthy allegedly represented to Ho that the defendant's financiers (Hong Leong) would not release funds from the construction loan the defendant had secured unless the plaintiff executed the contract documents based on the tender documents.

34 Relying on Murthy's representation (which the plaintiff referred to as the "second representation") that the contract documents were for "bank purposes", Ho executed the same. It was further alleged that when Ho signed the contract documents (at Payne's office), he was not

provided with the full set of documentation that was eventually compiled into volume I of the contract documents. In particular, Ho claimed he did not receive the Specifications and the Schedule of Works. Consequently, the plaintiff's statement of claim pleaded, volume I did not apply to the contract between the parties. The plaintiff alleged that the second representation was also made fraudulently by Murthy.

35 The plaintiff alleged that the defendant's termination of the plaintiff's employment on 2 February 2006 was wrongful, for which it claimed damages. The plaintiff had a separate claim for damages based on misrepresentation.

36 Not unexpectedly, the defendant denied the plaintiff's allegations. The defendant asserted that Murthy had at all material times informed Ho that the terms of the contract as contained in the contract documents would be binding on the parties and Ho had represented that the plaintiff would abide by the terms and conditions thereof.

37 The defendant admitted that ACME issued 25 interim certificates but asserted that the defendant had overpaid the plaintiff $316,450.36. The defendant referred to the Supplemental Agreement which stated that the sum of $494,375.00 could be withheld from the plaintiff until the TOP was obtained. Consequently, as the TOP had not yet been issued at the material time, the sum of $494,375.00 should be deducted from ACME's certification of $3,903,803.65. Further, a sum of $142,742.98 was paid directly to suppliers on the plaintiff's behalf and the sum should be charged back to and deducted from the plaintiff's payments. The defendant was also forced to pay the plaintiff another $50,000.00 on 22 October 2005, without which the plaintiff would not cooperate with the defendant to carry out further works on site.

38 According to interim certificate no. 25 issued by ACME, the plaintiff's works had been delayed by 197 days as of 31 May 2005. Pursuant to Appendix (i) of the contract, liquidated damages were payable at $1,500.00 per day; this amounting to $295,500.00 for 197 days.

39 Pursuant to cl 24(1) of the Conditions of Contract, ACME issued a delay certificate on 16 November 2004. There was another delay of 79 days (up to 1 February 2005) when ACME issued a termination certificate, for which liquidated damages amounted to $118,500.00. Liquidated damages for 276 days (197+79 days) totalled $414,000.00.

40 The defendant asserted that its calculations showed that it only owed the plaintiff a balance of $1,607,251.99 against which it claimed a set-off for liquidated damages, the overpayments and backcharges ([37] *supra*); and damages under the termination certificate.

41 It was the defendant's contention in its submissions that the plaintiff's change in position through Ho (described by counsel for the defendant as a third bite of the cherry) was indicative of dishonesty and lack of merit in the plaintiff's claim. The defendant speculated that the change was made because Ho knew the plaintiff's case was doomed.

The evidence

The plaintiff's case

42 Four witnesses including Ho testified for the plaintiff. Ho was in the witness stand first, to continue his testimony from 17 October 2006, when the first tranche of the trial was adjourned. The plaintiff's witness in the first tranche was Samuel Kuan, the structural engineer for the project from PEC.

43 I should add that the trial before me may not be the final tranche. Depending on my ruling, there may well be a third tranche of this suit when the claim and/or counterclaim, as the case may be, proceeds for assessment by the Registrar.

44 Ho's written testimony dwelt at length on how the plaintiff came to tender for, and be awarded, the project at the contract sum. In light of the plaintiff's pleaded allegation that the contract documents did not apply to the contract between the parties, it will be necessary to look at Ho's evidence in some detail.

45 In his AEIC, Ho deposed that he was acquainted with Murthy as Murthy was from CKM Consultants, a firm of structural engineers who worked with Ho on a previous construction project developed by another company, of which Ho was a director. Ho claimed that Murthy approached him to inquire about the cost of developing a piece of land at Kovan Road of about 20,000 square feet with a built-up area of approximately 40,000 square feet. Ho gave a rough estimate of about $3.6m as his (Ho's) cost for a project of ordinary design in the Hougang area. Ho claimed he declined when Murthy inquired whether Ho wanted to be the main contractor. Ho was told by Murthy that the defendant had paid $6.1m as the land cost. Ho commented that with the development charge of $1m together with construction costs of $4m, the defendant could take a loss on the project as pricing in the Kovan area was around $500.00 -$600.00 per square foot at the material time.

46 Ho said Murthy requested his help to find a contractor and also to give a quotation so that Murthy could use it as a basis for comparison with those of other contractors. Ho agreed and was provided with some drawings and a form to complete. Ho gave a quotation in the sum of $4.1m. When asked subsequently by Murthy, Ho said his quotation did not include GST. At Murthy's request, Ho completed a more detailed form and added GST to his quotation so that the figure increased to the contract sum.

47 Subsequently when Murthy inquired, Ho said he arrived at the figure of $4,257,500.00 based on the drawings Murthy had provided. Murthy again requested Ho to provide another quotation based on a thick volume of tender documents and a set of drawings. Initially, Ho refused saying he was not interested in tendering. Ho relented after repeated requests from Murthy and said he had told Murthy, in the course of flipping through the tender documents, that the cost would be more than $4.1m. Ho took the tender documents home, filled in the forms within the tender documents and a price of $5.2m ("the second quotation"). He returned the tender documents to Murthy a few days later without making a copy for himself. Ho, however, kept the drawings.

48 Subsequently, Murthy inquired of Ho why the second quotation was much higher than Ho's previous quotations. Ho replied that it was because the costs would increase if construction was to be carried out in accordance with the many requirements and specifications set out in the tender documents. The contractor would also have to incur higher staff costs.

49 Later, Murthy inquired of Ho whether the plaintiff could be the main contractor as tenders submitted to the defendant by other contractors all exceeded $5m. Ho again declined, pointing out that based on the tender documents, the pricing would be more than $5m and the only way to save on cost would be to do away with the requirements and specifications in the tender documents.

50 After Murthy's repeated requests, Ho finally agreed that the plaintiff would be the contractor for the project but on the basis that (and I quote from Ho's AEIC at para 23) "the works be based only on the drawings and my quotation for a development is of a standard of a usual development in the Hougang area." Ho claimed he also said (to which Murthy agreed) that in terms of materials, the plaintiff would not provide what was in the specifications but reasonable alternatives – as examples,

Burmese teak would be used for bedroom flooring in place of Brazilian teak and for waterproofing he would use additive concrete instead of ordinary waterproofing membrane system.

51 At the request of Murthy (who said the second quotation was not detailed enough) Ho claimed he provided a more detailed quotation, which was also revised downwards to $4,257,500.00. Ho contended that the letter of award was the only document that governed the parties' contractual relationship until 20 November 2003, when volume I of the contract documents was signed.

52 As Ho's AEIC echoed the plaintiff's statement of claim (see [30] to [35] *supra*), I shall not revisit his version of the facts which in any event was disputed by the defendant.

53 Ho devoted the greater part of his AEIC to the plaintiff's claims for underpayment, under-certification and additional works. Nothing was said to rebut the defendant's many allegations on the plaintiff's poor workmanship, omissions and delays in carrying out the works. Neither did he refute Murthy's AEIC wherein Murthy addressed each and every item comprised in the first and second representation. Further, apart from a brief reference (at para 41 of his AEIC) that the parties signed the document on 2 December 2003 and exhibiting a copy thereof, Ho made no reference whatsoever to the Supplemental Agreement in his AEIC. In cross-examination however, Ho admitted (at N/E 291) that the Supplemental Agreement was binding on the plaintiff. In its Further and Better Particulars on the Reply and Defence to Counterclaim filed on 16 October 2006, the plaintiff alleged that Yeh Leong Moi ("Sharon") of HYME had represented to Ho a few days after 18 December 2002, that the contract documents were for payment purposes.

54 The plaintiff subsequently called Payne to corroborate Ho's evidence. Payne was the BKP representative who had prepared the tender documents and provided the same to shortlisted contractors (who did not include the plaintiff). Payne left Singapore for England in December 2003. In his AEIC, Payne deposed that the tender documents did not include the M&E documents (which included volume II and specifications). Payne testified that when tenders closed for the project, the tenders received ranged from the high side of $5m to $9m.

55 It was at a meeting with Murthy to discuss the steep tender prices that Payne was told that the plaintiff had quoted around $4m to $5m for the project. Payne was surprised (because the plaintiff did not tender for the project) and (together with Nguyen) expressed his concern (because the plaintiff's pricing was low for what was required in the tender documentation) to Murthy. Against Payne's and Nguyen's advice however, the defendant insisted on appointing the plaintiff as the contractor, without going through the motion of conducting tender interviews with the plaintiff as Nguyen had done with other low tenderers.

56 Payne subsequently prepared the letter of award which he drafted on the basis that the successful contractor had undergone the tender process. He confirmed that for about a year, the only contractual document signed by the plaintiff was the letter of award. Payne opined that in the course of the project, it became clear to him that the plaintiff and the defendant had a personal arrangement on what was required of the plaintiff for the project. As he was not privy to the terms of the personal arrangement, it became impossible for Payne to administer the project. He raised the matter with Murthy and Nguyen but the issue was never resolved.

57 It was only after his many reminders to the defendant to get the plaintiff to sign a formal contract based on the tender documents that Murthy finally told him in October/November 2003 that the plaintiff had agreed to do so. On 20 November 2003, Ho called at Payne's office and signed what became volume I of the contract documents (not yet bound then). Payne deposed that he did not show all the documents in volume I to Ho; in particular, the specifications and M&E documentation.

Subsequently, after he had bound up volume I, Payne passed copies thereof to Nguyen for distribution. He was not aware who received the copies.

58 Not surprisingly, counsel for the defendant attacked Payne's testimony pointing out that Payne's AEIC made no reference whatsoever to the Supplemental Agreement notwithstanding the fact that Payne had drafted the document. Payne's answer during cross-examination (at N/E 413) that the omission was "an oversight" on his part was not accepted by the defendant in its closing submissions even though Payne acknowledged that the plaintiff was bound by the Supplemental Agreement. Payne was described by the defendant as an unreliable witness as:

(i) there had been a significant time lapse since he left Singapore;

(ii) he spent the least amount of time on the project amongst the consultants; and

(iii) he was not familiar with the voluminous documentation before the court.

When he left Singapore in late December 2003, the project (according to Payne's own evidence at N/E 486), was only at the stage of structural and some basic M&E works.

59 Although Sharon (PW4) was the plaintiff's witness, she denied (at N/E 527) that she had told Ho that volumes I and II were meant for payment purposes only. On the contrary, she had told Ho that the two volumes were the contract documents, for which reason she had queried Ho in December 2002, when he did not fill in the unit prices but only the summary of tender in the contract documents. She added that she lent Ho her copy of the electrical contract and although he assured her at the first site meeting on 16 December 2002 (see AB 202) that he would return to HYME the M&E tender documents by 18 December 2002, he never did. Sharon was emphatic that Ho had never said to her that volume II of the contract documents did not apply (at N/E 535).

The defendant's case

60 Murthy was the key witness for the defendant. Others who testified for the defendant were Nguyen, Dr Murthy and Sharon's colleague Neo Bee Keaw ("Pauline").

61 Murthy's AEIC addressed at length how the project came to be awarded to the plaintiff as well as the first ([31] *supra*) and second representations ([34] *supra*) he allegedly made to Ho. Murthy's attention was drawn to the defendant's two letters (which he signed) to the plaintiff, both dated 19 September 2003 (at AB 450/453), where he accepted the plaintiff's breakdown of work description and set out the defendant's mode of payment as follows:

(a) full payment up to $500,000.00 of work certified;

(b) the next $525,000.00 of work certified when TOP was obtained;

(c) remainder of the work certified from Hong Leong's financing.

The following was also stated:

> While the ... breakdown will be included in the contract documents, the mode of payment, which is a private arrangement between us, shall not be mentioned in the contract documents.

62 When cross-examined on the "private arrangement" (at N/E 585-586) referred to above, Murthy denied that the change in the mode of payment was due to the defendant's financial inability to pay

the plaintiff progressively. Murthy explained that Payne felt it was too difficult to incorporate the above mode of payment into volume I of the contract documents and suggested that it be a separate matter altogether. Murthy disagreed that the "private arrangement" meant that he did not want Hong Leong to know that the plaintiff had not been paid in full by the defendant.

63 The defendant's other witnesses were consistent in their testimony that the plaintiff/Ho at all material times acted on the basis that volumes I and II governed the project.

64 In his AEIC, Nguyen said that his view that the plaintiff's quality of work was below industry standards was indeed proven true because the plaintiff's poor workmanship and lack of co-ordination became apparent in the course of Nguyen's administration of the project. Nguyen's AEIC contained a litany of complaints about the plaintiff's failure to comply with the building contract in general and on Ho's conduct in particular.

65 Bearing in mind that one item in the first representation ([30] *supra* at (b)) was that the plaintiff need not attend site meetings, it was surprising that Ho did not object whenever Nguyen wrote to record the plaintiff's absence from site meetings. An instance would be ACME's letter to the plaintiff dated 13 March 2003 (at AB 232) where Nguyen wrote:

> Furthermore, you have failed to report to two site meetings and literally have not been contactable. We stress that this behaviour/conduct is less than professional and is unacceptable. We require you to urgently contact us or Mr S Selvakumar to arrange for an urgent meeting to resolve this matter amicably.

If the plaintiff need not attend site meetings, why did Ho attend any site meetings at all? Indeed, he was absent from only two site meetings, *viz*, nos. 4 and 11.

66 In the same vein, if the plaintiff (as Ho contended) needed to only waterproof the roof and basement by using waterproofing concrete, it was strange that the plaintiff/Ho did not object to ACME's fax dated 30 January 2004 (AB 668) headed "Waterproofing to the Basement" where Nguyen's sister Bonnie Nguyen wrote: "This is to confirm that you will submit to us the waterproofing system used for the Basement…."

67 At this juncture I need to digress by referring again to Ho's testimony. In the course of cross-examination (at N/E 301), counsel (as well as the court) inquired why Ho had never once written to the defendant and/or the consultants to state on record that the "private arrangement" (according to Ho's version) meant that the plaintiff could delete from the contract the ten items ([30] *supra*) and six items from the letter of award ([31] *supra*), (which also comprised the first and second representations respectively made to him by Murthy). Ho's wholly unconvincing answer was that he was a bit stupid. That cannot be true, as, when the plaintiff received a lesser amount of payment from the defendant than what was stated in Ho's letter dated 2 March 2004 to Hong Leong ([25] *supra*), Ho immediately wrote to the defendant on the same day to put the record straight.

68 Nguyen took issue with the plaintiff's allegations of under-certification of the plaintiff's claims by ACME. He referred to the numerous letters ACME had exchanged with the plaintiff on the subject, wherein he had pointed out that ACME's certification was in accordance with the contract.

69 I should add that similar to the testimony of the defendant's other witnesses, Nguyen's evidence was not discredited in cross-examination and his veracity was not cast into doubt.

The findings

70 The only issue I have to determine is whether volumes I and II formed part of the building contract between the parties. If they did, there will be no necessity for me to consider the plaintiff's claims regardless of whether they are based on misrepresentation (fraudulent or otherwise) or in estoppel; they would fail *in limine*. What is noteworthy about Ho's AEIC is the fact that he made no reference whatsoever to nor did he address, any of the allegations comprised in the first and second misrepresentations and which formed the *gravamen* of the plaintiff's action. Consequently, as the plaintiff did not pursue its claim in fraud but only proceeded on estoppel, I need not deal with the former at all. As an aside, I note that in the defendant's closing submissions, the opposite was argued – that the plaintiff did not pursue its claim in estoppel but only in fraud.

71 If the plaintiff's claim is dismissed, only the counterclaim of the defendant will go for assessment should I find in the latter's favour.

72 In its closing submissions, the plaintiff accepted that the Supplemental Agreement formed part of the contract between the parties. If that was the plaintiff's latest position, it contradicted the stand adopted by Ho in the witness box and in his written testimony; that volume I did not apply. I found it difficult to ascertain the plaintiff's case at any point of time as its stand (through Ho) kept shifting. Ho's position before me was that volume I of the contract documents did not apply. However earlier (at the first tranche of the hearing and when the defendant applied for a stay of proceedings because of an arbitration clause in volume I of the contract documents), his view was that volume I did apply while in its closing submissions (paras 12 and 44), the plaintiff said volume I applied only in part.

73 Logically, there cannot be a Supplemental Agreement unless there is a principal agreement in the first place. It is noteworthy that in the preamble to the Supplemental Agreement, Recital A states:

> The client [the defendant] and HPKR [the plaintiff] have on 20 November 2003 entered into a contract ("the main contract") for the construction, completion and maintenance of the proposed five-storey apartment (22 units) with a basement car park and swimming pool on lot 144-47, MK22 at 89 Kovan Road, Singapore.

74 Interestingly enough Payne did not corroborate the plaintiff's allegation that the contract documents were for payment purposes only. Payne had written on BKP's behalf to ACME on 18 May 2004 (at AB 5166) in response to the plaintiff's complaint dated 12 May 2004 on alleged under-certification by BKP as follows:

> HPKR [the plaintiff] allude to the fact that this contract was prepared for "bank purposes" whatever that is supposed to imply. As we were instrumental and intimately involved in preparing this contract, we can categorically state that as far as we were concerned, this was not the intent of such a document.

75 It was also Payne's evidence (at N/E 387) that he was aware that M&E contracts were part of volume II of the contract documents. The fact that the plaintiff's case was undermined by the testimony of its own witness speak volumes of the veracity of the plaintiff's claim of misrepresentation.

76 It was not disputed that volume I of the contract documents was signed by Ho and it was part of the tender documents that he had seen. Consequently, under the parol evidence rule (encapsulated in s 94 of the Evidence Act (Cap 97, 1997 Rev Ed), the plaintiff cannot introduce oral terms which contradicted the terms of volume I to state that the ten items therein were omitted from

its scope of works. I had earlier (see [67] above) commented on the absence of any correspondence from the plaintiff to the defendant or its consultants to record that such omissions were agreed between the parties.

77 As for volume II of the contract documents, it comprised of four separate contracts for the M&E works for the project. The defendant's closing submissions referred to a number of facts which contradicted Ho's claim that the only M&E works the plaintiff was required to carry out were those that were necessary to obtain the TOP for the project. These were:

(a) volume I of the contract documents made specific reference to volume II;

(b) the contracts in volume II were handed to Ho some time in October 2002 (according to Murthy's AEICat paras 35-39);

(c) volume II formed part of the tender documents handed to the plaintiff (according to the AEIC of Pauline at para 14);

(d) the plaintiff priced the air-conditioning works at $185,000.00 in the Final Summary (at AB 4607);

(e) the swimming pool prices totalling $21,800.00 were inserted into volume I of the contract (at AB 4601) and it was built by the plaintiff albeit with omissions;

(f) the plaintiff signed (which Ho did not dispute) the Electrical Works and the Plumbing and Sanitary contracts on 18 December 2002;

(g) Ho had also signed the remaining two contracts, *viz*, the swimming pool and air-conditioning, mechanical and ventilation ("ACMV") contracts, the copies of which he took from HYME and failed to return to HYME, despite promising to do so;

(h) the sprinkler/fire protection systems were a variation item which the plaintiff built and was paid;

(i) the lifts were meant to be installed by Otis Elevator Pte Ltd as a nominated subcontractor of the plaintiff but were eventually installed by the former in a direct contract with the defendant (see Pauline's AEIC at para 11(e)); and

(j) the plaintiff carried out all items of M&E works as specified (albeit there were omissions) and was paid accordingly.

78 If indeed Ho's contention was true, *viz*, that volume II of the contract documents was only meant for payment purposes, why did the plaintiff carry out any M&E works at all? More significantly, the plaintiff was paid for ACMV works and construction of the swimming pool. According to Pauline, the ACMV contract was a tender document.

79 In her AEIC, Pauline deposed that the first time the plaintiff raised its assertion that it would only carry out M&E works necessary to obtain the TOP was in Ho's letter dated 27 October 2005 (see AB 1923-1925), well after the project was completed, which would be 18 March 2005 according to the plaintiff and 18 August 2005 according to the defendant. In an earlier letter from the plaintiff dated 18 July 2005 (at AB 1692) to HYME, Ho had written that the plaintiff's responsibility for the project was only within the building and the plaintiff had done wiring for external works (which formed

part of volume II works) for "goodwill".

80 As the defendant pointed out in its submissions, the plaintiff could not have performed any M&E works without referring to the M&E contracts all of which were in volume II of the contract documents. Above all, if indeed the M&E works were to be excluded from the plaintiff's scope of works, why did Ho price each and every item of the same in his summary of tender for the project and why did he carry out any of the works at all? It was absurd of the plaintiff to contend (as it did in its letter dated 18 July 2005) ([79] *supra*), that it carried out the works as a goodwill gesture. No right-minded contractor would do any major works, particularly M&E works, for altruistic reasons just as no sane contractor would take on a construction project unless he really wanted to do it.

81 My observation also puts paid to Ho's constant refrain (in his AEIC) that the plaintiff was not keen to be the main contractor for the project but only took on the assignment reluctantly because Murthy requested his assistance repeatedly. It seems to me more likely than not that the plaintiff, contrary to Ho's protestations, was very keen to secure the project, the result being that Ho's pricing in the summary of tender for the project was the lowest as compared to other contractors who had tendered. Having either not made any profit or worse, lost money on the project, the plaintiff/Ho attempted to rewrite the contact Ho had signed with the defendant by claiming that volume II of the contract documents did not apply and volume I only applied in part or not at all (according to Ho's evidence at various stages).

82 As with the plaintiff's claim that ten items were omitted from volume I of the contract, the evidence adduced at the trial (from Sharon and Pauline) not only did not support, but was totally inconsistent with, the plaintiff's case that volume II was meant for payment purposes only.

83 To recapitulate the salient points of the evidence adduced in court, Ho was proved to have attended all but two site meetings, the plaintiff carried out (and was paid for) M&E works, the company provided construction programmes (although not to ACME's satisfaction), the plaintiff had to, (and did), provide a waterproofing system for the roof and basement and it had to (and did) adhere to specifications set out in the tender/contract documents. Lastly, the plaintiff was obliged to (but did not) provide the performance bond despite Ho's repeated promises to furnish the same, as reflected in minutes of site meetings.

84 If at all estoppel could be pleaded, it can only be raised by the defendant, because Ho's conduct and the plaintiff's correspondence (before 27 October 2005) led Murthy and the defendant's consultants to believe that both volumes of the contract documents governed the building contract.

85 I conclude with my observation that Ho was a totally unreliable witness as compared to the witnesses for the defendant. It was almost impossible to get straight answers from him during cross-examination.

Conclusion

86 Accordingly, I dismiss the plaintiff's claim with costs to the defendant. As the plaintiff produced no evidence to refute the many allegations that were the basis of the counterclaim, I award the defendant interlocutory judgment with costs on the counterclaim. Damages (including liquidated damages) on the counterclaim shall be assessed by the Registrar, and the costs of such assessment, together with interest on any sum assessed, shall be reserved to the Registrar. Any shortfall in or overpayments by the defendant to the plaintiff, based on the certificates issued to-date by ACME (which the defendant did not dispute), will be taken into account in the damages due to the defendant when assessed.