HCCT 26/2014

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTRUCTION AND ARBITRATION PROCEEDINGS
NO 26 OF 2014

BETWEEN

IPSON RENOVATION LIMITED Plaintiff

and

THE INCORPORATED OWNERS OF CONNIE TOWERS Defendant

Before : Hon Mimmie Chan J in Court
Dates of Hearing : 15-18 and 22 November 2016
Date of Judgment : 16 December 2016

J U D G M E N T

Background

1. Connie Towers ("**Towers**") is a property situated in Kwun Tong. The Defendant in these proceedings are the Incorporated Owners of the property ("**IO**").

2. On 26 April 2013, after and pursuant to a bidding process, the Plaintiff ("**Contractor**") signed a contract with the IO ("**Contract**") for repair and maintenance works to be carried out for and at the Towers ("**Project**"). The works involved in the Project ("**Works**") are set out in the list of works forming part of the undisputed Contract documents ("**List of Works**"). The List of Works (which formed part of the tender documents) described the Works in detail by category, with quantities or units, unit rates and the total price for the Project. The Contract documents further provide for the Project to be a "Lump Sum Tender without Quantities", with a total Contract price of HK$37,074,090 ("**Contract Sum**"). Under the Contract, the Works were required to be completed within 150 days from the date of commencement of the Works. These matters have not been the subject of dispute at trial.

3. The Contract had been approved by a resolution passed by the IO at a meeting of the owners held on 21 April 2013, at which 92% of the owners attending the meeting resolved to sign the Contract with the Contractor for the Works to be carried out at the Contract Sum.

4. The facts and events are set out in a more detailed account below, as they form the basis of the parties' claims, as to whether the conduct of the party in question constitutes breach of contract, and/or acceptance of repudiation.

5. Pursuant to clause 2.1 of the General Conditions of the Contract ("**Conditions**"), W & K Architect Ltd, the consultant engaged by the IO ("**Consultant**"), approved the Contractor's application to commence the Works at the site on 22 May 2013, when the scaffolding

work under the Contract was to start. A ceremony was organized to take place at the Towers for the commencement of the Works. However, owners of the Towers which were dissatisfied with the Project and with the chairman and secretary of the management committee of the IO ("**Committee**") disrupted the ceremony and prevented the Contractor and its workers from entering and bringing scaffolding materials and tools into the work site. These owners prevented the Contractor and the scaffolding workers from commencing work as scheduled, and threatened the workers not to return to the Towers for the Works. Melee ensued, the police was involved, and the Contractor was not able to commence Works at the Towers. The disruption apparently continued until 30 May 2013, and in the interim between 23 May 2013 and 30 May 2013, the Contractor was denied access to the Towers, despite various attempts made by the Contractor to deliver materials and tools to the Towers for the commencement of the scaffolding work.

6. As a result of the objections raised by the owners who were dissatisfied with the Project, Mr Tang, who was then the chairman of the Committee, agreed with the disgruntled owners to suspend the Works until matters could be further discussed at an owners' meeting to be convened on 9 June 2013. On 24 May 2013, the property manager of the Towers ("**Manager**") instructed the Contractor to suspend work at the Towers until 9 June 2013, and informed the Contractor that it would be notified when future arrangements were made for the Works to be carried out.

7. The Contractor wrote to the Consultant on 27 May 2013, to inform the Consultant that it had been prevented by some owners to enter

the Towers and had not been able to carry out the scheduled Works. The Contractor also advised the Consultant that the Manager had requested the Contractor to suspend all Works until 9 June 2013.

8. The Contractor received a letter in reply from the Consultant on 30 May 2013. The letter is significant, as it expressed the stance of the Consultant as to the suspension of the Works and how it affected the Contractor. The Consultant informed the Contractor that it had not received any instruction from the IO for the suspension of the Works. The Consultant further advised the Contractor that the Consultant did not agree to the suspension of the Works from 24 May 2013 to 9 June 2013, that no extension of time would be granted in respect of this period of suspension, and that the IO would not be responsible for any time lost.

9. Some discussions ensued between the IO, the Consultant and the Contractor, as to when the Works could commence. On 16 June 2013, a General Meeting of the owners was held and a new chairman and new members were elected to the Committee. The owners further resolved at the meeting to delete 6 categories of work from the Works to be carried out by the Contractor under the Contract. These were item 8 (which relate to the replacement of the drains servicing the public toilets), item 9 (which relate to the water supply facilities), item 10 (public ventilation windows), item 11 (steel works), item 12 (wood works) and item 14 (a provisional item for renovation of the exterior wall).

10. Consequently, the IO instructed the Consultant on 26 June 2013 to suspend the Works under the Contract, and on 28 June 2013, the Consultant issued a formal suspension notice in writing ("**28 June**

Notice") to the Contractor. This instructed the Contractor to suspend the Works under the Project until further notice. No indication or instruction was given in the 28 June Notice, as to whether the instruction to suspend the Works affected the Contract period, and whether there was an increase or decrease in the Contract period - since the matters in the standard form under the heading "Contract Period" were left blank. The boxes under the heading "Adjustment" were also left unticked: hence giving no indication as to whether the suspension instruction had any costs implications.

11. At a meeting which was held between the Contractor and members of the Committee on 2 July 2013, the Contractor agreed only to the deletion of items 9, 11 and 14 from the Works specified in the Contract, and in the absence of any agreement concluded with regard to the deletion of other items of the Works, the Contractor informed the Consultant, by a letter dated 9 July 2013, that further negotiations could not continue, and that claims would be made by the Contractor through its solicitors. Following that, on 19 July 2013, the Contractor's solicitors issued a letter to the IO ("**19 July Letter**"), by which the Contractor purported to give notice of acceptance of the IO's repudiation of the Contract. The Contractor's damages were quantified at $16,147,122.87, and demand for payment of the same was made in the 19 July Letter.

12. After 19 July 2013, there were further negotiations between the Contractor and the Committee from July 2013 to September 2013. Discussions took place as to the scope of the Works, items of the Works to be deleted, and deductions to be made to the Contract Sum. During this interim, a draft document entitled Supplemental Agreement (維修工程合約補充協議書) was submitted by the IO to the Contractor on about 28

July 2013. Discussions were made as to the costs of materials to be borne by the IO as a result of the suspension of the commencement of the Works, and when the suspension could be lifted and the Works could be carried out. After a meeting which was held on 7 August 2013, the Contractor apparently agreed to delete items 6, 8, 9 and 14 of the Works with a reduction of $3,693,000, and the chairman of the Committee had confirmed that the reduced scope of the Works could commence on 26 August 2013. Despite that, no final agreement could be reached, as the owners still wanted to retain all the Works and to reduce the Contract Sum to $32 million, as evidenced by an agenda for a meeting of the owners of the Towers to be held on 15 September 2013.

13. On 13 September 2013, the Contractor issued a notice of arbitration ("**NOA**") pursuant to clause 11 of the Conditions. This referred to the IO's breach by preventing the Contractor from commencing the Works under the Contract since 23 May 2013 and to the 28 June Notice issued by the Consultant. The NOA was served on the IO, with the Contractor seeking the IO's agreement to the appointment of a sole arbitrator.

14. On 15 September 2013, at a meeting of the owners of the Towers, the IO resolved to retain the original scope of the Works, but to reduce the Contract Sum to $32 million. The Consultant's engagement was also terminated. Further meetings and negotiations took place between 15 September 2013 and November 2013, between the Consultant and representatives of the Committee, including the new consultants appointed by the Committee.

15. Finally, on 8 January 2014, an instruction was issued by A Ferrari Architects and Engineering Consultants Limited ("**Ferrari**"), the new consultant appointed by the Committee, on behalf of the IO, whereby some items of the Works were deleted from the scope of the Contract, the Contract Sum was refixed at $32,781,390, and the Contractor was instructed to commence works within 7 days, by 15 January 2014. The Contractor did not comply.

16. The arbitration was not proceeded with. On 26 May 2014, the Contractor issued legal proceedings against the IO, claiming that the IO was in repudiatory breach of the Contract, by preventing the Contractor from entering the site to commence the Works on 23 May 2013, by instructing the Contractor to suspend the Works by the 28 June Notice, and by seeking to reduce the scope of the Works and the Contract Sum. The Contractor claims that the IO had the contractual duty to take all steps reasonably necessary to enable the Contractor to perform the Contract, and not to hinder or prevent the Contractor from so doing. The Contractor alleges that the IO had evinced an intention not to be bound by the Contract, and that the Contractor had accepted the IO's repudiation by the 19 July Letter, and alternatively by the issue of the NOA on 13 September 2013, or by a letter of 11 November 2013, whereby the Contractor's solicitors invited the IO to concur with an application for arbitration ("**11 November Letter**").

17. On its part, the IO claims that it was entitled to suspend the Works under the Contract, but if there was any breach on its part, the IO claims that the Contractor had never purported to accept any such repudiation, but had instead treated the Contract as valid and subsisting.

The IO further claims that it was the Contractor which was in breach of the Contract, by refusing to commence works by 15 January 2014, as instructed by Ferrari.

Issues in dispute

18. The key issues for determination at trial are whether the IO had repudiated the Contract in July, or alternatively in September or November 2013, and if yes, whether the Contractor had accepted the IO's repudiation; or whether it was the Contractor which had repudiated the Contract when it refused to commence works in January 2014. This calls for the court's determination of the following issues :

(1) Did the IO have power under the Contract to suspend the commencement of the Works?

(2) Did the IO have power under the Contract to vary the scope of the Works and reduce the Contract Sum?

(3) Was the IO in repudiatory breach of the Contract by varying the Works, reducing the Contract Sum or otherwise?

(4) Did the Contractor accept the IO's repudiation of the Contract?

(5) If the Contract had not been terminated by the Contractor's acceptance of the IO's repudiatory breach, was the Contractor in breach of the Contract by refusing to commence works on 15 January 2014?

19. The parties have agreed that on the question of the quantum of damages to be paid by the IO or by the Contractor, in the event that breach is found, the Court should simply give the parties liberty to apply for further directions, since some items of damage have been clarified or can be agreed in the event that liability is established.

The alleged power to suspend commencement of Works

20. The Contractor had pleaded in the Amended Statement of Claim that it had been prevented by about 40 residents and owners of the Towers to enter the site on 23 May 2013, and/or to commence the Works as scheduled. The IO claims that the IO is not liable for the acts of these individual owners and residents, such that it is not open to the Contractor to claim that the IO was in breach of the Contract as a result of the individual acts of the residents and owners in question in preventing the Contractor from carrying out the Works under the Contract between 23 May 2013 and 28 June 2013.

21. It is not disputed that the Manager verbally instructed the Contractor to suspend the Works until 9 June 2013, and in any event, that the Consultant issued an instruction to the Contractor on 28 June 2013 to suspend the Works indefinitely, until further notice.

22. The IO relies on clause 1.4.1 of the Conditions and clause 11.1.3 of what Counsel referred to as the "General Specifications" forming part of the Contract documents ("**Specifications**"), to support its claim that the IO has power to suspend the Works.

23. Clause 1.4.1 of the Conditions only sets out the authority of the Consultant to issue instructions in accordance with the Contract documents, and the duty of the Contractor to follow such instructions - if the Consultant has the power under the Contract documents to issue such instructions. It does not provide the answer to whether the Consultant has the power at all to issue instructions to suspend the Works, or otherwise to vary the terms of the Contract. This depends on the other provisions of the Contract.

24. Clause 11.1 of the Specifications provides as follows:

> "11.1 Progress plan
>
> 11.1.1 The Contractor should within 2 weeks after the signing of the Contract provide a substantive and detailed work progress plan for approval by the Consultant, and should execute works in accordance with the approved sequence and plan.
>
> 11.1.2 ... The progress plan should include but is not restricted to the following contents:
>
> ...
>
> f) in respect of materials and facilities, the method of installation, sequence, and time required for each of the procedures;
>
> g) the critical path for each procedure;
>
> h) inspection, testing and operation;
>
> i) handover.
>
> 11.1.3 In the course of execution of the works, if there should be exceptional circumstances or in accordance with the requirements of the Consultant, the approved work progress plan must be revised." (Emphasis added)

25. On behalf of the Contractor, it was argued that the Contractor had not yet submitted a work progress plan for the Works for approval by the Consultant, despite the fact that this should have been done within 2 weeks of the signing of the Contract (as provided by

clause 11.1.1). That notwithstanding, it is not disputed that the Consultant had approved the commencement of scaffolding works on 22 May 2013. Inasmuch as scaffolding works formed part of the execution of the Works under the Contract, the progress of the Works included the commencement of the scaffolding works on 22 May 2013, and this was approved.

26. The Consultant had the power under clause 11.1.3 of the Specifications to require the Contractor to revise the progress of the scaffolding work which formed part of the Works under the Contract, by postponing the commencement of the scaffolding work on 22 May 2013. Counsel for the IO highlighted that time is not of the essence in a construction and building contract, and there are provisions in the Contract for extensions of time for the completion of the Works. Counsel for the IO accepted that the power to suspend works and progress under the Contract must be reasonable exercised. He also accepted (paragraph 10 of his Closing submissions) that the Contractor was entitled to claim compensation as a result of the suspension and variation of the progress of the Works. At issue is whether the suspension of the Works from 22 May 2013, and as instructed by the Consultant on 28 June 2013, constitutes repudiation by the IO. In this context, the entire circumstances of the case leading up to the purported acceptance of repudiation (whether on 19 July 2013, 13 September 2013 or 11 November 2013) need to be considered.

27. By the conclusion of the evidence, it was accepted by Counsel for the IO that at all material times, the suspension of the Works requested by the IO, and by the Manager and the Consultant on the IO's

behalf, was for the purpose of negotiating with the Contractor not only the deletion of items of the Works and the reduction of the scope of the Works under the Contract, but the reduction of the Contract Sum as well. Some of the earlier documents and correspondence between the parties referred only to the deletion of items of the Works. However, it has never been suggested by any party at any stage that the Contract Sum would at any material time remain at $37,074,090, after the reduction of the scope of the Works by the deletion of the various work items proposed by the owners at different times. It was never a case of the Contractor being asked to do less work for the same Contract Sum. This in my view is significant in the context of considering whether the Contract had been repudiated.

Any power to vary the Works and the Contract Sum?

28. In my view, clause 11.1 of the Specifications only concerns the variation of the progress of the Works, and does not confer any right on the IO or the Consultant on its behalf to vary the scope of the Works, or the Contract Sum.

29. Counsel for the Contractor has highlighted throughout that the Contract is one for a lump sum fixed price. Article 1 of the Contract expressly so states, providing that the Contract Sum is inclusive of the costs of the completion of the Works for the Project and all works incidentally necessary, irrespective of whether the work items and costs are specified in the List of Works and costs schedule (單價細數連總價表) attached to and forming part of the Contract ("**Costs Schedule and List of Works**", at pages 237-262 of trial bundle B). The Costs Schedule and List of Works itself further states that the Project was a "Lump Sum

Tender without Quantities", and that the Contractor's cost includes all the necessary works for completion of the Project within the contract period and other incidentally necessary works and costs, and that the quantities specified in the Costs Schedule and List of Works are for "reference only". It further provides that the unit prices shall be regarded as part of the Contract, and any discrepancy between the quantities stated and the actual site conditions shall not affect the price and the total Contract Sum. Clause 6 of the Conditions contains further provisions as to the Contract Sum, and seeks to put the risk of any inaccuracies in the quantities on the Contractor.

30. Construed as a whole, the Contract is for the Contractor's execution and completion of the Works for the entire Project, in return for the Contract Sum. In the absence of any express power to order parts of the Works to be omitted with a consequent adjustment of the Contract Sum, the IO has no power to vary the fixed price contract by reducing the Works to be done. At paragraph 3-151 of *Hudson on Building and Engineering Contracts*, 13th edition, the editors referred to *Tancred Arrol & Co v The Steel Company of Scotland Ltd* (1890) 15 App Case 125 and *SWI Ltd v P&I Data Services Ltd* (2007) BLR 430, to support their observation that an employer must permit the contractor to carry out the whole of the work under the contract, and that if it prevents the contractor from so doing, the employer will be in breach of contract and liable for damages, unless there is an applicable power to omit work in the contract.

31. In the case of *Abbey Developments Ltd v PP Brickwork Ltd* [2003] EWHC 1987 (Technology), the English court referred to the relevant passages from *Hudson* and set out a useful summary of the case

law relating to the question of when it may be permissible for an employer or contractor to omit works from a contract, and in particular, the position when the employer omits work from a contract in order to give the work to another contractor (which does not arise in this case). None of these decisions were referred to by counsel in this case, and it is helpful to set out the observations made by His Honour Judge Humphrey Lloyd QC in the judgment of *Abbey Developments*:

> "45. The justification for these decisions is in my judgment to be found in fundamental principles. A contract for the execution of work confers on the contractor not only the duty to carry out the work of the corresponding right to be able to complete the work which is contracted to carry out. To take away or to vary the work is an intrusion into and an infringement of that right and is a breach of contract. (The work has to be defined sufficiently for there to be a right to execute it.) Hence contracts contain provisions to enable the employer to vary the work in order to achieve lawfully what could be achieved without breaking the contract or by a separate further agreement with the contractor. By entering into a contract with a variation clause, such further agreement is obviated as the contractor's consent to changes in the works is in the primary contract. So such clauses enable an owner to remove work from a contractor, just as they oblige the contractor to carry out additional work or to make alterations in the work, none of which could be achieved without the consent of the contractor.
>
> 46. Provisions entitling an owner to vary the works have therefore to be construed carefully so as not to deprive the contractor of its contractual right to the opportunity to complete the works and realize such profit as may then be made. They are not in the same category as exemption clauses. They have been common for centuries and do not need to be construed narrowly. In developed forms they now offer contractors to participate actively in the success of the project and to enhance their returns...
>
> 47. However, the cases do show that reasonably clear words are needed in order to remove work from the contractor simply to have it done by somebody else...
>
> ...

50. In my judgment, the answer is that the purpose of the variations clause is to enable the employer to alter the scope of the works to meet its requirements. As a project proceeds it may become clear that some change of mind is needed to attain the result now desired. That might be a simple realization that something is no longer needed (especially if it was always an option, typically signaled by the use of a provisional sum or some other indication of a lack of commitment or by the absence of the necessary definition) or it might be for some of the reasons such as lack of money, or a change in the requirements of the actual or prospective occupier or user. The test must therefore be whether the variations clause is or is not wide enough to permit the change that was made. If, with the advantage of hindsight, it turns out that the variation was not ordered for a purpose for which the power to vary was intended then there will be a breach of contract. So the motive or reason is irrelevant; it is not necessary to embark on the uncertainties inherent in the suggestion in *Hudson* of '*placing a reasonableness as opposed to an exploitative interpretation of the variation power*'; nor is it necessary to speculate whether this will be the occasion to reveal that the concept of good faith in all performance of the contract is (and always has been) part and parcel of English law (albeit well hidden); the test is familiar and objective - what purpose did the contract envisage? That purpose must however be expressed with clarity to displace the contractor's right to have the opportunity of completing all the work distinctly undertaken.

…

54. So on that basis the decisions all support the defendant's approach. They are all decisions on the wording of the relevant contract. There is no principle of law that says that in no circumstances may work be omitted and given to others without incurring liability to the original contractor for loss of profit etc. That is one of the reasons why a termination for convenience clause is useful although they frequently provide that the contractor is to be compensated for its losses, including loss of profit and overheads contribution on the balance of work. If they do not then they risk being treated as leonine and unenforceable as unconscionable. It is therefore difficult to accept that they are in themselves relevant. They might only be relevant if set against the variations clause. The valuation provisions of many contractors also provide the contractor with a means of obtaining acceptable compensation in the event of omissions which deprive it of profit etc. in these circumstances it may be doubted if there would be a viable claim for breach of contract even if the work is given to another if the contract provides its own means of awarding the contractor amounts

> that it might recover if it had a claim for breach of contract." (emphases added)

32. The court in *Abbey Developments* also made the following observation (in paragraph 77) in the context of termination clauses:

> "Just as the approach to variation clauses must be one which respects a contractor's right to complete the works which it has undertaken to do, and therefore clear words are required for an intrusion, so too with termination provisions. If they are to take away the contractor's right to finish the work, they themselves not only must be read clearly and carefully, but, if they are to be operated, they must be plainly and carefully operated."

33. The relevant provisions of the contract in *Abbey Developments* contained the right of the employer to vary the number of units to be built and the construction program, and further to renegotiate the rates or suspend the contract and retender the works, all stated to be without vitiating the contract or giving rise to any claim from the contractor. The court held, on construing the contract, that the variation clause does not confer upon the owner the right to take away work from the contractor so that it can be done by others. The right was held to be a right only to omit work that the claimant considers is no longer required by the project.

34. *Abbey Developments* was applied and followed in *Trustees of The Stratfield Saye Estate v AHL Construction Limited* [2004] EWHC 3286 (TCC). The contract in question was for the renovation of a derelict property to make the building wind and watertight. The work required was only described in general terms, the details of what was to be done was to be determined as the project proceeded. The court held on the facts of the case and on construing the relevant contract provisions that the

employer's power to omit works was subject to a clear limit, that the contractor had been employed to carry out works which were understood to mean works which would convert the property into a building which was wind and weathertight, and that the employer had no power to issue omission instructions which would detract from or change this fundamental characteristic of the works.

35. It is clear from *Abbey Developments* and *Trustees of The Stratfield Saye Estate* that whether an employer has the power to vary the scope of the contract works is a question to be decided on the facts of the case and on construction of the relevant contract provisions, and what must have been the intention of the parties as to the scope and meaning of the relevant clauses, at the time when the contract was made.

36. The IO relies on clause 4.7 of the Conditions to claim that it was entitled to vary the Works, to exclude items of the Works from the scope of the Contract, and to reduce the Contract Sum. This provides as follows:

> "4.7 Variation of the Project (工程更改)
>
> 4.7.1 The Consultant may according to actual Project implementation and as the Employer requests issue an instruction for the variation of the Project.
>
> 4.7.2 "Variation of the Project" means any one or more of the following situation:
>
> a) variation of the design, quality or quantity described in the Contract documents;
>
> b) addition, omission or alteration of work items required to complete the Project;
>
> c) variation of the material type, standard or work materials described in the Contract documents.

> 4.7.3 On the basis of any instruction for the variation of the Project, the Contractor has the duty to apply in writing to the Project Consultant for the value of any variation of the Project.
>
> 4.7.4 The value of all project variations must he applied for in writing to the Project Consultant 14 days before, and the Project Consultant will confirm and assess (the application) on the principles of fairness and reasonableness and in accordance with the relevant unit prices specified in the contract documents...
>
> 4.7.5 The unit prices completed in the (Costs Schedule) shall be the basis for calculation in the event of any Project addition or deduction made in the changes of the Project.
>
> ...
>
> 4.7.7 The value of all variations to the Project is only to be effective upon the Employer's written approval and acknowledgment, and the Contract price of the Project shall be adjusted accordingly..." (Emphases added)

37. Construing the Contract as a whole, it would appear that the Contract Conditions and Specifications, and clause 4.7 of the Conditions in particular, envisaged and provide for possible changes to be made to the Project (工程更改), which will occasion additions and/or deductions to be made to the items of the Works (工項增加刪減) in the course of the Contract, and for the execution or implementation of the Project Works and the completion of the Project (為完成本工程所需). Clause 4.7.1 refers to the Consultant's issue of variation instructions in accordance with the actual execution or implementation of the Project (就實際工程施工), which should in the context of the Contract and the Project envisaged be construed to mean that variations could be instructed, as required for the execution of the Works in accordance with the actual conditions on site, or as implementation of the Project required. As submitted by Counsel for the Contractor, I agree that clause 4.7.2 (b) envisages the additions and/or deductions to the Works to be required for

the completion of the Project (為完成本工程所需). As held by the court in *Abbey Developments* and i*n Trustees of The Stratfield Saye Estate*, it would require clear language to support a construction that the IO and the Consultant in this case would have the power, under clause 4.7, to order deduction and exclusion of the Works entirely, or of any of the Works which were required in order to complete the Project.

38. As defined in the Contract, the Project is the repair and maintenance of the Towers. On the evidence, the IO obtained funding for the Project from the Hong Kong Housing Society, on the basis that some essential works had to be carried out for the repair and maintenance of the Towers. The main aim of the Project was referred to in the letter from the Housing Society to the chairman of the IO dated 18 December 2012, as being to improve the safety of the building. The works involving the building structure, fire safety and hygiene facilities were considered "first priority" (優先項目) and were required to be executed under the Project.

39. It is therefore relevant to consider the Works which the IO had sought at the material times to omit or deduct from the scope of the Contract.

40. On 16 June 2013, the IO resolved at their general meeting to delete items 8, 9, 10, 11, 12 and 14 entirely from the Works to be executed by the Contractor under the Contract ("**IO Proposed Omitted Items**"). These related, respectively, to replacement of the drains servicing the public toilets, the water supply facilities, public ventilation windows, steel works, wood works and a provisional item for renovation of the exterior wall. With the exception of the provisional item (on which

no firm decision had been made under the Contract for execution), it would appear, on reviewing the List of Works, that items 8, 9, 10, parts of item 11, and item 12 all related to fire safety, hygiene and/or public safety, and would comprise Works which were considered as within the principal aim of the Project, as approved and subsidized by the Housing Society, if not to be given first priority. The execution of these items of the Works can reasonably be regarded as being included in the purpose for the IO's execution of the Contract with the Contractor, for the repair and maintenance of the Towers.

41. At the meeting held between the Contractor and the Committee on 2 July 2013 after the formal instruction to suspend Works, the Committee demanded the omission of these IO Proposed Omitted Items. The same IO Proposed Omitted Items were included in the draft supplemental agreement which was submitted by the IO to the Contractor on or about 28 July 2013, for exclusion from the Contract. Despite some further negotiations with regard to the scope of the Works to be reduced and excluded, the Contractor learnt that the Committee issued an agenda on 29 August 2013 for a meeting of the IO to be held on 15 September 2013, proposing that the original scope of the Works be retained (ie together with the IO Proposed Omitted Items) without any reduction in scope, but that the Contract Sum be reduced to $32 million from $37.07 million. In the notice to commence works issued by Ferrari on 8 January 2014, Ferrari purported to vary the Works by excluding item 3.2a, 4.1.ii, 6, 8, 9.5, 10.2, 11.1 and the provisional item 14 ("**Deleted Works**") of the List of Works, thus reducing the Contract Sum to $32,781,390, after deducting $4,292,700 as the value of the Deleted Works.

42. Construed as a whole, and bearing in mind the nature of the Project, which is for repair and maintenance works to be carried out for the Towers, in order to deal with the building structure, fire services and hygiene aspects of the Towers as the priority issues of the Housing Society in approving funding for the Project, and which were obviously the aim and concerns of the IO as well when the Contract for the Project was approved and signed in April 2013, I do not consider that clause 4.7 is wide enough to authorize or empower the Consultant, on the IO's behalf, to issue variation instructions to omit items 8, 9, 10, 11 and 12 which concern important aspects of the Works forming part of the Project. The variations sought by the IO in the course of the negotiations and in the interim of the suspension of works were not in order to complete the Project, but to deviate from the needs and stated aims of the Project, and from the purpose of the Contract.

Whether there was repudiation by the IO, and acceptance of repudiation

43. It is pertinent, as Counsel for the Contractor pointed out, that the Consultant never exercised its power to vary under clause 4.7 of the Conditions - at least not until 8 January 2014, when Ferrari issued its instruction to the Contractor to omit the Deleted Works of a total value of $4,292,700 (according to the Costs Schedule), and reducing the Contract Sum of $37,074,090 to $32,781,390. Prior to that, the owners and the Committee had simply insisted on deleting the IO Proposed Omitted Items, or other parts of the Works, or reducing the Contract Sum, and the meetings with the Contractor during the period of the suspension of the Works were for the purpose of procuring the Contractor's agreement to the owners' proposals.

44. On the Contractor's pleaded case, it relies on the following acts of the IO as breach and repudiation of the Contract: (1) the IO's prevention of the Contractor's workers from entering the Towers to commence the scaffolding works in May 2013, and its suspension thereafter of the Works under the Contract; (2) the circumstances of the IO's reduction of the scope of the Works under the Contract, and its exclusion of the IO Proposed Omitted Items from the Contract.

45. The principles relied upon by Counsel for the IO cannot be disputed. For there to be a repudiation or "renunciation" of the contract, there must be a clear and absolute refusal to perform the contract in some essential respect. Further, any purported acceptance of repudiation must be unequivocal. As summarized in para 24-018 of *Chitty on Contracts*, Volume 1, 22nd edition, the test of whether there is a renunciation is whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions. The party in default may intend to fulfill the contract but may be determined to do so only in a manner substantially inconsistent with his obligations (*Ross T Smith & Co v Bailey, Son & Co* [1940] 3 All ER 60), or may refuse to perform the contract unless the other party complies with certain conditions not required by its terms (*BV Oliehandel Jongkind v Coastal International Ltd* [1983] to Lloyd's Rep 463). In such a case, the authorities show that the contract has been sufficiently renounced. The critical question is whether, by its words or conduct, a party has evinced an intention not to perform the contract, which a reasonable person in the position of the other innocent party would regard as clear and absolute (*The "Ekha"* [2010] 1 Lloyd's Law Reports 543).

46. There is no evidence to support the claim that the IO at the material time in May 2013 had authorized, procured or arranged for the disgruntled owners to prevent the Contractor from entering the Towers to commence the scaffolding work. There is no evidence that the disgruntled owners represented or acted on behalf of the IO. The obstruction of the commencement of the scaffolding works in May 2013 by the disgruntled owners cannot be considered as the IO's acts.

47. However, there can be no dispute that the Manager requested the Contractor to suspend the Works until 9 June 2013 and further notice. It is also indisputable that on 28 June 2013, the Consultant issued instructions on behalf of the IO, and at their request, to suspend the commencement of the Works. This was after the new Committee was formed at the meeting of the IO on 13 June 2013, when the former chairman was replaced. Thereafter, work had been suspended until January 2014 when Ferrari issued the instruction to the Contractor to commence works by 15 January 2014.

48. After the obstruction on 23 May 2013, and after the Contractor had been instructed by the Manager to suspend work until 9 June 2013, the Contractor wrote to the Consultant to reserve its rights. The Contractor received a reply from the Consultant on 30 May 2013, to the effect that the Consultant had not received any instruction from the IO to suspend the Works, and that the Consultant did not agree to any suspension from 24 May 2013 to 9 June 2013. In particular, the Consultant notified the Contractor that the Contractor would not be granted any extension of time despite the suspension, and that the IO

would not be liable for any compensation in respect of the period of suspension.

49. Following from that, the Contractor's solicitors issued a letter dated 7 June 2013 to the Consultant. There was some dispute at trial as to the language used in this document. In the letter, complaint was made on behalf of the Contractor with regard to the IO's obstruction to the Contractor's commencement of the Works in May 2013, and it was recorded that the Consultant had informed the Contractor on 30 May 2013 that it did not agree to the suspension of the Works from 24 May 2013. The solicitors reserved the Contractor's rights and claims for damages in these respects. A request was also made in the letter, for a certificate to be issued by the Consultant in order to confirm the suspension of work "pursuant to clause 2.3 of the Terms and Conditions of the Agreement". The letter concluded by notifying the Consultant that in the absence of a reply within 3 days, the Contractor would treat the matter as a repudiation of the Contract by the IO.

50. Clause 2.3 of the Conditions (as referred to in the solicitors' letter of 7 June 2013) provides for extensions of time for the completion of the Works under the Contract.

51. The IO argued that the Contractor's request for a certificate confirming the suspension of the Works by reference to clause 2.3 of the Conditions, and the subsequent letters from the Contractor referring to the "consensus" reached between the Contractor and the IO evidence that the Contractor had agreed to the suspension of the Works under the Contract.

52. I agree with Counsel for the Contractor, that it was never part of the IO's pleaded case that there was an agreed suspension of the Works. In any event, the contemporaneous correspondence and in particular the letter dated 14 June 2013 from the Contractor to the Consultant (which records the alleged consensus reached between the IO and the Contractor on 13 June 2013) shows that any agreement as to suspension of the Works in May 2013 was conditional upon the parties being able to agree to resume the Works on or before 1 July 2013, and on some specified costs being borne by the IO. It is indisputable that the Works were not resumed by 1 July 2013. Nor was the Contractor's claim for costs incurred fully accepted by the IO.

53. Despite the fact that negotiations did continue between the Contractor and the Committee (on behalf of the IO), the latter made it clear in the meetings and in the course of the negotiations that the IO was seeking to delete major items of the Works - as the owners resolved on 16 June 2013, as indicated to the Contractor at the meeting on 2 July 2013, and as proposed in the draft Supplemental Agreement which was submitted to the Contractor around 28 July 2013. On the evidence of the Contractor, which I accept, the owners made it clear in the negotiations that they refused to pay compensation to the Contractor in respect of the reduction of the scope of the Works. That is consistent with the stance indicated in the Consultant's letter of 30 May 2013.

54. The evidence from Mr Siu, concerning the stance of the Committee as to the reduction of the Contract Sum, the omission of parts of the Works, and the refusal to pay the Contractor's claims for costs and expenses, had, in my view, the ring of truth. In reality, bearing in mind the

commotion caused by the disgruntled owners in May 2013 when the Contractor was to commence the Works under the Contract, which led to the suspension of the Works and the change in the membership of the Committee with representatives from the disgruntled owners being elected in June 2013, it is highly probable that the new Committee acting on behalf of the IO would adopt a firm stance with the Contractor in the negotiations for the reduction of the Contract Sum and the exclusion of items from the scope of the Works. This is borne out by the fact that despite the negotiations between the Contractor and the Committee members in July and early August 2013, the IO still rejected the Contractor's proposed changes to the scope of the Works at the end of August 2013, and the agenda issued by the Committee on 29 August 2013 for the owners' meeting to be held on 15 September 2013 still proposed the retention of the entire and original scope of the Works, but the reduction of the Contract Sum to $32 million. The IO further informed the Contractor on 30 August 2013, that the proposed Supplemental Agreement could not be entered into, as the owners refused to delete item 6 and insisted also on retaining items 10 to 12 of the Works. On the evidence and from the contemporaneous correspondence exchanged, it would appear that during the prolonged period of negotiations, the Contractor had been held to ransom by the IO's indefinite suspension of the Project before the Works could even commence, and after the Contractor had entered into contracts with its own suppliers and work force. The Contractor had little choice but to continue the negotiations with the Committee, and the correspondence shows that it had made compromise after compromise as to the reduction of the scope of the Works so as to reduce the Contract Sum. I reject as incredible the IO's

evidence, and the lame excuse offered by Madam Tsoi in her testimony, that the Committee had only issued the agenda for the meeting on 15 September 2013, in order to sound out the owners' views, but that the Committee had no intention to raise the reduction of the Contract Sum with the Contractor if the Contractor did not agree to it.

55. According to Mr Siu of the Contractor, one Mr Geung had been introduced to him by the Committee as the IO's consultant, and Mr Geung had clearly expressed at an earlier meeting that the IO refused to make any compromise and refused to pay any compensation. On behalf of the IO, Counsel only sought to argue that Mr Geung had merely been introduced as the IO's "consultant", but not as a "negotiations representative", and that he had no authority to represent the IO. This distinction is artificial. Even if I should accept the IO's evidence, that Mr Geung had only been introduced as the adviser to the IO, on the facts and circumstances of the case, this would amount to the Committee holding out to the Contractor that Mr Geung was authorized to speak on behalf of the IO in the negotiations, and the Contractor would reasonably understand from Mr Geung's statement, that the IO refused to compromise and refused to compensate, that this was indicative of the IO's stance. In any event, the stance of the Committee (apart from Mr Geung) was clear from their actions and the events which took place: they insisted on the reduction of the Contract Sum, with or without reduction of the scope of the Works, and it was only in January 2014 that the IO agreed to retain the essential parts of the Works, instead of insisting on the deletion of all of the IO Proposed Omitted Items.

56. In my judgment, the Consultant's suspension of all of the Works for an indefinite period, on the instructions of the IO, without any indication to the Contractor that it was entitled to an extension of time or to claim for direct costs or loss as a result of such suspension, coupled with the demands made by the IO through its representatives for material items of the Works to be omitted, without acceptance of the Contractor's intimated claims for direct loss, expenses and damages incurred as a result of the suspension and the reduction of the scope of the Works, collectively amount to repudiation of the Contract. By their aforesaid conduct, the IO through the Committee and the Consultant expressed to a reasonable person in the Contractor's position a clear refusal to perform the Contract in essential respects. Whatever may have been the subjective intentions of the members of the Committee in continuing negotiations with the Contractor, the Contractor reasonably understood from the conduct demonstrated by the Committee and the Consultant that the IO did not intend to and would not abide by the terms of the Contract, or would only abide by the terms of the Contract subject to the condition that the Contractor would accept a reduced Contract Sum.

57. I have borne in mind the distinction, as highlighted by Counsel for the IO, between a claim for damages on the basis of a breach of warranty or condition, and the acceptance of a repudiatory breach which has the effect of terminating the Contract.

58. The Contractor relies on the 19 July 2013 Letter as its acceptance of the IO's repudiation of the Contract. The letter referred to the suspension of the Works since 23 May 2013, over 2 months ago, and to the IO's attempts on 2 July 2013 to exclude the IO Proposed Deleted

Works. The letter stated in unequivocal terms that the IO had evinced an intention no longer to be bound by the Contract, that the IO had repudiated the Contract, and that the Contractor thereby accepted the IO's wrongful repudiation. The Contractor's loss and damages in the sum of $16,147,122.87 (including loss of profits) were particularized, and demand was made for payment of these damages within 14 days ("**Contractor's Claim**"), failing receipt of which legal proceedings would be instituted. In my judgment, the 19 July Letter clearly expressed the Contractor's acceptance of the IO's repudiation, in no uncertain terms.

59. I do not believe that Mr Fong, who was the Contractor's project manager responsible for monitoring the Project on site, would have totally dismissed the Contractor's acceptance of repudiation by the 19 July Letter, when Mr Au of the Committee approached him. He might have uttered polite words of appeasement or assurance, but in view of the language used in the 19 July Letter issued under the letterhead of the Contractor's solicitors, it would have been unreasonable, and highly improbable, for Mr Au to have believed that the 19 July Letter did not serve any real purpose, or was not intended by the Contractor to have any effect.

60. On 2 September 2013, the Contractor submitted an application to the Consultant for its 1st interim payment. Mr Siu of the Contractor claims that it had been advised by the Consultant to do so, and that it had no better alternative but to do this, given that as there had been no progress for months since the suspension. Counsel for the IO relied on this as evidence of the Contractor's act of treating the Contract as being

valid and subsisting, and not as having been terminated by the IO's alleged breach.

61. Even if the Contractor's participation in further negotiations after the 19 July Letter, and its submission of the application for interim payment, could have led the Committee or the IO to believe that the Contractor had not in fact terminated the Contract despite the clear expressions used in the 19 July Letter, and even if the IO's evidence as to the assurance allegedly given by Mr Fong were to be believed, the NOA issued by the Contractor on 13 September 2013 would have dispelled any reasonable doubt in the mind of any of the owners that the Contractor was relying upon its termination of the Contract by the service of the NOA and the submission to arbitration of their dispute as to the Contractor's Claim. The NOA identified the dispute as to the Contractor's assertion that the IO was in breach of the Contract, by suspending the Works and refusing to compensate the Contractor for its loss and damages suffered by reason of the termination of the Contract (thereby repeating the Contractor's Claim). The NOA referred to the Contractor's "termination" of the Contract by the 19 July Letter, hence relying on the Contractor's acceptance of the IO's repudiation, as stated in the 19 July Letter. By submitting to arbitration the issue of the IO's breach of the Contract and the Contractor's claim for its direct loss and costs, I agree that the Contractor had given adequately clear notice to the IO, of its acceptance of the IO's repudiation and of the termination of the Contract.

62. Any further negotiations which took place thereafter did not resolve any dispute. On 15 September 2013, the IO resolved to retain the original scope of the works, but to reduce the Contract Sum to

$32 million. Even if there was any power under the Contract to vary the scope of the Works by omitting any work items, the IO had no power to reduce the Contract Sum. It could not have been within the reasonable contemplation of the parties, at the time when the Contract was made, that the IO (or the Contractor) would have been able to alter the Contract Sum under any of the provisions relied upon by the IO, simply because the IO thought that the Contract Sum under the concluded Contract was too high, or that it was a bad commercial bargain. In the letter from the Contractor to the owners of 26 September 2013, the Contractor made it clear to all the owners that although it did not desire to have arbitration, it had no other alternative but to take legal action, since the IO had no sincere intention to resolve matters. Again, the meaning of this is plain. The mere fact of the IO having written to the Contractor, to ask the Contractor for time whilst the IO further considered the matter, or to seek the Contractor's agreement to exclude parts of the Works, does not in my view detract from the clear indication already given by the Contractor, that it regarded the IO to be in repudiation and that the Contractor had accepted such repudiation.

63. In view of the clear indications made in the 19 July Letter and the NOA as to the Contractor's acceptance of the IO's repudiation of the Contract, I do not agree that the Contractor's participation in the negotiations and meetings after 19 July 2013, and in October 2013 or November 2013 (if there were any negotiations then), can be regarded as the Contractor's affirmation of the Contract.

64. Counsel for the IO highlighted the fact that the Contractor did not exercise its contractual right under clause 10.2 of the Conditions

to terminate the Contract on the basis of the IO's prevention of the commencement of the Works for over a month. However, bearing in mind the IO's persistent attempts to omit material parts of the Works and to reduce the Contract Sum, coupled with the suspension of the Works for over 4 months in the context of a Contract for completion of the Works within 150 days, and the uncertainty created as to whether the Works would ever restart, the IO's breach is sufficiently serious and fundamental as to constitute repudiation and to entitle the Contractor to terminate the Contract at common law, by acceptance of the IO's repudiation.

65. In conclusion, bearing in mind my construction of clause 4.7 of the Conditions and my views on the IO Proposed Omitted Items, I find that the IO was in repudiatory breach of the Contract, and that its repudiation had been accepted by the Contractor by the 19 July Letter, and at the latest, by the service of the NOA.

Whether the Contractor was in breach as alleged

66. The IO claims that the Contractor was in breach, in failing to comply with the notice issued by Ferrari on 8 January 2014 to commence works by 15 January 2004, after its issue of an instruction pursuant to clause 4.7 of the Conditions, to omit the Deleted Works from the scope of the Works and the Contract.

67. Having suspended the Works since May or (formally) June 2013, it was in my view totally unreasonable for Ferrari to issue the notice to the Contractor after more than 6 months to require the Contractor to commence the Works within 7 days. In any event, I find that the Contract had already been terminated by the Contractor by the

19 July Letter, or by service of the NOA in September 2013. Accordingly, the IO was not entitled to require the Contractor to commence the Works under the Contract, and the Contractor is not in breach in failing to comply with the notice of 8 January 2014.

Conclusion and orders

68. I find that the IO was in breach of the Contract, and that its repudiatory breach had been accepted by the Contractor. I dismiss the IO's counterclaim and find that there was no breach by the Contractor in failing to resume works in January 2014.

69. As agreed by the parties, I will give liberty to the parties to apply for the orders (or any directions as required) on the damages to be paid by the IO to the Contractor.

70. I also make an order nisi that the costs of the action, including the counterclaim, are to be paid by the IO to the Contractor, to be taxed if not agreed.

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

Mr Anthony Chow, instructed by Tung, Ng, Tse & Heung, for the plaintiff

Mr Calvin Cheuk and Mr Terrence Tai, instructed by Charles Yeung Clement Lam Liu & Yip, for the defendant