Republic Airconditioning (S) Pte Ltd *v* Shinsung Eng Co Ltd (Singapore Branch) [2012] SGHC 46

Case Number	: Suit No 351 of 2011 (Registrar's Appeal No 397of 2011)
Decision Date	: 06 March 2012
Tribunal/Court	: High Court
Coram	: Lai Siu Chiu J
Counsel Name(s)	: Cheah Kok Lim (counsel instructed) and C P Lee (C P Lee & Co) for the plaintiff; S Magintharan and James Liew (Essex LLC) for the defendant.
Parties	: Republic Airconditioning (S) Pte Ltd — Shinsung Eng Co Ltd (Singapore Branch)

Civil Procedure – Summary Judgment

6 March 2012

Lai Siu Chiu J:

1 This was an appeal by Shinsung Eng Co. Ltd ("the defendant") in Registrar's Appeal No 397 of 2011 ("the Appeal") against the decision of the Assistant Registrar in granting Republic Airconditioning (S) Pte Ltd ("the plaintiff") summary judgment for the sum of $323,500.31 together with interest. I dismissed the Appeal. As the defendant has appealed (in Civil Appeal No 9 of 2012) against my decision, I now set out the grounds for my decision.

The background

2 The plaintiff is a company incorporated in Singapore, while the defendant is a Korean company registered in Singapore whose business comprises of building and construction works in Singapore. In or about December 2009, the defendant secured a project with Rolls Royce Pte Ltd for the erection of a single-user industrial factory at the Seletar Aerospace Park ("the project"). On 2 September 2010, the defendant entered into an agreement with the plaintiff ("the contract"), for the latter to supply labour for the project. The contract sets out, *inter alia*, the following terms:

(a) The daily rates for skilled workers and semi-skilled workers;

(b) The normal working hours and what constituted over-time;

(c) That all workers were to be equipped with the necessary personal protective equipment;

(d) The process for invoicing and payment of the labour charges;

(e) That the plaintiff could remove its workers from the construction site immediately without further notice in the event of non-payment of the labour charges;

(f) That any medical expenses arising from injuries that ocurred on the worksite would be claimable under the defendant's workmen compensation account;

(g) That the plaintiff guaranteed that the workers were holders of valid work permits;

3 Pursuant to the contract, the plaintiff issued various invoices to the defendant for payment of the labour charges. As the defendant failed to pay on some of the invoices ("the outstanding invoices"), the plaintiff removed their workers from the construction site on 11 November 2010 and stopped work with effect from 12 November 2010. On 18 March 2011, the defendant sent an "Audit Confirmation" to the plaintiff, acknowledging that there was a sum of $389,950.96 owing from the defendant to the plaintiff, and that nothing was owed by the plaintiff to the defendant. That figure was later amended by the plaintiff to reflect the reduced sum of $323,500.31, to take into account an invoice rendered by the plaintiff to the defendant dated 11 November 2010 for $23,549.36 (a debit), and a payment of $90,000 (a credit) made by the defendant to the plaintiff on 14 January 2011.

4 On 13 May 2011, the plaintiff commenced this action against the defendant for the sum of $323,500.31 ("the sum"), due and owing under the contract. On 7 December 2011, the plaintiff was granted summary judgment by the Assistant Registrar.

The defendant's case

5 Before me, the defendant sought to over-turn the Assistant Registrar's decision and to ask for unconditional leave to defend by asserting that the following amounted to triable issues:

(a) Whether the contract was only for the supply of labour or also for Air-conditioning and Mechanical Ventilation works ("ACMV works");

(b) Whether the plaintiff's claim for the sum was a sham claim based on "phantom" workers;

(c) Whether plaintiff's claim was illegal and unenforceable as it was carrying on the business of an unlicensed employment agency without the proper work permits for the workers;

(d) Whether the plaintiff had wrongfully repudiated the contract giving rise to the defence of set-off and a counterclaim by the defendant.

6 In addition, the defendant argued that the Audit Confirmation did not amount to an admission, and that the two payments made to the plaintiff on 9 November 2010 and 14 January 2011 were without prejudice and did not undermine its defence.

The plaintiff's case

7 The plaintiff countered the defendant's arguments by submitting that the Audit Confirmation amounted to an admission by the defendant, that the sum was due and owing by the defendant to the plaintiff, and that nothing was owed by the plaintiff to the defendant. It was further argued that the purported defences and counterclaims raised by the defendant were devoid of merit.

8 First, the plaintiff submitted that the defendant had no valid counter-claim or set-off for defective ACMV works as the contract was only for the supply of labour. Second, it was argued that the defendant's assertion that the plaintiff was using "phantom" workers to over-claim labour charges was without merit and calculated to avoid payment of the labour charges. Third, the defendant's claim for defective ACMV works was insufficiently particularised and vague. Fourth, the defendant's claim that the contract was tainted with illegality was misguided because the plaintiff was not an employment agency and thus, did not require a licence under the Employment Agencies Act (Cap 92, 1985 Rev Ed) ("Employment Agencies Act"). In addition, the plaintiff pointed out that the defendant's claim that the plaintiff did not have authorised work permits was not pleaded in the defence and was

clearly raised as an afterthought.

The law on summary judgment

9 The power of the court to grant summary judgment is found under O 14 r 1 and 3 of the Rules of Court (Cap 332, R5, 2006 Rev Ed) ("Rules of Court"). The primary concern of the courts in determining whether summary judgment ought to be granted is whether the plaintiff is truly entitled to this relief at this stage and, by the same token, whether it is just to deprive the defendant of the opportunity to challenge the plaintiff's claim at trial (see *Singapore Court Practice 2009* (Jeffrey Pinsler gen ed) (LexisNexis, 2009) ["*Singapore Court Practice*"] at para. 14/3/1). The law governing summary judgment is trite and had been succinctly stated by Prakash J in *Associated Development Pte Ltd v Loong Sie Kiong Gerald* [2009] 4 SLR(R) 389 at [22]:

> ...that in order to obtain judgment, a plaintiff has first to show that he has a *prima facie* case for judgment. Once he has done that, the burden shifts to the defendant who, in order to obtain leave to defend, must establish that there is a fair or reasonable probability that he has a real or *bona fide* defence.

10 The Court of Appeal in *Goh Chok Tong v Chee Soon Juan* [2003] 3 SLR(R) 32 held that leave to defend will not be granted based upon "mere assertions" by defendants; instead, the court will look at the whole situation critically to examine whether the defence is credible. In the Privy Council case of *Eng Yong v Letchumanan* [1979] MLJ 212 at 217, Lord Diplock explained it as thus:

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as 'he may think just' the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient prima facie plausibility to merit further investigation as to their truth.

11 Indeed, while the summary jurisdiction of the court is to be exercised with great circumspection, the court must also be wary of defendants who seek to evade summary liability by throwing out spurious allegations, assertions and afterthoughts as convenient smoke screens, which they neatly label as *bona fide* defences raising triable issues. In seeking to delay the inevitable, as it were, such defendants end up not only wasting precious court resources, but more importantly, could potentially cause serious hardship and irreparable loss to the plaintiff seeking vindication of his/her claim, for some of whom time is of the essence. In *Hua Khian Ceramics Tiles Supplies v Torie Construction* [1991] 2 SLR(R) 901 (not cited by either party) at [21], GP Selvam JC argued for a more robust approach in summary proceedings in order to resolve disputes at this stage, if possible, rather than to unnecessarily allow cases to go to trial:

> There will be no hardship or injustice to a claimant who is content to have his claim determined at the trial together with the cross claims against him. But delay in having to wait for the trial in many cases may cause severe or even irreparable loss to the plaintiff. Lawton LJ in *Ellis Mechanical Services v Wates Construction Ltd* [1978] 1 Lloyd's Rep 33 at 36 said:
>
> > One of the perils of commercial life for sub-contractors in the building trade is that there may develop between the main contractor and the building owner a serious dispute which leads to

> one or other of them repudiating the main contract. When that happens the lifeblood of the building trade, namely money, stops. It seems to me that the administration of justice in our Courts should do all it can to restore the lifeblood as quickly as possible.
>
> The Courts are aware of what happens in these building disputes; cases go either to arbitration or before an official referee; they drag on and on and on; the cash flow is held up. In the majority of cases, because one party or the other cannot wait any longer for the money, there is some kind of compromise, very often not based on the justice of the case but on the financial situation of one of the parties. That sort of result is to be avoided if possible. In my judgment it can be avoided if the Courts make a robust approach… to the jurisdiction under O 14.

In the present day context, it is in summary judgment applications that the defendant raises the set-off defence. In order to make a robust approach it is the duty of the court to closely examine points of set-off raised by the defendant and to ensure that the true purpose is not to cause delay to the plaintiff.

12 The same point was put across more succinctly by the same judge in the unreported case of *MP-Bilt v Oey Widarto* (Suit No 1844 of 1998 (Registrar's Appeal No 623 of 1998), judgment dated 26 March 1999):

> In *Hua Khian Ceramics Tiles Supplies v Torie Construction* [1991] 2 SLR(R) 901 a rule of practice was stated to the effect that the courts should take a robust approach when considering applications for summary judgment particularly in commercial and construction cases where cash flow is the life blood to make commerce work. The rigour of that rule is being applied to good end. It has earned a good reputation for Singapore.

13 With these principles in mind, I turn now to examine the various defences and counterclaims raised by the defendant.

The decision

Scope of the contract

14 The defendant first took issue with the scope of the contract, claiming that it encompassed not only the supply of labour for the project, but also the carrying out of ACMV works. As a corollary to that, the defendant further claimed since the contract encompassed ACMV works, it had a set-off by way of a defence and/or a counterclaim in relation to what it claimed was the cost of rectifying the defective ACMV works.

15 Recourse to the contract itself showed that the defendant's claims on the scope of the contract were entirely unmeritorious. It was undisputed by the defendant that there was nothing in the contract itself which referred to ACMV works: indeed, as is evident from [2] above, the contract merely listed out the various terms on which the plaintiff was to supply workers to the defendant for the purposes of the project.

16 Instead, the defendant attempted to rely on the "factual matrix" to establish what it claimed was "the true nature of the agreement", which purportedly encompassed the ACMV works. While it is accepted that the context in which the contract was made is relevant to the interpretation of that contract, what the defendant sought to do was to import an entire meaning to the contract, totally inconsistent with a plain reading of its terms, which clearly suggested that the contract was limited

to the supply of labour. In *Sandar Aung v Parkway Hospitals Singapore Pte Ltd* [2007] 2 SLR(R) 891 (cited by the defendant), the Court of Appeal, after establishing that the factual context played a role in contractual interpretation, was quick to caution at [36] against the reliance on amorphous conceptions of the 'factual background' to flout a "business commonsense" reading of contracts:

> However, Lord Hoffman did, in the subsequent House of Lords decision of *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251 state (at [39]) that while "there is no conceptual limit to what can be regarded as background", he was "certainly not encouraging a trawl through 'background' which could not have made a reasonable person think that the parties must have departed from conventional usage".

17 In any event, looking at the evidence which the defendant relied on, it was difficult to see how the scope of the contract could be extended to encompass the ACMV works. Specifically, the defendant relied on the fact that the plaintiff rendered invoices for "duct works" as indicative that the contract encompassed the ACMV works. That reliance, however, was misconceived for the following reasons:

(a) The "duct works" were separately invoiced from the labour charges, which were invoiced daily as part of a series of progress claims;

(b) The invoices for the labour charges followed the quotation set out in the contract; in contrast, the quotation for the "duct works", which was different from the quotation for the labour charges, was nowhere to be found in the contract;

(c) The invoices for the labour charges all referred to the "namelist claim", which was the timesheet submitted by the plaintiff to the defendant at the end of each working day. Again, this was explicitly provided for in the contract; in contrast, the "duct work" invoices bore no reference to the "namelist claim";

(d) Payment of the labour charges by the defendant was based only on the timesheets (*i.e.* time the workers spent working) and not on the nature of the work carried out.

Thus, the scope of the contract was limited to the supply of labour and did not include the ACMV works.

18 In relation to the defendant's purported set-off defence and/or counterclaim for the defective ACMV works, beyond mere assertions, the defendant did not provide any evidence of the purported contract for ACMV works it entered into with the plaintiff, much less the terms of that contract. Neither did the defendant show how it was that the plaintiff caused the defects, save for producing a laundry list of purported defects. Indeed, as the plaintiff pointed out, there was not a single contemporaneous letter sent by the defendant to the plaintiff in 2010 alleging that the ACMV works were defective, which was striking given that the defendant was now claiming the cost of rectification to be over $400,000.

Purported repudiation by plaintiff of the contract

19 It is apt, at this juncture, to deal with the defendant's claim that the plaintiff had repudiated the contract on 12 November 2010 by withdrawing its workers from the project site and ceasing work. Essentially, what the defendant was claiming here was that it was entitled to the defence of set-off, by virtue of its cross-claim on the plaintiff's alleged wrongful repudiation.

20 The defendant's argument here illustrated starkly the evil the court must guard against when dealing with applications for summary judgment (see [11] above): *i.e.* the desperate defendant who slings as many arguments as he/she can, no matter how frivolous, hoping that one sticks. The defendant cited two authorities which supposedly supported its argument that in construction and building contracts, failure to make payment was not a valid reason to abandon works and such abandonment amounted to wrongful repudiation: *Halsbury's Laws of Singapore*, *vol* 2 (LexisNexis 2003) ("*Halsbury's Laws of Singapore*") at [30.310] and *Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* [2004] 3 SLR(R) 288 ("*Jia Min*").

21 Both authorities, however, state clearly that while there was no general right to suspend works, this was subject to the parties expressly providing for such a right in their contract (see *Halsbury's Laws of Singapore* at [30.310] and *Jia Min* at [55]). Under the heading "Invoicing and Payment" in the contract, it was stated:

> ...In the event that our claims to you are not fully settled on time, we reserve our rights to claim all dues through legal means and remove all our workers from your site immediately without any further notice to your company. We will not be responsible, in any way, for any delays to your work schedule and losses suffered as a result of our cessation of work due to your non-payment.

It suffices to say that, in the light of the above, the defendant's claim here simply did not hold water.

"Phantom" workers

22 Next, I turn to the defendant's assertion that the plaintiff's labour charges incorporated billings for "phantom" workers who were not present and did not carry out works for the defendant. What was notable about the defendant's allegations here was that they were consistently vague and feeble throughout, such as to call into question the *bona fides* of its defence.

23 For instance, while the defendant had obliquely raised the issue in three letters sent on 4 November 2010, 8 November 2010, and 11 November 2010, stating that "there was an inconsistency and discrepancies on your workers signature reflect (*sic*) in the name list time sheet", it did little more to follow through with its complaint. Indeed, there was no attempt by the defendant to either identify the workers and/or the signatures it was disputing, or to set out in any detail/ tabulate its claim about the phantom workers. In fact, the defendant continued to make payments to the plaintiff on 9 November 2010 ($70,000), and on 14 January 2011 ($90,000), after solicitors' letters had been exchanged. While the defendant claimed that the $70,000 payment was made to help the plaintiff resolve its financial difficulties, and that the $90,000 payment was made without prejudice to its rights, the fact that those payments were even made was odd given the serious allegation that the plaintiff was fabricating sham claims on the labour charges. Coupled with the lack of any genuine attempt to follow through with the complaint, this raised serious doubts on the *bona fides* of the defendant's "phantom" worker defence.

The Audit Confirmation

24 More importantly, on 18 March 2011, the defendant sent the plaintiff an Audit Confirmation, effectively admitting the plaintiff's claim for the sum, and conceding that it did not owe any debt to the plaintiff.

25 In both *Gobind Lalwani v Basco Enterprises Pte Ltd* [1998] 3 SLR(R) 1019 ("*Gobind*") at [7] and *Capital Realty Pte Ltd v Chip Thye Enterprises (Pte) Ltd* [2000] 3 SLR(R) 419 ("*Capital Realty*") (decision of the Court of Appeal) at [24], it was held that an audit confirmation, while not conclusive,

constituted strong *prima facie* evidence of a debt. As per Lord Cave in *Camillo Tank SS Co Ltd v Alexandria Engineering Works* (1921) 38 TLR 134 at 143 (cited in *Gobind* at [7] as the *locus classicus* on account stated):

> An account stated in this sense is no more than an admission of a debt out of court; and while it is no doubt cogent evidence against the admitting party and throws upon him the burden of proving that the debt is not due, it may, like any other admission, be shown to have been made in error.

26 In *Re Bentimi Pte Ltd; In the matter of Part X of the Companies Act, Chapter 50 (1994 Revised Edition) v In the Matter of Bentimi Pte Ltd* [2003] SGHC 92 ("*Re Bentimi*"), Choo Han Teck J distinguished *Gobind* and *Capital Realty* but on the basis that the circumstances indicated that "there appeared to be sufficient incongruities in the petitioner's case to suggest that this is not a matter that ought to be decided on the strength of one document". Choo J therefore distinguished *Gobind* and *Capital Realty* on the facts: a consideration of the totality of the circumstances in that case revealed doubts about the probative value of the audit confirmation. *Re Bentimi* was therefore consistent with the holding in *Gobind* and *Capital Realty*.

27 The defendant sought to distinguish both *Gobind* and *Capital Realty* on the basis that in both cases, it was decided that the audit confirmation amounted to a clear admission only after a trial and not during an application for summary judgment. With respect, that argument missed the point totally. Although in an application for summary judgment - unlike a trial – it is not appropriate for the court to delve into a precise evaluation of the merits of the rival contentions or to assess the relative probabilities, it is nevertheless obliged to look at the totality of the situation critically to examine whether the defence raised by the defendant is credible. In approaching this (albeit limited) inquiry, the court is certainly allowed to take into account all available evidence, including the Audit confirmation, to decide if a *bona fide* defence has been raised.

28 In the present case, there was nothing to suggest that strong *prima facie* evidence of the Audit Confirmation in showing the existence of an admitted debt ought to be disregarded. Indeed, the Audit Confirmation was sent by the defendant to the plaintiff on 18 March 2011, more than four months after the plaintiff ceased work on the project, and after the defendant purportedly raised its various defences via letters exchanged between the parties. Yet there was no mention in the Audit Confirmation about the various assertions ("phantom" workers; defective ACMV works etc) now made by the defendant, save for an unequivocal admission by the defendant that it owed monies to the plaintiff.

29 Not unexpectedly, the defendant also claimed that the Audit Confirmation was "only to facilitate their accounting" and did not amount to an admission. That was an entirely self-serving position, with nothing to convince me otherwise. In fact, the defendant did not either deny the reliability of the Audit Confirmation or argue that it was erroneous. It was simply contented to make the bare assertion that the Audit Confirmation was provided "only to facilitate their accounting and can be explained at the trial of the said matter".

30 From the above, it was evident that, when the entire case was looked at critically, shorn of speculative and unsubstantiated assertions, the defendant's case raised no serious triable issues.

Illegality

31 Nevertheless, there remained a final string to the defendant's bow. The defendant claimed that the contract was tainted with illegality for two reasons:

(a) First, the plaintiff was carrying out the business of an employment agency without a valid licence under s 6 of the Employment Agencies Act;

(b) Second, the contract was in breach of 5(3) of the Employment of Foreign Manpower Act (Cap 91A, 2009 Rev Ed) ("Employment of Foreign Manpower Act"), read together with the Employment of Foreign Manpower (Work Pass) Regulations (Cap 91A, 2009 Rev Ed) ("Work Pass Regulations").

32 On (a), s 6 of the Employment Agencies Act applies only to employment agencies. Section 2 of the Employment Agencies Act defines "employment agency" as:

> "employment agency" means any agency or registry carried on or represented as being or intended to be carried on (whether for the purpose of gain or reward or not) for or in connection with the employment of persons in any capacity, but *does not include any registry set up by an employer for the sole purpose of recruiting persons for employment on his own behalf;*

33 It had always been the plaintiff's case that it was not an employment agency as it was itself the employer of the workers. The contract itself (under the term "Indemnity") revealed that it was the plaintiff itself who was responsible for the welfare of the workers, including the payment of wages, individual taxation and the payment of levies; the defendant was merely charged a daily rate for the workers provided by the plaintiff. At all times, the plaintiff was and remained the employer of the workers, and thus cannot be said to be an 'employment agency'. There was accordingly, no basis on which s 6 of the Employment Agencies Act was applicable to the present case.

34 On (b), the first thing to be noted was that this issue was not pleaded in the defence- only the issue relating to s 6 of the Employment Agencies Act was pleaded. The law in this area, *vis-a-vis* the question of whether a party challenging an O 14 Rules of Court application is entitled to rely on or raise any unpleaded defence, appears to be in a state of flux. The following string of High Court decisions (none of which were cited by the parties), *Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd* [2008] 2 SLR(R) 786 ("*Lim Leong Huat*"), *United States Trading Co Pte Ltd v Ting Boon Aun* [2008] 2 SLR(R) 981 ("*United States Trading*"), *HSBC Institutional Trust (Singapore) v Elchemi Assets Pte Ltd and another* [2010] SGHC 67 had established the position that if a respondent to an application for summary judgment failed to plead all the defences he intended to rely on in his pleading, any fresh defence that was not pleaded could not be relied on unless the defence was amended, or in exceptional cases where the court found that there were good reasons to allow that to be done (see also Singapore Court Practice at para. 14/3/2A). In coming to that position, the cases over-ruled an earlier Malaysian decision in *Lin Securities (Pte) v Noone & Co Sdn Bhd* [1989] 1 MLJ 321 ("*Lin Securities*") where it was said at p 322:

> No doubt a defendant is bound by the four corners of his pleading at the trial of the action but he is not so bound at the O 14 proceedings. Order 14 r 4(1) provides that a defendant may show cause against an application for summary judgment by affidavit or otherwise. He is entitled to show at the hearing of the O 14 application that over and above what has been pleaded in the statement of defence he has other defences. The issue at an O 14 application is whether the defendant has a defence and not whether the statement of defence provides him with a defence.

35 However, the Court of Appeal subsequently in the oft-cited case of *Poh Soon Kiat v Desert Palace Inc* [2010] 1 SLR 1129 ("*Poh Soon Kiat*") at [15], appeared to adopt the position set out in *Lin Securities*, albeit without the benefit of having had its attention drawn to the High Court decisions:

> 15 In this connection, the Appellant applied to this court via SUM 1312/2009 for leave to

> amend his defence to plead that the 2001 California Judgment was not a foreign money judgment ... We declined to hear this application and treated it as withdrawn. In our view, it was an unnecessary application as, in summary judgment proceedings, "[a] defendant may raise defences in his affidavit even if they are not referred to in the pleaded defence" (see *Singapore Civil Procedure 2007* (G P Selvam chief ed) (Sweet & Maxwell Asia, 2007) at para 14/2/12) and is "bound by the four corners of his pleadings [only] at the trial of the action but...not...[in] the O. 14 *ie*, summary judgment] proceedings"...

36 In *Rankine Bernadette Adeline v Chenet Finance Ltd* [2011] 3 SLR 756 ("*Rankine*") at [23], the court suggested that the Court of Appeal would have dealt with the issue differently had its attention been drawn to the High Court cases. That observation was repeated recently in *PMA Credit Opportunities Fund and others v Tantono Tiny (representative of the estate of Lim Susanto, deceased)* [2011] 3 SLR 1021. While I concur with the court in *Rankine* that there is room for greater clarity and certainty on this issue (see [23] of *Rankine*), in the light of the Court of Appeal decision in *Poh Soon Kiat*, I was unable to exclude the defence raised by the defendant.

37 Nevertheless, the question remained whether the defendant's claim that the contract was tainted by illegality by virtue of a breach of s 5(3) of the Employment of Foreign Manpower Act, read together with the Work Pass Regulations, was a *bona fide* defence. While the defendant's argument here was, to put it charitably, rather nebulous, I understood its argument to be that the plaintiff was in breach by virtue of the fact that at least two of the workers supplied under the contract were obtained from the plaintiff's sub-contractors.

38 For convenience, I set out the material provisions. Section 5(3) of the Employment of Foreign Manpower Act states:

> No person shall employ a foreign employee otherwise than in accordance with the conditions of the foreign employee's work pass.

Paragraph 2 of the First Schedule (Part II) of the Work Pass Regulations states:

> *Except as provided in paragraphs 7 to 13 of Part III* (emphasis added), the foreign employee shall be under the employer's direct employment and the employer shall be responsible for the control and supervision of the foreign employee. The employer shall not permit the foreign employee to be employed by or contracted to any other person or business to do work for that person or business. The employer shall not employ the foreign employee in either an occupation or a sector which is different from that specified in the work permit.

Paragraph 7 of the First Schedule (Part III) of the Work Pass Regulations ("Paragraph 7 of the First Schedule"), however, which specifically applies to foreign workers who are construction workers, in turn states:

> Notwithstanding paragraph 5, an employer may, with the consent of the foreign employee, enter into a contract for the supply of labour with an eligible third party engaged in the construction industry, in relation to a foreign employee to whom the conditions in this Part apply.

For completeness, paragraph 5 the First Schedule (Part III) of the Work Pass Regulations simply states that:

> Subject to paragraph 7, the employer shall ensure that the foreign employee is not sent to work for any other person.

39 The defendant appeared to have omitted to have regard to the proviso "*Except as provided in paragraphs 7 to 13 of Part III*" in Paragraph 2 of the First Schedule (Part II) of the Work Pass Regulations. Paragraph 7 of the First Schedule contemplates that a foreign worker may be sent to work for a third party engaged in the construction industry, so long as the worker consents. Some flexibility is thus accorded by the Work Pass Regulations, perhaps in acknowledgment of industry practices. As such, I saw nothing to preclude the plaintiff from using workers obtained from its sub-contractors for the purposes of the contract, which was a contract for the supply of labour. The issue of whether the workers provided under the contract came directly from the plaintiff or through its subcontractors could hardly amount to a *bona fide* defence enabling the defendant to evade summary judgment.

Conclusion

40 In the final analysis, the defendant was evidently clutching at straws in its attempts to conjure up a *bona fide* defence, precisely the sort of conduct that the court ought to be wary of. I therefore dismissed the Appeal and fixed costs at $3,000 to the plaintiff.