Econ Piling Pte Ltd v GTE Construction Pte Ltd
[2009] SGHC 213

Case Number : Suit 310/2008

Decision Date : 23 September 2009

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Tan Cheow Hin (CH Partners) for the plaintiff; P Padman (K S Chia Gurdeep & Param) for the defendant

Parties : Econ Piling Pte Ltd — GTE Construction Pte Ltd

Contract

23 September 2009 Judgment reserved.

Judith Prakash J:

Introduction

1 This claim arises out of work done in relation to a project awarded by the Jurong Town Corporation ("JTC") for the reclamation of Jurong Island Phase 4 and Tuas View Extension Option 1-1 ("the project"). The main contractor appointed for the project by JTC was Hyundai Engineering & Construction Co Ltd ("Hyundai").

2 In the course of the reclamation work, pre-fabricated vertical drains ("PVDs"), made from polyester filament wrapped in polyester filters, had to be installed vertically into the newly reclaimed land. Their function was to speed up the drainage of underground water and thereby expedite the settlement of the reclaimed land. The installation of PVDs involved the use of a special long mast which was mounted on an excavator or crane and which would then push the PVDs into the soil to the required depth.

3 The plaintiff, Econ Piling Pte Ltd ("Econ") (formerly known as Econ Corporation Limited) and the defendant, GTE Construction Pte Ltd ("GTE") (formerly known as Dae Yang Geotechnic Pte Ltd) were at all material times contractors in the business of conducting piling, civil engineering and other construction works. In 2000, when Hyundai called for tenders for a subcontract relating to the installation of PVDs for the project, both companies bid for the same. At the same time, they were in talks with each other about a possible joint venture to carry out the subcontract works. GTE's bid was successful and by a subcontract agreement dated 30 October 2000 ("the subcontract"), Hyundai appointed GTE as its subcontractor to supply, drive and install PVDs. Thereafter, on 10 July 2001, Econ and GTE entered into a joint venture agreement ("the JV Agreement") whereby they agreed that each of them would carry out 50% of the works to be done under the subcontract.

4 By October 2002, the parties had completed part of the works with Econ having met its obligation to complete 50% of the work done to that date. Based on the work done by Econ, GTE issued payment certificate no. TVE/ECON/2002-8 dated 23 October 2002 ("the payment certificate") pursuant to which a net sum of $154,894.92 was paid to Econ. The payment certificate showed that a sum of $516,077.67 had been retained ("the retention sum"). Econ's claim in this action is for payment of the retention sum. GTE has put in a counterclaim for damages arising out of the alleged failure by Econ, in breach of the JV Agreement, to carry out any further work on the project after

October 2002.

The claim

The pleadings

5 This action was started in April 2008. In its statement of claim, Econ recited the details of the JV Agreement and the payment certificate and then in para 5 noted that by GTE's letter of 25 September 2003, GTE had said:

> The retention amount shall be claimable to the main con after the main con hand over the concerned area to the client. A2 area is still on going for reclamation work not handed over to the client yet. Therefore we are not able to claim for release of retention to the main con.

6 In para 6 of the statement of claim, Econ pleaded that it was an implied term of the JV Agreement that GTE was to keep Econ informed and updated on the status of the retention sum and its release and that it was also an implied term that GTE would cooperate with Econ in respect of the retention sum. In the next paragraph, it was pleaded that despite numerous requests and demands made by Econ, GTE had failed to pay the retention sum to Econ and had failed and refused to inform Econ whether the works completed by Econ had been handed over to Hyundai or what the status of the same was.

7 Responding, in para 7 of its defence and counterclaim, GTE admitted that by October 2002, Econ had performed its obligation of completing 50% of the work that was done at that date and therefore the payment certificate was issued pursuant to which a net sum of $154,894.92 was paid to Econ. Then, in para 8, came GTE's defence in relation to the retention sum. It read:

> 8. Sometime before October 2002, there were rumours that the Plaintiffs were facing financial difficulties. It was agreed between the parties that a sum of $516,077.67 be retained by the Defendants as a performance bond to ensure that the Plaintiffs would continue to honour their obligations under the JV Agreement.

8 The rest of the defence and counterclaim dealt with GTE's allegations that after October 2002, Econ had never resumed any work and had completely abandoned all of its obligations under the JV Agreement. It averred that as a result, it had had to undertake the sole burden and cost of performing the works which was still on-going. In para 11, GTE asserted that it had suffered loss and damage and had incurred cost and expense in undertaking work that should have been carried out by Econ. In para 13, GTE pleaded that if it was liable to Econ, it would seek to set off against such liability the sums due from Econ arising as damages payable for Econ's breach of contract.

9 It can be seen from the pleadings that there were only two points raised by GTE in response to Econ's claim. The first of these was that the parties had agreed that the retention sum was to be retained as a performance bond to ensure performance of Econ's obligations. The second was that the retention sum could be set off against the damages that GTE had allegedly sustained by reason of Econ's breach of contract. The second point really has to be considered in the context of the counterclaim rather than the claim so I will deal with it later. On the defence in its strict sense, therefore, the only issue that arose was whether Econ had agreed with GTE that the retention sum was to be held as a performance bond for Econ's performance of the JV Agreement.

The evidence and the arguments

10 In its closing submissions, GTE contended that the issue was whether Econ was entitled to the retention sum despite the fact that the work had not been completed and handed over to Hyundai. It then contended that this issue had to be resolved in favour of GTE because GTE's witnesses had said in court that the work area in relation to which Econ's claim had been made had not been handed over to Hyundai and therefore the retention sum was not due for release. No submissions were made on the allegation that there had been an agreement to make the retention sum a performance bond. In fact, it would not have been possible for GTE to make such submissions since neither of its two witnesses said anything in their affidavits of evidence-in-chief about the alleged agreement. Further, the alleged agreement was not put to Econ's witnesses in cross-examination. It is therefore apparent that this ground of defence has been abandoned.

11 As I see it therefore, the issue that I have to consider in relation to the claim is whether it is open to GTE to argue that the claim for the retention sum is premature. This is because there was no pleading in the defence that raised this point in response to the claim. It is well established that cases have to be decided on the basis of their pleadings and if material facts are not pleaded, they may not be brought forward either in support of a claim or in defence to it. In this case, the statement of claim set out the basis on which GTE had in correspondence refused to make payment of the retention sum in September 2003. The issue of whether the work area in question had been handed over to Hyundai or not was therefore clearly presented to GTE when it read the statement of claim. Yet, it did not assert that the position had not changed from 2003. It did not plead that the retention sum was not due to be released because the work area had not been handed over to Hyundai. I therefore hold that GTE cannot put forward a defence to the claim for the retention sum on this basis.

12 It may be argued that I should allow GTE to make this point since it was contemplated by the statement of claim. I do not think the reference in the statement of claim to the original ground for refusing to release the retention sum is sufficient. Even if, however, I allowed this point to be used by GTE as a defence, on the evidence, GTE has not been able to establish it.

13 The evidence showed that the first time that GTE informed Econ that the retention sum was not due and payable because the works had not been handed over the Hyundai was by its letter of 25 September 2003. GTE repeated this position in an email dated 17 August 2005. Then, on 20 November 2007 when Econ asked for payment again, GTE through its solicitors stated:

> With regard to the retention sum, your clients are fully aware that the release of the retention sum shall only be made after the main contractor has handed over the above-captioned premises to their clients. To date, works on the above-captioned premises are still in progress.

Econ made further enquiries about the status of the works in the A2 area which it had been involved in on 3 March 2008, 14 March 2008 and 26 March 2008. GTE did not respond to any of these queries.

14 GTE's case was that throughout its communications with Econ, it had informed the latter that the retention sum in respect of the A2 area had not yet been released. That may have been the information conveyed, but the truth of that statement as to the non release of the retention sum was not supported by the evidence. By 26 April 2006, the total amount of retention money being held by Hyundai only amounted to $351,654.54. This was a sum quoted in a letter which GTE wrote to Hyundai on that date and, in that letter, GTE actually proposed to Hyundai that it should further reduce the retention sum to 2.5% of the total subcontract sum so that more money could be released to GTE. It was apparent from this letter that GTE had already received quite a lot of so called

"retention" money. Then, Mr Her Tea Young, the managing director of GTE who testified on its behalf, conceded in court that Hyundai had paid out the retention sum to GTE and that GTE was not willing to release the same to Econ for reasons that had nothing to do with the claim being premature. The evidence in question reads as follows:

> Court: What is your reason for not paying the retention money?
>
> Witness: In 2004, when Econ went under judicial management, we did not have a contract and also there was no equipment. At that time we had to do the work on behalf of Econ and we had – we were having problem with increased costs and so on. So we did ask Hyundai to release some of the retention money, which they did. So in these circumstances, we were not thinking of releasing this money to Econ.
>
> Court: Yes, what is your justification for not releasing it to them?
>
> Witness: We were thinking that we had – we had our loss incurred because it was like suddenly our joint venture partner disappeared, so there was increased cost which by right we should be sharing together with the joint venture company, which we could not.
>
> So if we were working together, this would all come and discuss together with the joint venture company. Since it was like the company was disappeared, I was not thinking of our obligation of releasing this retention.
>
> Court: So are you saying you kept the retention money to offset against your loss?
>
> Witness: Yes, your Honour.

15 In the light of the evidence, it appears that GTE knowingly breached its obligation to release the retention sum to Econ and that the explanation that Hyundai had yet to refund the same to GTE was only an afterthought. Indeed, if the retention sum had not been released by Hyundai to GTE, the latter would certainly have raised this fact as its first line of defence in its pleadings. Mr Her the managing director admitted in court that he was aware that it had not been pleaded in the defence that the retention sum had not been released by Hyundai. In all the circumstances, therefore, this ground would not have availed GTE even if it had been pleaded.

16 I therefore find that GTE has no defence to the claim for the release of the retention sum.

The counterclaim

Factual background

17 The basis of the counterclaim was the allegation in para 9 of the defence and counterclaim that subsequent to the work done as stated in the payment certificate, Econ had never resumed work and had completely abandoned all its obligations under the JV Agreement.

18 The factual background to the stoppage of work on the project was that at about the same time that the payment certificate was issued, reclamation work came to a complete halt due to a ban in Indonesia on the export of sand. As a result, both Econ and GTE had to stop work. They, however,

left their machines on the site so as to be able to resume work when sand became available again. Due to the sand ban, no work was available until October 2003.

19 In the meantime, Econ experienced financial difficulties. Some time in 2003, it was put into interim judicial management. It only emerged from this position in 2005.

20 In October 2003, some work was available and this was carried out exclusively by GTE. GTE did not inform Econ at that time of the availability of work. Its reason, given by Mr Heo Jong Cheol, the former project manager of GTE, was that the quantity of work available was too little and it would not have been feasible for both Econ and GTE to carry out the work together.

21 On 27 January 2004, Econ received a letter from GTE requesting it to mobilise one machine to resume the work at "A3b area" by 1 February 2004. In that letter, GTE Yang informed Econ that work was available for the installation of 2 million linear metres of PVD. The letter was forwarded to Econ's interim judicial manager, who replied on 13 February 2004 stating that Econ was able to provide a team of men and a machine for the work.

22 On 16 February 2004, Econ received a reply from GTE dated 20 January 2004, saying that:

> As we mentioned on the above our letter, you were required to mobilize your one stitcher till 1st Feb 2004. We, Dae Yang, mobilized two machines to meet the Hyundai's plan due to your no reply timely and we considered your no reply as no intention for the work mentioned because of not enough pvd quantity to operate.
>
> *As mentioned earlier, we don't have a plan to demobilize one of our machines for your machine operation* and provisionally the available area for pvd up to date is about 250,000 linear meters which is able to complete with 3 machines (Dae Yang 2, Econ 1) by 10th of Feb 2004 if you mobilize machine and manpower to operate as soon as possible. *Please inform us your machine ID and mobilization plan if you are still keen to operate your team though it is not enough quantity as said above available to run 3 machines*. [emphasis added]

23 Econ promptly replied the following day, informing GTE once again, of its willingness to commit a team of men and a machine to the works. In response, GTE reiterated (by way of letter dated 18 February 2004) that:

> We cannot guarantee the balanced pvd quantity for you for the temporary available area; therefore your earlier mobilization would be helpful for us to make plan for you.

Thereafter, Econ performed no further works under the subcontract.

The evidence and the arguments

24 Before I discuss the submissions, it would be helpful to note the following salient provisions of cll 4 and 5 of the JV Agreement. These stated:

> **4. The Leading Company [*ie* GTE]**
>
> A. [GTE] shall act as Leading Company of the JV and will coordinate the performance of the Project.

B. The JV agrees that 5% of the total interim monthly amount (inclusive release of retention) paid by the Main Contractor shall be paid to the Leading Company as fees for administration and management of the JV.

5. PVD Materials and Installation Works

A. PVD quantity for Econ will be 50% of the whole project quantity.

B. …

C. Econ is required to meet the weekly production target as stated in the schedule by the Main Contractor and agrees hereby to mobilize _ no. of pvd rig for the work. The Leading Company will install pvd on Econ's share of quantity till Econ delay is caught up by each area planed target if Econ progress lags behind from schedule by more than 10 calendar days.

D. …

E. Econ shall purchase the PVD for their installation works from the Leading Company at the rate of S$0.285/linear meter ex stock. The rate of PVD would be variable due to supplier's inevitable conditions with crude oil price.

….

G. Both Parties shall give their best effort for the smooth and timely completion of the sub-contract works.

25 Although GTE had pleaded that Econ had completed 50% of the works up to October 2002, in its final submissions it contended that Econ was not able to carry out 50% of the works up to this date. It pointed out that GTE had started work in February 2001 while Econ had only commenced operations on the project in July 2001. According to its witnesses, at around October 2002, between Econ and GTE, an aggregate total length of 12,727,695.24m of PVD had been laid, with GTE accounting for 7,828,043.96m and Econ accounting for 4,899,651.28m, which was less than half. Thereafter, between October 2002 and June 2007, a further additional length of 1,614,019.44m of PVD had been laid by GTE in respect of the works.

26 GTE then contended that after October 2002, Econ's insolvency and entry into judicial management formed a stumbling block to Econ's being able to carry out further work. Whilst it was true that the judicial manager of Econ had sent letters to GTE appearing to signal Econ's readiness to start work, Econ was not in a position to do any further work. The witnesses for Econ had presented a false picture of hope and ability. Econ had had neither the men nor the machine to do any further work in 2004. In cross-examination, Econ's witness Mr Ong Soon Tee had given the following evidence:

Ct: But when they requested you to provide a unit of PVD stitcher, why didn't you provide it immediately?

Witness: During that period, it was on the verge of entering into the IJM, er, so we also have to get instruction from the IJM whether we can go ahead or not to go ahead.

Ct: So you couldn't accept this request because of your internal problems, is that it?

Witness: Yes.

In GTE's submission, the above evidence was illuminating with regard to the reason why Econ had done no further work on the project.

27 GTE submitted that since Econ was not able to complete 50% of the works, it was in breach of contract and by failing to do the works, it had deprived GTE of the profit it would have made on the sale of material to Econ and of the five percent management fee that Econ would have had to pay GTE for Econ's portion of the work.

28 Econ refuted the contention that it had completely abandoned its obligations under the JV Agreement. Its defence to the counterclaim was that it had not carried out further work due firstly to circumstances beyond its control and secondly, to GTE's failure to allot further work to it. It pointed out that it had had to stop work because the sand ban meant that no further work could be carried out for at least a year from October 2002. Yet, Econ had not completely demobilised after October 2002. It had left its machines on site and also had personnel stationed there. It was charged for water consumption on the site after October 2002 and also had regular site meetings with GTE. Further, Mr Heo had admitted during cross-examination that his statement in his affidavit that there were no Econ employees on site was incorrect and that until September or October 2003, there had been Econ workers on the site. He had further agreed that his assertion that after October 2002 there was no communication from Econ was not correct. In Econ's submission, the reason why it had not done any further work when further work became available was that GTE had not informed it of the same and had kept this further work for itself. Econ considered that it was GTE rather than Econ that had been in breach of the JV Agreement since it had failed to allot 50% of the work to Econ.

29 Econ also submitted that GTE's letter of 18 February 2004 (see [23] above) showed that there was a lack of intention on GTE's part to allocate any of the works to Econ. Econ had therefore formed the view that it should no longer incur costs in keeping its machine and manpower on standby. It considered that it was perfectly entitled to sell off its equipment and remove its staff from the site. Also, considering that there was a ban on sand exports to Singapore from Indonesia, Econ assumed that both it and GTE considered themselves as discharged from further performance of the JV Agreement.

30 Having considered the evidence and the submissions, I find that on a balance of probabilities, GTE has failed to make out its claim. Econ has established that its abandonment of the JV Agreement was caused by GTE's actions in taking the whole benefit of the subcontract, to the exclusion of Econ. The conduct of GTE was such as to permit Econ to walk away from the JV Agreement. This holding is based on the legal principle which was recognised in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR 413 and that is that where a party, by his words or conduct, simply renounces his contract inasmuch as he clearly conveys to the other party to the contract that he will not perform his contractual obligations at all, that the other party is entitled to terminate the contract. Further recognition of the principle can be found in the following passage of *Chitty* on Contracts, vol 1 (Sweet

& Maxwell, 30th Ed, 2008) (at 24-018):

> … An absolute refusal by one party to perform his side of the contract will entitle the other party to treat himself as discharged, as will also a clear and unambiguous assertion by one party that he will be unable to perform when the time for performance should arrive. Short of such an express refusal or declaration, however, the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions. The renunciation is then evidenced by conduct. …

31 The evidence established that GTE had demonstrated its intention not to be bound by the JV Agreement. First, when GTE had some new work in October 2003, GTE did not inform Econ. As Mr Heo conceded during cross-examination:

Q: … And I am focusing on 2003 October, just a few days after DB94[sic], showing that the defendant had carried out work of some 188,000 linear meters.

A: That is correct.

Q: Why wasn't this shared with the plaintiff?

A: As I remember, I have advised this to the plaintiff in the meeting.

Court: Advised what to the plaintiff in the meeting?

Witness: I advised that next month there is some work to be carried out.

Court: When was this advice given?

Witness: Some time in September, I remember, your Honour.

…

Court: If you told them in September, why didn't you mention it in your letter of the 25th of September?

Witness: Though I remember, I discussed with the persons in – in site. This was a relatively small amount of work. That – that's probably why I didn't mention in this letter.

Court: In this letter you say that: "We will inform you when you get the plan from the main con. We are keeping under observation for resumption of work." So this letter is saying that there's no work.

Witness: I cannot remember exactly, but perhaps it was a very urgent requirement of work that we didn't have time to discuss any further. One reason that it was not possible to keep it in secret is that there were Econ personnel always staying at the project site.

32 That passage casts doubt on the reliability of Mr Heo's evidence that he had informed Econ that some new work would be forthcoming. It would be noted that he changed his position when his testimony was probed. Furthermore, the fact that GTE deliberately excluded Econ from the benefit of the subcontract can also be inferred from his answer to a subsequent question:

> Court: … In your letter, when you say there's --- there's no work, right, if they could have seen that there was, you were getting ready for work, they would have known you were telling a lie. Isn't that correct?
>
> Witness: The work I was referring to in this letter, your Honour, is something of significance, something that we could carry on for several months at least. The type of work that just do as a small project wouldn't do any good for us or the plaintiff company anyway.

33 Even if the quantity of work was so little that it would not have been profitable for both parties to the JV Agreement to participate in, the availability of such work should at least have been mentioned in the 25 September 2003 letter to Econ. This was because GTE, as Econ's joint venture partner, was bound to co-operate in the equal discharge of the subcontracted work pursuant to cl 5E. Since under cl 5A, the PVD quantity for Econ was 50% of the total quantity to be installed, GTE should at least have obtained Econ's consent to allow GTE to proceed with the allegedly small quantity of works without Econ's participation. Instead, in its 25 September 2003 letter, GTE informed Econ that there was no compensation for idling machines and that it would let Econ know later when it received the plan for resumption of work from Hyundai.

34 Admittedly, GTE wrote to Econ on 20 January 2004 requesting that Econ mobilise its machinery and manpower for work to be done on 1 February 2004. This letter, however, was only received by Econ on 27 January 2004 and as it needed one week to mobilise the necessary machinery, it was not able to start work on 1 February 2004. At that stage, GTE appeared to be willing to give more work to Econ but its subsequent conduct showed that this was not in fact the case.

35 By the time Econ was ready to perform the work, GTE's refusal to demobilize one of their two machines on the work site to accommodate Econ showed that GTE was not actually interested in allowing Econ to come on site to participate in the work. GTE relied on the following evidence from Mdm Ong of Econ to show that it was to blame for not participating in work from February onwards:

> Ct: But when they requested you to provide a unit of PVD stitcher, why didn't you provide it immediately?
>
> Witness: During that period, it was on the verge of entering into the IJM, er so we also have to get instruction from the IJM whether we can go ahead or not to go ahead.
>
> Ct: So you couldn't accept this request because of your internal problems, is that it?

Witness: Yes.

That evidence was not, however, as damaging for Econ as it might seem to be at first sight. Econ was under judicial management in January 2004 and therefore it could not act without the approval of the judicial manager. All that the answer said was that no machine could be provided immediately because the approval of the judicial manager was required. The answer did not say that no machine could be provided at all.

36 As the later correspondence of February 2004 showed, after considering the matter, the judicial manager approved the resumption of work and Econ informed GTE that it was able to provide personnel and machinery and asked for the schedule of work. That offer was rejected by a letter from GTE (mistakenly dated 20 January 2004) which was received by Econ on 16 February 2004 informing Econ that it would not demobilise one of its machines to allow Econ's machine to operate and that the work available was not sufficient for the use of three machines. Then, on 17 February 2004, Econ reconfirmed its ability to provide men and machinery to do the work. GTE's response to that was that it could not guarantee the quantity of work available. Thereafter, GTE did not give Econ any further work to do. In these circumstances, it was not realistic to expect Econ to remain on standby, incurring costs, while GTE was denying Econ the opportunity to perform its side of the bargain. In the event, GTE went on to do work to the exclusion of Econ during the months from February 2004 to June 2004. As Mr Heo stated in cross-examination, there was not enough work to share with Econ in 2004. This, and not Econ's abandonment of the JV Agreement, must have been the true reason why only GTE was at work in 2004.

37 GTE's assertion that Econ's staff simply became uncontactable after they had decided to abandon the JV Agreement in October 2002 was not true. Econ maintained a mechanic on the work site until its machines were sold in September 2004. Further, it can hardly be said that Econ could not be contacted. On 26 May 2003, Econ wrote to GTE to inform the latter that Econ's staff member in charge of the project was staying at the camp site. On 4 June 2003, Econ again wrote to GTE, this time agreeing to pay the fees due for consumption of water and the anti-mosquito service provided. It also confirmed that invoices issued after May 2003 would not "fall under Econ's Scheme of Arrangement". In fact, during cross-examination, Mr Heo conceded that Econ's employees were contactable, and that his assertion that Econ's staff were not present on the work site was untrue.

38 In light of the above, GTE's counterclaim was a mere afterthought. Even after the original management of Econ took over again in 2005 when Econ emerged from interim judicial management, GTE never saw it fit to raise the matter of Econ's alleged repudiatory breach. GTE simply acquiesced in Econ's moving its equipment out of the site. Also, whilst GTE had alleged that Econ's non-performance after October 2002 had caused it loss because it had to take on the burdens of the subcontract alone, Mr Heo agreed in cross-examination that in 2004, there was no point in asking Econ to do the work or suing Econ to enforce specific performance because there was not enough work in 2004 to share with Econ. Later, when Mr Heo was asked whether he had taken the view that Econ had breached the JV Agreement because it was under judicial management and its machines had been sold in September 2004, his reply was: "I wasn't thinking that way".

39 I am satisfied on the evidence that GTE had renounced the JV Agreement by deliberately excluding Econ from the benefit of the same and therefore that its counterclaim against Econ must fail. There is no basis therefore on which GTE can claim to exercise any right of set off against the retention sum. It is also worth noting that in April 2006, GTE, without consulting Econ, extended the subcontract with Hyundai. In this connection, I asked Mr Heo whether if he chose to extend the subcontract after April 2006 (there was no work at all done in 2005) he could really hold Econ liable

for any extra expense that GTE had incurred after that date. The witness did not answer the question directly. All he said was that GTE had been supposed to advise Econ of the extension since it was a joint venture party but GTE had not known who to contact at that time. This was a weak response since by 2006, Econ was no longer in interim judicial management and GTE could easily have tracked down the management of the company. I am satisfied that if GTE did in fact incur extra expense after February 2004 this was due to its own actions for which Econ cannot be held responsible.

Conclusion

40 In the result, the plaintiff's claim succeeds and there will be judgment for Econ in the sum of $516,077.67 together with interest thereon at the court rate from the date of the writ to the date of payment. The defendant's counterclaim is dismissed and GTE shall pay Econ the costs of the action and of defending the counterclaim as taxed or agreed.