Spandeck Engineering (S) Pte Ltd v China Construction (South Pacific) Development Co Pte Ltd
[2005] SGCA 59

Case Number	: CA 66/2005
Decision Date	: 27 December 2005
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Tay Yong Kwang J; Yong Pung How CJ
Counsel Name(s)	: Gopinath Pillai and Jacqueline Teo Lin (Tan Peng Chin LLC) for the appellant; Joseph Liow Wang Wu and Yusfiyanto Yatiman (Straits Law Practice LLC) for the respondent
Parties	: Spandeck Engineering (S) Pte Ltd — China Construction (South Pacific) Development Co Pte Ltd

Contract – Contractual terms – Parties forming contract by exchange of correspondence – Whether letter from respondent to appellant part of contract – Whether contract sum payable from respondent to appellant estimated or fixed

Equity – Estoppel by convention – Whether appellant estopped from asserting that agreement between parties was fixed sum contract

Limitation of Actions – When time begins to run – Whether cut-off date for time bar six years before date of filing of set-off and counterclaim or six years before date of filing of writ of summons – Whether s 24A Limitation Act applicable to facts of case – Sections 24A, 31 Limitation Act (Cap 163, 1996 Rev Ed)

27 December 2005 *Judgment reserved.*

Tay Yong Kwang J (delivering the judgment of the court):

1 Both parties in this appeal are in the building construction industry. In the court below, Andrew Ang JC (as he then was) gave judgment for the respondent in the sum of $479,613.57 ("the amount claimed") and allowed the appellant's counterclaim in part amounting to some $60,300. The judge also ordered interest at 6% per annum on the net amount payable to the respondent, such interest to run from the date of the Writ of Summons to the date of payment.

2 Sometime in 1994, the respondent was interested in tendering for a Housing and Development Board ("HDB") project to build 492 apartments in Hougang under a contract known as the Hougang Neighbourhood 9 Contract 6 ("the N9C6"). However, the respondent was not pre-qualified to tender for a project of that value. The respondent therefore approached the appellant, which was so pre-qualified, to see if the two companies could collaborate on the N9C6. They decided to co-operate in the tender exercise with the appellant tendering for the project and the respondent working very closely with it as the intended main subcontractor. The plan was for the respondent to carry out all the works, with the appellant supplying and installing the pre-fabricated components as well as the Civil Defence shelter doors.

3 The appellant was successful in the tender. Prior to the submission of the tender, the parties entered into an agreement dated 16 November 1994 but this was superseded by three letters in January 1995 between the parties. The first letter dated 26 January 1995 from the respondent's managing director, Chen Guo Cai ("Chen"), to the appellant's managing director, Dr Tony Chi, was in the following terms:

We are pleased to quote to you the scope of work as follows:

(1) Total construction of the Building, Sanitary, Plumbing and Civil Engineering works except for

(a) precast pantry/store, (including supply & install Civil Defence Shelters' Doors)

(b) precast lightweight partitions

which will be supplied and delivered by you (See attached Appendix I). We will carry out the works as in accordance to the conditions and specifications in the HDB's contract.

(2) A Project Manager will be appointed under Spandeck and he will be paid by us. The Project Manager will represent Spandeck regarding the operations as well as the weekly projections and all the necessary inspection forms and material requirements. His work will be assigned by China Construction and China Construction will be responsible for all the action he takes, letters, instruction, costs etc.

(3) The proposed sub-contract will be a back to back with the HDB's contract and all its terms, conditions, drawings specifications and other contract documents which will apply to this sub-contract and responsible for all the schedules and penalties as specified in HDB's contract.

(4) The estimated contract sum shall be $31,966,375.00 (See attached Appendix I)

(5) We will furnish a Security Bond for the amount of $1,835,854.00 required under the HDB contract in favour of the HDB in your name and a second Security Bond for the same sum on the same terms in your favour to secure our obligations to you under the Sub-Contract.

4 The said "Appendix I" referred to in the 26 January 1995 letter provided:

APPENDIX I

BUILDING CONTRACT AT HOUGANG N'HOOD 9 CONTRACT 6

Contract Sum = $36,717,070.00

Less:

(a) Management Fees :

(i) Spandeck's Cost & Overheads = $717,070.00

(ii) Project Manager (Estimated) = $147,000.00
($7,000 x 21 months)

(iii) Site Quantity Surveyor
(Lump sum) = $105,000.00
($5,000 x 21 months)

(b) Supply and delivery of precast pantry/store @ $5,500 per no. (Total : 492 nos) = $2,706,000.00

Unloading by China Construction within one hour, any addition time waiting is $50 per hour and storage space of minimum one storey space shall be provided by China Construction.

(c) Supply and install Civil Defence Shelter Doors to precast pantry/store (Total : 492 sets) = $350,000.00

(d) Supply and deliver precast lightweight partitions for = $725,625.00

(i) 75mm thick 20,600m2 @ $30/m2

(ii) 90mm thick 3075m2 @ $35/m2

Revised Contract Sum $31,966,375.00

Notes :

(1) For items (a) ii, (b), (c) & (d), the contract sum is approximate only and will be subjected to final measurement of actual cost or quantities. All unit rates are fixed and will be used for pricing the quantities.

(2) For item (a) i, payment of management fees by us to Spandeck will be on a monthly basis of $34,000 per month for 21.09 months.

(3) The above prices does [*sic*] not include Goods & Services Tax.

5 The appellant replied on 27 January 1995 as follows:

Per your offer dated 26 Jan 1995, we are very happy to inform you that we would like to engage you as our main sub-contractor for the above project. Your scope of work will be as follows:

1) As stated in your letter of 26 Jan 1995, you should carry out the work based on the condition and specification as specified in HDB's contract. You will also be responsible for the schedule as tabulated in the HDB contract.

2) The project manager on site shall report to our manager (in Spandeck main office) regarding the daily operation as well as weekly projection and all the necessary inspection form and material requirement should be prepared accordingly and you are to execute the contract without any excuse for delay. This sub-contract shall be back to back with the HDB contract and all its terms, conditions, specifications, drawings and other contract documents shall apply to this sub-contract; which means that if HDB penalise us, you will receive the same penalty with administration charges if there is any; you will only be paid when we receive payment from HDB.

3) You should provide the site office (12 x 15ft min.) for our management team and supply us with all the utilities such as fax machine, telephone (minimum one line for our site use), typing service and etc. You also have to provide these facilities to our client, HDB as per contract specification.

4) The total contract sum shall be S$31,966,375 excluding G.S.T.

5) By 7/2/95, you will at your cost and expense obtain and furnish a Security Bond for the amount required under the HDB contract in favour of the HDB in our name and furnish a Second Security Bond for the same sum and upon the same terms (with suitable changes) in our favour to secure your obligations to us under the sub-contract.

If the above offer is agreeable to you, please counter sign this letter and the legal document shall be prepared and signed between both parties. Based on this letter, you can proceed to make all the necessary preparation. Please submit your site organisation chart, construction program and site office layout to us in one week's time.

Upon acceptance of this contract, all the previous letters and understanding will be void.

The terms of this letter were accepted by Chen on behalf of the respondent. Chen was also asked to initial at the end of para (4), where the "total contract sum" was indicated.

6 On 28 January 1995, in its letter entitled "HDB Hougang N9C6 Project – Supplement Contract", the appellant sought to impose the following additional conditions:

Further to our offer letter dated ref: SDE/HOUG/043/95 dated 27 January 1995, the following are the additional conditions added to the letter.

1) The other management team which is going to carry Spandeck's namecard is only permitted to use the namecard subject to the following condition:

a) You have to write down his or her responsibility and also a [*sic*] give us a guarantee letter that your company will be responsible for them for all the management result and hold Spandeck free of liability. We will only grant you to print the namecard upon receiving this guarantee letter.

2) We will let your people to use the Spandeck letterhead for Hougang project but you also have to give us a letter to guarantee and hold Spandeck free from the consequences arising from these letters.

3) You have to carry out the site management, hire management team with R.E. etc. at your cost, to carry out works according to agreed, schedulling [*sic*] and reply to HDB's request etc. and such other terms as we may require to reflect your responsibilities as a subcontractor.

4) The project manager on site shall be appointed by us and paid by you. You shall bear all responsibility for the actions of the project manager.

5) You will also by 7/2/95, at your cost and expense obtain and furnish a contractors All Risk Insurance Policy, in a form acceptable to us in the joint names of HDB, ourselves and yourselves together with the premium receipt.

You are not allowed to release the content of the offer letter and this additional condition to a third party without our written permission otherwise you will be responsible for the consequences.

A postscript was added as follows:

All the necessary cost at site such as utilities bill, insurance premium and etc. shall be paid by China Construction.

China Construction shall be responsible for the project management team and site staff's insurance, medical and hospitalisation bill etc. and all other costs related to this construction.

These additional conditions were also accepted by the respondent.

7 The N9C6 had different completion dates for the various buildings. The respondent completed its agreed works between 1996 and 1997. On 7 January 1998, HDB issued to the appellant a provisional final account. This was subsequently finalised and the appellant was paid in full by HDB sometime after 29 September 2000. The respondent computed the final account between itself and the appellant on the basis of the final account between the appellant and HDB. From this computation, the amount claimed was found due to the respondent. This formed the subject of the action commenced by the respondent.

8 The appellant denied that the amount claimed was payable to the respondent. Instead, it claimed that it had overpaid the respondent $116,668.69 on the basis that the subcontract was a lump sum contract for the fixed price of $31,966,375 ("the alleged lump sum"). It was the appellant's case that the letter of 26 January 1995 had been superseded by the one dated 27 January 1995 and that the 26 January 1995 letter therefore did not form part of the contractual documents. Accordingly, the appellant sought the repayment of the alleged overpayment and various other amounts (such as prolongation costs as a result of delay to the project) by way of counterclaim in the action. These other amounts added up to some $800,000.

9 The respondent disagreed with the appellant's interpretation. It argued that para (4) of the 27 January 1995 letter did not state that the contract was to be on a lump sum basis and that the phrase "all the previous letters and understanding will be void" in the last paragraph of that letter only excluded matters prior to 26 January 1995. It contended that it was important to see how the alleged lump sum was arrived at and that it was illogical to exclude the 26 January 1995 letter when the one dated 27 January 1995 made specific reference to it.

The decision of the trial judge

10 The trial judge identified the following five issues:

(a) whether the terms of the agreement between the parties included the 26 January 1995 letter;

(b) if so, whether the contract price payable to the respondent was to be calculated in accordance with Appendix I attached to the 26 January 1995 letter ("Appendix I") or was the alleged lump sum;

(c) if the appellant's interpretation was the correct one, whether the appellant was estopped by conduct as the parties had acted on the assumption that the computation of the total contract price was to be in accordance with Appendix I;

(d) if the respondent's interpretation was the correct one or if the appellant was estopped from denying that the method of computation was to be in accordance with Appendix I, what was the amount payable to the respondent; and

(e) whether the appellant had proved the alleged breaches by the respondent and, if so, what was the quantum of loss in respect thereof.

11 The judge held that the 26 January 1995 letter formed part of the agreement between the parties. On an interpretation of the agreement, he held that the total contract price was not the alleged lump sum but was to be calculated in accordance with Appendix I. Based on this finding, it became unnecessary for him to decide the estoppel point but, if it were necessary to do so, the judge would have held that the appellant was estopped from asserting that the agreement was a lump sum contract. He also found that the amount claimed was due to the respondent. Finally, the judge held that the appellant had not overpaid the respondent but was entitled to counterclaim $32,113.60 (being the prolongation costs incurred due to delay, with the period allowed being shortened by reason of the defence of limitation), $25,089.57 (being the cost of engaging a project manager from 12 December 1997 to 11 December 2000) and $3,127.00 (being the costs incurred in rectifying defects in the external paint works).

Our decision

12 Before us, the appellant submitted along the same lines as the issues set out by the trial judge, with the fifth issue being whether the counterclaim for prolongation costs ought to have been reduced in quantum by the defence of limitation.

13 The judge's decision that the agreement was constituted by the three letters was based primarily on a concession made by Dr Tony Chi (the appellant's managing director) in cross-examination that the 26 January 1995 letter could be part of the documents evidencing the agreement between the parties. The appellant's pleadings and affidavit evidence took the position that that letter had been expressly excluded or superseded. In the judge's view, the concession was rightly made because if one were to read only the letters of 27 and 28 January 1995, one would have got the wrong impression that the respondent was to carry out the entire scope of works under the N9C6, including all the pre-cast elements, when that was not the case. On Dr Tony Chi's and his counsel's efforts to qualify the concession by stating that the 26 January 1995 letter could be included as part of the documents provided it did not contradict the 27 January 1995 letter, the judge had two comments. Firstly, as the appellant was no longer contending that the final paragraph of the 27 January 1995 letter rendered the 26 January 1995 letter void, the 26 January 1995 letter had to be construed alongside the other two letters. Secondly, the judge opined, it was not open to the appellant to cherry-pick parts of the 26 January 1995 letter favourable to its case while discarding others repugnant to it. Accordingly, the judge proceeded to adopt the principle that the court would give effect to any reasonable construction which harmonised apparently inconsistent clauses rather than hold that they were in conflict.

14 Paragraph (4) of the 26 January 1995 letter spoke of "estimated contract sum" and referred to Appendix I for the computation of the alleged lump sum while para (4) of the 27 January 1995 letter spoke of "the total contract sum" without reference to Appendix I. Appendix I made it quite clear that the alleged lump sum was derived from deducting the costs of the items listed from the contract price in the appellant's agreement with HDB in the main contract. It also emphasised that the values attributed to certain items were approximate only and would be subject to final measurement of actual cost or quantities. Although Appendix I also referred to the alleged lump sum as "Revised Contract Sum", it was obvious that it was subject to the qualifications in the "Notes".

15 In our view, the reference in the 27 January 1995 letter to "[p]er your offer dated 26 Jan 1995" and "[a]s stated in your letter of 26 Jan 1995" imported the 26 January 1995 letter into the contractual documents even if the terms therein were repeated in a different form and some new

terms were added (such as the "pay when paid" clause and the issue of penalty imposed by HDB). As stated by the judge, the 26 January 1995 letter therefore had to be construed harmoniously alongside the 27 January 1995 and the 28 January 1995 letters. Although the appellant had changed the wording from '"estimated" to "total" in describing the contract sum, there was no doubt as to how the amount specified came about. The "total" was the sum worked out in Appendix I of the 26 January 1995 letter and that sum was specifically qualified by the "Notes" in the same Appendix I. The appellant chose not to use words such as "firm price contract" (which appeared in its contract with HDB) or "lump sum contract" or "fixed price contract". After all, the 27 January 1995 letter was drafted by the appellant and we do not see in its language any clear attempt to convert an estimated figure into a confirmed or fixed one. Asking the respondent's Chen to initial against the alleged lump sum at para (4) of the 27 January 1995 letter therefore did not assist in the interpretation of that clause. In interpreting the contents of these two letters without reference to extrinsic evidence, it was plain to us that the appellant's "total contract sum" was subject to the same qualifications as the respondent's "estimated contract sum" and was not a fixed price or lump sum, as alleged by the appellant.

16 The appellant also submitted before the trial judge that para (2) of the 27 January 1995 letter provided that the subcontract was to be back to back with the HDB contract and since the HDB contract was on a firm price basis, the subcontract had to be on the same basis. The judge noted that the 26 January 1995 letter also had a similar provision in its para (3) and yet, in that letter, the contract was expressly stated to be on a re-measurement basis. In his view, therefore, the words "back to back" had to bear a narrower meaning than full incorporation of all the HDB terms and conditions. We agree with his view and would add that whatever had been incorporated from the main contract with HDB was qualified in any event by the clear terms of the 26 January 1995 letter which made it explicit that the contract sum was an estimated one subject to re-measurement, which could result of course in one or the other party having more money than originally anticipated. If the words "back to back" were taken absolutely literally, the subcontract would end up having the same contract sum as the main contract, an interpretation that the appellant no doubt would reject immediately.

17 In deciding the issue as to estoppel by convention, the judge cited *MAE Engineering Ltd v Fire-Stop Marketing Services Pte Ltd* [2005] 1 SLR 379 where this court observed at [44] and [45]:

> 44 Estoppel by convention is not founded on any representation but on an agreed statement of facts the truth of which has been assumed by the parties to be the basis of the transaction (see also Spencer Bower's *The Law Relating to Estoppel by Representation* (4th Ed, 2004) at para VIII.2.1).
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> 45 In *Singapore Island Country Club v Hilborne* [1997] 1 SLR 248, the Court of Appeal laid down the following criteria for estoppel by convention (at [27]):
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> (i) that there must be a course of dealing between the two parties in a contractual relationship;
>
> (ii) that the course of dealing must be such that both parties must have proceeded on the basis of an agreed interpretation of the contract; and
>
> (iii) that it must be unjust to allow one party to go back on the agreed interpretation.

18 The judge noted that the appellant here had made 28 payments on various dates between 1995 and 1997 based on the method of computation set out in Appendix I and, on each of those

occasions, the sum deducted in respect of the lightweight partitions was based on the amount supplied. The judge did not accept the appellant's explanation that this was done at the request of the respondent and that it applied the computation in Appendix I only to speed up the payments. He was of the view that if the sum attributable to the lightweight partitions was fixed as alleged by the appellant, then on each occasion, the fixed amount should have been deducted and the respondent would not have been overpaid by more than $116,000 as alleged. He found that the fact that this was not done showed clearly that the shared assumption of the parties was that Appendix I applied and the sum to be deducted for the lightweight partitions was to be based on the actual amount supplied.

19 Two arguments were put before us on this issue. First, the appellant contended that there was no inconsistency between a fixed sum contract and an arrangement which determined progress payments on a measurement basis. It argued that if it was shown at the conclusion of the contract that the progress payments exceeded the fixed price, as had happened in this case, the difference would be a credit in its favour. Reliance was placed on the House of Lords decision in *The Tharsis Sulphur and Copper Company v M'Elroy & Sons* (1878) LR 3 App Cas 1040. We note, however, that on the facts of that case, there was a clause in the agreement which provided that no payment was due to the contractors until the completion of the contract but that advances would be made upon work actually done. That case therefore involved a situation where there was a fixed sum contract but there was also an agreement to make progress payments on a measurement basis.

20 The second argument was that the progress payment arrangement was the result of a letter dated 17 April 1995 from the respondent to the appellant, which referred to discussions on 18 March 1995 between the parties on the issue of progress claims and payments from HDB. An appendix to that letter set out a formula for the computation of the progress claims payable by the appellant to the respondent.

21 The appendix to the letter of 17 April 1995 is similar to Appendix I of the 26 January 1995 letter. Although only a formula was specified in the 17 April 1995 appendix, the rates which the parties used in computing the progress payments were those spelt out in Appendix I. Those rates were not found in the later appendix. There did not appear to have been any discussions on the rates to be used for the various items supplied by the appellant. This suggested strongly that the parties were proceeding on the agreed interpretation that their contract was not a fixed price one but was one subject to re-measurement and it would be unjust to allow the appellant now to ignore this. We note in passing that when the appellant agreed that it would not charge the respondent the fee of $147,000 for a project manager (as the respondent used its own for the project with the appellant's consent), the appellant's letter dated 27 January 1997 confirming this also used the figures indicated in Appendix I. We therefore agree with the view of the judge and with his conclusion that, if it were necessary to decide the estoppel issue, the appellant was indeed estopped from asserting that the agreement between the parties was a fixed sum or lump sum contract.

22 The appellant's dispute as to the amount claimed by the respondent was based on two items in the final accounts between the parties drawn up by the respondent. These involved the lightweight panels supplied by the appellant and the issue of medical expenses. The appellant argued that the judge was wrong to allow a deduction of $353,978.44 for the lightweight panels as the respondent was unable to prove that the said panels were re-measured at that value. It contended that the correct figure to be deducted should be $725,625.

23 As noted by the judge, the sum of $353,978.44 was actually provided by the appellant. After the appellant had obtained the 28th payment certificate from HDB, it sent a payment voucher to the respondent which indicated that the amount to be deducted for this item was $353,978.44. We

therefore agree with the judge that if this figure was an error, it behoved the appellant to show how such an error came about. In the absence of evidence to the contrary, the respondent was entitled to rely, as it did, on the appellant's own figure. After all, by November 1996, the appellant had supplied all the lightweight panels for N9C6 and it would be rather astonishing that the value of this item had now doubled.

24 The appellant further argued that the respondent should not have included medical expenses (amounting to $93,194.10) in the final accounts between them because it had already paid the respondent separately for this item. It pointed out that the respondent's financial controller agreed under cross-examination that it was true that medical expenses had already been paid to the respondent.

25 It was never in dispute that the said medical expenses had been paid by the appellant. The only issue was whether this item was properly reflected in the final accounts prepared by the respondent. In the said final accounts, the cumulative payments (up to progress claim no 28) totalled $26,050,298.75. In arriving at this figure, the respondent added a separate item for the medical expenses to its cumulative progress claims. The respondent's financial controller was recalled to testify about this. She explained that the figure for cumulative payments did include medical expenses. Although the respondent's figure for cumulative payments was lower than that computed by the appellant, that was not due to the respondent's exclusion of payment for the medical expenses. Instead, it was due to the appellant's inclusion of certain utility bills in that figure which were not included in computing the amount due to the respondent in the first place. Her evidence upon her recall as a witness was not challenged by counsel for the appellant at the trial. We do not think that the judge fell into any error in accepting that evidence. We therefore agree that the amount claimed by the respondent at the trial was correctly calculated.

26 The final issue concerns the reduction of the counterclaim for prolongation costs by virtue of the Limitation Act (Cap 163, 1996 Rev Ed). The original completion date for the project was 17 November 1996. An extension was granted by HDB and the new completion date was 14 February 1997. Counsel for the respondent contended at the trial that the respondent, as the main contractor in reality, should have the benefit of the extension of time and that the period of delay should be computed only after 14 February 1997. The judge did not think it necessary to determine this point as he was of the view that the six-year limitation period for contract claims would not permit the appellant to claim prolongation costs before 23 September 1997 anyway. This was because the appellant's set-off and counterclaim was pleaded only on 22 September 2003 and any claim for any period more than six years before that date would have been time-barred by s 6 of the Limitation Act. The judge therefore allowed prolongation costs for the appellant for the period of 23 September 1997 to 11 December 1997, when the project was completed. The judge used the figure of $12,042.55 as the prolongation costs per month on the basis that the true value of the contract to the appellant was approximately $4m.

27 Before us, counsel for the respondent conceded that he was mistaken in his submissions to the judge that the cut-off date for the time bar was six years before the date of the filing of the set-off and counterclaim by the appellant. This was because s 31 of the Limitation Act provides:

> For the purposes of this Act, any claim by way of set-off or counterclaim shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded.

28 As the Writ of Summons here was issued on 28 August 2003, the prolongation costs ought to have been allowed from 29 August 1997 onwards (until 11 December 1997, the date of completion of

the project). The additional prolongation costs between 29 August 1997 and 22 September 1997 (25 days), using the same rate as that used by the judge, would amount to $10,035.46.

29 A cause of action founded on breach of contract accrues when the breach occurs and the fact that the damage may be suffered later does not extend the date on which the period of limitation begins to run (*Lim Check Meng v Orchard Credit (Pte) Ltd* [1997] 3 SLR 795). On the facts of the present case, the cause of action would have accrued either after 17 November 1996 (the original date of completion) or after 14 February 1997 (the extended date of completion). The appellant contended, however, that s 24A (3) of the Limitation Act applied to the facts here and that the period of limitation did not begin to run until September 2000 (see [7]) because it was not able to compute the amount owing to it by the respondent until after HDB had provided it with a final statement of account, which confirmed the amount which was to be deducted from the contract sum. Section 24A(3) provides:

> An action to which this section applies, other than one referred to in subsection (2), shall not be brought after the expiration of the period of —
>
> (*a*) 6 years from the date on which the cause of action accrued; or
>
> (*b*) 3 years from the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action, if that period expires later than the period mentioned in paragraph (*a*).

30 Section 24A(4), which specifies the said knowledge, is in the following terms:

> In subsections (2) and (3), the knowledge required for bringing an action for damages in respect of the relevant injury or damage (as the case may be) means knowledge —
>
> (*a*) that the injury or damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty;
>
> (*b*) of the identity of the defendant;
>
> (*c*) if it is alleged that the act or omission was that of a person other than the defendant, of the identity of that person and the additional facts supporting the bringing of an action against the defendant; and
>
> (*d*) of material facts about the injury or damage which would lead a reasonable person who had suffered such injury or damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

31 In our view, the appellant clearly had the requisite knowledge for bringing an action from the time of breach of contract although it may not have knowledge of what the exact amount of damages would be. As the judge pointed out, s 24A typically covers actions in respect of latent injuries and damage caused by latent defects. We agree with him that this provision was inapplicable to the facts of this case.

32 On the above reasoning, the appeal is dismissed subject to the qualification that the appellant is entitled to additional prolongation costs amounting to $10,035.46 in respect of its

counterclaim (see [27] and [28] above). As the error on this point was conceded by the respondent and the arguments required no more than a reference to s 31 of the Limitation Act, we will deduct 5% of the costs to be awarded to the respondent. Accordingly, this appeal is dismissed with 95% costs to the respondent.