New Civilbuild Pte Ltd v Guobena Sdn Bhd and Another
[2000] SGHC 30

Case Number : Suit 46/1998

Decision Date : 29 February 2000

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Lee Chin Seon (CS Lee) for the plaintiffs; Tan Woon Tiang and Karen Phua (Tan & Tan) and KS Chung and Michael Moey (Chung & Co) for the first defendants; BR Rai and Edric Pan (Rajah & Tann) for the second defendants

Parties : New Civilbuild Pte Ltd — Guobena Sdn Bhd; Another

Civil Procedure – Judgments and orders – Res judicata – When judicial decision deemed final

Civil Procedure – Judgments and orders – Res judicata and or issue estoppel – Court dismissing earlier application by first defendants to strike out plaintiffs' action on grounds of and res judicata issue estoppel – Whether doctrine of res judicata estoppel and/or applicable

Civil Procedure – Judgments and orders – Declaration – Whether declaration that first defendants' call on performance bond being fraudulent and/or unconscionable should be granted – s 18 Supreme Court of Judicature Act (Cap 322), First Schedule para 14, O 15 r 16 Rules of Court

Contract – Remedies – Building sub-contract – Delay in completion – Whether plaintiffs can claim for variation works and damages resulting from delay – Whether plaintiffs can claim retention monies and progress payments

Building and Construction Law – Sub-contracts – Liquidated damages – Issue of no delay certificate – Whether sub-contract in SIA form – Whether first defendants can claim liquidated damages

Building and Construction Law – Building and construction related contracts – Claim for expenses – Payment by first defendants on behalf of plaintiffs to third parties – Whether first defendants can claim expenses from plaintiffs

Contract – Unconscionability – Performance bond – Whether call on bond fraudulent and/or unconscionable – Whether first defendants can retain sum received under bond

: The first defendants Guobena Sdn Bhd (`Guobena`), a Malaysian-incorporated company, were the main contractors under a Design and Build Contract (`the main contract`) for a condominium project in Singapore known as the Tanglin Regency project (`the project`). The developers of the project were First Tanglin Land Pte Ltd (`First Tanglin`). Under the main contract awarded to Guobena on 17 July 1995, Guobena were required to design and complete the construction of the project by 31 July 1997. The main contract was valued at $38,534,000 and liquidated and ascertained damages (`LAD`) for the project were fixed at $10,000 for each day that the works remained uncompleted.

By a sub-contract dated 21 September 1995 (`the sub-contract`) awarded under a Letter of Award dated 2 November 1995 (`the letter of award`), Guobena contracted out to the plaintiffs, New Civilbuild Pte Ltd (`New Civilbuild`), a part of the works under the main contract. The scope of works of New Civilbuild under the sub-contract comprised the construction of the buildings including works within the building boundary, co-ordination with all other sub-contractors and suppliers appointed by Guobena under the sub-contract, completion (including commissioning and testing of all mechanical and electrical installations), application for and the obtaining of Temporary Occupation Permit and Certificate of Statutory Completion as well as maintenance and making good of defects, if any (see the letter of award at 1AB4-5). The works of New Civilbuild under the sub-contract constituted about

50% to 55% of Guobena`s obligations under the main contract. The value of the sub-contract was $16,413,047.88 (excluding Goods and Services Tax) and LAD was fixed at $20,000 per day. The sub-contract was stated to be in the standard form of the Singapore Institute of Architects (`SIA`) and it required New Civilbuild to provide a performance bond of 10% of the sub-contract value. The second defendants The Tai Ping Insurance Co Ltd (`Tai Ping`) had, at the request of New Civilbuild, issued a performance bond (`the bond`) for the sum of $1,642,045 in favour of Guobena.

New Civilbuild commenced construction on or about 21 September 1995; the project was originally scheduled to be completed by 21 April 1997 (1AB6) but it was not.

On 5 January 1998, Guobena`s solicitors issued a letter of demand to Tai Ping demanding payment of the full sum under the bond. This letter followed earlier letters of demand from Guobena to Tai Ping dated 17 and 30 December 1997. Guobena`s letter of demand dated 17 December 1997 did not contain any allegation that New Civilbuild had breached the sub-contract. On 18 December 1997, New Civilbuild replied to Guobena`s letter of demand dated 17 December 1997 and expressed their surprise at the demand. It transpired that in calling upon the bond, Guobena relied on New Civilbuild`s breach of their obligations under the sub-contract resulting in delays in the completion of the works under the sub-contract.

New Civilbuild asserted that there was no delay on their part in the completion of the project and that the delay was due to Guobena`s default. Guobena, however, claimed that the delay arose by reason of New Civilbuild`s own default. New Civilbuild therefore viewed Guobena`s demand under the bond as fraudulent and unconscionable.

In response to Guobena`s call on the bond, New Civilbuild commenced these proceedings and obtained an injunction to restrain Guobena from calling on or receiving payment under the bond and, to restrain Tai Ping from paying on Guobena`s call on the bond. On 23 April 1998, the injunction was discharged by Judicial Commissioner Lee Seiu Kin on Guobena`s application. New Civilbuild lodged an appeal (in CA 139/98) against the order setting aside the injunction but the appeal lapsed when New Civilbuild went into liquidation. As a result of its liquidation, New Civilbuild were ordered to furnish security ($15,000) for Guobena`s costs.

After the injunction was discharged, Guobena commenced an action (Suit 57/98) against Tai Ping and obtained summary judgment on the basis that the bond was payable on demand. Pursuant to the summary judgment, Tai Ping paid Guobena the sum of $1,642,045 with interest and costs; Tai Ping did not appeal against the summary judgment.

The pleadings

In this action, New Civilbuild claimed against Guobena for $2,122,743.29 arising from damages suffered and costs incurred as a result of the delay which, they contended, was caused by Guobena. New Civilbuild also sought to recover from Guobena retention moneys amounting to $335,511.33 and outstanding progress claims (Nos 23 and 26) of $1,478,470.62 for work already completed. In total, the amount claimed by New Civilbuild was $3,936,725.24.

In addition to their monetary claims, New Civilbuild also sought a declaration that Guobena`s call on the bond was fraudulent and/or unconscionable and prayed for repayment of the sum received by Guobena under the bond.

Guobena denied New Civilbuild`s claims and counterclaimed for expenses incurred in completing

alleged uncompleted works, supplying materials to New Civilbuild and making payments on New Civilbuild`s behalf to suppliers, sub-contractors and other third parties. These expenses amounted to $5,702,309.41. After deducting the progress payments admitted to be owed to New Civilbuild and the amount received by Guobena under the bond, the amount counterclaimed by Guobena against New Civilbuild in respect of such expenses was $270,913.36. Guobena also counterclaimed $3m for liquidated damages for the delay in completion. As for their call on the bond, Guobena pleaded that it was proper and not fraudulent or unconscionable.

On its part, Tai Ping counterclaimed against New Civilbuild (and Guobena) repayment of the sum paid out on the bond (with interests and costs on an indemnity basis) and also sought declaratory relief that the call on the bond was fraudulent and or unconscionable and, that Guobena should refund to Tai Ping the judgment sum (totalling $1,694,457.10) the former received in Suit 57/98.

Issues

At the outset, I had informed the parties that I would only decide liability on the issues involved and, depending on my findings, the Registrar would assess damages at a later stage if necessary. The following issues arise for determination:

(i) was the delay in completion of the project caused by New Civilbuild or Guobena;

(ii) are Guobena liable to New Civilbuild for the variation works claimed;

(iii) are Guobena liable to pay New Civilbuild the retention moneys and progress claims Nos 23 and 26;

(iv) are Guobena entitled to claim from New Civilbuild the expenses allegedly paid on the latter`s behalf;

(v) are Guobena entitled to claim liquidated damages against New Civilbuild;

(vi) was Guobena`s call on the bond fraudulent and or unconscionable;

(vii) were Guobena entitled to retain the sum received under the bond without accounting for the same; and

(viii) should the court rule that Guobena`s call on the bond was fraudulent and or unconscionable or, that the sum received was overpaid, whether Tai Ping are entitled to be refunded the judgment sum received by Guobena.

I shall proceed to deal with each of the issues in turn.

The cause(s) of delay

In the course of the 15-day trial, New Civilbuild adduced evidence from four witnesses, namely, their executive-director cum project manager Gee Kim Fah (`Gee`), their contracts manager Foo Yoke Ching (`Foo`), their site engineer (`Lin Peide`) and their site foreman (`T Kathiravan`).

a The plaintiffs` case

New Civilbuild started work under the sub-contract on 21 September 1995 when they were given

possession of the project site. The original completion date (21 April 1997) could not be adhered to due to numerous delays caused by Guobena. Gee (PW1) testified that the delays were due to:

(i) failure to provide a site ready for New Civilbuild to carry out the works;

(ii) repeated failures and/or delays on Guobena`s part in submitting the required structural or construction plans and drawings, rendering New Civilbuild unable to start and or to continue construction works. This was particularly true of the first storey deck - the complete set of plans were only submitted in August 1997, well after the completion date;

(iii) Guobena made various corrections and or amendments to the structural or construction plans and drawings, often with little or no prior notice, resulting in abortive works; and

(iv) amendments to construction plans and drawings which led to New Civilbuild having to carry out variation works, causing delay in the completion of the works.

Gee testified that between December 1995 and October 1997, he had made several written requests to Guobena for extensions of time under the sub-contract and Guobena had never indicated that they would reject those requests (NE 62D-E). Instead, New Civilbuild were asked to proceed and had various progress payments paid to them along the way; they were therefore led to believe that their requests for extensions of time had been acceded to or at least, that their requests would not be rejected. Guobena on the other hand (according to Foon Hoong Fatt), claimed that despite repeated reminders, New Civilbuild had failed to submit the critical path of their construction programme (highlighting the affected works) to substantiate their claim for and to warrant the granting of, extensions of time for the sub-contract works.

Gee asserted he had submitted a construction schedule (see 2AB263) in which New Civilbuild had outlined the various timeframes in which various items of work were to be completed. That construction schedule however, was prepared on the basis of certain underlying assumptions, which, inter alia, included: that the site would be ready for New Civilbuild to proceed without any hindrance, drawings would be complete with full details of beams, slabs and columns in terms of depth, dimensions, length and levels and, that excavation work was to be carried out by excavators and tower cranes. Another reasonable assumption was, that all basement works including pile caps, excavation beams, slabs and walls must be completed to form an integral part of the whole basement so that the first storey deck could be erected followed by the tower block. When cross-examined, Guobena`s witnesses agreed that there were certain underlying assumptions which formed the basis for New Civilbuild`s construction schedule.

Gee gave evidence that, contrary to the underlying assumptions, the site was not ready for construction when New Civilbuild took vacant possession on 21 September 1995 because, the sheet piles were not completed and, there was an abandoned underlying telecom cable - it was not within New Civilbuild`s scope of work to remove that cable.

New Civilbuild asserted that the delay in completion was also due to inadequate architectural drawings being received from Guobena for purposes of commencing construction. Further, New Civilbuild had, in numerous letters to Guobena, pointed out the various delays and stated the need for Guobena to take remedial action. Guobena however, did not deal with or failed to deal adequately with, the various matters brought to their attention. This affected New Civilbuild`s ability to complete the project as scheduled.

In relation to the construction of the first storey deck, New Civilbuild claimed that Guobena did not

provide a full set of detailed construction drawings in sufficient time. This problem was highlighted in a series of letters to Guobena Gee referred to. He said that Guobena only gave the full detailed construction plans to New Civilbuild in August 1997, well after the original completion date and even then, there remained unresolved discrepancies between the architectural and structural drawings which only Guobena could sort out. Indeed, Guobena`s Senior Construction Manager, Kee Chin Keong (1DW5), admitted in cross-examination that New Civilbuild could not have proceeded with the works unless Guobena resolved those problems (NE552D-554F).

Guobena also required certain amendments to their plans and drawings which prevented New Civilbuild from using the method of construction originally intended and this also delayed New Civilbuild`s work schedule. New Civilbuild also had to carry out variation works in the course of doing the basement works causing further delays. Variation works were necessitated by amendments to drawings and this caused New Civilbuild to incur losses. New Civilbuild also brought up a list of some 18 other problems which they faced during the construction of the super-structure.

b The first defendants` case

Guobena called seven witnesses who included their chief operating officer Johnny Choong (`Choong`). He (1DW1) said that throughout 1996 and 1997, Guobena had repeatedly complained to New Civilbuild about defective works, poor workmanship, slow progress and insufficient manpower being provided on site. Although more than a hundred letters of complaint were sent to New Civilbuild, Guobena did not receive any replies.

Guobena refuted as groundless, New Civilbuild`s allegation that Guobena did not provide adequate construction drawings or, had frequently delayed providing New Civilbuild with such drawings. According to Guobena, the first lot of drawings and plans comprising 128 tender drawings were sent to New Civilbuild on 15 September 1995 to enable New Civilbuild to prepare their tender. Another set of drawings and plans was sent by Guobena to New Civilbuild when the letter of award dated 2 November 1995 was signed. The drawings and plans annexed to the letter of award were the exact same plans and drawings comprised in the first lot. Gee however contended that some but not all, the drawings handed to New Civilbuild by Guobena could be used for construction (NE 46B-C, 48D-49A).

The court had requested Gee to cite examples of drawings which could or could not be used for construction. In giving examples of drawings which could be used, Gee quoted the drawing numbers which were the same drawings sent to New Civilbuild in the first lot and in the lot annexed to the sub-contract, thereby rebutting his own complaint.

As for the drawings and plans for the construction of the first storey deck, Guobena adduced evidence to show that they had been sent to New Civilbuild by 15 January 1996. Between October and December 1995, New Civilbuild wrote four letters to Guobena requesting the first storey deck construction drawings. After the drawings had been sent to New Civilbuild by 15 January 1996, no more demands were made for drawings of the first storey deck until New Civilbuild`s letter of 19 July 1996 to Guobena (see 1AB316) still asking for the first storey deck drawings. There was therefore a lapse of six months from the delivery of all the plans of the first storey deck to New Civilbuild and their subsequent request for the same. If the drawings sent to New Civilbuild in January 1996 did not contain sufficient details, then they should have asked for more details promptly. As New Civilbuild did not request for details promptly, Guobena assumed that no more details were required .

According to New Civilbuild`s schedule, the completion date for the first storey deck was end July 1996. However, on 18 January 1997, New Civilbuild were still writing to Guobena setting out various problems and discrepancies they encountered in the construction of the first storey slab (1AB344).

Guobena alleged that the delay could have been avoided if New Civilbuild had exercised more diligence and had raised the problems to Guobena earlier. Guobena also complained there were problems of discrepancies between actual construction and drawings caused by New Civilbuild`s failure to study the structural and architectural drawings.

Moreover, as the sub-contract was for a Design and Build Contract, if there were any issues in respect of the design or drawings, New Civilbuild were supposed to inform Guobena before construction began. New Civilbuild`s site engineer for the project Lin Peide (PW4), said in cross-examination that before construction started in respect of a particular portion of the project, New Civilbuild had already encountered problems with the drawings (NE114D-F). Yet, no issue touching on the design or drawings was brought up by New Civilbuild prior to their commencement of works under the sub-contract. Guobena also gave evidence that none of the alleged discrepancies or difficulties with the drawings raised by New Civilbuild was of a fundamental nature or would affect the critical path or be considered a major obstacle to the progress of the works under the sub-contract. In any case, Guobena claimed that all issues brought up by New Civilbuild were duly conveyed to the consultants and dealt with promptly.

Guobena`s evidence was that it was typical of New Civilbuild not to ask for drawings or details until months or a year later when they experienced difficulty in the midst of construction. Only then did New Civilbuild apply to Guobena for detailed drawings which should have been asked for much earlier. This was despite a warning to New Civilbuild in Guobena`s letter of 9 February 1996 that any discrepancy in the drawings must be brought to Guobena`s attention one month before construction work began. Under the sub-contract, New Civilbuild were required to complete their scope of works by 21 April 1997 and yet, in March 1997, they were still raising various queries, discrepancies and proposals to Guobena.

Further, the structural works for the first storey deck were delayed for about a year while the tower block construction was delayed for about ten months. According to Choong and the architect for the project (Chionh Chye Luay), the construction of the first storey deck and the construction of the tower block were independent of each other and any delay in the construction of one should not have caused delay in the construction of the other. This was admitted by Gee under cross-examination (NE 9B-C). Choong testified that Guobena had, on various occasions, urged and reminded New Civilbuild to focus on and expedite their works on, the tower block.

In addition, Choong alleged that New Civilbuild had not provided sufficient manpower and materials for the sub-contract works and this slowed as well as delayed, progress in the construction. Guobena had raised this issue with New Civilbuild on various occasions and even reminded them of the penalty under the LAD clause in the sub-contract. In many instances, New Civilbuild`s poor workmanship and defective works needed rectification and this contributed to further delays. According to Foon Hoong Fatt (Foon), Guobena`s senior/project manager, the poor workmanship and defective works had been pointed out to New Civilbuild by Guobena since January 1996 but New Civilbuild were slow to rectify the problems and constant reminders had to be issued to them. I should point out however that Guobena`s allegations of New Civilbuild`s inadequate manpower and their defective works, were not part of Guobena`s pleaded case (NE 316).

Findings on cause(s) of delay

On the evidence, I find that New Civilbuild have not succeeded in proving that the delays in the construction of the first storey deck and in completion of the works under the sub-contract generally was wholly due to the fault of Guobena. A large portion of the delays was due to default and omissions on their own part.

Claim for variation works and damages suffered as a result of delay

New Civilbuild particularised their claim for variation works and damages under the following items:

(i) claim for additional six months (for delayed completion);

(ii) under-certification of variation works;

(iii) delay to first storey deck (additional material and labour costs);

(iv) removal of rebar rust;

(v) clearing of debris;

(vi) additional disposal (for the formwork used for the first storey deck);

(vii) separator beam;

(viii) plastering at pitch roof;

(ix) concrete plinth;

(x) basement wall construction;

(xi) sheet gap pile concreting;

(xii) additional shoring to pile cap; and

(xiii) additional works to basement wall construction.

The question to be determined is whether New Civilbuild were entitled to the numerous items they claimed as resulting from the delay. It should be noted at the outset that Guobena relied extensively on contractual provisions in the letter of award and the sub-contract to defend New Civilbuild`s claim under these various items. In particular, Guobena claimed that New Civilbuild`s claims under several items were covered by para 16.1 of the letter of award (see 2AB10) requiring variation orders to be approved by the developers. In this case, no variation orders were approved by the developers in respect of the relevant items.

It is recognised that to give effect strictly to such contractual provisions in every instance as contended by Guobena would mean that New Civilbuild could not succeed in their claims at all unless they were sanctioned by First Tanglin. This could result in undue hardship to New Civilbuild. However, contractual provisions are binding on both parties to the contract and if on their true construction, they cover the various claims made by New Civilbuild, then the only way in which New Civilbuild`s claims would succeed is, if the claims were made in accordance with the sub-contract. For works done outside the scope of the sub-contract or for works done under the sub-contract but for which no remuneration was provided in the sub-contract, a claim in quantum meruit may be possible, depending on the circumstances. However, New Civilbuild pleaded their claim on the basis of the sub-contract, not in quantum meruit. I shall now proceed to deal with each item of claim.

In respect of item (i) (claim for additional six months up to 27 October 1997), New Civilbuild treated it

as a claim for preliminaries (prolonged rental of plant and equipment) (NE 94A). Under the Letter of Intent dated 7 September 1995 (2AB20) and the letter of award dated 2 November 1995, such preliminaries are not claimable by New Civilbuild; in particular, para 7.2 of the letter of award states:

> *The Sub-Contractor shall not be entitled to claim for loss, expense, cost or preliminaries and whatsoever in the event extension of time is granted.*

Thus, even if extensions of time were said to be granted (evidenced by the many requests in letters from New Civilbuild to Guobena who did not expressly reject such requests), New Civilbuild would not be entitled to claim for loss or expenses resulting from the delay in the completion of the sub-contract. In any case, as the evidence showed, generally New Civilbuild were largely responsible for the delay in the construction; it would be unfair to Guobena if their claim in respect of such delays succeeded.

Item (ii) (under-certifying of variation works), would be claimable by New Civilbuild only if sanctioned in writing by First Tanglin, as provided by para 16.1 of the letter of award which states:

> *No variation order will be permitted unless it is subsequently sanctioned in writing by the Client. The procedures for variation orders are adequately covered in the Articles and Conditions of Contract.*

As the developers did not at any time sanction the variation works in writing, New Civilbuild are not entitled to payment for such variation works.

Under item (iii), New Civilbuild claimed additional material and labour costs resulting from delay in the construction of the first storey deck. Under cl 4.0 of the General Specifications of Materials and Workmanship (see 1AB85), which forms part of the sub-contract, additional material and labour costs were not claimable by New Civilbuild; the clause states:

> *Materials*
>
> *... Unless otherwise described, the description of each item of measured work shall include for supplying and delivering of all materials, unloading, storing, carriage and cartage, cutting and all waste on materials, hoisting, all labour setting, fitting and fixing in position, covering up and protecting finished work, clearing away all debris and waste, return of packaging, carriage paid, use of plant and equipment, supervision, establishment and overhead charges and profit and all other labour and materials necessary for the due and proper execution of each item.*

As the evidence showed that New Civilbuild were primarily responsible for the delay in the construction of the first storey deck, they should not be compensated for their own wrongdoing.

Clause 4.0 also extinguishes New Civilbuild`s claims under items (v) (clearing of debris) and (vi) (additional disposal of formwork for the first storey deck). In any case, item (v) was already provided for in the sub-contract price; item (vi) cannot be justified because the normal practice is that formwork can be re-used four times before it is disposed off. In this case, the formwork was used only once.

New Civilbuild claimed costs for removal of rebar rust under item (iv). It would appear that New Civilbuild had breached their obligations to protect the works under cll F, G and H on p B1/26 of the Preliminaries and General Conditions (see 1AB70) which formed part of the sub-contract. These clauses state:

> *F The Contractor shall provide for carefully covering up and protecting the Works and materials from inclement weather.*
>
> *G The Contractor shall provide full and adequate protection for all finished surfaces and for all materials which may subject to damage or staining and shall be responsible for making good all damage done to such finished surfaces and materials until the Works are handed over to the Employer.*
>
> *H This protection must be applied or provided as soon as a surface is finished and/or materials arrive on the Site or as may be otherwise desirable and such protection shall be maintained in effective condition throughout the course of the Works.*

As New Civilbuild were in breach of their obligations under the sub-contract in this respect, they are not allowed their claim under item (iv).

As for item (vii) (separator beam), this was already included in the contract price of New Civilbuild; hence, no extra claim can be allowed for this item.

Items (ix) to (xiii) (concrete plinth, basement wall construction, sheet pile gap concreting, additional shoring to pilecap and additional works to basement wall construction) apparently arose from and were linked to, a problem created by the tilting of sheet piles which New Civilbuild alleged was caused by, or was the responsibility of, Guobena. The sheet pile problem affected the basement works, resulting in delay to the construction. Guobena relied on Gee`s own evidence to show that the tilting of the sheet piles was caused by over-excavation carried out by New Civilbuild against instructions given by Guobena. Gee however, denied that the tilting of the sheet piles was caused by over-excavation on the part of his company (NE 615B-C). Even so, Guobena claimed that they were not responsible for the sheet pile problem and consequently should not be responsible for costs incurred by New Civilbuild to resolve the problem.

There was evidence to show that New Civilbuild required advice, remedial work and action from Guobena to deal with the sheet pile problem. From the early stage of the works undertaken by New Civilbuild to the time of completion, New Civilbuild wrote numerous letters to Guobena pointing out the delays and emphasising the need for Guobena to expedite the actions on their part. It appeared from Gee`s testimony that Guobena were often slow in reverting to New Civilbuild (NE 51C). Guobena did not challenge New Civilbuild`s evidence that there were repeated changes made to the construction drawings and this caused further delay to the project. Foon (1DW3) admitted under cross-examination that the additional works carried out by New Civilbuild affected the progress of the basement works (NE 269C-D).

In the light of such evidence, New Civilbuild should not be wholly to blame and Guobena should bear some responsibility for the delays in the basement works stage of construction. Therefore, with the exception of item (xiii) which was already provided for in the sub-contract price, New Civilbuild is

entitled to claim from Guobena items (ix) to (xii) in respect of delay to the construction in view of problems encountered in the course of doing the basement works.

Guobena, however, contended that items (ix) to (xii) were in respect of works which should have been claimed as variations under para 16.1 of the letter of award. Since those variations had not been authorised by the developers in writing, New Civilbuild were not entitled to claim the same. It seems to me however, that this case is akin to one where an employer desired the execution of extra works by the employee and had stood by and seen the expenditure on such works by the employee and taken the benefit thereof. In such a case, it would be inequitable for the employer to refuse to pay the employee on the ground that the work done was not properly ordered; the employer should be ordered to account for the value of the extra work. The basis of the employer`s liability in such a case is an implied promise to pay (see ***Keating on Building Contracts*** (6th Ed) at pp 98 - 99). In the present case, if Guobena wanted extra works to be executed by New Civilbuild in relation to the basement as a result of, the sheet pile problem or the amendments to the construction drawings and, had stood by and seen such works being carried out by New Civilbuild (to their benefit but to the latter`s detriment), then New Civilbuild should be allowed their claims in respect of such expenditure, notwithstanding that such variations were not properly ordered under the contract. Unfortunately, the claim was not pleaded on this basis by New Civilbuild and it cannot therefore be allowed.

The only item left to be dealt with is item (viii) (plastering at pitch roof). This claim is disallowed as New Civilbuild did not adduce any evidence in support thereof.

In the light of the evidence, New Civilbuild has failed to show that they are entitled to claim against Guobena the costs incurred for variation works done and damages resulting from the delay in completion. No documents, invoices or receipts were produced to independently validate the various expenses New Civilbuild claimed to have incurred.

The evidence adduced on the whole did not show that the delay in completion of the project was, as New Civilbuild sought to prove, largely due to the fault of Guobena. Instead, Guobena adduced sufficient evidence to show that New Civilbuild were primarily responsible for the construction delays and for failing to complete the project according to their own schedule. Therefore, New Civilbuild should not be allowed to claim for extra costs incurred and damages allegedly suffered as a result of delay due mostly to their own lack of due diligence.

Claim for retention moneys

Under cl 11.2 of the sub-contract (1AB8), Guobena were obliged to release to New Civilbuild 50% of the retention sum under the contract. Clause 11.2 states, inter alia:

> *... Half of the retention will be released upon issuance of the Completion Certificate by the architect and balance upon settlement of Final Account and at the end of DLP [defects liability period] or Notice of Completion of Making Good Defects, whichever is later.*

New Civilbuild claimed $335,511.33 being 50% of retention moneys which Guobena failed to release to them.

It is clear from cl 11.2 that 50% of the retention moneys may be released only upon issuance of the Completion Certificate by the architect. Guobena contended that New Civilbuild were not entitled to claim the 50% retention sum since there was no Certificate of Practical Completion until 13 May 1998

when the Certificate was issued by the project architects to Guobena and not to New Civilbuild, who had by then abandoned the project site.

On a plain reading of cl 11.2, it does not appear that the Completion Certificate by the architect must as a condition, be issued to New Civilbuild in order for New Civilbuild to receive the retention moneys owed to them under cl 11.2. As long as the Completion Certificate had been issued, New Civilbuild should be entitled to 50% of the retention sums as stipulated under cl 11.2. In any case, the retention moneys were for works already completed by New Civilbuild; even if New Civilbuild had abandoned the site before the project was completed, Guobena still had recourse to the balance 50% of the retention moneys for whatever claims they may have against New Civilbuild in that regard.

Claim for progress payments

New Civilbuild claimed from Guobena $154,593.84 and $1,323,876.78 under progress claims Nos 23 and 26 respectively. Guobena`s defence to these progress payments was that Guobena were entitled to set them off against a sum of $5,702,309.41 for expenses which they had incurred on behalf of New Civilbuild. Apart from the defence of set-off, Guobena did not dispute that New Civilbuild were entitled to the progress payments. Accordingly, New Civilbuild`s claims under the progress payments should be allowed. Guobena`s defence of set-off has to be considered in the context of their counterclaim against New Civilbuild for expenses incurred on behalf of New Civilbuild. If Guobena`s counterclaim succeeds, New Civilbuild`s claim for progress payments would be completely extinguished.

Guobena`s counterclaim for expenses incurred on behalf of New Civilbuild

New Civilbuild gave evidence that at the initial stage, they paid their sub-contractors from their own resources before receiving progress payments from Guobena. With delays caused by Guobena, progress on the construction became slower and Guobena began to withhold payment on New Civilbuild`s progress claims. New Civilbuild`s financial state was affected and they had no choice but to seek Guobena`s assistance in making payment direct to their sub-contractors. Although New Civilbuild would continue to co-ordinate and supervise the works until completion, Guobena would make payment directly to New Civilbuild`s sub-contractors.

In this regard two letters were sent by New Civilbuild to Guobena authorising Guobena to make certain payments on New Civilbuild`s behalf and to recover those payments from moneys owing to New Civilbuild; the first was dated 30 September 1997 (1AB390). By this letter, New Civilbuild allowed Guobena to make direct payment to 14 listed sub-contractors of New Civilbuild and to deduct such payments from the outstanding amount owing to New Civilbuild. Gee, however, claimed that this letter was written under pressure from Guobena. Further, New Civilbuild claimed that Guobena made unauthorised payments to sub-contractors other than the 14 listed in New Civilbuild`s letter of 30 September 1997 (NE 92D- 93A).

New Civilbuild alleged that Guobena did not abide by the arrangement agreed under New Civilbuild`s letter of 30 September 1997 but exploited the former`s financial weakness by preparing an undated letter (1AB391) and getting Gee to sign it under threat of financial ruin and by calling on the bond. Gee said he had signed the letter on or about 4 November 1997 but it was backdated to 19 September 1997 (exh D1). This was the second letter of authority from New Civilbuild to Guobena. The contents of the second letter states:

> *We are agreeable to your take over of our remaining works and using whatever moneys (retentions inclusive) balance to complete the outstanding works as we are currently unable to complete the project due to our financial constraint. It is agreed that we shall give up whatever moneys due to us (inclusive of*

retentions) to enable you to complete the outstanding works, defects, rectifications and 18 months maintenance period).

New Civilbuild also alleged that Guobena`s claim in respect of payment and expenses incurred on New Civilbuild`s behalf were not substantiated by evidence. None of Guobena`s witnesses were able to give direct evidence on what these alleged expenses were for, whether and when they were paid out. Counsel relied on the decision in **Sum Kum v Devaki Nair & Anor** [1964] MLJ 74 , where the court (citing **Bonham-Carter v Hyde Park Hotel Ltd** [1948] 64 TLR 177) held:

In an action for damages it is for the plaintiff to prove his damages, it is not enough to write down the particulars and `throw them at the head of the court, saying: "This is what I have lost; I ask you to give me this damages".` He has to prove it.

Guobena on the other hand, claimed that the various payments disbursed by them on behalf of New Civilbuild were authorised by New Civilbuild. Guobena produced in evidence letters from New Civilbuild (see 2AB689-690, 1AB390) in which New Civilbuild proposed that due to financial constraint, Guobena should deduct from their progress claim to pay a list of sub-contractors the amount specified in the letters. Pursuant to these letters, Guobena made the payments as requested by New Civilbuild. Guobena also produced proof of those payments in the form of claimants` invoices, delivery orders, debit notes and Guobena`s payment vouchers set out in seven volumes of documents (2DSB 1-2739). According to Guobena`s Finance Manager Khoo Boo Tee (Khoo), a debit note issued to New Civilbuild must be acknowledged by New Civilbuild before any payment would be made on their behalf (NE 583C-D). When recalled to the witness stand, Gee admitted that those volumes of documents had been perused by him and he had countersigned and acknowledged various but not all, debit notes (NE 617D-E). However, he claimed that he had signed the documents under duress and financial threat by Choong (NE 617E-618D).

Guobena also contended that under cl 11.3 of the sub-contract, they were empowered to make payments to suppliers and sub-contractors when New Civilbuild defaulted in making payments to them. Therefore, they should be able to exercise their right of set-off against payments due to New Civilbuild. Clause 11.3 (see 1AB8) of the sub-contract states:

In any case, if the Sub-Contractor fail or default to make any payment to his Suppliers or third Sub-Contractor, the Main Contractor reserves the right to make direct payment to his Suppliers or third Sub-Contractor and deduct the amount from his payment.

It is common ground that in July 1997, New Civilbuild were undergoing financial difficulties. As evidence, Guobena produced letters from New Civilbuild requesting Guobena to make payments to sub-contractors on New Civilbuild`s behalf as well as letters from New Civilbuild`s creditors, sub-contractors and suppliers claiming against New Civilbuild various sums owing to them. As New Civilbuild had defaulted in making those payments, Guobena were entitled to make direct payment to New Civilbuild`s suppliers and sub-contractors and deduct the amounts paid from moneys due to New Civilbuild, pursuant to cl 11.3 of the sub-contract.

In the light of the evidence, New Civilbuild`s allegation that Guobena did not adduce any evidence to

show that:

(i) the payments requested by New Civilbuild had been made by Guobena, or

(ii) received by the intended recipients or

(iii) New Civilbuild had defaulted in making payments to their suppliers or sub-contractors cannot be sustained. As for Gee`s claim that he had signed under duress the letter requesting Guobena to make the payments on New Civilbuild`s behalf and the various debit notes, this was clearly an afterthought - it was not pleaded and was only raised on the very last day of the trial.

When he was recalled to the witness stand, Choong had denied that the letter in exh D1 was signed by Gee under duress. Earlier, Choong had testified that New Civilbuild had promised to give Guobena a letter of authority but it never came. Finally, because of the `horrendously high` amounts (NE 138E) Guobena had advanced to New Civilbuild over a period of time, Choong said he insisted on having the long outstanding letter as otherwise Guobena would not pay whatever sub-contractors Gee had asked Choong to pay direct (NE 134E/F). Choong telephoned Gee one morning in early November 1997 and requested Gee to come to Guobena`s office with the letterhead of New Civilbuild. Gee showed up (with Foo) at Choong`s office. In the presence of Yap Giok Lin (yap) the contracts manager of Guobena, Gee initially drafted a letter which talked at length about delay; Choong rejected it, dictated to Gee what was required and instructed his secretary to prepare the letter (which was to be backdated) before he left the office. After Choong`s return to Guobena`s office, Yap inquired whether 19 September 1997 was acceptable as the date; Choong inquired and was told that it was not a Sunday, so he agreed. Choong then telephoned Gee to inform him exh D1 was being dated 19 September 1997. Therefore, it was not true that Gee only found out later that exh D1 was backdated, let alone that Gee was forced to sign that letter and Guobena`s payment vouchers under threat by Choong. Further, there was no such meeting (as alleged by Gee) either in October or November 1997 (N/E 642B).

Notwithstanding New Civilbuild`s letter of 30 September 1997 authorising Guobena to make payment to only 14 listed sub-contractors, the subsequent letter backdated to 19 September 1997 in exh D1 clearly authorised or ratified the payments made by Guobena to other sub-contractors as well. Accordingly I allow Guobena`s counterclaim in respect of these payments made on New Civilbuild`s behalf; the sums allowed will be set off against payments due to New Civilbuild. I would add that I prefer the testimony of Guobena`s witness namely Choong`s in this respect, to that of Gee or Foo - Choong came across as a more credible witness than the latter two (2) whose stance, especially that of Gee was defensive, attempting to justify his actions, even when he was clearly in the wrong.

Guobena`s counterclaim for liquidated damages under the sub-contract

Guobena had also counterclaimed against New Civilbuild for LAD (pursuant to cl 6.1 of the sub-contract) for a total delay of 150 days. At $20,000 per day, the total LAD counterclaimed by Guobena was $3m ($20,000 x 150). New Civilbuild had alleged that the delay in completion of the project was due to the fault of Guobena evidenced by, inter alia, Guobena`s failure to provide complete and detailed drawings in adequate time. That being the case, there was no legal basis for Guobena to claim for LAD under the sub-contract. Their counsel relied on the following passage from Keating on Building Contracts (6th Ed at p 250):

> *(e) Employer causing delay*

> *If the employer prevents the completion of the works in any way, as, for example, by failing to give possession of the site or to provide plans at the proper time, or by interfering improperly through his agent in the carrying out of the works, or by ordering extras which necessarily delay the works, or by failing to deliver components he is bound to provide, or by delay in giving essential instructions, the general rule is that he loses the right to claim liquidated damages for non-completion to time, for he `cannot insist on a condition if it is his own fault that the condition has not been fulfilled`.*

However, as I have already found, the delay was largely due to the fault of New Civilbuild and not Guobena. Thus, Guobena should not be precluded from claiming LAD.

New Civilbuild had also argued that as the terms of SIA contract were incorporated into the sub-contract via the Letter of Intent dated 7 September 1995, Guobena must first issue a delay certificate in order to claim LAD under the sub-contract. Clauses 24(1) and (2) of the SIA contract (see exh P1) which deal with the issue of extension of time provide as follows:

> *(1) As soon as the latest date of completion of the Works pursuant to clause 22 of the conditions has passed, then if at the said date there are not other matters entitling the Contractor to an extension of time and the Works nevertheless remain incomplete, the architect shall issue a certificate setting out the contract Completion Date (if necessary modified or re-calculated under clause 10(1) of these Conditions); the total period of extension of time (if any); and certifying that the Contractor is in default in not having completed the Works by the stated Completion Date or Extended Completion Date (as the case may be). Such certificate shall be issued to the Employer with a copy to the Contractor, and is hereinafter called a `Delay Certificate`.*
>
> *(2) Upon receipt of a Delay Certificate the Employer shall be entitled to recover from the Contractor liquidated damages calculated at the rate stated in the Appendix to the Conditions from the date of default certified by the architect for the period during which the Works shall remain incomplete, and may but shall not be bound to deduct such liquidated damages, whether in whole or in part, from any moneys due under the contract at any time up to and including the Final Certificate.*

At trial, Guobena`s Contracts Manager (Yap Giok Lin) conceded that his company did not issue any delay certificates in respect of the project (NE 416B).

Guobena, however, disputed that the sub-contract was an SIA form of contract. They contended that the sub-contract was a Lump Sum Bills of Quantities contract (see 1AB37). Granted that the Letter of Intent which states that the sub-contract would follow SIA form formed an integral part of the sub-contract under cl 18.1 of the Letter of Award (1AB10). However, it was subject to cl 18.2 of the Letter of Award which states:

> *In case of discrepancy, the terms and conditions stated in this Letter of Award shall take precedence over those stated in the above said Sub-Contractor`s letter.*

Guobena therefore contended that the terms of SIA contract were not incorporated into the sub-contract. Yap (1DW4) testified that there was no provision in the sub-contract to issue a delay certificate in Guobena`s claim for LAD (NE 413E) and that the sub-contract was not an SIA contract (NE 414A - 415B).

Although Guobena`s witnesses testified that the terms in the SIA contract relating to extension of time did not apply to the sub-contract, Guobena did not show that there was any discrepancy between the terms of the Letter of Award and the clause in the Letter of Intent which contemplates the SIA form for the sub-contract in respect of claims for LAD (NE 468-469). Since no discrepancy was shown, cl 18.2 of the Letter of Award would not prevent the sub-contract from following the SIA form in respect of such claims. In addition, Yap had admitted during cross-examination that Guobena should have issued a delay certificate or at least a notice in writing to, before they claimed LAD against New Civilbuild but that was not done (NE 470C-472A).

The legal principle is clear - if the sub-contract contemplates a delay certificate and none is issued by the claimant, then no LAD can be claimed. In this regard, it was held (by LP Thean J) in **Tropicon Contractors Pte Ltd v Lojan Properties Pte Ltd** [1989] SLR 610 at 616 [1989] 3 MLJ 216 at 219:

> *Under cl 24(2) of the conditions of contract the defendants are entitled to recover from the plaintiffs liquidated damages for delay in completing the works only upon receipt from the architects the delay certificate issued under cl 24(1) and may then deduct such liquidated damages from any moneys due under the contract to the plaintiffs; and the architects did not issue or purport to issue such a certificate until 2 December 1987. Hence, throughout the period in which the original interim certificates were issued, ie September 1984 to 16 January 1987, there was no question of any liquidated damages arising.*

Counsel for Guobena attempted to distinguish the ***Tropicon*** case on the ground that in the present case, there was no provision in the sub-contract such as cl 24(1) requiring the architects of the project to give a delay certificate justifying Guobena`s claim for liquidated damages. Hence, ***Tropicon*** had no application to the present case. However, as I have already pointed out, if there was no discrepancy between the terms of the Letter of Award and those in the Letter of Intent, the sub-contract would probably have incorporated the SIA form.

The LAD under the sub-contract was fixed at $20,000 per day whereas the LAD under the main contract was $10,000 per day. New Civilbuild suggested that this disparity showed that the LAD under the sub-contract could not be a genuine pre-estimate of the loss occasioned by the delay but, was punitive in nature and should not be given any effect by the court. This point, however, was not pleaded as New Civilbuild claimed that they were only aware of the relevant facts at trial. It is clear from the case of **Banner Investments Pte Ltd v Hoe Seng Metal Fabrication & Engineers (S) Pte Ltd** [1997] 1 SLR 461 that the question whether a clause is a penalty or a claim for liquidated damages is one of both law and fact; it must be pleaded if the party relying on the point wishes to raise it at trial.

Having considered the parties` arguments, I am of the view that New Civilbuild have succeeded in showing that the sub-contract was an SIA form of contract; a delay certificate is needed before Guobena can claim LAD under the sub-contract. Since no delay certificate was issued at all, Guobena`s counterclaim against New Civilbuild for LAD is accordingly dismissed.

Declaratory relief

Aside from their monetary claims, New Civilbuild also sought: a declaratory order that Guobena`s call on the bond was without any bona fide or basis and/or was unconscionable and/or was actuated by bad faith and, a further order that Guobena repay to Tai Ping all sums received under the bond with interest and costs.

Tai Ping had also counterclaimed against New Civilbuild and Guobena for recovery of payments made to Guobena under the bond on the basis that if the evidence adduced at the trial showed that Guobena were not entitled to call on the bond, the latter must refund the money or account for it. The only witness who testified on behalf of Tai Ping was Yew Kai Hau (2DW1), its Assistant General Manager, who said that Tai Ping had not been indemnified by New Civilbuild for their payment to Guobena under the bond. Neither New Civilbuild nor Guobena filed a defence to Tai Ping`s counterclaim which meant that under O19 r 8 read with O 19 r 3 of the Rules of Court, the counterclaim was deemed to be admitted and only the quantum of damages was left to be assessed.

The powers of the High Court to make a declaratory order is contained in s 18 of the Supreme Court Judicature Act (Cap 322) (SCJA), read with para 14 of the First Schedule to the SCJA and O 15 r 16 of the Rules of Court.

Section 18 of the SCJA reads:

> *(1) The High Court shall have such powers as are vested in it by any written law for the time being in force in Singapore.*
>
> *(2) Without prejudice to the generality of subsection (2) the High Court shall have the powers set out in the First Schedule. ...*

Paragraph 14 of the First Schedule to the SCJA reads:

> *Power to grant all reliefs and remedies at law and in equity ...*

Order 15 r 16 of the Rules of Court reads:

> *No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not any consequential relief is or could be claimed.*

The law governing the granting of declaratory relief by the court was extensively set out in **Salijah bte Ab Latef v Mohd Irwan Abdullah** [1996] 1 SLR 63 and by the Court of Appeal in the same case (see report at [1996] 2 SLR 201). The following relevant principles are taken from those two cases as well as from the textbook ***Singapore Court Practice 1999*** (`Preliminary Matters to Withdrawal and Discontinuance` by Jeffrey Pinsler at pp 676-679, para 15/16/10):

(i) the court must have the jurisdiction and power to award the remedy;

(ii) the power to make a declaratory judgment is confined to matters which are justiciable in the High Court;

(iii) as a declaration is a discretionary remedy, it must be justified by the circumstances of the case and, the court may take into account any relevant matter in determining whether it would be just to grant a declaration;

(iv) the plaintiff must have locus standi to bring the suit and, the court will not entertain a suit for a declaration unless there is a `real controversy` for the court to resolve; and

(v) the court is concerned that any person whose interest might be affected by the declaration should be before the court.

(vi) Further, when a declaration is prayed for, there must be some ambiguity or uncertainty about the issue so that the court`s determination would have the effect of laying such doubts to rest.

None of the points set out above were disputed by the parties; their sole bone of contention was whether the doctrine of res judicata applied to prevent New Civilbuild from seeking such declaratory relief, to which issue I now turn.

Issue estoppel/res judicata

Lee Seiu Kin JC had discharged the interlocutory injunction obtained ex parte by New Civilbuild against Guobena on two grounds: firstly, New Civilbuild had not made full and frank disclosure before the court when applying for the injunction and there were no circumstances that justified their not doing so; secondly, there was no allegation nor any evidence of fraud on the part of Guobena in their call on the bond and unconscionability alone was not a separate ground for an injunctive relief.

New Civilbuild and Tai Ping contended that Lee Seiu Kin JC`s decision was unsound on two grounds - firstly, they alleged that Guobena`s witness, Choong, was the one guilty of non-disclosure as he deliberately misled the court when he filed his affidavit to set aside the interim injunction. The allegation was, that Choong had deliberately failed to disclose the true circumstances of the letter dated 19 September 1997 signed by Gee, authorising Guobena to use moneys owing to New Civilbuild for completion of the outstanding works. It was only during cross-examination at the trial that Choong admitted that the letter was issued undated in November 1997 and then backdated to 19 September 1997 (NE199D-202E). New Civilbuild alleged that Choong had misled the court to set aside the injunction by, inter alia, using the letter to show that New Civilbuild had voluntarily consented to Guobena`s paying the sub-contractors from the retention moneys and by inflating Guobena`s claim for damages such that Guobena`s losses appeared massive and far exceeded the sum secured by the bond.

Secondly, it was contended that Lee Seiu Kin JC`s reason for discharging the injunction has been overruled by the Court of Appeal in **GHL Pte Ltd v Unitrack Building Construction Pte Ltd & Anor** [1999] 4 SLR 604 . The Court of Appeal had there held that it was clear from the decision in **Bocotra Construction Pte Ltd v A-G (No 2)** [1995] 2 SLR 733 and other relevant Singapore authorities that there existed a separate ground of `unconscionability` (apart from fraud) for restraining a beneficiary of a performance bond from enforcing it. I would point out again that New Civilbuild did not pursue their appeal against Lee Seiu Kin JC`s decision setting aside the injunction against Guobena.

Issue estoppel (res judicata in the wide sense) has been aptly explained by Lord Denning MR in

Fidelitas Shipping Co Ltd v V/O Exportchleb [1966] 1 QB 630 (at p 640) as follows:

> *... within one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again ...*

There being no appeal against Lee Seiu Kin JC`s decision to set aside the injunction, Guobena contended that the injunction and all points decided by him were res judicata. On the other hand, New Civilbuild and Tai Ping contended that issue estoppel/res judicata did not apply.

New Civilbuild`s contention was that the defence of issue estoppel and/or res judicata did not apply because it had not been pleaded in Guobena`s defence and counterclaim. In **Florence Bailes v Dr Ng Jit Leong** [1983] 2 MLJ 175 the court held:

> *Another reason why the plea of res judicata should fail is that it was not pleaded. It is true that the defendant was not in a position to consider setting up the plea of res judicata until he has received the written grounds of judgment of Arulanandom J but it was open to him thereafter to amend his pleadings or set up the plea by formal application supported by affidavit. But this was not done.*

The defence of issue estoppel and or res judicata must be but was not pleaded by, Guobena; they cannot therefore rely on it.

Guobena had also applied to strike out New Civilbuild`s action, relying on the grounds of issue estoppel and res judicata, which application I had dismissed. New Civilbuild therefore contended that Guobena were bound by my decision against which there was no appeal. Guobena were thus estopped from reviving either defence to New Civilbuild`s claim in these proceedings.

In order that a judicial decision may operate as a res judicata, it must be final. A judicial decision is deemed final, when it leaves nothing to be judicially determined or ascertained thereafter, in order to render it effective and capable of execution, and is absolute, complete, and certain, and when it is not lawfully subject to subsequent rescission, review, or modification by the tribunal which pronounced it (see ***The Doctrine of Res Judicata*** by Spencer Bower and Turner (2nd Ed) at p 132 para 164).

New Civilbuild and Tai Ping also argued (relying on Lord Diplock`s reasoning on the limitation of the use of affidavits in interlocutory hearings in **American Cyanamid Co v Ethicon Ltd** [1975] AC 396 at pp 406-408), that the principle of issue estoppel or res judicata did not and could not apply to judicial decisions made on interlocutory applications or at hearing of interlocutory applications; they cited ***Florence Bailes v Dr Ng Jit Leong*** (supra). In that case, the plaintiff sought a declaration that a suspension imposed on her by the Penang Club was null and void. She obtained an interim injunction restraining the Penang Club Committee from enforcing the suspension until the trial of the suit. The injunction was set aside by a judge who made findings which appeared to cover all the issues involved in the suit. Ajaib Singh J held:

> *... the hearing and arguments during the interim injunction stage were not exhaustive for the determination of the issues involved in the suit. In view of all*

these matters it seems to me that the plea of res judicata should not prevail and that in the interest of justice there should be a full hearing of the suit itself.

Similar reasoning was adopted by the Penang High Court in **Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors** [1988] 3 MLJ 90 . There, Edgar Joseph Jr J held, inter alia, that an order refusing the extension of an interlocutory injunction lacked the essential element of finality because it was always open to the High Court, at the final hearing, to review the question involved and to arrive at the opposite conclusion in the light of all the evidence should the circumstances so require.

The test of whether an order or judgment is final or interlocutory in nature has been settled by the Court of Appeal in **Bocotra Construction Pte Ltd & Ors v A-G** [1995] 2 SLR 523 where Karthigesu JA stated (at pp 534-535):

> *... As established in **Bozson v Altrincham Urban District Council** [1903] 1 KB 547, a final order must be one which finally disposes of the rights of the parties. Adopting the Court of Appeal`s reasoning in **Rank Xerox (Singapore) Pte Ltd v Ultra Marketing Pte Ltd** [1992] 1 SLR 73 , the phrase `the rights of the parties` refers to the substantive rights in dispute in the particular action. The order had purported to determine the interim rights of the parties, but the crucial test is whether the order as made had finally disposed of the substantive rights in dispute in the action. The order as made was never a conclusive determination of the parties` substantive rights in dispute in the action. These rights would still be considered and determined at a later point in time. Contrary to the appellants` submissions, we are impelled to conclude that the order was in reality an interim order which was interlocutory in nature.*

In the present case, it would appear that the decision of Lee Seiu Kin JC (in SIC 614/98) discharging the interlocutory injunction obtained by New Civilbuild against Guobena was an interlocutory order and not a final order since it only determined the interim rights of the parties and not the substantive rights in dispute in this action. Therefore, the doctrine of issue estoppel and or res judicata would not apply in this case.

There are two further grounds why New Civilbuild and Guobena should not be bound by the doctrine of issue estoppel and or res judicata in this instance. Firstly, it is not entirely correct to say that the issue as to whether Guobena`s call on the bond was without good faith or unconscionable was a point of law already dealt with by Lee Seiu Kin JC in Guobena`s application to set aside the injunction obtained by New Civilbuild against them. It is pertinent to note that the issue of whether the call on the bond was fraudulent and/or unconscionable on the facts did not feature in either of the grounds on which Lee Seiu Kin JC discharged the injunction. In the light of his decision that there was no allegation of fraud by New Civilbuild and that unconscionability alone could not be a ground for upholding the injunction, it was not necessary for Lee Seiu Kin JC to decide on whether there was indeed fraud or unconscionability on the facts of the case. In this regard, it cannot be said that the issue of whether Guobena`s call on the bond was fraudulent and /or unconscionable was already determined by Lee Seiu Kin JC.

Secondly, a prerequisite to the application of issue estoppel has been stated in ***The Doctrine of Res Judicata*** by Spencer Bower and Turner (supra) at p 179, para 210:

> *Only determinations which are necessary to the decision - which are*

> *fundamental to it and without which it cannot stand - will found an issue estoppel. Other determinations, without which it would still be possible for the decision to stand, however definite be the language in which they are expressed, cannot support an issue estoppel between the parties whom they were pronounced.*

In distinguishing a fundamental determination from a collateral one, the test is whether the determination upon which it is sought to found an estoppel is so fundamental to the substantive decision that the latter cannot stand without the former (see ***The Doctrine of Res Judicata*** (supra) at pp 181-182 para 211). Only if the answer is in the affirmative would the doctrine of issue estoppel apply. In this case, the issue of whether Guobena`s call on the bond was fraudulent and/or unconscionable was not fundamental to the decision of JC Lee in discharging the injunction against Guobena. Whether his decision was correct is not relevant in founding an estoppel (***The Doctrine of Res Judicata*** at pp 14-15 para 15).

Guobena also contended that since they had obtained final judgment on the sum under the bond against Tai Ping in Suit 57/98 which judgment was not appealed against, it was conclusive and binding upon both Guobena and Tai Ping. Although the decision in Suit 57/98 was binding upon both Guobena and Tai Ping, it is equally clear that if it was established that there was overpayment on the bond or, that Guobena should not be entitled to any payment at all on the bond, Guobena must be made to account for the overpayment to Tai Ping. In this regard, the following passage from ***Hudson`s Building and Engineering Contracts*** (Vol 2, 11th Ed, at p 1558 para 17-078) is relevant:

> *It is generally assumed, and there is no real reason to doubt, that the courts will provide a remedy by way of repayment to the other contracting party if a beneficiary who has been paid under an unconditional bond is ultimately shown to have called on it without justification: `I do not doubt that in such an event the money would be repayable, but it is not so certain it would be repayable with interest` (per Donaldson J in **General Surety and Guarantee Co Ltd v Francis Parker Ltd** [1977] 6 Build LR 16 at p 21).*

In **The Ngee Ann Kongsi v The Tai Ping Insurance Co Ltd** (Unreported) , Goh Joon Seng J held (at [para] 26):

> *I was therefore of the view that the bond is a demand bond. The defendant`s liability was `triggered` by the plaintiff`s call thereon. The amount of the bond demanded must be paid in full. It will then be left to the contractor (or the liquidator) and the plaintiff to do an `accounting` thereafter. If the plaintiff has suffered no loss, the money received by it must be paid over to the contractor (or the liquidator). See **Cargill International SA & Anor v Bangledesh Sugar & Food Industries Corp** [1996] 4 All ER 563.*

Whether Guobena`s call on the bond was fraudulant and/or unconscionable

It was not disputed that the bond was an unconditional one payable on demand of Guobena. New Civilbuild and Tai Ping, however, contended that Guobena had acted fraudulently and/or unconscionably in calling on the bond. New Civilbuild claimed that they had completed the scope of works under the sub-contract by 27 October 1997 and had accordingly informed Guobena of this by a letter dated 10 November 1997 (1AB462). In the same letter, New Civilbuild also informed Guobena

that the Architectural RI Inspection was confirmed on 27 October 1997. There was also another letter dated 11 December 1997 (1AB427-433) from JIA Quantity Surveyors & Project Manager Pte Ltd (the quantity surveyor) to SEP Partnership (the architects of the project) which New Civilbuild claimed was a certification that New Civilbuild had completed their scope of works under the sub-contract. This claim was refuted by Guobena who contended that the letter merely certified the value of work done up to the date of valuation (namely 11 December 1997). This was the opinion of Lee Seiu Kin JC and on a perusal of the letter, I agree that it cannot constitute evidence that New Civilbuild had completed their scope of work under the sub-contract.

Guobena denied that New Civilbuild`s scope of works was completed on 27 October 1997; a Certificate of Practical Completion (2AB735) was issued to Guobena by SEP Partnership only on 13 May 1998, certifying that practical completion was achieved on 25 February 1998. Further, Gee had admitted under cross-examination that New Civilbuild`s workers had abandoned the project site on 2 December 1997 (NE 44F- 45A) and that as at 11 December 1997, New Civilbuild had not completed their scope of works under the contract (NE 45D). However, another witness Foo (PW2), asserted during cross-examination that New Civilbuild had completed their scope of works as at 11 December 1997 (NE 89D-E). In any case, the RI inspection carried out on 27 October 1997 failed because works were found to be uncompleted. This fact was admitted by Gee in cross-examination (NE 44E) and confirmed by Chionh Chye Luay, the project architect (NE 240B) and Yap (NE 349A).

In support of their contention that New Civilbuild had not completed their scope of works by 27 December 1997, Guobena also relied on a letter from the project architect (dated 5 December 1997) setting out further works to be completed by 15 December 1997 (2AB611).

In the light of such evidence, I do not find that Guobena had been fraudulent or unconscionable in calling on the bond in view of the delay caused by New Civilbuild. Consequently, neither New Civilbuild nor Tai Ping are entitled to the declaration they sought.

The decision

For the foregoing reasons, New Civilbuild`s claim against Guobena is partly allowed and Guobena`s counterclaim against New Civilbuild is allowed in respect of the expenses incurred or the advances made, on behalf of New Civilbuild. Guobena`s counterclaim for liquidated damages, however, is dismissed. There will be interlocutory judgment on the items allowed for both claim and counterclaim save that New Civilbuild is also awarded final judgment in the sums of $1,478,470.62 (for progress claims Nos 23 and 26) and $335,511.33 (for retention moneys), and the Registrar is directed to assess the quantum of both claim and counterclaim with the costs of such assessment to be reserved to the Registrar.

As New Civilbuild did not deny or contest Tai Ping`s counterclaim against them, there will be judgment in favour of Tai Ping against New Civilbuild in the sum of $1,642,045 plus interest of $49,412 and costs of $3,000 together with interest at 6% per annum on the total sum of $1,694,457.10 from 16 July 1998 (date of payment of the judgment sum in Suit 57/98 to Guobena) until payment. Costs are awarded to Tai Ping on a full indemnity basis, pursuant to the Indemnity furnished to Tai Ping by New Civilbuild on 21 September 1995.

As Guobena`s call on the bond was neither fraudulent nor unconscionable, the declaration sought by New Civilbuild and Tai Ping is disallowed and, subject to any right of set off, Guobena are entitled to retain the sum received from Tai Ping on the bond, pursuant to their judgment in Suit 57/98.

On the question of costs, Tai Ping having failed on their counterclaim against Guobena, the latter are entitled to costs against them. As between New Civilbuild and Guobena, I shall hear further arguments from counsel before finalising my order for costs.

Outcome:

Order accordingly.