

Nam Kee Asphalt Pte Ltd v Chew Eu Hock Construction Co Pte Ltd
[2000] SGHC 45

Case Number : Suit 803/1999
Decision Date : 20 March 2000
Tribunal/Court : High Court
Coram : Lee Seiu Kin JC
Counsel Name(s) : Leow Tiat Hong (T H Leow & Co) for the plaintiffs; Lee Chin Seon (C S Lee) for the defendants
Parties : Nam Kee Asphalt Pte Ltd — Chew Eu Hock Construction Co Pte Ltd

1 The Plaintiffs and Defendants are companies registered in Singapore. The Plaintiffs are road contractors and suppliers of graded aggregates, asphalt premix and other road building materials. The Defendants are general contractors and at the material time were a partner in the joint venture ("the JV") that was awarded a contract by the Land Transport Authority for a certain stretch of the North-East Mass Rapid Transit line designated as the MRT C704 NEL contract ("the MRT contract").

2 The Plaintiffs and Defendants entered into two written contracts, both dated 1 October 1997, which provide for the supply, delivery and laying of graded aggregates ("the Aggregates Contract") and of asphalt premix ("the Premix Contract"). Graded aggregates are stones of various sizes, ranging from coarse to fine, that form the base layer of our bituminous roads. Asphalt premix is a mixture of fine stones and asphalt, or bitumen, that forms the top layer of such roads.

3 Under the Aggregates Contract, the Defendants ordered and paid for 8,643.42 tonnes of graded aggregates. The Plaintiffs claim that the Defendants were obliged to consume a total 40,000 tonnes under this contract and seek in this action to recover loss of profits on the unsold balance of 31,356.58 tonnes amounting to \$260,259.61.

4 Under the Premix Contract, the Defendants ordered and paid for 3,962.22 tonnes of grade B1 asphalt premix and 6,292.63 tonnes of grade W asphalt premix. The Plaintiffs claim that the Defendants were obliged to consume 60,000 and 8,000 tonnes respectively of grade B1 and grade W asphalt premix. The Plaintiffs therefore seek to recover loss of profits on the unsold balance of 56,037.78 tonnes of grade B1 and 1,707.37 tonnes of grade W asphalt premix amounting to \$648,357.10 and \$20,334.77 respectively.

5 In total, the Plaintiffs' claims in this action amount to \$928,951.48, plus interest and costs. At the end of the trial and after hearing submissions by counsel I dismissed the Plaintiffs' action with costs. The Plaintiffs appealed on 23 February 2000 and I now give my grounds of decision.

Parol Evidence

6 Both contracts take the form of a letter of offer from the Plaintiffs to the Defendants dated 1 October 1997. The letters set out certain terms of the offers and are signed by the Plaintiffs' General Manager. One of the directors of the Defendants accepted the offers by signing at the acknowledgement section provided at the last page of the letters. The acceptances are dated 9 October 1997.

7 The first question is whether the parties are entitled to adduce any evidence relating to the terms of these contracts apart from the two letters of 1 October 1997. Sections 93 and 94 of the Evidence Act are relevant in this regard. They provide as follows:

"93. When the terms of a contract ... have been reduced by ... the parties to the form of a document, ... no evidence shall be given in proof of the terms of such contract ... or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act."

"94. When the terms of any such contract ... have been proved according to section 93, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument ... for the purpose of contradicting, varying, adding to, or subtracting from its terms subject to the following provisions:

...

(b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved; in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;"

8 The Plaintiffs were quite prepared to proceed on the basis of the written contracts with no other evidence to be adduced in respect of their terms. However the Defendants took the position that they had evidence admissible under section 94(b). I allowed the Defendants to adduce such evidence the admissibility of which I would determine after hearing submissions. The Defendants' witnesses gave evidence that in the course of the negotiation leading to the contracts, the Plaintiffs' representative had agreed that the Defendants would not be bound to take the entire quantities specified in the contracts nor would they be bound to take all their requirements of graded aggregates and asphalt premix from the Plaintiffs. In the course of his submissions, counsel for the Defendants conceded that this evidence would not be admissible under section 94(b). I therefore need not consider any evidence of the terms of the contracts apart from the Aggregates Contract and the Premix Contract.

The Aggregates Contract

9 The Plaintiffs claim that the Defendants were in breach of the following terms of the Aggregates Contract:

(a) the Defendants must purchase at least 40,000 tonnes of graded aggregates from the Plaintiffs ("the minimum quantity clause"); and

(b) the Defendants must purchase all the graded aggregates that they require in respect of the MRT contract from the Plaintiffs ("the exclusivity clause").

In respect of the minimum quantity clause, counsel for the Plaintiffs said that it was an express term of the contract. As for the exclusivity clause, he at first contended that it was also an express term. However he was unable to point to such term in the contract and eventually conceded that it was an implied term.

10 I first set out the provisions of the Aggregates Contract which are as follows:

"[To:] Chew Eu Hock Construction Co Pte Ltd

MRT C704 NEL (MARCH 1998 – MARCH 2001)

SUPPLY, DELIVERY & LAYING OF GRADED AGGREGATES

We thank you for the invitation to quote for the above-mentioned job and submit herewith our quotation and terms and condition as follows:

Estimated Quantity : 40,000 Tonnes

Mat Thickness : 250 mm and above

W/O sensor (Unless otherwise stated) : Yes

Day Work (Unless otherwise stated) : Day/Night

Rate – 1 Aug 1997 to 31 Aug 1999 : \$21.00 per tonne

Rate – 1 Sep 1999 to 31 Aug 2000 : \$22.00 per tonne

Rate – 1 Sep 2000 to 31 Aug 2001 : \$23.00 per tonne

Est date of commencement : Early 98*

The price quoted does not include GST or other fees which shall be payable by you as required by any law or rules at any point of time.

* Please give 2 weeks advance notice before date of commencement.

TYPE OF MATERIAL (GRADED AGGREGATES)

The graded aggregates shall consists of graded crushed, clean and hard angular aggregate complying with the requirements of SS 31 and conforming to the gradation showing on Table 17.7 of PWD General Specification.

SITE CONDITION

The underlying course shall be checked and accepted by the relevant authority before placing and spreading of the Graded Aggregates. Any ruts or soft, yielding places due to improper drainage conditions, hauling or from any other courses shall be corrected and rolled to the required density prior to placing of the Graded Aggregates.

The levels of subgrade shall be within the appropriate tolerances stated in Table 17.2 of PWD General Specification.

SCOPE OF WORK

The material shall be transported directly to the point where it is to be laid and shall be deposited and spread by a paver finisher in lanes in a uniform layer without segregation of size to such loose depth that, when compacted, the thickness of the compacted layer shall not exceed 250 mm.

After spreading the lose material shall be thoroughly compacted. The rolling shall continue until the material is compacted to a dry density of not less than 98% of the maximum dry density as determined by BS1377 Test No 14.

OTHER CONDITIONS

This agreement shall not be assigned in part or in whole to any other persons without the written consent of our company.

All delivery notes acknowledge and signed by your site staff shall be considered as final proof of receipt of goods delivered and as ordered under your instructions. You are also advised to have all delivery notes stamped with your company's seal.

Payment shall be made on the actual quantity of graded aggregates delivered and acknowledge on the delivery notes.

PAYMENT TERM

60 days from date of supply.

Interest at the rate of 1% per month will be charged on overdue accounts.

The supplier shall be entitled to withhold further deliveries of premix without notice if any invoice shall be found unpaid on the due date. In such case the company may terminate this agreement with immediate effect and notwithstanding the credit term hereby agreed and in recovering such outstanding payments, plus all legal costs and expenses together with interest accrued thereon.

COMPENSATION FOR DELAY

Nam Kee shall strictly adhere to your work schedule given to us not later than 2 weeks in advance.

In the event Nam Kee fails to comply with work schedule or within such reasonable time other than those listed below:

- (a) Force majeure
- (b) Exceptionally adverse weather conditions the assessment of which shall be in accordance with the relevant provision in the specifications.
- (c) Industrial action by workmen, strikes, lock-outs or embargoes affecting any of the trades employed upon the works or in the preparation, manufacture or transportation of materials or goods required for the works and provided the same are not due to any reasonable act or default of the contractor or of any subcontractor. Provided that this event shall only apply if the industrial action by workmen, strike, lock-out or embargo causing the delay is in Singapore.
- (d) Compliance with the requirements of any law, regulation, by-law or public authority or public service company.
- (e) Fire, storm, lightning, high winds or flooding.

Nam Kee shall compensate the main contractor the difference in price and cost if the same work is being executed by another contractor under this circumstance.

VALIDITY PERIOD

The validity of this quotation shall be for 14 days from the date of this Sales Quotation, subject to fluctuation of materials costs. Any amendments to the conditions must be countersigned by officials from both parties.

If the quotation is in order kindly acknowledge our offer by signing on the space provided below to signify your acceptance and return the duplicate copy of this quotation to us soonest possible.

...

[signed]

Desmond Lim

General Manager

I/We acknowledge and agree to the terms and conditions of your Sales Quotation
NKA/GA/SQ/025/97

[signed Tan Eng Siang, Director, Chew Eu Hock Construction Co Pte Ltd]"

11 From a perusal of all its terms, it can be seen that the Aggregates Contract is a an agreement in which the Plaintiffs undertakes to supply graded aggregates conforming to certain specifications to the Defendants. The graded aggregates would be delivered by the Plaintiffs to the MRT contract site. They would be laid and compacted to a minimum mat thickness of 250 mm in accordance with certain specifications. The delivery, laying and compaction may be required to be done by day or night, as can be expected in road works that interfere with existing public thoroughfare. The Aggregates Contract provides for the Defendants' staff to sign delivery notes which shall constitute final proof of receipt of the graded aggregates.

Minimum Quantity Clause

12 The following provisions in the Aggregates Contract lead me to the conclusion that there is no obligation on the Defendants to take the entire quantity stated:

- (i) It is expressly stated that the "Estimated Quantity" is 40,000 tonnes;
- (ii) There is only one other reference to quantity, under the title "Other Conditions", and it provides that payment shall be made on the actual quantity of graded aggregates delivered as evidenced by the signed delivery notes;
- (iii) Under "Payment Term", it is provided that if any invoice relating to any delivery is not paid on the due date the Plaintiffs may terminate the agreement immediately and recover such outstanding sum, plus legal costs, expenses and interest, from the Defendants. It does not provide that the Plaintiffs shall also be entitled to recover loss of profit from the balance quantity under the contract. If there had been an intention to oblige the Plaintiffs to take the entire quantity, it would have been logical and prudent to make provision for this here; and
- (iv) Under "Compensation for Delay" the Defendants may engage another contractor to carry out

the supply and the work if the Plaintiffs failed to comply with the work schedule. In that event the Plaintiffs is obliged to compensate the Defendants for any increased cost. If the Defendants were obliged to take the quantity specified, there ought to be a provision as to whether such quantity procured from a third party would be treated as being purchased from the Plaintiffs under the Aggregates Contract in reduction of the total contract quantity. The contract is silent on this.

13 Counsel for the Plaintiffs submitted that the express term is contained in the provision "Estimated Quantity: 40,000 Tonnes". He argued that on a true construction of the terms of the Aggregates Contract, from the viewpoint of the industry and in the context of the case, the term "Estimated Quantity" should be interpreted to mean "Minimum Quantity". However he was unable to give me any cogent reason or authority to justify this conclusion. I should add that the contract was drafted by the Plaintiffs and see no reason to give such a strained construction to words that are very clear. "Estimated Quantity" of 40,000 tonnes can only mean that the quantity specified is only an estimate and the actual quantity to be paid for by the Defendants is what was actually ordered, delivered and laid as provided in the "Other Conditions" clause. There is no express provision for the Defendants to take a minimum sum. Neither is there any provision in the Aggregates Contract that hints at such an interpretation. Indeed the other provisions that I have listed above all point the other way.

Exclusivity Clause

14 Counsel for the Plaintiffs said that there is an implied term under the contract that the Defendants would purchase from the Plaintiffs all the graded aggregates that they require in respect of the MRT contract. Citing from *Chitty on Contracts* (28th Ed.) he submitted that it was clear from the circumstances of the case and the terms of the written contract that the parties had intended that the Plaintiffs would be the exclusive supplier for all the Defendants' requirements in the MRT contract. Paragraphs 13-004, 13-005 and 13-007 of *Chitty* state as follows:

"13-004 Intention of parties. In many cases, however, one or the other of the parties will seek to imply a term from the wording of a particular contract and the facts and circumstances surrounding it. The court will be prepared to imply a term if there arises from the language of the contract itself, and the circumstances under which it is entered into, an inference that the parties must have intended the stipulation in question. An implication of this nature may be made in two situations: first, where it is necessary to give business efficacy to the contract and, secondly, where the term implied represents the obvious, but unexpressed, intention of the parties. These two criteria often overlap and, in many cases, have been applied cumulatively, although it is submitted that they are, in fact, alternative grounds. Both, however, depend on the presumed intention of the parties.

13-005 Efficacy to contract. A term will be implied if it is necessary, in the business sense, to give efficacy to the contract. The general principle of law was thus stated by Bowen L.J. in *The Moorcock*:

"Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded upon the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and there are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with

the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have."

In this situation, although there is an apparently complete bargain, the courts are willing to add a term on the ground that without it the contract will not work.

13-007 Obvious inference from agreement. A term which has not been expressed may also be implied if it was so obviously a stipulation in the agreement that the parties must have intended it to form part of their contract. "Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common, 'oh, of course.'" A term will not, however, thus be implied unless the court is satisfied that *both* parties would, as reasonable men, have agreed to it had it been suggested to them. The knowledge or ignorance of each party of the matter to be implied, or of the facts on which the implication is based, is therefore a relevant factor. Further, since "the general presumption is that the parties have expressed every material term which they intended should govern their contract, whether in oral or in writing," the court will only imply a term if it is one which must necessarily have been intended by them, and in particular will be reluctant to make any implication "where the parties have entered into a carefully drafted written contract containing detailed terms agreed between them.""

15 Considering the factors above, firstly there is nothing in the language of the contract nor in the circumstances under which it was entered into that raises an inference that the parties had intended that there be an exclusivity clause. Such a clause is neither necessary to give business efficacy to the contract nor does it represent the obvious intention of the parties. It is common for a vendor to give an open quotation to a purchaser for the latter to make orders as he deems necessary. Implying the exclusivity clause does not make the contract any more efficacious; instead it alters the nature of the bargain considerably. As such, I cannot see how it can pass the "officious bystander" test. I therefore do not see any basis whatsoever to imply the exclusivity term into the Aggregates Contract.

The Premix Contract

16 The Plaintiffs makes similar contentions in respect of the Premix Contract, i.e. that the Defendants were obliged to take 60,000 tonnes of grade B1 and 8,000 tonnes of grade W asphalt premix and that the Defendants would purchase these exclusively from the Plaintiffs under the Premix Contract in respect of the MRT contract. The Defendants equally say that the quantities specified were not minimum quantities and that there was no exclusivity clause. The Premix Contract contains terms similar to the Aggregates Contract, but for completeness I set these out below:

"[To:] Chew Eu Hock Construction Pte Ltd

MRT C704 NEL (MARCH 1998 – March 2001)

SUPPLY, DELIVERY & LAYING OF ASPHALT PREMIX

We refer to the above-mentioned job and submit herewith our quotation and terms and conditions as follows:

Estimate Tonnage : B1 – 60,000 Tonnes

W3 – 8,000 Tonnes

Mix Design : B1 and W3

Mat Thickness : 80 mm – 120 mm

W/O sensor (Unless otherwise stated) : Yes

Day work (Unless otherwise stated) : Day/Night

Rate (Premix) 1 Aug 1997 to 31 Aug 1999 : \$45.00 per tonne

Rate (Premix) 1 Sep 1999 to 31 Aug 2000 : \$46.00 per tonne

Rate (Premix) 1 Sep 2000 to 31 Aug 2001 : \$47.00 per tonne

Est date of commencement : Early 98*

* Please give 2 weeks advance notice before date of commencement.

The price quoted is for the Supply & Laying of Asphalt Premix, including spraying of colpave (0.54 litres/m²) and compaction.

The price quoted does not include GST or other fees which shall be payable by you as required by any law or by-laws, rules and regulations of any Government Ministry, Statutory boards or other public authorities at any point of time relevant to the execution of the works.

TYPE OF MIX AND MAT THICKNESS

The mix shall be designed according to Table 17.19 of the current PWD General Specification March 87 including amendments made in March 92. However, if there is any changes to this, a copy of the mix design specification to be submitted to us at least three days before the commencement of the actual work in order to establish a satisfactory job mix formula.

Any last minute changes to Mix Specification as instructed by your authorised representatives either at site or from your office shall be amended accordingly. However, our company will not be responsible for disputes, if any, arising from these changes.

PREMIX FAILURE AND REIMBURSEMENT

Any claim for reimbursement of premix failure shall be considered provided the tests were carried out using fresh samples collected and delivered by our staff and may be witnessed by your staff to an accredited laboratory to determine conformity with requirements stated in the PWD General Specification.

We shall not entertain any claim by the client if they fail to produce the details of test results together with the official penalty imposed by the LTA within one month from such notice or writing. All reimbursement for test failure shall be based on our fixed selling price as in this quotation.

SITE CONDITION

The Stone Base on your site should be designed and constructed according to the specifications of the relevant Government Authorities and should be firm enough to carry the designed traffic loading. The base material shall be compacted to a dry density of not less than 98% of the maximum dry density as determined by BS1377 Test No 14.

Any deficiencies in the construction of the ground resulting in early failure of our products, our company shall not be held responsible for such premature failures of the road and consequent remedial works. The deficiencies should be rectified immediately otherwise our machines will be deployed to other sites and will return to continue the job only when the deficiencies are rectified. Extra Mobilisation fees will be charged.

SCOPE OF WORK

The work comprises of the supply of labour, plant, materials, transport and everything else necessary for the milling of the asphalt pavement (where applicable) and the supply and laying of the Asphalt premix at locations pre-arranged by both parties.

The Asphalt Premix supplied will be paved with a paver finisher and compacted according to relevant authorities requirements.

OTHER CONDITIONS

This agreement shall not be assigned in part or in whole to any other persons without the written consent of our Company.

All delivery notes acknowledged and signed by your site staff shall be considered as final proof of receipt of goods delivered and ordered under your instructions. You are also advised to have all delivery notes stamped with your Company's seal.

Payment shall be made on the actual quantity of Asphalt Premix delivered and acknowledged on the delivery notes.

PAYMENT TERM

60 days from date of supply.

Interest at the rate of 1% per month will be charged on overdue accounts.

The supplier shall be entitled to withhold further deliveries of premix without notice if any invoice shall be found unpaid on the due date. In such case, the company may terminate this agreement with immediate effect and notwithstanding the credit term hereby agreed and in recovering such outstanding payments, plus all legal costs and expenses together with interests accrued thereon.

VALIDITY PERIOD

The validity of this quotation shall be for 14 days from the date of this Sales quotation. Any amendments to the conditions must be countersigned by officials from both parties.

COMPENSATION FOR DELAY

Nam Kee shall strictly adhere to your work schedule given to us not later than 2 weeks in advance.

In the event Nam Kee fails to comply with work schedule or within such reasonable time other than those listed below:

- (a) Force majeure
- (b) Exceptionally adverse weather conditions the assessment of which shall be in accordance with the relevant provision in the specifications.
- (c) Industrial action by workmen, strikes, lock-outs or embargoes affecting any of the trades employed upon the works or in the preparation, manufacture or transportation of materials or goods required for the works and provided the same are not due to any reasonable act or default of the contractor or of any subcontractor. Provided that this event shall only apply if the industrial action by workmen, strike, lock-out or embargo causing the delay is in Singapore.
- (d) Compliance with the requirements of any law, regulation, by-law or public authority or public service company.
- (e) Fire, storm, lightning, high winds or flooding.

Nam Kee shall compensate the main contractor the difference in price and cost if the same work is being executed by another contractor under this circumstance.

If the quotation is in order kindly acknowledge our offer by signing on the space provided below to signify your acceptance and return the duplicate copy of this quotation to us soonest possible.

...

[signed]

Desmond Lim

General Manager

I/We acknowledge and agree to the terms and conditions of your Sales Quotation NKA/AP/SQ/098/97

[signed Tan Eng Siang, Director, Chew Eu Hock Construction Co Pte Ltd]"

17 The Premix Contract is an agreement in which the Plaintiffs undertakes to supply asphalt premix conforming to certain specifications to the Defendants'. The asphalt premix would be delivered by the Plaintiffs to the MRT contract site. They would be laid and compacted to a mat thickness of between 80 and 120 mm in accordance with certain specifications. The work may also be required to be done by day or night. The Premix Contract provides for the Defendants' staff to sign delivery notes which shall constitute final proof of receipt of the graded aggregates.

18 The Premix Contract contains four provisions similar to those I have listed in respect of the Aggregates Contract and they also lead me to the conclusion that the Defendants were not obliged

to take the quantities specified. Briefly, such provisions in the Premix Contract are:

- (i) It is expressly stated that the "Estimated Tonnage" are 40,000 tonnes of grade B1 and 8,000 tonnes of grade W asphalt premix;
- (ii) There is only one other reference to quantity, under the title "Other Conditions", which provides that payment shall be made on the actual quantity of asphalt premix delivered;
- (iii) Under "Payment Term", there is a similar provision that the Plaintiffs may terminate the agreement upon failure by the Defendants to pay any invoice and recover such outstanding sum, plus legal costs, expenses and interest, from the Defendants. Again there is no provision that the Plaintiffs shall also be entitled to recover loss of profit from the balance quantity under the contract; and
- (iv) Under "Compensation for Delay" there is a similar provision that the Defendants may engage another contractor to carry out the supply if the Plaintiffs failed to comply with the work schedule. Similarly there is no provision as to whether such quantity procured from a third party would be treated as being purchased from the Plaintiffs under the Premix Contract in reduction of the total contract quantity.

19 Counsel for the Plaintiffs made the same arguments in respect of the Premix Contract as in the Aggregates Contract, i.e. that on a true construction of the terms of the Premix Contract, the court ought to interpret the term "Estimated Tonnage" to mean "Minimum Tonnage" and that an exclusivity clause is implied. And for the same reasons that I have given in respect of the Aggregates Contract, I am unable to agree with him.

LEE SEIU KIN

JUDICIAL COMMISSIONER

SUPREME COURT

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