Econ Corp Ltd v So Say Cheong Pte Ltd
[2004] SGHC 234

Case Number : Suit 476/2002

Decision Date : 19 October 2004

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Tan Cheow Hin (CH Partners) for plaintiff; Timothy Ng (Lee and Lee) for defendant

Parties : Econ Corp Ltd — So Say Cheong Pte Ltd

Civil Procedure – Principles – Defendant contested plaintiff's computation of its claim – Whether plaintiff had made out its claim.

Contract – Formation – Defendant claimed there was an oral contract with plaintiff under which plaintiff was to pay defendant commission – Whether oral contract was concluded.

19 October 2004

Belinda Ang Saw Ean J:

1 The plaintiff, Econ Corporation Limited, is a wholly-owned subsidiary of Econ International Limited, a company listed on the Singapore Exchange. This action for breach of contract was filed on 24 April 2002 to recover the total sum of $925,738.30 being the unpaid balance for material supplied and work and services rendered by the plaintiff as subcontractor of two projects, namely the Amenity Centre and Multi-storey Carpark project at Jurong Island ("the JI project") and the Woodlands Secondary School project ("the WSS project"). The plaintiff also carried out the mechanical and electrical ("M&E") works at Sembawang Secondary School, but the claims here do not concern those works. The plaintiff was placed under judicial management on 15 March 2004. This action continues against the defendant, So Say Cheong Private Limited, with the approval of the judicial manager.

2 The defendant was the main contractor of both projects. The defendant is not pursing its counterclaim, but is raising a set-off as a defence to extinguish the plaintiff's claims. The set-off is founded upon an alleged oral agreement reached in March 1997 whereby the plaintiff agreed to pay the defendant a 2% commission for appointing the former as its subcontractor of the two projects. The pleadings go on to allege fraudulent misrepresentation and estoppel, but neither plea was pursued at the trial and in the defendant's Closing Submissions.

3 A plea of an alleged oral agreement, or the alternative plea formulated as an alleged oral collateral contract, is one for breach of such a contract, not for misrepresentation. I should mention that a claim founded on s 2(1) of the Misrepresentation Act (Cap 390, 1994 Rev Ed) is an action in contract: see *Trans-World (Aluminium) Ltd v Cornelder China (Singapore) Pte Ltd* [2003] 3 SLR 501 at [124]. The defendant has to establish the oral contract and the representation that induced it into contracting with the plaintiff. Otherwise, the claim under this Act will fail.

The pleadings

4 It is convenient to now set out in some detail the terms of the alleged oral contract. In its Amended Defence, the defendant averred that:

> 5. Sometime in March 1997 the Plaintiffs and the Defendants through their respective chairmen, entered into an oral agreement … The Plaintiffs had requested the Defendants and the

Defendants had agreed to engage the Plaintiffs as their subcontractors for certain future building projects where the Defendants would be engaged as the main contractor.

6. The parties agreed inter alia that:

6.1 the Plaintiffs would contact the Defendants if they wished to tender for a project that was worth more than $10 million and would prepare the tender. The costs of preparing the tender would be borne by the Defendants, the Plaintiffs and/or the consultants or other parties engaged by the Plaintiffs;

6.2 the Defendants would thereafter submit the tender prepared by the Plaintiffs as its (sic) own. The tender was checked by the Defendants;

6.3 if the tender was successful, the Defendants had to subcontract the works to the Plaintiffs in return for a commission/fee amounting to 2% of the final contract value as certified by the employer or their consultants. The final contract value was to be determined and the 2% commission deducted once the final accounts for the respective project was finalised;

6.4 in addition to this 2% commission/fee, the Plaintiffs would also pay a management fee and any other disbursements incurred by the Defendants on behalf of the Plaintiffs. The rate and quantum of the said management fees and other disbursements as well as other details were to be negotiated and agreed on a case by case basis between the respective chairmen's subordinates (on behalf of the Plaintiffs and the Defendants).

5 The plaintiff argues that there is no right of set-off. It flatly denies an agreement of the type described as having been made when Chew Tiong Kheng ("Chew") of the plaintiff and So Say Cheong ("SSC") of the defendant met in March 1997. The plaintiff's version of the meeting in March 1997 is set out in its Reply as follows.

3. The Plaintiffs aver that there were however prior oral negotiations between the respective Chairmen of the Plaintiffs and the Defendants with the object of mutual benefits whereby the general approach was as follows:

(i) As the Defendants have no track record in design and build projects in excess of $10 million, the Plaintiffs would prepare the tender documents and bear the expenses thereof, for submissions for such projects in the Defendants' name;

(ii) if the tender was successful and the Defendants were appointed main contractor of such project, the Defendants shall award the sub-contract for the entire project to the Plaintiffs on such written terms to be agreed;

(iii) the Plaintiffs shall pay for and retain the Defendants' architect/project manager during the contract period; and

(iv) the Plaintiffs shall bear the fees, costs, expenses and other charges arising from their engagement as sub-contractors.

4. In the premises, any sub-contract that were to be subsequently awarded by the Defendants to the Plaintiffs … shall be on written terms to be specifically agreed upon on an ad hoc basis.

6 The Amended Statement of Claim avers that the terms of the JI project were contained in or evidenced by a letter of award dated 27 July 1998 read with the plaintiff's letter of 22 March 1998 ("the JI sub-contract"). The terms of the sub-contract for the construction of the Woodlands Secondary School were contained in or evidenced by a letter of award dated 5 January 1999 ("the WSS sub-contract"). So, by s 93 of the Evidence Act (Cap 97, 1997 Rev Ed), the court is to look at the four corners of the documents mentioned for the terms of the agreements. Mr Tan submits that none of the documents recorded a 2% commission to the defendant. In any event, the defendant cannot bring its case within the exceptions in s 94 of the Evidence Act.

7 On the Friday before the start of the trial on Monday, the defendant obtained leave to amend its pleadings. Counsel for the plaintiff, Mr Tan Cheow Hin, pointed out that the defendant, at the very last minute, abandoned its previously held position – that the sub-contracts were partly oral and partly in writing – to plead that both sub-contracts were made orally. Consequently, the omission of the 2% commission was, after all, not a mistake on the defendant's part. Rectification of the sub-contracts was no longer sought by the defendant.

8 On any view, the existence of the sub-contracts is admitted. The claims relate to unpaid certificates and the debate is about the plaintiff's computation of the claims, not liability. It is not the defendant's case that work was not rendered or material was not supplied. Neither is the objection premised on a reduction of the claim amount because of delays or defects that had made the work less valuable or caused extra expenses to the defendant. In raising the defence of setoff, there is tacit acceptance that the claims as presented are well founded, but the debts have been extinguished. As an alternative to the defence of set-off, a few items of the plaintiff's claims are being contested. I shall come to them in due course.

9 Ultimately, a major issue in the action that I have to decide on is whether there was an oral agreement reached in March 1997 to pay 2% commission on the final contract value to be determined at the end of the project when accounts are finalised. The burden of proof is on the defendant to establish that the parties intended to make a binding agreement to the effect as pleaded. Whether the parties have reached a contract binding at law is a question to be determined objectively.

10 I said in *Lemon Grass Pte Ltd v Peranakan Place Complex Pte Ltd* [2002] 4 SLR 439 at [116] to [119] that for a collateral contract to be enforceable, the court must find all the usual legal requirements of a contract having been fulfilled. Any statement purporting to be the contractual promise must be promissory in nature or effect rather than representational. Similarly, the burden of proof is on the defendant, as the party seeking to rely upon the collateral contract, to establish that both parties intended to create a legally binding contract.

11 It is appropriate at this juncture to deal with the issue of illegality canvassed in the defendant's Closing Submissions. It emerged at the trial that the main contractor is prohibited under the main contract from subcontracting the entire project to a sub-contractor, and the errant main contractor may be debarred, for a few years, from tendering for future public sector projects. During the trial, I asked counsel whether any illegality was being suggested. Tan said that in such a situation, the main contractor was simply in beach of contract. Counsel for the defendant, Mr Timothy Ng, agreed with that observation and added that the main contract might be terminated. As either side had not suggested illegality of any sort, I was surprised to see arguments on the illegality of the JI sub-contract and WSS sub-contract in the defendant's Closing Submissions to which the plaintiff duly responded. The defendant had not pleaded illegality in the Amended Defence and O 18 r 8(1) of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) clearly requires a party to specifically plead any matter showing illegality. At the conclusion of the trial, no leave to amend the pleadings was applied for. Be that as it may, where a transaction is manifestly illegal on its face, the

court can intervene on its own motion and refuse to enforce it, even if illegality is not pleaded or alleged. However, I am unable to say that this was such a case. There is also no evidence of illegality adduced before me. Accordingly, I must reject the defendant's arguments on illegality.

The evidence

12 The plaintiff called three witnesses. The principal witness for the plaintiff was Chew, the chairman of the Econ group. The next two witnesses were Chua Thing Chong ("Chua") and Joseph Sin Kam Choi ("Sin"), the General Manager (Construction Division) and Managing Director of the plaintiff, respectively. The defendant called three witnesses. The principal witness was the defendant's founder, SSC. His son and managing director, Soh Chee Kian ("SCK"), also testified at the trial. The third witness was Lee Soot Khiang ("Lee"). Although Vivien Yu Vui Ping, a former Senior Manager (Contracts) of the plaintiff, was subpoenaed, the defendant decided against calling her as a witness.

13 As stated above, I have to decide whether the defendant has sufficiently established on a balance of probabilities the primary fact of a concluded oral agreement to pay 2% commission as a result of a meeting between SSC and Chew in March 1997. In the end, the crucial witnesses are the two protagonists, SSC and Chew. SSC and Chew have contradicted each other's version of the conversation. There is no witness to the conversation in March 1997 between SSC and Chew in which the alleged oral agreement arose, and there is nothing by way of documentary evidence relating or referable to the oral agreement. A good deal turned upon the reliability of the recollections of the two protagonists of what passed between them seven years ago, and upon their credibility. In considering the discussions in March 1997, it has been necessary for me to consider both the inherent likelihood of Chew being prepared to reach an agreement of the type asserted by the defendant; and the demeanour of SSC on the one hand, and Chew on the other, in relation to that particular meeting. Where there is a conflict of evidence such as in the present case, the objective facts, the witnesses' motives, and the overall probabilities, can assist the court in ascertaining the truth.

14 It is common ground that the JI project was completed and a temporary occupation licence was issued on 14 July 1999, and that the certificate of statutory completion was issued on 27 February 2002. In the case of the WSS project, the certificate of statutory completion was issued on 23 June 2000. The plaintiff sent a total of eleven demands and reminders for payment between 1 February 2001 and 10 April 2002. Separately, there were also demand letters from Mr Tan's firm and they were dated 31 October 2001, 12 April 2002 and 18 April 2002.

The defendant's evidence

15 SSC is an elderly gentleman in his late 70s and whose career and experience in the construction industry spanned five decades. In 1978, he founded the defendant company. According to SCK, he manages the family company as his father has retired.

16 In March 1997, Chew was at SSC's office to negotiate the piling contracts for two electrical substations. It is not disputed that a conversion occurred in March 1997 at SSC's office, but as noted earlier, the plaintiff disputes material aspects of SSC's version of it. SSC's version is that a concluded oral agreement to pay 2% commission was reached at this first meeting with Chew in March 1997.

17 In his written statement, SSC said that the defendant was a G8 contractor who is eligible to tender for large public-sector projects. The plaintiff was interested in public-sector projects opened only to G8 contractors, but it was not eligible as it was a G5 contractor. The plaintiff was keen to work with the defendant and it was Chew who requested the defendant to engage the plaintiff as subcontractor for its building works. At that time, the plaintiff was interested in building up its track

record to qualify for G8 grading. SSC had no objections to working with Chew who was an old friend of more than 40 years. Chew was said to have complained that, whilst the plaintiff did all the work, it still had to pay Neo Corporation Ltd ("Neo Corporation") a commission representing 3% of the contract sum. My impression of his oral testimony is that it was SSC who offered to work with Chew for a 2% commission. SSC said in cross-examination:

> A: …We started to talk. He said Neo [Corporation] took 3% profit from him and he was very unhappy. I told him that the Defendants have G8 status. I could help him. [There was] no need to pay 3%. I would only ask for 2% and not 3%. … I told him that if he [wanted] any job I would help him on jobs that I don't want and I would ask for 2% from him. …

18 Reportedly, Chew replied that if the plaintiff made a huge profit, he might, in addition to 2% commission, pay a bonus. In any event, the defendant's commission would be no less than 2%. He was adamant that, gain or loss, this 2% commission was payable in respect of any future projects awarded to the plaintiff as its subcontractor.

19 According to SSC, it was agreed at that meeting that the plaintiff would be in contact with the defendant whenever it was interested in tendering for public-sector projects opened to G8 contractors. The plaintiff would prepare the tender for vetting by the defendant who would then submit it in its name. If successful, the defendant would subcontract the entire project to the plaintiff for a commission of 2% of the final contract value for each project awarded to the plaintiff. This 2% commission was to be deducted after the final accounts had been issued when the final contract value had been ascertained. In addition, the plaintiff would pay the defendant a management fee and other disbursements, the details of which were left to the parties' representatives. Pursuant to this oral agreement, the plaintiff, in September 1997, contacted the defendant about the design and build project at Jurong Island.

20 SSC further stated in his written statement that it would have been absurd for a businessman to sub-contract both projects without a commission or fee. The defendant, as the main contractor, was answerable and remained liable to its employer. SSC alluded to the practice in the construction industry where the main contractor would receive a minimum of 2% of the sub-contract sum even though the subcontractor did all the work.

21 SSC also explained that this oral agreement was not reduced into writing since he trusted Chew to honour the agreement. Chew was someone whom he regarded as a brother.

22 SCK was called as a witness to corroborate SSC's story that he told his son about the oral agreement reached with Chew. SCK testified that the JI subcontract and WSS sub-contract were made orally, and the two projects awarded to the plaintiff as subcontractor was on the basis that a 2% commission was payable to the defendant. According to SCK, the letters of award relied upon by the plaintiff, were not contractual documents as they were intended purely to assist the plaintiff in its application for G8 grading. The plaintiff was well aware that the 2% commission was left out of the letters of award because the defendant was not allowed, without the employer's permission, to sub-contract to the plaintiff the entire project awarded to a G8 contractor.

23 In respect of the JI project, SCK testified that it was orally agreed that the plaintiff would, *inter alia*, pay the defendant a monthly management fee of $5000 for 17 months, monthly rental for the tower crane at $5000 for 12 months plus disbursements.

24 In August 1998, the defendant was invited by the Public Works Department ("PWD") to tender for a design-and-build project for two secondary schools, one at Woodlands and another at

Sembawang. For the WSS project, SCK said he agreed with Chua that, on top of the 2% commission, the plaintiff would pay disbursements plus a lump sum figure of $100,000 as a management fee. SCK maintained that the WSS sub-contract was made orally. The letter of award dated 5 January 1999 relied upon by the plaintiff was intended purely to assist the plaintiff in its application for G8 grading.

The plaintiff's evidence

25 I now turn to the plaintiff's evidence. In his written statement, Chew said that when he met SSC in March 1997, the defendant was a G8 contractor and SSC expressed concern that the defendant may lose its G8 status for want of new public-sector contracts. Around that time, large public-sector projects were the design and build type. The plaintiff, as opposed to the defendant, had the capacity, expertise and experience in "design and build" projects. The plaintiff was a G5 contractor and it could not tender for public-sector design-and-build projects open to G8 contractors. The plaintiff became a G8 contractor on 14 February 2001. It was SSC who suggested to Chew that as the defendant was a G8 contractor the defendant and plaintiff were in a position to help each other. It was SSC who suggested to Chew that the plaintiff should prepare the tender documents for public-sector projects valued in excess of $10m under the defendant's name. The plaintiff was to remain responsible for the wasted costs of any unsuccessful tender. In the event of a favourable outcome, the entire project would be sub-contracted to the plaintiff who, in return, during the contract period, would pay a management fee for the defendant's architect/project manager. With this "win-win" approach, the defendant, on the one hand, could maintain its G8 grading and the plaintiff, on the other hand, could build up its track record in public-sector projects. Subsequently, there were chance encounters between the pair at social gatherings. In those informal settings, they spoke on how they could possibly work together in the prevailing poor market conditions.

26 Chew disagreed with the defendant's contention that an agreement as described was reached at this first meeting in March 1997. There was no representation as a 2% commission was never discussed at this meeting. Nothing specific could be discussed since the projects were not known. He explained, by way of illustration, that it was a year later on 22 March 1998 that they talked in detail about the management fee for the JI sub-contract. In March 1997, the pair only spoke generally about the poor state of the construction industry and what transpired then was a broad-based understanding to co-operate.

27 Chew was adamant that a 2% commission was a matter he could not have agreed to at that time, calling the defendant's assertion "ludicrous" and "uneconomical" having regard to the thin profit margins and costs of tendering large design-and-build public projects, which could be as high as $200,000 a project. According to Chew, SSC was of a similar opinion in that, in view of the prevailing competitive environment, the plaintiff would be lucky to make a profit in excess of 1%, let alone 2%. The plaintiff, therefore, could not afford to pay a 2% commission of the final contract value, regardless of whether or not profit was made, on top of the costs of tendering and the management fees. He similarly refuted the allegations that he had in two separate conversations, promised SCK a commission of 2% on the final contract value for the JI sub-contract and WSS sub-contract.

28 Chew denied telling SSC that the plaintiff was unhappy to pay 3% commission to Neo Corporation. He explained that the arrangement with Neo Corporation was different. The plaintiff was in a joint venture with Neo Corporation and the first project was given to the joint venture entity. Sin corroborated Chew's evidence. The total payment to Neo Corporation was less than 2% for each of their two projects.

29 Chew disagreed that SCK had informed Chew that payment was held back because the defendant was deducting, amongst other things, the 2% commission. The excuse for the defendant's

delay in settling the outstanding claims had always been poor cash flow. Chew, in answer to the court's question, said that the 2% commission was not used as an excuse for the defendant's refusal to pay the plaintiff's claims.

30 By 2001, the WSS project was completed. SCK asked Chew whether or not the project was profitable. Chew's answer was affirmative, but that depended on the plaintiff's allocation of overhead costs. SCK then insisted that Chew should give him "additional benefits". It was raised by SCK in this manner: "Mr Chew please give me something back". Chew asked SCK how much he had in mind and SCK mentioned 2% as a guideline. At the beginning, Chew saw it as a request for additional payment, but later the 2% commission was introduced as an excuse to delay payment. Thereafter, it was used as an issue to refuse payment.

Findings and decision

31 In considering whether the parties have actually formed the oral agreement as alleged, it is permissible to look to the background circumstances from which it arose and the subsequent conduct of the parties. A legally binding contract may be inferred from the conduct of the parties.

32 Whatever the subjective understanding of Chew and SSC of their conversation in March 1997, in my judgment, the overall weight of the evidence gathered from the background against which the alleged agreement was said to have been reached, its subject matter, the circumstances in which the relevant meeting took place, and the words used by the parties, are inconsistent with an intention to reach a concluded agreement. I find that there was no intention at that time in March 1997, to create a contract without further negotiation leading to a written document. Thus, I must reject the defendant's claim on an overriding concluded oral agreement. That is not to say that the result of the March 1997 meeting or of the various chats at social occasions was nothing at all. On the contrary, there was sufficient empathy for the parties to start work together. They co-operated by preparing tender documents for several projects where the plaintiff paid the cost occasioned by the tenders. However, that is not the same thing as saying that there was a complete oral agreement of the kind alleged. There was not. It follows that the defence of set-off based on a 2% commission must fail.

33 For the same reasons, I find that there was no collateral agreement. I am satisfied, at the end of the case after all the evidence has been adduced, that the plaintiff has discharged the burden of proof, and I so find that the terms of the JI sub-contract and the WSS sub-contract were evidenced in writing as the plaintiff has pleaded.

34 I shall now set out the circumstances and considerations, which lead me to the conclusions reached.

35 First, upon an objective assessment of the evidence, the plaintiff's case is more plausible than that of the defendant in that there is a great deal of commercial sense in not agreeing at that early stage to a commission at the rate of 2% based on final accounts. The last construction boom, which was before 1997, saw the emergence of many G8 contractors. Competition was keen as there were fewer large public-sector projects for G8 contractors. G8 contractors were caught with excess capacity in terms of staff and equipment. Profit margins were low because material cost was still high. SCK, in re-examination, painted a different picture of the construction industry. He said that in 1997 and 1998 there were ample jobs available. It was only in 1999 that jobs became fewer. Mr Ng, on behalf of the defendant, contends that the oral agreement was reached in March 1997, well before the beginning of the Asian currency crisis which can be traced back to July 1997 when the Thai baht fell heavily against the US dollar. This became the trigger for the Asian currency crisis. I am unable to

give much weight to SCK's testimony. It was too general to be of much evidential value. His account said nothing about the state of large public-sector projects and G8 contractors. Besides, SSC stated categorically that the building construction market was bad. The defendant retrenched its staff and reduced its capacity and overheads to survive in 1997. There was intense competition and projects were tendered at low prices. According to him, it was pointless to submit a lowly-priced tender because the contractor was bound to lose money and end up in bankruptcy. There was a need to be selective and hence, the defendant's decision to only tender for projects on invitation. There was only one invitation to the defendant by PWD in or about August 1998 to tender for the construction of two secondary schools. The evidence ties in with Chua's unchallenged testimony that the defendant was running out of jobs in 1997. Given the high tender costs of large design-and-build projects and thin profit margins, Sin dismissed the notion of an outright commitment to pay 2% commission as a "non-starter".

36 The background facts again make it improbable that the Chew would, at such an early stage, commit the plaintiff contractually, even to an old friend, to pay 2% commission given the imponderables. When Chew and SSC chatted in March 1997, the projects were unidentified. The size, complexity, duration and costs of the projects and, therefore, the profit margins were unknown. Chew was willing, at the plaintiff's own risk, to undertake the costs of a tender at a time when he knew that the other side could resile and decide not to award the plaintiff a sub-contract. Beyond that, he was non-committal. Chew expressed in the witness box, a concern for appropriate documentation given the plaintiff's status as a subsidiary of a public-listed company where there are internal and external auditors as well as independent directors to scrutinise what he does. It seems to me unlikely that he would have agreed informally and without documentation to a proposal of 2% commission of the final contract sum suggested by SSC.

37 Second, although the meeting in March 1997 was at the defendant's office, the setting was an informal one – a chat between old friends after the business at hand was concluded. No notes and no formal record were kept. There is no evidence of anything said to SSC at the time of this meeting or immediately prior to it, which would indicate that the discussion was intended to be a formal one. Chew said that the pair had a broad-based discussion. Even if I accept the evidence given on behalf of the defendant that 2% commission was raised in conversation in March 1997, the defendant's case is not advanced. The words attributed to SSC that he told Chew that "if he [Chew] wants any job I would help him on jobs that I don't want and I would ask for 2% from him …" are to my mind more consistent with approval of a plan of action in the future than an intention at that time to undertake significant obligations. It is doubtful if the discussion was anything more than of a tentative and exploratory nature, aimed at reaching some general consensus as to the way to "co-operate". This meeting was in March and the JI project materialised six months later in September 1997.

38 Third, there was in fact an extraordinary absence of written material bearing upon the alleged agreement reached in March 1997. The defendant did not see fit to reduce it to writing either at that discussion or at any subsequent stage during the two projects. There was hardly any document, which indirectly illumine its alleged terms.

39 The defendant's attempts to explain this absence of documentation, in my view, fail miserably. SSC and his son said during cross-examination that business is often done orally. In support of the defendant's business style, the latter called Lee. He testified to supplying scaffolding at a unit price to the defendant for many years, and business was often done on an oral basis. Lee's evidence is self-evidently irrelevant. The casual manner of doing business certainly does not sit well with its G8 status. The defendant was the contractor for the renovation works at the Istana Main Building and Singapore Academy of Law restaurant. These contracts would hardly be made orally. It was emphasised that, above all, SSC trusted Chew to honour his word. There are, however,

inconsistencies in SSC's testimony on this material aspect of the case that gave me cause to be somewhat careful with his evidence. It is convenient to set out his answers to counsel's questions where he explained the sole reason for the lack of documentary evidence.

Q: Did you tell [your] son that you do not have to put this [2% commission] in writing?

A: Yes because I trusted Chew.

Q: Based on your instructions your son did not put this 2% in writing?

A: Yes

….

Q: This is the only reason why it is not in writing?

A: Yes

Q: What you are saying is the truth?

A: Yes

….

Q: Look at affidavit of evidence-in-chief. Where does it say that you did not put this 2% in writing is because of trust and you told your son not to do it?

A: Not mentioned in affidavit of evidence-in- chief.

…..

Q: You say 2% based on trust and told [your] son not to put that in writing?

A: I did not tell my son not to reduce it in writing. I just told my son to trust him.

40 Not only did SSC contradict himself in his answers, his oral testimony also contradicted his written testimony. In so doing, he discredited himself and his son who adopted SSC's oral testimony. He said that the defendant could not mention the 2% commission in writing for fear that, if discovered by the employers, the defendant's employment as main contractor would be terminated, and it might lead to being debarred from tendering for public-sector contracts in the future. In his Affidavit of Evidence-in-Chief, he said this:

19. TK Chew also knew that the 2% commission was not reflected as the Defendant was not allowed to totally subcontract the works under the respective subcontracts to the Plaintiff. Mr Chew was fully aware of this prohibition …

25. [Chew] had wrongly assumed that the Defendant would be afraid of being debarred from tendering in future government projects and therefore would *never reveal the reason why the 2% commission was never reduced into writing*. Well he is wrong in his assumptions. We will rather risk debarment than let Mr Chew enjoy the fruits of his deceit and betrayal.

[emphasis added]

41 Even more curious are the grounds for saying that the JI sub-contract and WSS sub-contract were made orally. The plaintiff's case is that the letter of award signed by Chew for $16.25m[1] evidenced the JI sub-contract whereas the other letter of award for $11.3m signed by Chua[2] was for the plaintiff's G8 application to the Building and Construction Authority ("BCA"). The defendant's contention is that the written documentation averred to in the Amended Statement of Claim were generated just to assist the plaintiff in its application for G8 rating.

42 The defendant contends that Vivien Yu's handwritten note on a draft letter of award for $16.25m[3] was for submission to BCA and this is borne out by Vivien Yu's handwritten note to the defendant to this effect. This contention cannot be supported. On a closer look at the handwritten note, I agree with Sin, who testified to the plaintiff's document, that Vivien Yu wrote "AUD" (short form for "audit") and not "BCND". With that, the sentence reads: "We need this for AUD."

43 In his written testimony, SCK stated that he issued the letters of award, *ie* JI sub-contract for $16.25m[4] and WSS sub-contract on 5 January 1999 for $16.33m,[5] after he separately spoke to Chew and Chua about his concerns that the 2% commission could not be included in the sub-contracts. Chew and Chua were aware of the 2% commission and they assured him that they would honour it. SKC's testimony took a turn during cross-examination. He claimed that the letter of award for $16.25m and signed by Chew[6] was for the plaintiff's application to BCA. The letter showing a lower figure of $11.3m[7] was issued first and it was intended to safeguard the defendant's 2% commission.

44 Mr Ng submitted:

> [SCK's] testimony that [the letter for $11.3m] was really a safeguard. All the time the Defendants were prepared to work on the basis of an oral contract. Chew and [SSC] were old friends and [SCK] could not doubt Chew's honour and totally trusted him. [That letter for $11.3m] is there in case there are any problems and to safeguard the Defendant's [*sic*] position on the 2% commission …

45 There are shortcomings in the arguments. If SCK truly trusted Chew, he would not have needed a safeguard. That argument contradicts SCK's evidence and undermines SSC's testimony. Conversely, if it were indeed a safeguard, it would have been at the forefront of the defendant's case and made used of to recover the 2% commission because Chew was proving himself untrustworthy. The safeguard argument does not sit well with the defendant's admission that the JI sub-contract was for $16.25m.

46 I accept Sin's evidence that Chua is a careful man and he would not have signed a letter of award for $11.3m before having in hand the letter of award for $16.25m. As Chua himself said, the plaintiff would not be so foolish as to do all that work for $11.3m.

47 There is no basis for Mr Ng's contention that Chua's testimony showed that the plaintiff was fully aware that the letter of award for $11.3m was drawn up to safeguard the defendant's position on the 2% commission. In my view, the defendant has read too much into Chua's testimony that $11.3m was adjusted by SCK to "suit a percentage" as being referable to the 2% commission. Chua was merely saying that the contract value was adjusted in a way so as not to give any hint of a total sub-contracting of the entire project.

48 Although SCK denies it in evidence, there was, in my view, something of a change of mind on the part of this witness concerning this topic by the time of the trial. The story is that the defendant's willingness to now "come clean" is because of Chew's dishonesty and the defendant

would rather risk being debarred than let the plaintiff benefit from Chew's and Chua's deception. That story changed when SCK was asked in cross-examination to explain the late application to amend the Defence. He denied that there was a last minute change of mind. He blamed the lawyers for having not understood the defendant's position. He was aware from the beginning that the JI sub-contract and WSS subcontract were made orally. I do not find his explanation satisfactory. SCK had affirmed in an earlier show cause affidavit that the sub-contracts were in writing, and at that stage, the defendant sought rectification of the sub-contracts because the 2% commission was left out of the letters of award by mistake.

49 The defendant, through SSC and SCK, said that a 2% commission is industry practice. This industry practice does not assist the defendant. *Halsbury's Laws of England*, vol 21 (4th Ed Reissue, 1995) at para 650, distinguishes a usage from a mere trade practice and states that a practice, however frequently repeated, does not affect legal relations unless it is considered to be a binding rule. Practice falling short of usage cannot be incorporated into a contract.

50 Fourth, in my analysis of the evidence, I find that the defendant understood that the plaintiff was not bound contractually to pay 2% commission. Sin alluded to a discussion in his own office in 1998. SSC, SCK, Chew, Chua and he were in the discussion. They talked about working together for the JI tender. Sin specifically remembered SSC speaking to Chew in Hokkien and in the course of the conversation, requested some money from the plaintiff if the latter made a profit. That is something wholly different from the evidence of SSC that the plaintiff, whether gain or loss, must pay the 2% commission. It is telling from the evidence that no percentage was mentioned and the subject matter was put across as a request, a discretionary payment as opposed to a payment that is fixed and obligatory. Curiously, the defendant relies on Chua's answer to a different question – that he had not met SSC before the trial or spoken to him – to dent Sin's evidence, denouncing it as nothing more than a figment of Sin's imagination. Notably, Chua's overall testimony is in a similar vein as Sin's. He first denied having promised a 2 % commission to the defendant for the JI and WSS sub-contracts. At no time did he and SCK talk about a 2% commission. A telling passage following Chua's cross-examination is SCK's understanding gathered from his utterance during a luncheon, held sometime after the JI project was completed and towards the tail end of the WSS project, that if the plaintiff made a profit, the plaintiff was to consider giving the defendant a share of it. Of significance is the fact that neither SSC nor SCK contradicted what Chua and Sin said here.

51 There is also Chew's unchallenged evidence that in 2001, when he became involved in pressing SCK to settle the outstanding certificates, the latter inquired whether or not the plaintiff had made money on the project. Again, this query contradicts the defendant's own evidence that gain or loss, a 2% commission must be paid. The plaintiff's correspondence dated 22 November 2001 also shows, and follows the understanding, that payment of commission was at the plaintiff's discretion.

52 Fifth, in considering whether the parties have actually formed a contract, it is permissible to look also at the subsequent conduct of the parties. The defendant said that its priority was to survive the downturn in the construction industry. Against this background, and in a business like the defendant's where cash flow is vital, it is very odd that the defendant did not ensure that it would be paid periodically out of the progress payments received directly from the employer as opposed to payment after completion of the project and after the project account was finalised, which meant having to wait eight months to over a year for the money. A few options as to what the defendant could have done to protect the 2% commission, apart from recording it in a side letter, were put to SCK. The options, to name a few, were to either reflect the 2% commission as a management fee, or simply make deductions to account before releasing the money received from the employer to the plaintiff. Whilst accepting the options as viable, he replied that he did not know how to go about some of the options suggested or that he never thought about them at the relevant time. I reject his

fatuous testimony which must be untrue especially from someone with 25 years of experience in the construction business and who viewed the 2% commission as important to the defendant.

53 Finally, I did not form a favourable impression of SCK as a witness. In contrast to the evidence of SCK, I found the evidence of Chua and Sin to be consistent and given in a manner which sought to assist the court to reach proper findings. Chua was subpoenaed as a witness. He left the employment of the plaintiff after some disagreement with management. He is presently managing his family business in Malaysia. There was no reason to question his motive as a witness. I have already touched on the inconsistencies in the material aspects SSC's evidence. The seeming weakness of parts of Chew's evidence, were not so troubling as to call for a rejection of all the uncorroborated parts of it.

Other matters

54 I now mention a number of disputed factual issues concerning the computation of the plaintiff's claim. On the JI sub-contract, the defendant disputes two items. The first relates to the sale price of the containers. According to the defendant, the sale price of $3000 was agreed between SCK and Chua. No details as to when, where and how this was arrived at was stated in SCK's Affidavit of Evidence-in-Chief. There is no documentation on this alleged agreement which was also not put to Chua in the witness box. In the circumstances, before the court is only Sin's evidence that he checked with a third party, Soon Huat Engineering Works, for the market price of a reconditioned steel container and the price quoted was $2000 per container and a discount would be given for a purchase of more than four units. Sin reckons that if the plaintiff were to negotiate with Soon Huat Engineering, it would be able to buy the reconditioned container for $1,800. He thus reasons that the figure of $2000 per unit was fair. Even though the defendant's containers were made of aluminium, they were not reconditioned and the plaintiff took them over "as is where is" at the defendant's location and moved them to the plaintiff's site.

55 Turning to the management fee payable for the defendant's architect, the defendant's contention is that the plaintiff should pay the management fee for 17 months and not 12 months. The argument is that the monthly management fee continued to be payable during the maintenance period. I am not persuaded by the argument. The evidence contradicts SCK's assertion that 17 months was orally agreed and to which he gave no details. According to the JI sub-contract, a management fee was payable for the duration of the contract period. According to the evidence, the contract period was for 12 months. In the draft letter of award,[8] to which the defendant did not take issue with its contents, the contract period was stipulated as commencing from 21 July 1998 and to be completed by 20 August 1999. In contrast, the WSS sub-contract[9] expressly stated that the monthly management fee payable was for the duration of the whole contract period of 17 months.

56 On the WSS sub-contract, the defendant disputes three items. I am again not persuaded by the defendant's arguments. On item five, I find the plaintiff's explanation on how the undercharging of the diesel supplied arose, plausible. The defendant did not adduce any counter-evidence to disprove the plaintiff's position. It was a simple case of Caltex having undercharged the plaintiff and the error was repeated when it came to invoicing the defendant at cost for the diesel supplied. The defendant is therefore to reimburse the plaintiff the sum of $2,041.20.

57 Under the WSS sub-contract, the plaintiff has to bear the consultant's fees in respect of its scope of work. The plaintiff's share is thus $485,732.09. I agree that the computation should exclude M&E works for which the plaintiff has separately paid the M&E consultant. Moreover, the defendant had not substantiated its claim that its consultant's fee was $1m and not $978,000. The fact of the matter is that the defendant did not apply for leave to adduce further evidence of a figure of $1m,

and the plaintiff, quite rightly, objects to the introduction of an invoice that was not discovered and whose content has not been proven. I am persuaded that the defendant had over deducted a sum of $109,106.11. As for the balance fee of the structural engineer, TY Lin, the defendant was not able to debunk Sin's explanation that the figure of $24,329.05 is part of the sum of $978,000 and already taken into consideration by the plaintiff.

Result

58 For these considerations, the plaintiff is entitled to judgment as claimed, together with costs and interest at the rate of 6% per annum from the date of the Writ of Summons to date of judgment. The plaintiff shall also have the cost of defending the counterclaim.

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[1]AB at pp 6–7

[2]AB at pp 80–83

[3]AB at pp 143

[4]*Supra* n 1

[5]AB at pp 8–9

[6]*Supra* n 1

[7]*Supra* n 2

[8]*Supra* n 3

[9]*Supra* n 5

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