

HONG KONG / JUDGMENT

FALCON BUILDING MATERIALS CO LTD v. FINE VIEW ENGINEERING LTD

COURT

District Court

DECIDED

3 January 2007

CASE / FILE NUMBER

DCCJ5663/2006

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Introduction

The Defendant was the main contractor of government contract HS2/223/05-2 (Main Contract) titled Design, Supply & Installation of 16 sets of Automatic Door System with associated Accessories at Tseung Kwan O Hospital [TKOH Works) administered by the Electrical and Mechanical Services Department (EMSD). The Plaintiff was the Defendant s sub-contractor pursuant to Sales Contract no.C025/05 dated 7th April 2005 (Sales Contract) and varied by the Plaintiff s letter to the Defendant dated 12th July 2005 (Variation Letter) (collectively, Sub-contract). The Sales Contract set out inter alia the price of the Works (HK\$851,536.00) and the following express terms : Payment Terms: 20% deposit [Deposit] on confirmation of order after approval by the EMSD on [the Defendant s] submission. 80% to be settled by [the Defendant s] receipt of final payment from the EMSD [Receipt Provision] within 45 days from the completion of testing and commissioning [T&C Provision] and the acceptance of the works by the EMSD [EMSD Acceptance Provision]. Remarks: This Contract shall be executed on a back-to-back basis in accordance with the relevant clauses within the Main Contract [Back-to-back Provision The Receipt, T&C and EMSD Acceptance Provisions are collectively referred to as Three Provisions below. By the Variation Letter, the price of the Works was revised to HK\$811,327.25 (Sub-contract Price). On 12th July 2005, the Plaintiff issued a revised invoice for the Deposit, which was paid on/ about 10th August 2005. The Plaintiff proceeded to order the automatic swing door system with associated accessories (System) from its supplier GEZE Asia Pacific Limited (GEZE) and to install the same at TKOH. On 1st April 2006, the Defendant issued an invoice for the sum of HK\$649,061.80 being the Sub-contract Price less Deposit. On 26th April 2006, the Defendant as main contractor, Regent Elect Eng Co as electrical sub-contractor and EMSD carried out testing and commissioning () of the System and of the electrical works. For T&C of the System, the Defendant and EMSD signed 15 Testing and Commissioning Reports () in the following format : [The Defendant] [T&C] Record Automatic Door System Project : Design, Supply and Installation of [the System] at [TKOH] Name of Contractor: [the Defendant] [T&C] for [the System] Date

27-4-2006 Time [xxx] Equipment

- (a) Drive Geze TSA160/162 automatic door drive unit
- (b) Safety Sensor Geze #79608 safety sensor (push side) [Opposite Hinge Sensor Geze #79633 safety sensor (pull side) [Hinge Sensor
- (c) Contactless switch Geze #79208 contactless switch (push & pull side)
- (d) Foot switch Geze #02906 foot switch w/ #53757 pressure pulse switch (push & pull side)
Location Floor [xxx] Door No. [xxx] Testing Result Test 1 Results Remarks Type of Test Pass
Fail Functional test of automatic door drive unit O.K. Functional test of safety sensor (push side) O.K. Functional test of safety sensor (pull side) O.K. Functional test of contactless switch (push side) O.K. Functional test of contactless switch (pull side) O.K. Functional test of foot switch (push side) O.K. Functional test of foot switch (pull side) O.K. Door opening time (6-10 sec) [xxx] sec Door hold-open time (4-10 sec) [xxx] sec Door closing time (15-25 sec) [xxx] sec Door opening angle (≥ 90 deg) O.K. Performed by : [name] Acknowledged by: [name] Witnessed by: [name] [the Defendant] [the Defendant] EMSD Signed by : [signed] Signed By : [signed] Signed by : [signed] Date : 26.4.06 Date : 26.4.06 Date : 26.4.06
Subsequently, the Defendant issued an invoice for the sum of HK\$649,061.80 being the Sub-contract Price less Deposit with the following typed remarks : A copies of [the TCR] dated April 26, 2006 This Invoice is supersedes our previous Invoice dated April 1, 2006 as well as a handwritten remark of Benny Wong called 2:30pm on 21/9/2006. Release 50% on its face. On/ about 10th October 2006, the Defendant paid a sum of HK\$150,000.00 (1st Further Payment) to the Plaintiff. On 11th October 2006, the Plaintiff issued an invoice for the sum of HK\$449,061.80 (Original Balance) being the Sub-contract Price less Deposit and 1st Further Payment. The Plaintiff issued the writ of summons herein on 16th November 2006 (Relevant Date) to claim for the Original Balance. Subsequently, the Defendant paid further sums of HK\$251,436.35, HK\$140,925.45 and HK\$33,000.00 on 24th January, 19th March and 24th September 2007 respectively (2nd, 3rd and 4th Further Payments), so the Plaintiff claimed for the remaining balance of HK\$73,700.00 (Claimed Balance) at trial. II. Issues Both Mr Chan, counsel for the Plaintiff, and Mr Fong, counsel for the Defendant, agreed the crucial issue was whether the Original Balance (inclusive of the Claimed Balance) was due and payable as at the Relevant Date since the Plaintiff could not sue for default that had not accrued prior to its writ of summons (see Wing Siu Co Ltd v Goldquest International Ltd (No.1) [2003] 2 HKC 64). There was no dispute that (a) by 26th April 2006 the Plaintiff had installed the System at TKOH, (b) as at the Relevant Date the System was in use by the Hospital Authority () as end-user, but the Defendant had not received final payment from EMSD, and (c) the Defendant received final payment from EMSD in the sum of HK\$168,246.20 on/about 8th February 2007. The Defendant claimed that pursuant to the Back-to-back and Three Provisions, the parties expressly agreed (a) the Sub-contract and Main Contract were back-to-back , and (b) the final 80% balance of the Sub-contract Price (80% Balance) was to be paid on a paid-if-paid basis , ie the Three Provisions were condition precedents to the Defendant s liability to pay. Although the Defendant generously

paid the 1st to 4th Further Payments at the Plaintiff's requests, EMSD did not accept the Works at all (as evidenced by non-compliance with clauses 5c and 8 of the General Conditions of Contract for Minor Works (General Conditions) of the Main Contract) and did not make final payment until 2007 (see paragraph 9 above), so the Original Balance (inclusive of the Claimed Balance) was not due and payable as at the Relevant Date or at all. Mr Fong confirmed the Defendant did not have any counterclaim. On the other hand, the Plaintiff denied the Three Provisions amounted to any pay-if-paid provision which description was unclear and embarrassing. The Plaintiff further claimed (a) the Receipt Provision was irrelevant and (b) upon compliance with the T&C and EMSD Acceptance Provisions (which related to the time but not liability for payment) the Defendant was obliged to pay the 80% Balance to the Plaintiff within 45 days. Compliance of the T&C Provision was not disputed, and the EMSD Acceptance Provision was satisfied by EMSD's endorsement on the TCR and evidenced by the Defendant's letter to EMSD dated 14th October 2006, so the Plaintiff was entitled to claim for the Original Balance (inclusive of the Claimed Balance) as at the Relevant Date. Alternatively, if the Receipt Provision was relevant (which the Plaintiff denied), the Plaintiff argued it only affected the time but not liability for payment of the 80% Balance. Although EMSD had not paid the final payment under the Main Contract as at the Relevant Date, the Plaintiff argued the Receipt Provision was no longer applicable because the Defendant prevented proper functioning of the payment mechanism under the Main Contract (which mechanism was outside the Plaintiff's control) by failing to collect final payment from EMSD after the Plaintiff completed and EMSD accepted the Works (Prevention Argument). The Plaintiff would not rely on its plea that EMSD also prevented proper functioning of the payment mechanism under the Main Contract.

III. Alleged defects of the Works Ultimately, the Works involved inter alia the design, supply and installation of 15 (and not 16) sets of the System that comprised inter alia hydraulic door drive units that controlled the automatic opening/ closing of swing doors via hand/foot switches. Each double-leaf swing door had 4 safety sensors mounted at the top portion of the door leaves on both sides. The Hinge Sensor (fitted with 2 light switches) was longer in length and had a wider scanned area than the Opposite Hinge Sensor (fitted with 1 light switch). They are collectively referred to as Sensors below. After installation of the System, HA and EMSD raised concerns over blind spots outside the detection areas of the Hinge Sensor (near to the door edge, HS Blind Spots) and Opposite Hinge Sensor (near to the door frame, OHS Blind Spots). But both counsel confirmed it was unnecessary for this court to decide whether the Works (including the Sensors) (a) were defective or not and/or (b) failed to comply with the contract requirements or not. It was agreed that the evidence led on the defects was to illustrate the stance adopted by the parties and EMSD, whether rightly or wrongly, on the time and/or liability for payment under the Main Contract and/or Sub-contract. The Plaintiff claimed such evidence showed that the parties considered it had satisfactorily completed the Works and EMSD had accepted the same on/about 26th April 2006. But the Defendant claimed such evidence showed that EMSD (whether rightly or wrongly) considered the Works defective and/or not in accordance with the contract requirements, so EMSD did not accept the Works at all and did not make final payment until

2007 but with deduction. IV. Overview of the witnesses The Plaintiff called its project manager Mr Kung Po Kit Billy (Mr Kung) to give evidence. The Defendant called its site agent Mr Wong Chung Yeung Benny (Mr Wong) to give evidence. In assessing witnesses credibility, the court should consider the totality of their evidence against the documentary evidence, inferences based on inherent improbabilities and/or undisputed facts (see the principles set out by Chung J at paragraph 12 of *Star Glory Investment Ltd v Kai Tua (H.K.) Technology Ltd & ors* HCA3523/2002 (unreported, 13th August 2005)). This case turned largely on the construction of the Main Contract, the Sub-contract and other documents (eg TCR and correspondence). In such context, I prefer the evidence of Mr Wong. I disagree he was evasive on payment issues. I accept that although as site agent he was familiar with the Works and participated in collecting payment from EMSD and making payment therefrom to the Defendant, negotiations on payment matters were essentially handled by the Defendant s accounts department and project director Mr S K To (Mr To). On the other hand, the analysis below highlighted the unreliability of Mr Kung s evidence on the core issues, which did not sit well with the documents. V. Relevant terms of the Main Contract In 2005, EMSD invited tender for the Works. The tender documents (and eventually the Main Contract) comprised inter alia the Form of Quotation (Engineering) (Quotation), General Conditions, General Specification, Particular Specification, Schedule of Particulars, and Schedule of Rates (which was priced upon awarding the Main Contract). The General Conditions provided inter alia as follows :

4. General obligations of the Contractor

- a. Design responsibility Except as may be provided for in the Contract, the Contractor shall be responsible for the design of the Works and shall in completing the designs use all necessary skill and care. The Contractor shall ensure that all equipment and materials required by the design to be incorporated into the Works are fit for the purpose intended by the Contract.
- c. Work to be to the Satisfaction of the Engineer Save in so far as it is legally or physically impossible the Contractor shall execute, complete and maintain the Works in strict accordance with the Contract to the satisfaction of the Engineer [ie the engineer as appointed from time to time by the Director of Electrical and Mechanical Services Department and notified to the Contractor] and shall comply with the Engineer s instructions on any matter related to the Contract, whether mentioned in the Contract or not.

5. Commencements, Completion and Acceptance of the Works

- c. The Engineer or Engineer s Representative [ie any person(s) appointed from time to time by the Engineer and notified to the Defendant to perform the duties set forth in clause 3 of the General Conditions] shall notify the Contractor in writing the date of acceptance of the Works.

8. Payment Payment will be made after the completion of any tests and submission of test reports as required under the Contract and the acceptance of the works by the Engineer or the Engineer's Representative. (my emphasis) The General Specification provided inter alia as follows :
- 1.8 Drawings and Information to be Provided By the Contractor Prior to the Completion of Works At least two months before the commissioning of the installation, the Contractor shall submit two copies of draft Operation and Maintenance Instruction Manual to the Engineer for approval. After the draft Instruction Manual is approved, the Contractor shall supply five copies of the approved version of the manual
- Importance of Information Submission as regards to Completion of Works The Contractor shall note particularly that the Works shall not be considered completed unless and until the information specified in sub-paragraphs 1.8.4 has been received and accepted by the Engineer and the Contractor shall also be fully responsible for any possible consequence which may arise from his late submission of the said technical information.
- Commissioning Tests As soon as practical after individual equipment, sub-assemblies and assemblies have been properly installed, tested to the satisfaction of the Engineer, the Contractor shall carry out the commissioning tests for the complete installation.
- 1.24 Labels 1.24.1 Each item of equipment shall have permanently attached to it in a conspicuous position a label upon which the manufacturer's name, type and serial number of the equipment shall be engraved or stamped. All indicators, instruments, relays, control switches, push-buttons, fuses and other ancillary apparatus shall be provided with labels clearly stating their functions. All label instructions shall be subject to the approval of the Engineer. The Particular Specification provided inter alia as follows :
- 2.4 Drawings 2.4.5 Approval by the Engineer of any modification work or drawings shall not relieve the Contractor from his obligation or liabilities under this Contract.
- 2.13 Testing and Commissioning 2.13.1 General 2.13.1.1 The Contractor shall carry out all necessary testing and commissioning procedures and acceptance tests as specified on the government General Specification and in this specification, and as necessary for the safe, reliable and satisfactory operation of the system and equipment installed. 2.13.1.4 All testing standards and procedures shall be submitted two months after the letter of acceptance. 2.13.1.5 Testing and commissioning shall be conducted in accordance with the procedure specified in the testing and commissioning procedures for different systems published by Building services branch of Architectural Services Department and with the specific requirements of this Particular Specification. 2.13.1.6 The Contractor shall provide a full record of all tests and commissioning results indicating clearly the performance of all plant, equipment, system balance, system percentage leakage and comprehensive acoustic test results. 2.13.1.7 Should the results of any test show that any plant, system or equipment etc. fails to perform to the efficiencies or duties as specified, the Contractor shall adjust, modify and if necessary replace the equipment at no additional cost in order that the required performance can be obtained.
- 2.13.2 Site Acceptance Test 2.13.2.1 On completion of the installation of the equipment, the Contractor shall notify the Engineer at least two weeks prior to the scheduled site acceptance tests and submit a test schedule so that the Engineer may witness the test. A qualified installation engineer shall be present to carry out the installation, inspection, and operational testing of the equipment. All equipment shall

be demonstrated to work/operate functionally as required in this Specification. Site acceptance test shall show, inter alia, that : 2.13.2.3.17 All safety device shall be inspected and tested. (my emphasis) Appendix 2 of the Particular Specification provided inter alia as follows :

7. Safety Sensor The safety sensors shall be mounted at both side of swing door panel, which located at top portion of door leaves. Length of the sensor shall be full width of door with flexible conduit connected. The safety sensor shall use active infrared detection method with both presence and motion detection method, which shall provide a stop function upon obstacles have been detected upon door opening at the swing side of door panel. The safety sensor shall also halt the door closing operation and return the doors to full opening if obstacles have been detected upon closing. (my emphasis) VI. Main Contract and Sales Contract In/about January 2005, the Defendant invited the Plaintiff to submit a quotation for the Works. The Plaintiff liaised with GEZE for supply of the System. On 1st February 2005, the Plaintiff submitted a quotation offering the GEZE System with a priced Schedule of Rates on the following terms : Terms of Offer: Supply & Installation Only Payment terms: 20% deposit on approval / placement of order. 50% against materials on site. 20% monthly on progress. 10% on completion. Price validity: Our offer to remain firm acceptance 90 days from above date. Total Quotation Sum HK\$916,880.00 Limitation: Our quotation is prepared on the specifications provided at the time of preparing this tender. Should there be any change in design, dimensions and/or performance requirements, we would need to consult with the manufacturers to ensure that latest requirements can be met. Additional costs may be incurred which will be subject to the manufacturer s final advice and the buyer s confirmation of acceptance prior to our commencement of ordering and subsequent procurement of the goods. (my emphasis) The Defendant counter-proposed the following amendments, ie (a) crossing out the italicised parts in the above paragraph and (b) adding the following in the quotation and price summary : BACK-TO BACK PAYMENT))) [signatures/initials] SUBJECT TO EMSD PAYMENT TERM. AGREED BY MR ISSAC NIP on 1/2/2005 LUMP SUM TENDER AS IS LESS 5% AS VERBAL CONFIRMED BY MR. NIP ON 1/2/2005. NET TOTAL \$871056(FINAL NET PRICE \$850,000 EXCLUDED A.P. EMPLOYMENT . On 2nd February 2005, the Defendant submitted to EMSD its priced Quotation in the sum of HK\$950,000.00 for the Works. Between 15th February and 14th March 2005, EMSD issued its requests for 1st, 2nd and 3rd Tender Clarifications. The Plaintiff supplied information to the Defendant for onward submission to EMSD, including (a) confirmation that the offer under its quotation and the Sensors fully complied and/or shall fully comply with the relevant requirements in the tender documents, and (b) enclosure of copy catalogue of the offered GEZE System. The Defendant clearly relied on the Plaintiff s expertise/ experience in dealing with these matters. On/about 22nd March 2005, EMSD awarded the Main Contract to the Defendant for the price of HK\$950,000.00 and wrote to the Defendant concerning submission of information. There was no dispute that the Plaintiff received a copy of the Main Contract (including inter alia the General Conditions, General Specification and Particular Specification, but not the Defendant s priced Quotation and priced Schedule of

Rates). On 30th March 2005, the Plaintiff faxed to the Defendant draft sales contract no.C025/05 with inter alia the following terms for comment : To design, supply and install 16 sets of [the System] as per attached Schedule of Rates S.R. No. 1, 2 & 3 LESS 5% special discount LESS a lump sum special discount Payment Terms: 20% deposit and balance within 14 days from the completion of testing and commissioning and the acceptance of the works by the Engineer. Remarks: This Contract shall be executed on a back to back basis in accordance with the relevant clauses within the Main Contract. (my emphasis) TOTAL:HKD 906,880.00 (45,344.00) (10,000.00) 851,536.00 The Defendant rejected the aforesaid italicised Payment Terms and counter-proposed (20% deposit on confirmation of order after approval by the EMSD on [the Defendant s] submission (80% to be settled after [the Defendant s] receipt of final payment from the EMSD in a marked up copy of the draft sales contract faxed to the Plaintiff for comments. The Plaintiff attended a joint inspection and survey at TKOH on 4th April 2005. On 7th April 2005, the parties entered into and signed the Sales Contract. VII. Pay-if-paid provision? The issue was whether the Three Provisions regulated the timing of payment of the 80% Balance as opposed to operating as binding conditions of liability preventing recovery notwithstanding completion of the Works. This turned on the construction of the payment terms in the Sales Contract (which were not affected by the Variation Letter). It was made clear in *Wo Hing Engineering Limited (formerly known as Wo Hing Air-conditioning Engineering Co Ltd) v Pekko Engineers Limited* HCA5561/1996, Suffiad J (unreported, 7th September 1998) that clear and unambiguous words were required to deprive the sub-contractor of the right to payment as opposed to the time at which payment was to be made. In that case, the plaintiff issued invoices to the defendant upon completion of works, but the defendant only received final payment from the main contractor after the plaintiff commenced legal action for recovery of the invoiced sums. Suffiad J said as follows : The underlying principle from all these cases seems clear enough - that when having to construe a clause in a sub-contract that the sub-contractor will only be paid when the main contractor is paid, commonly called a pay-when-paid clause, sufficiently clear words will have to be used before a court will be prepared to construe that such a clause imposes as a condition payment to the main contractor which had to be fulfilled before the sub-contractor had the right to be paid as opposed to a clause limiting the time for payment. Suffiad J held that the provision in the purchase orders that [this] contract is based on back to back basis including payment terms was not sufficiently clear to construe it to mean the plaintiff was only entitled to be paid when the defendant received payment. In *Hong Kong Teakwood Works Ltd v Shui On Construction Co Ltd* [1984] HKLR 235, the sub-contractor claimed against the main contractor for the amount due under 2 architect s certificates. The sub-contract provided that within 14 days of the receipt by the main contractor of payment from the employer against any certificate from the architect, the main contractor shall notify and pay to the sub-contractor the total value certified therein. The employer failed to pay the main contractor the certified amount as a result of set-off against liquidated damages for delay under the main contract. Mr Fong relied on Hunter J s observations at p.238 on the plaintiff s attempt to rely upon the second certificate which, in my view, did not directly address the issue to hand. Further, this was a summary

judgment application, and the court was only concerned whether there was a sufficiently arguable defence to prevent the sub-contractor from obtaining summary judgment. I am not persuaded this case amounted to any authoritative statement of the law (see *Smith & Smith v Winstone* [1992] 2 NZLR 473 per Master Towle cited in *McInnis*, Hong Kong Construction Law Vol.1 para.[1174] at p.VI307). Having considered the background matrix of fact, I am not persuaded the Three Provisions were so clear and unambiguous as amounting to conditions precedent to the Defendant's liability to pay the 80% Balance. Rather they dealt with the time of such payment which did not detract from the Plaintiff's right to be paid if it had satisfactorily completed the Works according to the contract requirements. VIII.

Construction of the Sales Contract

- (a) Law The classic statement by Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913 endorsed by Sir Ivor Richardson NPJ in *Ying Ho Co Ltd & ors v Secretary for Justice* (2004) 7 HKCFAR 333, 406-407, was as follows : The principles may be summarised as follows.
- (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract,
 - (2) The background was famously referred to by Lord Wilberforce as the matrix of fact , but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
 - (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
 - (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352, [1997] 2 WLR 945.

- (5) The rule that words should be given their natural and ordinary meaning reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Cia Naviera SA v Salen Rederierna AB*, *The Antaios* [1984] 3 All ER 229 at 233, [1985] AC 191 at 201: ... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense. In *Bank of Credit and Commerce International SA v Ali & ors* (No.1) [2002] 1 AC 251, 269, Lord Hoffmann went on to say as follows : The background is however very important. I should in passing say that when, in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 913, I said that the admissible background included absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man , I did not think it necessary to emphasise that I meant anything which a reasonable man would have regarded as relevant. I was merely saying that there is no conceptual limit to what can be regarded as background. It is not, for example, confined to the factual background but can include the state of the law (as in cases in which one takes into account that the parties are unlikely to have intended to agree to something unlawful or legally ineffective) or proved common assumptions which were in fact quite mistaken. But the primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage: we do not easily accept that people have made linguistic mistakes, particularly in formal documents I was certainly not encouraging a trawl through

background

which could not have made a reasonable person think that the parties must have departed from conventional usage. I therefore approach the interpretation of the payment terms under the Sales Contract not as a matter of semantics or dictionary meaning of words, but having regard to the circumstances surrounding their making and the practical objectives they intended to achieve. I also bear in mind that in arriving at a construction of the language of the Sales Contract that would give the most commercial sense there was no conceptual limit as to what could be regarded as background save that previous negotiations of the parties and their declarations of subjective intent should be excluded.

- (b) Back-to-back Provision I am not with Mr Kung's assertion that the Back-to-back Provision merely required the Plaintiff to supply and install the System in accordance with the technical requirements under the Main Contract. I prefer Mr Wong's evidence that by such provision the parties agreed that the terms of the Main Contract insofar as they were relevant to the Sub-contract would be applied *mutatis mutandis*. Mr Kung conceded that the General Conditions were applicable to the Sub-contract and that the Plaintiff was aware of the General Conditions, General Specification and Particular Specification prior to entering

into the Sales Contract. So other than builder s works, AP certificate and labels which were to be carried out by the Defendant, the specifications concerning the Operation and Maintenance Manual (O&M Manual), drawings, T&C and safety sensors set out in paragraphs 19-22 above (being part of the Works under the Sub-contract) were necessarily applicable to the Sub-contract on a back-to-back basis.

- (c) Three Provisions The Three Provisions were expressed in the Sales Contract as payment terms for the 80% Balance. Mr Kung claimed the Receipt Provision was irrelevant because after completion of testing and commission the Plaintiff could rely on the TCR as acceptance of works by the EMSD to invoice the Defendant for the 80% Balance which the Defendant should pay within 45 days. Mr Kung further said the T&C and EMSD Acceptance Provisions referred to the same requirement since a clean TCR signed by EMSD without indicating any defect that required rectification was equivalent to acceptance of the Works by EMSD. On the other hand, Mr Wong said acceptance of the Works by EMSD was not the same as completion of T&C and/or the TCR since such acceptance required EMSD s certificate in writing. Unsurprisingly, in light of EMSD s complaint of defects and/or non-compliance with contractual requirements in relation to the Works (see below), EMSD did not issue (and there was no evidence before me of) any certificate of completion or similar certificate acknowledging acceptance of the Works. I am unable to accept the Plaintiff s contention. Such interpretation failed to give any meaning or effect to the express words after [the Defendant s] receipt of the final payment from EMSD . In my view, all the words in the payment terms of the Sales Contract should be given their natural and ordinary meaning. I find the natural and ordinary meaning was that the time for payment of the 80% Balance would be after the Defendant received final payment under the Main Contract from EMSD and within 45 days of satisfying the T&C and EMSD Acceptance Provisions. There was no suggestion that the Receipt Provision was a linguistic mistake. Mr Kung sought to justify ignoring the Receipt Provision by saying the Plaintiff would not know when EMSD paid the final payment under the Main Contract to the Defendant. But EMSD s payment (if any) was a fact which could have been proved and/or verified. In my view, it was not a justifiable reason for ignoring the express words of the Receipt Provision. In coming to this view, there is no need to refer to the previous negotiations that it was pursuant to the Defendant s insistence of the Receipt Provision by way of counter-proposal to the draft sales contract dated 30th March 2005 that the parties eventually agreed to the same (see paragraph 28 above). I now turn to the issue whether the T&C and EMSD Acceptance Provisions were the same or separate requirements. First, the use of the conjunctive word in the payment terms for the 80% Balance in the Sales Contract (see paragraph 3 above) suggested they were separate requirements. Secondly, a brief study of the express terms of the Main Contract (which were applicable to the Sub-contract on a back-to-back basis) would also show they were separate requirements. According to clauses 2.13.2.1 and 2.13.2.3 of the Particular Specification, T&C of the System after completion of installation (ie site acceptance test) was for operational testing to demonstrate that all equipment worked/operated functionally. This accorded with the functional test results and door opening/closing times recorded in the TCR dated 26th

April 2006. But such T&C did not cover all aspects of the Works (eg O&M Manual) and/or other contractual requirements (eg length and detection areas of the Sensors). More importantly, clause 2.13.2.1 made clear the Engineer's role was to witness the test. This accorded with the EMSD's capacity as stated in the TCR dated 26th April 2006. In my view, there was neither objective nor reasonable basis for saying that completion of T&C and signing of a clean TCR by EMSD were equivalent to its acceptance of the Works. I also do not find Mr Chan's reference to the dictionary meaning of the word witness helpful.

Construction of words used by commercial men in contract documents does not turn on semantics or dictionary meaning. The natural and ordinary meaning must be elicited from the relevant matrix of fact in order to give commercial sense to the language used. Mr Chan next submitted that the payment terms in the Sales Contract did not in any way qualify the form of EMSD's acceptance of the Works. I disagree. Clause 6 of the General Conditions (which Mr Kung agreed were applicable to the Sub-contract) expressly provided that acceptance of the Works was to be given in writing by the Engineer or Engineer's Representative. Further, it was common ground that under clause 7 of the General Conditions the Defendant was entitled to payment after completion of any tests and submission of test reports as required under the Main Contract and acceptance of the Works by the Engineer's Representative. The use of the conjunctive word clearly showed that acceptance of the Works by EMSD was separate from and additional to T&C of the System. Indeed, Mr Chan almost conceded the point in his final submissions. There was no dispute the Works comprised inter alia the O&M Manual (see clause 1.8.4(1) and (2) of the General Specification in paragraph 20 above). Mr Kung agreed that the Plaintiff was required to prepare the O&M Manual under the Sub-contract even though it was not covered by the TCR dated 26th April 2006. Clause 1.8.5(1) of the General Specification (see paragraph 20 above) made clear the Works would not be considered completed unless and until the O&M Manual had been received and accepted by the Engineer. Mr Chan accepted that EMSD's endorsement of the TCR could hardly be regarded as acceptance of the O&M Manual being part of the Works under the Sub-contract. Since the Receipt and/or EMSD Acceptance Provisions had not been satisfied, apart from the Prevention Argument discussed below, the time for the Defendant's payment of the Original Balance (inclusive of the Claimed Balance) was not yet due as at the Relevant Date or at trial. There was no plea of waiver or estoppel by reason of the Defendant's (a) 1st to 4th Further Payments and/or (b) proposal for deductions from the final payment by EMSD under the Main Contract (see paragraph 126 below), so these points were not open to the Plaintiff. IX. Prevention Argument I now turn the Prevention Argument, which was based on the premise that the Defendant had to pursue all means available to obtain payment before it could rely on the Three Provisions to defeat the Plaintiff's claim for payment. But mere failure by EMSD to certify acceptance of the Works in writing or to pay the final payment under the Main Contract where there was no fraud or collusion or wrongful interference by the Defendant did not of itself enable the Plaintiff to recover. The Plaintiff had to establish the Defendant prevented EMSD from doing so, which default was not contributed to by the Plaintiff, so that the Defendant could not take advantage of its own default to deprive the Plaintiff of recovery. The Defendant's case was

that EMSD (and in turn the Defendant) was not satisfied with the Works (eg the OHS Blind Spots). So EMSD requested the Defendant which in turn requested the Plaintiff to rectify the defects whilst declining to accept the Works or pay the final payment. On the other hand, the Plaintiff denied the Works were defective and refused to carry out the requested rectification which it regarded as additional/variation works beyond the Sub-contract. But since neither party required the court to make findings of fact as to whether the OHS Blind Spots and/or other complaints were truly performance defects or non-compliance with the requirements of the Sub-contract or not, the Plaintiff faced a difficult uphill task in establishing cogent evidential support for the Prevention Argument. As will be apparent from the analysis below, I am not persuaded the Plaintiff successfully established the Prevention Argument on a balance of probabilities. X. Post-Sales Contract Mr Chan submitted that the documents emanating from the Defendant and the correspondence amongst the parties and EMSD would show that the Defendant's stance amounted to prevention of the proper functioning of the payment mechanism under the Main Contract. To understand such contention, it is necessary to start with the background to such communications. On 7th April 2005, the Plaintiff gave information to the Defendant for submission of information requested by EMSD (see paragraph 26 above), including inter alia 2 sets of binding catalogues of GEZE products which included the Sensors. On 9th April 2005, the Plaintiff submitted its door and equipment schedule as well as marked up layout plans for the Defendant's comments/approval, and requested the Defendant to note inter alia the following :

- (2) To address the previous EMSD's concern on the insufficient area of the safety sensor, [the Defendant] propose that the safety sensor fixed on door hinge side, i.e. GEZE 79555 w/ 1 light switch be changed to GEZE 79633 w/ 2 light switches for door widths of 750-900mm wide. The safety sensor fixed on door opposite hinge side remains as GEZE 79608 w/ 1 light switch due to this safety sensor is primarily used for detecting the area around the door edges to prevent trapping of pedestrians or any obstacle at the door edges. There will be no cost implication for this change. On 14th April 2005, the Plaintiff sent 2 sets of drawings and sample board for onward submission to EMSD. On 23rd April 2005, the Defendant sent a set of the GEZE System catalogues to EMSD for reference. On the same day, EMSD summarised their comments on submission of information in relation to the Works. On 28th April 2005, the Plaintiff wrote to the Defendant clarifying that the Sensors were of the same type except that the Hinge Sensor was fitted with 2 instead of 1 light switch with additional scanned area at no extra cost to ease EMSD's concern over insufficient scanned area raised during the tender clarification stage. On 23rd June 2005, the Plaintiff urged the Defendant for prompt confirmation of the final requirements, so it could proceed with procurement/preparation. On 8th July 2005, there was a meeting at TKOH attended by the parties and EMSD during which (according to Mr Kung) the Defendant/EMSD confirmed that the Plaintiff could proceed with ordering the System. On 12th July 2005, the Plaintiff sent the Variation Letter to confirm to the Defendant inter alia that it would proceed with immediate ordering of the System upon receipt of the Deposit, and to set out details of the new door locations and

electrical works. After the Defendant paid the Deposit, the Plaintiff proceeded to order the System. On 25th August 2005, the Plaintiff faxed a copy of the purchase order it placed with GEZE to the Defendant. On 12th July 2005, the Plaintiff also sent inter alia drawings to the Defendant for onward submission/approval. On 12th September 2005, EMSD commented on the Plaintiff's submitted drawings. Subsequent to a meeting of the parties and EMSD at TKOH on 15th September 2005, the Plaintiff sent inter alia revised drawings to the Defendant for onward submission. On 7th November 2005, EMSD summarised its comments on the submissions of materials/drawings, which the Defendant forwarded to the Plaintiff with request for schedule of arrangement of site work and re-submission of revised working programme on the following day. XI. Installation of the System and the TCR On 9th March 2006, there was a site meeting attended by the parties and EMSD in respect of a mock-up System on 6th floor of TKOH (Mock-up). On the same day, the Defendant wrote to EMSD reporting that the setting out & operation of [the Mock-up] has been accepted by End User (Hospital). The Plaintiff then proceeded with full-scale installation of the System. On 1st April 2006, the Plaintiff issued an invoice to the Defendant for the sum of HK\$649,061.80 being the Sub-contract Price less the Deposit. On 25th April 2006, EMSD emailed the Defendant referring to the site checking for the Mock-up carried out by EMSD's inspector on 21st April 2006 and stating it was observed during such inspection that the new System's safety devices did not properly operate when the obstacle/user was stationed near the door frame/edge of the door leaf (as per the drawing attached to the email). EMSD requested the Defendant to review the overall design and rectify the defects by 28th April 2006. In subsequent correspondence between the parties (see below), the Plaintiff placed emphasis on the Defendant's letter of 9th March 2006 to EMSD (see paragraph 64 above) as the Defendant's and/or EMSD's approval of the System (including the Sensors). In my view, such letter at best indicated that the end-user HA did not have any query at that stage. The letter was plainly addressed to EMSD for seeking its view. Clause 1.22.1 of the General Specification (see paragraph 20 above) provided that testing of the Mock-up must be to the satisfaction of the Engineer. It is plain from EMSD's email of 25th April 2006 (see paragraph 65 above) that it was not so satisfied. On/about 26th April 2006, the Plaintiff completed the installation of the System. On the same day, T&C was carried out resulting in the TCR. Although the Defendant signed the TCR as contractor under the Main Contract, T&C was in fact arranged and carried out by the Plaintiff's staff. Mr Kung suggested that the signature of EMSD's representative on the TCR represented EMSD's acceptance of the Works, but he could not satisfactorily explain why the printed TCR form as agreed between the parties described EMSD's capacity as witness. I disagree with Mr Kung's suggestion that EMSD's representative might not necessarily sign at the right place on the TCR. The 2 other spaces for signature on the printed TCR form were specifically reserved for the Defendant who performed and acknowledged the T&C. I prefer Mr Wong's evidence that the TCR only demonstrated that the System could function properly, which was consistent with the provisions of the Main Contract as applied to the Sub-contract (see paragraph 21 above). Further, EMSD had already raised the issue of the HS and OHS Blind Spots (see paragraph 65 above) prior to issuance of the TCR. There was no evidence that the detection areas of the

Sensors were tested during T&C on 26th April 2006 and/or EMSD waived rectification of the defects demanded in its email of 25th April 2006. The fact that EMSD requested rectification to be done by 28th April 2006 (ie after T&C and the TCR of 26th April 2006) also suggested that the problem of the blind spots was to be handled separately from T&C and the TCR. The above analysis reinforced my conclusion above that the TCR of 26th April 2006 was not intended to be EMSD's acceptance of the Works (see paragraphs 47-52 above). The Plaintiff's contrary contention was also contradicted by its letter to the Defendant dated 29th September 2006 : We have no knowledge of whether or not the works have been accepted by your Client EMSD as so far, we have not received any document or evidence relating to this. it is therefore your obligation to confirm to us whether the current materials and works done have been accepted. It is also your obligation to confirm to us payment received by Fine View from EMSD on this Contract since our Contract agreement is on a back-to-back basis thus, an equivalent percentage payment relative to our Contract sum shall be made to Falcon. We therefore request for your provision of these documents showing date and time for our checking. (my emphasis) Mr Kung's admission that the above letter represented the Plaintiff's stance in September 2006 plainly contradicted the Plaintiff's case that EMSD had already accepted the Works via the TCR 5 months earlier. More importantly, the Plaintiff admitted in the letter that the Defendant's payment under the Sub-contract should be a pro-rata percentage of payment received by the Defendant from EMSD, which also contradicted the suggestion that the Receipt Provision was irrelevant. XII. Defendant's interim payment application On 7th June 2006 the Defendant applied to EMSD for interim payment by submitting payment invoice dated 25th May 2006 for the sum of HK\$455,675.00. Mr Chan suggested that since clause 8 of the General Conditions anticipated a lump sum payment under the Main Contract, the Defendant in making the above payment application must have thought EMSD had accepted the Works. First, there was no plea that the Defendant was estopped from denying EMSD's acceptance of the Works, so such point was not open to the Plaintiff. Secondly, even if such argument were open to the Plaintiff, I do not agree with it. Had the Works been satisfactorily completed, there would have been no sensible commercial reason for the Defendant not to submit an application for the full price under the Main Contract. In my view, the interim payment application reflected the Defendant's recognition that it was not yet entitled to final payment under the Main Contract as it knew (a) EMSD had not accepted the Works in writing pursuant to clauses 5c and 8 of the General Conditions, and (b) EMSD/HA had in April 2006 (see paragraph 65 above) and May 2006 (see paragraph 93 below) complained to the Defendant about the HS and OHS Blind Spots that required rectification. I prefer Mr Wong's evidence that since the Defendant was confident that progress of the Works was quite advanced albeit not completed, it thought there was no harm in putting forward a conservative payment application for about half of the price under the Main Contract to see if EMSD would release some interim payment. On such basis, there was no contradiction in the Defendant signing the TCR in April 2006 and requesting for interim payment in June 2006. I disagree that in not submitting payment application for the full price under the Main Contract after signing the TCR in April 2006 the Defendant failed to use best endeavours to collect final payment from EMSD. Rather, I find

the Defendant had acted proactively in trying to obtain interim payment even though clause 5c and 8 of the General Conditions had not been satisfied. XIII. HS and OHS Blind Spots As an initial observation, I need not be concerned with the HS Blind Spots because they were resolved by re-adjustment of the angle setting of the Hinge Sensor in/about September 2006 (ie prior to the Relevant Date). To understand the OHS Blind Spots, it is necessary to set out the parties respective stance as revealed in their correspondence between May and November 2006.

- (a) Plaintiff's stance The Plaintiff claimed it had carefully executed all Works in accordance with the contract requirements, approved details and the Defendant's instructions, and did not under-provide any item or performance under the Sub-contract. It denied the OHS Blind Spots were performance defects, and claimed that the Defendant was unable to identify what aspect of the Works was not in compliance with the contract requirements. The Plaintiff pointed out that GEZE's catalogue showed the normal scanned area of the Opposite Hinge Sensor covered the area in the proximity of the door edge and not up to the door frame (see paragraph 25 above). Item 2 of the Plaintiff's letter of 9th April 2005 for onward submission to EMSD mentioned the model/type/number of the Sensors, addressed the issue of insufficient scanned area, and made clear that the Opposite Hinge Sensor would be equipped with 1 light switch (see paragraph 59 above). The Plaintiff prepared/submitted all shop drawings, material schedules, material sample board etc in accordance with the Sub-contract that identified all individual items and the positions of the associated accessories. Throughout there was no specific comment on the blind spots or adverse comment on the scanning scope of the Opposite Hinge Sensor by EMSD and/or the Defendant, so the Plaintiff reasonably believed they accepted the normal scanning scope of the Opposite Hinge Sensor and proceeded to order the System. Further, the Defendant had sight of the purchase order placed by the Plaintiff with GEZE that did not allow for additional sensor for the Opposite Hinge Sensor, but had no objection (see paragraph 62 above). During March 2006, the Mock-up was constructed according to the approved schedules/drawings and the Defendant's instructions. The Plaintiff received the Defendant's confirmation of acceptance by letter dated 9th March 2006 after inspection of the Mock-up for physical approval of the System but prior to full-scale installation with no query/comment on blind spots (see paragraph 64 above). The Plaintiff claimed that the drawings, purchase order and Mock-up clearly defined the model, type and mounting position of the Opposite Hinge Sensor, and it was not informed of any insufficient length cover of the Opposite Hinge Sensor. There was a system of submission and approval before EMSD and the Defendant allowed the Works to proceed. In any event, the clean TCR dated 26th April 2006 showed that both EMSD and the Defendant were satisfied with the construction/operation of the System with no query/comment on blind spots, and the installed System was in use by HA as end-user. The Plaintiff claimed that an increased scanned area of the Opposite Hinge Sensor requiring addition of another light switch was clearly a special requirement (see GEZE's letter to the Plaintiff dated 5th June 2006 see paragraph 93 below) amounting to additional order or variation works with cost implications. So the Plaintiff could not offer to supply the additional sensors unless and until

the Defendant gave an additional order.

- (b) Defendant's stance The Defendant claimed that by the Sub-contract the Plaintiff agreed to design, supply and install the System in compliance with the contract requirements of the Main Contract. Clause 7 of Appendix 2 of the Particular Specification called for [length] of sensor shall be full width of the door The safety sensor shall provide a stop function upon obstacles have been detected upon door opening at the swing side of door panel also halt the door closing system if obstacles have been detected (see paragraph 21 above). The Plaintiff should have been aware of the Sub-contract requirements, and the Defendant relied on the Plaintiff's skill/knowledge as specialist in the field to design and choose the System including the Sensors. Although the Plaintiff by its letter of 9th April 2005 suggested changing the model for the Hinge Sensor (see paragraph 59 above), the System still fell short of meeting the stated purpose of the Opposite Hinge Sensor. Item 8 of the Plaintiff's purchase order placed with GEZE showed that the Plaintiff ordered Sensors in the length of 750-900mm. The Plaintiff should have ordered equipment in compliance with the requirements stipulated in the door schedule (which set out the width of each door leaf see paragraph 59 above) and contract documents (see paragraph 85 above), but it failed to provide Sensors that covered the full width of the door leaf. The Defendant doubted whether the Plaintiff's assertion that safety sensors normally would not cover full door width was applicable under the Particular Specification and/or acceptable to EMSD. According to GEZE's brochure supplied by the Plaintiff, the safety sensor should be installed below the guide rail and there should only be a clearance of 14mm between the edge of the door and the edge of the sensor. Given the shorter length of the Sensors installed on site, the Defendant demanded the Plaintiff to immediately rectify the deviation from the detailed requirement of the manufacturer. The Defendant's letter of 9th March 2006 was not a letter of acceptance as such, but a report to EMSD regarding the Mock-up (see paragraphs 64 and 66 above). In any event, acceptance of the Mock-up did not necessarily preclude discovery of performance defects at a later stage. Clause 2.4.5 of the Particular Specification made clear that approval itself did not relieve the Contractor's obligation under the Main Contract (see paragraph 21 above), so the Plaintiff's design duty under the contract documents was not in any way altered. Upon inspection of the Mock-up on 21st April 2006, EMSD complained of blind spots of the Sensors in its emails of 25th April and 29th June 2006 (see paragraph 65 above and paragraph 95 below) and asked for rectification. This was when the Defendant first knew of the problems of blind spots and insufficient length of the Sensors. None of the Plaintiff's shop drawings, manufacturer's information, Mock-up and/or the Defendant's approval shall relieve the Plaintiff of its duty to ensure suitability/merchantability of the System and full compliance of the requirements under the Sub-contract. But the Plaintiff failed in discharging such duty, and was obliged to rectify the defects at its own cost without delay. The Defendant claimed that the Plaintiff's request for an additional order was unacceptable.

- (c) Did the Defendant prevent the operation of the payment machinery under the Main Contract? Since I am not required to decide whether the Opposite Hinge Sensors were defective or not, it is impossible for me to conclude (as Mr Chan suggested) that the Defendant's stance set out in paragraphs 85-91 above was so patently not maintainable that its failure to seek payment under the Main Contract amounted to prevention of the operation of the payment machinery under the Main Contract. This was especially so when the correspondence amongst the parties and EMSD showed that EMSD and the Defendant (whether rightly or wrongly) consistently maintained the Works were not satisfactorily completed due to inter alia the OHS Blind Spots which had not been properly rectified in accordance with the contract requirements. On 30th May 2006, there was a site discussion at TKOH attended by representatives of the parties, GEZE, EMSD and HA when HA raised concerns over inter alia the OHS Blind Spots. On 5th June 2006, GEZE wrote to the Plaintiff claiming that its hospital jobs all over the world used only 1 safety sensor on the opposite hinge side of the door panel because a person would enter from the door edge and not from the side close to the hinge, but proposing inter alia a remedial solution of adding 1 more safety sensor to address the concern over the OHS Blind Spots. On 6th June 2006, the Plaintiff wrote to the Defendant setting out GEZE's proposal which it claimed amounted to variation works because (a) the present settings of the Sensors were in accordance with the Mock-up that was acceptable to HA (see paragraph 64 above), and (b) the proposed works were a special requirement outside normal practice (see paragraph 93 above). The Plaintiff indicated its willingness to advise additional costs for such works on request. On 29th June 2006, EMSD sent email to the Defendant referring to the site discussion in May 2006 and requesting submission of the proposal for rectifying the defects by 3rd July 2006. On 15th July 2006, the Defendant referred to such email and urged the Plaintiff to immediately rectify the defects as required under the Sub-contract. Mr Kung was unsure, but I am persuaded the Plaintiff must have received a copy of EMSD's email of 29th June 2006 otherwise it would have asked for the attachment to the Defendant's letter of 15th July 2006. So by this time the Plaintiff was well aware of the problem with the OHS Blind Spots, and of the stance of EMSD and the Defendant that such problem was a defect that required rectification. On 20th July 2006, EMSD chased the Defendant for response to its email of 29th June 2006. On 8th August 2006, EMSD wrote to the Defendant drawing attention to the requirements of the Sensors in clause 7 of Appendix 2 of the Particular Specification and to clause 4a of the General Conditions. They required the Defendant to ensure all equipment and materials were fit for the purpose intended by the Main Contract. EMSD instructed the Defendant to review its design and submit proposal for rectifying the OHS Blind Spots by 16th August 2006. On 11th August 2006, the Defendant faxed EMSD's letter of 8th August 2006 to the Plaintiff for its further action and rectification. Although Mr Kung agreed the Plaintiff received the Defendant's fax dated 11th August 2006, he claimed to be unsure whether he read EMSD's letter of 8th August 2006 during August 2006 and even said he read it later because he had to prepare the O&M Manual after reading such letter. But EMSD's letter of 8th August 2006 had nothing to do with the O&M Manual. I find Mr Kung's evidence to be an evasive attempt to distance himself from awareness of EMSD's persistent stance that the

Sensors were defective. Mr Kung said that at a meeting at the Defendant's office on 2nd September 2006 he told Mr To the additional sensors were not included in the Sub-contract whereupon Mr To asked for a quotation. By its letter dated 12th September 2006 copied to GEZE, the Plaintiff reiterated its stance and stated it would consult GEZE for a separate quotation for the supply and installation of additional sensors. Notwithstanding the Plaintiff's correspondence, I am not persuaded I can safely rely on Mr Kung's assertion that the Plaintiff asked for a quotation for the additional sensors. Such assertion did not sit well with the Defendant's consistent approach in following EMSD's lead to insist that the Plaintiff was obliged under the Sub-contract to rectify the OHS Blind Spots. In any event, even though the Plaintiff submitted a quotation for additional sensors to the Defendant and insisted that it was pursuant to Mr To's request at the meeting on 2nd September 2006 and Mr Wong's telephone advice on 21st September 2006 (see the Plaintiff's letters of 15th and 22nd September 2006), I prefer Mr Wong's evidence that he did not ask for such quotation and note the Defendant promptly replied on 21st September 2006 to say the quotation was unacceptable. In the meantime, on 15th September 2006, EMSD wrote to the Defendant referring to its letters of 8th and 18th August 2006 and requesting a proposal for corrective action for the Sensors by 20th September 2006. Mr Kung agreed a copy of such letter was passed to the Plaintiff, but since the Defendant rejected the quotation the Plaintiff advised the Defendant on 29th September 2006 that it could not provide any further services unless [the Defendant] put [its] account in order. On 9th October 2006, the Defendant sent EMSD's reminder that requested rectification of the blind spots by 10th October 2006 to the Plaintiff by email. On 11th October 2006, the Defendant's solicitors wrote to the Plaintiff reiterating the Defendant's stance and stating that rectification of the OHS Blind Spots was not variation works but rectification of defects which should be carried out by the Plaintiff at its own cost. On 14th October 2006, the Defendant also wrote to the Plaintiff reiterating its stance. On 11th October 2006, the Defendant's solicitors proposed a meeting and/or testing with the Plaintiff and EMSD. On 16th October 2006, EMSD further reminded the Defendant to respond on corrective action for the Sensors by 20th October 2006, which request was (according to Mr Wong) passed to the Plaintiff for its action. But on the same day the Plaintiff wrote to the Defendant stating that no further works and commitments would be provided until its invoice was paid. Again on the same day, the Defendant's solicitors replied by reiterating the Defendant's stance and proposing a meeting with the Plaintiff and EMSD on 23rd October 2006. On 17th October 2006, EMSD wrote to the Defendant pressing for work schedule on major outstanding items by 21st October 2006 and completion of such items by 31st October 2006, which letter was copied to the Plaintiff's former solicitors. On 19th October 2006, the Plaintiff's former solicitors advised the Defendant's solicitors that the Plaintiff would not attend the proposed meeting with EMSD given its denial of liability for additional works and the lack of agenda for the proposed meeting. On the following day, the Defendant's solicitors sent EMSD's letter dated 17th October 2006 to the Plaintiff and asked the Plaintiff to withhold action for 14 days for the Defendant to supply documents/agenda for the proposed meeting with EMSD. The Defendant arranged a meeting with EMSD to be held on 26th October 2006. On 23rd October 2006, the Defendant's solicitors urged the Plaintiff to attend the meeting

and sent to the Plaintiff s former solicitors an agenda that included inter alia an item for rectification of the Sensors. On 25th October 2006, the Plaintiff s former solicitors replied stating there was no special matter that required the Plaintiff s attendance at the meeting. On 26th October 2006, EMSD and the Defendant held the meeting at TKOH. The minutes of such meeting (Minutes) noted that the Plaintiff should carry out safety sensor rectification within 2 weeks. On 3rd November 2006, the Plaintiff s former solicitors responded by saying that such issue had been the subject of numerous correspondence. In my view, without deciding on whether the OHS Blind Spots were true defects of the Works, the only conclusion from the above was that EMSD and also the Defendant rightly or wrongly considered they were true defects and declined to accept the Works which had not been satisfactorily completed pursuant to the contractual requirements. The Plaintiff was unable to show on a balance of probabilities that it did not contribute to EMSD s non-payment of the final payment under the Main Contract. It was not possible to say that the proposed remedial measure for the OHS Blind Spots was so plainly outside the scope of the Sub-contract that the Defendant in following EMSD s stance was preventing the operation of the payment machinery under the Main Contract. Once I have come to the aforesaid conclusion, it is unnecessary to consider the other alleged defects (eg alleged breakdown of some of the door systems and the labels) because the outstanding issue of the OHS Blind Spots, which had not been rectified by the Relevant Date, was by itself sufficient to defeat the Prevention Argument. However, I will deal with the matter of the O&M Manual briefly for completeness. XIV. O&M Manual As part of the Works under the Sub-contract, the Plaintiff was responsible for submitting the O&M Manual to the Defendant for onward submission to EMSD. On 18th August, 15th September and 16th October 2006, EMSD wrote to the Defendant listing various defects of the draft O&M Manual and requesting re-submission. Mr Kung agreed the Defendant passed copies of these letters to the Plaintiff for its action. But these defects remained outstanding, so the Minutes noted that the Plaintiff should re-submit the O&M Manual within 15 days except that AP certificate was to be arranged by the Defendant. On 25th October and 3rd November 2006, the Plaintiff s former solicitors confirmed the Plaintiff would act accordingly and re-submit the O&M Manual (as appropriate). Since the submission and acceptance of the O&M Manual were required for completion of the Works under the Main Contract (see clause 1.8.5(1) of the General Specification see paragraph 20 above), and there was no evidence that the Plaintiff rectified and re-submitted the O&M Manual prior to the Relevant Date, interference with the payment machinery under the Main Contract (if any) was plainly contributed to by the Plaintiff s default. XV. Prevention of final payment by the Defendant? Notwithstanding the above, Mr Chan submitted that some of the correspondence between the parties dealing with the payment issue supported the Prevention Argument. I shall review them below. On 12th September 2006, the Plaintiff wrote to the Defendant referring to the meeting at the Defendant s office on 2nd September 2006 regarding inter alia various financial issues , and noting that at the meeting [the Defendant] agreed to look into the matter [of the outstanding 80% Balance] and to put [the Defendant s] account in order as soon as possible. On 19th September 2006, the Plaintiff s account department followed up on the above letter by

writing to the Defendant to demand settlement of the 80% Balance. Mr Chan criticised the Defendant for failing to properly look into the matter of payment as promised because its reply of 21st September 2006 failed to address the matter of payment. I disagree. In fact, on the following day (ie 22nd September 2006) the Defendant issued a cheque for payment of the 1st Further Payment to the Plaintiff, which showed clearly the Defendant had looked into the matter of payment as promised and then responded by action. Indeed, the Defendant marked up the Plaintiff's fax dated 25th September 2006 with the following manuscript words, ie already reply about the payment. On 22nd September 2006, the Plaintiff wrote to the Defendant saying that during the telephone conversation with Mr Wong on 21st September 2006, [Mr Wong] confirmed that [the Defendant's] office would immediately effect 50% of the current outstanding Contract payment to [the Plaintiff]. (see also paragraph 6 above). The letter went on to remind that the 80% Balance should be paid within a reasonable time but should not be withheld for reasons that fell outside the existing completed and approved Works. Mr Wong was aware of the above letter, but denied that in failing to make payment as allegedly promised the Plaintiff was adopting delaying tactics. At that stage, the Receipt and EMSD Acceptance Provisions had not been satisfied, so the Plaintiff was not yet entitled to payment of the 80% Balance or any 50% payment as suggested. Indeed, the Defendant wrote to the Plaintiff on 26th September 2006 stating inter alia that [in] reply to [the Plaintiff's] concern on the ad-hoc payment. Please be informed that [the Defendant had] arranged an ad-hoc payment of HK\$150,000.00, and [the Defendant's] staff will inform [the Plaintiff's] A/C Department when the cheque is available. Although Mr Wong (who was not in charge of payment negotiations) did not know why the 1st Further Payment was described as an ad-hoc payment, I find it obvious from the matrix of facts that the Defendant made the 1st Further Payment on an ad-hoc basis outside the payment terms for the 80% Balance (which had not been satisfied as yet) pursuant to the Plaintiff's request. This was reflected by the Defendant's letter to the Plaintiff dated 29th September 2006 that emphasised it had paid the 1st Further Payment in excess of the payment terms (see also paragraph 118 below). By its letter dated 27th September 2006, the Plaintiff claimed the Defendant was using the excuse of the OHS Blind Spots to delay payment and demanded immediate payment of the outstanding balance of the Sub-contract Price within 14 days. On 29th September 2006, the Defendant replied stating inter alia that [notwithstanding] the issue of the sensor the 80% Balance was to be settled after the Defendant received final payment from EMSD within 45 days from the completion of T&C and acceptance of the Works by the EMSD, and the Plaintiff could not claim for the 80% Balance unless it could establish EMSD had accepted the Works. On the same day, the Plaintiff replied by stating that the 45-day credit period had expired, and threatened to take legal action if there were no payment within 14 days. On 11th October 2006, the Defendant's solicitors reiterated that EMSD had not accepted the Works and had withheld final payment to the Defendant, so notwithstanding the Defendant's generous advance payment of the 1st Further Payment, the Plaintiff was not entitled to the balance of the Sub-contract Price. On 11th October 2006, the Plaintiff issued an invoice for the Original Balance. On 14th October 2006, the Defendant wrote to the Plaintiff concerning the invoice stating that due to non-completion of the

Works, EMSD had not issued confirmation of completion, so the Plaintiff was not entitled to payment from the Defendant. On the same day, the Defendant wrote to EMSD stating that [further] to the satisfactory handover of the system to [EMSD s] staff and the representative of the Hospital ([the Defendant s TCR] dated 26 April 2006 as attached refers). [The Defendant] are still awaiting [EMSD s] issue of the Certificate of Completion as stipulated in clause 2.14.5 under Particular Specification. Mr Chan submitted that these 2 letters were surprisingly incompatible . I disagree and prefer Mr Wong s explanation. It was obvious from the series of correspondence amongst the parties and EMSD since April 2006 that EMSD and in turn the Defendant considered the Plaintiff had not completed the Works in that there were defects requiring rectification, so consequently EMSD did not issue any certificate of completion and the Defendant was in principle not yet entitled to payment under the Main Contract. This explained the Defendant s letter to the Plaintiff. But the Defendant was in an invidious position because it had to await the Plaintiff s rectification of the major defect of the OHS Blind Spots, but the Plaintiff was reluctant to do so. So according to Mr Wong (and I accept) the Defendant wrote to EMSD to attempt a request for the certificate of completion, failing which it hoped EMSD would give guidance on how to obtain such certificate. I see nothing sinister in the Defendant s efforts to maintain its stance against the Plaintiff whilst exploring with EMSD for a way of out of its unhappy position. I disagree with Mr Chan s criticism against Mr Wong for not thinking of requesting for the certificate of completion earlier, say, upon issuance of the TCR in April 2006. The Defendant all along tried to persuade the Plaintiff to rectify the OHS Blind Spots, and it was in/about September/October 2006 that it became quite clear that the Plaintiff was definitely unwilling to carry out any rectification of the OHS Blind Spots. In light of the aforesaid analysis, I do not agree with the Plaintiff s assertion that the Defendant failed to diligently/properly demand payment from EMSD or its superior, which prevented the proper functioning of the contract mechanism of getting payment. According to the Minutes, the Client s representative indicated it would accept a commercial settlement subject to agreed adjustment on the contract sum under the Main Contract for outstanding works concerning (a) provision of spare parts, (b) execution of DLP maintenance and (c) the OHS Blind Spots. On 1st November 2006, the Defendant s solicitors sent the Minutes to the Plaintiff s former solicitors for the Plaintiff s immediate action, and sought confirmation from the Plaintiff whether it would accept EMSD s proposal of commercial settlement by relieving the Plaintiff s duty in relation to the outstanding matters subject to deduction of money. On 3rd November 2006, the Plaintiff s former solicitors refused any deduction. Whilst the Plaintiff promised to deal with the outstanding matter of spare parts accordingly and sought confirmation of the date of practical completion for the commencement of the defect liability period, it noted the OHS Blind Spots were already subject of numerous correspondence. On 16th November 2006, the Plaintiff commenced the present proceedings. On 17th November 2006, the Defendant proposed draft variation for final payment under the Main Contract for EMSD s approval with deduction for spare parts, DLP maintenance and the OHS Blind Spots, and requested EMSD s settlement and release from the Works. On 24th November 2006, EMSD remarked on the proposal and suggested final total payment of

HK\$841,231.00. On 4th January 2007, the Defendant received HK\$217,309.80 from EMSD. On 22nd January 2007, the Defendant confirmed to the Plaintiff that EMSD had refused to accept the Works or issue notice of completion pursuant to clause 5c of the General Conditions, but would pay about 80% of the price under the Main Contract after deducting a sum of HK\$108,769.00. Consequently, the Defendant released the 2nd Further Payment to the Plaintiff on 24th January 2007. On 8th February 2007, the Defendant received a further sum of HK\$168,246.20 from EMSD. On 9th March 2007, the Defendant sent the cheque for the 3rd Further Payment to the Plaintiff without prejudice to its rights and claims against the Plaintiff. In my view, EMSD's deduction of HK\$108,769.00 from the price under the Main Contract for inter alia the OHS Blind Spots strongly suggested EMSD considered the Works defective or not in compliance with the contract requirements, so there was no certificate of completion or no acceptance of the Works in writing. It also strongly showed that EMSD's non-payment was not due to any effective prevention by the Defendant of the operation of the payment mechanism under the Main Contract. In light of the above analysis, the Prevention Argument fails. XVI. Conclusion The Plaintiff's claim is therefore dismissed. There is no reason why costs should not follow event. I therefore grant a costs order nisi that the Plaintiff do pay the Defendant costs of the action (including all costs reserved, if any, and the costs of the morning of the 1st day of trial) to be taxed if not agreed with certificate for counsel. As regards the costs of the preparation of the initial trial bundle which had to be replaced by reason of the matters raised in my directions dated 4th October 2007, the parties have agreed that costs be in the cause and I so order. (Marlene Ng) District Court Judge Representation: Mr Vod Chan instructed by Messrs Bennett Chan & Co for the Plaintiff. Mr Raymond Fong instructed by Messrs Fung, Wong, Ng & Lam for the Defendant. PAGE - PAGE DCCJ5663/2006/Judgment DCCJ5663/2006/Judgment A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V z k [L] k z x g x Y x Y x g x Y x Y r a r Q l a l a { m ^ U M U A & ` # \$ 98 h ; j %] p C \$ L y e [' n Z ^ t D / W s P) v H D L y e [98 h ; %] p C ' n Z ^ D / W s @ \ \ H c - o a - w s - 656 \ H P L a s e r J e t 1200 S e r i e s P C L 6 N e 00 : w i n s p o o l H P L a s e r J e t 1200 S e r i e s P C L 6 \ \ H c - o a - w s - 656 \ H P L a s e r J e t 1200 L e t t e r H P L a s e r J e t 1200 S e r i e s P C L 6 H j c) b 97 w f j B j g T) Y n @ { i 9 Z - 9] p V v r) \ \ H c - o a - w s - 656 \ H P L a s e r J e t 1200 L e t t e r H P L a s e r J e t 1200 S e r i e s P C L 6 H j c) b 97 w f j B j g T) Y n @ { i 9 Z - 9] p V v r) N o r m a l . d o t s e t u p M i c r o s o f t W o r d 9.0 T i t l e M i c r o s o f t W o r d D o c u m e n t M S W o r d D o c W o r d . D o c u m e n t . 8

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