Kensteel Engineering Pte Ltd v OSV Engineering Pte Ltd
[2005] SGHC 31

Case Number : Suit 839/2003

Decision Date : 04 February 2005

Tribunal/Court : High Court

Coram : Andrew Ang JC

Counsel Name(s) : Salem Ibrahim and Michele Lim (Salem Ibrahim and Partners) for the plaintiff; Jose Charles (Jose Charles and Co) for the defendant

Parties : Kensteel Engineering Pte Ltd — OSV Engineering Pte Ltd

Contract – Contractual terms – Plaintiff alleging delivery date governed by purchase orders – Defendant alleging that delivery date governed by quotations – Whether contractual terms governed by purchase orders or quotations

Contract – Discharge – Subsequent agreement – Whether parties mutually abandoning existing rights under contract – Whether contract rescinded by mutual agreement – Whether new agreement must be sufficiently precise to found new contract

Contract – Implied contracts – Quantum meruit – Defendant partially completing work under original contract – Parties discharging contract by mutual agreement – Defendant continuing to work after contract discharged – Whether defendant entitled to payment on quantum meruit basis

4 February 2005

Andrew Ang JC:

1 This was an action by Kensteel Engineering Pte Ltd ("the plaintiff") for the sum of $1,057,308.61, being the alleged cost, expenses and losses suffered by it:

(a) in having to complete certain works that its sub-contractor, OSV Engineering Pte Ltd ("the defendant"), had allegedly failed to deliver in breach of contract; and

(b) in having to rectify equipment delivered by the defendant which allegedly did not meet contract specifications.

2 The plaintiff was, at all material times, in the business of designing and fabricating offshore electrical and control steel buildings, living quarters modules, heating, ventilating and air-conditioning ("HVAC") systems and generator packages.

3 The defendant was, at all material times, in the business of supplying services and materials in the construction and fabrication of equipment related to industrial air-conditioners for use on offshore oil and gas platforms.

The Conoco-Belanak Project

4 The plaintiff had successfully tendered for certain works (including HVAC works) from Siemens Pte Ltd ("Siemens") in a project called the Conoco-Belanak Project.

5 The main components in the HVAC system which the plaintiff successfully tendered for consisted of the air-handling unit ("AHU"), the compressor condenser unit ("CCU"), interconnecting piping systems and the control panels. Initially, the plaintiff's intention was to engage the defendant to do only the design work for the HVAC ("Contract 2 Works") while Carrier Singapore Pte Ltd

("Carrier") was to provide the compressors, cooling coils, condensers and the AHU. Carrier, however, only fabricated such equipment according to standard designs and with a range of fixed dimensions. The works in respect of the design and fabrication of the condensers and cooling coils needed to be tailored to fit into the building space at the project site. On the suggestion of Carrier's representative, the design, fabrication and supply of the CCU ("Contract 1 Works") were given to the defendant; Carrier was engaged only to design, fabricate and supply the AHU. The defendant was also engaged to design, assemble and supply the control panels ("Contract 3 Works").

6 The parties are not in agreement as to the terms of the three contracts nor, indeed, on the date of their formation.

7 The plaintiff contended that the terms of the contract for each of the works were set out in a purchase order issued by the plaintiff. The defendant, however, averred that the contracts were made orally and evidenced by the last of the quotations in respect of each of the works. There were important differences between the terms set out in the quotations and those in the purchase orders. In particular, the dates (*viz*, 7 September 2002 and 7 October 2002) set out in the purchase order for "Contract 1 Works" were substantially earlier than as provided in the relevant quotation.

8 In order to decide, in each instance, which of the two documents evidenced the terms of the contract, it was necessary to go into the facts surrounding the formation of the contracts.

Contract 1 Works

9 In all, the defendants issued three quotations for the Contract 1 Works. Before the first quotation, in a meeting on 26 June 2002 at which "in principle" agreement was reached, the plaintiff's representative Lim Hau Guan ("Lim" also known as "Philip Lim") said that he needed delivery of the CCUs in early September 2002 for the first batch of units and early October 2002 for the second. The defendant's managing director, Terence Peter Sims ("Sims") told Lim that the normal period for delivery of the type of purpose-built equipment was 16 weeks but that he would look at what could be done to offer the plaintiff the earliest possible delivery.

10 The next day, the defendant sent its first quotation. The delivery period was 12 weeks for the first two units and 14 weeks for the remaining two units. The delivery period was to run from the receipt of the down payment and final approval of drawings. It was also subject to timely delivery of certain compressors from Carrier and electric motors from a nominated vendor, Reliance Motors. By fax dated 28 June 2002, the defendant forwarded a drawing of the CCU to the plaintiff.

11 On 4 July 2002, Sims met again with Lim and the latter said that he wanted four units of CCUs in the first batch and another four units four weeks later. He also asked Sims to try and work on a shorter delivery period. That day, the defendant sent a second quotation to the plaintiff. By this time, the defendant had been verbally informed of a purchase order number that the plaintiff had assigned for the works. Sims was therefore confident that the plaintiff would award the defendant the Contract 1 Works. The second quotation bore a reference to the purchase order number, although the purchase order was then non-existent.

12 As at 4 July 2002, some of the prices for the equipment had not been agreed upon as their costs could not be ascertained. The delivery period in the second quotation was 12 weeks for the first batch and 16 weeks for the second.

13 Subsequently, Lim discussed the second quotation with Sims. Lim felt that the delivery periods were too long. However, Sims told him that he could not do it any earlier than as stated in

the second quotation. Lim asked Sims to try his best. The prices were also agreed and Lim asked the defendant to proceed with the works which it did.

14 On 8 July 2002, Sims sent an e-mail attaching a drawing to the plaintiff requesting its confirmation. On the same day, Lim wrote asking the defendant to proceed with the works and giving the plaintiff's purchase order number. The plaintiff's letter also stated that it would issue its purchase order "shortly".

15 All terms having been agreed, on 9 July 2002, the defendant issued its final quotation to the plaintiff. It stuck to the same delivery periods as in the second quotation. Delivery remained conditional upon timely delivery of the compressors from Carrier and the electric motors from Reliance Motors. On 11 July 2002, the defendant placed an order for the electric motors from Reliance Motors.

16 According to Sims, the plaintiff first faxed its purchase order ("PO1") to the defendant on 13 July 2002. It was dated 26 June 2002. The defendant noticed that delivery dates of 7 September 2002 and 7 October 2002 had been set out therein. As Sims had already made it clear to Lim that the periods of 12 weeks and 16 weeks were needed to complete the Contract 1 Works, he saw the delivery dates in PO1 as merely the dates that Lim wanted him to try his best to achieve. He did not see them as binding on him. This was because the defendant's second and third quotations had covered all the agreed terms. Besides, the plaintiff had earlier already given the defendant the purchase order number and had instructed the defendant to proceed with the works even before the issue of PO1.

17 On or about 18 July 2002, the defendant rendered an invoice for 20% of the value of the Contract 1 Works. The invoice bore reference to PO1 and was backdated to 26 June 2002 to coincide with the date on PO1. Sims said that this was done so that the plaintiff could arrange for payment immediately.

Contract 2 Works

18 Similarly, in regard to the Contract 2 Works, the first two quotations of 29 June 2002 and 4 July 2002 did not bear reference to any purchase order number. Neither did the defendant's invoice dated 28 June 2002. It was only on 15 July 2002 that the plaintiff faxed the second purchase order ("PO2"). Like PO1, it was backdated to 26 June 2002. The defendant's first invoice (also pre-dated to 26 June 2002) in relation to the Contract 2 Works was sent on 18 July 2002. It was for 20% of the value in accordance with the defendant's quotation and was duly paid by the plaintiff. But it did carry the purchase order number. Neither the quotation nor PO2 provided for a delivery date.

Contract 3 works

19 In regard to the Contract 3 Works, there was a dispute whether the third purchase order ("PO3") had been received by the defendant. The evidence of Sims was clear and unambiguous. In summary, the defendant submitted three quotations, the last of which was on 14 August 2002. Like the second quotation of 30 July 2002, it had the same delivery period of six weeks for two units and eight weeks for another two units. All three quotations also stated that the delivery periods commenced from the receipt of the down payment and final approval by the plaintiff of the drawings submitted by the defendant.

20 Following the payment schedule consistently set out in the quotations, the defendant had on or about 21 August 2002 sent by fax to the plaintiff its first invoice for the sum of $75,165.20 being 40% down payment. The invoice was pre-dated to 15 July 2002. It was followed by two other

invoices dated 31 August 2002 and 7 September 2002. None of the three invoices bore any reference to PO3 but instead merely referred to "Philip Lim". This tended to support the defendant's contention that it did not receive PO3.

21 On Lim's part, he alleged, in para 14 of his affidavit of evidence-in-chief, that the first invoice was issued against PO3 which the plaintiff had dated 26 August 2002. Examination of the invoice did not bear him out. It did not refer to PO3. Besides, he had returned the invoice with his handwritten note approving "20% down payment" and "10% upon issue of order" rather than simply "30% upon issue of order" which is what he would have written if he had followed PO3.

22 In any event, unlike the quotations, PO3 did not stipulate a delivery date. Plaintiff's counsel contended that the three purchase orders were interconnected and that therefore the date stipulated in PO1 had to be implied into the other two purchase orders. Whilst I agree that the works in the three contracts (whether evidenced by purchase orders or quotations) are interrelated, it does not follow that the date stipulated for one contract necessarily applies to all three contracts; *a fortiori* where the quotations consistently provided a distinctly different delivery period.

The events of 18 September 2002

23 Certain events occurred on 18 September 2002 which made the delivery dates assume a critical importance.

24 On 18 September 2002, the plaintiff's representatives, Lim and one Jonathan Lee, visited the defendant's workshop in Johor Baru. Lim expressed disappointment with the progress of the works. His own account in para 38 of his affidavit of evidence-in-chief reads as follows:

> It was clear that there was no way the Defendants could diligently complete the assembly work and carry out Factory Acceptance Test of the HVAC System which was required to be done pursuant to the terms of the Purchase Orders for the Conoco-Belanak Project. Eventually, it was agreed between the Plaintiffs and the Defendants that the uncompleted parts of the equipment for the Conoco-Belanak Project were to be sent back to the Plaintiffs' factory in Singapore.

25 The defendant's fax of 24 September 2002 to the plaintiff stated:[1]

> We confirm that, at our meeting with you on 18th September 2002 in our workshops, you decided that you wanted to arrange to continue to fabricate and assemble the condensing units in your own workshops in Changi. Based on your assurances that you had the required resources in terms of manpower, material and equipment we agreed to accept your instruction to ship the first condensing unit frame from our workshop in Permas Jaya and an additional three frames from our subcontractors workshop in Skudai to your Changi workshop together with condensing coils, motors and other components.
>
> We assure you of our full co-operation to complete this equipmwnt [*sic*] to the satisfaction of the client.
>
> Since your new proposal for completing this project may involve us in extra costs we reserve the right to charge you at our normal charge rate for anything which is additional to our original scope of work.

Sims deposed that on the same day, Lim also told him that he would arrange for a Singapore contractor to do the control panel assembly and wiring, *ie*, the Contract 3 Works. The plaintiff also

asked the defendant to continue to work with it to assist it in completing the works. The defendant's fax, also of 24 September 2002, stated:[2]

> We confirm that at our meeting with you on 17th September 2002 it was necessary for you to include additional features into the control logic which were not included in the original project specifications and that you redesigned the control logic.
>
> On 18th September we started to draw the new design and in view of the short remaining time to complete the project you decided that you would arrange for a Singapore subcontractor to do the control panel assembly and wiring. We submitted drawings of the new design to you as soft copy to use as a basis for the work.
>
> We assure you of our full co-operation to complete this equipmwnt [*sic*] to the satisfaction of the client.
>
> Since your new proposal for completing this project may involve us in extra costs we reserve the right to charge you at our normal charge rate for anything which is additional to our original scope of work.

The defendant also averred that by the plaintiff's conduct they were required to cease the Contract 2 Works.

26 After 18 September 2002, the defendant continued to work with the plaintiff, albeit not on a daily basis, attending at the plaintiff's workshop to inspect the works that were being carried out, preparing reports thereon and highlighting to the plaintiff any action it needed to take. The defendant also liaised with suppliers to arrange for the purchase of items that were needed to complete the work.

27 What was the effect of the plaintiff asking to move the components to the plaintiff's workshop to complete the works? On the basis that 7 September 2002 was the delivery date, the plaintiff contended that its so doing on 18 September 2002, together with non-payment, was (in the words of plaintiff's counsel) "thunder and lightning" – in other words, a rescission for breach. On the other hand, the defendant maintained that there was no breach as the delivery date had not yet arrived and that they would have been able to complete the work timeously. To test the validity of the parties' assertions, it would be necessary to review the quotations and purchase orders.

Delivery date for the contract works

28 We begin with the three quotations for the Contract 1 Works. Each of them is fairly detailed, going into six to seven pages. Details in the three quotations show that the defendant was aware of the specifications. The three quotations were consistent with regard to the prices quoted for delivery to a Singapore address. Each quotation also recommended a factory acceptance test and offered a quote upon development of a hook-up and testing programme.

29 Payment terms were the same for the second and third quotations. Delivery terms were the same for all three quotations except that under the first quotation, delivery of the second batch of CCUs was 14 weeks instead of 16 weeks as provided in the two later quotations.

30 The quotations consistently provided for delivery periods to run from the making of down payment and final approval of drawings submitted by the defendant. A similarly consistent clause provided that delivery of equipment was subject to timely delivery of electric motors from Reliance

Motors and compressors from Carrier as well as other components required from preferred vendors.

31 The defendant contended that after each quotation, discussions took place resulting in the next quotation until finally the third quotation was issued. The opening sentence of the covering fax attaching the third quotation in respect of the Contract 1 Works expressly stated that it "resolves the outstanding issues which were discussed today". The defendant contended that this clearly showed that whatever differences there were had been resolved and that the parties had come to an agreement. When Lim was asked, in cross-examination, whether he made any protest to the terms in the three quotations, he merely continued to reiterate that all the terms had been agreed on 26 June 2002 save for the price.

32 It is difficult to believe that the defendant would continue to quote repeatedly the same terms if they were in conflict with what had allegedly been agreed with the plaintiff. In particular, if the parties had agreed on the delivery dates, it is difficult to believe that the defendant would still quote 12 weeks and 16 weeks. (In fact, the change from 14 weeks in the first quotation to 16 weeks in the second and third quotations would certainly have upset the plaintiff if the delivery dates indeed had been agreed earlier). Far from being upset, the plaintiff's representative, Lim, asked the defendant to proceed with the works. This was before the plaintiff issued PO1. The defendant averred that Sims had, on at least two occasions, explained to Lim that it was not possible to meet the dates. On each occasion Lim merely told Sims to just try his best.

33 What then are we to make of PO1 which came after the third quotation? Was it the culmination of a long process of negotiation, as contended by plaintiff's counsel (this in itself being a departure from Lim's earlier assertions in his affidavit of evidence-in-chief that PO1 had been issued on 26 June 2002), or something much less, *ie*, merely an assurance to the defendant that the works had been formally awarded to it?

34 The plaintiff said the third quotation was only an offer. The defendant pointed to the opening words in the covering fax accompanying the third quotation which stated:[3]

> We attach our [revised] B quotation for these compressor/condenser units *which resolves the outstanding issues which were discussed today*. [emphasis added]

I accepted the defendant's contention that the third quotation evidenced the agreed terms. Whilst it was true that PO1 contradicted the third quotation and the defendant did not object, I accepted the explanation of Sims that, as in his quotations he had already reiterated to Lim that the delivery periods would be 12 weeks and 16 weeks, he understood the dates set out in PO1 to be merely the dates which Lim wanted the defendant to endeavour to achieve. Besides, even before the defendant's third quotation and before the defendant received PO1, Lim had already instructed the defendant to proceed with the works. That the plaintiff did not appear to attach much importance to the purchase order was seen from the fact that it did not require the defendant to sign and return the purchase order even though the purchase order specifically called for it.

35 Other evidence, circumstantial or otherwise, tending to suggest that PO1 was not the contractual document which the plaintiff made it out to be, are as follows:

> (a) In a letter dated 12 October 2002 written by the plaintiff's procurement manager (where he wrongly assumed that certain condensing coils were to have been delivered on 15 September 2002, not knowing that there had been an agreement to hold the delivery), the plaintiff had said:[4]

> If you failed and refused to deliver the required components as mentioned above in accordance with the Contract and resulted in Kensteel suffer [*sic*] any losses or damages, Kensteel shall have no alternative but to claim from you for such losses and damages.

This was hardly the sort of language one would have expected if the plaintiff regarded the defendant as having already breached the contract. Further, by its own account in another letter of the same date, the plaintiff claimed to have "mobilized more than 30 men and worked long hours in order to be able to deliver the HVAC on 12th Oct 2002 to the Indonesia site".[5] And yet, at that stage, despite having had to mobilise the more than 30 men, the plaintiff did not allege that the defendant was already in breach.

(b) In fact, there were numerous e-mails that had passed between the parties. Yet not a single one by the plaintiff asserted that the defendant had breached the delivery date. After the plaintiff had taken over the work in progress and had sub-contracted certain parts of the Contract 1 and Contract 3 Works, it continued to ask the defendant for help. Not once did it allege breach. On no occasion did it intimate that it would look to the defendant for losses for any existing breach. Neither did it notify the defendant of the ongoing costs of completing the works. It would appear that it was not until after 9 July 2003, when the defendant threatened legal action if outstanding payments were not received by 30 July 2003, that the plaintiff raised its claim for the first time. By a letter of 31 July 2003, the plaintiff's solicitors claimed a sum of $1,069,308.61 for alleged losses the plaintiff had suffered for late delivery of work under PO1, PO2 and PO3.

(c) As was mentioned earlier, part of the HVAC system was the AHU which Carrier was engaged to design, fabricate and supply. It appeared that with regard to the AHU to be supplied by Carrier, the plaintiff had generated a purchase order with the same delivery dates (7 September 2002 and 7 October 2002) as in PO1. (Under cross-examination, Lim was asked if the purchase order had been forwarded to Carrier. He had said he would check but failed to revert.) In any case, it would not have made much sense to forward it as it was generated in September 2002. Besides, it appeared that Carrier had informed the plaintiff that delivery would only be at the end of September and October 2002. There again, it could be seen that the plaintiff did not accord the purchase order the importance that the plaintiff alleged it had. There was no demand by the plaintiff that Carrier abide by the plaintiff's delivery dates. This was telling. As both Carrier and the defendant were responsible for different components of the HVAC, all of which had to be put together for testing, the failure of the plaintiff to take any action against Carrier brought into question the *bona fides* of the plaintiff's claim against the defendant.

(d) I also had misgivings about the credibility of Lim as a result of his oral testimony. Lim, in his affidavit of evidence-in-chief, had originally deposed that pursuant to discussions and negotiations between the parties, the plaintiff had issued the purchase order dated 26 June 2002 and that subsequent thereto the defendant had submitted its quotation of 27 June 2002 and issued its invoices. Lim had further alleged that the defendant's quotations were attempts to change the terms of the purchase order after they had been agreed upon on 26 June 2002. In paras 11 and 19–21 of his affidavit of evidence-in-chief, he deposed as follows:

> 11. Between 31 May 2002 to 27 June 2002, discussions and negotiation were held between Plaintiffs and Defendants. Upon discussion and agreement on the terms and conditions of the scope of work of the contract based on the bid documents requirements as exhibited in this Affidavit, *the Plaintiffs issued the Purchase Orders dated 26 June 2002 for the supply of the HVAC equipment*. Subsequently, the Defendants submitted the quotation on 27 June 2002 and issued the Invoice No. E772/P404/101 dated 26 June 2002 and Invoice

No. E771/P403/102 dated 26 June 2002 against Purchase Orders No. PO/KE/02/07/1213 dated 26 June 2002 and Purchase Order No. PO/KE/02/07/1233 dated 26 June 2002 respectively for down payment of the contract. Subsequently, the Defendants received and accepted payment from the Plaintiffs.

19. From the date the Purchase Orders were issued by the Plaintiffs till the 1st Project Meeting on or about 4 July 2002, the Plaintiffs reiterated that the Defendants were to adhere to the terms of the Plaintiffs' Purchase Orders.

20. The Plaintiffs have numerous business transactions with the various contractors. Frequently, the contractors would try and revise the terms of contract in the Purchase Orders during the course of the contract with variation orders, hoping to increase the contract sum, despite the original contract requirements unchanged.

21. This is a common occurrence. *The Defendants were doing exactly that by issuing further quotations after the Plaintiffs had already issued the Purchase Orders and Defendant had agreed to the terms and conditions*. This was well after the Defendants issued the invoices against the Purchase Orders. To me, the issuance of invoices meant the Defendants accepted the terms and conditions as stipulated in the Purchase Order. The terms and requirements of the original Purchase Orders to me remained unchanged and any request by Defendants for variation orders would not be entertained by the Plaintiffs. This is also the Plaintiff's company policy not to entertain any supplier's request for variation orders unless the Plaintiffs agreed to it.

[emphasis added]

36 Under cross-examination, when confronted with evidence which clearly showed that the purchase order had been issued *after* the third quotation, Lim stubbornly insisted that para 11 of his affidavit of evidence-in-chief meant only that the purchase order number, and not the physical purchase order, had been given. This was clearly untenable. In so doing, he raised doubts in my mind as to his credibility. (I should add that later in the trial, the plaintiff accepted that the purchase order was actually issued after the quotation. Accordingly, with leave of the court, the plaintiff amended its pleadings.)

37 It follows from what I have said that the delivery date was therefore as provided in the third quotation. The defendant gave evidence of various circumstances which precluded it from an early start. Without going into the details, suffice it to say that, in my view, as at 18 September 2002, the delivery date had not yet arrived. The plaintiff did not have the right to ask for the fabrication and assembly of the condensing units to be continued in the plaintiff's workshop in Singapore. The same applied to the control panels, the subject matter of the Contract 3 Works. It had to be agreed on between the parties.

38 As I found that the delivery date was governed by the third quotation, there was therefore no breach on 18 September 2002.

39 One of the arguments advanced by counsel for the defendant was that the contracts had been varied by agreement between the parties on 18 September 2002. Did the oral agreement vary the contracts or extinguish them altogether? In order to answer this question, the terms of the oral agreement must be studied. If they are so far incompatible with the original contracts as to destroy their substance, it may be inferred that the parties intended to extinguish the former contracts and replace them with the oral agreement. An illustration of how such a question of construction is dealt

with is provided by the leading case of *Morris v Baron & Co* [1918] AC 1 ("*Morris*").

40 In that case, one Morris agreed, under a written contract, to sell some cloth to Baron & Co. Having delivered part of the goods, he demanded payment. A dispute arose and legal proceedings were instituted. The parties then orally agreed that both the claim and counterclaim should be withdrawn, the buyer being given a three-month extension to pay a sum owing under the contract; the buyer was also given an option to purchase goods as yet undelivered instead of being bound to take delivery. The House of Lords held that the original contract had been extinguished by the oral agreement. Lord Atkinson said (at 33):

> It is quite impossible, in my opinion, to reconcile the agreement of April 22, 1915, with that of September 24 previous. With the exception already pointed out as to price, they are in conflict in all those material and fundamental provisions which go to the root of each of them. It is, I think, impossible to arrive at any rational conclusion as to the meaning, aim, and effect of this new arrangement other than this, that it was the clear intention of both the appellant and the respondents to put aside, in their future dealings, the original agreement, and to treat it thenceforth as abandoned or non-existent.

41 In the case before me, the parties had agreed to have the work in progress sent to the plaintiff's workshop and for the fabrication of the works to be undertaken by the plaintiff and/or other sub-contractors. This went to the root of the contract. Although the defendant continued to be involved, its role was reduced so that it functioned more as a consultant. There appeared to be no agreement as to how the defendant was to be compensated for its continued involvement. There was no discussion as to how the costs of the work needed to complete the fabrication were to be borne. (The plaintiff had averred that it was an implied term that the defendant would bear all the costs. The defendant categorically denied it. Having reviewed the evidence, I did not accept that such an important term could have been left to implication. Besides, throughout the time after the plaintiff took over the fabrication of the works, it never once consulted the defendant in regard to sub-contracts which it entered into or in regard to the employment of workers. One would have expected the plaintiff to have consulted with the defendant, if indeed there was an implied term that the defendant was to bear the costs. Incidentally, the contention on the plaintiff's part that there was an implied term that the defendant would bear all costs also served to undermine its assertion that the contract had been rescinded for breach. In the latter case, the innocent party would have been able to look to the party in breach for damages without any need for implying a term that the party in breach would bear the costs of work that it had failed to do!)

42 In these circumstances, the inference is irresistible that there was not merely a variation, but a rescission, of the contracts by mutual agreement. It may be useful to refer to the following passage from *Chitty on Contracts*, vol 1, (Sweet & Maxwell, 29th Ed, 2004) at para 22-025:

> Where a contract is executory on both sides, that is to say, where neither party has performed the whole of his obligations under it, it may be rescinded by mutual agreement, express or implied. A partially executed contract can be rescinded by agreement provided that there are obligations on both sides which remain unperformed. Similarly, a contract which has been fully performed by one party can be rescinded provided that the other party returns the performance which he has received and in turn is released from his own obligation to perform under the contract. The consideration for the discharge in each case is found in the abandonment by each party of his right to performance or his right to damages, as the case may be.

43 In my view, there was a rescission by mutual agreement or – in other words – a mutual abandonment of existing rights. The plaintiff was able to take over the works which it otherwise would

not have been entitled to. The defendant was released from further performance of its obligations under the contract.

44 Even though what was orally agreed between the parties on 18 September 2002 may not have been sufficiently precise or detailed to found a new contract capable of standing on its own, the agreement to rescind was clear from the conduct of the parties. In *Morris* ([40] *supra*), the subsequent oral agreement, which was held to have extinguished the earlier written contract, was itself unenforceable under the then existing statute for want of writing.

45 This left us with two questions:

(a) In respect of the contracts rescinded by mutual agreement, how was the defendant to be paid for its partial performance prior to rescission by mutual agreement; and

(b) How was the defendant to be paid for work done after rescission?

As regards question (a), it was obvious that the plaintiff could not take the benefit of what had been performed by the defendant for free. I therefore ruled that payment for the defendant's partial performance should be upon a *quantum meruit*, account to be taken of the amount of $280,514.06 received by the defendant. As regards question (b), in the absence of an agreement, the defendant likewise had to be paid on a *quantum meruit*. In each case, I also allowed interest at 6% from the date of the Writ until the date of the judgment.

46 I therefore dismissed the plaintiff's claim with costs and further ordered that assessment of the above two items payable to the defendant be undertaken by an expert to be appointed by the parties, such expert to be selected by mutual agreement between the parties or, failing that, by the court from a joint list of two names (one nominated by each of the parties), and failing that, by the Registrar.

BP West Java Project – Contract 4 Works

47 Apart from the three contracts in respect of the Conoco-Belanak Project, the plaintiff also engaged the defendant to design, supply and deliver a combined pressuring/air-conditioning unit with frame and casing for the BP West Java –Waterflood Project for $20,000.

48 As with the other contracts, the plaintiff alleged that the terms of this contract ("Contract 4 Works") were set out in a purchase order ("PO4") issued on or about 11 July 2002. PO4 provided for a delivery to be on 10 August 2002 which the defendant allegedly failed to meet as delivery took place on or about 10 October 2002. The plaintiff further alleged that the equipment as delivered failed to meet the specifications in PO4. The defendant denied that the terms or all the terms of the contract were as set out in PO4. In particular, it disputed that the date for delivery was 10 August 2002.

49 The defendant had submitted two quotations for the Contract 4 Works, the later of which was dated 9 July 2002. This quotation provided, *inter alia*, that delivery of the equipment would be made four weeks after the defendant's receipt of the order and initial payment and the plaintiff's approval of the drawings submitted by the defendant. It further provided that the two air-conditioning units to be installed in the equipment had to be delivered to the defendant ten days prior to the defendant's own delivery to the plaintiff.

50 The defendant contended that the delivery period was as provided in the quotation of 9 July 2002. It pleaded in the alternative that even if the delivery date was as provided in PO4, the plaintiff

was estopped from insisting on that date for reasons set out in the pleadings and further elaborated upon in Sims' affidavit of evidence-in-chief. The defendant also denied the alleged failure to meet specifications.

51 From a detailed chronology of events set out in Sims' affidavit of evidence-in-chief,[6] it was clear that the defendant's drawings had been submitted to the plaintiff time and again for approval and that each time the plaintiff had asked for changes. I noted that on 17 July 2002, the plaintiff had forwarded to the defendant a new 23-page specification for the defendant's compliance and that this resulted in further negotiations. I also noted that on 20 August 2002 (ten days after the delivery date alleged by the plaintiff), the plaintiff made a further change to the works.

52 It was only on 8 August 2002 that the plaintiff informed the defendant that the air-conditioning units were ready for the defendant's collection. It was clear therefore that the plaintiff would have had difficulty insisting that the agreed date for delivery was 10 August 2002 and that even if that date had earlier been agreed, the plaintiff by its conduct was estopped from insisting on that date remaining inviolate. Perhaps, for that reason, the thrust of the plaintiff's contentions related more to the defects in the equipment that the defendant ultimately delivered.

53 The alleged defects were particularised in the Statement of Claim as follows:

(a) The Programmable Logic Controller ("PLC") was a used unit.

(b) The fuses, circuit breakers and overload relays in the control panel were under capacity.

In his affidavit of evidence-in-chief, however, Lim included the following:

(c) The control panel wiring was not flame retardant. (The defendant had offered to use neoprene rubber insulated cable and this had been agreed to by the plaintiff. But it was not done.)

(d) The cable entry was from the bottom instead of the top. (This, however, had been rectified.)

(e) The pressure switch was missing. (This was found to be untrue.)

(f) There was water leakage and no rain shed was provided.

54 In regard to the defects, I found as follows:

(a) The PLC ought to have been a new one.

(b) The fuses, circuit breakers and overload relays ought to have been up to capacity.

(c) Neoprene rubber insulated cables or other flame retardant cables should have been used.

(d) There was no agreement or requirement for a rain shed. (The air-conditioning units arranged by the plaintiff to be supplied by Marc Climatic were stipulated for outdoor use and had no rain shed. There was no report of any investigation into the water leakage at all and the defendant had also never been informed of the leakage.)

55 I noted that the plaintiff claimed $46,550 as the sum incurred by it in rectifying the defects

and/or completing the job. This was more than twice the contract sum and on the evidence I had heard there was a strong suggestion that the amount had been exaggerated. What came out of the evidence was also that the plaintiff had completely changed the design of the control panel. The change was such that there was no longer the need for a PLC.

56 The plaintiff ought to have informed the defendant of the alleged defects and required the defendant to rectify the same, failing which the plaintiff would do so at the defendant's cost. The plaintiff was not entitled to go on a frolic of its own, totally re-designing the control panel in the process and, presumably, improving upon the same. The final product was not what the defendant had contracted to deliver.

57 Accordingly, I dismissed the plaintiff's claim and allowed the defendant's counterclaim in respect of the Contract 4 Works in the amount of $20,000 less a sum to be assessed in respect of the following:

(a) what it would have cost to replace a new PLC;

(b) what it would have cost to replace the wiring with neoprene rubber insulated cables;

(c) what it would have cost to change the fuses, circuit breakers and overload relays; and

(d) the cost of renting a generator for testing.

Such assessment was to be undertaken by an expert to be appointed by the parties, such expert to be selected by mutual agreement between the parties or, failing that, by the court from a joint list of two names (one nominated by each of the parties), and failing that, by the Registrar. Finally I awarded interest at 6% on the amount payable from the date of the Writ until the date of the judgment. I also ordered costs to the defendant to be taxed.

---

[1]AB.694/aeic 151

[2]AB.693/aeic 150

[3]AB.189

[4]AB.850/aeic 154

[5]AB.849/aeic 153

[6]Paras 141-145