Wishing Star Ltd v Jurong Town Corp (No 2)
[2004] SGHC 255

Case Number : Suit 31/2003

Decision Date : 22 November 2004

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Christopher Chuah Chee Kian, Tan Liam Beng and Eugene Tan (Drew and Napier LLC) for the plaintiff; K Shanmugam SC, Ho Chien Mien, Ng Lip Chih, Karen Teoh and J Sathiaseelan (Allen and Gledhill) for the defendant

Parties : Wishing Star Ltd — Jurong Town Corp

Contract – Misrepresentation – Damages – Defendant counter-claiming damages for plaintiff's misrepresentations – Misrepresentations contained in tender documents subsequently incorporated as terms of contract – Whether more appropriate to sue for breach of contract

Contract – Misrepresentation – Inducement – Plaintiff making various misrepresentations in tender documents – Whether defendant induced by misrepresentations to enter into sub-contract with plaintiff

Contract – Misrepresentation – Recission – Whether defendant losing right to rescind sub-contract by electing to affirm sub-contract after discovering plaintiff's misrepresentations

22 November 2004

Choo Han Teck J:

Introduction

1 The plaintiff is a Hong Kong registered company carrying on the business generally of a façade cladding contractor. The defendant is a statutory body established under the Jurong Town Corporation Act (Cap 150, 1998 Rev Ed). The plaintiff was engaged by the defendant as a contractor for the façade works in a large building project referred to as "The Biopolis". The plaintiff sued the defendant in this action for wrongful termination and the defendant counterclaimed for damages for misrepresentation and breach of contract. Mr Shanmugam SC appeared as counsel for the defendant, and Mr Christopher Chuah appeared for the plaintiff. Throughout the trial the defendant had emphasised the massiveness of the Biopolis project, not only in terms of its physical size, but also the international prestige it was expected to gain. The Biopolis is an 185,000m² research complex for biomedical research. The Biopolis project itself consisted of seven tower blocks and three basement levels. The defendant asserted that the façade works "would not only serve an aesthetic purpose in terms of forming the exterior appearance of the building but also, *inter alia*, ensure the water tightness of the buildings". Samsung Corporation ("Samsung") was the main contractor of the building project. The defendant had also appointed Jurong Town Corporation Pte Ltd ("JCPL") as its managing agent. JCPL played an important role in the history leading to the present litigation. Ordinarily, a contractor such as the plaintiff would be engaged by the main contractor and thus be known as a nominated sub-contractor ("NSC"). In this case, the plaintiff did not impress the main contractor, Samsung. The plaintiff, whose tender was the lowest among the competitors, managed to impress JCPL. Hence, in spite of strong objection from Samsung, the defendant, on the advice and recommendation of JCPL (which was submitted formally to the defendant on 23 May 2002), appointed the plaintiff as the sub-contractor for the façade works ("the Façade Works") directly and not as an NSC of the main contractor. On 9 September 2002, the defendant terminated that appointment on the ground of misrepresentation and breach of contract by the plaintiff. According to the plaintiff, the

sub-contract sum was $54m, but the defendant averred that this figure comprised the base offer made by the plaintiff in its tender document. This disagreement is not material for the time being.

Scope of works and the representations

2 The defendant alleged that the plaintiff made a number of representations (all of which were contained in the tender documents) that were false and which had induced the defendant into contracting with the plaintiff. The alleged representations are set out in the following order for convenience:

(a) The plaintiff had, in the past five years preceding the tender, completed a curtain walling system of $10m and above in a single project;

(b) The plaintiff had at least two project managers with 20 years' experience each for the unitised curtain wall project;

(c) The plaintiff had a chief design manager with at least 20 years' experience;

(d) The plaintiff had an in-house production capacity of 10,000m² per month for curtain production;

(e) The plaintiff's in-house facilities included a 1,000m² polyester powder coating plant;

(f) The plaintiff's in-house facilities included a fluorocarbon coating workshop;

(g) The plaintiff's in-house facilities included a window and curtain wall plant;

(h) The plaintiff's in-house facilities included a functioning laboratory for testing cladding systems and were also suitable for testing curtain wall materials for the Façade Works;

(i) The plaintiff's in-house facilities included a 2,000m² stone fabrication plant;

(j) The plaintiff's in-house facilities included a metal panel fabrication plant.

Six of these representations were made in response to the evaluation criteria imposed by the defendant for the purpose of shortlisting and selecting its contractors. The criteria itself comprised two sub-sets named "Critical Criteria" and "Other Criteria" respectively. The former, according to Mr Ong Tiong Beng ("Mr Ong"), a vice-president of JCPL, "sets the basic minimum criteria that tenderers needed to meet in order to be eligible to be awarded the Façade Works". Only the first representation related to the "Critical Criteria". "Other Criteria", Mr Ong said, set out "certain specific requirements and conditions" and were as important as the items in "Critical Criteria". Only items (b) to (f) above came from "Other Criteria". It was the defendant's case that the above representations were "point by point confirmations of the plaintiff's compliance with the Evaluation Criteria". It was by this argument that it sought to cluster all the representations as being equally important.

The defendant's case and important dates

3 It will be more convenient to begin with the defendant's case rather than the plaintiff's because of the positive assertions made by it, whereas the plaintiff's case will depend, in essence, on a successful defence of the defendant's assertions in the defence and counterclaim. The narrative of the eventful story will be better appreciated if some important dates are identified. The plaintiff

submitted its tender document on 23 April 2002. This was followed by a number of other documents and letters, culminating in the defendant's letter of award dated 14 June 2002, issued through JCPL. The contract stipulated that the plaintiff had to commence work by 23 May 2002. On 9 September 2002, the defendant wrote to the plaintiff alleging that the plaintiff had repudiated the contract by its misrepresentations and breaches, and the defendant had accepted the repudiation and treated the contract as terminated. Counsel for the defendant emphasised repeatedly that the Biopolis was a prestigious and important national project, and was put on a "fast-track" development programme, that is to say, it was intended that the project be completed within 19 months instead of the 30 months that such a project would normally require.

The role of JCPL and its officers

4 References to the parties so far were of the plaintiff and the defendant, but in fact, throughout much of the crucial period between the tender of contract and its subsequent termination, JCPL and its officers were dealing directly with the plaintiff (as well as with Samsung). JCPL was a wholly-owned subsidiary of the defendant. It performed the dual role of consultant to, and agent of, the defendant. The most senior officer from JCPL to testify in this trial was Miss Mao Whey Ying ("Miss Mao"), the Executive Vice-President of JCPL's Public Business Division. She was also designated the Superintending Officer of the Biopolis project. The Superintending Officer was in charge of administering the main contract between the defendant and Samsung on the defendant's behalf. In reality, the day-to-day work was left to her assistant, Mr Nick Chang Koon Chean ("Mr Nick Chang"), who was the Principal Architect of JCPL's Specialised Parks Department. Mr Nick Chang was appointed the Superintending Officer's Representative, referred to in the documentary evidence as the "SO's rep". As Miss Mao testified, her role was more a "supervisory one" and she did not deal with the contractors and sub-contractors. That job was performed mainly by Mr Nick Chang, and Mr Ong, the Project Manager for the Biopolis project. Three other relevant officers from JCPL were Mr Seah Chee Kien, the Chief Architect, Mr Chew Son Wah, the Senior Contracts Manager, and Mr Lim Lye Huat, a manager.

How the tocsin was sounded

5 Almost from the moment the tender exercise closed, Samsung was already indicating its uneasiness with contractors unfamiliar to it. Mr Ong deposed that two letters from Mr Harrison Park of Samsung in April and May 2002 respectively gave him the impression that Samsung was "posturing"; hoping to influence the defendant in awarding the tender to Permasteelisa, which he said, would also been beneficial to Samsung financially, but he did not elaborate. In the face of continued objections by Samsung, Mr Ong, Mr Nick Chang, and Mr Chew Son Wah appeared to scrutinise the plaintiff carefully before clearing with Mr Cheong Kum Yin, JCPL's Senior Vice-President, and Miss Mao prior to submitting JCPL's recommendation to the defendant. When asked by Mr Spencer Lim, a director of the defendant, whether he was convinced that the plaintiff would be able to "deliver a good job, in time, and within budget", Mr Ong told Mr Spencer Lim that he would ideally "have preferred to recommend bigger players such as Permasteelisa but that was not possible due to [the defendant's] budget constraints". In response to a letter from Mr Harrison Park, the plaintiff wrote on 1 May 2002 giving a detailed affirmation that it was able to meet the criteria and terms set out in the "Evaluation Criteria" in the tender documents. Ten days later, the plaintiff wrote again, this time to affirm that its project manager would be a person with 20 years' experience. The ever-sceptical Samsung continued to raise questions. Mr Ong eventually reacted to the constant warnings from Samsung and asked to check the plaintiff's programme. By June 2002 senior officers at JCPL appeared nervous and concerned. It was about this time that Mr Nick Chang visited the plaintiff's office where he saw 15 members of the plaintiff's design team at work. It transpired that almost all of them were models hired by the plaintiff.

The only real dispute was whether the fake employees were employed with or without the plaintiff's knowledge. It was a small point because the most probable conclusion that the evidence leads to is that it was done with the plaintiff's knowledge and consent, by a Mr Jack Koh, a senior member of its management team (which was not very large in any case, comprising of Miss Carol Wen, Mr C H Tong, and Mr Jack Koh). The result was that on 10 July 2002, JCPL made a trip to China to examine the plaintiff's facilities for itself. This was the first of two trips. The second was on 24 July 2002. On 3 September 2002, the defendant's senior officers (Mr Steven Choo and Mr Spencer Lim) made a trip to inspect the plaintiff's facilities. Immediately after its first China trip, and consequent upon its team's findings at the plaintiff's industrial park in China, JCPL sounded the alarm loud and clear.

The disputed facts

6 The course of the trial meandered slightly at this point and there was a contest over a variety of factual issues and their significance. The plaintiff's work under its contract with the defendant required it to produce or fabricate substantial amounts of the necessary materials such as stone and metal. It was with this in mind that the contract reiterated various representations by the plaintiff. The representations had become terms of the contract. They were not merely statements made with the intention of inducing the defendant to grant them the work. It was expressly provided and thus a contrary view could not be seriously entertained. The question that had now arisen was whether the representations were false or substantially false such that the defendant was entitled to terminate the contract. First, the contract required the plaintiff to have a 2,000m² metal fabrication plant. What the plaintiff showed the visiting JCPL and defendant members in the two visits was a two-storey building with just over 1,000m² of floor space on each floor. The photographs that were produced to support the witnesses' testimonies put an end to the debate. The photographs showed the empty interior of the building. A 2,000m² empty room that might potentially be a metal fabrication plant is not a 2,000m² metal fabrication plant. I need not dwell on the quarrel as to whether two machines in the whole building altered the nature of the building, and whether that made the building not "virtually bare". On the evidence, the two machines appeared irrelevant in the otherwise empty hall. The building could not be called a metal fabrication plant despite the machines. The defendant's representatives were taken to two plants purported to be the 3,000m² "window and curtain wall fabrication plant". There were some busy activity and machinery there, but the question was whether these were activities involved in the fabrication of the large windows and curtain walls needed for the Biopolis. On the testimonies of the witnesses and the photographic evidence, I would say not.

7 The defendant also adduced evidence to rebut the claim that the plaintiff had a powder coating plant, a fluorocarbon coating plant, and a test laboratory for the curtain wall system. The issue concerning the plaintiff's ability to produce 10,000m² of curtain wall was the focus of some extreme suggestions from both sides. Mr Chuah, counsel for the plaintiff, submitted that the defendant was resorting to "a contrived and overly technical, down to the last nut and bolt calculation" to show that the plaintiff was unable to make good its representation that it had the facilities to produce 10,000m² of curtain wall. A full and complete curtain wall would include the panels, the mullions and the transoms. The defendant's expert, Mr Bruce Wymond, was of the view that the plaintiff did not have the appropriate or adequate equipment to fashion the essential components of the curtain wall. Dr Shillinglaw, one of the plaintiff's experts, advanced the proposition that the definition of "curtain wall" included only the mullions and transoms but excluded the cladding. He gave a slightly technical explanation, which seems plausible. But on the whole, the evidence suggested that when the parties referred to the curtain wall in their discussions, in contract documents and in court, the reference was to the entire curtain wall, cladding and all. Further challenge to Mr Bruce Wymond's evidence came from Miss Carol Wen. Miss Carol Wen was seriously injured in a motor vehicle accident before her cross-examination ended. But in the time that she was

testifying in court, she was adamant that the plaintiff's representations were not false. However, Mr Shanmugam SC severely tested her loyalty to truth, and although I do not find her to be in any way near the form of liar that counsel bluntly suggested that she was, the overall evidence weighed against her. She appeared to have glossed over some of the plaintiff's shortcomings, and was overly optimistic of the plaintiff's potential and capability. It was quite apparent that the plaintiff did not have the facilities that it said it had. Perhaps the plaintiff might somehow find competent sub-contractors to do the work for them entirely, but this is only speculation.

8 All the alleged misrepresentations referred to above fall within the category known as "Other Criteria" in the tender documents. There was another category called "Critical Criteria", which appears, from the name itself, as well as the evidence of Mr Spencer Lim, to be a criterion that the defendant regarded as highly important. As Mr Spencer Lim said, it meant that if it could not be complied with, the evaluation of the tendering contractor would end there and then. The only representation that belonged to the "Critical Criteria" category was the representation that the plaintiff had completed a curtain walling system of $10m and above in a single project in the five years prior to the statement. The dispute on this point concerned the question whether the plaintiff had misrepresented to the defendant when it said that its $10m contract was for the curtain wall work in the Shanghai Square project in China. In that project, the main contractor appeared to be Shanghai Mei Da Construction and Decoration Co Ltd. It contracted the curtain wall work to the plaintiff, who in turn, sub-contracted it to Wishing Star Curtain Wall (Shanghai) Ltd, which was its wholly-owned subsidiary company. The defendant took this to be an outright misrepresentation. Legally, a subsidiary is a separate legal entity from its parent. In that sense, it was not true that the plaintiff *itself* had done a $10m job, although commercially, no real distinction could be drawn in the present circumstances where it appeared that the parent and subsidiary had common personnel and were otherwise working closely together.

9 In a complex and factually complicated case such as this, it would be useful to be reminded of two cardinal principles in fact finding by a court. First, the facts are required to be established on a balance of probabilities. In so far as it relates to the finding of hard facts, *ie*, matters such as whether X made statement Y, a court may sometimes find the evidence so finely balanced that it cannot be tilted. In that event, the second principle applies, namely, that the burden of proof lies with the party who asserts, or in certain circumstances as the law may impose, on the other. I have dealt with the factual disputes above on the basis of a plain finding as to whether the statements asserted in the tender documents were true or correct, as the case may be. I shall now deal with the more difficult aspect, that is, whether on the facts, the statements amount to misrepresentation in law.

Misrepresentation – The law

10 For false or untrue representations to be effective, they must have induced the contract. Reference is commonly made to the old case of *Horsfall v Thomas* (1862) 1 H & C 90; 158 ER 813 in which the court held that the person who buys a defective cannon (where the seller had concealed a defect by plugging it with metal) cannot claim that the seller misrepresented to him that the cannon was not defective when he (the buyer) did not inspect the cannon before or at the time of the purchase. This anachronistic illustration retains its appeal in academic texts and from them, it is often lifted to emphasise the point that unless the representee was aware of the misrepresentation he could not be said to have been induced into the contract by it. The present context and circumstances were far more complex. Here the plaintiff had made specific statements of facts. These facts were not true. It will be relevant at this juncture to ask, did the defendant enter into the contract *because* of the said false or untrue statements, and would the defendant have agreed to

award the contract to the plaintiff had it been aware that the statements were false? These are two different questions, but the correlation between them is so strong that the distinction is sometimes not fully appreciated.

11 Mr Spencer Lim agreed under cross-examination that the distinction between the items in the "Critical Criteria" and those in the "Other Criteria" lay in the fact that a non-compliance with the former ends the prospect of further evaluation or review. It was therefore aptly named "Critical". Hence, Mr Chuah submitted that by implication, a failure to observe the items in the "Other Criteria" would not rule out the plaintiff's chances entirely. I am inclined to accept this distinction not only because Mr Chuah's interpretation of these terms were reasonably formed from Mr Spencer Lim's evidence, but also because the nature of the terms itself leans towards such a construction. If we take the term that the plaintiff must have a project manager of 20 years' experience as an example, I think that it is unlikely that the defendant would have rejected a contractor if its project manager had only 19 years and six months' experience. Furthermore, a mere non-rejection of a tender should not be taken to mean that the defendant was therefore induced by the representations to award it to the plaintiff. Let me carry the illustration further. A contractor who says to the owner that he has a project manager of 19 years and six months' experience might still be accepted and there will be no question of misrepresentation. However, a contractor who says that he has a project manager of 20 years' experience when his projector manager had only 19 years and six months' experience would not have stated the truth, but might not have misrepresented because the statement was substantially true. Mr Chuah also pointed to the evidence of Mr Nicky Chang who said that he had seen the organisation chart put up by the plaintiff which indicated that the plaintiff was planning to have only one and not two project managers. Hence, counsel submitted, the defendant knew or had good grounds to be aware that some of the items in the "Other Criteria" might not be fully complied with. If these were material discrepancies, counsel submitted, the obligation fell on JCPL to alert the defendant, which it did not do. The result, he submitted, was that the defendant's subsequent claim that it was induced by the representations thus made, could not accepted.

12 The proper and relevant question is whether the defendant was induced by the said representations. This has proved to be a difficult question even in the straightforward cases. The degree of difficulty increases the more complex or complicated the facts become, as can be seen, for example, in the modern case of *Avon Insurance plc v Swire Fraser Ltd* [2000] 1 All ER (Comm) 573, which involved the representation by insurance brokers that the risks, that were the subject of the insurance to be taken from the plaintiff insurers, would be individually assessed by the underwriters. They were not so assessed, but the relevant facts were more complicated than that, and Rix J (as he then was) held that the action based on misrepresentation failed. In the present case, there were several representations classified under three different categories, and the majority of the representations were set out in the tender documents that eventually became terms of the contract. This was a major and massive construction project, and understandably, the documents were voluminous. In simpler contracts such as the sale and purchase of, say, a second-hand car, the circumstances which might give rise to misrepresentations inducing the contract are much more obvious, and by their nature, more readily proved or accepted. If the buyer is believed, a simple statement such as, "this car is absolutely accident-free" would be sufficient, if false, to amount to an actionable misrepresentation. But where the parties are dealing with a massive construction project, the details and co-ordination of suppliers, materials, sub-contractors, professional consultants and so on will likely preoccupy all parties concerned. It would therefore be sensible to ensure that the contractual documents cover all the terms and concerns of the parties. It will require very clear evidence that a party would not have entered into the contract if he had known that one or more representations made to him was not true for the court to find misrepresentation in such cases. There was no evidence in the present case that inclines me to find that the defendant was induced into

awarding the contract to the plaintiff because of one or more of the said representations. In a contract of this size and nature, there are very few considerations that stand out to be the one article that clinches the deal. All conditions and factors had to be weighed and considered in totality. But if there were a single most important item in the present case, it would be the fact that the plaintiff's was the lowest tender at $60,000,000. The next closest, but by a long way, would have been the representation that the plaintiff had experience in a project of at least $10,000,000. In a contract of this nature, generally, and this contract, specifically, I am of the view that if there had been no hitches, the defendant would not have been alarmed that it was the plaintiff's subsidiary and not the plaintiff itself that completed the $10m job.

13 A decision to award a contract to a tenderer because he fulfils the conditions laid down is not necessarily one that is reached by reason of the awarding party being induced by the representation that the terms have been or will be complied with. This obvious point is sometimes obscured by overly simplistic views. Generally, proposals and counter proposals that are exchanged between the parties that become terms of the contract (such as those presently alleged) must be subject to the law relating to breach of contract and not misrepresentation. This is particularly so in a construction contract such as the present. Otherwise, every breach of such a contract in itself would be an actionable misrepresentation. I would, therefore, take a stricter view as to whether there was misrepresentation in law. It appears to me that all that were stated in the Evaluation Criteria were matters that the defendant wanted the plaintiff or the successful tenderer to comply with. These are requirements that the construction industry understands would be incorporated into the contract as terms of the contract, and consequently, if they were not complied with, the innocent party would be entitled to sue for breach of contract.

Election or affirmation: The law

14 I will now turn to the question of election or affirmation, on the assumption that the defendant was induced into the contract with the plaintiff. Mr Chuah submitted that the defendant lost the right, if it had one, to rescind the contract because it had affirmed the contract after discovering the misrepresentations. Counsel began his submission on this point by referring to Lord Goff's speech in *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391 at 398 as the state of the law concerning the doctrine of election, and also to stress the point that it is applicable equally in the case of misrepresentation as it does in a case of a breach of contract. In the case of a breach, which I shall revert to shortly in respect of the present case, the doctrine of election applies concomitantly to the remedies depending on whether the breach involved a warranty, a condition or that which has fascinatingly, and ironically, been named an "innominate term". Beginning, however, with the doctrine as it applies to misrepresentation, it appears that I must deal first with the dispute in law as to whether the right to rescind depended not only on the knowledge of the facts, but also of the right to rescind. *Peyman v Lanjani* [1985] Ch 457 ("*Peyman*"), the case of the non-English-speaking Iranians, was referred to by Mr Shanmugam for the defendant as suggesting that both factors were essential. Mr Chuah relied on *The Kanchenjunga* to the contrary, denying that *Peyman* goes the length that the defendant suggests; alternatively, if it does, Lord Goff's views must have since changed the position; thirdly, that *Peyman* itself admits of an exception based on estoppel; and finally, that in any event, the defendant was aware of the right to rescind. In *Peyman*, May and Slade LJJ agreed fully with the judgment of Stephenson LJ. In that judgment, it appears clear that a key question for the UK Court of Appeal's determination was whether the knowledge required to support a plea of waiver was knowledge of the facts alone, or whether there had to be further knowledge "that they give rise to the right and hence to a right of choice" (at 482). Stephenson LJ, after noting that "[s]tatements of the highest authority seem at first sight to give conflicting answers", then reviewed the conflicting

authorities and, in conclusion, inclined towards the older established authority of the House of Lords decision in *Evans v Bartlam* [1937] AC 473, holding at 487 that:

> [K]nowledge of the facts which give rise to the right to rescind is not enough to prevent the plaintiff from exercising that right, but he must also know that the law gives him that right yet choose with that knowledge not to exercise it.

The passage from *The Kanchenjunga* that Mr Chuah relied on comes from that part of Lord Goff's judgment at 398–399 as follows:

> If, with knowledge of the facts giving rise to the repudiation, the other party to the contract acts (for example) in a manner consistent only with treating that contract as still alive, he is taken in law to have exercised his election to affirm the contract.

However, a little further at 399, his Lordship, after drawing the contrast between the doctrines of election with that of equitable estoppel, went on to elaborate as follows:

> In the context of a contract, the principle of election applies when a state of affairs comes into existence in which one party becomes entitled to exercise a right, and has to choose whether to exercise the right or not. His election has generally to be an informed choice, made with knowledge of the facts giving rise to the right.

15 In my view, Lord Goff's judgment, read in the context of the case, is consistent with the interpretation of the law by Stephenson LJ in *Peyman*. Contrary to counsel's submission, the House of Lords in *The Kanchenjunga* did not express any scepticism of *Peyman* itself. In fact, *Peyman* was not cited before it. One cannot make an election whether of or on facts. An election can only be made as regards one's rights. Naturally, such an election is impossible unless he knows that he has a right upon which to make a choice. Further, in order that he may exercise his choice, it would also be necessary for him to be informed of the facts because a decision whether to insist on his rights depends on the contextual background, and that can only be provided by a knowledge of the facts. I am therefore in full agreement with the position taken by the UK Court of Appeal.

16 I shall now address the issue as to whether the defendant had knowledge of the right to rescind. Since the law requires an election to be made as close as possible to the discovery of the facts creating the basis for rescission (otherwise the right might be lost consequent upon delay), it follows that the material time must be the time at or soon after the discovery of the facts. In this regard, the evidence indicated that the defendant very probably knew that rescission was an option. In his evidence-in-chief, Mr Nick Chang stated that the JCPL team that visited the plaintiff's factory in China in July 2002 discussed their options when they returned from the trip. Termination was an option in the sense that getting advice (presumably legal advice) was discussed, but Mr Ong was too concerned about the impact of termination on the "fast-track" project. Miss Mao, who had been briefed about the findings of the team that visited the plaintiff's factory, stated under cross-examination:

> We actually did not decide against termination at that time. We know that is one option but we moved ahead to see if there are any other options, so we decided to explore the solutions first.

She further conceded, agreeing with counsel that the topic of termination was discussed, that she did say in her affidavit that they decided against termination because it was too time-consuming a procedure. It is therefore not just a case of the defendant knowing about the facts (of the plaintiff's

alleged misrepresentations). A discussion on the subject of termination implied that it would have included a discussion on the right to terminate. It would be pointless to consider termination unless the question of whether there is a right to do so is also raised. The defendant and its agent JCPL were not unschooled and inexperienced parties. To the contrary, it had a collection of highly trained and some of the best professionals in its organisation as well as in its agent and consultant JCPL. Furthermore, by 24 July 2002, an important letter in which Mr Harrison Park urged the defendant to terminate had been copied to the defendant's legal department ("the Harrison Park letter"). (I shall refer to the Harrison Park letter and the surrounding circumstances, in detail, in [18] below.) On the balance of probabilities, I would find that the defendant was aware not only of the facts, but also of the right to terminate. For the avoidance of misunderstanding, knowledge of the right to terminate in this regard does not mean that it would be right to terminate. The latter is the main issue before me.

Election or affirmation: The facts

17 It is important to revert to the first trip to inspect the plaintiff's facilities in China. The trips to China were prompted by the serious concern that the plaintiff appeared not to be able to perform the contract. The impression given was that JCPL and the defendant were hoping that the trip(s) might prove them wrong; but in the end, the trip(s) confirmed their worst fears. The first trip was made by JCPL but upon the team's return, the defendant was given an account of it. According to Mr Spencer Lim, Mr Ong briefed the defendant's officer including himself on 16 July 2002, and essentially reported that the plaintiff's facilities were "not up to the mark". When asked by Mr Chuah, under cross-examination, whether he felt that the plaintiff's facilities were "highly inadequate", Mr Ong stated, "Yes, even as a layman, I feel that way." The preceding evidence appears to me to have been carefully understated. A few moments later, the true and full extent of the impression the visiting team had of the plaintiff's facilities was revealed. Mr Ong testified that, "At that point in time, I think we were really, if I could use the word, panicking. My observation is that I think we were in deep trouble." Further on, he recalled Mr Harrison Park (of Samsung Corporation) saying, "Wah, finished lah." At that point it became obvious to everyone, from the main contractor to JCPL and to the defendant, that the urgent matter at hand was to find a solution. As far as they were concerned, the plaintiff would not be able to perform its part of the contract. Mr Ong confessed under cross-examination that at that point (briefing the defendant on the first China trip), he said:

> I think termination might have crossed our minds, I think it certainly did, because it was already in my mind, because at that point in time, saying I am really in trouble, I do not think I can finish this project; how do I finish this and, to be honest, your Honour, at that point in time, I had no idea how we would be able to salvage the situation, so I was just trying to cool things down.

He then went on to explain that he thought that the termination of a contract was procedurally cumbersome, and if that should take two or three months, "the damage would be far more severe". This will be considered with Miss Mao's evidence that they did not decide against termination at that time: "We know that it was one option but we move ahead to see if there are any other options, so we decided to explore the solutions first." The long evidence of the numerous witnesses for the defendant indicated very clearly, although not expressly, perhaps because it was one of those unmentionable things that one tries not to voice, that the defendant decided upon a two-pronged solution to the problem. First, it would try and obtain third party suppliers to work with the plaintiff, and at the same time, convince Samsung to take over the plaintiff as its NSC.

18 The second prong was totally unrealistic from the start although that did not prevent the defendant from hoping and trying, up to the moment when it finally terminated the plaintiff's contract,

because by a letter dated the same date, the defendant was persuading Samsung to take the plaintiff as its NSC. I had said that this second prong was doomed from the start because Samsung's chief in this project, Mr Harrison Park, was convinced from the start that the plaintiff could not do the job. His trip with the JCPL team to China reinforced his view. And thus, on 18 July 2002, he wrote to the defendant, copying his letter to the top management of the defendant itself, and after describing the poor state of the plaintiff's facilities in China, pleaded his "final appeal" to it in the following terms:

> (a) I presumed that JCPL wish to continue with [the plaintiff] by affording all necessary assistance to them even though the evidence is overwhelming that [the plaintiff] is not capable of undertaking this size of curtain wall and other related works.
>
> (b) However, I see no reason how this can work, as the Curtain Wall business is not simple but extremely complex.
>
> (c) As there is no time for trial and error, we are already late in procuring this very critical works and this project cannot afford to have any further mistake.
>
> (d) I understand the decision to terminate/rescind [the plaintiff's] nominated sub-contract is very difficult, however, if you do not take this position now, I foresee the project will face more difficulties later, ultimately the whole project suffers.
>
> (e) If the decision to terminate [the plaintiff] is taken now, we may still have the possibility in completing the work on schedule by sourcing existing curtain wall specialists who are competent with ready company set-up to strongly drive the curtain wall and other related works.

It was no wonder that Samsung steadfastly refused to accept the plaintiff in spite of the defendant's cajoling. The defendant could have exercised its contractual right and have insisted that Samsung did so, but it did not for reasons which I shall revert to shortly. The Harrison Park letter, prophetic in some ways, and also accurate and sensible as it appeared to be, nonetheless had an element of self-interest. It can be seen from earlier correspondence that Samsung was pushing for its own nominees, one of which was its related company, to be nominated for this sub-contract. The turn of events had given Samsung the opportunity for a refrain, but my observation of that undercurrent is only relevant for a better understanding of the narrative. It is not relevant to the issues in this trial.

19 Consequent upon the Harrison Park letter, Mr Philip Su (the Assistant Chief Executive Officer of the defendant) called an urgent meeting with JCPL on 20 July 2002. Mr Spencer Lim, who attended the meeting as well, testified that Mr Harrison Park's call for termination of the plaintiff's contract was discussed at the meeting but the meeting "did not elaborate [*sic*] whether termination was an option". He agreed with counsel that the meeting was content with Mr Ong's assurance that he had things under control and was lining up other sub-contractors and suppliers to help. Mr Philip Su himself candidly agreed that the meeting considered the Harrison Park letter, and in response to Mr Chuah's suggestion that the meeting, "discounted it because of the assurance given by the consultants", he replied, "That would be in sync." Mr Ong also agreed that termination was in their minds but "the implications of termination were horrendous". So, according to this witness, the defendant concentrated "on the way forward – how to salvage the situation". A little later, he testified that they were looking at new suppliers and if they could get them, the problem would be solved. That was his "road map" out of trouble. Miss Mao, confirming the same evidence of the others, further added that termination would have given Samsung an extension of time for the main contract work. She added that termination would be good for Samsung but not necessarily good for the defendant. So, wading through all the above evidence, it seems to me that the defendant had consulted JCPL

and discussed carefully and thoroughly all the options, although their witnesses were careful to say that they did not elaborate on the decision to terminate. Superficially, it might appear that thoughts of election or affirmation were avoided. But that would be impossible unless the discussions were neither serious nor thorough. Given the circumstances and the high quality of each and every officer from JCPL and the defendant, I do not think that that would be the case. On the contrary, the evidence, as I had narrated above, indicated that the defendant had weighed all its options and decided that termination, whether its consequences would be too horrendous (as Mr Ong said) or for strategic reasons such as not giving Samsung the excuse for getting an extension of time, was out of the question. That was an election.

20 The defendant went further than merely deciding against termination. It decided positively in favour of the option of using third party contractors to make up the deficiencies of the plaintiff. I had used the term "positively" in the sense of a positive action as opposed to an act of omission – it was not positive in the sense of an idea confidently hatched. As Mr Nick Chang candidly testified, they were not even sure whether it would work, but they were trying for it. In the meantime, the evidence showed that after the crisis meeting of 20 July 2002, the plaintiff continued to submit shopdrawings to the defendant and there were meetings between JCPL and the plaintiff over those drawings. On 14 August 2002, the plaintiff had a meeting with Samsung, the purpose of which was to present an updated programme for Samsung's comment and approval. According to the evidence of Mr Tong, there was no adverse comment by Samsung. This was certainly true because whatever opinion Samsung might have had, it was not put to the plaintiff at that time. In the meantime, too, co-ordination meetings between the plaintiff and JCPL continued. The minutes of a co-ordination meeting, held on 18 July 2002, reported that the plaintiff was told that JCPL would consider any innovations that the plaintiff might propose, and specifically requested that the plaintiff propose improvements that could be incorporated into the curtain wall system "and implemented within the timeline". It was also recorded at that meeting that the parties discussed matters concerning copper cladding, glass-work, and manpower. The minutes ended with a schedule for the next meeting. In other words, it was business as usual. The meeting of 18 July 2002 was consistent with an e-mail sent by Miss Mao to Mr Spencer Lim dated 17 July 2002. In it, Miss Mao stated that:

> Through the visit to the [plaintiff's] factory and other plants, we have identified credible sub-contractors whom [the plaintiff] will be working with and we will get [the plaintiff] to commit the engagement of such reputable sub-contractors shortly. We will also be working with the [plaintiff] to identify reputable installers and other sub-contractors critical for the successful completion of the work.

She continued by stating that:

> [JCPL] will be planning the detailed schedule with [the plaintiff] for all stages of the façade work, from shopdrawings to actual installation. Our staff will also be deployed to carry out periodic inspection and checking of work in the factory.

21 For the reasons above, I find that the defendant was not induced into the contract by any of the representations that had been found to be untrue, and further, that in the event, the defendant had, by its conduct, elected to affirm the contract after it had full notice of the facts and its rights in law. Counsel for the parties have agreed to defer the issue of a breach of contract until the disposal of the preliminary issue of misrepresentation and rescission has been dealt with. In this regard, counsel have also agreed to deal with the issues of repudiatory and anticipatory breach subsequently.