# MAE Engineering Ltd v Fire-Stop Marketing Services Pte Ltd
# [2004] SGCA 54

**Case Number** : CA 49/2004, Suit 287/2003

**Decision Date** : 23 November 2004

**Tribunal/Court** : Court of Appeal

**Coram** : Chao Hick Tin JA; Lai Siu Chiu J; Yong Pung How CJ

**Counsel Name(s)** : Tan Kok Quan and Karam Singh Parmar (Tan Kok Quan Partnership) for the appellant; John Chung and Tan Yeow Hiang (Kelvin Chia Partnership) for the respondent

**Parties** : MAE Engineering Ltd — Fire-Stop Marketing Services Pte Ltd

*Contract – Contractual terms – Rules of construction – Contract stating respondent to supply and install cladding to 5,000m2 of duct for $400,000 – Whether payment should be based on area of cladded or uncladded duct – Whether evidence of antecedent agreement can be taken into account – Whether commercial sense of court can override words of contract – Whether court can look to subsequent conduct of parties to interpret written contract*

*Equity – Estoppel – Estoppel by convention – Whether appellant estopped from contending that payment should be based on area of uncladded duct*

23 November 2004

**Lai Siu Chiu J (delivering the judgment of the court):**

1 This was an appeal by a building sub-contractor against a decision of the High Court in interpreting a term in the sub-contract against the sub-contractor. At the conclusion of the hearing, we allowed the above appeal. We now give our reasons.

**The background**

2 The appellant, MAE Engineering Ltd ("MAE"), was the air-conditioning, mechanical and ventilation ("ACMV") sub-contractor for The Esplanade – Theatres on the Bay ("the project"). The main contractor of the project was Penta-Ocean Construction Company Ltd and the project consultant was PWD Consultants.

3 Sometime in June 1999, MAE invited the respondent, Fire-Stop Marketing Services Pte Ltd ("Fire-Stop"), to tender for the supply and installation of fire-rated board cladding to the ACMV duct of the project. Based on MAE's estimate that some 5,000m² of the ACMV duct required cladding, Fire-Stop quoted a price of $95 per m² for the supply and installation of two-hour fire-rated board cladding under the "Cape Monolux 40" board system and $185 per m² for the four-hour fire-rated option. At the request of MAE, Fire-Stop revised and lowered the prices to $85 per m² and $165 per m² respectively. However, MAE was still not satisfied. By a fax dated 30 June 1999 to MAE from its sales manager Tan Seng Huat ("S H Tan"), Fire-Stop further reduced its price for two-hour fire-rated board to $80 per m² ("the revised price"). The fax stated:

> Base [*sic*] on information given, Total Area of ACMV Duct to be fire rate [*sic*] estimate at 5,000m²
>
> Price for supply & install for 2 hour fire rating = $80/m²

4 MAE accepted the revised price and on 30 November 1999, two documents were signed, the

first being form T/007, which was an agreement by Fire-Stop to keep its offer open until its appointment was approved by the owners and consultant of the project. The first paragraph of T/007 stated:

> During our recent evaluation exercise re the above Project, M/s Fire Stop Marketing Services Pte Ltd represented by Mr S H Tan, the final lump sum offer price to MAE Engineering Pte Ltd (MAE) is S$400,000/- (Singapore Dollars Four Hundred Thousand Only) (5,000m² x $80/m²). In consideration of S$1 (the receipt of which you acknowledged) this offer price to MAE remains valid and irrevocable throughout MAE's negotiations in seeking the approval and final decision from the customer and consultant. If final approval is given, you have agreed to enter into a contract with MAE.

5 The second document signed that day was form T/008 (although it was dated 23 June 1999). T/008 contained the revised price and the lump sum figure of $400,000. Both forms were subsequently referred to in the pre-award letter dated 2 December 1999 ("the pre-contract document") from MAE to Fire-Stop. The fourth paragraph thereof stated:

> … MAE accept [Fire-Stop's] fully compliance [*sic*] offer for the supply, delivery, installation, warranty and endorsement of 2 Hours Fire-Rated Board Cladding to ACMV Duct with 'Cape' Monolux 40 Board System for a lump sum price of $400,000/- (SIN DLR Four Hundred Thousand Only). …

6 The pre-contract document was formalised in a sub-contract agreement dated 17 April 2000 ("the sub-contract"). Clause 1 of the sub-contract reads as follows:

> SCOPE OF WORK AND CONDITIONS
>
> 1.1 This Sub-Contract Agreement is for the provision of Supply, Delivery, Installation, Warranty & Endorsement of 2 Hours Fire Rated Board Cladding to 5,000M² of ACMV Ductwork with 'Cape' Monolux 40 Board System in accordance with the specifications and drawings.
>
> …
>
> If the contract is as stated remeasurable then final payment shall be subject to final measurements which will be based on the as built drawings.
>
> 1.2 All qualifications made by the Sub-Contractor to the accepted sub-contract amount and scope of work are deemed to be withdrawn unless they have been previously accepted by MAE in writing. The Sub-Contractor has fully familiarized himself with all drawings and specifications necessary to execute the above works.

**Method of cladding and mode of payment**

7 Whenever a particular area of the duct required cladding, MAE would issue a works order to Fire-Stop, attaching therewith sketches of the area to be cladded. Upon receipt of the works order, Fire-Stop would deliver the cladding material and commence installation at the specified area. After the work was completed, a joint inspection and measurement exercise would be carried out by representatives of both MAE and Fire-Stop. The quantities of cladding material used would be verified and measurements of the external surface area of the cladded duct would be taken. These would be recorded in delivery orders ("DOs") which were verified by MAE's representatives. Once MAE confirmed that the quantities of materials and measurements were correct, its representatives would sign and

stamp the DOs with the following remarks:

> I/We … hereby acknowledge that the above quantities/measurements are certified correct as per measurement conducted on site.
>
> This confirms delivery of Quantity Only. Quality and Performance subject to approvals by Consultant/Owner. Other additional terms in this DO are excluded.

**The claim**

8 Fire-Stop prepared interim payment claims based on the endorsed DOs and submitted a total of 17 claims altogether. MAE paid 14 of the claims amounting to $687,779.80 (excluding goods and services tax ("GST")) and refused to pay the balance of $310,305.61 (excluding GST), prompting Fire-Stop to commence the present suit.

9 In defence, MAE claimed that Fire-Stop's cladding work was defective and incomplete. It further alleged there were no outstanding payments due to Fire-Stop. MAE counterclaimed the sum of $168,664.29 (excluding GST) which it said it had overpaid Fire-Stop.

**Proceedings below**

10 In the court below, the parties had agreed, after the trial started, to confine their dispute in respect of the claim and counterclaim to the following agreed issue:

> Whether on the true and proper construction of the sub-contract document and having regard to all the documents, affidavits and evidence before the court, payment to the plaintiffs should be based on the area of the cladded ACMV duct or the area of the uncladded ACMV duct ...
>
> In the event the court decides that payment should be based on the area of cladded ACMV duct, the total amount payable by the defendants to the plaintiffs shall be $310,305.61 (excluding 3% GST).
>
> In the event the court decides that payment should be based on the area of the uncladded ACMV duct, the total amount payable by the plaintiffs to the defendants shall be $168,664.29 (excluding 3% GST).

11 It was common ground that the total area of ACMV actually cladded by Fire-Stop exceeded 5,000m² which figure the parties agreed was only MAE's estimate. At no time did MAE attempt to hold Fire-Stop to the ostensible lump sum contract price of $400,000 as it was willing to pay for the additional area cladded over and above 5,000m². What the parties disagreed on was the basis of measurement for the cladding work done by Fire-Stop,

12 Fire-Stop's stand at the trial was that it should be paid based on the external surface area of the cladded ACMV duct. MAE, on the other hand, contended that payment to Fire-Stop should be based on the area of the uncladded ACMV duct. Since the cladding was attached to a thick layer of rockwool and it was wrapped around the external surface of the duct as well as the supports and hangers, the external area of a cladded duct was greater than that of an uncladded duct. Consequently, the value of cladding work based on the area of the cladded duct was therefore higher than that based on the area of the uncladded duct.

**The decision below**

13 The trial judge ruled in favour of Fire-Stop's basis of measurement and accordingly awarded judgment to Fire-Stop in the agreed sum of $310,305.61 (excluding GST). He noted that the sub-contract was silent as to the mode of measurement for computing the payment due to Fire-Stop. As it was not disputed that the figure of 5,000m² of the ACMV to be cladded was only an estimate, he found that the ostensible lump sum price of $400,000 stated in the sub-contract did not have any significance. He was of the view that the parties had merely agreed that Fire-Stop would be paid the revised price for the work done and materials supplied. The only question that remained to be answered was whether the revised price should apply to the uncladded or the cladded areas.

14 In awarding judgment to Fire-Stop, the judge below rejected the argument put forward by MAE that the ordinary meaning of the words in the pre-contract document (see [5] and [6] *supra)* and in the sub-contract itself indicated that payment should be based on the area of the uncladded duct.

15 The judge disagreed with MAE's interpretation and held that the figure 5,000m² was *meaningless* since it was only an estimate and the precise area of the uncladded duct was never known. In finding that Fire-Stop was entitled to be paid on the basis of the area of the cladded duct, the judge observed (in [23] of the judgment ([2004] SGHC 116):

> On the evidence, it is even too late to measure the amount of cladding, as most of it has been covered or is not accessible without a disproportionate breaking-up of the premises. The term [5,000$m^2$] was merely a description of the nature of work and it was not meant to define the quantity of work, for which there would be re-measurement as work progressed. The unit rates worked out seemed within commercial range. I do not think that any supplier and installer of such cladding would quote a lump sum for a contract over which the quantity is not known.

He accordingly awarded judgment to Fire-Stop on its claim and dismissed MAE's counterclaim.

**The appeal**

16 The primary issue before us was whether, on the true and proper construction of the sub-contract, payment to Fire-Stop should be based on the uncladded or cladded areas of the ACMV duct.

***The meaning of the figures 5,000m² and $400,000***

17 The principles applicable to the construction of contracts are well established. The object of the construction exercise is to determine the mutual intention of the parties as expressed in the words of the document (see *Estate of Seow Khoon Seng v Pacific Century Regional Developments Ltd* [1997] 1 SLR 509 at [23]). The task of ascertaining the intention of the parties must be approached objectively; the question is not what one or the other of the parties meant or understood by the words used, but the meaning the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties at the time of the contract (see also *Chitty on Contracts* vol 1 (28th Ed, 1999) para 12-043; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912). The words used by the parties should be construed in their ordinary and natural meaning, unless the context requires otherwise (see *Lim Bio Hiong Roger v City Developments Ltd* [2000] 1 SLR 289 at [26]).

18 Counsel for MAE submitted that on a true and proper construction of the sub-contract, payment ought to have been calculated on the basis of the area of the *uncladded* ACMV duct. The preamble clearly stated:

> Further to your confirmation ref FS/06/6848/99 dated 30/6/1999 agreed Lump Sum price of S$400,000.00 (SINDLRS Four Hundred Thousand Only) we hereby confirm the award for the provision of Supply, Delivery, Installation, Warranty & Endorsement of 2 Hours Fire Rated Board Cladding *to* 5000M² of ACMV Ductwork … [emphasis added]

Clause 1.1 reiterated:

> This Sub-Contract Agreement is for the provision of *Supply, Delivery, Installation, Warranty & Endorsement of 2 Hours Fire Rated Board Cladding to 5000M² of ACMV Ductwork* … [emphasis added]

19 On a plain and ordinary reading, therefore, *5,000m²* must have referred to the area of *5,000m²* of the uncladded duct since the cladding was to be installed to the *5,000m²* of ACMV ductwork. Counsel took issue with Fire-Stop's contention that the term was ambiguous and could also refer to the area of the cladded duct. That would mean MAE would in effect be asking Fire-Stop to install cladding to an area of ductwork that was already cladded. Contrary to Fire-Stop's argument, the language of the sub-contract was plain and unequivocal – the natural meaning of the words indicated that the figure *5,000m²* must have referred to the area of the uncladded duct. Fire-Stop's managing director Steven Yeong[1]himself confirmed in cross-examination that the parties had been dealing with each other on the basis that the 5,000m² referred to the area of the uncladded ACMV duct:[2]

> Q: Do you agree that the "5,000m²" referred to the area of the duct and not the cladding?
>
> A: Yes.

20 The trial judge had ascribed no significance to the figure *5,000m².* Counsel for MAE disagreed, pointing out that the figures *5,000m²* and *$400,000* were terms in the sub-contract and should be construed together. He submitted that the two figures explained the basis for the revised rate, *viz*, *how* the parties intended to ascertain the final contract price, not *what* was the final contract price. Every contract should be construed as a whole and no words should be ignored, omitted or glossed over. Counsel relied for this proposition on *Citicorp Investment Bank (Singapore) Ltd v Wee Ah Kee* [1997] 2 SLR 759 at [72], following the appellate court's earlier decision in *Wong Kai Chung v Automobile Association of Singapore* [1993] 2 SLR 577 at 582, [10].

21 We agreed that the fact that the quoted area of 5,000m² was only an estimate did not necessarily mean that it carried no weight whatsoever. The area of 5,000m², taken together with the lump sum price of $400,000, was the only indication of the basis of payment in the entire sub-contract. Its inclusion could hardly be dismissed as superfluous or *meaningless*. Since the parties had explicitly agreed that MAE would pay Fire-Stop $400,000 for cladding 5,000m² of the uncladded duct, this would suggest that the revised rate should apply to the uncladded duct.

22 On its part, Fire-Stop contended that even if *5,000m²* was held to refer to the area of the uncladded duct, it did not necessarily indicate that *payment* should also be based on the area of the uncladded duct.

23 If one were to read the sub-contract in isolation from the surrounding circumstances, this may be an arguable proposition. However, it is trite law that when construing a contract, the court must also look at the factual matrix in which the agreement was made, as the surrounding circumstances including "the 'genesis' and 'aim' of the transaction" are relevant: *Prenn v Simmonds* [1971] 1 WLR 1381 at 1385. As Lord Wilberforce explained in *Reardon Smith Line Ltd v Hansen-*

*Tangen* [1976] 1 WLR 989 at 995–996 (approved by the Court of Appeal in *Mt Elizabeth Hospital Ltd v Allan Ng Clinic for Women* [1994] 3 SLR 639 at 652, [35]):

> No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as "the surrounding circumstances" but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

and at 997:

> [W]hat the court must do must be to place itself in thought in the same factual matrix as that in which the parties were.

24 Although evidence of prior negotiations is inadmissible as it does not represent any consensus between the parties, evidence of an antecedent agreement is an objective fact that the court should take into account as part of the "factual matrix" in which the parties made their contract (Kim Lewison, *The Interpretation of Contracts* (3rd Ed, 2004) at para 3.05). In the present case, the parties did sign a pre-award document which incorporated forms T/007 and T/008. The document clearly provided that Fire-Stop would be paid "S$400,000 (Singapore Dollars Four Hundred Thousand Only) (5,000m² x $80m²)" for the cladding work. The underlined formula demonstrates that the area of *5,000m²* did more than simply specify the amount of work Fire-Stop was required to perform; it was obviously a vital component of the basis of payment as well. The fact that the figure *S$400,000* corresponded exactly to the revised rate based on the area of the uncladded duct could hardly be a coincidence.

25 We were of the view that the factual matrix of the sub-contract, including the pre-award document, reinforced MAE's case that the revised rate was to be applied to the area of the uncladded, rather than the cladded, duct. In this regard, we rejected the submission of counsel for Fire-Stop that it would have been erroneous for the trial judge to have considered the pre-award document and forms T/007 and T/008, when the sub-contract only referred to the fax quotation and not those documents.

***Commercial sense***

26 The trial judge noted that the cladding had to be wrapped around not only the duct itself but also around the supports and hangers. In some instances, there were also obstructions like pipes and services. As the thickness of the cladding materials alone was 19mm, he commented (at [18] of the judgment) that "it would therefore not make commercial sense to quote based on the uncladded area of the duct".

27 Two points arise herefrom. First, the perceived "commercial sense" of the court cannot be allowed to override the words of a contract where they are clear and unambiguous. We had earlier stated that on a plain and ordinary reading of the words and figures in the sub-contract, payment should be based on the area of the uncladded duct. Even if the court below was of the view that Fire-Stop had entered into an improvident bargain, one cannot ignore the plain meaning of the words used and hold in favour of what the judge perceived to be a more commercially sensible arrangement. The court's task is to ascertain what the parties mean by the words they use in a contract and enforce it according to its terms; it should not rewrite the contract. In *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, Lord Mustill noted (at 388):

> [T]o force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for a court. Particularly in the field of commerce, where the parties need to know what they must do and what they can insist on not doing, it is essential for them to be confident that they can rely on the court to enforce their contract according to its terms.

28 In any case it is not necessarily incompatible with common sense to find that payment should have been advanced in accordance with the area of the uncladded ACMV duct. Fire-Stop had alleged that on this construction of the sub-contract, it would be paid the same price irrespective of whether the materials it used cost $50,000 or $100,000 and contended that such a position "cannot be correct nor what the parties had intended".[3]

29 This argument is misconceived. The price of materials should already have been factored into Fire-Stop's quotation when it first tendered for the project. Although the trial judge was correct when he observed that the cladding would also have to wrap around the supports and other obstacles which would result in more cladding material being used, this did not necessarily mean that an agreement to pay on the basis of the uncladded duct area was not commercially viable. The presence of such obstructions was part and parcel of cladding work which Fire-Stop, as an experienced cladding specialist, would or should have been aware of. This is supported by cl 1.4 of the sub-contract, which reads:

> … *the contract sum and the rates and prices shall be inclusive of all ancillary and any other works or expenditure,* whether or not they are separately or specifically mentioned or described in this agreement which are indispensable and deemed necessary to bring to completion an operational system to the satisfaction of MAE. … [emphasis added]

If there were any genuine unforeseen obstacles that would entail considerably more work than was originally contemplated by the parties, it was open to Fire-Stop to request for a written variation for additional payment under cl 1.5 of the sub-contract which states:

> This agreement shall in all aspects not [be] subject to any adjustments except for the following: -
>
> (a) Written Variations only as and when instructed (whether by way of additions or deletions) by MAE.
>
> (b) The valuation of all variations (addition or deletion) shall be in accordance to the agreed unit rate with MAE. …

30 In fact, establishing payment on the basis of the area of the uncladded duct would make more commercial sense. As different cladding systems use different materials and layering processes, the final cladded area would differ according to the cladding technique actually used. The final area of the cladded duct was therefore a matter wholly within the control of the cladding specialists, and could only be precisely determined after the work was completed. If the tendered prices were based on the final area of the cladded duct, it would have been impossible for MAE to accurately compare the quotations it had obtained, since it was in no position to ascertain the final price for the work.

31 Given that MAE's sole concern was to safely insulate the 5,000m² of the ACMV duct with the most cost-effective cladding system, the final cladded area was irrelevant for their intents and purposes. The more practical course which was adopted in the present case was to inform the cladding specialists of the area of the uncladded duct that required cladding, and then leave it to the

individual designers of the cladding systems to work out the contract price for cladding that particular area of ductwork, after taking into account the normal contingencies of cladding work, including wastage.

***Industry practice***

32 In so far as industry practice was concerned, the evidence did not point one way or the other. MAE's independent expert, Ms Kee Bee Kheng, confirmed that it was industry practice to use the area of the uncladded duct when measuring insulation to ductwork. However, her evidence was based on a flawed reading of the Singapore *Standard Method of Measurement of Building Works* (Singapore Institute of Surveyors and Valuers, 2nd Ed, 1986). She had relied on cl 18.16(a) therein which states:

> Internal lining and external *insulation to ducts shall be measured in the same manner as the ducting* and shall each be given in **m** stating the size of the ducts. [emphasis added]

The manner of measuring the ducting is provided in cl 18.07(a):

> Ducts shall be measured the net length along the centre lines of ducts over all bends, offsets, diminishing pieces, change of section pieces, junction pieces, shoes and the like duct fittings and shall be given in **m** stating the size …

33 It is clear that cl 18.16(a) merely provides that the insulation should be measured in the same manner as the measurements of the ducts. It does not in any way state that measurements of insulation such as cladding are equivalent to the measurements of an uncladded duct for the purposes of payment.

34 Ms Kee had also referred to R.36 of the British *Standard Method of Measurement of Building Works* (6th Ed, 1979) to substantiate her opinion. The rule states:

> 1. Insulation to ductwork shall be given in square metres and shall be *measured the net area in contact with the base of all ducting* as installed and overall ducting fittings and joints.

What she neglected to mention was that R.36 is stated as an *alternative* method of measurement to R.32, which appears to support Fire-Stop's case, as the latter rule simply states that the insulation (*viz* the cladding in this case) to the ductwork should be measured in metres.

35 Given that there is no compelling evidence that industry practice supports any particular construction, it was our view that the sub-contract should be enforced in accordance with the plain and ordinary meaning of its terms, *viz*, payment should be based on the area of the uncladded duct.

***Oral agreement***

36 Fire-Stop's managing director Steven Yeong had claimed that prior to the signing of the sub-contract, his sales manager, S H Tan, had assured him that MAE had agreed to make payment based on the area of the cladded duct. Tellingly, there was no mention of any such oral agreement in Yeong's affidavit evidence. The evidence of S H Tan and Fire-Stop's project manager, Joel Chia ("Chia") also left much to be desired.

37 According to S H Tan,[4] he met MAE's quality manager, Jimmy Ng ("Ng"), sometime after Fire-Stop's fax quotation dated 30 June 1999. At this meeting, he told Ng that according to Fire-

Stop's practice, measurements would be based on the external surface area of the duct cladded. Ng did not raise any objections. When the parties met again to sign the sub-contract in April 2000, Tan claimed that he reminded Ng that measurements would be based on the area of the cladded duct. Again Ng did not object.

38 S H Tan's evidence should be contrasted with Chia's version of events. Chia averred that sometime in November 2000, he had gone to see Ng to clarify the basis of measurement for payment. Ng had apparently mentioned that payment should be based on the area of the uncladded duct, but Chia retorted that this was not possible. According to Chia, Ng finally agreed after some discussion that the measurements could be based on the actual cladded size and not the duct size.

39 If one were to accept S H Tan's evidence, the parties would have come to an agreement to take measurements based on the area of the cladded duct long before November 2000. Yet Chia made no mention of this earlier agreement in his affidavit evidence, even though S H Tan had briefed him on the project. If the parties had indeed made a prior agreement to use the area of the cladded ACMV duct to calculate payment, one would have expected Chia to bring this up at his meeting with Ng once the latter had raised the possibility of paying on the basis of the uncladded area instead. There was no explanation for Chia's silence on the issue.

40 Even if Fire-Stop could prove the existence of the alleged oral agreement, this could not further its case. Based on the words used and the figures stated, the sub-contract clearly provided for payment to be made on the basis of the area of the uncladded duct. Section 94 of the Evidence Act (Cap 97, 1997 Rev Ed) provides:

> When the terms of any … contract have been proved according to section 93 [*ie* reduced to the form of a document], *no evidence of any oral agreement* or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms … [emphasis added]

Hence, once the sub-contract was signed, the parol evidence rule excluded extrinsic evidence being introduced to contradict or vary the terms of the written agreement.

***Subsequent conduct***

41 In support of its contention that payment should be based on the area of the cladded duct, Fire-Stop pointed out that MAE had in fact made 14 payments by reference to the area of the cladded duct. Fire-Stop's argument was based on the parties' subsequent conduct. It is well-settled law (*James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583) that the court may not look at the subsequent conduct of parties to interpret a written agreement except when variation or estoppel is in issue. This approach was adopted by the Singapore High Court in *Estate of Seow Khoon Seng v Pacific Century Regional Developments Ltd* ([17] *supra*).

***Estoppel by convention***

42 At the hearing, counsel for Fire-Stop applied for leave pursuant to O 57 r 9A(6)(c) of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) to address us on the issue of estoppel by convention, which leave we granted. Although the Respondent's Case made a brief reference to estoppel, the court below did not make any finding on this issue. Counsel argued that MAE was estopped by its conduct from contending that payment should be made on the basis of the area of the uncladded duct.

43 The *locus classicus* on the doctrine of estoppel by convention is *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84. There, the conduct of the parties was held to give rise to an estoppel by convention which precluded them from relying on the true construction of the written document, as opposed to what they had erroneously supposed it to mean. Lord Denning MR said (at 122):

> When the parties to a transaction proceed on the basis of an underlying assumption – either of fact or law – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so.

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.

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]):

> (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.

46 In this case, the first criterion was clearly satisfied. What was in issue was, did the parties conduct themselves on the agreed premise that payment would be made on the basis of the area of the cladded duct, despite indications to the contrary in the sub-contract? Relying on the testimony of S H Tan and Chia, Fire-Stop asserted that both parties had so conducted themselves. However, we had observed earlier [37] to [39] that the evidence of the two witnesses was contradictory and unreliable. That left Fire-Stop with its main argument – MAE was estopped due to the 14 payments it had made based on measurements of the cladded duct.

47 For a claim of estoppel by convention to succeed, it must be shown that acceptance of a particular state of things was the foundation of the dealings between the parties. However, Fire-Stop failed to establish that MAE's payments were made based on a *shared assumption* that the contract price should be derived from the area of the cladded duct.

48 Since the time MAE invited quotations from Fire-Stop, the former had proceeded on the basis that payment would be based on the area of the uncladded duct. This was reflected in the pre-award document incorporating forms T/007 and T/008 and in the sub-contract itself. Although MAE's representatives had confirmed measurements of the external surface area of the duct in the joint inspection exercise, this was merely to confirm the quantity of materials used and not to verify the area for calculating payment.

49 It would appear that MAE had paid the first 14 claims submitted by Fire-Stop because it failed to appreciate that the latter's calculation was based on the area of the cladded, not the uncladded duct. There was no mutual understanding that payment would be based on Fire-Stop's method of calculation. Indeed, the correspondence between the parties suggested that Fire-Stop itself believed that payment should be calculated on the area of the uncladded duct.

50 In this regard, we refer to MAE's letter to Fire-Stop dated 28 October 2002 addressed to Steven Yeong and Chia informing them that the company had been overpaid based on "as-built" drawings (*viz* area of the uncladded duct). Fire-Stop's reply dated 25 November 2002 states:

> We still maintain that the work done on the site is more than that shown on the as-built drawing. It is important to note that the as-built drawings only give a rough sketch of the location of the ducting. It does not indicate the actual shape and size of the ducting.

If, according to Fire-Stop, the parties had been proceeding on the shared assumption that payment should be based on the area of the cladded duct, the areas indicated in the as-built drawings should have been irrelevant since they reflected the area of the uncladded duct. The appropriate response would have been to point out to MAE that payment should be based on the uncladded duct. Instead, Fire-Stop chose to dispute the accuracy of the uncladded duct areas as reflected in the as-built drawings. If indeed there was a shared assumption by the parties, it was that payment would be based on the area of the uncladded duct.

**Conclusion**

51 Consequently, we accepted the submissions put forward for MAE and allowed its appeal with costs here and below. We ordered Fire-Stop to refund the judgment sum to MAE and pay MAE the agreed sum of $168,664.29 (excluding GST) on the counterclaim.

*Appeal allowed.*

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[1] PW2

[2] N/E18

[3] See para 30 of the Respondent's Case

[4] PW1