Fongsoon Engineering (S) Pte Ltd *v* Kensteel Engineering Pte Ltd [2011] SGHC 82

Case Number : Suit No. 67 of 2008

Decision Date : 06 April 2011

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Joseph Ignatius (Ignatius J & Associates) for the plaintiff; Wong Yoong Phin (Wong Yoong Phin & Co) for the defendant.

Parties : Fongsoon Engineering (S) Pte Ltd — Kensteel Engineering Pte Ltd

Building and Construction Law

6 April 2011 Judgment Reserved.

Belinda Ang Saw Ean J:

Introduction

1 In the present action, the plaintiff, Fongsoon Engineering (S) Pte Ltd, claims moneys due to the plaintiff under a lump sum contract for the fabrication and erection of the main structure of the Su Tu Vang switchgear (hereafter referred to as "the Sub-Contract Works"). The other claim relates to variation or additional works requested by the defendant, Kensteel Engineering Pte Ltd. The defendant's counterclaim against the plaintiff is for expenses incurred by the defendant in rendering assistance to the plaintiff to complete the Sub-Contract Works. Mohd Puad bin Md Isa ("Mohd Puad"), the plaintiff's business manager, and Ng Chin Hong, commonly known as Francis Ng ("Francis Ng"), the defendant's chief executive officer, were the only witnesses called to testify for the respective parties.

The parties' pleaded cases

2 The plaintiff's pleaded case is based on a lump sum contract for the Sub-Contract Works. Whilst the defendant rejects in entirety the plaintiff's claim in the sum of $403,072.74 for variation works, the defendant's refusal to pay the outstanding progress claims in the sum of $121,621.16 was on account of its counterclaim against the plaintiff.

3 In its Defence and Counterclaim, the defendant pleaded that the plaintiff was contractually obliged to complete the Sub-Contract Works by 6 May 2007. However, the plaintiff failed to meet the contractual deadline, and was therefore in breach of contract. The defendant, in adherence to its duty to mitigate following the plaintiff's breach, proceeded to and did render assistance to the plaintiff to facilitate completion of the Sub-Contract Works as well as rectification of defective works. As a result, the defendant expended the sum of $201,649.53 and is, therefore, seeking payment in its counterclaim against the plaintiff. In addition, the defendant denies issuing any variation orders to the plaintiff. In any event, the defendant's pleaded case is that the plaintiff was obliged to finish the Sub-Contract Works by a stipulated time, and changes to the work-plan, if any, were due entirely to plaintiff's obligation to speed up its work after its initial delay. Accordingly, the defendant has denied any responsibility whatsoever.

4 In its Reply and Defence to Counterclaim, the plaintiff denied that it was in breach. It contended that it had a period of ten weeks to complete the Sub-Contract Works, and that the period of ten weeks would not commence until the plaintiff had received all the steel required for the Sub-Contract Works. The defendant only completed its supply of steel sometime in mid April 2007.

What were the terms of the lump sum contract?

5 The debate is over the deadline by which the plaintiff was supposed to complete and hand over the Sub-Contract Works. Ordinarily, the applicable deadline can be easily ascertained from the terms of the contract. Unfortunately, the parties were unable to agree on the documents that evidenced the contract between them, or even the date on which a binding contract was formed. As such, the dispute became rather protracted.

6 The defendant maintains that the contract gave the plaintiff a total of ten weeks to complete the Sub-Contract Works, and time would start to run from *the commencement of the work*. The plaintiff commenced work on 22 February 2007, and the Sub-Contract Works should have been completed by the end of April 2007. In contrast, the plaintiff's case is premised on a different start date: the ten weeks to complete the Sub-Contract Works was to start from *the total receipt of the steel*. The defendant's delivery of the steel material was completed on 20 April 2007. As such the period of ten weeks should start from that April date. In support of its contention, the plaintiff relied on a 3-page document dated 7 March 2007 which was signed and initialled by the parties. According to the plaintiff, this 3-page document is the contractual documentation governing the rights and obligations of the parties.

7 This dispute came about because of the inclusion of an additional term shortly *after* the defendant had signed the 3-page document and then *passed* it on for the plaintiff's execution. A good starting point is to examine the course of the correspondence between the parties to determine the date on which the contract between them was concluded, as well as the terms contained within that contract.

Initial quotation by the plaintiff

8 On 24 January 2007, the defendant sent an e-mail to the plaintiff attaching the terms and conditions and the schedule of work. The plaintiff was specifically asked to review the terms and conditions and to revert with its comments, if any. The plaintiff's witness, Mohd Puad, confirmed that the terms and conditions referred to in the e-mail of 24 January 2007 were attached to the e-mail and received by the plaintiff. He identified the documents exhibited in his affidavit of evidence-in-chief at pages 36 to 54 as the terms and conditions received by the plaintiff. [note: 1] The documents in question comprised "Exhibit A - Form of Agreement, Part II - Sub-contract terms and conditions (hereafter referred to as "the STC"). In reply, the plaintiff on 30 January 2007 quoted a total price of $480,000 excluding GST and wrote:

> Dear Sir,
>
> We thank you for your enquiry and are pleased to quote as follows:
>
> ...
>
> Delivery Time: 14 Weeks
>
> Terms of offer: 20% deposit upon confirmation of order. Balance by progress claim upon invoice.

It is common ground that up to this point, there was no binding contract.

Letter of intent

9 On 9 February 2007, the defendant e-mailed its Letter of Intent to the plaintiff. The Letter of Intent read as follows:

> **Re: Letter of Intent for (Structural fabrication and erection of the Su Tu Vang Switchgear/CCR Building Award)**
>
> **...**
>
> In reference to your quotation on the above subject matter, we have reviewed and perused your quotation and we are please[d] to award your Company the contract for the structural fabrication & erection of the Su Tu Vang Switchgear CCR Building. Please treat this letter of intention as an authorization to proceed with the work, while the Sub Contract is being prepared.
>
> The Sub-Contract shall consist of:
>
> 1. Scope of Work for structural fabrication and erection of the Su Tu Vang SwitchGear/CCR Building
>
> 2. Engineering Deliverable starting with Reference No. R2837-006013-ST-0WG001 to R2837-006013-ST-0WG0023
>
> Please confirm acceptance of this letter of intent by signing and duly returning the signed copy by end of business day 9 February 2007.

10 The e-mail of 9 February 2007 read as follows:

> Dear Edmund,
>
> As spoken, Attached is the Letter of intent for your company to proceed with the work. As discussed in the meeting, it was agreed the following:
>
> 1) The final subcontract price is S$400,000.00 (exclude GST)
>
> 2) The Fabrication and erection schedule to be completed by 10 weeks
>
> 3) The milestone payment shall be 10% upon contract sign and the rest will be progressively payment upon work completion.
>
> We are preparing the subcontract agreement (Draft will be email to you for review by early next week) and we can sign once all are agreed.
>
> ...

11 I should mention that the usage of letters of intent that give rise to some limited rights and liabilities is common in the construction business. Typically, the employer states that it intends to enter into a contract with the contractor and requires the contractor to start work while the formal contractual documentation is being prepared. Ultimately, the full effect of any letter of intent depends entirely on the objective meaning of the language used as well as the context in which it

was given.

12 In my judgment, the Letter of Intent coupled with the defendant's e-mail of 9 February 2007 make up the defendant's offer for the Sub-Contract Works. The terms of the offer were those set out in the e-mail, Letter of Intent and the STC. I should add that the document entitled "Scope of Work" and dated 23 January 2007 was exhibited by Mohd Puad in his affidavit of evidence-in-chief at p58. The witness confirmed that it was provided to the plaintiff by the defendant via e-mail of 24 January 2007. [note: 2] Mohd Puad also confirmed that the Scope of Work mentioned in item 1 of the Letter of Intent was referable to the document at p58 of his written evidence. [note: 3] For present purposes, under the Scope of Work dated 23 January 2007, the defendant was to supply primary and secondary steel to the plaintiff.

Did the plaintiff accept the defendant's offer

13 The plaintiff's reply of 10 February 2007 indicated that it was accepting the contract but with additional terms:

> Dear Tjek Poa;
>
> We refer to your - and the Letter of Intent, dated 9/2/2007.
>
> We hereby agreed and confirmed in principle for the above job but with the following conditions:
>
> 1) All payment and progressive payment shall be quantified as follows:
>
> - 10% of the Total Sub-Contract upon contract sign
> - 20% fortnightly progressive payment of the remaining Contract Sum
>
> 2) Progressive payment shall be fortnightly and payment shall be made to us 1 week after submission of claim.
>
> 3) We also reserved the right to exercise "Stop of Work", should your company fail to make progressive payment after submission of our claim.
>
> For your review and retention. Thank you.

14 On 12 February 2007, the defendant replied to the plaintiff in the same e-mail thread with its comments. The defendant wrote:

> Dear Edmund/Violet,
>
> Pls note my response below in Blue. Hope all clear and agreeable. Pls concur.

[LawNet Admin Note: For display purposes, the text that was coloured in blue in the source document has been emphasised in bold and underlined below.]

15 The text in blue was as follows:

> · 20% fortnightly progressive payment of the remaining Contract Sum – **Progressive payment shall depend on the progress achieved**

2 Progressive payment shall be fortnightly and payment shall be made to us 1 week after submission of claim. – **Payment shall be made the earliest within 2 weeks from invoices.**

3) We also reserved the right to exercise "Stop of Work", should your company failed to make progressive payment to us after submission of our claim. – **"Stop of Work" shall be applicable if payment is not made within 30 Days**

16 In my view, the plaintiff's e-mail reply of 10 February 2007 was a counter-offer which was accepted by the defendant on 12 February 2007. The text in blue did not contain counter proposals, but rather the defendant's attempts at stating its understanding of the ambiguous and imprecisely worded terms put forward by the plaintiff. In my judgment, a concluded and binding contract was therefore formed between the parties on 12 February 2007, the terms of which included:

(a) the defendant's STC (see [8] above); and

(b) the Letter of Intent and e-mail of 9 February 2007 (see [9]-[10]).

Subsequent events

17 On 13 February 2007, the plaintiff in an e-mail attempted to change the payment terms. It also tried to add other conditions like liquidated damages for late completion, and incentives for early completion. The defendant did not reply to this e-mail.

18 On 15 February 2007, the defendant sent the plaintiff an undated copy of the contract ("the Contract") via e-mail. The e-mail read as follows:

Dear Edmund,

Refer to Letter of intent given to you. Attached is the contract which we will be signing for the contract of structural fabrication. Pls review and confirm agreement and we will make the original for signature.

19 The original copy of the Contract was pre-signed by the defendant and forwarded to the plaintiff for execution. Shortly thereafter, the defendant by e-mail dated 17 February 2007 requested the plaintiff to send its workers to the worksite on 22 February 2007 for a safety induction, as well as to commence the cutting of steel. The plaintiff's personnel showed up at the yard as instructed.

20 The plaintiff signed the Contract, dated it 7 March 2007, and returned it to the defendant on a date which the defendant's witness could not recall. [note: 4] Unbeknown to the defendant, the plaintiff's Edmund See had handwritten against the provision in the Contract that the "delivery time" was to be "10 weeks end of April 2007", the following:

(To be revised – 10 weeks from total receipt of raw material)

21 The plaintiff's attempt to change the completion date to a later one was unilateral. It was ineffective as it was inserted well after the contract had been concluded, and without the prior knowledge and consent of the defendant. There is no evidence that after the Contract was returned, the defendant had by conduct subsequently agreed to the plaintiff's revision.

22 To summarise, the defendant's e-mail of 9 February 2007 required "the Fabrication and erection schedule to be completed by 10 weeks". There is no dispute that this referred to completion of the Sub-Contract Works within ten weeks from commencement of work, as Puad had candidly admitted to this during cross-examination. [note: 5] Accordingly, I hold that the plaintiff was contractually obliged to complete the Sub-Contract Works within ten weeks of commencement, starting from 22 February 2007. However, matters developed into the second dispute.

Delay

23 The second dispute between the parties resolves around the issue of whether the plaintiff or the defendant was responsible for the delay in the plaintiff's completion of the Sub-Contract Works. Although the defendant did not make any claim for damages for the plaintiff's late completion of the construction works, a substantial part of its counterclaim against the plaintiff was for time and money expended in helping the plaintiff to speed up the Sub-Contract Works. Naturally, if I find that the defendant was responsible for the plaintiff's late completion of the Sub-Contract Works, then that part of its counterclaim against the plaintiff would fail.

24 I note that there was no extension of time clause in the contractual documents. In the absence of such a clause, an employer would not be allowed to insist on completion by the due date if he was responsible for part of the delay, and he would not be able to rely on any liquidated damages clause (see generally *Dodd v Churton* [1897] 1 QB 562; *Trollope & Colls v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601). In common parlance, time is said to be "at large".

25 Even though time for completion is at large, the contractor has to complete the works within a reasonable period. If the contractor fails to do so, the employer will be able to sue to recover general damages resulting from the contractor's breach (see per Salmon LJ in *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 114 at 121). What constitutes a reasonable time is a question of fact. As a guide, how the courts in some cases have determined the period of reasonable time is by simply adding the effect of the employer's delay to the contractual deadline. This is usually regarded as a fair method because it is able to strike an appropriate balance between not allowing the employer to take advantage of its own fault, and not giving the contractor any other additional time other than that caused by the employer's delay (see generally *Balfour Beatty Construction Ltd v London Borough of Lambeth* [2002] 1 BLR 288).

26 The contractor has the burden of proving that the employer's actions caused the delay in completing the works. In *John Doyle Construction Ltd v Laing Management (Scotland)* Ltd 2004 S.L.T. 678, the court held at [35]:

> Ordinarily, in order to make a relevant claim for contractual loss and expense under a construction contract (or a common law claim for damages) the pursuer must aver (1) the occurrence of an event for which the defender bears legal responsibility, (2) that he has suffered loss or incurred expense, and (3) that the loss or expense was caused by the event. In some circumstances, relatively commonly in the context of construction contracts, a whole series of events occur which individually would form the basis of a claim for loss and expense. These events may interreact with each other in very complex ways, so that it becomes very difficult, if not impossible, to identify what loss and expense each event has caused. The emergence of such a difficulty does not, however, absolve the pursuer from the need to aver and prove the causal connections between the events and the loss and expense.

27 As the passage quoted above made it clear, causation is not easy to prove. Even if the

employer's actions prevented the contractor from working on a certain part of the project, but the contractor was nevertheless still able to continue to work uninterrupted elsewhere, the courts might not find that the employer had caused any delay to the contractor. To succeed, the contractor would have to prove that the works had to be completed in a sequential manner, and that no work could be done until the employer's default had abated or resolved. The difficulty with discharging the burden of proof explains why many construction contracts have provisions allowing a neutral party like an assessor to determine whether or not there has been delay by the employer, and its resulting effects. If the dispute ends up in court, expert evidence often plays an important part in determining whether the employer's default has caused the delay which the contractor alleges.

28 The plaintiff's allegations of delay fall into four main categories. They are:

(a) The defendant's failure to supply steel to the worksite on time;

(b) The defendant's change of plans;

(c) The defendant's failure to provide proper equipment on the worksite on time; and

(d) The stop orders issued by the defendant's client.

(a) The defendant's failure to send steel to the worksite on time

29 The plaintiff's allegation is that the quantity of steel on the worksite was insufficient for its workers to commence work on 22 February 2007. In addition, the supply of steel to the worksite was intermittent, and it was only until 21 April 2007 that the supply of steel was completed.

30 For its part, the defendant conceded in its closing submissions that it was late in supplying some of the steel to the worksite. However, by 16 March 2007, at least, 80% of the steel was already been sent to the worksite. [note: 6] Hence, the defendant submits that the period of ten weeks to complete the Sub-Contract Works commenced from 16 March 2007.

31 I now turn to examine the alleged delay caused by the defendant after 16 March 2007. I begin with the project schedule sent to the plaintiff on 24 January 2007. The relevant portion of the schedule states: [note: 7]

Job	**Early Start**	**Early Finish**
Cutting of Primary Steel	20 Feb 07	02 Apr 07
Fit and Assembly of floor frame structure	27 Feb 07	09 Apr 07
Cutting of Secondary Steel	07 Mar 07	10 Apr 07
Fit-up and Assembly Roof frame structure	15 Mar 07	25 Apr 07

Install floor plates	19 Mar 07	19 Apr 07
Install roof plates	30 Mar 07	02 May 07
Install columns/braces	10 Apr 07	07 May 07
Cutting of tertiary steel	30 Apr 07	18 May 07
Install Roof frame to columns and weldout	08 May 07	15 May 07
Fabricate other structural appurtenances	02 May 07	23 May 07
Install interior wall plate	16 May 07	31 May 07
Install exterior walls and weldout	16 May 07	29 May 07
Install other structural appurtenances	09 May 07	12 Jun 07

32 In light of the defendant's concession that the start date was 16 March 2007 (due to its own delay in sending the steel to the worksite), the various dates in the schedule would, logically, have to be adjusted further by one month with no change to the description of the Job scope. According to the first item on the schedule, the plaintiff was required to cut the primary steel available on the worksite. It is clear from the documented evidence that at least the following quantities of steel had been delivered to the worksite on various dates:

Date	**Type**	**Amount Delivered**
25 January 2007	Primary Steel	5.1612 tons
26 January 2007	Primary Steel	1.706 tons
2 February 2007	Primary Steel	21.8592 tons
3 February 2007	Primary Steel	42.638 tons
12 March 2007	Secondary Steel	52.5132 tons
2 April 2007	Secondary Steel	40.1822 tons
16 April 2007	Secondary Steel	19.266 tons
19 April 2007	Secondary Steel	6 pieces (weight uncertain)
28 April 2007	Tertiary Steel	6.081 tons

33 During cross-examination, Mohd Puad admitted that by 16 March 2007, the plaintiff had only managed to cut 30% of the primary steel that was on the worksite. [note: 8] His testimony is borne out by the plaintiff's own first progress claim of 20 March 2007, whereby the plaintiff invoiced the defendant the sum of $30,219.97 for 30% of work done on the 68.526 tons of primary steel. In light of this, and on account of the plaintiff's inability to explain why its workers did not work on the remaining 70% of the primary steel that was available at the worksite by 16 March 2007, it is reasonable for the court to draw the inference that there is no correlation between the defendant's late delivery of steel material and the plaintiff's work progress. The evidence points to the plaintiff's

inability to complete the Sub-Contract Works seeing the quantities of primary and secondary steel available to the plaintiff on the worksite as at 16 March 2007. I therefore reject the plaintiff's first complaint as baseless.

(b) Change of construction plans by the defendant

34 The plaintiff blames the changes made to the construction plans many times during the Sub-Contract Works, thereby causing further delays in the work process and progress.

35 The first set of project drawings was issued by the defendant to the plaintiff on 15 January 2007, and it related to the general scope of the plaintiff's work. [note: 9] On 20 March 2007, the defendant issued a second set of drawings to the plaintiff, and it related to the floor beam details. The first and second sets of drawings were for different aspects of the Sub-Contract Works. [note: 10] Mohd Puad admitted in cross-examination that the second set of drawings did not change the instructions in the first set of drawings, and that the plaintiff could still use the first set of drawings to carry out the Sub-Contract Works. [note: 11]

36 On 22 March 2007, the defendant issued a third set of drawings to the plaintiff which related to the lower floor framing and the floor beam details. Even at this stage, the changes to the construction plans did not affect or disrupt the plaintiff's work progress because as Mohd Puad admitted at paragraph 20 of his affidavit of evidence-in-chief, the plaintiff only started the fabrication work on 22 March 2007.

37 On 2 April 2007, a fourth set of drawings was issued to the plaintiff. Mohd Puad admitted in cross-examination that those drawings only required some minor changes to the entire floor beam details. [note: 12] Furthermore, there is no evidence that the plaintiff had even started work on the floor beam at the time the fourth set of drawings was issued.

38 On 19 April 2007, a fifth set of drawings was issued to the plaintiff. It related to the roof beam details. Mohd Puad admitted during cross- examination that the plaintiff had not started work on the roof beam at the time the fifth set of drawings was issued. [note: 13]

39 The last allegation was that the defendant required some amendments to the requirements for the padeye (lifting eye section) on 5 June 2007. This allegation turned out to be a red herring because Mohd Puad admitted during cross-examination that the amendments were actually given to the plaintiff on 18 April 2007, and as such, the plaintiff's progress was not affected at all. [note: 14]

40 In light of Mohd Puad's evidence, the plaintiff's allegation that the defendant's changes to the construction plans caused delays to the plaintiff is unfounded and must fail.

(c) The defendant's failure to provide equipment at the worksite on time

41 The plaintiff's allegation that there was insufficient equipment on the worksite is entirely bereft of details. No details were given as to the kind of equipment that were supposedly lacking, the time period in which they were lacking, and to what extent the plaintiff's work was held up and, hence, delayed as a consequence.

42 Again the allegation assumes that the defendant was contractually obliged to supply the equipment. The contractual documents do not stipulate the type and number of equipment to be supplied by the defendant. One finds some hints in the copy of the Contract sent to the plaintiff on

9 Feb 2007:

Work scope

a) welding test

b) one supervisor

c) welder and fitter

d) cutting torch

e) PPE

f) Including the supply of grinding machine

Work exclude

a) all lifting equipment

b) all material

c) welding equipment

d) gases

e) testing for weld and welders

f) painting

Beyond that list headed "Work exclude", nothing more was stipulated elsewhere after 9 February 2007. It is not unreasonable to construe every item listed there as the responsibility of the defendant to supply at its cost when so required by the plaintiff for the Sub-Contract Works. The other list of items under "Work scope" was to be provided by the plaintiff.

43 Throughout the period of March to May 2007, Mohd Puad agreed during cross-examination that there was sufficient material and equipment on- site for the plaintiff's work. In fact, the plaintiff issued three progress claims in respect of the following areas of Sub-Contract Works:

(a) First progress claim submitted on 20 March 2007 ("Invoice I70070") for work done in marking and cutting 68.5 tons of steel. The claim was for $28,780.92 (excluding GST), and the defendant paid the sum on 9 April 2007.

(b) Second progress claim submitted on 10 April 2007 ("Invoice I70095") for work done in marking and cutting 40.4 tons and fabricating 39 tons of steel. The claim was for $44,763.60 (excluding GST) and the defendant paid the sum on 10 May 2007.

(c) Third progress claim submitted on 21 May 2007 ("Invoice I70127") for work done on 86 tons of steel. The claim was for $52,043.18 (excluding GST) and the defendant paid the sum on 18 June 2007.

44 I was referred to the plaintiff's e-mail of 24 May 2007 as proof that the defendant did not provide the plaintiff with equipment at the worksite. The e-mail read as follows:

> Hi Mond,
>
> We refer to the above and your proposed recovery plan.
>
> We have been promised by yourself during our last meeting dated 10/05/07, that the following equipments and resources to be made available to us but to date, these things were not given and made available to us.
>
> 1. Full tentage to cover the floor & roof framing structures, so as to enable our men to work without interruption even if it is raining.
>
> 2. Scaffoldings at the floor framing structures for our men to erect & assemble all the columns.
>
> 3. Additional welding machines of 10 sets for our welders.
>
> 4. Additional quivers/dryers of 12 nos for our welders.
>
> The inavailability of all these items have caused much disruption and inconveniences to our Engineer Mr Kumar to execute his work at your site. Therefore, we would like to highlight to you that if the above were not given and made available to us by end of the week we will not continue with your recovery plan and should there be delay in the recovery work, we will not be responsible for it.

45 Taking the e-mail at its face value, what seems to have happened is that the plaintiff had fallen behind in the progress of its work and the defendant proposed a recovery plan that was supposed to help the plaintiff speed up its work. The equipment that the defendant promised to give to the plaintiff by 10 May 2007 was pursuant to the proposed recovery plan, and not based on the original contract. Accordingly, this e-mail does not assist the plaintiff.

46 In conclusion, the plaintiff's allegation that the defendant had failed to provide it with sufficient equipment at the worksite is without merit and baseless.

(d) ***The stop orders issued by the defendant's client***

47 The plaintiff's allegation is that the defendant's client had issued a stop order due to safety issues on the worksite. Details of the stop order were not given in Mohd Puad's affidavit of evidence-in-chief. However, an e-mail from him to the defendant dated 19 June 2007 read as follows:

> Hi Mond;
>
> The stop work order by your client on the roof section and other areas due to scaffold and other related issues, will definitely slowing down the process of completing the work.
>
> I really don't understand why now then they come to give such comments and demand. This

should be addressed much earlier during the initial start of work.

Please assist to look into this matter immediately by engaging a full time scaffold erector & supervisor at site to avoid all this stoppage of work.

48 The plaintiff did not give evidence on how long the stop order lasted, what aspects of the work the stop order related to, or what impact the stop order had on the plaintiff's work. Accordingly, I reject the plaintiff's complaint for being too sketchy and vague to merit serious consideration.

Conclusion

49 In conclusion, I find that the defendant was responsible for the delay arising from the fact that the steel materials to be supplied were sent to the worksite on 16 March 2007. The contractual deadline of ten weeks beginning from 22 February 2007 was no longer binding on the plaintiff. In its place, I hold that the plaintiff was obliged to complete the construction work within a reasonable time, which would be ten weeks starting from 16 March 2007 through to end May 2007. However, the Sub-Contract Works were only completed on 11 August 2007. In the premises, the plaintiff was in breach of its obligation to complete the Sub-Contract Works within a reasonable time.

The plaintiff's claim for variation works

50 The plaintiff is claiming a substantial amount for variations works requested by the defendant. They were oral variation orders for the completion of certain works. Details of the variation works were particularised in:

(a) Invoice number 170177 dated 17 July 2007 for a sum of $28,643.90;

(b) Invoice number 170178 dated 17 July 2007 for a sum of $10,785.60;

(c) Invoice number 170179 dated 17 July 2007 for a sum of $4,269.30; and

(d) Attachment 1 dated 10 September 2007 for a sum of $403, 072.74.

51 The defendant denies the claim for several reasons. First, there was no variation order issued to the plaintiff. Second, the items which the plaintiff had billed the defendant fell within the scope of works which the plaintiff had agreed to complete under the lump sum contract. I will deal with the first reason now. A determination in favour of the defendant disposes of the liability issue completely.

52 Clause 5 of the Contract (see [18] above) states:

In the event of delaying the completion of the aforesaid work, the Sub-Contractor shall ensure it shall bear its own cost in the execution of the aforesaid work. In the event there are variations to the aforesaid work, the Contractor shall issue new variation order to the Sub Contractor and the Sub Contractor shall comply with the new variation order in an appropriate and diligent manner.

53 In addition, clause 3.8 of the STC (see [8] above) provides as follows:

> SUB-CONTRACTOR shall submit such variations to the SUB-CONTRACT WORK whenever by way of additions, modifications or omissions the variation may be:
>
> a) Ordered by JRMAP under the Main Contract and confirmed in writing to SUB-CONTRACTOR by CONTRACTOR; or
>
> b) Agreed to be made by JRMAP and CONTRACTOR and confirmed in writing to SUB-CONTRACTOR by CONTRACTOR; or
>
> c) Ordered in writing by CONTRACTOR

54 The plain wording of clause 3.8 requires a variation order to be in writing. Clause 5 as a matter of construction also contemplates, from the use of the word "issue", the existence of a written variation order from the defendant. The plaintiff has not produced any written variation order issued by the defendant. A written variation order is a condition precedent for any claim by the plaintiff for payment of any additional or varied work done. The plaintiff is not entitled to payment of any of its claims for variation works since there were no written instructions from the defendant. As an aside, the plaintiff did not establish any verbal instructions for variation works in any case. In the premises, the claim for variation works is fails.

The defendant's counterclaim

55 The defendant's counterclaim against the plaintiff consists of two separate claims. The claim of $69,911.13 is for costs incurred when it had to provide additional workers to assist the plaintiff in rectifying defectives, and to make up for the delay that had been caused by the plaintiff's slow progress ("first counterclaim"). The other claim of $131,738.40 is for costs incurred in assisting the plaintiff to weld 12 of the 24 lifting padeye box stiffeners that the plaintiff was supposed to complete ($32,400.00), as well as for conducting rectification works on the floor of the fabrication structure ($90,720.00) ("second counterclaim").

56 In relation to the defendant's first counterclaim for $69,911.13, it is noteworthy that the plaintiff has accepted this claim as justified. The statement of account sent by the plaintiff to the defendant on 1 October 2007 showed the plaintiff's acceptance of the defendant's claim, and had even used the said amount to set off the sums which it said were owed by the defendant (or so it thought). In the circumstances, the defendant's first counterclaim of $69,911.13 against the plaintiff is allowed.

57 This leaves the defendant's second counterclaim of $131,738.40. There are two parts to this second counterclaim. The first sub-claim is for costs incurred in assisting the plaintiff to weld 12 of the 24 lifting padeye box stiffeners that the plaintiff was supposed to complete ($32,400.00), and the second sub-claim is for conducting rectification works to the floor of the fabrication structure ($90,720.00).

58 As regards the first sub-claim, it is noteworthy that nowhere in Mohd Puad's affidavit of evidence-in-chief did he challenge the defendant's witness, Francis Ng, on his testimony that the defendant had completed 12 of 24 lifting padeye stiffeners that were supposed to be completed by the plaintiff. In fact, the plaintiff's counsel did not cross-examine Francis Ng nor challenge his evidence on this. Applying the principle enunciated in *Browne v Dunn* (1893) 6 R 57, I am entitled to hold that the plaintiff has accepted Francis Ng's evidence on this issue. Accordingly, I allow the

defendant's claim of $32,400.00 against the plaintiff.

59 Turning now to the rectification works, the plaintiff's position, as stated in paragraph 21 of Mohd Puad's affidavit of evidence-in-chief, was that although the floor framing was uneven, it did not constitute a breach of contract. It backed up its position with a survey report prepared by one of the defendant's employees, Yuly Satiawan, where the said employee had mentioned that the calculation was adequate for presentation to the defendant's client. Furthermore, even if the defendant had conducted some rectification work to even out the unlevel or sagging floor framing, it was voluntary and had nothing to do with the plaintiff.

60 On the other hand, the defendant's stance was that the survey report prepared by its employee had been made purely for the purpose of showing that the fabrication structure could be lifted to the quay side of the defendant's yard. It did not, however, show that the fabrication structure had been satisfactorily constructed. Furthermore, the plaintiff did not dispute that the defendant had carried out some rectification work to the floor framing. [note: 15]

61 From the contemporaneous correspondence between the parties, I have no doubts that the defendant had recorded its dissatisfaction with the uneven floor framing and its intention to rectify the defects on multiple occasions. On 17 August 2007, the defendant had sent a letter by fax to the plaintiff complaining about the unevenness of the floor framing. The letter was written in the following terms:

> Re: Notice on performance of Sub Contract Work
>
> We refer to the aforesaid matter and to the contents thereof.
>
> We would like to bring to your attention the issue appended hereunder which our client has raised with us.
>
> The dimensional control of the Su Tu Van Switchgear CCR / Building floor and roof is out of tolerance and not level. The main reason for the aforesaid is due to the welding sequence which according to the client was not in sequence and thus as subcontractor of the project we are answerable to our client.
>
> As a result of the non-levelness, we are required to remove the equipment supports which Kensteel had installed. Thus, resulting in incurring additional manhours to remove the equipment supports and schedule delay. All these costs shall be backcharged to Fong Soon.
>
> In the event, Kensteel is required by our client to rectify the out of levelness and/or other works, all cost shall be borne by Fong Soon Engineering(s) Pte Ltd, pursuant to the contract executed between the parties.
>
> ...

The plaintiff did not reply to the defendant's letter. [note: 16]

62 On 3 September 2007, the defendant sent the plaintiff an e-mail attaching its bill for $69,911.13 in respect of its first counterclaim. In that e-mail, the defendant indicated to the plaintiff its intention to make further claims against the plaintiff for the cost of welding the 12 lifting padeye stiffeners, and for rectification of uneven or sagging floor framing.

Fuad,

Attached is the Kensteel claim as agreed by you during the meeting on 22 Aug 2007.

There will be some more claimed from Kensteel for doing the welding of the inside stifferners for the padeyes and re-work of the equipment supports inside the building due to the building un-levelness. We will compile the hours and send to you ASAP.

There was no reply from the plaintiff to this second e-mail.

63 Mohd Puad admitted in cross-examination that the defendant had carried out substantial rectification work to the floor framing. [note: 17] I agree that the defendant would have no reason to undertake such works if there were no defects to the floor frame at all. For instance, shimp plates were added to fill the gaps between floor and equipment supports due to uneven floor framing. All in all, there was credible evidence of the existence of defects, and rectification of the same by the defendant. The uneven floor framing was due to the plaintiff's defective or shoddy workmanship.

64 In its Defence and Counterclaim, the defendant is claiming $90,720.00 being the cost of rectifying the uneven floor framing. As stated in the e-mail of 3 September 2007, the claim is only for labour supplied. I noticed that the plaintiff had not challenged the defendant's quantum at the trial even though no details were given. I sought clarification from counsel on 16 February 2011. For their mutual benefit and in the interest of expediency and cost, I directed the defendant to provide the documentary particulars of its claim within a week with liberty to the plaintiff to respond by way of an affidavit to whatever documentary particulars the defendant might produce. If cross-examination was required by the parties, leave of court had to be sought by 7 March 2011.

65 On 24 February 2011, counsel for the defendant filed an affidavit which was affirmed by the managing director of the defendant, Tsai Heng Een ("Tsai"), in respect of the expenses incurred by the defendant in rectifying the defective floor framing. In his written statement, Tsai deposed that he was able to locate documentary evidence in support of $78,023.71 and not $90,720.00. The plaintiff did not file any reply affidavit nor sought leave to cross-examine Tsai.

66 The documents attached to Tsai's affidavit included cheques paid out by the defendant to third parties for work done, as well as the time sheets to show the period when the work was done. The time sheets were for work done in the period stretching from as early as 22 May 2007 up to 6 September 2007. On reviewing the documents, it was clear to me that not all the documents were for the rectification work. The survey report prepared by Yuly Satiawan on the adequacy of the calculations relating to the floor of the building structure was dated 11 August 2007. Any rectification work done by the defendant to the floor must have been done after 11 August 2007, or more precisely, after 17 August 2007, when notice of the defects were first brought to the attention of the plaintiff.

67 Given this state of affairs, the best case for the defendant would be for me to accept that all the expenses incurred by the defendant after 17 August 2007 (as shown by the cheques and the timesheets) were for the purpose of rectifying the uneven floor. Based on the documents produced by Tsai, there are 4 sets of expenses that were incurred by the defendant in respect of work done after 17 August 2007. These are

(a) Amount of $3,313.08 paid as salary to Yip Wing Koo and Leong Sek Khan for 406 hours of casual labour supplied;

(b) Amount of $2,295.00 paid as salary to Yu Chee Hoe and Fong Kun Fatt for 165 hours of casual labour supplied;

(c) Amount of $3,400.00 (UOB Cheque No.383217) paid to Express Engineering Pte Ltd for 340 hours of labour supplied; and

(d) Pro-rated amount of $18,947.50 [(2056.5-161.75)/2056.5 x $20,565] paid to Express Engineering Pte Ltd for 1,894.75 hours of labour supplied.

These four sets of expenses add up to $27,955.58.

68 Accordingly, I find that the plaintiff is liable to the defendant for the sum of $27,955.58 in respect of the expenses incurred by the defendant in rectifying the defective flooring.

Results

69 For the reasons given, I hold:

(a) the defendant is liable to pay to the plaintiff the balance of the contract sum of $121,621.16; and

(b) the plaintiff is liable to the defendant under its Counterclaim for the sums of $69,911.13, $32,400.00, and $27,955.58 (being the cost of providing extra workers to make up for the delay caused by the plaintiff's slow progress, the cost of welding 12 lifting padeye box stiffeners, and the cost of rectifying the defective flooring, respectively). This adds up to a total figure of $130,266.71.

After setting off the figures in (a) and (b), the plaintiff has to pay the defendant a sum of $8,645.55. Accordingly, there be judgment for the defendant in the sum of $8,645.55. I make no order on interest.

70 As both parties have succeeded substantially against each other in respect of their claims, I order each party to pay its own costs.

[note: 1] Transcripts of Evidence dated 8 July 2009 at pp 29-30

[note: 2] Transcripts of Evidence dated 8July 2007 at p 35

[note: 3] Transcripts of Evidence dated 8 July 2007 at pp50-51

[note: 4] Transcripts of Evidence dated 10 July 2009 at 71

[note: 5] Transcripts of Evidence dated 8 July 2009 at 53

[note: 6] Transcripts of Evidence dated 10 July 2009 at 97

[note: 7] DB 13

[note: 8] Transcripts of Evidence dated 8 July 2009 at p75

[note: 9] Transcripts of Evidence dated 9 July 2009 at p 65

[note: 10] Transcripts of Evidence dated 9 July 2009 at p 70

[note: 11] Transcripts of Evidence dated 9 July 2009 at p72

[note: 12] Transcripts of Evidence dated 9 July 2009 at pp 90-91

[note: 13] Transcripts of Evidence dated 9 July 2009 at p 101

[note: 14] Transcripts of Evidence dated 9 July 2009 at pp 102-103

[note: 15] Transcripts of Evidence dated 9 July 2009 at p 37

[note: 16] Transcripts of Evidence dated 9 July 2009 at p 25

[note: 17] Transcripts of Evidence dated 9 July 2009 at p 37