Fu Hai Construction Pte Ltd v Econ Corporation Limited
[2002] SGHC 201

Case Number : Suit 1070/2001

Decision Date : 31 August 2002

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Simon Yuen and Gavin Goh (Tan & Lim) for the plaintiffs; Tan Cheow Hin and Sheerin Amin (Cheow Hin & Partners) for the defendants

Parties : Fu Hai Construction Pte Ltd — Econ Corporation Limited

Judgment

Cur Adv Vult

GROUNDS OF DECISION

The facts

1. Fu Hai Construction Pte Ltd (the plaintiffs) were incorporated in Singapore on 31 August 1998 as building contractors. The plaintiffs' managing-director is one Qiu Chang Hai (Qiu) who is a mainland Chinese national with permanent residence status in Singapore. Econ Corporation Limited (the defendants) are also in the construction business and it is one of many subsidiaries of, Econ International Limited, which is a public listed company in Singapore. The defendants are more diverse than the plaintiffs in their activities; they not only construct buildings but also build sewerage treatment plants, roads, mass rapid transit (MRT) stations and carry out land reclamation works at Southern Islands.

2. Sometime in late November or early December 2000, their ex-employee (chief designer) Dr Jeffrey Wang (Wang) offered to introduce Qiu to the defendants. The defendants were then looking for a subcontractor for a project. Qiu indicated his interest which Wang duly conveyed to T C Chua, the defendants' director of construction. As a result, Qiu met up with Ms Sim Peck Hoon (Sim) and Lai Leong Chong (Lai) the assistant contracts manager and senior projects manager respectively, of the defendants.

3. According to Qiu, he was informed by Sim/Lai that the defendants had been awarded a contract for $13,717,986.05 (the contract sum) by the Housing and Development Board (HDB) for construction of Punggol East contract 23 shopping centre cum branch office (the project) and the defendants would consider appointing the plaintiffs as their subcontractor for the same. Qiu alleged that at the meeting (which took place on or about 5 December 2000), the following representations were made to him if the plaintiffs agreed to be the main subcontractor for the project:

> i. there would be three (3) omissions from the contract sum namely, (i) the M&E works of the value of $4,618,097.64; (ii) the supply of materials for concreting works (but the plaintiffs would provide labour and ancillaries); (iii) the supply of pre-cast items. The plaintiffs would be the subcontractor for the balance works in the sum of $5,340,906.23;
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> ii. the contract period was two (2) years from 3 August 2000 to 2 August 2002 and the balance 20 months (from January 2001) were more than sufficient for the project,

which was not too big/difficult to complete;

iii. the soil condition was normal and there was nothing difficult about excavation although substantial excavation was involved in relation to the basement for the shopping centre (which occupied a large portion of the project site);

iv. there were no adverse or unusual factors which would require the plaintiffs to expend money, effort, manpower or equipment that would likely result in the plaintiffs being subject to the penalty of liquidated damages for delay;

v. the defendants would support the plaintiffs' request for 250 foreign workers (from China) but would only assist the plaintiffs to apply for 180 foreign workers initially, leaving the balance 70 for later consideration.

4. Qiu further alleged that his request for an increase of $500,000 in the subcontract sum was rejected; he was told the defendants had themselves under-provided for M&E works (at $4.618m) when they tendered for the project and would incur a loss as a result of overruns ($5.1m) in expenditure for that item.

5. On or about 19 December 2000, Qiu was handed a contract by the defendants for his signature. Qiu (who is not literate in English) was told by his staff that the contract stated:

a. the contract was a lump sum contract at the price of $5,443,524.23 (the subcontract sum);

b. the scope of works was not spelt out but was referred to in an annexure which was not attached;

c. the plaintiffs were to supply labour (and tools) for all structural works and supply labour, tools and materials for the completion of architectural and external works;

d. the plaintiffs were required to deposit a performance bond with the defendants within 14 days, in the sum of $1,371,798.60;

e. the plaintiffs were deemed to have knowledge of the defendants' main contract with HDB as well as of the defendants' construction schedule; and

f. the plaintiffs would not assign or subcontract out the works under the subcontract.

6. Qiu eventually refused to provide the performance bond requested which, based on $5,443,524.23, amounted to 25% thereof; he was aware that the standard performance bond was for 10% of the contract sum. In February 2001, the defendants agreed to reduce the performance bond from the plaintiffs to 10% ($544,353) of the subcontract sum; the same was provided on 15 February 2001 by Tai Ping Insurance Co Ltd (Tai Ping). The plaintiffs then signed the (revised) subcontract

(the subcontract) with the defendants on 28 February 2001. However, even prior thereto (on 30 January 2001), the plaintiffs' representatives had attended the first site meeting with representatives of the defendants. Indeed, by 28 February 2001, the plaintiffs had apparently attended four (4) site meetings.

7. Qiu alleged that the defendants breached the representations set out in para 3 above. He realised (on hindsight) that the defendants had made scapegoats of his company as, the defendants themselves (inter alia), could not have completed the contract within the completion period of two (2) years. The defendants countered that the plaintiffs failed to carry out the subcontract works regularly and diligently in particular the excavation works (which should have been completed by 27 February 2001), despite numerous reminders. Consequently, after giving the plaintiffs three (3) days' notice by their letter dated 18 May 2001, the defendants terminated the plaintiffs' contract on 23 May 2001.

The pleadings

8. In the statement of claim, the plaintiffs pleaded that the representations set out in para 3 above were breached by the defendants. The plaintiffs further alleged that the defendants purported to hold the plaintiffs responsible for the delay in works by a letter dated 27 February 2001, even before the plaintiffs had signed the subcontract. The plaintiffs cited numerous instances of the defendants' breach of the terms of the subcontract. There was also an allegation that the defendants deliberately concealed a soil report prepared by their subsidiary ECON GEOTECH Pte Ltd (ECON GEOTECH) dated 9 September 1999 which showed that the soil conditions contained backfill (of rubbish) of 6-9m, contrary to the defendants' representation that the soil condition was not unusual; soil (and dumping of the excavated rubbish) was a major factor which resulted in delays to the project and caused the plaintiffs to be subjected to the penalty of liquidated damages. Delay was compounded by the defendants' failure to provide the plaintiffs with 180 foreign workers and by the late supply of shop drawings. In addition, the plaintiffs discovered inter alia, three (3) other subcontractors on site doing bored and soldier piles and excavations which works were within the scope of the subcontract. The defendants also failed to pay the plaintiffs on their first and second progress claims (submitted in March and April 2001) promptly or at all.

9. The plaintiffs alleged that the defendants wrongfully terminated the subcontract on or about 23 May 2001 and took possession of the site. Further, on or about 25 July 2001, the defendants wrongfully called on the performance bond by making a demand on Tai Ping. The plaintiffs prayed inter alia for, a rescission of the subcontract, cancellation of the performance bond and or damages pursuant to s 2 of the Misrepresentation Act Cap 390.

10. In the defence filed, the defendants admitted they had informed Qiu/the plaintiffs of certain omissions from the main contract and that the subcontract was in the sum of $5,443,524.23; they also admitted receiving a performance bond for $544,353. However, the defendants denied they had made the representations set out in para 3(i) to (iv). As for the representation alleged in para 3(v), the defendants averred that they had only agreed to support/assist the plaintiffs' application for 180 foreign workers in consideration of the plaintiffs furnishing a bond of $2,000/- for each foreign worker (which the plaintiffs did not). If the representations as alleged were made, the defendants denied they were made with the intention of inducing the plaintiffs to enter into the subcontract. The defendants contended that the plaintiffs could not have been induced by the alleged representations as, the plaintiffs attended site meetings/inspections and could have ascertained for themselves the scope/nature of the subcontract works. The plaintiffs were therefore aware of the presence of other subcontractors on site and the nature of the works they carried out.

11. The defendants admitted receiving the plaintiffs' first and second progress claims but denied the plaintiffs were entitled to any payment thereon. They also admitted they had given notice of termination of the subcontract on 23 May 2001 and had demanded payment (on 25 July 2001) from Tai Ping on the performance bond. The defendants counter-claimed against the plaintiffs for the additional costs ($752,665.79) they incurred in re-awarding the subcontract to other subcontractors to complete the works.

12. I should point out that the plaintiffs obtained from this court an exparte injunction on 22 August 2001, to restrain the defendants from calling on Tai Ping for payment on the performance bond; the defendants failed in their subsequent application to discharge the injunction.

The evidence

(i) the plaintiffs' case

13. Qiu was the plaintiffs' only witness; I shall now consider his evidence, some portions of which have already been set out in earlier paragraphs. I should at this stage point out that apart from a bare statement in his affidavit (para 8.3) that he was familiar with HDB contracts, Qiu did not expand on his/the plaintiffs' experience with HDB contracts nor did he give details of what jobs the plaintiffs had previously undertaken. It was only in cross-examination that he revealed the plaintiffs had undertaken HDB projects previously as a subcontractor but again gave no details; neither did he volunteer any details as to his own background. As the plaintiffs were only incorporated on 31 August 1998, they could not in any event have had that much experience in the 2 year interval between their date of incorporation and the project, bearing in mind the slump in the construction industry in recent years.

14. In his written testimony, Qiu expanded on how the plaintiffs had acted on the defendants' representations to their detriment. On the first and second representations (omissions from and the value of, the subcontract), Qiu alleged that he was shown a set of drawings and asked by the defendants (Sim and Lai) if the plaintiffs would agree to a lump sum of about $5.4m to carry out the works reflected in those drawings. Qiu calculated that $5.4m was equivalent to the balance of the contract less the three (3) items omitted, without factoring in the cost ($500,000) of supplying labour for concreting works, which works Qiu estimated would cost about $3.54m. As far as the plaintiffs were concerned, it was their prerogative whether they wished to subcontract out any of the works in the subcontract or do the works themselves. However, when the plaintiffs came onto the site, they found other subcontractors doing works which were <u>within</u> the plaintiffs' scope of works. For these subcontracted works (bored/soldier piles, instrumentation, erection of site office and excavations) which were carried out without the plaintiffs' consent, the plaintiffs were entitled to payment from the defendants (inclusive of 15% for profit and attendance) and in turn the plaintiffs would pay the defendants' subcontractors. However, the defendants not only did not pay the plaintiffs their two (2) progress payments in that regard but went further to deduct from the plaintiffs' subcontract, the price for the works carried out by the defendants' subcontractors.

15. On the second representation, Qiu explained that as the plaintiffs' contract period would be four (4) months less than the defendants' 24 months from the HDB, it was essential that the plaintiffs were apprised of any problems which could affect the plaintiffs' ability to complete the project within 20 months, especially when the plaintiffs were liable for liquidated damages in the event of delay. Instead of the initial impression given to the plaintiffs that they would have sufficient time to complete the project, the defendants took the view from the start after the subcontract was signed, that the plaintiffs were late in executing the works under the subcontract. Unbeknownst to the plaintiffs, the defendants were already behind schedule for the project and had received written

warnings (3) in that regard from HDB. Had the plaintiffs known of these warnings Qiu testified, they would not have accepted the subcontract.

16. As for the third representation, Qiu testified that soon after (on 23 March 2001) the plaintiffs' subcontractor had commenced excavating the basement for the shopping centre, it was discovered that the soil contained backfill of 6-9m which comprised of rubbish. Although excavating the rubbish was not a problem, disposal was – there were no dumping grounds for the rubbish and the more the plaintiffs excavated, the more the rubbish accumulated. Eventually, the plaintiffs (in April/May 2001) were given permission to temporarily store the rubbish on nearby state land; the permission was subsequently revoked and the problem of disposal arose once again. When Qiu obtained (in April 2001) a copy of the soil report dated 9 September 1999 by ECON GEOTECH (see 1AB74-108), he discovered that all the boreholes revealed backfill of 6-9m in depth, contrary to the defendants' representation that there was nothing unusual about the soil. The report was in the possession of the defendants at all material times but they never gave it to the plaintiffs.

17. On the fourth representation, Qiu testified the plaintiffs were only offered a full set of drawings on 27 February 2001, one day before they signed the subcontract. On 7 March 2001, Qiu said he was surprised to receive a letter from the defendants requiring the plaintiffs to produce shop drawings for six (6) items (including skylight and glazier), which responsibility he asserted was that of the defendants, not the plaintiffs.

18. In regard to the fifth/last representation, Qiu testified that the plaintiffs' representatives requested the defendants in April 2001 to let the plaintiffs have their Man Year Entitlement for 180 foreign workers. Despite several reminders from him and their assurance that they would so provide, Qiu claimed that the defendants did not give the plaintiffs the man years entitlement for 180 foreign workers.

19. As this item has a significant impact on my findings, more need to be said about this alleged representation and Qiu's testimony in this regard. Under cross-examination, Qiu admitted quite candidly that the defendants' initial agreement to allocate 180 foreign workers to the plaintiffs particularly from mainland China, was the factor which prompted him to enter into the subcontract.

20. Under the foreign workers' scheme implemented by the Ministry of Manpower (MOM), all building contractors/developers (who rely essentially on skilled/unskilled foreign workers) are given a quota of the number of foreign workers they can bring into Singapore; this is based on the value of the contracts/projects pursuant to which the contractors/developers apply for such workers. Apparently, the higher the value of the projects, the higher the quota the foreign workers allocated by MOM.

21. Cross-examined, Qiu revealed that mainland Chinese construction workers in Singapore pay (through their recruitment agency) to their employers between $6,000 to $8,000 each. Consequently, for 200 Chinese workers, an employer could receive upfront between $1.2m to $1.6m, which sums Qiu acknowledged were very good profits indeed, more so if there were 250 workers, which was the number he had requested of the defendants. Qiu further revealed that he had counted on receiving such sums for the initial funding of the project until the plaintiffs received progress payments from the defendants. Further, had the defendants given him 250 workers, he would have arranged for two (2) shifts of workers in June 2001 to complete the work. Questioned, Qiu admitted that he did not provide (under cl 14.3 of the subcontract) letters of guarantee to indemnify the defendants at $2,000 per worker; he said no approval had yet been given by MOM without which (he claimed) insurance companies would not provide the security bond. However, he also admitted that the defendants signed the form (1A) which would have enabled the plaintiffs to apply to MOM for 50 foreign workers,

even though the plaintiffs did not provide the security bond of $100,000 ($2,000 x 50) for them; he offered no explanation why the plaintiffs did not submit the form to MOM.

22. Further cross-examination of Qiu extracted the following evidence:-

(i) the plaintiffs did not/never provided the defendants with any work schedule (although they had one for their own use) despite having been requested to do so since the first site meeting. It was the defendants who provided the work schedules produced in court (see 2AB481-483 and 2AB477-480) to the plaintiffs, which however, he did not accept;

(ii) although he claimed his company had experience in doing such works for the HDB, the plaintiffs subcontracted out the excavations (at $580,000 against the plaintiffs' price of $412,851.28 from the defendants). He admitted that the plaintiffs were sued (in DC Suit No. 3111 of 2001) by System Holdings Pte Ltd who obtained judgment in the sum of $180,000 (not including interest and costs) for carrying out the excavations works and for the plaintiffs' breach of contract (in subcontracting those works to yet another subcontractor);

(iii) he did not learn about the soil condition until after his subcontractor had commenced excavations and had requested him to obtain a soil report from the defendants; he denied being given a copy of the soil report by the defendants at their first meeting on 5 December 2000. However, he was aware that HDB had provided a soil report to all prospective tenderers (including the defendants) to enable them to come up with their tenders for the project;

(iv) he maintained that the defendants knew there was rubbish in the soil as, they had completed 70-80% of the piling works before the plaintiffs signed the contract. However Qiu admitted that the plaintiffs themselves had written to the defendants on 11 April 2001 (see 2AB81) stating that *'the excavated earth is full of debris*' which problem was unforeseeable *'while looking through the soil report*';

(v) he admitted that as at 18 April 2001 (see minutes at 2AB121), the defendants were pressing the plaintiffs to put more workers on site as work was very much behind schedule — strutting works (which should be in tandem with excavations) had not commenced, there were only 7 workers on site, huge quantities of excavated materials were not removed and, excavation works had stopped;

(vi) he eventually found a dumping ground for the excavated soil but not the rubbish. Hence, the rubbish was

dumped on the state land next to the site, as a temporary measure until a proper dumping ground could be found, which the plaintiffs never did find;

(vii) in February 2001, the plaintiffs requested the defendants' help as they had difficulties in obtaining supplies of timber and in April 2001, they requested the defendants for permission to use the defendants' name to place orders for materials and to rent machines. However, he denied the plaintiffs did not have enough resources to perform the subcontract;

(viii) he admitted that at the first meeting with the defendants, he was informed the project had been on-going for four (4) months;

(ix) he explained that although the defendants had carried out the piling works by the time the plaintiffs took on the project, he nonetheless included piling works ($1,346,327) in the plaintiffs' first progress claim because it was within the plaintiffs' scope of works under the subcontract and, they were entitled to profit and attendance for supervision of these items (although not stated in the subcontract);

(x) temporary works (soldier piles) were done by Zap Piling Pte Ltd (Zap Piling), instrumentation (calibration) was carried out by AL Technologies (S) Pte Ltd (AL Technologies) but the plaintiffs charged for both items in the first progress claim, for the same reason;

(xi) despite the requirement in cl 15 of the subcontract (that progress claims must be accompanied by measurement records and or delivery orders duly endorsed by the defendants' authorised site staff), the plaintiffs did not submit such documents with their progress claims;

(xii) out of the total claim of $1,430,071.64, the only item ($12,385.54) of work in the plaintiffs' first progress claim which they actually carried out was excavation;

(xiii) he admitted the site office was not erected by the plaintiffs but by Cape Engineering Construction Pte Ltd (Cape Engineering) for which the defendants were entitled to backcharge the plaintiffs as minuted in site meetings;

(xiv) claimed the plaintiffs could not manage the site properly because the defendants did not accede to the plaintiffs' request to call all subcontractors for site meetings to ensure proper co-ordination of works;

(xv) claimed the defendants did not give the plaintiffs the

requisite three (3) days' notice under cl 17.2 of the subcontract before they terminated the contract by their letter dated 18 May 2001; he received the said letter on 19 May 2001 whereas on 16/17 May 2001, the defendants had told him at a meeting to stop work immediately. However, he admitted that earlier (on 15 May 2001) the defendants had already warned the plaintiffs' project manager of the plaintiffs' shortcomings/slow progress and the defendants' subsequent letter dated 21 May 2001 (2AB320) confirmed that their earlier notice dated 18 May 2001 remained valid. Qiu blamed the rainy weather for the plaintiffs' slow progress of work;

(xvi) admitted that the performance bond was a demand bond regardless of any dispute between the plaintiffs and the defendants.

23. In re-examination, Qiu testified that had he known that the defendants would not pay the plaintiffs anything for the works done by Zap Piling and AL Technologies, he would not have signed the subcontract. Their presence on site was also a factor which slowed the plaintiffs' progress because the site was small and Zap Piling had a lot of equipment on site. The plaintiffs on their part needed to have three (3) excavators and more than ten (10) trucks on site. He said the plaintiffs would have applied for an extension of time in April-May 2001, relying on the soil condition as the main reason. Indeed, the defendants themselves applied to HDB for extension of time (see **D1**) in September 2001 (and succeeded), citing the *'quick sand like'* soil as the reason.

The defendants' case

24. The defendants called two (2) witnesses to refute Qiu's evidence, the first was Sim who is a qualified quantity surveyor. Sim (DW1) only became involved in the project after the HDB awarded the defendants the contract on 3 April 2000; she said works commenced on 3 August 2000, starting with bored piles (about 300 pieces) by the defendants' geotechnic division, which work was completed on 9 February 2001.

25. In her written testimony, Sim explained that before the plaintiffs were appointed the defendants' main subcontractor, the defendants had many subcontractors on site including Zap Piling, AL Technologies, Cape Engineering, Lee Welded Mesh Singapore Pte Ltd (Lee Welded), Hor Kew Pte Ltd, Supermix Concrete Pte Ltd and Hoe Seng Huat Hardware Co Pte Ltd.

26. When the plaintiffs approached the defendants through Wang to do the project, she had prepared (on the instructions of T C Chua) a general budget for the proposed main subcontracting contract, which she handed to Wang. As neither party chose to call Wang as a witness although his evidence would have been material, it serves no purpose to speculate whether Wang in turn handed the general budget to Qiu or what he said to Qiu in that regard. Neither did the defendants call T C Chua to testify. Sim explained that the general budget only provided a broad overview of the components of work required to complete the project (including the bored piling then in progress), the subcontractors already appointed, as well as the aggregate costs the defendants were prepared to incur until completion. It was only after T C Chua received Wang's telephone confirmation of the plaintiffs' interest in taking on the project and she was asked by T C Chua to attend a meeting with Qiu, that she prepared a proper budget which expanded on the earlier general budget. The previous general budget for $13,717,986.05 comprised the following breakdown:-

1.	Piling works	$1,923,324.28
2.	Temporary works	685,794.36
3.	Excavations	412,851.28
4.	Concrete works	3,545,142.07
5.	Waterproofing to basement	117,420.49
6.	Instrumentation	27,796.62
7.	Structural steel	29,322.95
8.	Precast items	213,840.11
9.	Architectural works	1,747,672.49
10.	M & E works	4,618,097.64
11.	External works	396,723.76
	Total subcontract for C23:	$13,717,986.05

27. At that meeting with Qiu on 5 December 2000, Sim said she presented the proper budget for discussion. As compared with the earlier general budget, Sim said it should have been obvious to anyone that the residuary value of the contract (less the work for the various subcontractors and less bored piling) was very much less than the contract sum (see 1AB2) stated in the general budget. The residuary value ($5,443,524.23) which would form the plaintiffs' subcontract is arrived at as follows:-

General budget sum			$13,717,986.05
Less:	Materials	$3,017,097.94	
	Precast items	239,102.00	
	M & E works	5,018,261.88	($ 8,274,461.82)
Residuary value:			$ 5,443,524.23

Sim pointed out that in accepting the subcontract, the plaintiffs should have been prepared to manage and supervise the work of the other subcontracts already appointed and, should have realised that the value of whose works would be backcharged to the plaintiffs and deducted from the subcontract sum. She claimed she had reminded Qiu that the works had commenced since August 2000. Qiu apparently had told her he had vast experience in HDB projects but, Sim warned him that this was no ordinary HDB project but, a shopping centre with a basement. Sim had also rejected Qiu's request that the defendants improve on the subcontract sum (by $500,000). She explained that the defendants themselves had a tight budget as their tender to HDB was $6m lower than the next lowest tender. Even if Qiu did not understand the difference between the general budget and the residuary value, Sim deposed that at a meeting she attended (in late April 2001) with Qiu and other representatives from the plaintiffs, she had reminded Qiu of the residuary value for the subcontract. He did not protest but turned his attention to man year entitlements asking the defendants for 250 workers.

28. Sim had also told Qiu that the plaintiffs must provide a performance bond of 10% of the contract sum even though the actual residuary value of the subcontract was $5,443,524.23. When Qiu asked for man year entitlements, she had told him that the defendants were amenable to give the plaintiffs their balance quota (180) of man year entitlements provided the plaintiffs furnish a bond/guarantee of $2,000 for each worker. Sim deposed she had extended to Qiu documents which

included the main contract with HDB, the soil report given by HDB, drawings and plans and advised him to study them carefully before making his decision. Qiu had subsequently reverted (on or about 12 December 2000) to say he was interested and could work within the general budget sum and residuary value of the contract; he then asked for a letter of award which she prepared. She told him to get someone conversant in English and Mandarin to explain the subcontract terms to him, when the subcontract agreement was subsequently prepared.

29. Qiu told the defendants he was unable to provide a performance bond at 10% ($1,371,798.60) of the contract sum. Consequently, towards end January 2001, the defendants agreed to reduce the amount to 10% ($544,353) of the residuary value of the subcontract. Although the subcontract was only signed on 28 February 2001, Sim said she considered the subcontract a *'done deal'* as, the plaintiffs had prepared their detailed work schedule on or about 5 January 2001 and had attended site meetings commencing 31 January 2001.

30. Sim denied that the defendants had made misrepresentations and or fraudulent misrepresentations to the plaintiffs. She pointed out that negotiations and discussions were conducted in Mandarin; hence, Qiu could not use the excuse he did not understand what transpired. As regards the alleged second representation, she had made it clear to Qiu that four (4) months of the contract period had lapsed, since the defendants' commencement of the project. The alleged third representation was not sustainable either as, she had given Qiu a copy of HDB's soil report which did not suggest rubbish in the backfill.

31. As for the plaintiffs' first progress payment, Sim explained that it included works not carried out by the plaintiffs (bored piles and instrumentation); hence these items had to be deducted or backcharged to the plaintiffs. The only item in the claim attributable to the plaintiffs was excavations which sum of $12,385.54 was valued at $8,257.03 by the defendants. However, the plaintiffs were not paid at all because of deductions totalling $1,463,340.15 for works done by Zap Piling, AL Technologies and the defendants' geotechnic division.

32. Similarly, the only item attributable to the plaintiffs in the second progress claim ($1,612,900.58 at 2AB63) was $41,285.13 for excavations. Like the first progress claim, the defendants did not pay the plaintiffs any sum because the deductions of $1,556,218.60 far exceeded the plaintiffs' payment entitlement. Payment was also withheld because the plaintiffs owed the defendants the sum of $100,000/- for the security bond for 50 foreign workers for whom the defendants had signed Form 1A [see 2AB552-554] which the plaintiffs for their own reasons failed to submit to MOM for processing. After making all the deductions (including deductions for rental of equipment and supply of materials to the plaintiffs), not only did the defendants not owe any monies to the plaintiffs but the latter in fact owed the defendants $28,894.11 on the two (2) progress claims.

33. In addition to $28,894.11, Sim deposed that the plaintiffs were liable to the defendants for liquidated damages for delay and or damages for failing to provide shop drawings for architectural works, despite repeated reminders from the defendants/the HDB, over a period of four (4) months.

34. As for excavation works, Sim pointed out that the plaintiffs' own work schedule stated such works would commence on 12 February 2001 and would be completed by 27 February 2001. As early as 6 February 2001, the defendants had written to the plaintiffs requiring them to submit the name(s) of their excavation subcontractor(s). Despite numerous site meetings however, the plaintiffs failed to commence excavation works by their own schedule. Moreover, the excavations works when they finally started, were unsatisfactory so much so that the defendants were obliged to commit their own resources to carry out those works, on or about 26 February 2001. Unless the excavation works were

completed, other works such as exposing the pile caps could not proceed.

35. Moving next to the issue of removing the excavated material, Sim pointed out that it was the plaintiffs' contractual responsibility to remove such materials. However, the plaintiffs breached that duty as they did not have a proper dumping ground for such materials — instead, they dumped the same on the adjoining State Land despite warnings of the consequences of such encroachment from the defendants/the HDB. Indeed, the HDB went further and warned the defendants that the plaintiffs' slow progress may cause the defendants to be debarred from future public sector projects.

36. Due to their tardiness, lack of progress and total disregard for their own work schedule, the defendants by their latter dated 18 May 2001, gave the plaintiffs three (3) days' notice to proceed with the works diligently failing which, notice of termination would be given. The plaintiffs failed to respond to the letter and notice of termination was given by the defendants on 23 May 2001. As a consequence of the plaintiffs' breach, the defendants suffered loss and damage. Hence, they called on the performance bond which demand for payment was not met by Tai Ping despite three (3) reminders. Ultimately, the defendants were restrained by an order of court from receiving payment thereon, on an application filed by the plaintiffs. Resulting from the plaintiffs' breach of contract, Sim deposed that the defendants had sustained losses in excess of $2m.

37. Cross-examined, Sim revealed that the defendants did not show to the plaintiffs their contract from the HDB save for the specifications; it was a matter of strategy. However, the defendants left a copy of their main contract (with pricing omitted) with their architects for subcontractors to check if the latter wished to do so. She further revealed that the defendants' geotechnic division did the piling works at cost. She agreed that the defendants' tender price of $4,618,097.64 for M&E works fell short of what the defendants had to pay subcontractors to get the work done — the best price the defendants could obtain was $5.1m. In order to cover the shortfall for M&E works, the defendants reduced the budget for architectural works by $400,000/- to $1,347,508.25.

38. Sim admitted that by end 2000, the defendants' piling works were 1-2 months behind schedule; she agreed that piling works are crucial and unless completed, no other construction work can begin. Even so, the defendants did not apply to the HDB for extension of time. It was much later (in January 2002), that extension of time was granted by the HDB, but not in relation to piling works. However, the plaintiffs' subcontract did not contains provisions similar to the defendants' contact with HDB, for extensions of time. Hence, even if the HDB granted extensions of time to the defendants, the plaintiffs would not benefit therefrom; the defendants could still hold the plaintiffs to the completion date in the subcontract.

39. Notwithstanding that the plaintiffs' subcontract excluded piling and M&E works, Sim explained that the defendants' management still wanted the plaintiffs to co-ordinate those works, particularly on the supply of materials, so as to ensure that all work was completed on schedule. She denied that the motive was to have another contractor take the blame because piling works were already delayed. It was similarly on management's (TC Chua's) instructions that Sim requested the plaintiffs initially for a performance bond at 10% of the contract sum even though it amounted to 25% of the subcontract.

40. Sim maintained that during negotiations she had told Qiu three (3) items of work were taken out of the subcontract namely: (i) materials ($3.017m); (ii) pre-cast elements ($239,000) and (iii) M & E works ($5.018m), thereby reducing the plaintiffs' subcontract to the value of $5.4m. She had also informed him that although bored piling and instrumentation works were taken out of the plaintiffs' contract, they were required to co-ordinate the works to which (she claimed), Qiu did not object,

before or at any time after, the subcontract was signed. In reality however (Sim acknowledged), instrumentation being so highly specialised, the plaintiffs were unlikely to be able to interpret the readings in relation to the soil condition, nor would they have any role to play as regards bored piling. She did not deny counsel's suggestion that the motive for including these two (2) items in the plaintiffs' subcontract was to obtain a higher performance bond from the plaintiffs.

41. In cross-examination Sim revealed that she had told Qiu the defendants had 120 not 180, man year entitlements. She denied she had agreed to give him 180 initially followed by 70 later, on his request for 250 workers. Qiu and Sam Yong had told her 180 was the minimum figure the plaintiffs could accept but to her, it was the maximum. She had told Qiu the defendants could only afford to give him 180 (although her computerised records showed the defendants had 120 left, out of 370 MOM approved man year entitlements). Sim said she was aware that such entitlement was a good source of revenue for local contractors who engage mainland Chinese workers and was an important factor to them. However, it was not the defendants' practice to insert a clause on man year entitlements into their subcontracts. She was also aware that the plaintiffs raised the issue in their letters to the defendants in April 2001. The defendants' practice was to give man year entitlements to subcontractors in batches (but admittedly this was not told to Qiu). Hence, in Form 1A which the defendants signed as the main contractor to support the plaintiffs' application, the number stated was 50. In any case, Qiu had told her/the defendants (sometime in April-May 2001), that the plaintiffs themselves had 100-200 workers and hence man year entitlement was not a critical factor, contrary to his testimony.

42. Re-examined, Sim explained the defendants' rationale for agreeing to give the plaintiffs only 50 foreign workers initially – from past experience, the defendants were afraid that if the plaintiffs were unable to continue with and or to complete, the project, it meant that the man year entitlements would all be wasted. In any case, excavation works are not labour intensive.

43. Sim contended that the defendants' geotechnic division did not reveal to her the condition of the material they cored out while installing bored piles; she said she was only given a monthly summary of the lengths of piles installed. She added that the geotechnic division would not know what was cored out as *they didn't see*.

44. Sim admitted that the defendants' successful tender was $6m lower than the next lowest price. She said that had the defendants split up the architectural works amongst the various trades; her company would have had to pay more than $3.3m for the works instead of the budgeted $1.34m inserted in the subcontract. She further revealed that the defendants did not require performance bonds from any of their other subcontractors (save for their glazier) as she had the security of their retention sums. She agreed that the performance bond originally requested from the plaintiffs ($1.37m) was more than the defendants' own performance bond ($1.1m) furnished to HDB.

45. Sim disagreed with Qiu's testimony on the issue of drawings and plans. She contended that during negotiations (19 December 2000) she had handed him a full set of the drawings (including specifications and soil report) which documents Qiu did not return until the subcontract was signed; Sim however, did not make Qiu acknowledge the documents she handed over nor did she sign for those he returned. Qiu on the other hand claimed that it was Wang not Sim, who lent him a set of plans before the parties met on 5 December 2000. Leaving aside the dispute of how the documents came to be in Qiu's possession, it is common ground that the plaintiffs were aware from the drawings, of the defendants' scope of works, before Qiu signed the subcontract on the plaintiffs' behalf (28 February 2001).

46. Although she had informed Qiu that the defendants would engage labour from Zap Piling to

do the soldier piles (at the perimeter of the site), Sim admitted that she did not inform him that the defendants would also be providing the materials for the work and would be deducting the costs thereof from the subcontract price. (It was subsequently clarified in re-examination that the materials would not have added to the costs of soldier piling because the defendants used materials left over from their other projects). Apparently, Zap Piling did not complete their work and demobilise their equipment (including two [2] rigs) until 23 March 2001; however, Sin denied that it resulted in the plaintiffs being delayed in their excavation works. It was drawn to her attention that even before that, on 12 March 2001, the defendants had given written notice to the plaintiffs that if they did not mobilise their excavation team by that very afternoon, the defendants would engage another company Midas-Bilt Pte Ltd to do the work immediately, which costs would be backcharged to the plaintiffs. Sim insisted that Qiu was told verbally at site meetings of the particulars of other subcontractors on site notwithstanding that the defendants did not reply to the plaintiffs' several letters on such queries.

47. Sim did not deny that the defendants' intention was to subcontract out the entire project. Save for their project team headed by Ho Hin Sing and subsequently by June Tan, she revealed that the defendants had no staff or site personnel (other than a safety officer) apart from the defendants' bored piling workers.

48. What emerges from Sim's testimony is, that the defendants not the plaintiffs, dictated how the plaintiffs should carry out the works in the subcontract. What is even more remarkable is the fact that the plaintiffs or more correctly Qiu, seemed to accept the situation. Further, where there could be savings in the final price charged by subcontractors appointed for the plaintiffs by the defendants, those savings were not passed onto the plaintiffs, However, where the other subcontractors' final pricing exceeded the defendants' budget and in turn the provision for that item in the subcontract, the defendants had to absorb the excess cost. An illustration of cost-saving was the budget for piling whilst an example of overrun in costs would be architectural works, where the budgeted sum of $1,347,508.25 was less than half of the actual sum ($3,383,362.39) the defendants claimed they eventually expended. In her written testimony (para 64), Sim provided $1,923,342.28 for bored piling in the subcontract but the final sum for the item was $281,798.27 less, at $1,641,526.01. Sim sought to justify the defendants' actions by explaining that the defendants (and in turn the plaintiffs) were paid for bored piles according to the lengths and number of piles installed. It was also clear from Sim's testimony that the project was loss-making for the defendants. I shall return to these observations later in my judgment.

49. Although the defendants' stand was that the plaintiffs should have been aware of the soil condition and the same did not excuse them from completing the excavation works on time, it was noted (and admitted by Sim) from the defendants' letters [see **D1**] to the HDB that the defendants themselves used the *quick sand like* condition of the soil to justify their application for 40 days' extension of time from the HDB, stating the soil characteristic was very rare and remote in Singapore; hence, it was not foreseeable or expected at the tender stage. HDB (on 2 October 2001) acceded to the defendants' request and granted extensions of time up to 20 September 2002, for different stages of work. What is revealing is, that the defendants' letter (dated 8 September 2001) to the HDB stated that the defendants discovered *the unexpected bad soil condition* during excavation works to basement 2 around 28 July 2001. Sim had also conceded that if the plaintiffs had continued with the subcontract, she would have passed on to them the same extensions of time granted by the HDB, notwithstanding that there was no provision for such in the subcontract. Although she had asserted (in para 53 of her affidavit) that the defendants' new subcontractor was able to find a dumping ground for the excavated rubbish without the defendants' assistance, Sim could not name the dumping ground and could not comment on counsel's suggestion that the defendants' new excavation subcontractor had actually dumped the rubbish on the adjoining state land, then levelled and

concealed the rubbish with earth.

50. I turn now to the testimony of the defendants' second and last witness Tan Yew Eing, who is also known as June Tan (June). June's written testimony basically corroborated Sim's evidence. Cross-examined and subsequently re-examined, June:

a. said she assumed the post of project manager in January 2000 and asked to be released in June 2001 as she found the job *too stressful;*

b. admitted she had pressed the plaintiffs to accelerate the works even before they had signed the subcontract (because the project was then on a critical path) as by then they had attended site meetings. Indeed, the plaintiffs' site supervisor/engineer Lee Zhong (who has since returned to China) used to be on site until 5pm everyday, before 28 February 2000;

c. said although she was aware that Jalan Halus (an official dumping ground for rubbish) was nearby, she did not inform the plaintiffs as *it was not for her to advise, it was for the plaintiffs' excavation contractor to decide where to dump the rubbish.* In any event, the rubbish was localised and had been dumped on one area of the site only, due to inadequate security personnel;

d. explained that Zap Piling's work would not in any case have delayed or prevented the plaintiffs from commencing excavation works because, the former installed soldier piles in rows. After each row was completed, the plaintiffs could have installed timber laggings in between for shoring purposes in preparation for excavation works.

June was not questioned on any of the five (5) representations pleaded in the statement of claim.

The findings.

51. At the conclusion of the trial, counsel for the plaintiffs informed the court that his clients were relying on three (3) representations only for their case, namely:

(a) man year entitlements;

(b) soil condition;

(c) scope of the plaintiffs' contract

thereby abandoning representations (ii) and (iv) set out in para 3 above. I should point out however that representation (iv) [on the absence of adverse or unusual factors] is merged in the complaint on the unexpected soil condition. Consequently, I will confine my findings to the three (3) 'live' representations. Counsel further submitted that the three (3) representations were more than negligent, they were tantamount to fraudulent misrepresentations, from the evidence adduced. I shall

now address each representation in turn.

(i) man-year entitlements

52. I have already dealt with this subject in some detail (paras 19-21 *supra*) as to the plaintiffs' reasons for wanting 250 or at the very least 180, mainland Chinese workers. Indeed, counsel for the plaintiffs candidly submitted that this requirement was a critical condition to his clients. Consequently, if not for Sim's representation to Qiu that she would give him 120 man year entitlements followed by 60 more from the defendants' other projects, the plaintiffs would not have accepted the subcontract. The plaintiffs did not receive even the initial 180 foreign workers, let alone the second lot of 70. He argued that their cash-flow problem was exacerbated by the defendants' non-payment of the plaintiffs' first two (2) progress claims which counsel described as, *the lifeblood* of a construction company.

53. However, the plaintiffs' above submission has to be viewed against the actual evidence adduced in court. It was Sim's unchallenged testimony that the defendants did sign an application form for 50 foreign workers on the plaintiffs' behalf, on or about 2 May 2001. It was also not disputed that the plaintiffs failed or refused to submit the application form (IA). Qiu's excuse that he did not provide to the defendants a bond of $2,000 per worker (as which result the defendants eventually cancelled the application) because the application had first to be approved by MOM before an insurance company would furnish the security, did not explain his failure to submit the Form in the first place. Consequently, the plaintiffs only have themselves to blame for not getting any man year entitlements. It does not lie in their mouths to complain that the defendants did not give them 250 man year entitlements when the latter's offer of 50 workers first (for reasons which I accept) was not even taken up by the plaintiffs. It is therefore irrelevant whether the defendants (through Sim) initially promised the plaintiffs 180 or 250 foreign workers; the question of breach of this representation did not even arise.

(ii) soil condition

54. The nature of the soil excavated was not in dispute (although it was the defendants' contention that it was localised), it comprised of rubbish. The plaintiffs contended that the defendants (who denied) knew of the soil condition and failed to disclose to the former; the plaintiffs relied on the soil report of ECON GEOTECHNIC dated 9 September 1999 and the fact that it was the defendants' own geotechnic division which installed over 300 bored piles. Qiu had also alleged that at the meeting with the defendants on 5 December 2000, he had been given the impression by Lai that the soil condition was normal. The defendants did not call Lai to rebut Qiu's allegation but Sim had denied that her geotechnic division would have known beforehand of the rubbish, claiming they *did not see* whist the soil report only stated *backfill*.

55. I disbelieve and reject Sim's testimony in this regard. The defendants must have known or ought to have known, the nature of the material they excavated; how can their geotechnic division not have seen what they cored out? Yet they kept the information away from the plaintiffs. It is noteworthy that the defendants themselves wrote to the HDB much later (on 8 September 2001) using the soil condition as a ground for applying for extension of time.

56. I am mindful of the defendants' closing submission that non-disclosure of the soil condition does not amount to a misrepresentation relying on the following extract from *Chitty on Contracts* (28 ed vol 1 para 6-013 at p 343) which was also repeated in *Hudson's Building and Engineering Contracts* (11 ed vol 1 at para 1.145 p 73):-

> Non-disclosure. The general rule is that mere non-disclosure does not constitute misrepresentation, for there is, in general, no duty on the parties to a contract to disclose material facts to each other, however dishonest such non-disclosure may be in particular circumstances.

However, further down in the same passage from *Chitty's,* the following extract also appears:-

> ……Tacit acceptance in another's self-deception does not itself amount to a misrepresentation, provided that it has not previously been caused by a positive misrepresentation. But there are exceptions to the general rule that there is no duty to disclose, namely where the contract is within the class of contracts *uberrimae fidei*, where there is fiduciary relationship between the parties, and where failure to disclose some fact distorts a positive representation.

57. Granted, a construction contract is not within the class of contracts of the utmost good faith but where, as in this instance, Qiu had actually inquired from the defendants whether there were any adverse factors he should know about and was assured there were none, the defendants are caught by the second passage I have cited above from para 6-013 of *Chitty's*.

58. Before I address the third misrepresentation, I wish to make some general comments first. There is little doubt from the evidence adduced from both sides' witnesses, of the parties' unequal bargaining position. Contrary to the defendants' closing submissions, I did not find Qiu to be business-savvy at all; he was a babe in the woods and was no match for them when it came to negotiating with the defendants. Moreover, the plaintiff company was barely three (2) years old as at December 2000. Qiu was incredibly nave and if I may add, utterly foolish as can be seen from two (2) instances: firstly, his misguided optimism that the initial cash flow for his company (before progress payments from the defendants [which never materialised in any case]) would come from the premium (in excess of $1m) payable by foreign workers employed by his company. Secondly, his optimism that the plaintiffs' delay in the subcontract works could be remedied eventually by employing more workers and putting them to work in two (2) shifts. Thirdly, his foolhardiness in sub-subcontracting out the excavation works to System Holdings Pte Ltd at $580,000 when the plaintiffs' subcontract provided $412,851.28 for that item.

59. Granted, Qiu's testimony was inconsistent on the issue of when and what documentation he received from the defendant on 5 December 2000 and what exactly he was told about the defendants' contract from HDB for the project, the contract sum and, the omissions therefrom for the subcontract. Further, no other witness corroborated his evidence; his 'investor' Sam Yong did not testify, neither did his site supervisor/engineer (Lee Zhong) or project manager (Ma Jun). Whilst the court was told that Lee Zhong had returned to China, nothing was said about Sam Yong's or Ma Jun's whereabouts. The court was also not told if any attempts had been made by either side to procure Wang's attendance in court, notwithstanding his having left the defendants' services. Despite the shortcomings in his testimony however, I find that Qiu was not an untruthful witness. Rather, he came across as foolish, confused and inexperienced although he flattered himself by telling counsel for the defendants he was a careful man. Based on his company's short existence, he could not have had much experience. It was mainly due to his inexperience (and perhaps lack of understanding of what Sim told him) that he did not fully comprehend the enormity of the task he had undertaken on the plaintiffs' behalf. If indeed he was as experienced in construction as he claimed to be, Qiu would not have taken on the project based on the residual value of $5,443,524 offered by the defendants; any

experienced contractor would have realised that the budget was impossible to achieve, without incurring huge overruns in costs.

60. Unlike the plaintiffs however, the defendants were well aware of the financial risks; their agenda (admitted by Sim) was therefore to pass on to a third party the burden of not only an unprofitable but most certainly a loss-making, project. Sim had readily admitted that the defendants were anxious to look for a main contractor to take over the entire project, on the instructions of her director of constructions T C Chua. There is no question that the defendants would have lost money on the project. Just on two (2) items alone, M & E and architectural works, they had under-provided by $2m not to mention the gulf of $6m between their tender price and the second lowest tender. The plaintiffs' willingness to accept the project was therefore a godsend to the defendants, although the plaintiffs' counsel described his clients as scapegoats.

(iii) the scope of the contract

61. Despite their protestations to the contrary and their repeated assertions that they were only doing their best to help the plaintiffs to finish the project, I have no doubt from the defendants' conduct that they did the exact opposite. I say this based on evidence adduced from the defendants' own witnesses.

62. First, there is June's conduct. It was reprehensible that knowing Jalan Halus dumping ground was nearby, she deliberately withheld such information from the plaintiffs when they were desperately looking for a place to dump the rubbish they had excavated. Secondly, Sim had testified that the plaintiffs would be the subcontractor for the entire project save for three (3) omissions, which drastically reduced the contract value from $13.7m to $5.4m. True, that was known to and accepted by Qiu, who also admitted that he attempted to ask the defendants for another $500,000 for the subcontract sum, which request was rejected. What the plaintiffs could validly complain was, how the defendants dictated to the plaintiffs who the latter should employ as specialist subcontractors and how much those subcontractors should be paid. As Qiu explained, this arrangement could be highly inequitable to the plaintiffs because, the total charges of the subcontractors may even exceed the subcontract sum and caused the plaintiffs to incur losses; yet, the plaintiffs had no say whatsoever on the choice of subcontractors and subcontract sums awarded to them not to mention the value of materials supplied by the defendants. Even worse, the defendants (according to Sim) expected the plaintiffs to co-ordinate the works of such other subcontractors without any charge (for profit and attendance). Thirdly, there was the defendants' attempt to procure a performance bond for 25% of the subcontract value from the plaintiffs, instead of the usual 10% in the construction industry. It reinforced my finding of Qiu's naivete; he did not provide a performance bond in the larger amount <u>not</u> because he realised it was outside industry practice but because the plaintiffs' insurance company (presumably Tai Ping) refused to do so.

63. Consequently, the subcontract was not only entirely one-sided in the defendants' favour but the scope had been changed; it was <u>not</u> for the subcontract value of $5,443,524.23 and for the scope of works represented to and accepted by the plaintiffs/Qiu, but was whittled down further to exclude bored piling, temporary works/instrumentation and soldier piles. The breakdown for the subcontract is as follows:

(i)	bored piling	$1,923,324.28
(ii)	temporary works/instrumentation	713,590.98
(iii)	excavation/earthworks	412,851.28
(iv)	structural works	528,044.13

(v)	waterproofing to basement	117,420.49
(vi)	structural steel works	29,322.95
(vii)	architectural works	1,347,508.25
(viii)	external works (soldier piles)	371,461.87
		$5,443,524.23

Excluding those three (3) items, the value of the subcontract was reduced to $2,435,147.74 ($5,443,524.23 - $1,923,324.28 + $713,590.98 + $371,461.87). In their final submissions, the defendants pointed out (in para 22 of the statement of claim) that the plaintiffs had stated they knew of the presence of a bored piling contractor and Zap Piling on site. That may be so but, the plaintiffs did not know the value or scope of works of the two (2) and other subcontractors as, their repeated written inquiries of the defendants in that regard met with no response. Even if Qiu, as the defendants contended, knew the subcontract value to the plaintiffs was actually $3.2m, that was not the same as saying that the plaintiffs' subcontract would be $2.4m. If the other subcontractors were nominated by the defendants, then industry practice entitled the plaintiffs to profit and attendance for co-ordinating their works with those of the subcontractors. If the subcontractors were not nominated subcontractors but domestic subcontractors of the plaintiffs, only the plaintiffs could select and negotiate the terms and conditions of, their appointment. The defendants however wanted to have their cake and eat it. On the one hand, they told the plaintiffs they would appoint the other subcontractors. On the other hand however, they would not allow the plaintiffs to charge any attendance fee to co-ordinate the works of their appointees. Far worse, copies of the defendants' various contracts with numerous subcontractors (signed before as well as after the subcontract) were never extended to the plaintiffs at the material time.

64. There is one other small issue that needs to be dealt with before I turn to the law and the defendants' counterclaim – when did the subcontract come into existence? Was it on the date of execution (28 February 2001) as the plaintiffs contended or, much earlier as the defendants asserted? It was not disputed that the plaintiffs (Qiu and or Lee Zhong) had attended site meetings since 30 January 2001 as which result, the defendants considered the subcontract *a done deal* well before 28 February 2001. It bears recapitulating that the parties first met on 5 December 2000 and Qiu was handed the subcontract agreement dated 19 December 2000 about that date. It should be further noted that the plaintiffs provided the performance bond for the subcontract on 15 February 2001. Applying cl 20.0 of the subcontract, which states:

> Within 14 days of the letter of acceptance, the subcontractor shall deposit with the contractor an amount of $544,351.42 as and by way of security for the due performance of and observance by the sub-contractor of his obligations under the contract or a demand bond in an approved formula

can it be said that the subcontract was actually concluded on 1 February 2001 by the plaintiffs' conduct in furnishing the performance bond? I think not. In the statement of claim, the plaintiffs explained (in para 20) that they had sent a representative (presumably Lee Zhong) to the site in January 2001 purely to do preparatory work; Qiu had alleged that it was the defendants who invited the plaintiffs to visit the site. The defendants (June) on the other hand gave written notice to the plaintiffs (on 20 February 2001 at 2AB202) that they would start imposing a penalty if the plaintiffs' workers failed to show up at site. This was followed by another letter from June dated 27 February 2001 (2AB196) pointing out to the plaintiffs that the defendants were *so behind time*. The second letter explains the defendants' eagerness to hold the plaintiffs to the subcontract even before the execution date of 27 February 2001 and thereafter to terminate the same due to the plaintiffs' alleged breaches – the defendants themselves were behind schedule on the project, which fact they did not disclose to Qiu on 5 December 2000. It would be wholly unjust and inequitable to hold that the plaintiffs were bound by the subcontract before they signed it on 28 February

2001.

The law

65. In the statement of claim, the plaintiffs had prayed for rescission of the subcontract pursuant to s 2 of the Misrepresentation Act Cap 390 (the Act) which reads as follows:-

> (1) Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true.
>
> (2) Where a person has entered into a contract after a misrepresentation has been made to him otherwise fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded, the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party.

The decision

66. On the evidence, I find that the plaintiffs have succeeded in their claim on misrepresentations (ii) and (iii) but failed on misrepresentation (i). In the light of my findings on the defendants' conduct, it can hardly be said that the misrepresentations were made innocently. I very much doubt that the defendants can claim (under s 2(1) of the Act) that they had reasonable grounds to believe and did believe up to the time the subcontract was made, that the facts told to the plaintiffs under misrepresentations (ii) and (iii) were true. Are the plaintiffs therefor entitled to rescission of the contract under s 2(1) of the Act or, would damages be an adequate remedy, under s 2(2) thereof? Even if the misrepresentations had been made innocently, s 1 of the Act makes it clear that the plaintiffs are not thereby precluded from having the subcontract rescinded, notwithstanding that the contract has been performed.

67. In this regard, I note that the plaintiffs' position on their pleadings is ambivalent. In paras (a) and (b) of the reliefs claimed, they had prayed for both rescission and damages for rescission respectively. At law, rescission means that the plaintiffs are entitled to be restored to the position they would have been in had the contract not been made. Effectively, that would mean that the plaintiffs would recover back all the sums they had expended for working on the project, including the amount ($30,100) paid to Tai Ping for issuance of the performance bond.

68. It has to be borne in mind that the plaintiffs did not succeed on misrepresentation (i) and their conduct was not entirely blameless. One clear example would be Qiu's folly in engaging System Holdings

Pte Ltd to do excavations works at a higher amount than that provided for the item in the subcontract, and then attempting (unsuccessfully) to switch subcontractors. The court cannot relieve the plaintiffs and the defendants should not have to pay for the consequences, of Qiu's folly, namely the judgment sum of $180,000. Another instance of the plaintiffs' fault would be Qiu's decision not to proceed to apply for 50 man year entitlements, without valid reasons. It is a moot point whether the plaintiffs would have been entitled to extensions of time due to the soil condition, and claim the benefit of the extensions of time granted to the defendants by the HDB; we will never know.

The counterclaim

69. The maxim he who comes to equity must come with clean hands is well known and does not bear repetition. Rescission is an equitable remedy and the defendants cannot rely on their own misrepresentations as a basis to found a counterclaim for damages. Consequently, their counterclaim is dismissed with costs to the plaintiffs.

Conclusion

70. I award judgment to the plaintiffs with costs. I hold that the subcontract is rescinded, the defendants are directed to deliver up Tai Ping's performance bond for cancellation and, the interim injunction granted on 22 August 2001 to the plaintiffs to restrain the defendants from calling for payment on the performance bond is affirmed. The Registrar is directed to assess the expenses incurred by the plaintiffs consequent on rescission, such sums to exclude reimbursement/payment of the judgment sum awarded to System Holdings Pte Ltd, with the costs of such assessment reserved to the Registrar.

Sgd:

LAI SIU CHIU

JUDGE