HCCT 52/2014

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTRUCTION AND ARBITRATION PROCEEDINGS
NO 52 OF 2014

BETWEEN

CHAN CHI LAM trading as
HOI FAT CONSTRUCTION COMPANY Plaintiff

and

LAM WOO & COMPANY LIMITED and
CHEVALIER PIPE REHABILITATION HONG KONG LIMITED (formerly known as PREUSSAG PIPE REHABILITATION HONG KONG LIMITED) trading as
LAM WOO – PREUSSAG JOINT VENTURE Defendant

Before: Hon Mimmie Chan J in Court
Dates of Hearing: 23, 24, 27 & 28 June 2016 and 11 November 2016
Date of Judgment: 13 March 2017

J U D G M E N T

Background

1. This is an action commenced by the Plaintiff ("**Chan**") against the Defendant, Lam Woo-Preussag Joint Venture ("**JV**"), for the sum of $4,833,660.95 claimed to be due from the JV to Chan, for works carried out by Chan as one of the JV's subcontractors for water mains works under Contract No 22/WSD/02 ("**Contract**"). The JV was the main contractor of the Water Supplies Department ("**WSD**") under the Contract, which was for the replacement and rehabilitation of water mains in Cheung Sha Wan, Kwai Chung and Tsing Yi. According to Chan, the claim for $4,833,660.95 is based on his final account prepared for the Contract, which was submitted by him to the JV on 6 July 2012 ("**Plaintiff's Final Account**"), and represents (as pleaded in para 7 of the Statement of Claim "**SOC**') a sum of $1,873,559.84 due under 3 work orders for reinstatement of road surface ("**Road Surface Work**") and a sum of $2,194,000 for work concerning the abandonment of existing valve chambers ("**Valve Chambers Work**").

2. By way of Defence, the JV claims that of a total of 58 work orders placed with Chan under the Contract, 45 work orders were for water mains replacement work ("**Mains Work**"). Of the 45 work orders for Mains Work, the parties had agreed on the rates for the works under orders 68, 12 and 40, in the case of the latter 2, with rates agreed for the construction of fire hydrants and associated pipe works and for the construction of cross road water mains. For the other subject work orders, the JV claims that there had been no rates agreed between Chan and the JV for the work in question. According to the JV, such work, which included the Valve Chambers Work, should be assessed on a reasonable price or

quantum meruit basis. The value of the Road Surface Work is admitted in the Amended Defence.

3. By way of Counterclaim, the JV alleges that it was a term of the Contract between the JV and Chan that Chan's work under all of the 45 orders for the Mains Work was subject to re-measurement, on a back-to-back basis against what the WSD/its engineers assessed and certified on their re-measurement of the works under the main contract ("**WSD Re-measurement**"). On the JV's case, the Contract between the JV and Chan incorporates price terms and conditions, clause 9 of which ("**Remeasurement Clause**) provides as follows:

> "Method of Measurement: as per the Main Contract. All the BQ quantities are provisional and subject to re-measurement as based on back-to-back basic (*sic*) …"

4. On the JV's pleaded case, the value of Chan's work under the Contract should be $25,649,876.25, but Chan is liable to the JV for contra charges. In paragraph 19 of the Amended Defence and Counterclaim ("**Defence**"), the JV claims that after deducting the contra charges for which Chan is liable and taking into account previous payments made by the JV to Chan, Chan has been overpaid by a sum of $6,195,925.37 – which the JV seeks to recover by counterclaim.

5. In answer to the JV's claim that there were no agreed rates for some of the works, Chan claims in his Re-amended Reply and Defence to Counterclaim ("**Reply**") that in addition to the works under orders 68, 12 and 40, rates had also been agreed for the works under order 64. For the other work orders said to contain no agreed rates, Chan claims that he had

agreed with the JV that Chan's works would be assessed "in accordance with the agreed rates of similar works items in other works orders" ("**Similar Work Rates Basis**"). Chan further claims that the JV had been assessing and, under all of the JV's interim payment certificates, paying for his works in question on such a basis.

6. As for the WSD Remeasurement Clause, Chan claims that on its proper construction, it simply meant that the *method of* measurement of the works was to follow that of the main contract between the JV and WSD ("**Main Contract**"), but that the WSD re-measured *quantities* were not binding upon Chan (paragraph 6 of the Reply).

7. On the basis of the pleadings filed in the action, a single joint expert ("**Expert**") was appointed by direction and leave of the Court on 12 April 2016. The matters to be addressed by the Expert on the basis of the issues in dispute were framed by the parties. As approved by the Court, the issues addressed by the Expert were:

> (a) What should be the value of the Plaintiff's work done (item 1.1 in the Amended Appendix 1 of the Amended Defence and Counterclaim) under each of the following four scenarios:-
>
> i. Quantities based on the Plaintiff's re-measurement records in connection with the Plaintiff's final account as pleaded in paragraph 7 of the Statement of Claim and the rates based on agreed rates for the Work Orders with Agreed Rates and similar rates in other work orders for the Work Orders without Agreed Rates (as defined in paragraph 3(e) of the Re-amended Reply and Defence to Counterclaim);

ii. Quantities as per scenario (i) above, save as applying the agreed rates for Work Orders with Agreed Rates, the rates for the remaining items would be assessed on quantum meruit basis;

iii. Quantities on a back-to-back basis against what WSD had assessed/re-measured and the rates based on agreed rates for the Work Orders with Agreed Rates and similar rates in other work orders for the Work Orders without Agreed Rates;

iv. Quantities as per scenario (iii) above, save as applying the agreed rates for Work Orders with Agreed Rates, the rates for the remaining items would be assessed on quantum meruit basis; and

(b) What should be the reasonable value of the Plaintiff's work done for items 1.5, 3 and 5 in Appendix 1 of the Amended Defence and Counterclaim.

8. On the face of the pleadings, the matters for determination at trial are:

(1) whether the Remeasurement Clause was incorporated into the Contract between Chan and the JV in respect of the work orders without agreed rates;

(2) the interpretation and meaning of the Remeasurement clause;

(3) in respect of the work orders without agreed rates, what should be the rate for assessing payment to Chan?

(4) whether the Contract between Chan and the JV was subject to an implied term that the JV was to submit Chan's claim to quantities and substantiation of his claims to the WSD for

assessment, and whether there was breach of such implied term; and

(5) whether any amount is due from the JV to Chan, as Chan claims, or any amount is due from Chan to the JV, as the JV claims.

Incorporation of the Remeasurement Clause

9. Of the 58 work orders under the Contract, 48 were for Mains Work, and 16 of the orders for Mains Work had quotations issued by Chan. The quotations were amended and accepted by the JV, and it is not disputed that the quotations were subject to terms and conditions which included the Remeasurement Clause. Chan does not dispute that the Remeasurement Clause applied to the work orders in respect of which quotations had been issued by him, and to work orders under which the parties had agreed on the rates for the work covered (paragraph 3 (a) to (c) of the Reply).

10. As the JV emphasized, all the quotations for the work orders with agreed rates had a copy of the subcontractors' price terms and conditions (including the Remeasurement Clause) annexed. The conditions were accepted by Chan, and were the standard terms of the JV for work orders issued by the JV in respect of the Main Contract works. All of the 45 work orders for the Mains Work were concerned with work of a similar nature, for replacement of water mains. The work orders were issued between May 2004 and February 2007, over a course of nearly 3 years.

11. Chan claims that he was a one-man company without any staff, office or equipment. On his case, and I accept, he was not a sophisticated businessman, but was a skilled pipe laying worker with years of experience on the site. He claims that he had no capability to handle sophisticated paperwork involved in a construction project, and did not know how to prepare drawings, submissions, site records or payment applications. He does not know English and has a low education level. According to Chan, he had prepared or asked workers to prepare rough hand-drawn sketches or site notes as work records, leaving the formal paperwork to the "upper tier contractors" to handle. It is Chan's case that when he was contacted by the JV's Mr Cheung to carry out the Mains Work, he was not provided with any documentation. He was simply told to follow the JV's instructions in carrying out the works, initially on a day work basis with the rates orally agreed, as Chan was only to provide labour and tools.

12. It is not disputed that the work arrangement between Chan and the JV changed from 2007. Chan claims that he was asked by Mr Cheung then to adopt a different payment mechanism, in that Chan's works would thereafter be paid "by way of re-measurements rather than on day work basis". Chan was told that he would have to sign quotations to be prepared by the JV for this purpose, even though the works under the relevant work orders had been commenced years ago.

13. It is not disputed that Chan agreed to such change in work arrangements, and that since 2007, he was asked to attend meetings at the JV's office for discussing the quotations. According to Chan, Mr Cheung would give him some bills of quantities for different work orders, with the

JV's proposed rates and amounts typed up or written thereon. As he did not know English, Mr Cheung and one Mr Tang would explain the items in the bills to him. If Chan found the rates proposed by the JV to be unacceptable, he would cross them out and insert his own proposed rates. He would then sign the quotation and give this back to Mr Cheung. There might be further meetings to discuss discounts, and if agreement was reached, the quotations with the agreed rates would be signed by Chan and by representatives of the JV.

14. Chan's evidence (paragraph 25 of his witness statement) is that he had agreed with Mr Cheung that apart from the work orders with the signed quotations from Chan, the JV would also value "all other work orders" on re-measurement basis, including those which had previously been paid on day work basis. He claims that for those other work orders, it was agreed that the JV would value the work in accordance with "agreed unit rates for similar items in the Plaintiff's signed quotations for other work orders" (paragraph 25 of Chan's witness statement). This is Chan's only evidence on the rates which he claims to be applicable to the work orders without any agreed rates specified. According to Chan's evidence, it was agreed that "account adjustments" would be made, but "without affecting the payments previously received by the Plaintiff", and he had told Mr Cheung that "so long as the previous payments to the Plaintiff remained unaffected", he had no objection.

15. On Chan's evidence, after he was told that his works would be paid on re-measurement basis, he instructed his workers to prepare hand-drawn sketches showing the lengths of pipes and the number of fittings

installed by Chan for the JV's foreman to confirm and sign. The countersigned sketches were then submitted by Chan to the JV for payment application purpose at the end of each month, but Chan did not keep any copies of the hand-drawn sketches. According to Chan, the JV would make its own assessment of the re-measured value of Chan's works and would issue payment certificates to Chan. He would check the payment against the sum he had applied for, and had found the JV's payments to be "generally not far off the Plaintiff's applied amounts".

16. Chan completed the works under the Contract by 31 December 2008. The last payment certificate issued by the JV to Chan was for interim payment number 57 ("**IP 57**") covering the period ending 30 April 2009. The amount due under this certificate was paid to Chan in November 2009. The total payment received by Chan under the Contract was $23,252,996.67.

17. I reject Chan's evidence that he was not aware of the existence or incorporation of the Remeasurement Clause into the Contract. Despite his claims that he did not understand English, the quotations included handwritten notes in Chinese, signed by the parties and obviously incorporated into the Contract. These Chinese provisions clearly provide that the work under the orders were to be re-measured. In stating the value of the work as of a certain amount, the Chinese notes further state:

> "並以量數方式計算（實量實度）"

In other instances, the Chinese notes state: "這張柯打爲量數方式（Re-measurement）".

18. On the evidence, I am satisfied that the Remeasurement Clause had been incorporated by the course of dealings between Chan and the JV, to become part of the terms and conditions of the Contract between them for all the work orders under the Contract. The works under all the work orders were similar in nature, as Chan also appears to suggest. It cannot reasonably be envisaged that different terms would apply to the different work orders for the Mains Work, when these were accepted and worked upon at around the same time. No factors have been put forward by Chan as to why the work under the orders with no specific rates agreed should be measured differently to the other work he did under the Contract.

19. As for the suggestion of the re-measurement arrangement being conditional upon "previous payments being unaffected", that is in my view too vague and uncertain to be operative. As Chan himself claims, the valuation on re-measurement basis and on Similar Work Rates Basis would be done "by way of account adjustments" (paragraph 25 of Chan's statement). The condition that "previous payments" to Chan should remain unaffected may simply mean that so long as Chan did not have to make cash repayment immediately, the account adjustments can be made at the end of the day.

Interpretation of the Remeasurement Clause

20. The thrust of the arguments made on behalf of Chan was directed against the meaning of the Remeasurement Clause, and the rates applicable to the work orders under which no rates had been specifically agreed between Chan and the JV.

21. The Remeasurement Clause provides for measurement "on a back-to-back basis". According to Counsel for Chan, there is no clear or fixed meaning of a clause which provides for "back-to-back". On behalf of Chan, it was submitted that the Remeasurement Clause simply means that Chan and the JV agreed that the same "method of measurement" provided for under the Main Contract between the WSD and the JV would be adopted for the Contract between the JV and Chan. According to paragraph 6 (a) of the re-amended Defence to Counterclaim:

> "The Re-measurement Clause concerns the method of measurement only as the clause title suggests. Therefore, it was the method of measurement, such as item coverage and measurement rules, which was to follow that of the Main Contract rather than the actual re-measured quantities."

22. The Remeasurement Clause, which is clause 9 of the "Subcontractor Price Term and Conditions", actually reads as follows:

> "Method of Measurement: as per the Main Contract. All the BQ quantities are provisional and subject to remeasurement as based on back-to-back basic (*sic*). The quantities shown in the attached Bill of Quantities may be substantially decreased, Subcontractor cannot claim additional cost for this issue." (Emphasis added)

23. The parties do not dispute that the legal principles governing the interpretation of contracts are those set out in the case of *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913. They will not be repeated here. The factual matrix is relevant to ascertain the meaning which the document would convey to a reasonable man, but there can be no doubt that the law excludes the parties' declarations of their subjective intent.

24. Apart from specifying that the method of measurement under the Main Contract is to be adopted for the Contract, the Remeasurement Clause clearly states that the quantities in the bills of quantities are "provisional", and are subject to re-measurement, on a back-to-back basis. Reading clause 9 as a whole, the "back-to-back basis" must refer and apply to the re-measurement of the quantities which are stated to be provisional only at the time of the Contract. The Contract is to be "back-to-back" to the Main Contract, such that the remeasurements made under the Main Contract are to apply to the Contract.

25. In the payment summary form for IP 54, there is the express notation that the measurement would be in accordance with the "final measurement" of the project engineer.

26. Considering the context of the Contract and the works carried out thereunder, it would not be unusual for the parties to agree that the work would be valued on a re-measurement basis. The Contract involves (on Chan's evidence) breaking up sections of the existing road surface, excavation to the required trench depth, laying the replacement water pipes, reinstating the road surface, and then moving on to another section of the road to repeat the work sequence, until the newly laid replacement pipes reached the total length required. According to Chan, very limited documents were provided before work was commenced. Generally, calculation of the final price of work on the basis of "as built" (or "as worked") quantities is applicable, where the precise extent of the work is not known in advance, or where there are inherent or contingent elements of uncertainty or unpredictability as to quantities, as in cases where the

unascertained levels of ground surfaces may affect the final excavation quantities, or where the extent of the particular work in question may be inherently unpredictable or provisional. In this case, much of the work is underground, and the full extent of the work may not be known until after excavation, and until the utilities pipes underground are exposed.

27. In the circumstances of this case, I reject the contention that the "back-to-back" reference in the Remeasurement Clause only means the adoption of the method of measurement under the Main Contract. There is no uncertainty in either the English version of the clause or the Chinese notes specifically agreed to and countersigned by Chan.

28. If Chan did not understand what "re-measurement" of actual quantities meant, or what "provisional quantities" were, he should have consulted experts before signing the Contract or the quotations. In construing the Contract and its provisions, Chan's subjective declarations of his understanding of the Remeasurement clause is neither admissible nor relevant. Nor should the court consider any unfair consequences of a construction of the plain wording of a clause. Even if Chan had misplaced his trust in Mr Cheung, in the words of Lord Neuberger of Abbotsbury PSC in *Arnold v Britton* [2015] AC 1619 at 1628H:

> "a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly,

> when interpreting a contract a judge should avoid rewriting it in an attempt to assist an unwise party or to penalize an astute party."

Rate for assessing payment under work orders without agreed rates

29. The focus of the litigation was the applicable rate of payment for Chan's work, under orders where no contractual rate was agreed.

30. I agree with Counsel for the JV, that the starting and determinative point must be the pleaded case of the parties in the action. The issues for determination and which the parties prepared to meet at trial are framed by the pleadings, not by the witness statements, and certainly not by the documents presented in evidence at trial or by particulars hidden in the mass of the documents included in the bundles prepared for trial. As the Chief Justice noted in *Kwok Chin Wing v 21 Holdings Ltd* (2013) 16 HKCFAR 663, at paras 21 - 27:

> "It should by now really be quite unnecessary to issue yet another reminder on the rationale behind pleadings. The basic objective is fairly and precisely to inform the other party or parties in the litigation of the stands of the pleading party (in other words, that party's case) so that proper preparation is made possible, and to ensure that time and effort are not expended unnecessarily on other issues: *Wing Hang Bank Ltd v Crystal Jet International Ltd* [2005] 2 HKLRD 795, 799. It is the pleadings that will define the issues in the trial and dictate the course of proceedings both before and at trial. Where witnesses are involved, it will be the pleaded issues that define the scope of the evidence, and not the other way around. In other words, it will not be acceptable for unpleaded issues to be raised out of the evidence which is to be or has been adduced."

31. The JV's case in relation to the work orders without agreed rates is that such rates should be assessed on a reasonable price basis, as

pleaded in paragraph 7 (5) of the Defence. In answer to that, Chan pleads in paragraph 3 (d) of the Reply that it was agreed between Chan and the JV that Chan's works under the relevant work orders without agreed rates "were to be assessed in accordance with the agreed rates of similar works items in other works orders".

32. There is no pleading that for each relevant work order without agreed rates, which "other order" contained "similar works items", the agreed rates of which would by agreement apply.

33. As highlighted in paragraph 14 above, the only evidence from Chan is that contained in his witness statement, that it was agreed that the JV would value the work in accordance with "agreed unit rates for similar items in the Plaintiff's signed quotations for other work orders". No further explanation or particulars was given by Chan in evidence, as to which other work orders were relevant for considering the similar work or the similar rates.

34. There is accordingly no basis in the light of the pleadings, and in fact no evidence from Chan in support, for Counsel to argue that the rates in work order WO 139, or those in IP 57, are the rates applicable to the work orders without agreed rates. As Mr Wong for the JV pointed out, Chan's unpleaded case was not even referred to by his Counsel in Opening, and the JV was not only taken by surprise, but had been deprived of the opportunity to cross-examine Chan in relation to the allegedly applicable and agreed rates. I agree that this cannot be allowed.

35. Because of the dispute on the pleaded case as to the rates applicable to the work orders without agreed rates, the Expert was jointly instructed to give his opinion on (1) the disputed quantities: based either on Chan's re-measurement records and his final account, or on a back-to-back basis against WSD's re-measurements; and (2) so far as the rates were concerned: on the agreed rates, on "similar rates in other work orders", or on quantum merit basis.

36. In answer to the specific questions framed for the Expert, his opinion on the work orders where no rates had been agreed was that there was ***no*** consistent standard of agreed rates even for the work orders under which rates had been agreed. The Expert noted that the agreed rates were very complicated because different rates existed for the same items in different work orders, with different discount and adjustment factors applied to different work orders for the same item. It was accordingly difficult in the Expert's opinion to assess the "similar rates in the work orders". To resolve the inconsistencies, the Expert arrived at a standardized and reasonable agreed rates, by discounting the agreed rates without further adjustment or discount factors, averaging the agreed rates to one standard rate for each item, excluding unreasonably high or low rates, and fine-tuning the rates to make them consistent with each other. In this way, the Expert compiled an Agreed Rates Schedule ("**Schedule**"), and used the Schedule to assess the similar rates in other work orders for those orders without agreed rates.

37. The Expert also explained that after reviewing the reasonable standard agreed rates in the Schedule, and comparing them with the market

rates for other contracts, he found that the rates in the Schedule are also representative of the reasonable market rates which can be used for assessment on quantum merit basis.

38. Despite having sought clarification from and having made submissions to the Expert before receipt of the Expert's final report before trial, Chan's legal representatives did not refer the Expert to those rates in work order WO139 or IP 57 which Counsel now argues to be the applicable rates. As Mr Wong emphasized on behalf of the JV, the functions of the single joint Expert, jointly instructed by the parties in this case, should not be usurped. Attention was drawn to the observations made by Bharwaney J in *Chan Yuet Keung v Harmony (International) Knitting Factory Ltd* [2010] 5 HKLRD 599, where His Lordship explained that joint instructions to a single joint expert should outline the different factual versions to the expert concerned, and his expert opinion should be sought on each separate version. His Lordship continued:

> "Parties should take care to compose joint instructions which deal with all relevant matters. In the normal course of events, there should be no need for a joint report to be amplified or tested by cross-examination."

39. Bharwaney J also referred in *Chan Yuet Keung* to what Lord Woolf LCJ said at paragraph 28 of his judgment in *Peet v Mid-Kent Healthcare Trust* [2002] 1 WLR 210, that the assumption should be that the single joint expert's report is the evidence, and any amplification or cross-examination should be restricted as far as possible. I respectfully agree, as it would otherwise be an unnecessary waste of time and legal costs.

40. In this case, the issues in dispute between the parties as to the quantities and rates for the works had been the subject of argument and dispute even at the stage of interlocutory applications. The issues to be addressed by the expert, whether single or joint experts should be engaged, and the identity of the single joint expert, were all debated before the single joint Expert was instructed and the issues framed for the Expert, in the light of the issues identified by the pleadings. At the time when the Expert was instructed, there was no reason why Chan could not have outlined his case on the Similar Work Rates Basis and identified the rates which he alleges to be applicable, and to seek the Expert's opinion thereon, but instead to present such case only through Counsel in the course of the trial, when the Expert gave evidence, and thereafter.

41. I accordingly reject Chan's case argued in Counsel's closing, that in respect of the work orders without agreed rates, rates different to and apart from those advocated by the Expert should apply. I find no basis to reject the Expert's compilation of the rates in the Schedule, and accept his explanation that they can be used both as rates on quantum merit or reasonable price basis, and as rates for the Similar Work Rates Basis where no rates were specifically agreed between Chan and the JV under the Contract.

42. In respect of any reliance sought to be placed on the payments made under IP 57, it is clear that interim certificates are interim only, and not final. Interim certificates are thus approximate estimates (para 5-015, (*Keating on Construction Contracts*, 10th Ed), and are not binding upon the

parties as to quality or amount, and are subject to adjustments on completion, when the final accounts and final certificates are issued.

The specific items of disputed valuation

43. The only items of the Amended Appendix 1 to the Defence ("**Appendix 1**") which are disputed at trial are: items 1.1, 1.5, 3, 5, 6.7, 6.7a and 6.15.

44. For work orders which were solely carried out by Chan without any involvement of other subcontractors of the JV, the quantities as measured by the WSD in its final accounts should be adopted by virtue of the Remeasurement Clause.

45. As a result of its late disclosure, the JV was not granted leave to produce any documents to support the apportionment and between the various sub-contractors engaged to do work under the Main Contract. For lack of documentation to evidence the apportionment of the costs, the JV accepts that the valuation of Chan's works should be made without regard to any apportionment for the value of work done by other sub-contractors. I agree that the valuation should be so made, without regard to any apportionment, since the onus of proving such work and apportionment is on the JV, which it has failed to establish.

46. The Expert's valuation of $19,354,370.61 is accordingly accepted for the disputed item 1.1 of Appendix 1.

47. For the disputed item 1.5 of Appendix 1, the Expert explained that the valuation should be $1,848,050 if Chan's quantities are to be adopted, whereas the valuation should be $1,698,200 if the quantities measured by the project engineer of the WSD are adopted. Since the measurements made by Chan and/or by the JV are subject to the WSD's re-measurements under the Remeasurement Clause, the sum of $1,698,200 is to be accepted.

48. In relation to the disputed item 3, I accept the Expert's assessment of $5870, for the reasons he gave in the report.

49. For the disputed item 5, I also accept the Expert's assessment of $46,769.60 according to Chan's case, which is conceded by the JV.

50. For the disputed item 6.7, the JV claims that since there were defects in Chan's works and rectification works had to be carried out, insurance coverage had to be extended beyond the time when Chan claims his works had been completed. The contra charges claimed under item 6.7 of Appendix 1 relates to insurance payments for the period from January 2010 to 30 June 2010, totaling $6600.20. However, as the JV accepts that the works under work order 81 were not Chan's works, a sum of $33.33 should be deducted from the insurance charges.

51. The contra charges under item 6.7 are allowed at $6,525.69.

52. Item 6.7a relates to a sum of $23,814, being the amount charged to Chan for damage to a telephone plant and connecting cables,

caused as a result of Chan's Mains Work. In the course of cross-examination, Chan admits that the works were carried out by his workers under work orders 12 and 63, at a time when the damage occurred. I allow the JV's claim of $23,814.

53. The disputed item 6.15 relates to a charge of $598,358.53. There is insufficient evidence from the Routine Inspection Report or the emails that the blockage of the pipeline detected in August 2009 was caused by Chan's works carried out under the Contract before the end of 2008, and not by any other sub-contractor or worker of the JV. The onus of proof of Chan's liability is on the JV. I disallow the claim.

Whether there was an implied term and breach thereof

54. Chan pleads that by reason of necessity and/or business efficacy, there is an implied term in the Contract that the JV is to submit all of Chan's claimed quantities and substantiations to the WSD for assessment, and to afford him the reasonable opportunity to make submissions on the assessment as appropriate. It is claimed that the JV was in breach of the implied term, in that it failed or refused to submit in full Chan's re-measured quantities together with the supporting documents to the WSD for assessment, and failed to provide the WSD's re-measurements to Chan for consideration, depriving him of the chance to identify errors in the re-measurements and to provide further substantiations.

55. On behalf of the JV, it was pointed out that it is clear from the payment summary form for IP 54, for the period ending 31 December 2008, that the JV made distinctions between quantities "submitted as built" from Chan, and the quantities submitted for "final measurement", and that it is inherently improbable that the JV would not submit Chan's measured quantities and supporting particulars to the WSD or its engineer. Even if I should accept that there is an implied term as Chan contends, there are no particulars and no evidence to support Chan's claim of the JV's breach: what quantities and supporting documents of Chan had been excluded or omitted from the JV's submission to the WSD's engineer, no plea that the WSD's re-measurements were erroneous, and how they were erroneous, as a result of any omission of Chan's measurements and supporting documents.

56. I reject the claim of the JV's breach of any implied term.

Adverse inferences

57. As for the submission made on behalf of Chan, that adverse inferences should be drawn against the JV for its failure to call Mr Wong as its witness at trial, I accept the explanation given on behalf of the JV. Mr Wong's statement only deals with the disputed items 6.8-6.14 of Appendix 1, which were not pursued at trial. Further, as Counsel for the JV pointed out, the drawing of an adverse inference is only appropriate when the opponent's assertion and claim is credible. The issues remaining in dispute at trial are adequately clear without the need to call Mr Wong, and any adverse inference against the JV by reason of its failure to call

Mr Wong would not have assisted Chan's case. As the court rightly observed in *Gleneagle Holdings Ltd v Tse Yue Fong & others* HCA 2807/2006 12 May 2009, it would be unreasonable to draw an adverse inference against a party to give support to an assertion which cannot even stand on its own, or is not established.

Conclusion

58. In the light of the findings I have made on the assessment, parties should submit (within 7 days of the handing down of this judgment) for the court's approval a draft order which should include the amounts which were no longer disputed by the time of Counsel's closing, and the amounts which I have found on the valuation, on the construction and incorporation of the Remeasurement Clause.

59. Any submissions on costs (restricted to no more than 2 A4 pages for each party) should be made in writing within 7 days of the lodging of the draft order.

(Mimmie Chan)
Judge of the Court of First Instance
High Court

Mr Vincent Li, instructed by Lui & Law, for the plaintiff

Mr Jonathan Wong, instructed by ONC lawyers, for the defendant