China Construction (South Pacific) Development Co Pte Ltd v Spandeck Engineering (S) Pte Ltd
[2005] SGHC 86

Case Number : Suit 872/2003

Decision Date : 29 April 2005

Tribunal/Court : High Court

Coram : Andrew Ang JC

Counsel Name(s) : Joseph Liow Wang Wu and Yusfiyanto Yatiman (Straits Law Practice LLC) for the plaintiff; Glenn Cheng (Kelvin Chia Partnership) for the defendant

Parties : China Construction (South Pacific) Development Co Pte Ltd — Spandeck Engineering (S) Pte Ltd

Building and Construction Law – Building and construction contracts – Lump sum contract – Contract formed by exchange of correspondence – Description of contract sum inconsistent – Method of calculation set out in appendix to plaintiff's letter to defendant – Whether parties entered into lump sum contract

Contract – Construction of contract – Contract formed by exchange of correspondence – Whether plaintiff's letter to defendant formed part of contract – Whether circumstances surrounding parties' agreement indicated what their intentions were

Equity – Estoppel – Estoppel by convention – Defendant made numerous payments to plaintiff according to method of computation set out in appendix to plaintiff's letter to defendant – Whether defendant estopped from asserting that parties entered into lump sum contract

29 April 2005

Andrew Ang JC:

1 The plaintiff company is a building contractor. Sometime in 1994, the plaintiff was interested in tendering for a Housing and Development Board ("HDB") project to build 492 dwelling units in Hougang under a contract known as the Hougang Neighbourhood 9 Contract 6 ("the N9C6 Contract"). At that time, the plaintiff was not pre-qualified to tender for a project of that size. According to its managing director, Chen Guo Cai ("Chen"), the plaintiff therefore approached Dr Tony Chi, the managing director of the defendant, to see if they could work together on the project. The defendant was also a building construction company and was pre-qualified to tender for the project. Chen said that the defendant was keen to supply the precast components and Civil Defence shelter doors required for the project.

2 The parties decided to co-operate in the tender which the defendant was to submit to HDB. Chen gave evidence that the plaintiff worked very closely with the defendant in the tender process as it was intended by both that the plaintiff would be the main subcontractor. The intention was that the plaintiff would carry out all the works for the said project with the defendant supplying and installing the pre-fabricated components as well as the Civil Defence shelter doors.

3 The defendant was successful in the tender and, by an exchange of correspondence comprising letters dated 26, 27 and 28 January 1995, the parties put into writing their agreement. (Prior to the submission of the tender, the parties had entered into an earlier agreement of 16 November 1994 but this was superseded by the subsequent letters.)

4 Under the letter of 26 January 1995 ("the 26 January letter") sent to the defendant, the plaintiff quoted for the following:

Total construction of the Building, Sanitary, Plumbing and Civil Engineering works except for

(a) precast pantry/store (including supply & install Civil Defence Shelters' Doors)

(b) precast lightweight partitions

which will be supplied and delivered by you (See attached Appendix I).

Paragraph (2) of the said letter provided for the appointment of a project manager under the defendant but for whom payment was to be borne by the plaintiff. It also provided that the project manager was to represent the defendant

> regarding the operations as well as the weekly projections and all the necessary inspection forms and material requirements. His work will be assigned by China Construction and China Construction will be responsible for all the action he takes, letters, instruction, costs etc.

Paragraph (3) provided, *inter alia*, that the proposed subcontract would be back to back with the HDB contract. Paragraph (4) provided that the "estimated contract sum shall be $31,966,375.00", reference being made to Appendix I. Looking at Appendix I, one would understand how the figure of $31,966,375 was arrived at. In view of the plaintiff's heavy reliance on Appendix I, the same is set out in full below:

BUILDING CONTRACT AT HOUGANG N'HOOD 9 CONTRACT 6

Contract Sum = $ 36,717,070.00

Less:

(a) Management Fees:

(i) Spandeck's Costs & Overheads = $ 717,070.00

(ii) Project Manager (Estimated) = $ 147,000.00
($7,000 x 21 months)

(iii) Site Quantity Surveyor (Lump sum) = $ 105,000.00
($5,000 x 21 months)

(b) Supply and delivery of precast = $ 2,706,000.00
pantry/store @ $5,500 per no.
(Total : 492 nos)
Unloading by China Construction
within one hour, any addition [*sic*] time
waiting is $50 per hour and storage
space of minimum one storey space
shall be provided by China Construction.

(c) Supply and install Civil Defence = $ 350,000.00
Shelter Doors to precast pantry/store
(Total : 492 sets)

(d) Supply and deliver precast lightweight partitions for = $ 725,625.00

(i) 75mm thick 20,600m2 @ $30/m2

(ii) 90mm thick 3075m2 @ $35/m2

Revised Contract Sum $31,966,375.00

Notes :

(1) For items (a)ii, (b), (c) & (d), the contract sum is approximate only and will be subjected to final measurement of actual cost or quantities. All unit rates are fixed and will be used for pricing the quantities.

(2) For item (a)i, payment of management fees by us to Spandeck will be on a monthly basis of $34,000 per month for 21.09 months.

(3) The above prices [do] not include Goods & Services Tax.

5 Paragraph (5) is interesting. It provided that the plaintiff was to furnish two security bonds for the sum of $1,835,854 – one in favour of HDB in the name of the defendant and the other in favour of the defendant to secure the plaintiff's obligations under the subcontract.

6 The 26 January letter was followed by the defendant's reply of 27 January 1995 ("the 27 January letter") in the following terms:

Per your offer dated 26 Jan 1995, we are very happy to inform you that we would like to engage you as our main sub-contractor for the above project. Your scope of work will be as follows:

(1) *As stated in your letter of 26 Jan 1995*, you should carry out the work based on the condition and specification as specified in HDB's contract. You will also be responsible for the schedule as tabulated in the HDB contract.

(2) The project manager on site shall report to our manager (in Spandeck main office) regarding the daily operation as well as weekly projection and all the necessary inspection form and material requirement should be prepared accordingly and you are to execute the contract without any excuse for delay. This sub-contract shall be back to back with the HDB contract and all its terms, conditions, specification, drawings and other contract documents shall apply to this sub-contract; which means that if HDB penalise us, you will receive the same penalty with administration charges if there is any; you will only be paid when we receive payment from HDB.

(3) You should provide the site office (12 x 15ft min.) for our management team and supply us with all the utilities such as fax machine, telephone (minimum one line for our site use), typing service and etc. You also have to provide these facilities to our client, HDB as per contract specification.

(4) *The total contract sum shall be S$31,966,375* excluding G.S.T.

(5) By 7/2/95, you will at your cost and expense obtain and furnish a Security Bond for the amount required under the HDB contract in favour of the HDB in our name and furnish a Second Security Bond for the same sum and upon the same terms (with suitable changes) in our favour to secure your obligations to us under the sub-contract.

If the above offer is agreeable to you, please counter sign this letter and the legal document shall be prepared and signed between both parties. Based on this letter, you can proceed to make all the necessary preparation. Please submit your site organisation chart, construction program and site office layout to us in one week's time.

Upon acceptance of this contract, all the previous letters and understanding will be void.

[emphasis added]

It will be observed that the letter made references to the 26 January letter. Paragraph (4) of the letter also provided that the "total contract sum" shall be $31,966,375 – the same figure described as the "estimated contract sum" in the 26 January letter and arrived at as shown in Appendix I. As if to drive the point home, the plaintiff's managing director was asked to initial against para (4).

7 In reliance upon the 27 January letter, the defendant contended that the contract between the parties was a "lump sum" contract for $31,966,375. The defendant further contended that the 26 January letter (and therefore Appendix I thereto) did not form part of the contract between the parties as it had been superseded. This was stoutly denied by the plaintiff, who countered that para (4) did not state that the contract was on a "lump sum" basis. The plaintiff insisted that it was important to see how the figure was arrived at. This necessarily entailed referring to the 26 January letter and Appendix I. The plaintiff contended that it was illogical to exclude the 26 January letter when the 27 January letter made specific reference to it. On the plaintiff's interpretation, what the last paragraph of the 27 January letter did was to exclude letters and "understanding" prior to 26 January 1995.

8 The last of the trilogy of letters is that sent by the defendant to the plaintiff dated 28 January 1995 ("the 28 January letter") spelling out additional conditions. *Inter alia*, the letter stipulated conditions governing the use by the plaintiff's staff of name cards bearing the defendant's name, as well as of the defendant's letterhead. In particular, the plaintiff was to hold the defendant free from any liability arising therefrom. By way of postscript, the letter also provided that "[a]ll the necessary cost at site such as utilities bill, insurance premium and etc. shall be paid by [the plaintiff]". The plaintiff was also "responsible for the project management team and site staff's insurance, medical and hospitalisation bill etc. and all other costs related to this construction".

9 According to the plaintiff, the essence of the agreement between them was that the plaintiff became the main subcontractor, effectively taking over all the main contract works except for the precast components and the Civil Defence shelter doors. The plaintiff managed the works and the site as if it were the main contractor.

10 The plaintiff averred that it was an implied term of the agreement or, alternatively, the understanding between the parties (and on which the plaintiff relied) that:

(a) the defendant would make progressive payments to the plaintiff based on the payment certificates issued by HDB to the defendant;

(b) the terms of payment of the said agreement was on a "pay when paid" basis, *ie*, that

within a reasonable time after HDB made any payment to the defendant, the latter would then, in turn, pay the plaintiff; and

(c) the defendant would give to the plaintiff a true account of all amounts and times of any payments received by the defendant from HDB in relation to the N9C6 Contract.

11 Prior to the commencement of works, the plaintiff appointed and used its own project manager for the site with the defendant's consent. The defendant agreed that it would not charge the plaintiff the fee of $147,000 which the plaintiff would otherwise have had to pay. This change was subsequently confirmed in a letter dated 27 January 1997 by the defendant to the plaintiff. That same letter provided:

It is agreed that the total deduction for management fee will be $717,070.00. As for the QS salary, deduction of $5,000 per month will be continued until the project is completed.

It will be noted that all the figures mentioned in the letter were the same figures appearing in Appendix I.

12 In the course of the performance of the said agreement, the defendant issued payment vouchers or payment certificates to the plaintiff from time to time. On each occasion, it did this only after it had received progress payments from HDB.

13 Upon receipt of the defendant's payment vouchers or certificates, the plaintiff would issue its tax invoices to the defendant based on the information received.

14 The plaintiff completed the works under the said agreement. As the N9C6 Contract had different completion dates for the construction of the various buildings, the plaintiff completed its works between December 1996 and 1 August 1997.

15 As earlier mentioned, in the course of the performance of the said agreement, the plaintiff had submitted tax invoices to the defendant subsequent to receiving payment vouchers or certificates from the defendant. As at August 1997, the defendant had made payments invoiced by the plaintiff up to the 28th progress claim. This last progress claim made by the plaintiff was on 26 July 1997 by its tax invoice for the sum of $34,305 (not including goods and services tax ("GST")), and was duly paid by the defendant.

16 As at 26 July 1997, the defendant was holding retention moneys totalling $1,775,450, of which some were on account of HDB having deducted certain moneys by way of provision for liquidated damages and the non-submission of warranties, and others were because the defendant wanted to ensure the plaintiff's compliance with certain aspects of the agreement between them. Save for the retention moneys that were held back as provision for liquidated damages and for the non-submission of warranties, the plaintiff did not agree to the retention of the other amounts. Nevertheless, according to Chen, the plaintiff decided not to make an issue of it then as it was something which would be easier to deal with once HDB had issued its final certificate to the defendant.

17 On 7 January 1998, HDB issued to the defendant a provisional final account which was subsequently finalised between them as follows:

FINAL ACCOUNT

Contract Sum	$ 36,717,070.00
Less: Provisional/Prime Costs Sum	$ 1,785.70
	$ 36,715,284.30
Less: Nett Variation Order	$ 164,141.73
Final Contract Sum	$ 36,551,142.57
Less: Previous Payments	$ 34,797,000.00
	$ 1,754,142.57
Less: Liquidated Damages	$ 1,519,979.00
Payment Due	$ 234,163.57

Following that, the defendant received payment in full from HDB at a date unknown to the plaintiff but after 29 September 2000.

18 Based on the final account between the defendant and HDB, the plaintiff computed the final account between itself and the defendant, from which it was shown that $479,613.57 was payable to the plaintiff. As the defendant failed to pay the same despite the plaintiff's demand, the plaintiff brought this action to recover the same together with GST and interest thereon.

19 The defendant asserted that it did not owe the plaintiff any money under the agreement. On the contrary, it alleged that the plaintiff had been overpaid by an amount of $116,668.69. As earlier mentioned, the basis of the defendant's contention was that the subcontract between them was for a lump sum price of $31,966,375 only. In addition to the alleged over-payment of $116,668.69, the defendant counterclaimed for the following:

(a) Prolongation costs (*ie* additional costs incurred by the defendant as a result of delays to the project) in the form of:

(i) the sum of $445,900.47 being "management fees and costs overheads";

(ii) the sum of $65,000 being the additional site quantity surveyor fees ($5,000 x 13 months);

(iii) the sum of $143,500 being the additional costs for the project manager from July 1997 to December 2000 (41 months x $3,500 per month).

(b) The sum of $30,000 for the costs incurred in rectifying the defects enumerated in para 30 of the Re-Re-Amended Defence and Counterclaim.

(c) The sum of $8,672 for the costs of rental of a gondola for external painting works, transportation and manpower deployment.

(d) The sum of $2,340 incurred in employing a security company to carry out inspections on the site.

(e) The sum of $100,000 in respect of the non-submission of warranties.

The issues

20 The principal issues in this action are the following:

(a) whether the terms of the agreement between the parties included the 26 January letter from the plaintiff to the defendant;

(b) if so, whether, on an interpretation of the agreement between the parties, the contract price payable to the plaintiff was

(i) to be calculated in accordance with Appendix I to the 26 January letter; or

(ii) a lump sum fixed at $31,966,375 only;

(c) in the event the court finds that the defendant's interpretation of the agreement is correct, *ie*, that the agreement provides a lump sum price, whether both parties had so acted or conducted themselves on an assumption that the method of computation of the contract price was to be in accordance with Appendix I that the defendant is now estopped from denying that assumption;

(d) in the event that the court favours the plaintiff's interpretation, or rules that the defendant is estopped from denying that Appendix I is to be followed in the computation of the contract price, what is the sum payable to the plaintiff; and

(e) whether the defendant has proved the alleged breaches by the plaintiff and, if so, what is the quantum of loss in respect thereof.

Whether the 26 January letter forms part of the agreement

21 In the defendant's pleadings and in Dr Tony Chi's affidavit of evidence-in-chief, the position taken was that the 26 January letter had been expressly excluded or superseded. It was only at trial that Dr Tony Chi conceded, under cross-examination, that the 26 January letter could be part of the documents evidencing the agreement between the parties. This concession was rightly made; reading only the 27 January and 28 January letters, one would have got the erroneous impression that the plaintiff was to carry out the entire scope of works under the N9C6 Contract, including all the precast elements. Nevertheless, Dr Tony Chi, and indeed the defendant's counsel as well, sought to qualify the concession by saying that the 26 January letter would be let in provided it did not contradict the 27 January letter. The position taken was therefore that:

(a) the 27 January letter was paramount; and

(b) whatever was in the 26 January letter that further elaborated upon the agreement would be permitted, provided it did not contradict the 27 January letter.

22 Two comments may be made about this. Firstly, albeit grudgingly, the defendant no longer contends that the last paragraph of the 27 January letter rendered the 26 January letter void. Accordingly, it has to be construed alongside the other two letters of the trilogy. Secondly, it is not open to the defendant to cherry pick parts of the 26 January letter favourable to its case and discard others repugnant thereto.

Interpretation

23 Where possible, the court will give effect to any reasonable construction which harmonises apparently inconsistent clauses, rather than to hold that they are in conflict. To this end, we examine para (4) of the 26 January letter which reads as follows:

> The estimated contract sum shall be $31,966,375.00 (See attached Appendix I).

and compare it with para (4) of the 27 January letter in reply stating:

> The total contract sum shall be S$31,966,375 excluding G.S.T.

As can be seen from Appendix I to the 26 January letter, the sum of $31,966,375 (described as the "Revised Contract Sum") is the figure arrived at after subtracting from the contract sum of $36,717,070 under the main contract with HDB various items including:

(a) the project manager's fee (estimated);

(b) the supply and delivery of precast pantries or stores at $5,500 each (total: 492 pieces);

(c) the supply and installation of Civil Defence shelter doors (total: 492 pieces) to the precast pantries or stores; and

(d) the supply and delivery of the following precast lightweight partitions:

(i) 20,600m² of 75mm thick partitions at $30 per square metre; and

(ii) 3,075m² of 90mm thick partitions of $35 per square metre.

A note at the end of Appendix I clearly states:

> For items (a)ii [the project manager's fee], (b), (c) & (d), the contract sum is approximate only and will be subjected to final measurement of actual cost or quantities. All unit rates are fixed and will be used for pricing the quantities.

Thus with respect to item (d), for example, the sum to be deducted in respect of the lightweight partitions must obviously be based on the amount actually supplied. It is clear therefore that the figure of $31,966,375 was correctly described in the 26 January letter as "the estimated contract sum" even if it was also called the "Revised Contract Sum" in Appendix I.

24 By calling the same sum the "total contract sum", did the defendant effect a total change in the character of that figure from a mere estimate (subject to final measurement) to a fixed or lump sum? In my view, it did not. Had the defendant wanted to change the basis of computation of the price, the defendant could easily have used words customarily used such as "lump sum" or other words to like effect such as "fixed price" or "firm price". Indeed, the defendant's main contract with HDB bears out this point. Clause 3 of the main contract states:

> TYPE OF CONTRACT
>
> The Contract is a Firm Price Contract and the Contract Sum shall remain firm for the duration of the Contract.

If truly it was the intent of the defendant to have a lump sum contract, it is strange that it stopped short of saying so.

25 The defendant urged this court to ignore Appendix I, but at the same time it conceded that other parts of the 26 January letter form part of the agreement between the parties. This cannot be right. The defendant cannot pick and choose which parts of the 26 January letter to accept or omit. As plaintiff's counsel submitted, the defendant "can only hope to explain why, taking all the contents of [the] three letters, its interpretation should be [the] right one". Thus far, the interpretation of the agreement between the parties has been confined to a construction of the 26 January and 27 January letters without reference to extrinsic evidence.

26 Presumably, the defendant will insist that the inconsistency has not been satisfactorily resolved. Where there remains any ambiguity or the meaning of the written words is not clear, evidence of the circumstances in which the agreement was made is admissible to assist in the ascertainment of the meaning of the written words. In *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989, Lord Wilberforce said at 995–996:

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

Going on to the object of ascertaining the intention of the parties in an objective sense, he further said at 996:

> Similarly, when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties.

This was followed by Lord Hoffmann's exposition on the law relating to the interpretation of contracts in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912:

> I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v. Simmonds* [1971] 1 W.L.R. 1381, 1384–1386 and *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of "legal" interpretation has been discarded. The principles may be summarised as follows:
>
> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable

man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

27 The same approach to the admission of extrinsic evidence forming part of the factual matrix was adopted by our Court of Appeal in *MAE Engineering Ltd v Fire-Stop Marketing Services Pte Ltd* [2005] 1 SLR 379 ("*MAE Engineering*"). Lai Siu Chiu J, delivering the judgment of the Court of Appeal, said at [23]:

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

She further added at [24]:

> Although evidence of prior negotiations is inadmissible as it does not represent any consensus between the parties, evidence of an antecedent agreement is an objective fact that the court should take into account as part of the "factual matrix" in which the parties made their contract (Kim Lewison, *The Interpretation of Contracts* (3rd Ed, 2004) at para 3.05).

28 Prior to the 26 January, 27 January and 28 January letters, the parties had entered into an agreement on 16 November 1994. When, in collaboration with the plaintiff, the defendant succeeded in tendering for the Hougang N9C6 project, the terms of the agreement were refined as shown in the trilogy of letters, thereby superseding the agreement of 16 November 1994.

29 The opening paragraph of the antecedent agreement of 16 November 1994 clearly stated:

> It is agreed that Spandeck Engineering will sub Hougang N9C10 [*sic*] project totally to China Construction if Spandeck is successful in this tender.

Clause 4 of the agreement provided:

> All the precast elements will be Spandeck's work. The price for each precast element will be based on the lowest market price which China Construction seek plus S$2.00/m2 but Spandeck reserve the right to object that price for any particular precast items provided China Construction has the right to appoint other precasters.

It is clear from cl 4 that the defendant had agreed to have its works (*viz*, the supply and delivery of precast elements) measured and priced at $2 per square metre more than the lowest market price that the plaintiff was able to obtain. It is also illuminating that the plaintiff was given "the right to appoint other precasters" instead of the defendant. Read with the opening paragraph, it would appear that the parties recognised that, in the execution of the agreement between the parties, the defendant would be taking a subsidiary role *vis-à-vis* the plaintiff even though it would be the main contractor *vis-à-vis* HDB.

30 As contemplated under the agreement of 16 November 1994, the parties sought to establish the price per square metre of the precast components to be supplied by the defendant. This can be seen, firstly, from a letter dated 10 January 1995 from the plaintiff responding to the defendant's quotation of 3 January 1995. A further letter from the plaintiff dated 12 January 1995 referred to a discussion between the respective managing directors of the parties and enclosed a copy of a quotation. Evidence regarding these letters is admissible, as the purpose is merely to establish the objective fact that, following the 16 November 1994 agreement, there was negotiation on the unit prices of the precast components; the evidence is not to show what unit prices were or were not agreed: see Lord Wilberforce's rationale for the exclusion of evidence regarding negotiations in *Prenn v Simmonds* [1971] 1 WLR 1381, and Lai Siu Chiu J's judgment in *MAE Engineering* ([27] *supra*).

31 It seems clear that if the intention of the parties was that the contract between them was to be on a lump sum basis, there would not have been the concentration of effort on establishing only the rates for the precast components as distinct from the total cost thereof.

32 When Dr Tony Chi was confronted with these documents, he attempted to say that the documents were quotes for other projects. When it was pointed out that the reference in the letters was "SDE/HOUG", he conceded that it was in relation to the N9C6 project but then launched into a whole lot of matters irrelevant to the question put to him. (Unfortunately, this was not the only occasion that he was evasive. Time and again the court had to intervene because he avoided answering plaintiff's counsel's questions.)

33 On this occasion, while seeking to explain away the irresistible inference that the parties had agreed to contract on the basis of measurement of quantities, Dr Tony Chi attempted to explain how the total amount of money attributed to the lightweight partitions was arrived at. A further explanation was given by him at pp 308–310 of the Transcript as follows:

> A: The meeting was called because we are preparing the submission to HDB for the details HDB require and we asked China Con to come for a meeting. The *purpose of the meeting* is to discuss how to separate the contract, how to manage the contract and whose responsibility on what area, and how this contract shall be run, and how the people going to be, you know, engaged to do the job. *So it's not the meeting discussed of how to discuss Spandeck's scope of work, doing the unit rates or doing the quantity and so forth*. During that time we only have documents for the one we submit to HDB and also our QS preparation for the tender. Our QS preparation for the tender have two parts; one is prepared 100% by China Con and one is prepared 100% by Spandeck. And these two parts we put together to see what is the, you know, come along because during the submission for the tender it's based on these two major contracts. We have not carried out any other detailed works. We just have these documents. So during that time, May was first introduced because previous tender May was not involved. She just joined the company in December. So we actually talked about how to separate the work and how the management was, and our QS is there with the bundle of documents which we prepared, and China Con had prepared their bundles of documents and also another bundle is we submit to HDB. And the major discussion is this. Of course, May come in maybe have a different assignment, for instance, to regularise the drafting of the letter or whichever, which we have never discussed in the meeting. So the meeting have concluded precast work only limited for the precast shelter and the precast lightweight partition is under Spandeck's work and the other precast work they have a prerogative to sub to anybody. So this is out [*sic*] conclusion. *Of course, some of the conditions was on the letter of January 26th but this was discussed but never been put very details because at that time we don't have the information what is the unit rate, what is the quantity for the precast lightweight partitions, how many metres square is total required for the job. But we have tendered we know for the precast lightweight concrete is*

about one million dollars, and this figure can be calculated from the submission to HDB. HDB have at page 205 --- where's my documents?

MR CHENG: Your document is in front of you.

WITNESS: This one, right.

MR CHENG: Yes.

A: From here, we have tendered each block, each block; each block how much money, each block how much money. And on the category (e) item 3, there's mention about the weight which is 2.95% on certain blocks and the 5.1% on the other blocks. If you base on calculations for the each block amount, then times the weight, the whole amount is about one million dollars.

During that time, we *discussed how to portion of this one million dollar*, because we doing the supply, the China Con doing the erection. So based on the common practice, the supplier will getting 75% of the total sum and 25% for the erection labour and so forth. *So we negotiate the figures, and finally we got a 72.5% and the other side getting --- because they asked for more, of course, so we give away 2.5%. So they got a 27.5%*. Finally, that figure was being known by us during the negotiation. And that figure was agreed by us and that figure also being presented on the 26th letter, but *unfortunately, China Con actually added one additional clause inside, which is unit rate plus the quantity*. Those figures we never know because that figure, if we want to sign on that figure, we have to get our QS to do the calculation and when we do the figures we give to China Con. China Con also will not agree, because this one then, this contract never going to be able to finish. Yesterday, Ms Mei [*sic*] also mentioned this, is take time, she only prepare the quantity based on her experience. *But the 26th letter, with that quantity and the rate, is first time I was informed after I received the letter. So this was not we agreed in the meeting; we only agreed how much our portion on this particular light weight partition work, which we got a 72.5%, they got a 27.5%*.

[emphasis added]

Some explanation needs to be given as to this testimony.

34 The plaintiff's witness, Woo Soo Mei ("Ms Woo"), had said in her evidence that just before the 26 January letter was signed, there was a meeting at the defendant's office between the parties at which she, Dr Tony Chi and Chen were present, amongst others. According to her, the meeting discussed the costs of the various items of work. She further testified that the meeting concluded with the defendant giving her a tabulation similar to Appendix I except that in respect of precast lightweight partitions in item (d), only the rates of $30 per square metre and $35 per square metre were given. She said that she used her experience with HDB to estimate the likely quantities of such partitions and arrived at a figure of $725,625. She emphasised that she did not work out the actual measurements, *ie*, by "taking off" quantities from the plan. For lack of time she merely did an estimate. As the quantities were estimates only, Note (1) of Appendix I provided that the unit rates were fixed but not the quantities. Dr Tony Chi sought to rebut Ms Woo's evidence as to the purpose of the meeting and how the figure of $725,625 for the precast lightweight partitions was arrived at.

35 The problem with his testimony on the derivation of the figure is that, mathematically, it is not borne out. To begin with, the amount attributed to the precast lightweight partitions in the main contract with HDB was not $1m but $998,710.[1] The $1m figure therefore involved a rounding-off. Secondly, according to Dr Tony Chi, the common practice was to split the price 75:25 between the

supplier and the party installing the partitions. The division in the ratio of 72.5:27.5 therefore represented an alleged deviation from the common practice. In spite of these two adjustments, the final figure arrived at, *ie*, $725,000, still falls short of the $725,625 figure shown in Appendix I. Whilst it is not uncommon to round off a figure, it is far-fetched to suggest that the figure of $725,000 somehow resolved itself into $725,625! No evidence was given as to how this happened. A much simpler explanation devoid of any mathematical aberration is that set out in para (d) of Appendix I, which works out to be exactly $725,625. In my view, the evidence given by Dr Tony Chi as to how the figure of $725,625 was derived is unbelievable.

36 I note that para (2) of the 27 January letter provided that the subcontract was to be back to back with the HDB contract. Relying on this, counsel for the defendant submitted that since the HDB contract was on a firm price basis, likewise the subcontract had to be on such a basis.

37 However, the 26 January letter also had a similar provision in para (3) and yet, in that letter, the contract was expressly on a re-measurement basis. "Back to back" in that letter therefore had to bear a narrower meaning than full incorporation of all HDB terms and conditions.

38 A further provision of interest is para (5) of the 26 January letter which, in essence, is repeated in para (5) of the 27 January letter By this provision, the plaintiff was required to furnish two security bonds – one in favour of HDB but in the defendant's name and the other for the same amount but in favour of the defendant. Why was the plaintiff required to furnish a security bond in favour of HDB but in the name of the defendant? Counsel for the defendant attempted to suggest other reasons, but the obvious reason to me was that the parties recognised that by virtue of the agreement between them, the plaintiff was *de facto* the main contractor.

39 This would also explain why the defendant allowed the plaintiff's staff to use name cards bearing the defendant's name as well as stationery bearing the defendant's letterhead. In this light, it is perfectly understandable why the contract sum is to be computed as set out in Appendix I (*ie*, on a re-measurement basis and as though the defendant was a supplier to the plaintiff) and not a lump sum as alleged by the defendant.

40 Counsel for the defendant pointed to a wide discrepancy between the quantity of precast lightweight partitions estimated by Ms Woo in Appendix I and the amount delivered and paid for. The witness had said that although the flats might be described as three-room or four-room flats, the quantity of partitions required per flat would differ according to its design and layout. Hence, there was difficulty with getting an accurate figure.

41 Ms Woo further suggested that the quantities could be affected by the substitution of bricks for the lightweight partitions. However, as counsel for the defendant pointed out, there was no evidence of any variation order issued by HDB. Be that as it may, in my view, how the quantity of lightweight partitions was over-estimated is of no relevance to the issue before us. The fact remains that the quantity was estimated as set out in Appendix I; it would be improbable in the extreme that the figure was trumped up by Ms Woo long before there was any dispute between the parties.

42 Counsel for the defendant also set great store by what he maintained was an admission by Chen that the plaintiff's work and the defendant's work were "lump sum price works". The evidence in the cross-examination was recorded as follows:

> Q: By reason of the exclusion of your quotation, which we say is excluded, the 26th January letter from the subcontract, it was the case that your work and Spandeck's work were necessarily lump sum price works, do you agree?

A: Yes, I agree.

HIS HONOUR: Can we have a repeat of that question?

MR CHENG: Indeed, Sir.

Q: By reason of the exclusion of your quotation of 26th January from the subcontract, it was the case that your work and Spandeck's work were lump sum price works. Do you agree?

A: Yes.

This caused some surprise as Chen appeared to agree that the plaintiff's work was for a lump sum price. It is not possible to say whether or not Chen was thrown off by the opening limb of the defence counsel's question:

By reason of the exclusion of your quotation of 26th January from the subcontract, …

However, elsewhere in his evidence, Chen had said that the plaintiff was responsible for the whole contract at $36,717,070 less the defendant's work and that certain portions of the defendant's work were subject to re-measurement. Therefore the court sought clarification from him at the end of his evidence. He confirmed that para (d) of Appendix I was subject to re-measurement.

43 Whilst I would agree that the evidence of Chen was confusing at times, on this particular issue, the bone of contention between the parties being the very question whether the contract sum for the plaintiff was fixed at $31,966,375, it was unlikely in the extreme that he had intended to confirm the defendant's case. Besides, Appendix I speaks for itself.

44 Therefore, taking into account the factual matrix in the interpretation of the agreement between the parties, I am emboldened in my view that the contract price payable to the plaintiff was to be calculated in accordance with Appendix I to the 26 January letter.

Estoppel by convention

45 On the view that I have taken, it is unnecessary to consider the plaintiff's alternative argument that, by the conduct of the parties subsequent to the agreement, the defendant is estopped from denying that the computation of the contract sum payable to the plaintiff should be in accordance with Appendix I. Nevertheless, I shall deal briefly with it.

46 Ordinarily, a court may not look at the subsequent conduct of the parties to interpret a written agreement. Exceptionally, where the conduct amounted to a variation of contract or gave rise to an estoppel, it may do so: *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583. In *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84, Lord Denning MR said (at 120–121):

> Although subsequent conduct cannot be used for the purpose of interpreting a contract retrospectively, yet it is often convincing evidence of a course of dealing after it. … If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it – on the faith of which each of them – to the knowledge of the other – acts and conducts their mutual affairs – they are bound by that interpretation just as much as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not – or whether they were mistaken or not – or whether they had in

> mind the original terms or not. Suffice it that they have, by the course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it.

This case was cited by the Court of Appeal in *MAE Engineering* ([27] *supra*) where the court observed at [44]:

> Estoppel by convention is not founded on any representation but on an agreed statement of facts the truth of which has been assumed by the parties to be the basis of the transaction ...

The Court of Appeal also cited its own decision in *Singapore Island Country Club v Hilborne* [1997] 1 SLR 248, in which it laid down the following criteria for estoppel by convention (at [27]):

> (i) that there must be a course of dealing between the two parties in a contractual relationship;
>
> (ii) that the course of dealing must be such that both parties must have proceeded on the basis of an agreed interpretation of the contract; and
>
> (iii) that it must be unjust to allow one party to go back on the agreed interpretation.

47 In *MAE Engineering*, what was in issue was whether the parties had conducted themselves on the agreed premise that payment would be made on the basis of the area of the cladded duct, despite indications to the contrary in the subcontract. The respondent had failed to establish that the appellant's payments were based on a *shared assumption* that the contract price should be derived from the area of the cladded duct. This was because the evidence of two witnesses, on which the respondent relied, was found to be contradictory and unreliable. It appeared to the court that the appellant had paid the first 14 claims submitted by the respondent without appreciating that the latter's calculation was based on the area of the cladded, not the uncladded, duct. It held that there was no mutual understanding that payment would be based on the respondent's method of calculation.

48 Such is not the case here. The defendant had made 28 payments on various dates between 1995 and 1997 based on the method of computation as set out in Appendix I to the 26 January letter. On each occasion, the sum deducted in respect of the lightweight partitions was based on the amount supplied. The defendant sought to explain this away by saying that this was at the request of the plaintiff and that it applied the computation in Appendix I only to speed up payments. I do not accept this explanation. If the sum attributable to the lightweight partitions was fixed as alleged by the defendant, then on each occasion, the fixed amount should have been deducted. That could easily have been done. If that had been done, the plaintiff would not have been "overpaid" the sum of $116,668.69 as alleged by the defendant. The fact that it was not done clearly goes to show that the shared assumption between the parties was that Appendix I applied and that the sum to be deducted for the lightweight partitions was to be based on the actual amount supplied.

49 Therefore, if it were necessary for me to do so, I would hold that the defendant is estopped from asserting that the agreement between the parties was a "fixed sum" or "lump sum" contract.

The contract sum payable

50 The plaintiff's position is that the defendant is liable to pay the plaintiff the sum of $479,613.57. The defendant has received the final payment from HDB, the provisional final account having been finalised and accepted by the defendant.

51 The plaintiff's claim for the sum of $479,613.57 was arrived at after deducting, *inter alia*, the sum of $353,978.44 in respect of the lightweight partitions. The plaintiff gave evidence that the figure of $353,978.44 was provided by the defendant. It argued that if the defendant alleged that more lightweight partitions were supplied, it was incumbent on the defendant to provide proof thereof. None was furnished. The best that the defendant could do was to point to HDB's payment certificates, from which one could derive the value of the total lightweight partitions supplied and installed at $998,710. However, as was pointed out by the plaintiff, this figure was inclusive of the installation work done by the plaintiff.

52 In contrast, the plaintiff was able, through cross-examination of Dr Tony Chi's son, Dr Jeffrey Chi, to show that by November 1996 the defendant had supplied all the lightweight partitions and that the figure of $353,978.44 fully accounted for the amount supplied.

53 Accordingly, I find that the defendant has failed to show that the figure of $353,978.44 attributed to the lightweight partitions is wrong.

54 The defendant also alleged that it had paid medical fees but that the plaintiff failed to take account of this payment in arriving at the figure of $479,613.57 payable by the defendant to the plaintiff. The defendant gave Ms Lew Meow Heng ("Ms Lew"), the plaintiff's financial controller, a summary to support its contention. When she was re-called as a result of the defendant having obtained leave to amend its pleadings, she produced an exhibit "P1", the first page of which was the defendant's summary. She gave a detailed explanation to show why the plaintiff's computation was correct. Her evidence was not challenged, counsel for the defendant having elected not to cross-examine her further.

55 Parenthetically, I should mention that counsel for the defendant sought leave to adduce further evidence through Dr Jeffrey Chi to challenge Ms Lew's evidence. I disallowed it for the reason that he had chosen not to challenge Ms Lew's evidence. To allow further evidence to be given would have necessitated re-calling Ms Lew yet again. Besides, in my estimation based upon what I had observed in the proceedings, there was little prospect of the defendant's counsel making good his promise that the evidence would be "conclusive". I therefore directed that the parties meet to resolve what I considered to be merely accounting issues. Despite having met, they remained unable to agree.

56 Therefore, as the matter stands, we have the uncontroverted explanation given by Ms Lew upon her re-call. I accordingly find that the plaintiff's computation of $479,613.57 is correct.

The counterclaim

57 I move on now to the defendant's counterclaim, the particulars of which have been set out in [19] above.

Overpayment

58 In view of my accepting the plaintiff's interpretation of the agreement between the parties, there was therefore no overpayment of the sum of $116,668.69 as alleged or at all.

Prolongation costs

59 To ascertain the amount of the prolongation costs, two sub-issues need to be considered:

(a) What was the period of delay in the construction?

(b) What was the loss suffered by the defendant during the period of delay?

60 The date for completion was 17 November 1996. However, an extension of time was granted by HDB so that the latest date for completion became 14 February 1997. The plaintiff's counsel argued that such extension would not have been given if the main contractor was at fault and that therefore the plaintiff, which was the *de facto* main contractor, should have the benefit of the extension. On this basis, the period of delay would have commenced only after 14 February 1997. However, in view of my upholding the plaintiff's plea of time bar, so that prolongation costs could only be claimed from 23 September 1997, it will not be necessary to consider this point.

61 What did this delay cost the defendant? The defendant's computation of $34,000 per month clearly cannot be used as it has a profit element. The plaintiff's counsel recounted the cross-examination of Dr Jeffrey Chi and on the basis that the true value of the contract to the defendant was approximately $4m, derived a figure of $12,042.55 which, he submitted, was the appropriate prolongation costs per month. As to the period of prolongation, he argued that the defendant did not have to manage the site until after the plaintiff's project manager left the site on 1 August 1997. Accordingly, he reasoned that any management costs incurred by the defendant would have commenced only from 1 August 1997.

62 However, he further argued that by reason of the time bar, prolongation costs could only be claimed from 23 September 1997. This was because the defendant's set-off and counterclaim was pleaded on 22 September 2003. The plaintiff's counsel cited *Lim Check Meng v Orchard Credit (Pte) Ltd* [1997] 3 SLR 795 for the proposition that the cause of action in respect of a breach of contract accrues when the breach occurs and the fact that the damage may be suffered later does not extend the date on which the period of limitation begins.

63 In response, counsel for the defendant cited *Prosperland Pte Ltd v Civic Construction Pte Ltd* [2004] 4 SLR 129 in support of his contention that the period of limitation did not begin until September 2000 at the earliest. As plaintiff's counsel pointed out, the latter case is inapplicable as it is based on s 24A of the Limitation Act (Cap 163, 1999 Rev Ed). That section extends the time limits for actions based on contract or tort where the plaintiff may not have had the requisite knowledge required for bringing an action in damages within the normal periods of limitation. Typically, it covers actions in respect of latent injuries and damage caused by latent defects. It has no application to the present case.

64 I therefore agree with plaintiff's counsel that prolongation costs could only be claimed from 23 September 1997. The amount of prolongation costs recoverable by the defendant therefore works out to be only $32,113.60 for the period from 23 September 1997 to 11 December 1997 when the project was completed.

65 As part of the claim for prolongation costs, the defendant had included a sum of $65,000 to engage a site quantity surveyor for 13 months and another sum of $143,500 to engage a project manager for 41 months (*ie*, until December 2000 when the maintenance period ended).

66 In regard to both items, the plaintiff's contention was that the costs of the quantity surveyor and the project manager up to 11 December 1997 were included in the head office costs. This was confirmed by Dr Jeffrey Chi in cross-examination. Accordingly, the defendant should not be doubly compensated. However, the defendant's claim in respect of the costs of engaging a project manager was not only until 11 December 1997. It extended throughout the maintenance period ending

December 2000.

67 Counsel for the plaintiff argued that such a contention was inconsistent with the defendant's pleadings at para 43 of its Re-Re-Re-Amended Defence and Counterclaim. The basis for such a contention was that the words "present at the project" could only mean "present at the site". If so, the period for which the claim was made would end when the handover took place on 11 December 1997. I am unable to accept this contention. Reading para 43 as a whole, one sees clearly that the defendant was referring to the "maintenance period". The defendant's claim was therefore consistent with its pleadings.

68 The plaintiff sought to rely on a letter of 27 January 1997, by which the parties had agreed as follows:

> We agreed to waive the deduction of project manager salary. However, China Construction is to ensure that there will be project manager on site until the whole project is completed and handover to HDB. If at anytime, there is no project manager on site to manage the project, Spandeck Engineering will have to impose the deduction.

In my view, this letter of 27 January 1997 merely sought to amend Appendix I of the letter of 26 January under which the project manager's costs would have been deductible against the contract sum. The letter of 27 January 1997 was not intended to address the question of any prolongation costs.

69 I would therefore allow the defendant the project manager's costs incurred after the handover. From Dr Jeffrey Chi's affidavit, the replacement project manager was Ms Fan Lin who appears from the documents exhibited to have worked from August 1997 to March 1998 only. Her gross salary, including bonuses and allowances for this period, totalled $25,089.57. This, therefore, is the sum I would allow.

Costs incurred in rectifying defects

70 The defendant alleged in para 30 of its Re-Re-Re-Amended Defence and Counterclaim a number of defects and estimated that the costs of rectifying the same were $30,000. However, the defendant did not discharge its burden of proof of the losses. Besides, the defendant's claims included matters which clearly were not the responsibility of the plaintiff, *viz*, the defective apartment door hinges and the replacement of the aluminium rivets. In regard to the former, Dr Tony Chi had in fact admitted that the defendant, having supplied the hinges, was liable to replace them at its own cost. The aluminium rivets were specified in the HDB contract. As HDB wanted to upgrade them to stainless steel rivets, HDB ought to have paid for the replacement. The defendant cannot pass the cost of such replacement to the plaintiff just because the defendant was unable to insist on HDB bearing the cost. For the foregoing reasons, I award no costs to the defendant in respect of the alleged defects.

Rental of gondola for external painting works, transportation and manpower deployment

71 The plaintiff contended that the defendant had failed to inform the plaintiff of the defects in the external painting works. It also pointed to some discrepancy as to the particular apartment block that required repainting. I agree with counsel for the defendant that it does not stand to reason why the defendant would have chosen to incur costs for remedying the defects when the plaintiff could have been required to undertake the work. I am satisfied that repainting was done and the costs of the gondola rental, transportation and manpower deployment ought to be borne by the plaintiff. As to the actual quantum, I agree with the plaintiff's computation of the total cost at $3,127.00.

Engagement of security company to carry out site inspections

72 The defendant's claim in respect of the engagement of a security company to carry out site inspections is a minor item. Whilst I would agree that it was understandable why the defendant would incur this expense, I see no justification in law why the plaintiff should be made to bear it. The agreement between the parties made no mention of it. The defendant engaged the security company for its own benefit. It should absorb the cost.

Non-submission of warranties – $100,000

73 I agree with the plaintiff that the claim for the non-submission of warranties is a non-issue. Dr Tony Chi testified that the defendant had been refunded the sum of $100,000 by HDB. Therefore, there was no loss.

Conclusion

74 In conclusion, I grant judgment to the plaintiff in respect of the sum of $479,613.57. I also allow the defendant's counterclaim against the plaintiff as follows:

(a) $32,113.60 in respect of prolongation costs for the period 23 September 1997 to 11 December 1997;

(b) $25,089.57 in respect of the costs of employing a project manager for part of the maintenance period from 12 December 1997 to 11 December 2000; and

(c) $3,127 in respect of the costs of rental of the gondola and external painting works.

The net amount payable to the plaintiff after setting off the amounts allowed under the counterclaim shall be with interest at 6% per annum from the date of the Writ until payment. I will hear the parties on costs.

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[1]According to Dr Jeffrey Chi's affidavit of evidence-in-chief at para 62.