

Engineering Construction Pte Ltd v Sanchoon Builders Pte Ltd
[2010] SGHC 293

Case Number : Originating Summons No 321 of 2010
Decision Date : 07 October 2010
Tribunal/Court : High Court
Coram : Quentin Loh J
Counsel Name(s) : Chan Chun Hwee Allan (C H Chan & Co); Philip Jeyaretnam, SC and Benjamin Yam (instructed) (Rodyk & Davidson LLC) for the plaintiff; Tan Joo Seng (Chong Chia & Lim LLC) for the defendant.
Parties : Engineering Construction Pte Ltd — Sanchoon Builders Pte Ltd

Arbitration

7 October 2010

Judgment reserved.

Quentin Loh J:

1 The Plaintiff, subcontractor to the main contractor Defendant, applied for leave under section 49 of the Arbitration Act (Cap 10, 2002 Rev Ed) to appeal to the Court on two questions of law arising from an Arbitration Award dated 1 February 2010.

The Facts

2 The Defendant tendered for and secured a contract from the West Coast–Ayer Rajah Town Council (“the Town Council”), to carry out certain improvement works at a lump sum of \$572,000. The works were broken down into Part A, for \$350,000 and Part B, for \$222,000. It will be convenient to briefly set out a break down of the works and the contract sums against each item:

Part A:

(1) Improvement works to pedestrian mall in front of Blocks 608 and 706, Clementi West Street 1 and 2:	\$ 59,000 \$ 60,000
(2) Covered Walkway beside Block 413A, Commonwealth Avenue:	\$ 41,000
(3) Drop off porches at Blocks 715 and 716, Clementi West Street 2:	\$ 33,000 \$ 25,000
(4) Extended covered walkway at Block 607, Clementi West Street 1 and Block 702, West Coast Road:	\$ 23,000 \$ 39,000
(5) Pavillion between Blocks 104C and 106A Depot Road Singapore:	\$ 70,000
Total:	\$350,000

Part B:

(1)	Improvement works to pedestrian mall in front of Blocks 726 and 727 Clementi West Street 2:	\$ 91,000
(2)	Covered Walkway beside Blocks 724, 725 and 727 Clementi West St 2:	\$ 94,000
(3)	Drop off porches at Block 710 Clementi West Street 2:	\$ 37,000
	Total:	\$222,000

The Defendant subcontracted the whole of the works to the Plaintiff by a letter dated 30 July 2004 for a lump sum of \$543,400. The 5% difference in price from the sum of \$572,000 was for the Defendant's profit and attendance.

3 The Defendant used its own subcontract form and this subcontract agreement was also dated 30 July 2004. The subcontract period of 6 months from 27 August 2004 to 26 February 2005 mirrored the period stipulated in the main contract between the Defendant and the Town Council.

4 Disputes arose between the Parties during the course of the subcontract works. In essence, the Plaintiff complained that their interim monthly payments, although certified and paid to the Defendant by the Town Council, were being unjustifiably withheld by the Defendant in breach of their contractual obligation to make payment within 10 days of payment by the Town Council. On the other hand, the Defendant complained that the Plaintiff had insufficient labour at site; was falling unacceptably behind in their progress of the works; lost their project manager and did not replace him and caused these and other complaints to be registered by the consultant, E M Services Pte Ltd ("the Consultant") against the Defendant.

5 Alleging a repudiatory breach by non-payment of Payment Certificates Nos. 2 and 3, the Plaintiff terminated its subcontract and abandoned the works on 10 January 2005. The Defendant alleged that the Plaintiff had repudiated the contract by stopping work without justification on 10 January 2005 and accepted their repudiatory breach. In addition, the Defendant alleged that the Plaintiff was in breach of their subcontract by failing to carry out their works diligently and with due expedition, resulting in the Defendant having to take over parts of their works; failed to have a competent project manager; and failed to rectify their defective works. The Defendant also alleged that the Consultant had documented the defaults of the Plaintiff.

6 The disputes were referred to arbitration in February 2006. The Singapore International Arbitration Centre ("SIAC") appointed Mr John Chung as the sole arbitrator ("the Arbitrator"), on 6 March 2006. The arbitration hearing was held on 31 August, 1, 3, 4 and 10 September 2009, written closing submissions were made on 8 October 2009 and reply submissions on 5 November 2009 and the Arbitrator published his award on 1 February 2010 (the "Award").

7 The Arbitrator ruled in favour of the Defendant, finding and holding as follows:

- (a) the Plaintiff had wrongfully terminated the subcontract;
- (b) the value of work done by the Plaintiff up to the date of termination was \$130,522.87 and after deducting therefrom, the 1st Progress Payment of \$20,947.50, the sum owed to the Plaintiff for this was \$109,575.37;

(c) the Defendant succeeded in its counterclaim for having to rectify the Plaintiff's defective works, taking over the Plaintiff's works and finishing the project by appointing other subcontractors, thereby suffering loss and damage. This was quantified at \$377,798.01 and was arrived at as follows:

(i)	Cost & Expense to Complete the Project:	\$768,290.51
(ii)	Loss of Profit (5% of Main Contract Sum):	\$ 28,600.00
	Subtotal:	\$796,890.51
(iii)	Less Value of Subcontract works not carried out by Defendant:	(\$419,092.50)
	Total:	\$377,798.01

When the sums were set off against each other, (\$377,798.01 - \$109,575.37), the net result was an award in the favour of the Defendant for \$268,223.23. (Although I pause here to note that mathematically the result should be \$268,222.64) The Arbitrator also awarded the Defendant the costs of the arbitration.

The Issues of Law

8 It is from this Award that the Plaintiff seeks leave to appeal on two questions of law. The questions of law set out in the Originating Summons are as follows:

(i) Whether when a main contractor, who has awarded a back-to-back contract to a sub-contractor and in so doing agreed to pay the sub-contractor progress payments within 10 days of receipt of payment from the employer net only of 5% profit and attendance and specified permitted deductions, delays payment of the 1st progress payment and makes no payment of the 2nd, 3rd and 4th progress payments having received payment from the Employer, has thereby renounced its obligations under the sub-contract, notwithstanding complaints or concerns about the subcontractor's progress or quality of work that do not constitute permitted deductions under the sub-contract;

(ii) Whether a provision permitting the main contractor to make deductions of "ascertained or contra accounts" can extend to a *bona fide* counterclaim for unascertained and unquantified damages for breach of contract.

Question (ii) was amended by the addition of the underlined words "unascertained and unquantified", pursuant to an oral application to amend made during the hearing by counsel for the Plaintiff, Mr Jeyaretnam SC. This was not opposed.

9 Mr Jeyaretnam SC concentrated on the 2nd issue of law and anchored his arguments on a fairly simple and straightforward proposition. The question of law arose because the Arbitrator seemed to overlook the fact that when the Defendant refused to make payment of Certificates Nos. 2, 3 and 4 when they were due, there was no evidence given by the Defendant of having quantified or having tried to estimate the sum which they were setting off against the Payment Certificates. There was no finding by the Arbitrator on this and yet the Arbitrator accepted the Defendant's right to set off

unliquidated and unascertained sums against sums that had been certified by the Project Consultant and paid over to the Defendant.

10 Mr Jeyaretnam SC relied heavily on the House of Lords decision in *Gilbert-Ash (Norton) Limited v Modern Engineering (Bristol) Limited* [1974] AC 689 ("*Gilbert-Ash*") where an issue arose as to the main contractor's ability to set off sums claimed by way of damages for defective works and delays of the subcontractor against certified progress payments to the subcontractor. The relevant clause, clause 14, provided:

The Contractor also reserves the right to deduct from any payments certified as due to the sub-contractor and/or otherwise to recover the amount of any *bona fide* contra accounts and/or other claims which he, the Contractor, may have against the sub-contractor in connection with this or any other contract.

On the above clause, the official referee held that even if it was narrowly construed, it entitled the main contractor to withhold the balance of the amounts due pending determination of their cross claims for unliquidated damages against the sub-contractor for delay and defective work. The Court of Appeal reversed that decision and on appeal the House of Lords allowed the appeal. Besides overruling the case of *Dawnays Limited v F G Minter Limited and Trollope and Colls Limited* [1971] 1 WLR 1205 ("*Dawnays*"), the House of Lords held that on its true construction there was no provision in the sub-contract which ousted the right of set off in respect of unliquidated cross claims, and that accordingly, since the sum deducted was related to a "*bona fide* contra accounts ... or other claims" within the meaning of clause 14, the main contractor was entitled to deduct that sum, pending the determination of the cross claims, from the amounts certified payable to the respondent.

11 Mr Jeyaretnam SC referred me to the following passage from the judgment of Lord Morris, at 704:

It is upon the interpretation [of the above clause] that the present case, in my view, depends. A 'certified' payment is clearly a liquidated sum. To have a process of deduction from such a sum *there must clearly be some other stated sum*. There could, for example, be some other liquidated sum. There could be some other sum which could be regarded as a contra account. *But there would have to be some sum. There could not be a deduction of something that lacked any kind of specification*. But need the sum to be deducted be a liquidated sum or an ascertained sum in the sense of an agreed sum or of a sum assessed by a court? The wording of the provision does not so indicate. There may be a *deduction of the amount* of any *bona fide* claim which the contractor may have against the sub-contractor. Such claim may be in connection with the contract which has occasioned the certified payments or in connection with any other contract. As applied to the facts now before us the position is that the appellants have claims against the respondent in connection with the sub-contract. Those claims have both been particularised and quantified. Their amount is known. Whether or not they can be substantiated it is accepted that as "claims" they have been made in good faith.

[emphasis added]

and the following passage of Lord Diplock's judgment at 715:

The Court of Appeal, however, felt able to reverse his decision by construing "contra accounts and/or other claims" as limited to "established or admitted liquidated sums". By "established" they meant determined by and embodied in a judgment of a court of law or an award of an arbitrator.

My Lords, even without the qualifying adjectival phrase “*bona fide*” the words “contra accounts and/or other claims” in ordinary usage do not, in my view, bear so restricted a meaning; nor am I persuaded by the Court of Appeal that the restriction is justified by the use of the verb “deduct”. *The amount of the “contra account and/or other claims” must, of course, be quantified before it can be deducted; but there is nothing in those words themselves to suggest that the quantification may not be made by the claimant himself.*

[emphasis added]

The Right of Set-off

12 Although it is difficult to give any comprehensive definition of set-off without reference to the various forms it can take, it is in essence the taking of two competing money cross-claims, setting off one against the other and producing a single balance, (see S R Derham, *The Law of Set-off* Oxford University Press, 3rd Ed, 2001 at para 1.01) (“*The Law of Set-off*”). Its early development, under the strictures of the old forms of pleadings and practice at common law, 18th Century set-off legislation and the intervention of equity resulted in a tangle that caused Staughton LJ to exclaim in *Axel Johnson Petroleum AB v MG Mineral Group AG* [1992] 1 WLR 270 (“*Axel Johnson*”), at 276:

Its historical development has led to results which appear to lack logic and sense. It can be said that there is a case for reform of the law, which has to be discovered in a number of diverse rules based on no coherent line of reasoning.

Today we see references to legal set-off, common law set-off, equitable set-off, transactional set-off, independent set-off and the doctrine of abatement. For some categories, the cross-claims need not be connected so long as they are between the same parties, in others they have to be closely connected or arise out of the same transaction. In some, liquidated sums are required and in others unliquidated sums can be set-off against liquidated sums. There are exceptions that apply to one rule but not to another. It was this tangle, combined with Mr Jeyaretnam SC’s usual persuasiveness, which caused me to reserve judgement when I initially thought this application should be dismissed.

13 In the contract entered into between the Plaintiff and the Defendant, clause 10d of the subcontract conditions reads as follows:

In accepting this contract, the subcontractor agrees and permits the main contractor to setoff and deduct from the subcontract progress payments, any outstanding invoices and payment due to the main contractor.

and clause 11 of the subcontract conditions, (with all its errors), reads as follows:

RIGHTS OF SETOFF

The Main Contractor reserve[s] the right of deducting from any monies due to the subcontractor from subcontractor progress claim (including but not limited to the retention monies held by the Main Contractor) to recover the amount of any ascertained or contra accounts, which the Main Contractor may have against the subcontractor.

I read clause 10d to allow the main contractor to set-off any payment due to it from the subcontractor’s progress payments. Clause 11 allows the same for “contra accounts”. In addition, the indemnity in Clause 5 cannot be ignored, (see [\[47\]](#) below).

14 The question arises: what is the meaning of "payment due to the main contractor" and "contra accounts"? The latter phrase appeared in *Gilbert-Ash* and Lord Reid interpreted this phrase to mean "generally itemised accounts not yet agreed." From the passages of Lords Morris and Diplock, relied upon by Mr Jeyaretnam SC, the set-off must comprise "some sum" and "[t]here could not be a deduction of something that lacked any kind of specification." Mr Jeyaretnam SC submits that these passages stipulate that quantification is a necessary pre-condition for contractual set-off. There is some commonsense appeal to this proposition because a party must know there is an amount to be set-off before he can say he is deducting or exercising the right to set-off that sum against the sum he owes. But whether that must be a liquidated or unliquidated sum is one question and must it be a liquidated sum at the time of set-off is exercised is yet another question.

15 In construing the contract, the other three Law Lords in *Gilbert-Ash* referred to "contra accounts and/or other claims" in a general sense and not liquidated sums. Lord Reid said at 698:

I do not see how it can be limited to sums which have either been found to be due or agreed. It refers to bona fide contra accounts. The words "bona fide" would be quite unnecessary and, indeed, meaningless, if the scope of this provision were limited to sums as adjudged or agreed to be due. They must imply a claim which a contractor believes to be genuine but which may still be in dispute. And contra accounts are generally itemised accounts not yet agreed. Even if "other claims" could be read as claims ejusdem generis with contra accounts, that would not help the sub-contractor because in this case the claim in respect of bad workmanship and delay are worked out in great detail. It is true that this provision goes a very long way if that is its meaning, because it would allow deduction of all detailed claims outstanding under other contracts. But if the sub-contractor chooses to agree to that, that is his affair.

[emphasis added]

Although Lord Reid refers to "sums" and "itemised accounts" which may still be in dispute but referable to ascertained sums, he also refers to "a claim", which can mean an unquantified claim, especially since he related it to bad workmanship and delay. Loss or damage caused to a main contractor by a subcontractor's bad workmanship and delay may not be quantifiable at the time of set off and may even have to be quantified by a court or arbitral tribunal although in the case before him it had been worked out in great detail. Viscount Dilhorne's statements at 711 are of similar import:

[The above clause] which gives the contractor the right to deduct "the amount of any bona fide contra accounts and/or other claims which he, the contractor, may have against the sub-contractor in connection with this or any other contract" is not, in my opinion, limited to the deduction of amounts which have been agreed between the parties or to amounts calculated by reference to a liquidated and ascertained amount. This, in my opinion, is conclusively shown by the fact that deduction may be made to recover the amount of any bona fide claims the contractor may have against the sub-contractor. If, as I do not think is the case, a contra account is limited to the deduction of agreed or ascertained sums, the amount of any bona fide claim is not. It is admitted in this case that the contractor's claims against the sub-contractor were bona fide. They were quantified by the contractor and under this clause of the sub-contract the contractor is entitled to deduct them.

[emphasis added]

Lord Salmon similarly said at 724:

Clearly you can have contra accounts or claims which are neither "established" nor "admitted"

but which are still *contra accounts and claims* . I can see no reason for excluding these from the ambit of clause 14 and every reason for including them for, if you exclude them, it is impossible to make any sense of the words "bona fide" which immediately precede them. Nor can I see any difficulty in "deducting" the amount of the contractors' claim for £4,532.94 which although neither "established" nor "admitted" has been elaborately itemised.

[emphasis added]

16 It is important to note the facts in *Gilbert-Ash*. The architect had certified £14,532 due to the subcontractors. The main contractor paid £10,000 and withheld £4,532 alleging remedial costs for defective steel work, which they quantified at £1,862, and for delays, which was quantified at £3,317. The set-offs totalled £4,999. The issue there was whether, on the subcontract terms, the main contractor was entitled to set-off unliquidated and disputed counterclaims against otherwise certified and undisputed sums due to the subcontractor. At that time, as every student and practitioner in the building and construction industry knows, the English Court of Appeal in *Dawnays*, had laid down the principle that sums certified and paid over to main contractors as due to subcontractors must be paid over without deductions or set-offs. The House of Lords in overruling *Dawnays* held that the subcontract clause there did not oust the right of the main contractor to set-off its "bona fide contra account ... or claim" and it was entitled to deduct the sum that it did, pending the determination of the cross claims from the amount certified as payable to the subcontractor. Clear contract language was needed to exclude this right of set-off.

17 In *Gilbert-Ash* therefore, the main contractor had quantified the amounts in detail in respect of delay, defective workmanship and rectification costs before set-off. We cannot tell whether these amounts were quantified at the time the set-off was exercised or at the time of pleadings. The passages relied upon were made in the context of ascertained and quantified but disputed set-offs. If one goes deeper down to questions like what degree of quantification is necessary before a right to set-off arises, or must the quantification be possible at the time of set-off, as compared to time of pleadings, is set-off permissible without any quantification and if so under what kind of circumstances, then the *Gilbert-Ash* decision and the passages cited above do not provide the answers.

18 The question boils down to this: must a contractor who withholds payment to his subcontractor, claiming a set-off, have *some* sum in mind, be it an estimate or a sum certain, *at the time* he withholds payment? Or is it sufficient that he had *contra* claims in mind when he withheld payment leaving the *contra* claims to be quantified or ascertained at the time he files his pleadings or, as it can sometimes happen, leaving the *contra* claims to be quantified or ascertained by a court or an arbitral tribunal?

19 Mr Jeyaretnam SC's arguments must fail on at least three grounds when looked at from the authorities. First, *Gilbert-Ash* itself is not an authority for the proposition he seeks to advance on behalf of his clients because the House of Lords expressly recognised the right to withhold certified sums against *bona fide* unliquidated claims under the phrase "bona fide contra account/ ... or claim" used in the subcontract entered into between the parties. The judgments support the rule that set-offs could be effected, *pending* the determination of the cross-claims. Further, as it was conceded that the main contractor's claims were *bona fide*, Lord Reid said, at 696:

It is now admitted, and in my view properly admitted, that at common law there is a right of set off in such circumstances: but that right can be excluded by contract.

20 Secondly, and more importantly, the Defendant had the right in equity to set-off any *bona fide*

unliquidated claims. Building contracts and claims in that context clearly fulfil the criteria of contra claims that are so closely connected with the subject matter of the claim that it would be unjust to allow the Plaintiff's claim without taking into account the Defendant's set-offs. In *The Law of Set-off*, the learned author considered the law in respect of cross-claims by the building employer against the contractor for damages for delay and bad workmanship at para 5-49:

A cross-claim for damages for delay or for bad workmanship is capable in principle of being employed in set-off against an amount due for work performed under a building contract. At one time it was thought that a set-off was not available in cases in which the price was to be paid by instalment on the certificate of an architect or engineer, or some other such person. In a series of cases, commencing with *Dawnays Ltd v F G Minter Ltd* ... [a] claim on the certificate by the contractor against the employer, or by subcontractor against the contractor, could not be met by a set-off or counterclaim in respect of an unliquidated cross-demand ... However *Dawnays v Minter* ... was overruled some two years later by the House of Lords in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* ... [which] held that there is no presumption in building cases in which the price is to be paid by instalment on certificates that the parties intend that the ordinary defences of set-off and abatement should not apply.

21 Thirdly, as the learned author alludes, the doctrine of abatement would also apply to building contracts: see eg Lord Morris in *Gilbert-Ash* at 699 and *Hua Khian Ceramics Tiles Supplies Pte Ltd v Torie Construction Ltd* [1991] 2 SLR(R) 901 ("*Hua Khian Ceramics Tiles*") at 905-906. The Defendant's claims for rectifying defective works and providing a supervisor to drive the Plaintiff's work are classic situations for the application of the doctrine of abatement. These claims can clearly be taken into account as they relate directly to the value of work done by the Plaintiff. Depending on the case and evidence, taking over uncompleted work and the incurring of additional costs therefor can also be factors taken into account in reducing the claims by the subcontractor that it has done that work. There can be no doubt that under the common law doctrine of abatement, a main contractor is entitled to raise an unliquidated claim which, if established, would reduce or extinguish the subcontractor plaintiff's claim. An obvious example would be the case of a piling subcontractor's bad workmanship or errors in the foundation which can cause an entire building to be torn down and reconstructed or require extensive and very expensive remedial works resulting in long delays. Lord Morris himself referred to this in *Gilbert-Ash* at 699. In so saying I have not overlooked the fact that the Arbitrator adopted a different route for calculation, perhaps because of the nature of the evidence before him, but the result is the same.

22 There is also authority that a party relying on set-off can quantify his set-off at the time of pleadings. There is no authority that requires this quantification to occur *before* a right of set-off arises. *Morley v Inglis* [1837] 4 Bing NC 58, involved setting off an unliquidated sum under a guarantee pursuant to the Statute of Set-Off which provided that "where there are mutual debts between the plaintiff and defendant, one debt may be set off against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar as the nature of the case shall require." In considering this legal set-off under this statute, Tindal CJ said at 71: "It seems to me that the rule by which we are to determine whether or not a demand can become the subject of a set-off, is by inquiring whether it sounds in damages; *whether the demand is capable of being liquidated, or ascertained with precision at the time of pleading*" (emphasis added). In *Axel Johnson*, Legatt LJ said at 272:

For set-off to be available at law the claim and cross claim must be mutual, but they need not be connected. They need not be debts strictly so-called, but may sound in damages. The question is ... 'whether the demand is capable of being liquidated or ascertained with precision at the time of pleading.'

[emphasis added]

A close examination of authorities like these undermines the strict rule advocated by Mr Jeyaretnam SC that there must be some sum, not an unquantified or general claim, at the time of exercising the set-off.

23 In *The Law of Set-off* at para 5.51, in the context of contractual exclusion of equitable set-off and abatement in building contracts, the author states that the drafter must bear in mind that a cross-claim for damages for defective workmanship can give rise not only to an equitable set-off but also to the common law defence of set-off. This principle is similarly stated in Philip Wood, *English and International Set off*, (Sweet & Maxwell, 1989) ("*English and International Set-off*") at paras 1-20 to 1-21:

Transaction set-off (abatement, equitable set-off and United States recoupment)

Transaction set-off arises where the reciprocal claims flow out of the same transaction or closely connected transactions in circumstances, generally, where the creditor claiming his primary claim has defaulted in performance of the very obligation for which he is seeking payment. Unlike independent set-off, the remedy is self-help and neither claim need be liquidated...

This form of set-off was developed by the common law courts under the name of "abatement" as an exception to the rigours of independent set-off which requires that both claims be liquidated. It was developed separately by the courts of equity under the name of "equitable set-off"... Some slight differences between abatement and equitable set-off may remain... but, as mentioned, the courts have discouraged over-nice distinctions between equity and common law in the field of set-off.

24 The principles discussed above have been applied in Singapore. In *OCWS Logistics Pte Ltd v Soon Meng Construction Pte Ltd* [1998] 3 SLR(R) 888, Chao J, as he then was, said at [6]:

In general, any debt or liquidated sum due from a plaintiff to a defendant can be set off against the plaintiff's claim. This is the legal set-off or independent set-off. An unliquidated claim of the defendant for damages can be set off if it arises from the same transaction as the claim of the plaintiff or is closely connected with the subject matter of the claim: see *Hanak v Green* [1958] 2 QB 9 and *Morgan & Son Ltd v Martin Johnson & Co Ltd* [1949] 1 KB 107. This is the principle of equitable set-off.

The Court of Appeal has summarised the development of common law and equitable set-off and the doctrine of abatement in *Pacific Rim Investments v Lam Seng Tiong* [1995] 2 SLR(R) 643 ("*Pacific Rim Investments*") at [24]; it also cited Lord Denning MR in *The Nanfri* [1978] QB 927 ("*The Nanfri*") at 973 and 974 with approval. In addition, Lord Denning MR also said, at 974-975:

... it is not every cross-claim which can be deducted. It is only cross-claims that arise out of the same transaction or are closely connected with it. And it is only cross-claims which go directly to impeach the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim.

The cases of *Hua Khian Ceramics Tiles and Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* [2004] 3 SLR(R) 288 ("*Jia Min Building Construction*") at [43] are also useful. The case of *Hiap Tian Soon Construction Pte Ltd v Holo Development Pte Ltd* [2003] 1 SLR(R) 667 ("*Hiap Tian Soon Construction*") is also authority that Gilbert-Ash is good law in Singapore.

25 In *A L Stainless Industries Pte Ltd v Wei Sin Construction Pte Ltd* [2001] SGHC 243 (“*A L Stainless Industries*”), another building construction case, Woo Bih Li JC (as he then was) cited at [32] Hudson’s Building & Engineering Contracts 1995, 11th Edition at p 623 which states that the “set-off will need to represent a bona fide known present loss or entitlement by the deducting party ... and not some possible or even likely future loss” (emphasis added). In the *Pacific Rim Investments* case, our Court of Appeal quoted, as an “instructive passage”, Goff J in *SL Sethia Liners Ltd v Naviagro Maritime Corp* [1981] 1 Lloyd’s Rep 18 (“*The Kostas Melas*”) at 26:

Furthermore, the exercise of a right of deduction or set-off is essentially an act of self-help; it requires no order of the court or arbitrators for its enforcement. *If a party exercises it, however, he must have justification for doing so; and in theory he should be able to prove, at the time of its exercise, that he has that justification ...* it is in my judgement implicit in its very nature that it should only be exercised in good faith on reasonable grounds...

[emphasis added]

26 The authorities therefore only require the party exercising his right of set-off to have an “entitlement” to a contra claim before he can do so. He must have the “justification” in exercising his right and it must be exercised *bona fide*. It is for this very reason that Lord Morris said, in *Gilbert-Ash*: “There could not be a deduction of something that lacked specification”. A party exercising the right to set-off cannot have no idea why he is making a deduction, or withholding payment. He must know of his *entitlement* to set-off or his *justification* for doing so even though at that time of exercising his right, he is not able to quantify the set-off. He is exercising his remedy of self-help. Indeed, in the case of an unliquidated contra claim, that party will not know what the eventual figure will be. Of course in many cases, such a party will be able to make a reasonable and *bona fide* estimate of his contra claims and if his estimate turns out to be wrong, he is not in default, but has to refund the excess. In commenting on the estimation of the quantum of an unliquidated set-off, Philip Wood in *English and International Set-off* at para 4-27 states:

The weight of authority favours the view that where a party entitled to a transaction set-off for unliquidated damages quantifies his loss by a reasonable assessment made in good faith and deducts the sum quantified, then he is not in default. *One reason is that often the defendant does not have sufficient evidence immediately available to him to quantify accurately. But to protect the claimant, the assessment must be objectively reasonable.* If it subsequently turns out that a party has deducted too much, the other party can recover the balance. The same principle applies to both transaction set-off for unliquidated damages and to contractual set-off.

[emphasis added]

And also Philip Wood, *Set-off and Netting, Derivatives, Clearing Systems*, (Sweet & Maxwell, 2nd Ed, 2007) at para 3-019:

English decisions decide that, if the debtor quantifies his claim reasonably and in good faith, he is not in default even if his quantification turns out to be wrong. This rule is necessary because otherwise the debtor would be exposed if he did not have sufficient facts at his disposal to quantify the damages by the time the payment from him, such as hire, fell due.

27 In the *Pacific Rim Investments* case, Thean JA stated at [27], referring to *The Nanfri*:

The majority of the Court of Appeal, Lord Denning MR and Goff LJ, agreed that in the circumstances the appellant charterers were entitled to an equitable set-off and to deduct from

the hire, sums as loss arising from the loss of speed because the claims were so closely connected, provided that the unliquidated loss was quantifiable by means of a reasonable assessment made in good faith. This was a right quite apart from the contract entitlement.

This principle was also endorsed in *Hiap Tian Soon Construction*.

28 I would go further and say that in the context of a building contract dispute, if it is clear on the facts or *it is evident* that there is an entitlement or justification, to raise a claim in set-off against the claiming party, and that sum is likely to be so large as to exceed or extinguish the claiming party's claim, then the lack of an exercise to estimate the amount of the set-off or quantify the same is not fatal nor a disqualification to exercise this self-help remedy. In such an event, the lack of an estimate to satisfy the *bona fides* and reasonableness falls away. *A fortiori* if at that time the party asserting a set-off is under great pressure to take over the works and adopt acceleration measures to ensure timely completion or mitigate the length of the delay. Take the case at hand, after approximately 4.5 months into a 6 month contract, after having completed only slightly over one-fifth of the value of the contract, after being clearly in delay, after the main contractor has had to provide a supervisor and then take over some of the works, after unambiguous and strong written complaints by the employer's project consultant, the subcontractor walks off the site, does the law require the main contractor to sit down and quantify his likely damages before he can withhold payment? It seems evident to me that a defendant in such a position has other priorities, *viz*, to deal urgently with taking over the works, sort out the material on site and completing the same as soon as he can lest he faces claims or mounting claims for delay damages. As those in the construction industry well know, taking over incomplete works, and under time pressure, is a very messy and unenviable situation. Other subcontractors brought in to finish incomplete work charge a premium for taking on the liability for someone else's incomplete work and for acceleration. It is also clearly a measure in mitigation caused by the other party who is in default or repudiatory breach of the contract. If so, the entitlement is clearly there and so is the justification.

29 However, if the amount withheld or set-off is so large, and later confirmed to be so excessive or so disproportionate to the likely amount of those damages or the counterclaims, then there is the obvious difficulty in proving the *bona fide* belief in the amount set-off and the party effecting a set-off cannot satisfy the element of reasonableness or that he was justified in so doing. A court will then legitimately ask, did that party claiming the set-off, pause to think about his entitlement or estimate his set-off? Also, "*possible future*" losses cannot be the basis for a right of set-off, as it cannot amount to an "entitlement" since it must be necessarily speculative in nature, (see *A L Stainless Industries*). It will then also impinge on the reasonableness and *bona fides* of the exercise of that right and the amount deducted. In such cases, a court will consider not just the handing over of the excess balance wrongfully withheld but can, in its discretion and if the facts warrant it, consider proper compensation to the injured party for any damages suffered. This is what was meant by Rajah JC (as he then was) in *Jia Min Building Construction* at [43]:

The exercise of these rights have to be *bona fide* and reasonably made ... The fact that the amount may subsequently turn out to be erroneous will not vitiate the initial basis for exercising the right, *though it could lead to other consequences*.

[emphasis added]

It will all depend on the circumstances of each particular case.

30 Before I leave the applicable legal principles, I need to deal with *Hiap Tian Soon Construction*. In this case, the superstructure contractor caused damage to the piles installed by another

contractor, which in turn led to substantial delays to the project. The employer withheld subsequent payments, Interim Certificates Nos 8, 9 and 10, following which the contractor terminated the contract and brought a claim for the moneys withheld. The employer disputed the quantum and claimed that it was entitled to an equitable set-off for the defective building work. The learned Judge at [38], endorsed the principle already discussed above, that so long as the party purporting to exercise the right of set-off sought to quantify his loss in a *bona fide* way by reasonable means, the fact that the estimated figure may eventually turn out to be too high is not, in itself, sufficient to preclude a party from relying on a defence of set-off; the party does not actually have to produce a specific and final figure, quantified by professional quantity surveyors. The project quantity surveyor and the structural engineer had a meeting with the employer prior to the purported termination and the project quantity surveyor gave a verbal estimate of the cost of rectification works "in the region of \$200,000". The employer said he obtained a verbal estimate from a friend in the construction industry that the estimated cost of repairs would be around \$300,000, but that person was not called to give evidence. The amount withheld by the employer was \$214,196.90. Surprisingly, the learned Judge held that it was "not enough to obtain two casual verbal estimates in passing; at the very least, [the employer] must have had some basis or engaged in some form of rational analysis before coming to an estimate of the costs involved. I find that the two estimates used by [the employer] were not reasonable and that [the employer] had failed to show that the losses had been quantified by means on a reasonable assessment."

31 I accept that the full facts of the case may not have appeared in the reported judgment and that the issue is very fact sensitive. With great respect to the learned Judge, I find the application of the principles to the reported facts difficult to accept for the following reasons:

(a) First, the contractor admitted damaging 32 piles and well as some piles in another location (grid 7/A), as a result of his negligent workmanship; this resulted in 158 compensating piles having to be installed. The contractor admitted liability for this remedial work.

(b) Secondly, it was the project quantity surveyor who produced the estimate of \$200,000. Of all people on site, and of all professionals consulted, it would be the project quantity surveyor who would be the one person best informed on prices and cost of reinforced concrete piles and their installation. On top of that, the estimate was made in the presence of the structural engineer and he would be the professional who would be the most knowledgeable party on the employer's team to know about the type and methods of rectification works. Both these professionals were certainly better placed to form an estimate of the rectification costs as compared to the employer. I fail to see how these two professionals, giving their views in the presence of each other to the owner, who was making "some attempts ... to obtain an estimate of the cost of the rectification works" (at [39]-[40]), can be a mere "casual verbal estimate". Both of them gave evidence and I do not see any adverse remarks or findings by the learned Judge against them on this score (I accept the possible limitation that the manner in which these witnesses gave their evidence is not in the report). As the second estimate of \$300,000 was allegedly verbal and the person giving the estimate was not called to give evidence, I accept that this being fact sensitive, the learned Judge was entitled and correct to characterise this as a "casual verbal estimate".

(c) Thirdly, the 158 piles were not the only rectification or compensation piles; the learned Judge made a finding that because of the contractor's submission of inaccurate eccentricity plans, more damaged piles were discovered later (at grids 8/B and 6/A, see [71]), and the learned Judge held that the contractor was also liable for damage to those piles and that must have included their rectification.

(d) Fourthly, the rectification works were not the only contra claims. The learned Judge found there were substantial delays to the project, which was the building of a factory. It is self evident that superstructure works cannot commence until the foundations and piling damage is rectified. The learned Judge found that the contractor failed to proceed with reasonable diligence was responsible for the delays, damages for which was to be assessed by the registrar.

(e) Fifthly, the amount withheld was only \$214,196.90. The contract sum was \$10,090,000 which was later reduced to \$7,995,000. The total amount certified was \$1,310,661.83 and on the contractor's own evidence, it had received \$952,553.89. This was not a case where there were large sums withheld or sustained non-payment. This \$214,196.90 is not an extravagant sum by any measure, especially considering the estimate given by the project quantity surveyor, which was only for rectification/compensatory piles, and did not include delay damages or increased costs of completing the work. There was no allegation of the employer causing delay to the contractor except for an allegation that there was a late handover of the site. The learned Judge held against the contractor and found that there was no delay on this score.

With the greatest of respect, I therefore have my reservations on the correctness of the application of the principles to the facts of that case. The threshold for the *bona fides* and reasonableness was set far too high.

32 Although a digression, it is worth noting that by contract, parties can even agree to set-off a future or contingent claim. Thus in banking documents, it is common to find a contractual right to set-off a customer's credit balance against an unliquidated or a contingent claim. There is no doubt that such clauses are valid and enforceable because all that really means is that there are two contractual rights rolled into one:

... a right to withhold payment of the credit balance pending quantification of the claim (whether by agreement, or by judicial decision or by arbitral award), coupled with the right to set off that claim when it has been quantified. In other words, the so-called contractual set-off in relation to unliquidated claims is in effect two rights rolled into one: in the company instance, a right to suspend payment, while leaving the customer's credit balance intact; and later, when the amount of the claim has become liquidated, a set-off which will result in pro tanto extinguishment of the credit balance ...

(see *Goode on Legal Problems of Credit and Security*, (Sweet & Maxwell, 4th Ed, 2008) at para 7-22).

The Facts Available to the Arbitrator and his Award

33 Before me, Mr Tan Joo Seng, counsel for the Defendant, candidly accepted that the Defendant did not put forward any evidence during the arbitration of having quantified or estimated his contra claim when it chose not to pay the Plaintiff on the Payment Certificates No. 2 and 3. On the facts, the Arbitrator has not made any findings on the question of *bona fides* or reasonableness in exercising its rights of set-off. The Award, as it stands, exposes the Arbitrator to criticism that he does not seem to have directed himself to these issues. However, this alone does not entitle the Plaintiff to obtain leave to appeal on a question of law.

34 By the time the dispute reached the Arbitrator, the Defendant was clearly able to quantify its contra claims. Hence, on the evidence of the Defendant, the Arbitrator was able to make an award for the amount spent by the Defendant to complete the works and to rectify the Plaintiff's defective works. I also note the subcontract included an indemnity clause, *viz*, for the Plaintiff subcontractor to indemnify the Defendant main contractor for and against certain breaches and omissions (see below

[47]).

35 The following facts appear from the Award and the Affidavits. The subcontract sum was \$543,400, the start date was 27 August 2004 and the contract completion was 26 February 2005. The Plaintiff purportedly terminated the subcontract on 10 January 2005, some 4½ months into a 6 month contract and having, as found by the Arbitrator, carried out only about 20% by value of the contract.

36 Payment Certificate No.1 was for the month ending September 2004 for the sum of \$22,050.00 and no dispute arises on its payment. In any case, the Plaintiff accepted there was delay in furnishing a valid performance bond and insurance policy and the Defendant paid the Plaintiff \$20,947.50 on 30 December 2004 after the Plaintiff furnished the same. This inordinate delay by the Plaintiff speaks for itself.

37 Payment Certificate No. 2 for the sum of \$31,447.50 was for the month ending October 2004. Payment Certificate No. 3 for the sum of \$26,617.50 was for the month ending November 2004 and Payment Certificate No. 4 for the sum of \$57,277.50 was for the month ending December 2004. The Town Council paid Certificate No. 3 to the Defendant on 20 December 2004. The withholding of these three sums under Certificate Nos. 2, 3 and 4 by the Defendant, totalling \$109,575.37 was the basis of the Plaintiff's claim that the Defendant was in breach of the subcontract. However at the time the Plaintiff repudiated the subcontract, 10 January 2005, only Payment Certificates No. 2 and 3, (*ie* totalling \$58,065), were due. Payment Certificate No. 4 was only certified on 10 January 2005 and the Plaintiff's Tax Invoice for Progress Claim No. 4 is dated 15 February 2005.

38 After hearing the witnesses and considering the evidence and the submissions, the Arbitrator held that the Plaintiff had failed to carry out their works with due diligence and expedition and that the Plaintiff was in breach of the subcontract and was in culpable delay. There was ample evidence in the form of letters from the project consultant to the Defendant complaining about the slow progress and delays to the works. He accepted the Defendant's evidence that the Plaintiff's slow progress was due to the lack of resources and manpower and this was the subject of written complaints by the project consultant; the Defendant had to assign one of their project managers to the Plaintiff's works in November 2004; the Defendant did not cause any delaying events which critically affected the progress of the works; although the Defendant was in breach of the payment terms in paying Certificates No. 2 and 3 late, that delay was not so serious as to go to the root of the contract and it did not have the effect of depriving the Plaintiff of the whole benefit under the subcontract. He also held that the Defendant took over and completed the works abandoned by the Plaintiff and Part A was eventually completed and handed over to the Town Council on 31 July 2005 and Part B was completed and handed over on 27 December 2005.

39 There was sufficient evidence before the Arbitrator to make those findings and come to those conclusions that he did. In the Affidavits of Evidence-in-Chief ("AEIC"), the complaint letters of the project consultants were exhibited. The earliest letter is dated 29 October 2004 and it directed the Defendant to arrange for a project manager from its own staff for the project. This was done on 13 November 2004 and in a letter dated 13 November 2004 the Defendant informed the Plaintiff that they would be charged \$3,000 per month for their supervisor's services, (see AEIC of Michael Chew Choon Ling at para 18). In this same letter of 29 October 2004, the project consultant expressed his doubts about the Plaintiff's ability to complete the subcontract and stated that the Defendant was to "replace your current sub-contractor, if necessary". These complaint letters continue through to January 2005. It is worth noting a letter of 17 January 2005 from the project consultant to the Defendant:

I refer to my warning letter no.1 dated 30 Dec 04 to you regarding the progress of works for the above project...

Pursuant to Clause 10 of the Condition [sic] of Contract, you are instructed to take immediately steps as to expedite the construction works at the above sites with due diligence [sic] in accordance with the Contract by arranging another team of competent workers to complete the works by the end of the contract period. If you fail to do so, you are unlikely to complete the project in time. Therefore, LD will be imposed accordingly.

Notwithstanding the LD, if you do not show any improvement by 20 Jan 05, please be notified that in pursuant [sic] to Clause 51 Condition [sic] of Contract, the Town Council reserves the right to engage a third party to carry out the work and all costs incurred will be recovered from you.

40 It is significant to note that in the Defendant's AEIC submitted at the arbitration, Ong Kai Siong's AEIC at para15 states that after the project consultant's warning letter of 30 December 2004, the Defendant took over the extended covered walkways at Blocks 702, 607 and 413A because the Plaintiff had not started any work on these items. The Defendant informed the Plaintiff of this by a letter dated 30 December 2004 and in that same letter, gave notice that they would 'back charge' the costs against the Plaintiff. These 3 blocks were in Part A of the contract works. From the tables at [2] above, the contract sums for the work at these 3 blocks totalled \$103,000 (Block 702 - \$39,000; Block 607 - \$23,000; and Block 413A - \$41,000). Taking away the 5% profit and attendance, the subcontract sums for these 3 Blocks taken over before any work was carried out by the Plaintiff amounted to \$97,850. As of 10 January 2005, the only sums being withheld were under Payment Certificates No. 2 and 3, ie \$58,065, (Payment Certificate No. 4 having been issued only on 10 January 2005). On top of the facts recited above, the Arbitrator found that the Plaintiff wrongfully abandoned the subcontract works on 10 January 2005. It follows that the Defendant had to take over and complete the works and was probably not going to be able to complete on time, exposing themselves to a claim for delay damages from the Town Council.

41 It may not be usual for the Court to dredge out such detailed facts on an application for leave to appeal, but I do so for a number of reasons. First the Arbitrator certainly had the evidence to come to the conclusions that he did. Secondly, and more relevantly, the questions of law do not arise in a vacuum. The Defendant here had more than ample ground to know, for sure, at the time it withheld Payment Certificates No. 2 and 3, that the damages it was likely to suffer was considerable, had accrued and there was every prospect of even more loss and damage materialising in the future. As noted above, of a subcontract sum of \$543,400, the subcontractor had not completed, by value, \$419,092.50 or some 77% of its subcontract works. Some 4½ months of a 6 month contract had passed. The Arbitrator found and held that the Defendant's cost and expense incurred to complete the Project was \$768,290.51. Against this is a total sum of \$109,575.37, but only \$58,065 as of 10 January 2005, withheld. It is in this context that I now turn to the Award once more.

42 The main question of law raised before me was not overlooked but was in fact an issue argued before the Arbitrator: "The Claimants averred that the set-off amounts must first be ascertained before the Respondents were entitled to set-off" (see the Award at [40]). The Arbitrator construed clauses 10d and 11 of the subcontract, applied the facts and noted at [31] of the Award:

The [Defendant] had paid the [Plaintiff] \$20,947.50 under Certificate No.1 but had withheld payment under Certificate No. 2 to set-off against damages for delays caused to the Subcontract works by the [Plaintiff]. The [Defendant] argued that due to delays by the [Plaintiff], the [Defendant] had taken over some of the works and it was prudent and reasonable

for them, to assess any potential set-off they would have against the [Plaintiff] before making further payment to them. Their right to set-off had been expressly provided for under clause 10d of the Subcontract conditions.

and held at [42]:

The [Defendant] *had withheld payment* of the amounts due in respect of Certificate Nos. 2 & 3 *because they were of the view that it was the [Plaintiff] who [was] in breach* of the Subcontract by failing to proceed with the works diligently and with due expedition and had delayed the progress of the works.

[emphasis added]

Although cited for a different proposition, Woo JC's decision in *AL Stainless Steel Industries* was cited to the Arbitrator.

43 The Arbitrator found and held that the Defendant had to deploy its own resources to assist the Plaintiff catch up with the subcontract works and were entitled to withhold payments "to set-off against the loss and damage suffered by the [Defendant] as a result of the [Plaintiff's] breach" (at [50] of the Award). Further, at [51] he stated "I am convinced that there was sufficient evidence adduced by the [Defendant] that the [s]ubcontract works were in culpable delay and that the same was attributable to the [Plaintiff], since the entire [s]ubcontract works had been subcontracted to them."

44 On the evidence before the Arbitrator and his findings in his Award, can it be said that the Defendant had not estimated any sum or had an 'unquantified' amount when he exercised his set-off and was therefore not entitled to do so? I think not. As noted above, the Arbitrator answered this at [42] and [50] of the Award. This is one of those clear cases where the contra claims were self-evident and they were likely to be considerably in excess of the Plaintiff's claims. The Defendant clearly was entitled to his contra claims for the subcontractor's breaches and he was certainly justified in withholding payment.

Whether Leave Should be Given

45 Even if I am wrong, the subcontract here was a one off contract, being the Plaintiff's own contract form and not a standard form. It comprised a letter of 3 paragraphs, a 2-page agreement form, a 2-page appendix and a 4-page Terms and Conditions containing 18 clauses, including grammatical, syntax and other errors.

46 Mr Jeyaretnam SC sought to persuade me that the wording of clause 11 was similar to other standard form contracts. He referred me to clause 52 of the Singapore Contractors' Association Ltd's ("SCAL's") Conditions of Sub-contract for Domestic Sub-contracts:

Notwithstanding anything in the Sub-contract, the Contractor shall be entitled to deduct from or set off against any money due from the Contractor to the Sub-contractor under the Sub-Contract any sum which the Sub-Contractor is or may be liable to pay to the Contractor under the Sub-Contract.

and clause 11.4 of the Singapore Institute of Architects ("SIA") Conditions of Sub-contract:

The Contractor may set-off against any monies due to the Sub-Contractor under the Sub-

Contract, such loss or damage suffered or incurred by him as a result of the failure of the Sub-Contractor to carry out the Sub-Contract Works with diligence or due expedition or to complete the Sub-Contract Works by the date or dates specified in Schedule III hereto or the date or dates as extended until such date as may be certified by the Contractor in his Sub-Contract Completion Certificate.

Neither of the clauses are sufficiently similar to the conditions here to support his submission. This is especially true because these clauses were within different standard form contracts with their own structure. For example under the SIA Conditions of Sub-contract, there is an elaborate clause 11.5 which prescribes conditions precedent for the main contractor to exercise its rights of set off, this includes quantifying the set-off in detail with particulars and reasonable accuracy, giving written notice of the same and grounds upon which the set-off is made. These are absent in the subcontract before me.

47 In this subcontract, clause 5 provides that the Plaintiff subcontractor will indemnify the Defendant main contractor from and against, *inter alia*, any breach, non-observance or non-performance of the provisions of the main contract by the subcontractor, its servants or agents or any act of omission by the subcontractor, its servants or agents, which will involve the main contractor in any liability to the Town Council. I accept the terms and conditions of the main contract did not feature in this dispute, but the latter indemnity will still apply to the facts here. The SCAL's Conditions of Sub-contract for Domestic Sub-contracts may or may not have had an indemnity clause as I was not shown the full subcontract conditions. The SIA Conditions of Sub-contract has rather more elaborate indemnities under Condition 4.2 and Condition 9 than clause 5 in the current subcontract before me.

48 Mr Jeyaretnam SC then tried to persuade me that set-offs arise all the time and are common in the building and construction industry, a subcontractor needs to know under what circumstances a main contractor's breach of payment terms can be justified and in particular whether ascertainment of an amount due from a subcontractor to a main contractor is required and whether he can actually set-off against amounts owing to the subcontractor without ascertaining or quantifying the sums; there needs to be certainty in the industry.

49 It is settled law that the principles set out in *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724, ("*The Nema*"), prescribe:

(a) Where the question of law involved is a 'one-off' point, leave to appeal should not be given unless it is apparent to the court upon a mere perusal of the reasoned award itself, without the benefit of argument, that the arbitrator was obviously wrong; and

(b) Where the question of law is not a 'one-off' point, leave to appeal should not be given unless the court considers that a strong *prima facie* case has been made out that the arbitrator is wrong.

Our Court of Appeal has accepted these principles in *Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd* [2004] 2 SLR(R) 494. However, this was a case that was decided under the 1985 Arbitration Act (Cap 10) and the old section 28 wording.

50 Under section 49(5) of the Arbitration Act, which is *in pari materia* with section 69(3) of the English Arbitration Act 1996, leave to appeal shall only be given if the Court is satisfied that:

(a) the determination of the question will substantially affect the rights of one or more of the

parties;

(b) the question is one which the arbitral tribunal was asked to determine;

(c) on the basis of the findings of fact in the award –

(i) the decision of the arbitral tribunal on the question is obviously wrong; or

(ii) the question is one of general public importance and the decision of the Arbitral Tribunal is at least open to serious doubt; and

(d) despite the agreement of the parties to resolve the matter by Arbitration, it is just improper in all these circumstances for the Court to determine the question.

51 In *CMA CGM SA v Beteiligungs-KG MS "Northern Pioneer" Schiffahrtsgesellschaft mbH & Co & Others* [2003] 1 WLR 1015, ("*The Northern Pioneer*"), a case involving construction of the war cancellation clause in the NYPE time charter form, and the onset of NATO operations in Kosovo in March 1999, the English Court of Appeal, at [60], said that section 69(3)(c)(ii) of the 1996 Arbitration Act, (our equivalent being section 49(5)(c)(ii)), imposed a broader requirement than Lord Diplock's formulation in *The Nema* that leave should not be given "unless the judge considered that a strong prima facie case had been made out that the arbitrator had been wrong in his construction." According to Lord Phillips MR, Lord Diplock's formulation "was calculated to place a particularly severe restraint on the role of the commercial and higher courts in resolving issues of commercial law of general public importance." This has now been superceded by the statutory criteria in section 69(3)(c)(ii), which opens the door "a little more widely to the granting of permission to appeal than the crack that was left open by Lord Diplock." (see judgment at [11] and [61]). So except for the fact that the arbitrators there had decided that the charterers had failed to exercise their right to cancel within a reasonable time, which rendered the other issues academic, the court could have granted leave as the construction of the standard NYPE form's war cancellation clause and their manner of application in the light of the changing circumstances of international conflict was of general public importance and would substantially affect the rights of one or the parties.

52 The first question of law is in effect, the construction of the subcontract clauses and the right of repudiation. It is a 'one-off' contract and it is related to the particular facts of this case. It clearly does not satisfy either *The Nema* principles nor section 49 of the Arbitration Act as interpreted by *The Northern Pioneer*. I note Mr Jeyaretnam SC did not, and quite rightly in my respectful view, spend any time on it.

53 The second question of law suffers from the same defect, it is a one-off contract and it was decided on its own particular facts. Despite the absence of any findings of fact in relation to the question of *bona fides* or reasonableness, referred to at [33] above, I cannot say that the Arbitrator here is "obviously wrong" in this case. On the contrary, the Arbitrator's findings are amply supported by the evidence before him and he was certainly justified in coming to the decision that he did. The determination of this question of law will not therefore substantially affect the rights of one or more of the parties. Neither can it be said on the basis of his findings of fact in the Award, that the decision of the Arbitrator is obviously wrong, nor, even if I accept that the question is one of general importance, that the Arbitrator's decision is open to serious doubt.

54 It follows that the application for leave to appeal on the two questions of law must be refused.

55 Costs must follow the event and unless there are any special circumstances that I am unaware

of, and if so, the parties are at liberty to write in for a hearing thereon within 10 days from the date hereof, I award costs to the Defendant which are to be agreed or taxed. If neither party writes in within the stipulated time, my award on costs shall become final.

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