Rotol Projects Pte Ltd *v* CCM Industrial Pte Ltd
[2014] SGHC 72

Case Number : Suit No 255 of 2011

Decision Date : 15 April 2014

Tribunal/Court : High Court

Coram : Quentin Loh J

Counsel Name(s) : John Chung and Maurice Tan (Kelvin Chia Partnership) for the plaintiff; Ng Hweelon (Legal Clinic LLC) for the defendant.

Parties : Rotol Projects Pte Ltd — CCM Industrial Pte Ltd

Building and Construction Law – Building and construction contracts – Lump sum contract – Terms

15 April 2014 Judgment reserved.

Quentin Loh J:

1 This judgment is for consolidated Suits No 255 and No 736 of 2011. As the proceedings have been bifurcated, quantum will be assessed at a later stage. This judgment deals solely with the question of liability. I gave oral judgment on 4 March 2014 and the defendant has appealed against my decision.

Background facts

2 Rotol Projects Pte Ltd ("the Plaintiff") brought these proceedings to recover sums due to it under an aluminium and glazing sub-contract entered into with the defendant. CCM Industrial Pte Ltd ("the Defendant") was the main contractor employed by Park Regis Investments Pte Ltd ("the Employer") for the construction of a 7-storey block hotel/office development with a basement carpark on Lot 353X TS07 and Lot 462W TS08 at the intersection of Merchant Road and Keng Cheow Street, now known as the Park Regis Hotel ("the Project"). The Project architects were RSP Architects Planners & Engineers Pte Ltd ("the Architects") and the quantity surveyors were WT Partnership ("WTP").

3 The Defendant employed the Plaintiff to carry out the aluminium and glazing works for the Project pursuant to a lump sum sub-contract ("the Sub-contract") priced at S$3.15m. I pointed out to parties that the opening paragraph of the Defendant's works order dated 2 July 2009 ("the Defendant's Works Order") stated that parties "shall enter into a subcontract agreement … in accordance with the following terms and conditions", *ie*, the terms and conditions of the Defendant's Works Order and that there were some differences when compared to the terms and conditions in the Plaintiff's quotation (Reference No RP010609) dated 8 June 2009 ("the Plaintiff's Quotation"). [note: 1] Parties nevertheless agreed that the Sub-contract consisted of both the Plaintiff's Quotation, which included a bill of quantities ("BQ") detailing the quantity of materials to be used for the Sub-contract works and rates chargeable, as well as the Defendant's Works Order which the Plaintiff signed and accepted on 7 July 2009. [note: 2] Parties further agreed that no oral terms were being alleged or relied on. [note: 3]

The agreed issues

4 The parties have helpfully jointly put forward an agreed list of issues, as follows:

(a) whether the Plaintiff was entitled to be paid for variations to the subcontract over and above the Sub-contract sum of $3.15m as set out in Serial No A of Annex A of the amended consolidated statement of claim ("the CSOC");

(b) whether the Plaintiff was entitled to be paid for the additional works carried out in accordance with the design drawings issued by the Architects, as set out in Serial No B of Annex A of the CSOC;

(c) whether the Plaintiff caused or contributed to the 145 days of delay (from June to October 2010) to the completion of the main contract works and if so, how many days of delay did the Plaintiff cause;

(d) whether the "main contractor's master program" in cl 4 of the Defendant's Work Order referred to the Master Program Revision 9 dated 13 June 2009 ("the Rev 9 Program") or the Master Program Revision 11 dated 22 September 2009 ("the Rev 11 Program");

(e) whether the Plaintiff was entitled to payment and/or in breach of contract in the supply of gypsum blocks;

(f) whether the Plaintiff was liable for the Defendant's back-charges; and

(g) whether the Defendant was liable for the Plaintiff's financing charges.

Subsequently at trial, the Parties agreed that for the issue of back-charges, both liability and quantum will be dealt with at the quantum hearing. [note: 4]

Analysis

Issues (a) and (b), variations and additional works, Annex A, CSOC

5 It will be convenient to deal with these two issues together as there are some common issues and defences raised to the Plaintiff's claims.

The meaning of a lump sum contract

6 In its pleadings and its opening statement, the Defendant's contention was that this is a lump sum contract, *ie*, the Plaintiff is not entitled to any additional payment other than the agreed sum of $3.15m for all and any work done. There was to be no re-measurement and therefore no re-calculation of the Sub-contract sum payable by the Defendant to the Plaintiff. The Plaintiff contended that although this is a lump sum contract, if there were any changes to the design or work to be done, then the lump sum is subject to the usual additions and/or omissions, as the case may be.

7 The key terms of the Sub-contract as contained in the Plaintiff's Quotation of three pages were as follows: [note: 5]

Terms & Conditions

1. Any changes in the works & designs as per approved shop-drawings, shall be subject to variation order

2. Goods supplied will remain the property of [the Plaintiff] until the certified amount is fully paid

3. It's [sic] shall be a Lump Sum Contract

The third page of the Plaintiff's Quotation contained items comprising the aluminium and glazing works based on approved shop drawings with quantities, unit rates and sub-total amounts which added up to $3,185,000 to which a discount of $35,800 was applied giving a rounded down cost of $3.15m.

8 The key terms in the Defendant's Works Order, which was signed by the Plaintiff, were as follows: [note: 6]

1 Scope of Works

To [s]upply, fabricate and install external aluminium and glazing works for the abovementioned project with the total lump sum amount of S$3,150,000.00 (Singapore Dollar: Three Million One Hundred Fifty Thousand only). The breakdown of cost shall be referred to the quotation ref: RP010609 dated 08 June 2009.

…

3 Terms of Payment

Monthly progressive payments in accordance to standard SOP.

LC For procurement of glass and aluminium extrusion.

There will be 10% retention of the contract amount. 5% retention sum will be released upon completion of work and balance 5% will be 6 months upon completion of work.

9 At this juncture, it is important to highlight the context in which the Sub-contract was entered into. The Sub-contract documentation was typical of an informal type of construction subcontract and did not follow any of the usual building contract standard forms. The parties were not overly sophisticated and the Sub-contract documentation was unfortunately wanting in clarity and incomplete in many respects. The testimonies of the Plaintiff's former general manager Steven Chow Mun Poh ("Mr Chow"), the Defendant's senior project manager Gan Chee Keong ("Mr Gan") and chief executive officer, Liew Sen Keong ("Mr Liew") clearly demonstrated imprecise usage of technical contractual terms within the construction industry.

10 During the trial, some confusion arose over the use of the terms "variations", "additions" and "omissions" by the parties. In law, the term "variation" refers to a change to the work which a contractor was originally contracted to do for a lump sum price which could comprise (but is not restricted to) any increase or decrease in the quantity of any part of the works; any changes to the character, quality or nature of any part of the works as well as "additions" and "omissions": Chow Kok Fong, *Law and Practice of Construction Contracts* (Sweet & Maxwell Asia, 4th Ed, 2012) at para 5.1. Additions and omissions are thus variations in the construction industry and in construction law. Moreover, most standard form construction contracts allow for variations within as well as *outside* the original scope of the works and set down a procedure for a variation.

11 However, whilst the Plaintiff used the terms "omissions" and "additions" to refer to those changes that fell within the Sub-contract, it used the term "additional works" to refer to those

changes that fell *outside* the Sub-contract. As noted above though, in the context of building and construction law, all of these fell to be "variations" in law.

12 Proceeding on its understanding of the above terms, the Plaintiff averred that it had, in accordance with the Defendant's instructions, carried out its work according to revised drawings issued by the Architects that, *inter alia*, changed the curtain walls and aluminium cladding designs of the external elevations of the building. [note: 7] The Plaintiff's case is that it was entitled to payment for these variations to the Sub-contract works, as set out in Serial No A of Annex A of the CSOC, brought about by the aforementioned design changes. The Plaintiff claimed for the differences in quantities arising from the variation to its Sub-contract works, calculated on the Sub-contract unit rates, in a progress payment claim dated 29 September 2010 ("Progress Payment Claim No 11") which to date remains unpaid.

13 The Plaintiff further claimed payment for ten items of additional works falling *outside* the scope of the Sub-contract which it alleges the Defendant had instructed it to carry out in accordance with design drawings issued by the Architects. [note: 8] These alleged items of additional work are set out in Serial No B of Annex A of the CSOC. The Plaintiff claims for these items of additional work as variation orders ("VOs No 1–10"). [note: 9]

14 In my judgment, on a true and proper construction of the contract documents, this was not a lump sum contract as contended for by the Defendant but a lump sum contract as contended for by the Plaintiff, *ie*, it was subject to additions to and omissions from the lump sum for any changes made to the works and design, for the following reasons:

(a) It was clear that the price of $3.15m was based on approved shop drawings, of which the Plaintiff lifted their quantities and applied their unit rates.

(b) For this reason, the terms and conditions within the Plaintiff's Quotation contained the following: "[a]ny changes in the works and designs as per approved shop drawings shall be subject to a variation order".

(c) The meaning of the above provision is clear—measurement of any changes, by way of additions and omissions, was to be made and the contract sum would be accordingly reduced or increased thereby. The base line for measuring changes was the approved shop drawings upon which the Plaintiff's Quotation was based.

(d) Mr Chow's evidence showed a clear understanding of the concept of lump sum; he accepted that if he had wrongly quantified the amount of work to be done from the approved shop drawings and there were no changes, then he would have to bear the cost of any under-quantification on his part [note: 10] in that there would be no re-measurement.

(e) At the end of the day, Mr Gan's understanding, once the Plaintiff's use of "variations", "additions" and "omissions" was clarified, was similar. [note: 11] What Mr Gan really contested was that quantities had increased unjustifiably and alleged it had gone far beyond the total square metre calculation of the façades. [note: 12] However, that is a matter for the hearing on quantum.

15 Significantly, on the first day of the trial, the Defendant conceded that there were changes to façade treatment of the office block from aluminium cladding to aluminium curtain walls which led in turn to the changes in quantities. [note: 13] Counsel for the Defendant, Mr Ng Hwee Lon ("Mr Ng")

said:

> Ng: We agree that there were all these changes … We agree to these changes.

This was also conceded by Mr Gan in cross-examination. [note: 14]

16 The affidavit of evidence-in-chief ("AEIC") of Mr Gan as to the meaning of cl 1 and 3 read together is also, I think, significant: [note: 15]

> 13 This simply means, and as it is widely accepted in the construction industry, that the sub-contractor have [*sic*] been awarded the contract based on a fixed amount and *whilst there are unit rates on a per quantity basis in the quotation, these rates would only be applicable for any variations amounting to either an addition or an omission to the works as approved by a certified Variation Order* ("VO"). [emphasis added]

17 Mr Ng also accepted that the Scott Schedule annexed at page 29 of the Plaintiff's opening statement, setting out omissions and additions, was prepared by the Defendant's quantity surveyor [note: 16] and conceded that the Scott Schedule showed additions and omissions to the aluminium cladding and curtain walls and accepted the figures in the last column of the Scott Schedule.

18 Given the concessions by the Defendant at [14(e)]–[17] above, they have come to accept the meaning of lump sum as set out in [14] above and this issue accordingly falls away. On this first issue I therefore find and hold that, subject to proof of quantum, the Plaintiff is entitled to be paid for any changes from the approved shop drawings upon which the Plaintiff's Quotation was based and will be subject to "additions" and "omissions" to re-calculate the lump sum price.

Was there a binding claims procedure in the Sub-contract?

19 Having conceded that there had been changes to the façade treatment of the office blocks from aluminium claddings to curtains walls [note: 17] but that the Scott Schedule had indicated a doubling of the quantities of materials used, [note: 18] Mr Ng then clarified that the Defendant's argument was purely that there was a claims procedure which the Plaintiff had not adhered to. [note: 19] Whilst this appears to have been addressed in relation to the ten items claimed by the Plaintiff under Serial No B of Annex A of the CSOC, it was also raised in relation to issue (a) and the interpretation of cl 1.

20 The Defendant's pleaded case was that cl 1 of the Plaintiff's Quotation: [note: 20]

> 1. Any changes in the works & designs as per approved shop-drawings, *shall be subject to variation order*
>
> ...
>
> [emphasis added]

expressly provided for the claims procedure described at [31] below.

21 Clause 1 clearly contemplated that changes could be made to the works or designs set out in the approved shop drawings by variation orders ("VOs"). However, it is also clear on the face of the

Sub-contract that unlike the standard form contracts or sub-contracts in use in Singapore, there were *no* express provisions on the *procedure* to effect any changes in design or quantities, who was to issue the VO given that this was a domestic sub-contract and how payment is to be made therefor, other than that it should be "subject to" or effected by a VO. What form that VO was to take is also not spelt out.

22 Although our courts have endorsed a contextual approach in interpreting the terms of a written contract: see *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") and *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and Anor and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*"), there are no words here that fall to be interpreted in relation to a certain context.

23 The Defendant's submission on this point is therefore erroneous. It is evident, and I so find, that when the Sub-contract was entered into there was no variation claims procedure agreed upon on the face of the contract. As noted above, it is common ground that there are no oral terms being alleged or relied on.

Is there an implied term for a binding claims procedure?

24 The Defendant also contended that the specific claims procedure was to be implied in law or in fact into the Sub-contract. The question thus arises as to whether such a claims procedure can indeed be implied.

25 In *Sembcorp Marine* the Court of Appeal held that:

(a) "interpretation" was the process of ascertaining the meaning of expression in a contract; such a process fell short where there was a gap in the contract because the contract was silent on a particular issue and there was no language to which an appropriate meaning could be ascribed;

(b) the implication of terms in fact was the process by which the court filled in the gap in the contract to give effect to the parties' presumed intentions;

(c) not all gaps in a contract are true gaps in the sense that they may be remedied by the implication of a term; a gap could arise because:

(i) the parties did not contemplate the issue at all and so left a gap;

(ii) the parties contemplated the issue but chose not to provide a term for it because they mistakenly thought that the express terms of the contract had been adequately addressed; and

(iii) the parties contemplated the issue but chose not to provide any term for it because they could not agree on a solution;

it was only in scenario (i) that it would be appropriate for a court to imply a term into the parties' contract;

(d) the business efficacy and officious bystander test used in conjunction and complimentarily remained the prevailing approach for the implication of terms under Singapore law; and

(e) business efficacy was the normative basis for the implication of the term and the test was

helpful in identifying the existence of a *lacuna*; it did not assist in identifying just what more was needed on the basis of the parties' presumed intentions to fill the gap with any degree of precision, that was where the officious bystander test served an instrumental function.

26 The facts of this case fell within the situation described in [25(c)(i)]. The parties clearly contemplated changes effected by a VO but omitted to provide for the form of the VO or the procedure for effecting changes. It is also possible for this case to fall within the situation described in [25(c)(ii)] above, however, there was no evidence to suggest this to be the case.

27 The various types of variation procedures set out in standard forms in use in Singapore vary and are fairly detailed. For example, they cater for written or oral orders for variation, some descend to the particular forms that must be used and others state the level of detailed supporting documents and time-lines which may or may not lead to extensions of time. Reference can be made to provisions like General Condition 12 of the *Singapore Institute of Architects Articles and Conditions of Building Contract: Lump Sum Contract* (Singapore Institute of Architects, 9th Ed, 2011) or cl 18 (Variations) and 19 (Subcontract Sum—Valuation of Variations) of the *Public Sector Standard Conditions of Contract for Construction Works* (Building and Construction Authority, 6th Ed, 2008).

28 The Defendant contended for a fairly detailed procedure to be adhered to, see [32] below. I do not think it permissible for a court to imply such detailed provisions into this kind of sub-contract and then hold that if it is not followed there is no entitlement to payment. This would amount to writing the contract for the parties and inserting a condition precedent.

29 Clause 1 of the Plaintiff's Quotation clearly contemplated that any changes had to be effected by a VO. In my judgment, all that can be implied into this contract are the following elements adapted from Stephen Furst and Sir Vivian Ramsey, *Keating on Building Contracts* (Sweet & Maxwell, 9th Ed, 2012) ("*Keating*") at para 4-023:

(a) that variations or changes are to be made by a VO;

(b) that it is a change, whether by way of addition or omission in the work for which the contract sum is payable and that these changes are permissible in that they are contemplated by the parties, and in this case by the provision of quantities of itemised work and the unit rates expressed therein;

(c) that there is a promise express or implied to pay for the additional work so ordered and that the lump sum be adjusted by the omissions or additions; and

(d) that the party or any agent who ordered the work was authorised to do so.

Keating also goes on to stipulate a fifth condition, that any condition precedent to payment imposed by the contract has been fulfilled; I deal with this, and the issue of "additional work", *ie*, work that is outside the scope of the contract, below. Beyond these basic requirements, no claims procedure can be implied as such provisions are in their nature detailed, step-by-step processes which contain specific requirements, like being in writing or if oral, to be confirmed in writing within a certain time limit. As noted above, it is not the function of the court to re-write the contract for the parties.

The subsequent conduct of the parties

30 It is nonetheless possible for the parties to have subsequently agreed to adopt a particular

procedure. However I find that there is no evidence before me to find that any particular procedure was subsequently agreed upon by parties.

31 I have already noted at [11]–[13] above that the Plaintiff categorised the "variations" to the Sub-contract as follows—the additions and omissions which fell within the Sub-contract were one group and the "additional" works which it treated as being outside the Sub-contract were another. What emerged from the evidence was that different procedures were adopted in relation to the claims for variations (*ie*, "additions and omissions") as set out in Serial No A of Annex A of the CSOC and the claims for what the Plaintiff termed "additional work" as set out in Serial No B of Annex A of the CSOC.

32 The Defendant admitted that the Architect's Instructions had been issued [note: 21] and contended that the Plaintiff had to adhere to the following procedure in respect of its variation and additional work claims: [note: 22]

(a) first, identify the VO instruction;

(b) second, identify the approved shop drawing that is affected by the VO in question;

(c) third, identify the change required by the VO in question;

(d) fourth, quantify the variation in question and price the VO ("the VO Quotation");

(e) fifth, present and justify with supporting documentation (with documentary evidence) the VO Quotation to the Defendants for their review in a timely manner; and

(f) sixth, obtain a confirmation from the Defendants before proceeding with the VO.

33 I have noted above the shortcomings of the Sub-contract documentation and the lack of precision in the language used by parties. This imprecision of language also plagued the cross-examination of both Mr Chow and Mr Gan.

34 During the course of cross-examination, it appeared that the Defendant was placing some reliance on the manner in which the Plaintiff had claimed for what it termed "additional works" *ie* through VOs No 1–10. This was apparent from Mr Ng's cross-examination of Mr Chow: [note: 23]

Q: Did it not occur to you, Mr Chow, to submit a VO claim which is similar to the same VO claim as the additional work for these items?

A: Er, basically this is part of the contracts, I don't need to submit another VO claims [*sic*] because we apply the same rate in the contracts.

…

Q: Mr Chow, if you say that, does it not go against … your contract … [Clause 1]?

A: Yes. But doesn't mean that I have to inform the main contractors to entitle [*sic*] for this VO. If any changes is ---I'm entitled to a VO but I don't need to inform them because they are the one [*sic*] who inform me on any VO works."

As well as from Mr Gan's AEIC: [note: 24]

20. [The Plaintiffs] have never claimed for such additional works under any VOs although they had every opportunity to do so, in fact [the Plaintiffs] were chased by [the Defendants] for their submission for VOs which was not done…

21. At the end of the day, there were 10 variation items claimed by [the Plaintiffs] which were eventually certified by the Defendants and [the Employer], none of these relates [*sic*] to the additional 1259.27 sq m claim or the omissions as claimed.

22 At this juncture, I wish to highlight that even after August 2010, the door was not shut on [the Plaintiffs], as this Court will see in the VOs submitted by [the Plaintiffs], even as late as 11 September 2010, [the Plaintiffs] had submitted VO. In fact, there is even a VO which was submitted on 25 January 2011 which was even after the termination of [the Plaintiffs]. …

And further in Mr Gan's (somewhat garbled) evidence under cross-examination:

A: No, you---you should claim under variation as in changes in design like those items that they have always been claiming progressively, the ten items, and during progressively, maybe they have only claimed three items or four items, right? During the final claim, they were still --- a ten item that they have claimed under VO, but why didn't they claim---if there's really some changes in that area that you're talking about, they should highlight and claim what is this work [*sic*]? You cannot change the lump sum figure. The lump sum figure can only be changed by variations --- justifying where is the location, what are the changes in design, you know, and all that and the rates and the areas applicable.

35 As regards the latter items of "additional work", Mr Chow described in his AEIC how the Plaintiff had been instructed to carry out the various items of additional works—the process, although slightly different from item to item, contained the following key stages: [note: 25]

(a) the Defendant would confirm with the Architects that the additional works were to be carried out;

(b) the Defendant would then inform the Plaintiff to submit a quotation for the additional work being requested;

(c) after submitting its quotation, the Plaintiff would then be instructed by the Defendant to proceed with the works;

(d) after completion of the additional works, the Defendant would request from the Architect's Instructions for the additional works;

(e) the Architect's Instruction will be issued together with a requisition for VO;

(f) the Plaintiff submitted its claims for these items of additional work as "VO claims".

VOs No 1–10 were eventually certified by the Defendants and WTP. It is significant to note that the procedure as described above is analogous to the procedure the Defendant alleges the Plaintiff had to adhere to.

36 However, the above procedure was not followed as regards the "additions and omissions". To summarise Mr Chow's evidence, the procedure as regards "additions and omissions" was as follows:

(a) the Plaintiff would receive the Architect's Instructions through the Defendant; [note: 26]

(b) the Plaintiff would carry out the instructions and also prepare as-built drawings which it then submitted to the Defendant; [note: 27]

(c) the Defendant's quantity surveyor would have to verify the additions and omissions being claimed by the Plaintiff. [note: 28]

As can be seen, no quotations were provided by the Plaintiff and ultimately, the Plaintiff claimed for these additions and omissions in Progress Payment Claim No 11 and not as a "VO claim".

37 Under cross-examination, Mr Chow sought to explain why the Plaintiff followed different procedures in respect of these two categories of claims. The relevant portions of his evidence are extracted here:

A: Because basically the changes is---from this contract, the major changes is from the claddings to the curtain wall. *So these are all initiate* [*sic*] *by the architects and the owner and also with the presence of the main contractors. So all this adjustment, we --- we don't even --- I mean we don't have to highlight to them on the a---adjustments that; we need to tell them it's a VO*. It's basically that there's a change of design, then there is a change of quantity that those affected area: example, that you remove 100 metres of claddings, and you put 100 metres square of curtain wall into that area, so that will so-called a change of design. [note: 29]

…

A: Earlier you asked me about the --- …10 VOs that we have. *This 10 VO is out of the scope of those that in the contract. That's why out of these 10 VO, … we provide a quotations and the costing to the main contractors for their claims to the owners and architects*. Whereas in this clause, we are talking about works and design as per approved shop drawing, those that… within our scope. [note: 30]

…

Q: Did it not occur to you, Mr Chow, to submit a VO claim which is similar to the same VO claim as the additional work for these items?

A: Er, basically this is part of the contracts, I don't need to submit another VO claims *because we apply the same rate in the contracts*.

Q: Mr Chow, if you say that, does it not go against [recites cl 1 of Plaintiff's Quotation]

A: Yes. But doesn't mean that I have to inform the main contractors to entitle for this VO. If any changes is --- I'm entitled to a VO but *I don't need to inform them because they are the one who inform me on any VO works*. [note: 31]

[emphasis added]

The gist of Mr Chow's evidence, which I accept, was that unlike the additional works, the additions and omissions fell *within* the scope of the Sub-contract. Thus the rates contained in the BQ (which

formed part of the Plaintiff's Quotation) applied; there was no need for the Plaintiff to submit another quotation. Further, Mr Chow averred that there was no need for the Plaintiff to inform the Defendant of their entitlement to a VO as the Architect's Instructions pertaining to the design changes were received by the Plaintiff through the Defendant. This was not challenged by the Defendant: [note: 32]

> Q: Okay, Mr Chow, I'll ask you a very short question on this point. Other than what you submitted in the progress claim, are there any notification [*sic*] from your side, [the Plaintiff], stating that this is a variation? I.e., an addition or omission to the sub-contract?
>
> A: No, these instructions comes [*sic*] from the main contractors to me. It's not I informing them. It's they inform me that there's a changes I need to do.
>
> Q: Okay.
>
> A: Yah.

Furthermore, the Defendant admits, at para 32 of its defence and counterclaim (second amendment), that the Architects issued the revised drawings to the Plaintiff.

38 I accept that the ten items of "additional work" being claimed by the Plaintiff did *not* fall within the BQ included in the Plaintiff's Quotation which described the scope of work to be carried out by the Plaintiff. Clearly therefore, the additional works were not governed by the terms of the Sub-contract and would have to be carried out by fresh agreement of the parties. In this regard, the procedure spelled out at [35] above is entirely consistent with the entering into a fresh agreement by parties. In light of this, the mere fact that the claims in relation to the items of additional work were made in a certain way is not conclusive as to the existence of any claims procedure in relation to the omissions and additions and *vice versa*.

39 In any case, I find that the Defendant could not rely on evidence of the Plaintiff's subsequent conduct pertaining to its claims for the additional works to interpret cl 1 of the Plaintiff's Quotation. This clearly could not have been extrinsic evidence of facts and circumstances which were (or ought to have been) in the minds of the parties at the material time (*ie*, when the contract was drafted and entered into). Logically, by virtue of being works that fall outside the Sub-contract, the additional works (and its attendant claims procedure) could not have been within either party's contemplation at the time the Sub-contract was entered into, except as some vague possibility.

40 For the foregoing reasons, I find that cl 1 cannot be interpreted as stipulating the claims procedure as alleged by the Defendant. Insofar as the Defendant was suggesting that the subsequent conduct of the Plaintiff in claiming for their additional works in a certain manner amounted to evidence of a variation of the Sub-contract to include the alleged claims procedure (which I note is *not* their pleaded case), the mere fact that the Plaintiff had acted in a certain way would not suffice to show that it had agreed to a variation on such terms.

41 Moreover, I note that no further evidence was adduced showing that the Plaintiff had subsequently agreed to abide by this particular claims procedure. The evidence showed the following:

(a) the Plaintiff proceeded to carry out the variation works in accordance with revised Construction Drawings A-113 (rev b) and A-114 as issued by the Architects; and

(b) subsequently, Architects' Instruction K77-AI-77 was issued on 20 January 2011 to regularise the Architect's Instructions to proceed with the provision of the glass curtain-wall

system in lieu of aluminium cladding for the façade of the office block.

This was certainly not evidence of an agreed procedure.

Was there an implied condition precedent of giving reasonable notice to the Defendant prior to undertaking and/or carrying out the variation order and/or additional works?

42 The Defendant pleaded that it was a condition precedent to payment by the Defendant, implied into the Sub-contract in law or in fact, that the Plaintiff give reasonable notice to the Defendant prior to undertaking and/or carrying out a VO and/or additional works. [note: 33]

43 Mr Chow accepted that in his experience as both a sub-contractor and main contractor, any changes in quantities will ultimately have to be certified by the Architects (who had been employed by the owners): [note: 34]

> Q: And this goes up to the --- whatever instructions that comes in [*sic*] from the owner or architect is going through the main contractor, am I correct?
>
> A: Yes.
>
> Q: So, whatever additional omissions, do you agree with me, Mr Chow, that such di---digi---the channel is for you to go – as a sub-contractor – to go through the main contractor on your claims eventually at the end of the day?
>
> A: Yes.
>
> …
>
> Q: Right, so at the end of the day, the main contractor pays you for any additions or omissions as certified by the architect or the owners.
>
> A: *Yes*.
>
> Q: Correct?
>
> A: Yes.
>
> [emphasis added]

44 I have already noted above that the Plaintiff proceeded to carry out the variation works in accordance with revised Construction Drawings A-113 (rev b) and A-114 issued by the Architects and subsequently, Architect's Instruction K77-AI-77 was issued on 20 January 2011 to regularise these Architect's Instructions to proceed with the provision of the glass curtain wall system in lieu of aluminium cladding for the façade of the office block.

45 I deal first with the Plaintiff's contention that a condition precedent must be expressly stated or provided for in a contract and cannot be implied into a contract. I note that the Plaintiff has not provided any authority for this proposition and that further in both *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd* [2005] 2 SLR(R) 651 (at [95]–[101]) and *Asirham Investment Pte Ltd v JSI Shipping (S) Pte Ltd* [2008] 1 SLR(R) 117 (at [16]), the High Court considered the possibility of implying condition precedents, although in both cases, it was eventually held that no condition

precedent could be implied in the circumstances. I am of the view therefore that there cannot be a strict rule prohibiting the implication of condition precedents into contract subject to the principles which I set forth below. It must depend on the facts and circumstances of each case.

46 As noted above in *Sembcorp Marine* the Court of Appeal ruled that the "business efficacy" and "officious bystander" tests were to be used in a complementary manner in order to determine whether the term(s) should be implied in fact and how the term(s) should be implied (at [91]):

> … the officious bystander test: it is the device that enables the court to define that term which can be said to reflect the parties' presumed intention *vis-à-vis* the gap in the contract. While the business efficacy test is helpful to identify the existence of a *lacuna*, that is to say that for the sake of the efficacy of the contract something more needs to be added into the contract, it does not assist in identifying what that "something more" is with any degree of precision. That is where the officious bystander test serves an instrumental function.

The Court of Appeal also confirmed in *Sembcorp Marine* at [82] the position it had taken in earlier cases like *Foo Jong Peng and others v Phua Kiah Mai and another* [2012] 4 SLR 1267, that the standard for the implication of such terms remains one of *necessity* not reasonableness.

47 The Court of Appeal thus held in *Sembcorp Marine* at [101] that the implication of terms in fact is to be considered using a three-step process:

> (a) The first step is to ascertain how the gap in the contract arises. Implication will be considered only if the court discerns that the gap arose because the parties did not contemplate the gap.
>
> (b) At the second step, the court considers whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy.
>
> (c) Finally, the court considers the specific term to be implied. This must be one which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at the time of the contract. If it is not possible to find such a clear response, then, the gap persists and the consequences of that gap ensue.

48 I am not satisfied that the above tests have been met and find that it was unnecessary to imply the alleged claims procedure into the contract, much less as an onerous condition precedent to payment. As already observed above at [37], there was no need for the Plaintiff to price the variations as the applicable rates were already contained in the Sub-contract. Nor was there a need to obtain confirmation from the Defendant before proceeding with the works as it was not disputed by the Defendant that the instructions pertaining to the design changes came from the Architects and I accept the unchallenged evidence of Mr Chow that these instructions or revised drawings were transmitted through the Defendant and/or its employees. There is thus no question of the Defendant being caught by surprise by the *existence* of such claims. There is also no question that the request for the changes came from someone who had the authority to make such a request. As for the *quantum* of these claims, it is clear that it was ultimately for the Defendant to verify the Plaintiff's claims for the variation works carried out by comparing the architectural drawings, the approved shop drawings and the as-built drawings submitted by the Plaintiff. [note: 35]

49 Turning to the Defendant's alternative contention that the claims procedure will be implied in law, I observe that such an implication must not be made lightly since once such term has been implied, such a term will be implied in *all future contracts of that particular type*: see *Forefront*

Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd [2006] 1 SLR(R) 927 (at [42]). Besides its assertion in its defence that the claims procedure ought to be implied in law by virtue of the fact that the Sub-contract was priced at a lump sum, no further arguments were furnished by the Defendant. There is in my view, no reason to imply such a claims procedure in law where such matters would be more appropriately left to the freedom of the contracting parties.

50 I find, therefore, that there was no claims procedure, as alleged by the Defendant, implied into the contract as condition precedent to payment.

Acquiescence, waiver and estoppel

51 The Defendant also puts forward a defence of acquiescence, waiver and estoppel on its pleadings in relation to the ten additional items (see paras 15.1 to 18 of their defence), *viz*, even if the Plaintiff is found to be entitled to payment, it had known of the Employer's own quantifications of the ten additional items and had not objected to these quantifications. The Defendant thus submits that the Plaintiff should be deemed to have acquiesced to the relevant quantifications and is thus estopped from denying the quantifications and/or had waived its right to any alternative quantifications by reason of its acquiescence.

52 At this juncture, I observe that insofar as this pertains only to quantifications and not to liability, this will not be the appropriate stage to consider these arguments. In any case, I find that the Defendant has not made out its case of estoppel by acquiescence or waiver. I shall now give my reasons.

53 As regards estoppel by acquiescence, it is trite law that to successfully found an estoppel, three elements must be shown, namely: a representation of fact on the part of the party, against whom the estoppel is sought to be raised; reliance on the part of the party seeking to raise the estoppel; that results in detriment to the party seeking to raise the estoppel.

54 There is no evidence that the Plaintiff was ever privy to WTP's valuation of the ten additional items. Mr Chow's evidence was clear—the Plaintiff never received WTP's valuations. [note: 36] It is noted that his evidence was not challenged subsequently. Mr Gan's evidence under cross-examination, on the other hand, was far more equivocal. He first admitted that he did not know if WTP's valuations of the claims were forwarded to the Plaintiff. [note: 37] Subsequently, he averred that there was no need for the Plaintiff to know of WTP's valuations. [note: 38] No evidence was adduced in support of the Defendant's allegation in its defence that the Plaintiff was informed of the relevant valuations orally. It is also undisputed that only four payment responses were made to the Plaintiff's progress claims and none of them were concerned with the material progress claim (*ie*, Progress Payment Claim No 11). For the above reasons, I accept that the Plaintiff did not know of WTP's valuations. As such, it could not have possibly acquiesced to a state of affairs which it was unaware of: see *LS Investment Pte Ltd v Majlis Ugama Islam Singapura* [1998] 3 SLR(R) 369 at [40].

55 In any case, the Defendant has failed to show how it relied on the Plaintiff's alleged acquiescence to its detriment. In this regard, I note Mr Gan's admission under cross-examination that the whole of the Plaintiff's claims were claimed by the Defendant against the Employer in arbitration. [note: 39] The Defendant was not prejudiced thus in the arbitration proceedings.

56 Having held above at [54] that there was no evidence that the Plaintiff had acquiesced to the relevant quantifications, it must follow that there is no basis for the Defendant's argument that the Plaintiff had waived its right to alternative quantifications.

Financing Charges

57 Clause 3 of the Defendant's Works Order provides: [note: 40]

> **Terms of Payment**
>
> Monthly progressive payments in accordance with standard SOP… There will be a 10% retention of the contract amount. 5% retention sum will be released upon completion of work and balance 5% will be 6 months upon completion of work.

58 "SOP" refers to the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the Act"). Section 11(1) of the Act requires that a payment response to a payment claim be made within the stipulated period. In the present case, the Defendant only provided four responses to the Plaintiff's 11 payment claims. In light of my above finding that the Defendant is liable to pay for the variations and extra works, the Defendant is plainly in breach of cl 3 of the Defendant's Works Order.

59 A dispute arose at trial as regards the date on which the Plaintiff was deemed to have completed its work. Mr Gan had amended para 73 of his AEIC, which initially stated that the Plaintiff completed its work on 5 October 2010 to say instead that the Plaintiff substantially completed its work on 23 October 2010.

60 As the Plaintiff's counsel pointed out, this change took place more than three weeks after his AEIC had been affirmed. I note also that this change took place *after* both parties had filed their respective lead counsel statements on 24 June 2013; pertinently, it was stated in the Defendant's lead counsel statement that the works under the Sub-contract were completed on 5 October 2013 was a fact *not* in dispute. I am thus inclined to give Mr Gan's amendment to his AEIC little weight and find that the Plaintiff substantially completed its work on 5 October 2010.

61 In any case, parties do not dispute that the first 5% of the retention sum was not released to the Plaintiff on the completion of the Sub-contract works and neither was the balance 5% released to the Plaintiff six months after completion of the Sub-contract works (regardless of the dates alleged). As such, the Defendant was in breach of cl 3 of the Defendant's Works Order.

62 For the above reasons, the Defendant is liable to pay the Plaintiff damages by way of financing charges and interest incurred due to its breach.

Delay

63 The experts used different works programs as the basis for their analysis. The Plaintiff's expert, Mr Koh Beng Soon ("Mr Koh"), had relied on the Rev 9 Program for his analysis. The Defendant's expert, Mr Daniel Thomas Connors ("Mr Connors"), had on the other hand relied on the the Rev 11 Program. According to Mr Gan, there were no other programmes between the Rev 9 and Rev 11 Programs, [note: 41] and the Rev 11 Program was based on discussions between himself and Mr Chow about the Plaintiff's execution of their works. [note: 42] The evidence of Mr Chow about the genesis of the Rev 11 Program was, however, more equivocal—he claimed that he could not recall if he ever gave feedback on the program [note: 43] but also admitted that it was possible that Mr Gan could have discussed the Rev 11 Program with him. [note: 44]

64 The Plaintiff's Quotation dated provides "Work Schedule: To be discussed." The Defendant's

Works Order provides: "Contract Period … According to the main contractor's master program." I accept that domestic sub-contractors often agree to follow the main contractor's program and to fit their works to accommodate the main contractor. However, this very often gives rise to disputes when the main contractor's work schedule is extended beyond what is considered a reasonable extension or when there a changes which shorten the time within which the domestic sub-contractor has to carry out its procurement and erection. Questions can also arise as to who owns the "float". The words used in the Defendant's Works Order are not exactly apt as it refers to the "Contract Period" which is not the work schedule or bar chart program. The following words "according to the main contractor's master program" can be read in relation to, *ie*, in fixing, the contract period or it can be read there is a master bar chart program which governs the sub-contractor's work schedule.

65 At trial, both counsel agreed that all I needed to determine is what the "main contractor's master program" in cl 4 of the Defendant's Works Order was referring to and the credibility and weight to be attached to the respective experts' testimony on why they chose the respective programs. [note: 45] As noted the Plaintiff's expert, Mr Koh, chose the Rev 9 Program to work out that the delay attributable to the Plaintiff. The Defendant's expert, Mr Connors, chose the Rev 11 Program to work out the delays attributable to the Plaintiff. Both parties accept that other parties, including the main contractor, also contributed to the delays.

66 In my view, the following facts were highly pertinent:

(a) Only the Rev 9 Program was in existence when the Sub-contract was entered into. Thus, cl 4 of the Defendant's Works Order must have been referring to the Rev 9 Program. No evidence was adduced to show that the parties had subsequently agreed to vary the Sub-contract, such that the applicable master program was to be the Rev 11 Program. In this regard, I note that the decision of *Lim Chin San Contractors Pte Ltd v Sanchoon Builders Pte Ltd* [2005] SGHC 227 which was cited by the Defendant can be distinguished from the present case as the clause there provided that the sub-contractor carry out and complete the works "as may be requested *from time to time*" [emphasis added] (see [32] of the judgment). Such words or words to that effect are missing in this subcontract.

(b) The Rev 9 Program was the only program that had been approved and endorsed by the Architects. Mr Gan himself admitted under cross-examination that the Rev 11 Program had not been approved by the Architects. [note: 46]

(c) The minutes of the 30 September 2009 meeting recorded that the Defendant had confirmed that the Rev 11 Program was "no longer valid nor realistic". [note: 47] Although Mr Gan averred that the statement was not true, [note: 48] he was unable to furnish a satisfactory explanation why he had not made any attempt to correct the minutes.

(d) Mr Gan agreed with Mr Chow that it was "highly likely" and then later that it was "possible" that the Rev 9 Program was the program that had been pinned up at the site office. [note: 49] If this is true, the reasonable inference to draw must be that the Rev 9 Program was the applicable program at the material time; it would not make sense for an outdated program to be pinned up at the site office.

(e) Mr Gan averred that the Rev 9 Program had only been generated for the purpose of obtaining financing and tendered exhibit D5, an email from the Architects to the Defendant. In this regard, I note that the subjective intention of the Defendant as regards the purpose of the Rev 9 Program does not render it devoid of contractual effect as between it and the Plaintiff.

67 At this juncture, I think it apposite to deal with some of the issues raised by the Defendant's counsel about Mr Chow's evidence. The Defendant's counsel pointed out Mr Chow's own evidence that the Rev 9 Program was never given to the Plaintiff although he saw it pinned up on a notice board on site. [note: 50] The Defendant's counsel also noted that it was Mr Chow's evidence was that the Rev 11 Program was a catch-up program for the site works and would be frequently updated on site at the request of the Architects and the Employer. [note: 51]

68 However, the Defendant's counsel neglected to mention that Mr Chow himself had nevertheless accepted that the Rev 9 Program was binding on the Plaintiff: [note: 52]

> Q: And you said this programme is the one you have to follow.
>
> A: Because that is the---the late---that is the updated progress, er, when we signed the contracts.

Mr Chow also averred that as the work was already delayed, the Plaintiff had given its own preliminary schedule which was subject to the Defendant's approval. [note: 53] He further stated that subsequently, site progress was not measured against the Rev 11 Program as it was unrealistic and thus at each site progress meeting, every sub-contractor would have to forward their schedules to the Architects. [note: 54] In my view, Mr Chow's evidence was consistent with the other facts at [66] above.

69 For the above reasons, I find that the "main contractor's master program" in cl 4 of the Defendant's Works Order referred to the Rev 9 Program and not the Rev 11 Program. On balance, I accept Mr Koh's expert report which was based on the Rev 9 Program.

Gypsum blocks

Acoustic specifications

70 The first bone of contention between the parties was whether there was any agreement that the gypsum blocks supplied were to be of a particular acoustic specification and what this acoustic specification was.

71 According to the Defendant's pleaded case, the Defendant had provided the Plaintiffs, prior to the conclusion of the contract, with a specification for the supply of gypsum blocks ("the Defendant's Specifications") as approved by the architects of the Hotel which expressly stated, *inter alia*, that the acoustic insulation:

> (a) for a single-layer 80mm-thick gypsum block sound insulation shall be Sound Transmission Class ("STC") 37;
>
> (b) and the acoustic insulation for a single-layer 100mm-thick gypsum block shall be STC 41.

STC is the rating given according to the amount of sound reduction a building partition provides.

72 The Defendant further pleaded that the Plaintiff had submitted a product introduction in response to the Defendant's Specifications by email to Mr Gan on or about 15 October 2009 which stated, *inter alia*, that:

(a) a single-layer 80mm-thick gypsum block would satisfy an acoustic rating of STC 45;

(b) a double-layer 80mm-thick gypsum block would satisfy an acoustic rating of STC 50.

73 The Defendant averred that it was pursuant to the above representation that the Plaintiff's product introduction would equal or exceed the Defendant's Specifications in terms of acoustics ("the Acoustic Specifications") that the Defendant agreed to order the gypsum block from the Plaintiffs. However, upon testing by TUV SBD PSB Pte Ltd of the double-layer gypsum block wall system made up of gypsum blocks supplied by the Plaintiffs, twice, it only achieved an acoustic rating of STC 39 and STC 40 respectively, and did not meet the Architect's specification of STC 50.

74 It should be pointed out from the outset that no 15 October 2009 email was adduced. However, I note that the Plaintiff's procurement officer Rena Lee ("Ms Lee") sent Mr Gan an email on 6 October 2009 with an attachment of a brochure from Jinan Jinluyuan Building Material Co Ltd ("Jinan"), and then further on 7 October 2009 with an attached table of specifications of the 100mm-thick gypsum blocks first in Chinese then in English. However, there was nothing in the emails or the attachments to support the Defendant's pleadings as stated at [72(a)]–[73] above.

75 More pertinently, these emails came long after Plaintiff's quotation for the supply of Augreen gypsum blocks of 80mm and 100mm thickness dated 22 August 2009 and the Defendant's acceptance of the Plaintiff's quotation by their purchase order dated 28 August 2009. Logically, therefore, it could not have been pursuant to product introductions made in October that the Defendant accepted the Plaintiff's quotation and made their purchase order in August. It is thus no wonder that the Defendant's case subsequently acquired a somewhat different flavour.

76 In his AEIC, Mr Liew stated that the Architects had approved the use of Augreen blocks for an acoustic wall system which comprised of rockwool insulation sandwiched between two layers of gypsum boards. However as the Defendant found the price and conditions quoted by the sole supplier of Augreen blocks in Singapore too onerous, Mr Liew approached Mr Chow to source for the same product in China. Mr Liew averred that Mr Chow had informed him that he would be able to obtain Augreen blocks by approaching the Chinese supplier of the blocks directly. Mr Chow then instructed Ms Lee to email Mr Liew on 31 July 2009 with a brochure from the proposed supplier Jinan. Satisfied from the brochure that the products were indeed "Augreen blocks" and that the prices quoted by Mr Chow were competitive, Mr Liew instructed Mr Gan to follow up on the matter and subsequently the purchase order was made pursuant to a quotation from the Plaintiff. [note: 55]

77 Pertinently, it is observed that nowhere in the above account did Mr Liew inform Mr Chow that the acoustic wall system had an acoustic rating at least STC 50. This was in fact the Plaintiff's case —that Mr Liew had only spoken to Mr Chow about obtaining Augreen gypsum blocks for acoustic soundproofing of the hotel room partitions and that no acoustic specifications had been given to Mr Chow. [note: 56] Subsequently under cross examination, Mr Liew confirmed Mr Chow's account: [note: 57]

Q: Right. And did you tell him the specifications---the acoustic specification of this acoustic wall? In other words, to be more specific, did you tell him that, "I am supposed to erect an acoustic wall system with STC of 50"? Did you tell him specifically that?

A: *No.* Er, very simple, *I just told Mr Steven to get those products and this brand---*

Q: Right.

A: --- where I have to prove it to the architects. And if these systems or how --- it's how, it's nothing to do with him.

Q: Yes.

A: Yah.

Q: Thank you. So you are --- he's just obliged to supply the gypsum blocks to you?

A: To the brand that I want.

[emphasis added]

78 In the circumstances, I find that there was no agreement between the parties that the acoustic wall system constructed from the gypsum blocks supplied by the Plaintiff had to achieve an acoustic specification of at least STC 50.

79 However, I also find that the parties did agree that Augreen gypsum blocks from Jinan will be supplied by the Plaintiff to the Defendant. Notwithstanding Plaintiff counsel's submission that "Augreen" was merely a proprietary name for a product under the sole agency of Optimum Global Pte Ltd, it was clear to me from the express wording of the documents that comprised the supply contract and the surrounding circumstances that both parties contemplated sourcing for the Augreen gypsum blocks directly from the Chinese manufacturer Jinan.

80 First, it was expressly stated in both the Plaintiff's quotation and the Defendant's purchase order that the contract would be for the supply of "Augreen Gypsum Blocks". Second, it was not disputed by Mr Chow or Mr Liew that their discussions pertained specifically to the supply of Augreen gypsum blocks [note: 58] and it was pursuant to these discussions that Mr Chow instructed Ms Lee to send Mr Liew a brochure from Jinan for his consideration. [note: 59] Finally, it is pertinent that the Plaintiff's Ms Lee had travelled to Jinan's factory to verify that these were Augreen blocks before the Plaintiff's Quotation was submitted to the Defendant. [note: 60]

81 Insofar as the gypsum blocks had to meet the acoustic specifications of an Augreen gypsum block, I note that the Augreen brochure provided that the acoustic rating for an 80mm-thick block was STC 37 and for a 100mm-thick block, it was STC 41. [note: 61] To date, however, no evidence has been adduced by the Defendant that the gypsum blocks supplied by the Plaintiff did not meet the aforementioned acoustic ratings of STC 37 and STC 41 respectively. Further, testing had been conducted not on the individual gypsum blocks themselves, but on the entire acoustic wall. The results from the tests are thus not helpful for the purpose of ascertaining if the individual blocks have met the respective acoustic ratings of STC 37 and STC 41.

82 I turn now to deal briefly with the Defendant's contention that the gypsum blocks supplied by the Plaintiff were not Augreen blocks from Jinan but Dekai desulfurization gypsum blocks ("Dekai blocks") from Beijing Guohua Jiedi Power Technology Corporation Ltd ("Beijing Guohua"). I think it pertinent to note that this was not pleaded in the Defendant's counterclaim, but rather, was raised by Mr Liew in his AEIC, where he alleged that one of the Defendant's staff had discovered a brochure in an unopened pallet which identified the products as being Dekai blocks from Beijing Guohua. [note: 62]

83 Under cross-examination, Mr Liew further claimed that the Plaintiff's own staff had informed him

that the blocks came from Beijing Guohua. [note: 63] I am not inclined to place any weight on his statement under cross-examination; to my mind, it is very odd that such an important fact was not stated in Mr Liew's AEIC. The reasonable inference that can be drawn from this is that Mr Liew's evidence under cross-examination was simply an afterthought.

84 I note, however, that besides the brochure there was also a letter attached to an email from kencui@eainstruments.com.cn to Ms Lee and Mr Chow stating that there was "[c]argo loading from Beijing Gypsum Block Factory". [note: 64] This document was in the parties' agreed bundle, to which the parties only agreed to authenticity of the documents, but not to the truth of the contents stated therein. Unfortunately, the Defendant's counsel did not bring this document to the court's attention; nor was the document put to Mr Chow in cross-examination. As I warned parties at the start of trial, I would attribute such weight as I saw fit should the document(s) that were not be put to the witnesses. [note: 65] In the circumstances, I found it unsafe to draw any inferences from this document as it had not been tested in cross-examination.

85 No further evidence was adduced to show that the gypsum blocks supplied by the Plaintiff were Dekai blocks from Beijing Guohua. The burden of proof here falls on the Defendant and I am not satisfied that they have discharged it in the circumstances.

Breach of the Sale of Goods Act

86 For the reasons articulated at [80]–[84] above, I find that there is no basis for the Defendant's allegation that the Plaintiff was in breach of s 13(1) of the Sale of Goods Act (Cap 393, 1999 Rev Ed) ("the SOGA").

87 I turn now to the Defendant's contention that the Plaintiff was in breach of s 14 of the SOGA. I note that the Defendant's counterclaim does not specify which subsection of s 14 of the SOGA it is relying on. However, it would appear from the language of its pleadings that it was relying on s 14(2) of the SOGA, which provides that where a seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of satisfactory quality. The following are, *inter alia*, aspects of the quality of goods which are non-exhaustive and should only be taken into account in the appropriate cases:

(a) fitness for all the purposes for which goods of the kind in question are commonly supplied;

(b) appearance and finish;

(c) freedom from minor defects;

(d) safety; and

(e) durability.

88 The burden of proof falls on the party alleging that the goods are not of satisfactory quality and satisfactory quality is to be determined by way of a broad-based inquiry directed at whether the reasonable person placed in the situation of the buyer would regard the quality of goods in question as satisfactory: *National Foods Ltd v Pars Ram Brothers (Pte) Ltd* [2007] 2 SLR(R) 1048 ("*National Foods Ltd*") at [58].

89 I note that there was no evidence adduced before me of the purposes for which the gypsum blocks are commonly supplied. Moreover, such a guideline may not be applicable for goods that have a

wide range of possible uses, especially those that are to be further transformed by a specialist manufacturer for his own purposes: *Balmoral Group Ltd v Borealis (UK) Ltd* [2006] 2 Lloyd's Rep 629 at [140]–[141]. This would appear to be the case here since the gypsum blocks were being used in the manufacture of an acoustic wall system.

90 In the circumstances, s 14(3) of the SOGA was probably the more appropriate subsection to rely on. It provides:

> Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known –
>
> (a) to the seller; or
>
> …
>
> any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the seller ...

91 The phrase "particular purpose" is used in the sense of being a "specified" or "stated" purpose which has been known or communicated: *National Foods Ltd* at [76]. As stated at [7] above, the "particular purpose" which the Defendant made known to the Plaintiff in the present case was the construction of an acoustic wall system *without any particular acoustic specifications*.

92 The burden of proof then shifts to the Plaintiff to show that the Defendant did not rely on the Plaintiff's skill and judgment, or that it was unreasonable for the Defendant to so rely: *National Foods Ltd* at [74(b)]. It is noted that reliance is presumed unless positively disproved or unless the seller can show it to have been unreasonable: *National Foods Ltd* at [81]. I note that the Plaintiff has not adduced any evidence to positively disprove the presumption of reliance.

93 The burden of proof then shifts back to the Defendant to show that the goods were not reasonably fit for such particular purpose. I am satisfied that they were since they were successfully used for the manufacture of acoustic walls that were sent for testing. I note further that it was not the Defendant's case that the gypsum blocks were not fit for the construction of the acoustic wall system but that they were unfit for the construction of an acoustic wall system of a particular acoustic specification.

94 In the circumstances, I find that s 14 of the SOGA was not breached. The Defendant's counterclaim thus failed and the Plaintiff is entitled to payment for the gypsum blocks that it delivered to the Defendant.

Conclusion

95 In the premises, subject to proof of quantum, which will be assessed hereafter, I find that:

(a) The Defendant is liable in principle to pay for the alleged variations to its Sub-contract works, as set out in Serial No. A and B of Annex A of the CSOC.

(b) The Defendant is liable to pay the Plaintiff damages by way of financing charges and

interest incurred due to its breach of cl 3 of the Defendant's Works Order.

(c) The Plaintiff's expert report is to be preferred and of the delay of 145 days, 22 days are solely attributable to the Plaintiff and another 20 days is attributable to the Plaintiff, Defendant and Defendant's other sub-contractors.

(d) The Defendant is also liable to pay the Plaintiff for the gypsum blocks sold and delivered to it to date. The Defendant's counterclaim is dismissed.

96 The parties are to address me on costs and seek direction for the quantum hearing.

[note: 1] NE 09.07.2013 3/5 – 3/9.

[note: 2] NE 09.07.2013 2/16 – 2/24 and 3/10 – 3/13.

[note: 3] NE 09.07.2013 2/25 – 3/12.

[note: 4] NE 09.07.13 35/19 – 35/21.

[note: 5] AB Vol 1 p 6.

[note: 6] AB Vol 1 pp 11 and 12.

[note: 7] Consolidated Statement of Claim (Amendment No. 1) ("CSOC") paras 6 – 7.

[note: 8] CSOC paras 8 – 9.

[note: 9] Defendant's Bundle of Progress Claims & Variation Orders pp 96 – 126.

[note: 10] NE 09.07.13 61 – 64.

[note: 11] NE 10.07.13 128.

[note: 12] NE 10.07.13 130 – 131.

[note: 13] NE 09.07.13 9/16 – 9/20.

[note: 14] NE 10.07.13 128.

[note: 15] Gan Chee Keong's Affidavit of Evidence-in-Chief ("GCK AEIC") para 13.

[note: 16] NE 09.07.13 12/24.

[note: 17] NE 09.07.13 9/13 – 9/25.

[note: 18] NE 09.07.13 13/3 – 13/6.

[note: 19] NE 09.07.13 13/9 – 13/28.

[note: 20] AB Vol 1 p 6.

[note: 21] Consolidated Defence and Counterclaim (Amendment No. 2) ("CDC") para 48.

[note: 22] CDC paras 8 – 10.

[note: 23] NE 09.07.2013 122/13 – 122/14.

[note: 24] GCK AEIC paras 20 – 22.

[note: 25] Chow Mun Poh's Affidavit of Evidence-in-Chief paras 22 – 26.

[note: 26] NE 09.07.2013 121/29 – 122/2.

[note: 27] NE 09.07.2013 119/6 – 119/11.

[note: 28] NE 09.07.2013 119/15 – 119/19.

[note: 29] NE 09.07.2013 71/15 – 71/23.

[note: 30] NE 09.07.2013 74/22 – 74/27.

[note: 31] NE 09.07.2013 122/13 – 122/24.

[note: 32] NE 09.07.2013 121/29 – 122/4.

[note: 33] CDC paras 13 – 14.

[note: 34] NE 09.07.2013 64/9 – 64/26.

[note: 35] NE 09.07.13 120/1 – 120/11.

[note: 36] NE 09.07.2013 133/23 – 134/1.

[note: 37] NE 11.07.2013 15/24 – 16/3.

[note: 38] NE 11.07.2013 16/8 – 16/10.

[note: 39] NE 11.07.2013 74/6 – 74/10.

[note: 40] AB Vol 1 p 12.

[note: 41] NE 12.07.2013 58/21 – 58/31.

[note: 42] GCK AEIC para 48.

[note: 43] NE 09.07.2013 143/28 – 143/32.

[note: 44] NE 09.07.2013 144/20 – 144/24.

[note: 45] NE 09.07.2013 16/2 – 16/24.

[note: 46] NE 11.07.13 36/23 – 36/25.

[note: 47] AB Vol 3 p 836.

[note: 48] NE 11.07.2013 48/11 – 48/22; NE 11.07.2013 49/7 – 49/13.

[note: 49] NE 11.07.2013 43/3 – 43/32.

[note: 50] NE 09.07.2013 135/18 – 135/30.

[note: 51] NE 10.07.2013 25/13 – 25/23.

[note: 52] NE 09.07.2013 135/31 – 136/2.

[note: 53] NE 09.07.2013 137/13 – 137/29.

[note: 54] NE 10.07.2013 42/7 – 42/16.

[note: 55] Liew Sen Keong's Affidavit of Evidence-In-Chief ("LSK AEIC") paras 7 – 11.

[note: 56] NE 10.07.2013 97/13 – 98/6.

[note: 57] NE 11.07.2013 129/20 – 130/1.

[note: 58] NE 10.07.2013 98/1 – 98/8.

[note: 59] AB Vol 4 pp 1401 – 1407.

[note: 60] NE 10.07.2013 99/5 – 99/19.

[note: 61] AB Vol 4 p 1363.

[note: 62] LSK AEIC para 16.

[note: 63] NE 11.07.2013 132/4 – 132/19.

[note: 64] AB Vol 4 pp 1554 – 1555.

[note: 65] NE 09.07.2013 27/32 – 28/3.

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