Legend Building Supplies (Pte) Ltd v Chon Hwa Construction Pte Ltd
[2000] SGHC 217

Case Number : Suit 1085/1999
Decision Date : 30 October 2000
Tribunal/Court : High Court
Coram : Lee Seiu Kin JC
Counsel Name(s) : Devinder Kumar Rai & Justin Chia (Harry Elias Partnership) for the plaintiffs; M Sivakumar & Parveen Kaur (Azman Soh & Murugaiyan) for the defendants
Parties : Legend Building Supplies (Pte) Ltd — Chon Hwa Construction Pte Ltd

JUDGMENT:

Grounds of Decision

1 The Plaintiffs are a company incorporated in Singapore and among their business activities was the import and sale of steel reinforcement bars ("rebars") for reinforced concrete. The Defendants are a company incorporated in Singapore and carry on business as building contractors.

2 In this action the Plaintiffs claim against the Defendants the sum of $626,008.23 as damages for the Defendants' failure to perform 2 contracts for the purchase of rebars. The Plaintiffs claim that the Defendants had failed to take delivery of the total quantities specified under the 2 contracts and they had to dispose of the undelivered balance by selling them to third parties. The sum claimed represented the loss of revenue suffered by the Plaintiffs under both contracts after accounting for the proceeds of the disposal sales. In their Defence, the Defendants claimed that they were not obliged to take the quantities claimed for various reasons, which I will go into later. The Defendants also counterclaimed against the Plaintiffs for loss and expenses arising from the supply by the Plaintiffs of rusty rebars. At the end of the trial and after hearing submissions by counsel, I gave judgment for the Plaintiffs for the sum claimed and dismissed the Defendants' counterclaim. I ordered costs against the Defendants in respect of both the claim and the counterclaim. The Defendants have since appealed against the whole of my order and I now give my grounds of decision.

The Plaintiffs' claims

3 The Plaintiffs claim under 2 contracts as follows:

> (i) A contract in writing in the form of a letter from the Plaintiffs addressed to the Defendants, dated 26 February 1996 and entitled "Agreement for Supply of Reinforcement Bars" ("the First Contract"). This sets out the terms and conditions relating to the sale of 4,000 tonnes of rebars. The Defendants' Managing Director, Chai Chon Yen, placed his signature at the end of the document to signify his acceptance and confirmation on behalf of the Defendants. In this First Contract, the Plaintiffs put the reference number as LG960201.
>
> (ii) A contract in the form of a similar letter, dated 22 July 1996 ("the Second Contract"), in relation to 10,000 tonnes. However this time the acceptance and confirmation at the end of the document is signed by the Defendants' project manager for their Villa Marina project, Simon Ho ("Ho"). The Plaintiffs' reference number in this Second Contract is stated as LG960705.

4 The Plaintiffs adopted the following procedure in administering the 2 contracts. As and when orders were placed by the Defendants' site representatives, the Plaintiffs would deliver the rebars along with the corresponding Delivery Orders ("DOs"). These DOs would contain an item called "Sales Contract/P.O. No." and there, the reference number of either the First Contract or

the Second Contract would be entered. Next, the relevant invoices would be sent to the Defendants. These invoices would cite the reference numbers of the First Contract or Second Contract under an item called "Contract No." The Plaintiffs' case is essentially as follows:

(i) The Defendants had entered into the 2 contracts which were binding on them.

(ii) The contracts obliged the Defendants to purchase 4,000 and 10,000 tonnes respectively at the contractual prices.

(iii) The Defendants had only purchased 2,610.836 and 5,130.54 tonnes respectively under the First Contract and Second Contract and had refused to take the balance.

The Defence

5 The Defendants' have 5 alternative defences as follows:

(i) On a proper construction of the contracts, the quantities specified in both contracts were maximum quantities and the Defendants were not obliged to take the entire amounts.

(ii) While the Defendants agree that they had entered into the First Contract they deny that they had entered into the Second Contract. Ho, the signatory in the Second Contract, was not authorised to enter into such a contract on behalf of the Defendants and the Plaintiffs knew or ought to have known of this. Furthermore, as the Defendants had a flexible arrangement with the Plaintiffs in relation to project sites and they had taken a total of 7741.376 tonnes, this was well in excess of the 4,000 tonnes under the First Contract.

(iii) The Second Contract was signed after the validity period of the offer and was therefore not valid.

(iv) The Plaintiffs had committed a repudiatory breach of the contracts by supplying rusty rebars in September 1998 despite a warning given by the Defendants. The Defendants accepted this breach and ceased to make further orders of rebars.

(v) Time was not of the essence in both contracts and the Defendants could have completed purchasing the entire quantities if the Plaintiffs had not terminated the contract in January 1999.

(i) Construction of the Contracts

6 The first point is whether on a proper construction of the contracts, the Defendants were obliged to take the quantities specified, or whether these were merely maximum quantities under the contract that the Plaintiffs were obliged to supply at the contractual prices.

7 The First Contract is dated 26 February 1996 and drafted as a letter of offer. This was accepted and confirmed by the Defendants' Managing Director. This letter states as follows:

"Our Ref: LG960201

Chon Hwa Construction Pte Ltd
7500A Beach Road,

#08-316 The Plaza
Singapore 199591

Dear Sirs

AGREEMENT FOR SUPPLY OF REINFORCEMENT BARS

We are pleased to confirm having agreed to sell and you having agreed to purchase the commodities mentioned below subject to the following terms and conditions:

1	BUYERS :	CHON HWA CONSTRUCTION PTE LTD 7500A Beach Road #08-316 The Plaza Singapore 199591
2	SELLERS :	LEGEND BUILDING SUPPLIES (PTE) LTD 4 Kian Teck Drive Singapore 628821

3 COMMODITIES, SIZE ASSORTMENT AND PRICE

A) High Tensile Deformed Steel Bars

Dia.10/13/16/20/25/32 mm x 12 m length at S$480.00/Mt.

4 Country of origin will be at Seller's option.

5 The price term of this Agreement is costs of commodities delivered to the Buyers' job site mentioned in Clause 7. The price does not include 3% GST which shall be on Buyers' account.

6 Total quantity for this Agreement is 4,000.000 Mt.

7 The above-mentioned commodities are to be used for the project "Proposed Erection of A Part 4/Part 7-storey Commercial/Residential Flats at Havelock Road" or other projects as agreed by Sellers.

8 Commodities are in accordance with BS4449/1988 (Equivalent to SS2).

Copies of mill's test certificates, in which the results of testing in compliance with the aforesaid standard are stated, will be forwarded to Buyers upon request.

If Buyers require verification of the commodities' quality, Buyers should conduct sampling tests BEFORE cutting, bending or processing of the commodities. Upon non-conformity proved by valid tests conducted in Government approved laboratories, Sellers will remove and replace those non-processed bars only. The liability of Sellers is limited to the transportation cost. Sellers will not be responsible for any other consequential damages.

9 Commodities will be supplied by partial deliveries, within the contract period which commences from February 1996 and expires on January 1998.

10 Transportation will be arranged by Sellers by truck loads of 25MT per truck during weekdays, except Sundays and statutory holidays. Buyers are required to order at quantities of 25MT multiple, otherwise, a surcharge of S$100 per truck will be levied on Buyers for every truck load less than 20MT.

For any order of above 50MT per delivery, free crane will be provided by Sellers for unloading onto the ground alongside the truck. Otherwise, Buyers are required to pay a surcharge of S$160 per delivery, or to provide crane and labour for unloading. Transportation cost within site area and other extra costs, if any, are for the account of Buyers.

In the event that Buyers require cargoes to be unloaded to areas other than the ground level, Buyers shall provide their own labour to carry out the unloading process. A surcharge will be levied on Buyers as compensation of excess time used in so doing.

Buyers shall nominate authorized persons to receive the goods at site. Specimen signatures of such persons shall be given to Sellers before first delivery.

Should there be any delay or return of goods due to special site condition such as inaccessibility of unloading location etc, Buyers shall be responsible for the delivery charges or compensation of waiting time.

If special permits from government authorities are required for purpose of allowing access of trucks to unload the commodities, application of such permits is to be arranged by Buyers before delivery.

11 For dia.16mm and below, invoicing will be based on actual weight as ascertained by Sellers' designated weighbridge, which is deemed to be final, for each physical delivery. For dia.20mm and above, invoicing will be based on theoretical weight according to BS4449 : 1988.

12 Payment for each physical delivery is to be effected within 30 days from the date of delivery. Overdue payments are subject to interest at two (2) percent per annum above prevailing prime lending rate of United Overseas Bank Limited. At the discretion of the Sellers, the Agreement is determinable upon non-payment of invoice beyond the stipulated payment period.

This contract will not be construed as an agreement of credit between Buyers and Sellers. Sellers reserve the overriding right to withdraw granting such credit facility to Buyers at 7 days' notice.

13 All duties and/or taxes, surcharges, if any (except anti-dumping duty), levied by Government on the commodities or any increase thereof after date of confirmation of the Agreement are to be borne by Buyers.

14 This is the only Agreement concluded between Buyers and Sellers on the above subject, any amendment or additional terms thereto require written consent of Sellers.

Sellers are not bound by any alteration written, typed, and/or sealed on this Agreement without Sellers' consent by initialing and sealed in acknowledgement of alteration.

This Agreement contains the entire agreement between Buyers and Sellers and there are no verbal understandings in connection herewith.

15 Failure of Buyers to sign and return this Agreement to Sellers on or before 29th February 1996, will render this Agreement null and void.

Yours faithfully

For and on behalf of

Accepted and Confirmed by

(signed)	(signed)
Legend Building Supplies (Pte) Ltd	Chon Hwa Construction Pte Ltd"

8 The Plaintiffs' letter of 22 July 1997 sets out the terms of the Second Contract in a similar fashion. These terms are exactly the same as those in the First Contract except for variations in the price (clause 3), total quantity (clause 6), delivery locations (clause 7), delivery mode and period (clause 9), delivery details (clause 10), reservation of title provision (clause 12), and validity period of offer (clause 15). As the material provisions in both contracts are the same I need not set out the terms of the Second Contract in full.

9 I now proceed to analyse the terms of the First Contract. Clauses 1 and 2 identify the parties. Clause 3 sets out the price. Clause 4 provides that the seller may decide the source country. Clause 5 states that the price includes delivery at the site but not GST. Then comes clause 6 which provides as follows:

> "6. Total quantity for this Agreement is 4,000.000 MT"

There is nothing in the document which specifically clarifies this. The Defendants say that this is at best ambiguous and therefore must be interpreted *contra proferentem*. However I cannot agree. While the interpretation of this provision might depend on what other provisions have to say about this total quantity, I cannot see how there can be any ambiguity in the words of clause 6. They must mean what they say, i.e. that the total quantity under the agreement is 4,000 tonnes.

10 Moving on, clause 7 states that the rebars are for use at a site at Havelock Road or "other projects as agreed" by the Plaintiffs. Clause 8 specifies the standard that the rebars are to conform to and the Defendants' remedies and Plaintiffs' liabilities should there be non-conformity. Clause 9 provides as follows:

> "9. Commodities will be supplied by partial deliveries, within the contract period which commences from February 1996 and expires on January 1998."

The words "partial deliveries" can only relate to the total quantity specified in clause 6. Therefore clause 9, read with clause 6, shows that the Plaintiffs are obliged to supply and the Defendants to take the 4,000 tonnes between those 2 dates.

11 Clause 10 sets out the conditions of delivery such as minimum consignment size and site conditions. Clause 11 is a measurement provision. Clause 12 states that the Defendants are to make payment within 30 days of delivery of each consignment and that late payment will be subject to interest set at 2% above the UOB prime rate. This clause also gives the Plaintiffs the right to determine the contract if any payment is not made within the stipulate period. Clause 13 provides that all duties or taxes levied, except for anti-dumping duty, shall be the liability of the Defendants. Clause 14 is an entire agreement provision. Clause 15 limits the time for acceptance of the offer.

12 It can be seen that on a plain reading of the First Contract it provides for the Defendants to purchase 4,000 tonnes of rebars from the Plaintiffs at the price specified. Delivery would be effected in partial quantities between February 1996 and January 1998.

13 The Defendants argue that clause 12 is inconsistent with this interpretation. After specifying that the period for payment shall be 30 days, clause 12 ends with this sentence:

> At the discretion of the Sellers, the Agreement is determinable upon non-payment of invoice beyond the stipulated payment period.

The Defendants argued that if the contract was for the entire 4,000 tonnes, then were the Defendants to be in breach of the payment term in respect of the first consignment of say, 25 tonnes, then it would mean that the Plaintiffs are entitled to terminate

the contract and recover their loss of profits for the balance 3,975 tonnes from the Defendants. Since that cannot be the position, it must mean that the 4,000 tonnes only refers to the maximum quantity that the Plaintiffs are obliged to supply to the Defendants at the contract price.

14 Even though I agree that the consequences appear rather severe, I do not agree with this argument. Firstly, and as I have stated above, the words are clear in clause 6, read in conjunction with clause 9, that the total quantity for the contract is 4,000 tonnes. There is nothing in the rest of the document to suggest that this relates to only the maximum quantity. Secondly the second limb of clause 12 only gives the Plaintiffs the right to terminate the contract for late payment. It does not provide the extent of Defendants' liability upon such determination. Indeed the Defendants' point about the consequences being too harsh can be used against any submission by the Plaintiffs in that situation to claim for loss of profits in respect of the balance quantities. For the present purpose, I need not make any determination as to this question.

15 To support their position, the Defendants cited my decision in Suit 803/99, *Nam Kee Asphalt Pte Ltd v Chew Eu Hock Construction Co Pte Ltd* (unreported). That case involved a similar dispute as to whether the quantities specified in the contract were maximum or minimum quantities. I held that the quantities in that case related to the maximum quantities that the plaintiffs were obliged to supply at the contractual prices and not the quantities that the defendants were obliged to purchase. The main reason for that was the fact that the written contract stated that the quantities were "estimated quantities". I had also given 3 other reasons supporting this conclusion. One of these relates to the payment term and paragraph 12(iii) of the judgment there reads as follows:

> "(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;"

The Defendants point to clause 12 in the present contract, which gives the right to the Plaintiffs to terminate the contract for non-payment by the due date. They submit that this term gives a similar right to the Plaintiffs and therefore the contract in the present case must relate to a maximum rather than an quantity.

16 I have discussed clause 12 above. In my view the termination clause in *Nam Kee* is different because it provided expressly for the amount the plaintiffs could recover in the event of non-payment of any invoice. My reasoning in *Nam Kee* was that if there had been an intention to oblige the defendants there to take the entire quantity, then it would have been logical for the plaintiffs to specify that they would have been entitled to recover for loss of profits in respect of the entire quantity rather than to specify only the recovery of the outstanding amount under the invoice for a particular delivery. In the present case, the contract is silent as to what the Plaintiffs are entitled to recover in the event of termination. It should also be noted that the primary reason for the conclusion in *Nam Kee* was not the clause relating to the payment term, but the fact that the contract specified that the quantities were "estimated". In construing the obligations entered into by parties to a contract, it is important to consider the exact terms in each case. It is erroneous to point out a term common to another contract and from this, form a similar conclusion. The question is what is the true nature of the bargain between the parties and in the case of a written contract, the court has to distil this from the written terms in their entirety. It is clear to me that the present case relates to a situation whereby the purchaser had locked in a fixed price for certain quantities he required for his projects over a period of time.

17 As the material provisions of the Second Contract are similar to those of the First Contract, the same conclusions obtains, i.e. that the Defendants are obliged to purchase the entire quantity of 10,000 tonnes of rebars.

(ii) Whether Second Contract validly made

18 I turn to the next limb of the defence, i.e. whether the Second Contract is binding on the Defendants. This was signed by Ho, the Defendants' project manager at their Villa Marina site. The Defendants say that only their directors were authorised to sign such a contract. Indeed the First Contract was signed by Chai Choon Yen ("Chai"), their General Manager who, at the material time was a director. There were also earlier contracts between the parties and these had been signed either by Chai or another director, Leow.

19 The Second Contract is dated 22 July 1996. The circumstances under which it was signed by Ho is somewhat hazy. Alvin Lim ("Lim") was the Plaintiffs' Sales Manager at the time. He left the Plaintiffs' employment in November 1996 and at the time of the trial was working as a sales agent for a trading company which also traded in rebars. Lim confirmed that one of the signatures at bottom of the letter of 22 July 1996 was his. However he had no recollection of the Second Contract. He confirmed that at the material time, he was the only person from the Plaintiffs who dealt with the Defendants in relation to their rebar contracts. For negotiation of contracts he normally dealt with Chai. For operational matters such as complaints at site, he dealt with the respective project managers. There had been contracts between the parties prior to these 2 contracts and Lim said that Chai would usually sign the contracts on behalf of the Defendants. On occasions, Leow also signed the contracts. He could not recall how Ho got to sign the Second Contract.

20 On the other hand, the Defendants' Ho recalled that after several batches of steel bars were delivered to his Villa Marina site, 2 representatives of the Plaintiffs went to his site office and asked him to sign the Second Contract. They told him that Chai had approved its terms and that Ho's signature was a mere formality for administration purposes. It was on this basis that he put his signature on the document. Ho said that this was the first time that he had signed such a major contract. He could not recall the identities of the 2 representatives, except that it was a lady and a gentleman. When asked why he did not check with Chai when they told him that the latter had approved the contract, Ho said that he tried to but was unable to contact Chai and later found out that Chai was overseas at the time. Ho said that Chai had earlier told him that he, Chai, had firmed up the unit rates with the Plaintiffs and that Ho could order from them. Ho said that at the time he needed the rebars urgently. However Ho said that he did not subsequently speak to Chai about his signing the Second Contract.

21 Chai gave evidence that sometime in July 1996, Lim came to his office with 2 copies of a contract which he exhibited in his affidavit. This is a letter dated 22 July 1996 ("the First Draft") and is exactly the same as the Second Contract except for the following:

> (a) Under clause 9, the contract period is August 1996 to March 1998 in the First Draft and September 1996 to August 1998 in the Second Contract;
>
> (b) Under clause 15, the date for acceptance is 26 July 1996 in the First Draft and 1 August in the Second Contract.

22 Chai said that he told Lim that the quantity was too large and the Defendants only needed about 7,600 tonnes for the Villa Marina project. Therefore he did not sign the First Draft although Lim tried to persuade him to do so. Chai said that they eventually agreed that the Defendants would purchase rebars from the Plaintiffs on an ad-hoc basis at $482 per tonne, the price specified in the First Draft.

23 On the face of it, the Defendants appear to have a good defence. After all, the course of dealing was that contracts were signed by the directors Chai or Leow. Ho was only the project manager who had charge of the Villa Marina site and had neither actual nor ostensible authority to enter into such a large contract. However the problem with the Defendants' case is that the subsequent facts do not support it. These are as follows:

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(i) Part performance of contract

24 After the Second Contract was signed, the Plaintiffs delivered a total of 5,130.54 tonnes to the Villa Marina or other sites.

Each delivery was accompanied by a Delivery Order which cited the reference number of the Second Contract. Payment was made by the Defendants against invoices which also cited the reference number. The Defendants explained that those orders they made were pursuant to the ad hoc agreement and they did not pay attention to the reference number.

(ii) Defendants agreed to variation of contract

25 Sometime in 1997 the prices of rebars in the market fell. The Defendants asked the Plaintiffs for a reduction in the prices of the rebars. After a discussion on 10 September 1997, the Plaintiffs agreed to reduce the basic price from $482 per tonne to $472. To confirm this they sent 2 letters to the Defendants, both dated 11 September 1997. The first letter made reference to the First Contract and states as follows:

> "RE: LG 960201 – CONTRACT AMENDMENT TO AGREEMENT FOR SUPPLY OF REINFORCEMENT BARS TO "… HAVELOCK ROAD"
>
> We refer to our discussion held on 10 September 1997 and are pleased to amend the above-mentioned contract as follows:
>
> 3. COMMODITIES, SIZE ASSORTMENT AND PRICE
>
> A) High Tensile Deformed Steel Bars
>
> Dia. 10/13/16/20/25/28/32mm X 12M Length at **S$472.00/MT**
>
> 7. The above-mentioned commodities are to be use for the project "Hougang Point" or other projects as agreed by Sellers.
>
> 9. Commodities will be supplied by partial deliveries, within the contract period which commences from February 1996 and expires on March 1998.
>
> Other terms and conditions remain unchanged. For your information, the balance quantity for this contract to date is 1,389.164MT."

26 The second letter makes reference to the Second Contract and states as follows:

> "RE: LG 960705 – CONTRACT AMENDMENT TO AGREEMENT FOR SUPPLY OF REINFORCEMENT BARS TO "VILLA MARINA CONDOMINIUM AT JALAN SEMPADAN"
>
> We refer to our discussion held on 10 September 1997 and are pleased to amend the above-mentioned contract as follows:
>
> 3. COMMODITIES, SIZE ASSORTMENT AND PRICE
>
> A) High Tensile Deformed Steel Bars
>
> Dia. 10/13/16/20/25/28/32mm X 12M Length at S$472.00/MT
>
> B) Mild Steel Round Bars
>
> Dia. 06mm x 6M Length at S$660.00/MT

Dia. 10/13mm x 12M Length at S$472.00/MT

Other terms and conditions remain unchanged. For your information, the balance quantity for this contract to date is 9,904.488 MT."

27 Both letters were signed by Chai, on behalf of the Defendants, under the heading *"Confirmed and accepted by"*. Chai explained that at the time he signed these documents he did not pay attention to the fact that the second letter made reference to the Second Contract. He thought it was simply a reduction in price offered by the Plaintiffs in respect of their ad hoc orders for rebars. However the letters, on their faces, are clear enough. They are 2 separate letters, with their respective reference numbers and specify different project sites. They make reference to a discussion on 10 September 1997 and state that the *"above-mentioned contract"* would be amended. Then the contract terms that are amended are set out in full. Both letters finish off with a statement that the other terms and conditions remain unchanged. Last but not least, both letters conclude with a crucial piece of information: the balance quantities for each contract. In particular, the letter in respect of the Second Contract states that the balance quantity for this was 9,900 tonnes. Chai had given evidence that he could not have agreed to entering into the Second Contract which called for 10,000 tonnes because he only required 7,000 tonnes for the Villa Marina site. So the 9,900 tonnes stated in the letter would have sounded alarm bells in his mind. For Chai to be able to say that he did not realise that these letters related to the First Contract and Second Contract, he would have to say that he signed the documents blindly and did not read them at all.

(iii) Defendants had intention to terminate contract

28 Another of the Defendants' directors was Chai Choon Peow ("C.P. Chai"). He gave evidence of a meeting in mid-1998 with the Plaintiffs' representatives in which he complained about the rusty rebars being supplied by the Plaintiffs. He said that the Plaintiffs gave him a discount for the defective rebars and an assurance in respect of future deliveries. C.P. Chai said that he made it clear to the Plaintiffs that if they were unable to deliver acceptable rebars he would cease all orders from them. However the rebars delivered after that continued to be defective and he therefore ceased ordering from the Plaintiffs. The Plaintiffs wrote a letter to the Defendants dated 23 November 1998 in the following terms:

"RE: BALANCE QUANTITY EX OUR AGREEMENT FOR SUPPLY OF REINFORCEMENT STEEL BARS, REF. LG 960201 & REF. LG 960705

We write further to our letter ref. LBS-981105 dated 5 November 1998 concerning the captioned.

To-date, we still have not received from you the schedule for consumption of the balance quantity. We understand that you might need some more time to work out the schedule, and therefore, our management has decided to extend the deadline until 30 November 1998.

However, should we still not hear from you before the said date, we shall dispose of the remaining quantity and claim you for damage."

29 C.P. Chai said that he drafted a reply in Chinese for his secretary to translate into English and type out. However for some reason this was not done. Nevertheless he exhibited it in his affidavit along with an English translation which reads as follows:

"Received your company's letter, Reference LBS-981111, dated 23/11/98, in respect of the supply of reinforcement steel bars. Our company had intended to terminate the Contract originally, but your company sent a director (check the name) from Hong Kong to Singapore to discuss the matter. In view of the good business relationship between our company and your company in the past, we have decided not to terminate the Contract immediately. Now your company insists that our company is liable. It is very unreasonable! Our company has gone out of our way to make arrangement for the

quantity, but we do not guarantee when the quantity will be used. As our company does not have new land, we can't make any arrangement."

According to C.P. Chai, the Defendants had originally intended to terminate *"the Contract"*. The Plaintiffs' letter refers to the First Contract and Second Contract.

(iv) Response of Defendants to Plaintiffs' letter in late 1998

30 The delivery period under the First Contract was February 1996 to January 1998 and this was later extended to March 1998. That for the Second Contract was September 1996 to August 1998. By September 1998, the Defendants had not taken a substantial balance and on 22 September the Plaintiffs wrote a letter to the Defendants on the following terms:

"RE: BALANCE QUANTITY EX OUR CONTRACT REF. LG960705 & LG960201 & CONTRACT AMENDMENTS REF. LBS970910 & LBS970911 DATED 11/09/97

We refer to the above-mentioned agreements for supply of reinforcement steel bars and subsequent contract amendments.

We wish to bring to your attention that our contract LG960705 has to-date a balance of 5,178.184 MT which is supposed to be consumed before March 1998, whereas our contract LG960201 has to-date a balance of 1,389.164 MT which is supposed to be consumed fore March 1998.

As we have already locked in and reserved the quantity of steel bars for the two said contracts accordingly, the delay in consumption has already incurred loss to us in terms of commodity cost, exchange rate and interest cost.

We hereby urge you to honour the agreement by drawing the balance quantity as soon as possible. Moreover, we would appreciate your prompt reply in providing us a consumption schedule for the balance quantity of the said contracts.

We look forward to hearing from you before 30 September 1998."

It should be noted that in this letter the Plaintiffs made reference to 2 specific contracts and stated the balance quantities that were supposed to be *"consumed"* by certain dates. The Plaintiffs also said that they had already *"locked in"* the quantities for the 2 contracts and asked the Defendants for a consumption schedule.

31 On 28 October 1998, the Defendants wrote to the Plaintiffs as follows:

"CONTRACT AGREEMENT FOR SUPPLY OF REINFORCEMENT BARS REF. LG960201 AND LG960705

Please refer to the above.

Further to our verbal discussion, we would like to bring to your attention in writing, our reason for no full consumption of your rebar.

We have requested Rebar of Turkey origin but you are unable to provide us especially for Y10 to Y32. As this is an requirement from the Project Consultants, we have no alternative but to order from other Companies.

Our site staff have reported several times that your rebar supplied are rusty and are not accepted by RE. Though you have on several occasion given us discount to compensate for the additional work on brushing rebar, it does not justify the lost in time and the site staff have lost confident on your product and are being discourage from ordering from your Company.

Our Hougang site has started ordered rebar from your Company last few month but ended with heat argument with your transport company about access problem. As other Rebar suppliers do not have such problem, they therefore rather order form other suppliers in order not to create unfriendly working environment.

Basing on our long established relationship, we will try our very best to fully consume the contracted quantity. However, it is unfair to hold us responsible for the delay in consumption as explained.

Your understanding will be appreciated. Thank you."

It should first be noted that the Defendants did not state that they were not obliged to take the entire quantities. The primary thrust of the letter was a complaint that the rebars supplied were not from Turkey and that they were rusty. They also complained about the transport company. The letter ends on the note that the Defendants would do their best to *"fully consume the contracted quantity"*.

(v) Response of Defendants to solicitors' letters

32 On 7 January 1999 the Plaintiffs' solicitors, M/s Harry Elias Partnership ("HEP"), wrote to the Defendants as follows:

"1. We act for Legend Building Supplies (Pte) Ltd.

2. We refer to the two contracts entered into between yourselves and our clients dated 26 February 1996, numbered LG960201 ("the First Contract") and 22 July 1996, numbered LG960705 ("the Second Contract") respectively for the sale and purchase of steel bars, full particulars of which you are aware.

3. We are instructed that you agreed to purchase 4,000 MT of the said bars under the First Contract and 10,000 MT on the Second Contract.

4. To date, the following quantities remain to be drawn, namely:-

Under the First Contract: 1,389.164 MT; and

Under the Second Contract: 4,869.460 MT

5. We are further instructed that the contractual periods for drawing on the agreed quantities have already expired under both contracts. The contractual period for the First Contract expired in March 1998, as varied through mutual agreement, and the Second Contract expired in August 1998.

6. Despite repeated requests from our clients, you have still failed to draw on or take delivery of the balance quantities.

7. We are instructed to and do hereby demand that you draw on all balance quantities under the First and Second Contracts within seven (7) days of the date hereof and that you make payment for the said quantities within thirty (30) days of delivery of the same.

8. TAKE NOTICE that if you fail to draw on the said balance quantities by 4.00 p.m. on 14 January 1999, our clients shall take immediate steps to mitigate their loss by selling the balance quantities at the prevailing market rate and thereafter look to you for damages for their loss.

9. TAKE FURTHER NOTICE that in the event that you draw on the balance quantities but fail to make payment within the stipulated time, we have our clients' instructions to commence legal proceedings to recover the entire outstanding amount for the balance quantities from you together with further interest and legal costs without further reference to you."

33 Upon receipt of this letter, Chai said that he instructed M/s Ellen Lee & Co. ("ELC"). On 12 January 1999, ELC wrote the following letter to HEP:

"We act for Chon Hwa Construction Pte Ltd who have handed to us your letter to them dated 7th January 1999 with instructions to reply.

We are instructed to confirm your paragraphs 2, 3, 4 and 5 of your said letter. However, our clients could not draw on the remaining quantities of the steel bars for reasons already made known to your clients in their letter to your clients dated 28th October 1998, a copy of which is enclosed for your perusal. In further support of their contention, we are instructed to enclosed a photocopy of the site memo dated 18th June 1998 which has been given to our clients wherein it is clearly stated that the steel bars were rejected because they were excessively rusty and were therefore unsuitable for use and unacceptable.

Our clients have already tried their best to consume the steel bars wherever possible but the excessive rust is a major hinderance. Unless your clients are prepared to replace the balance steel bars with those that are not rusty and are of acceptable quality, none of our clients' site owners or their architects is prepared to permit their use on the sites.

Moreover, the current economic crisis has also slowed down construction activities very drastically and our clients have no new projects at hand where they could possibly try to use the undelivered steel bars.

In the premises, your clients' demands in your paragraphs 7 and 8 are misconceived and will not be acceded to for the reasons set out above.

In respect to your paragraph 9, we have firm instructions to resist whatever legal proceedings your clients may deem fit to commence and to counterclaim for whatever losses and damages our clients have suffered as a result of your clients' provision of excessively rusty steel bars."

Whatever the basis for the Defendants' denial of liability to the Plaintiffs, they did not deny the existence of the Second Contract. It should also be noted that the Defendants admitted paragraphs 2 to 5 of the HEP letter which assert the existence of the 2 contracts and the obligation of the Defendants to take the entire amounts specified.

34 Chai conceded that his solicitor, Miss Ellen Lee, explained to him the HEP letter and he understood what it said. However he did not think it was a serious matter and did not investigate. Chai confirmed that ELC replied to the HEP letter in accordance with his instructions.

(vi) Demeanour and Credibility

35 The last point is the question of the demeanour of the witnesses. The principal witnesses in respect of this issue were Chai and Ho. I find Chai to be a person who was generally earnest in the witness box, but when it came to the crucial question of his knowledge of the Second Contract, he displayed much discomfort. As for Ho, although his demeanour was satisfactory, his version of how he came to sign the Second Contract can only be believed if he were a simpleton. Unlike Chai, Ho speaks and reads English and the essential terms are clearly set out in the document. It is incredible that he would just accept the words of two persons whom he had never met before. Furthermore, Ho contradicted himself on the question whether he checked with Chai. In his affidavit evidence-in-chief, he said that he was unable to check with Chai at the time because the latter was overseas. But in cross-examination Ho said that it was not necessary to tell Chai about it because he was under the impression that Chai knew of it.

(vii) Conclusion

36 In the premises, I concluded that Chai was aware of the Second Contract and the obligations of the Defendants under it to purchase 10,000 tonnes of rebars. I therefore found that Ho had the Defendants' authority to enter into the Second Contract.

(iii) Validity Period of offer

37 Clause 15 of the Second Contract states as follows:

> "Failure of Buyers to sign and return this Agreement to Sellers on or before 1st August 1996 will render this Agreement null and void."

Although there is no evidence of the exact date that Ho signed the Second Contract, the parties agree that it was after 1 August. The Defendants submit that by operation of this provision, the Second Contract is null and void.

38 The short answer to this submission is that this is a provision that is capable of being waived by the Plaintiffs and they have clearly done so. Another approach would be as follows. This clause is actually one in which the Plaintiffs have undertaken to keep their offer open until 1 August 1996. The Defendants' purported acceptance of the offer after that date is actually a fresh offer which the Plaintiffs accepted by their conduct in subsequently accepting the Defendants' orders and making deliveries under the contract.

39 The Plaintiffs submit that the Defendants are estopped from enforcing this provision. In view of the preceding analysis, the Second Contract subsists and there is no question of estoppel. But if this is available for the Defendants to rely on, certainly the conditions for such estoppel are made out. After all, both parties have acted on the basis that this contract was valid for about 2 years.

(iv) Repudiatory Breach

40 The fourth defence is that the Plaintiffs had breached the contracts by supplying rebars that were excessively rusty and as a result of this, the Defendants terminated the contracts.

41 The Defendants adduced evidence of instances where their site staff had complained to the Plaintiffs that certain consignments of rebars supplied were excessively rusty. This is not denied by the Plaintiffs. However the Plaintiffs say that in appropriate instances they had given a discount to the Defendants in respect of those consignments. These were evidenced by Credit Notes which the Defendants did not deny. Therefore, the Plaintiffs argued, the Defendants had accepted those rebars in

consideration of the discounts.

42 Furthermore clause 8, which provides for rejection of the rebars delivered, states as follows:

> "Commodities are in accordance with BS4449/1988 (Equivalent to SS2).
>
> Copies of mill's test certificates, in which the results of testing in compliance with the aforesaid standard are stated, will be forwarded to Buyers upon request.
>
> If Buyers require verification of the commodities' quality, Buyers should conduct sampling tests BEFORE cutting, bending or processing of the commodities. Upon non-conformity proved by valid tests conducted in Government approved laboratories, Sellers will remove and replace those non-processed bars only. The liability of Sellers is limited to the transportation cost. Sellers will not be responsible for any other consequential damages."

In accordance with this provision, in respect of any consignment that did not meet the specifications, the Plaintiffs were only obliged to remove and replace the rebars. The Defendants did not adduce any evidence that they had rejected any consignment and asked the Plaintiffs to replace it. Therefore the Defendants have not proven any breach of contract by the Plaintiffs.

43 In any event, there is the question whether the contracts were terminated. There is no letter of termination. The Defendants relied on a meeting between their director, C.P. Chai and the Plaintiffs' director Kenneth Wong ("Wong") in mid-1998. C.P. Chai said that he told Wong at that meeting that the rebars being supplied were excessively rusty and that the Defendants would terminate the contract if the situation did not improve. The Plaintiffs dispute that such a meeting took place. But even if it did, the Plaintiffs say that there was no act of termination. The Defendants say that this is evidenced by the fact that the Defendants did not order any further quantities of rebars from the Plaintiffs. The problem with this argument is that again, it is not supported by the response of the Defendants to the Plaintiffs' letter of 22 September 1998 and to the subsequent letters from the Plaintiffs' solicitors. I have described these events above. The Defendants did not say at that time that the contracts had been terminated at any stage.

44 Furthermore, the Plaintiffs deny that such a meeting took place. Wong testified that he had only met C.P. Chai once, and that was in August 1997 when he came to Singapore in order to sort out the problem they were having with the Defendants who were not taking up sufficiently large quantities of rebars. In this respect, Wong's evidence is supported by Helen Lam, the Plaintiffs' Administration Manager.

45 I found C.P. Chai not to be a witness of truth. I arrived at this conclusion firstly from his demeanour on the witness stand. This is corroborated by attempts to tilt the evidence in his favour. The first is his allegation that he had drafted a letter in reply to the Plaintiffs' letter of 23 November 1998, which I have described earlier. C.P. Chai exhibited a photocopy of that letter on which he had scribbled a draft reply in Chinese. In his first Affidavit Evidence-in-Chief, he said as follows:

> "… I was extremely disappointed in the Plaintiffs and proceeded to write a letter to them to communicate my dissatisfaction and termination of the contract. I drafted this letter in Chinese … for my secretary to rewrite in English However, inadvertantly, this letter was not written or sent to the Plaintiffs."

This gives the impression that he had intended for his secretary to translate the letter into English and print it out for him to sign. This is reinforced by his statement that he wanted to write to the Plaintiffs to communicate <u>his</u> dissatisfaction. However in cross-examination, he said that the letter was not addressed to him but to Chai, and that he had drafted *"some information in Chinese for Chai Chon Yen to reply"*. When asked why he did not say this in his Affidavit, he replied that he had forgotten to mention it.

46 The second attempt by C.P. Chai to file the evidence in his favour is in relation to his third Affidavit Evidence-in-Chief, in

which he claimed that he could not have met with Wong in August 1997 because he was not at work. This was what he said:

> "I wish to clarify my whereabouts during the month of August 1997. Following a trip to Malaysia from 29 … 31 July 1997, I took a leave of absence from my duties as project director before leaving for Hong Kong on 5 August … until 8 August 1997. After the National Day holiday, I left for Malaysia on 10 August … and returned … on 11 August 1997, in time for my reservists in-camp training from 12 … - 25 August 1997. Following this, I took another leave of absence and only resumed duties on 1 September 1997. … Therefore, I did not personally attend to my duties as project director of the Defendants during the month of August 1997 in Singapore."

C.P. Chai exhibited his passports to prove his trips to Malaysia and Hong Kong and his SAF attendance booklet to show he had reported for reservist duties on those dates. The problem with this is that he had conveniently taken leave from work on all the other dates not accounted for in these documents. These total 11 days, or 6 days if we exclude Saturdays, Sundays and public holidays. When asked whether he had any leave form to show that he had gone on leave on those days, he said that there was none. He recalled that he was very tired after his reservist training and took leave after that. When asked, he agreed that he was also very tired after he returned from Malaysia on 31 July and went on leave until he departed for Hong Kong. It would appear that for almost the entire month of August in 1997, C.P. Chai did not perform any work on behalf of the Defendants, notwithstanding the fact that his reservist training was only for a 2-week period. It is also noteworthy that on 1 September he felt that it was time to get back to work. Or perhaps it was safe to do so, given that Wong had said that the meeting took place sometime in August. Clearly this evidence is conveniently structured to take care of this aspect of the Plaintiffs' evidence but it is done in a transparent manner that would fool nobody.

47 On the other hand, the 2 principal witnesses for the Plaintiffs, Lam and Wong, were forthright and steadfast in the witness box and their demeanour as well as the consistency of their evidence left me in no doubt as to the veracity of their version of events. I therefore found that the meeting did not take place in mid-1998 as C.P. Chai had alleged but in August 1997. As the allegations of rust were only made in early 1998, there could not have been any question of there being any threats to terminate the contracts in August 1997.

(v) Whether Time of the Essence

48 The final defence is that time was not of the essence in the contracts and that the Defendants could have completed purchasing the entire quantities if the Plaintiffs had not terminated the contract in January 1999. In a sense, it was the Defendants' bad luck that the Plaintiffs had decided to wind down their rebar trading business in Singapore. Had the Plaintiffs continued with the business, there would have been a real possibility that the matter would have been settled. But that does not affect the legal rights of the Plaintiffs. The sole issue therefore is, the Defendants being in breach in not taking up the quantities within the contract periods, were the Plaintiffs entitled to terminate the contracts under the circumstances.

49 Under the terms of the contracts, deliveries of the 4,000 tonnes under the First Contract were supposed to be made between February 1996 and January 1998. This was later extended to March 1998. The 10,000 tonnes under the Second Contract were to be delivered between September 1996 and August 1998. It is true that it was not specified in both contracts that time was of the essence. On the other hand, the Plaintiffs had been pressing the Defendants to take up rebars at a higher rate in order to be able to perform the contracts. In fact, the 1997 meeting with C.P. Chai for which Wong flew in from Hong Kong was mainly for this purpose. On 22 September 1998, Lam wrote to the Defendants to bring to their attention the fact that there was a balance of more than 6,000 tonnes under the 2 contracts. She stated that the Plaintiffs had *"locked in and reserved the quantity of steel bars under the ... contracts [and] the delay ... had [caused] loss ... in terms of commodity cost, exchange rate and interest cost."* There followed some negotiation and exchange of correspondence. The next significant document is the Defendants' reply on 28 October in which they gave reasons for not taking the quantities and ended with a statement that they will try their *"very best to fully consume the contracted quantity"*. However the situation did not improve and Lam wrote the final letter on 23 November 1998 in which she gave the Defendants until 30 November to revert with a *"schedule for consumption of the balance*

quantity", failing which the Plaintiffs would dispose of the balance and claim against the Defendants for losses. The Defendants did not reply to this and on 7 January the Plaintiffs' solicitors wrote to the Defendants, again demanding the Defendants to draw on the balance within 7 days and make payment within 30, failing which the Plaintiffs would sell the rebars and claim damages from the Defendants.

50 It should first be noted that there was no offer by the Defendants to take the balance of the rebars. For the Defendants' submission to succeed, they must be prepared to take the rebars even if it were on a later date. There is also the question whether this would be a reasonable offer in this case given that the rebars are perishable in that rust very soon sets in and reduces their utility, as the Defendants had complained about. Furthermore, the Plaintiffs' letter of 28 October 1998 and their solicitors' letter of 7 January 1999 would have been sufficient in the circumstances to make time of the essence. And it is not even the Defendants' case that they had asked for more time. By their failure to indicate that they were willing to perform, the Defendants have evinced an intention not to proceed with the contracts. Accordingly, the Defendants' failure to perform within the period stipulated or the extension of time granted would constitute breaches of contract on their part in relation to which the Plaintiffs would be entitled to terminate the contracts, dispose of the balance quantities and recover the damages they had incurred from the Defendants.

Damages

51 The Plaintiffs have given evidence of their losses and mitigation thereof which the Defendants did not seriously dispute. Accordingly I accepted the evidence in this regard and gave judgment for the Plaintiffs in the sum claimed.

The Counterclaim

52 The Defendants allege that 25% of the rebars supplied by the Plaintiffs were excessively rusty and that they incurred losses in having to engage workers to remove the rust and having to place additional rebars as instructed by the engineer.

53 In relation to the quantity of rebars that were affected by rust, the Defendants rely solely on an estimate by their project managers on the site. Apart from some documents in respect of a few instances of rusty bars, involving minuscule quantities, there is no documentary evidence to back this claim, not even site notes or rejection letters. Obviously the project managers were not that concerned with this issue at the time to have kept even the most rudimentary of records. I have referred previously to clause 8 of the contracts which sets out the procedure for rejection and the obligation of the Plaintiffs to replace such consignments. It would follow that if the Defendants took any rusty consignment without protest or have compromised it by obtaining a discount, they cannot subsequently complain about it.

54 The Defendants say that they incurred additional labour to rid the rebars of the rust. Again, there is no document supporting this and the cost of labour to carry out such tasks are also the rough estimates of the project managers. I must say that the quality of the evidence adduced by the Defendants in respect of their counterclaim is so dismal that I have absolutely no doubt whatsoever that it is but a feeble attempt to go on the offensive in this suit. Accordingly I dismissed the Defendants' counterclaim.

Judicial Commissioner