

HONG KONG / JUDGMENT

HYDROTECH WATERPROOFING SOLUTIONS LTD v. SHUN YUEN CONSTRUCTION CO LTD

[2022] HKCFI 1170

COURT

Court of First Instance

DECIDED

25 April 2022

CASE / FILE NUMBER

HCCT44/2020

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

bjbj HCCT 44/2020

[2022] HKCFI 1170 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE CONSTRUCTION AND ARBITRATION
PROCEEDINGS NO 44 OF 2020

BETWEEN HYDROTECH WATERPROOFING SOLUTIONS LIMITED Plaintiff and SHUN YUEN
CONSTRUCTION COMPANY LIMITED Defendant

Before: Hon Mimmie Chan J in Court Dates of Hearing: 27 & 28 October 2021 and 2 November
2021 Date of Judgment: 25 April 2022

J U D G M E N T

Introduction

This is an unfortunate case, although regrettably not an uncommon occurrence in the local construction industry, when a contractor which had performed its services and provided materials, often without fault, ends up without payment as a result of some other party further up the many tiers of the parties relationship in a project makes default in payment either in deliberate delay, or as a result of financial difficulties and liquidation. Nor is this the first or only case in which the Court has to point out that it must and can only decide an outcome on the basis

of the facts and evidence as presented to the Court, according to the applicable legal principles and not out of sympathy for any particular party, and that the Court cannot rewrite a contract made between consenting parties. As a preliminary observation, this Court should also highlight that in cases where the Court has to determine an issue on the credibility of a witness, based on his/her recollection of events, regard has to be given to the fallibility and potential unreliability of human memory. A recent decision handed down by Coleman J (*Yu Man Fung Alice v Chiau Sing Chi Stephen*, unrep, HCA 1584/2012, 23 December 2020, [2020] HKCFI 1923) sets out a helpful summary on the reasons for the need for caution, when the question of whether a witness is truthful or untruthful is considered. Accounts of events narrated by a witness in Court, or given in a witness statement, may not be an unbiased recollection to be treated as totally reliable evidence. Assessment of a witness's demeanour, and of whether a witness has been discredited over matters to which he has given evidence, are two matters which will be considered by the Court in assessing the general credibility of a party's case on any particular issue. Other relevant and important considerations are whether the party's case is inherently plausible or implausible, and whether the party's case is, in a material way, contradicted by other evidence (documentary or otherwise) which is either undisputed or indisputable. In *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd Rep 403, Lord Pearce had observed: Credibility involves wider problems than mere demeanour which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or, though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so, has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over-much discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, it is so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part. As to the fallibility and potential unreliability of human memory, I can add little to the observations made by Coleman J in the case of *Yu Man Fung Alice v Chiau Sing Chi Stephen* [2020] HKCFI 1923:

56. The various judicial and academic observations would bear repetition at some length, but I shall attempt to restate them in more compressed form: While everyone knows that memory is fallible, we are often unaware of the full extent to which our own and other people's memories are unreliable. Common and related errors include supposing that (a) the stronger or more vivid a recollection, the more likely it is to be accurate, and (b) the more confident a person is of their recollection, the more likely it is to be accurate. But memory is not a mental record fixed at the time of the experience, then fading gradually over time. So it is a misconception that memory operates like a camera or video device making a fixed and chronological record of an experience. Rather, memories are fluid and malleable, being constantly rewritten whenever they are retrieved. What gets encoded into memory in the first place is determined by what a person attends to, what they have already stored in memory, and their expectations, needs and emotional state. This information is subsequently integrated or consolidated with other information already stored in a person's long-term, autobiographical memory. What is subsequently retrieved from that memory is determined by the same multitude of factors, and additionally by what drives the recollection of the event. What is retold about an experience depends on the person to whom one is talking, and what the purpose is of remembering that particular event. What gets remembered is reconstructed from the remnants of what was originally stored, taking account of whatever has already been forgotten or any interference from any new experiences across the interval between storing and retrieving a particular experience or event. So the content of memory for experiences involves active manipulation, integration with pre-existing information, and reconstruction of that information. Memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time. Therefore, and in addition, the process of civil litigation itself subjects the memories of witnesses to powerful biases. First, such witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has some type of loyalty to a party to the proceedings. Secondly, other subtler influences come into play, perhaps from the process of preparing a witness statement and coming to court to give evidence for one side in the dispute. The natural desire to assist, or not prejudice, the party calling the witness, and the desire to give a good impression in a public forum, can be significant (even if unconscious) motivating forces. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in this case) when a long time has already elapsed since the relevant events. The statement is usually drafted for a witness by a lawyer who is inevitably conscious of the significance for the issues of the case of what the witness does or does not say. The witness statement is made after the witness's memory has been refreshed by reading documents. Yet those documents themselves often include statements of case and other argumentative material, as well as documents not previously seen by the witness, or documents which came into existence after the events which the witness is being asked to recall. The witness statement may go through several iterations before it is finalised. Months or even years later, the witness will be asked to re-read his or

her statement and review documents again before giving evidence in court. The effect of the process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be in fact true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it, rather than on the original experience of the events. There is also a powerful tendency for people to remember past events concerning themselves in a self-enhancing light. It is also not uncommon for witnesses to deceive themselves in what are essentially honest but nonetheless false recollections. In deciding the issues arising and assessing the witnesses testimony given in this case, I have borne the above observations in mind.

The Background The Defendant is a company engaged in providing building, construction, maintenance and refurbishment services in Hong Kong. The Plaintiff is engaged in providing waterproofing solutions and services in Hong Kong. On about 29 October 2012, the Defendant entered into a contract (DSD Contract) with the Drainage Services Department of the Hong Kong Government (), under which the Defendant was appointed the Main Contractor to provide drainage building and civil maintenance and minor works for the plant and related facilities of DSD (Main Contract Works) for a period of 4 years commencing on 1 December 2012, until 30 November 2016. What is indisputable is that on about 1 November 2012, the Defendant entered into a written subcontract (Subcontract) with another company, Jetrod Pipeline Consultant and Engineering Limited (), under which all the works and services necessary to complete the DSD Contract were subcontracted by the Defendant to J, on back-to-back basis. Some 2 years later, in late 2014, Mr Antony McKee (McKee) of the Plaintiff attended a presentation at the offices of DSD (Presentation), to introduce the Plaintiff's specialist waterproofing solutions and services to the DSD and other companies and contractors present. McKee was introduced to Mr Wong Yat Sing (Wong) of the Defendant and Mr Herman Kwok (Kwok), a director of J, at the Presentation. According to the Plaintiff, McKee was approached by Kwok after the Presentation, in around December 2014 or early January 2015, and McKee was informed that DSD would soon be instructing the Defendant to issue invitations for quotations (Invitations) for specialist waterproofing works at various sites under the DSD Contract, and that the Plaintiff would be invited to tender for such specialist works. Discussions ensued between Kwok and McKee, and the Plaintiff claims that following these discussions, the Plaintiff received Invitations from the Defendant to provide quotations for the undertaking of waterproofing works at various sites. In accordance with the quotations submission requirements of the Defendant as set out in the Invitations, the Plaintiff issued quotations for specialist waterproofing works, which were submitted to the DSD, marked for the attention of the Defendant. The Plaintiff claims that it was later informed that its quotations had been accepted, and as a result, Task Orders were issued by DSD in respect of waterproofing works at the various sites under which work was required to be performed by the Defendant under the DSD Contract. The Plaintiff claims that under and pursuant to the above procedure, it had been appointed by the Defendant as its subcontractor or specialist contractor to carry out the relevant waterproofing works. On the evidence, there were 10 Task Orders issued for waterproofing works which were carried out by the Plaintiff, referred

to in the Amended Statement of Claim () as the Works Contracts . All the relevant works were completed by the Plaintiff, and it received payment of approximately \$3.4 million under 4 undisputed Task Orders. 6 Task Orders for a total sum of approximately \$4.03 million remained unpaid. There is no dispute that throughout the project, the claims for payment in respect of the works undertaken by the Plaintiff under the Task Orders were all submitted by the Plaintiff to J, and that it was J which had made the payments to the Plaintiff. Despite the Plaintiff's repeated demands, payment was not received from J, which was wound up by Order of the Court on 11 December 2019. In August 2020, the Plaintiff issued these proceedings against the Defendant, for payment of a sum of \$5,137,453.40 claimed to be outstanding and payable under the Task Orders, together with finance charges due on the sum, which were later quantified in the SOC at \$11,535,415.44. In defence, the Defendant denies that it had any direct contractual relationship with the Plaintiff, claiming that the Plaintiff was a subcontractor of J. The Defendant claims that its Subcontract was made with J, and that the final account under both the DSD Contract made between the Defendant and DSD, and the Subcontract made between the Defendant and J, had been agreed and finalized in August 2019. DSD had issued over 4,000 Task Orders between 2012 and 2016, covering an excess of 300 sites owned or operated by the DSD in Hong Kong. The Defendant claims that DSD had paid the Defendant over \$183 million, and that on its part, the Defendant had already paid J over \$140 million under the Subcontract, which included sums for the works carried out under the 10 Task Orders involving the Plaintiff. In the absence of any contract between the Plaintiff and the Defendant, the Defendant denies that there is any liability on its part to make payment of any of the amounts sought by the Plaintiff. The Agreed List of Issues identified 3 questions for determination by the Court:

- (1) Whether there is a contractual relationship between the Plaintiff and the Defendant?
- (2) If there is a contractual relationship between the Plaintiff and the Defendant, is the Defendant liable to the Plaintiff for any outstanding payments under the contract(s)?
- (3) If the Defendant is so liable then what sum is payable by the Defendant to the Plaintiff? The DSD Contract Counsel for the Defendant set out a summary of the features of the DSD Contract, which is useful in this case for the proper understanding of the process whereby the Plaintiff was invited to, and did, submit quotations for the works it carried out under the disputed agreement with the Defendant. There is no indication that the Plaintiff disputes the framework and process provided for under the DSD Contract, and the summary provided by Counsel for the Defendant is referred to below. The DSD Contract is not a fixed price contract. It is an amended NEC Term Services Contract, intended to be used for the appointment of a supplier for a period of time to manage and provide a service in accordance with a priced activity schedule, with interim payments to be made against the completion of activities. In this case, the Defendant was appointed for 4 years to manage and provide the services and work specified in the DSD Contract. The DSD Contract contains detailed provisions for the issue of instructions for works to be carried out during the term of the contract, in the form of Task Orders, and how the works are to be valued and

estimated in the Task Orders, and finally re-measured for payment. Task Orders were issued by the DSD, as instructions by the Service Manager (the Chief Engineer of the DSD or their representative), for works to be carried out. The Task Orders were issued to the Defendant, the Main Contractor, and not any other specified contractor, and include a description of the work required, the date for commencement and completion of works, the number of days for completion, and the estimated cost of the works to be carried out. As the DSD Contract is not a fixed price contract, it only gives an estimated total expenditure of \$160 million. The estimated cost stated in an individual Task Order is intended to provide an indicative Total of the Prices, being the total value of the Task Orders certified by the Service Manager in accordance with the DSD Contract. The Defendant is required to provide an estimated cost in accordance with the service information included in the DSD Contract prior to the issue of the Task Order, and the Service Manager may revise the estimated cost on the basis of the updated details of the work to be carried out in a Task Order. Although each Task Order provides a description of the work required, the Service Manager is empowered under the DSD Contract to revise the scope of work required, and to determine the exact extent and quantities of the work to be executed. The estimated value of the works stated in a Task Order is ascertained primarily by reference to the detailed price list included in the DSD Contract. Where the price list does not provide a specific price for works, the rate is to be ascertained by agreement between the Service Manager and the Defendant. For the DSD Contract, the process adopted by DSD to ascertain a rate or lump-sum for work not specifically priced in the price list was through a tendering process as and when works arose. As the DSD Contract is a remeasurement contract, the actual amount paid by DSD to the Defendant is the sum of the rate, whether as stated in the price list or as agreed, multiplied by the quantity of works actually performed. On the Defendant's case, it managed the works under the DSD Contract by appointing Wong as the contract manager responsible for carrying out the instructions received from DSD, administering the Task Orders, supervising performance of works and managing activities on site. To assist Wong, Kwok and Mr Winson Chan (Chan) who were respectively the director and project engineer of J (the Defendant's Subcontractor), were appointed to act as the Defendant's project manager and site agent. Other individuals were seconded by J to the Defendant, all pursuant to or in reliance on the Subcontract made between the Defendant and J on 1 November 2012. It is not disputed that in the course of its execution of the works, the Plaintiff had dealt with either Kwok or Chan, in terms of day to day contact and work on the site, or by correspondence or telephone calls. The Subcontract The Subcontract entered into between the Defendant and J expressly states that it covers all works and services necessary to complete the DSD Contract on back-to-back basis. The Defendant claims that it maintained a supervisory role under the Subcontract, but the works subcontracted to and undertaken by J include making applications for payment under and in accordance with the DSD Contract, and the submission of the necessary documents for that purpose. The Defendant highlighted the fact that J was entitled under the Subcontract (clause 2 (9) thereof) to further subcontract specialist works to other subcontractors, and that J was not required to seek the prior approval or consent of either the Defendant or DSD. J was only required to inform the

Defendant of its subcontracting arrangements on a monthly basis. The Plaintiff sought to dispute the existence of the Subcontract. In my judgment, there is no evidence whatsoever to discredit the Defendant's case that the Subcontract was made and signed with J in November 2012. The certificates for payment, the applications for payment, the payments made and all the documents submitted under the Subcontract support the existence of the Subcontract, and there is no basis for this Court to find otherwise or to rule on its invalidity. Is there a contract between the Plaintiff and the Defendant? The Plaintiff relies on the fact that it had, pursuant to the Invitations issued by the Defendant, or by J as agent for the Defendant, submitted quotations for works to be performed under the DSD Contract, and that its quotations had been accepted by the Defendant. The acceptance of the price shown in the quotations submitted by the Plaintiff had (at least in respect of 8 of the Task Orders) been communicated by DSD to the Defendant in writing (DSD Confirmation), and the acceptance of the quotations had also (on the Plaintiff's case) been communicated to the Plaintiff by Chan, acting as the Defendant's site agent. Task Orders were then issued by DSD to the Defendant, and the Plaintiff received instructions to commence work which it did carry out. On the Plaintiff's case, its quotations constituted offers to carry out the relevant work at the price stated in the quotations, which offers were accepted by the Defendant and communicated to the Plaintiff, thus constituting a valid contract concluded between the Plaintiff and the Defendant, evidenced and/or confirmed by the work performed by the Plaintiff and accepted by the Defendant. On the evidence, however, it is clear that in response to the Invitations issued by the Defendant on the instructions of DSD, what the Plaintiff did was to issue two quotations: one to the Defendant, for a higher amount, and one to J, for a lower amount, for the same specialist works to be carried out by the Plaintiff. This is indisputable and is admitted by the Plaintiff. On the documents, the difference (in percentages) between the higher and the lower quotations ranged from 38% to 17% in respect of the 10 Task Orders. In explaining the arrangement, McKee pointed out in his witness statement that he was approached by Kwok in around December 2014 or early January 2015, and was informed by Kwok that DSD would soon be instructing the Defendant to issue Invitations for quotations in respect of specialist waterproofing works at various sites under the DSD Contract, and that the Plaintiff would be invited to tender for such specialist works. McKee stated that it was from his discussion with Kwok that McKee came to understand the arrangement between the Defendant, J and the Plaintiff for specialist works under the DSD Contract. According to McKee's understanding, J was at all material times a representative of the Defendant, and acted as the Defendant's contract supervisor and agent, to manage the Defendant's contracts for specialist works and specialist subcontractors under the DSD Contract. McKee pointed out that J and the Plaintiff would conduct site visits prior to the issue of any quotation, and McKee's understanding was that the quotations were to give to DSD an indication of the expected cost of the required specialist works. This is in fact consistent with the Defendant's explanation as to the framework, processes and procedures under the DSD Contract, and also consistent with the Defendant's case as to its having subcontracted all the works to J, and the role played by J. At paragraph 8 (d) and (e) of his witness statement, McKee then stated: s role in managing (the Defendant

- s) contracts for specialist works also included managing payments, in that (the Defendant) would pay (the Plaintiff) via J, its payments arising under the Works Contracts. I understood that the way that J was paid for its services in managing the specialist works was that it would take a percentage of (the Plaintiff
- s) quotation as its payment. The arrangement was that (the Plaintiff) would issue the formal quotation to (the Defendant) for a specific amount. Alongside that, (the Plaintiff) would issue a lower quotation to J. J payment would essentially be the difference between the rate that (the Plaintiff) quoted to (the Defendant) and the rate that (the Plaintiff) quoted to J. In the construction industry, a quotation is used to confirm the unit rate that a sub-contractor is proposing to charge for doing the works. It is not a formal confirmation of a contract. (The Plaintiff) would only formally tender for specialist works contracts to (the Defendant), in response to (the Defendant
- s) (Invitations) issued pursuant to the DSD s instructions. If DSD approved of (the Plaintiff
- s) quotation, (the Plaintiff) would become a direct sub-contractor of (the Defendant) for the awarded contracts. My understanding was that J did not have a contractual role under the DSD Contract for specialist works and was always representing (the Defendant) as its agent. It is clear from McKee s statement, which was not altered by his testimony in Court, that the arrangement he described was only his own understanding. He never claimed that the arrangement was what Kwok, or anyone else, had told him. On the Plaintiff s case, J was the paymaster for the Defendant, which was why it had handled all the payment applications from the Plaintiff. Although McKee sought to explain that he had treated J as the Defendant s agent, and that J managed the performance of the Works Contracts, there is nothing in his witness statement which sufficiently explains why there had to be a higher quotation to the Defendant, and a lower quotation to J. The fact that J acted as the Defendant s site agent does not require the Plaintiff to issue to J a quotation for a separate and lower amount for the cost of the works. Even if some agency fee should be chargeable by J for its management of the specialist contracts and specialist works subcontracted by the Defendant to J, as McKee suggested to be his understanding, the fee should be payable by the Defendant to J, and a matter between the Defendant and J as a matter of invoicing. There is no need for the Plaintiff to issue a lower quotation to J for that purpose. In law, any fee payable by the Plaintiff to J for the management or supervision work carried out by J cannot properly be received by J from the Plaintiff without the consent and knowledge of its principal, the Defendant. As an experienced contractor operating in the Hong Kong construction market, McKee should have known that an agent seeking payment without the knowledge and approval of its principal may be unlawful, and should have found it questionable for Kwok to have asked for such an arrangement (if that was indeed an arrangement agreed between Kwok and McKee), effectively enabling the percentage referred to in McKee s statement, or the difference between the higher and the lower quotes, to be kept by J. In any event, it is more probable that McKee would have considered it prudent and proper to seek confirmation from Wong/the Defendant, if such an arrangement had indeed been proposed

by J and agreed. I do not find McKee's explanation for the Plaintiff's issue of a lower quotation to J to be plausible, and do not find his justification for the use of the higher/lower quotation credible as the basis for the Plaintiff's assertion that there was a direct contract between the Plaintiff and the Defendant. In fact, the Defendant had no knowledge that there was a lower quotation which had been issued by the Plaintiff to J, or that the difference between the higher and lower quotations was received by J. The Subcontract itself already provided for the price payable by the Defendant to J, for the work carried out by J. It was only after all the works had been completed, that the Defendant was informed of the double quotation arrangement, at a time when the Plaintiff turned to the Defendant for payment, after having failed to recover the outstanding sums from J. The Defendant had only received the higher amount quotations, and these had been used throughout by the Defendant and by DSD as the basis for calculating the estimated cost of the relevant work in each of the Task Orders issued by DSD and, as elaborated upon below, as the basis for calculating the apportionment of the sums payable to the Defendant and J. Counsel for the Plaintiff argued that the process of inviting the Plaintiff to submit quotations to the DSD marked for the attention of the Defendant, and DSD's acceptance of the quotations submitted, had no purpose if there was no intention to procure a direct contract between the Plaintiff and the Defendant. J could make its own quote, and did not have to ask the Plaintiff to submit a quote lower than J's own. Kwok was not cross-examined on this. However, according to the Defendant's evidence, Invitations for quotations were sent by the Defendant as part of its overall administrative obligations as the Main Contractor under the DSD Contract. The tendering process was for the Defendant to ascertain the estimated costs for the works which were to be made the subject matter of the Task Orders to be issued by the DSD, in accordance with the service information contained in the DSD Contract, which the Defendant was required to do in order to provide an indicative Total of the Prices. The process adopted by DSD was to ascertain a rate or lump sum for those works not specifically priced in the price list as and when the necessity for such work arose. The quotations issued by the Plaintiff to the Defendant were submitted to and used by DSD and the Defendant throughout the term of the project as the basis for calculating the estimated cost or price in each of the Task Orders issued by the DSD. As Counsel for the Defendant pointed out, notwithstanding the fact that DSD may have accepted the higher quotation submitted by the Plaintiff to the Defendant, as the basis for the estimated cost of the work in question, DSD did not have any right under the DSD Contract to nominate or approve any named contractor for the works, nor did DSD have the right or authority to accept quotations on behalf of the Defendant. The Task Orders issued by the DSD set out an estimated price which was, on the evidence, calculated on the basis of the Plaintiff's higher quotation plus an addition of approximately 20% margin payable to the Defendant under the DSD Contract, and a further contingency sum. Counsel also pointed out that J had the right under the Subcontract, either to carry out the work itself, or to appoint a sub-subcontractor to do so. On behalf of the Plaintiff, Counsel argued that the double quotation made no commercial sense to J, if there was no intention to procure a direct contract between the Plaintiff and the Defendant. According to the Defendant, the Task Order estimated price was based on the

lowest quotation received, plus a 20% uplift, and the Defendant was to keep 8% of the uplift sum, with 92% of the uplift sum to be received by J, and to be paid by J to its own subcontractors including the Plaintiff. One explanation offered for and apparent from the use of the higher and lower quotations would be to enable J to increase the margin it received, by using the higher quotation issued by the Plaintiff for submission to the Defendant and DSD. The lower quotation represented the true price for the Plaintiff's work as offered by the Plaintiff to J, and as accepted by J (elaborated below). The Plaintiff claims that on the evidence, DSD had informed the Defendant, and (on its case) the Defendant had further informed the Plaintiff through the Defendant's agent Chan, that the lowest quotation submitted by the Plaintiff, at the price stated in the relevant quotation for the works, was accepted. The DSD Confirmation further stated that the Plaintiff should be requested to submit the materials in accordance with the specifications for the works. It was contended for the Plaintiff that the DSD Confirmation of acceptance constituted acceptance in law of the Plaintiff's offer, and that the relevant Works Contract was concluded upon Chan's communication to the Plaintiff of the acceptance of the Plaintiff's quotation. Since the Defendant had only received the higher quotations issued by the Plaintiff, and only those higher quotations had been forwarded to the DSD, DSD could only have accepted the higher quotations of the Plaintiff. It is material that, even on the Plaintiff's evidence, as accepted by McKee in cross-examination, the Plaintiff had only ever intended the lower price contained in the quotations it submitted to J to be the price at which the specialist works were to be carried out by the Plaintiff. McKee claimed and emphasized in his own statement (at paragraph 8(d)) that in the construction industry, a quotation is used only to confirm the rate proposed to be charged and is not a formal confirmation of a contract. He understood that the mere issue of the higher quotation to the Defendant does not constitute confirmation of a contract. The interim and final invoices issued by the Plaintiff in respect of the Works Contract were issued to J on the basis of the lower price contained in the quotations submitted to J. In respect of the 4 undisputed and settled Task Orders, J paid, and the Plaintiff accepted payment, for the works carried out, on the basis of the lower prices of the quotations submitted to J. The Plaintiff never sought payment of any invoice it had issued to the Defendant, for the higher quotations. In relation to the 10 Task Orders, at least 7 of the lower quotations issued by the Plaintiff to J were accepted by J in writing, with the signature and company chop of J imprinted. On the documentary and contemporaneous evidence, there is clear evidence of an offer made by the Plaintiff to J for the cost of the works covered, and acceptance of such offer by J, with the intention to create legal relations between the Plaintiff and J. On Kwok's evidence, J's acceptance in the form of its signature to the Plaintiff's quotations would have been sent to the Plaintiff, either by fax, or by delivery to the Plaintiff, and in any event was known to the Plaintiff, as evident from the Plaintiff's execution of the works under the relevant quotations. There is no evidence of the Plaintiff ever chasing the Defendant or J for acceptance of any of its quotations. On behalf of the Defendant, it was argued that an offer contained in the Plaintiff's higher quotations can only be accepted by the party to whom the offer was addressed (in this case DSD/the Defendant), and not by a third party unless the third party is the latter's agent. On the Plaintiff's case, the

acceptance of its quotations to the Defendant was allegedly notified by Chan to the Plaintiff, and according to the Defendant, there is no evidence that Chan as the Defendant's site agent/ project engineer had the actual or ostensible authority of the Defendant to enter into a contract with the Plaintiff. I agree that even if Chan was the site agent, it does not follow from that fact that Chan in such capacity would have the Defendant's authority to accept the Plaintiff's offer, and to bind the Defendant to any contract between the Plaintiff and the Defendant. As the site agent, Chan's authority would reasonably be expected to be limited to matters such as giving instructions to contractors to carry out works, approving contractors works and material, or supervising the contractor's works. I am not persuaded that a site agent such as Chan would have the implied or usual authority to enter into contracts on behalf of the Defendant, its principal. However, and in any event, even if it can be accepted that Chan (as the Defendant's site agent) had the authority to communicate the Defendant's acceptance of the Plaintiff's offer in its quotation, and even if Chan had so informed the Plaintiff that its quotation for the works had been accepted, such communication of acceptance is, on the evidence in this case, uncertain and ambiguous. As the Plaintiff had issued a higher quotation to the Defendant, and a lower quotation to J, it is uncertain whether Chan (who was at the material time the staff of J, but the Defendant's site agent for the purposes of the works at the site) was referring to the acceptance of the higher quotation issued to the Defendant, or the lower quotation issued to J. By contrast, there is clear written evidence of J's acceptance of the Plaintiff's quotations for the lower amount. I accept the submissions made for the Defendant, that there can only be one contract, either between the Plaintiff and the Defendant, or between the Plaintiff and J, for the Plaintiff's execution of the works under the Works Contract. The conduct and intentions of a party must be interpreted objectively, but also with regard to the factual matrix known to the parties. As a matter of fact, the Defendant in this case had signed a Subcontract with J in November

2012. In accepting the Plaintiff's offer constituted by the quotations it had issued, Chan, Kwok and the Defendant could not have intended to accept the Plaintiff's offer as the Defendant's subcontractor. It is inherently improbable that the Defendant could have any intention to contract directly with the Plaintiff, when it had already signed a Subcontract with J for the same works. The parties cannot be said to be *ad idem*, but in this respect, the Plaintiff denied any knowledge of the Subcontract. At paragraph 7 of the SOC, the Plaintiff pleads that throughout the parties' course of dealings, both the Plaintiff and the Defendant had acted on the basis that the contracts in respect of the relevant waterproofing works were made between the Plaintiff and the Defendant. The Plaintiff argued that the conduct of the parties in this case constituted and evidenced the conclusion of the Works Contract, but I am not satisfied that the conduct relied upon by the Plaintiff is sufficiently clear and unequivocal. In *Shanghai Tongi Science & Technology Industrial Co Ltd v Casil Clearing Ltd* (2004) 7 HKCFAR 79, the Court pointed out that the burden of establishing the inference of a binding contract from the conduct of the parties is on the person asserting its existence, and further, that the Court will not imply such a contract lightly. In *Shanghai Tongi*, the Court of Final Appeal set out the legal principles on the relevant considerations for

inferring a contract from the conduct of the parties. At paragraph 36 of the judgment, Ribeiro PJ observed: It is clear that a legally binding contract may be inferred from the conduct of the parties. In deciding whether a contract should be implied, the court adopts as its starting point what has generally been called an objective test Ribeiro PJ also highlighted, at paragraph 38 of the judgment, the burden of proof and the evidence required:

38. The burden of establishing such a contract is on the person asserting its existence: *Brogden v Metropolitan Railway* (1877) 2 App Cas 666 at 693. And the court will not imply such a contract lightly. The conduct relied on must be unequivocally referable to the contract sought to be inferred. As Bingaman LJ said in a subsequent passage in *The Aramis* (at 224): I do not think it is enough for the party seeking the implication of a contract to obtain it might as an answer to [the above-mentioned] questions, for it would, in my view, be contrary to principle to countenance the implication of a contract from conduct if the conduct relied upon is no more consistent with an intention to contract than with an intention not to contract. It must, surely, be necessary to identify conduct referable to the contract contended for or, at the very least, conduct inconsistent with there being no contract made between the parties to the effect contended for. Put another way, I think it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract.
39. In *Mitsui & Co Ltd v Novorossiysk Shipping Co* [1993] 1 Lloyd s Rep 311 at 320, Staughton LJ, following *The Aramis*, put the requirement of unequivocality in the following terms: it is not enough to show that the parties have done something more than, or something different from, what they were already bound to do under obligation owed to others. What they do must be consistent only with there being a new contract implied, and inconsistent with there being no such contract.
40. Where the conduct in question satisfies the objective test the law generally excludes as irrelevant evidence of a party's actual intentions regarding the contract to be implied. In *Allied Marine Transport Ltd v Vale Do Rio Doce Navegacao SA (The Leonidas D)* [1985] 1 WLR 925 at 936, Robert Goff LJ explained this as follows: if one party, O, so acts that his conduct, objectively considered, constitutes an offer, and the other party, A, believing that the conduct of O represent his actual intention, accepts O's offer, then a contract will come into existence, and on those facts it will make no difference if O did not in fact intend to make an offer, or if he misunderstood A's acceptance, so that O's state of mind is, in such circumstances, irrelevant. (Emphases added) The conduct relied upon by the Plaintiff as inferring the direct contract contended, of the Plaintiff having been instructed to commence work, the Plaintiff's execution of the relevant works and its preparation of the method statements and other documents for the relevant works, its submissions for payment, etc cannot be said to be unequivocally referable to the Works Contract alleged by the Plaintiff and which is sought to be inferred. All such conduct is no more consistent with the alleged Works Contract between the Plaintiff and the Defendant than with a sub-subcontract

between the Plaintiff and J. They do not satisfy the tests highlighted by Ribeiro PJ in Shanghai Tongi, as being consistent only with there being a direct contract between the Plaintiff and the Defendant, and inconsistent with there being no such contract. On the evidence in this case, Counsel for the Defendant argued that the conduct of the Plaintiff is in fact more consistent with the existence of a contract between the Plaintiff and J. Counsel emphasized that the Plaintiff had issued invoices to J and had sought payment from J, and on the basis of the lower quotations issued to J. Before September 2019, the Plaintiff had never sought payment of any outstanding sum from the Defendant. In respect of the payments which were made by J, the Plaintiff had never claimed that it had been underpaid. In respect of the Plaintiff's claims for the outstanding sums, the Defendant pointed out that it had made payment to J, and that it was the latter which had failed to pay the Plaintiff. The Defendant further emphasized the fact that at all material times before September 2019, the Plaintiff had only been seeking payment of the outstanding sum of approximately \$4 million from J, and when the Plaintiff approached the Defendant in mid-2017, it had still maintained that the outstanding sum was owed by J to the Plaintiff, and that the Plaintiff was only seeking the Defendant's assistance to resolve the issue of the outstanding payment from J. This is all supported by the contemporaneous correspondence. On 7 July 2017, McKee had sent an email to Chan and Kwok of J in respect of an outstanding payment of \$4,050,082.84. In the email, McKee referred to an earlier meeting between himself, Kwok and Chan of J, at which Kwok had claimed that the outstanding payment was due to an internal dispute between the directors within J, and that full payment would be made to the Plaintiff within 6 months. McKee concluded the email by stating: We agree that the outstanding amount owed by (J) to (the Plaintiff) is as below (setting out a table particularized in a sum of \$4,050,082.84). On 14 July 2017, McKee emailed Wong of the Defendant, forwarding his earlier email to J, and stating: Please find below an email addressed to (J) giving details of the amounts due to (the Plaintiff) for works completed under your DST contract DS/2012/01. We understand the payments are being withheld due to an internal dispute within (J). We would appreciate if you could assist in us gaining full payment of the monies due by withholding all future payments due to (J) by (the Defendant) until all payments to (the Plaintiff) have been made. Your assistance in this would be greatly appreciated. (Emphasis added) McKee issued a letter to the Defendant on 8 September 2017, in which it was stated: I would like to ask for your assistance regarding payments due to my company, (the Plaintiff), for work completed under your DSD Term maintenance contract DC/2012/01. (J) presently owe us over HK\$5 million. We have tried repeatedly to receive the money from (J) but to no avail. We understand from your colleague (Wong) that (the Defendant) have received all the payments for the works completed by (the Plaintiff) from DSD and have forwarded them to (J) for payment. As J's contract with you is still in the maintenance period you may be in a position to exert some pressure on (J) to pay to (the Plaintiff) the outstanding sums owed. We understand that (J) are also partnering with (the Defendant) on your recently awarded Highways contract 01/HY/2014 contract. (Emphases added) The Defendant pointed out that the purpose of the 8 September 2017 letter was clearly stated: that the sums due to the Plaintiff in respect of the relevant works were owed by J, and that because J's own contract

with the Defendant was still in the maintenance period, and also because the Defendant was still working and contracting with J on other projects, the Plaintiff considered that the Defendant would be in a position to assist the Plaintiff to recover payment from the Defendant, by exerting pressure on the Defendant to pay the outstanding sums owed to the Plaintiff. There was no suggestion that the money was due from the Defendant to the Plaintiff. The Plaintiff then wrote to DSD on 9 January 2018 to seek its assistance in obtaining payment due from s sub-contractor . Counsel for the Defendant highlighted that even on the Plaintiff s case, the Defendant was at all material times DSD s Main Contractor. It follows that even in its letter to DSD of 9 January 2018, the Plaintiff had considered that the sum owing to it was due from DSD s sub contractor and this is totally contradictory to the claim made in these proceedings, that the sum outstanding for the Plaintiff s work under the alleged Works Contracts is due to the Plaintiff from the Main Contractor for the works, ie the Defendant, under a direct contract between the Plaintiff and the Defendant. The Defendant therefore pointed out, and I accept this to be the case, that the contemporaneous correspondence all support and evidence the fact that at all material times, the Plaintiff had regarded the sums due under the Works Contract to be due from J, its counterparty, to the Plaintiff. The Defendant highlighted the fact that the sum of \$4,050,082.84 referred to in the July emails was calculated on the basis of the lower quotations issued by the Plaintiff to J, which were the only quotations intended to be binding on and enforceable by the Plaintiff, regardless of the higher quotations and any invoices issued to the Defendant. In cross-examination, McKee in fact acknowledged and admitted that by his emails in July 2017 and his letter of September 2017, the Plaintiff was only seeking payment from J, and not from the Defendant. McKee accepted that the Plaintiff was only asking the Defendant to assist the Plaintiff s recovery from J, by withholding further payments to J before the payments outstanding from J to the Plaintiff were made. The letter of 8 September 2017 from the Plaintiff to the Defendant referred (for the first time) to a sum of \$5 million, instead of the sum of \$4,050,082.84 referred to in the July emails and the Plaintiff s earlier demands to J for payment. McKee claims that this was on the basis that the sum was due under the Plaintiff s contract with the Defendant and DSD, but such an assertion is inconsistent with the Plaintiff s earlier demands on J, also contradicts the claim made in its own letter to DSD of 9 January 2018, and can only be regarded as entirely self-serving. The SMP and Declarations The Plaintiff placed much reliance on the Subcontractor Management Plans () prepared and submitted by the Defendant, and on the declarations made by J of there being no hidden subcontracting (Declarations). These are contended to be the best contemporaneous evidence of the contractual relationship between the Plaintiff and the Defendant, as the Plaintiff argued that it is inherently implausible for J to have made false declarations that there was no hidden subcontracting on its part. In my judgment, the existence and contents of the SMP and the Declarations can only be taken into consideration with the other available evidence when the Court decides, on the totality of the evidence, whether there is a direct contract made between the Plaintiff and the Defendant, as the Plaintiff alleges. As the Plaintiff contended, it may go to show the inherent plausibility and probability of the case asserted by each of the Plaintiff and the Defendant. However, whether a contract exists is

also a matter of law. Even if the parties themselves thought that there was a valid agreement made between them, if there was no valid offer, acceptance of the offer, and/or intentions to create legal relations, there is in law no valid contract concluded. Conversely, if there was an offer, acceptance, communication of acceptance, with the necessary intention to create legal relationship, there is a valid contract in law notwithstanding that the parties may have erroneously believed that there was no binding agreement between them. The Plaintiff relies on the fact that under the DSD Contract, the Defendant had the duty to submit SMPs to DSD in the course of the contract. The SMP was required to contain detailed information on the works to be subcontracted, with details of the subcontractors, how the Defendant would ensure its subcontractors report their subcontracting arrangements, and put in place a system by which declarations are made that there are no hidden subcontracting arrangements. The Plaintiff claims that according to the Defendant's SMPs, dated 27 March and 10 September 2015, 11 August and 5 October 2016, the Plaintiff was shown to be the Defendant's specialist subcontractor, and J was listed as one of the Defendant's civil subcontractors. The Defendant's stance is that the Plaintiff is not entitled to rely on these documents of which it had no knowledge until the commencement of these proceedings, and that they were internal documents prepared by the Defendant pursuant to and under the DSD Contract to which the Plaintiff is not a party. If there was any breach of the DSD Contract, or of any of the declarations made by J or by the Defendant, these are matters to be dealt with under the DSD Contract, and are claims which can only be made by the DSD. Whilst I accept that the Plaintiff can refer to these documents as evidence of the parties' conduct, and for the purpose of showing (as the Plaintiff contends) the plausibility of the existence of the Works Contracts between the Plaintiff and the Defendant, on the basis that it would be inherently improbable for J to have made false declarations, I do not consider that the SMP and the Declarations can conclusively establish the Works Contract alleged. The Plaintiff was named in some of the documents referred to (including the warranties), as the party doing the relevant specialist work. This can mean that the Plaintiff was named as the contractor to give it access to the site (as the Defendant contends), and the Plaintiff can be named as the party carrying out the work, either as a direct contractor of the Defendant, but just as equally probable, as a subcontractor of J. It does not in other words refer unequivocally to a direct contract between the Plaintiff and the Defendant which the Plaintiff seeks the Court to infer. Wong of the Defendant disagreed that the layout or content of the SMP was correct in showing that the Plaintiff was on the same tier as J, as a subcontractor of the Defendant in relation to the specialist works. According to Wong, the purpose of the SMP was to show the actual subcontractor carrying out the specific work under the DSD Contract. As for Kwok, his evidence was that he had not seen the SMP prepared by the Defendant and submitted to the DSD. As for the Declarations, Kwok was cross-examined on the Declarations made by Wong Chan Pang of J dated 17 June 2013 and 26 May 2014, which were submitted to the Defendant. In the first document, it was declared that there was no lower tier subcontractor to be sublet with any Subcontract work from J, and that J understood if the declaration turned out to be false, a criminal offence may be committed. In the second document, J sought the Defendant's approval to sublet

construction specialist trades to 2 demolition and landscaping contractors, and declared that excepting those sub-subcontractors, there was no lower tier subcontractor to be sublet with any Subcontract work from J. These declarations in fact predated the Task Orders to J, which were issued between February 2015 and September 2016, and cannot assist the Plaintiff's case because at the date of those declarations, they were not untrue by virtue of any subcontracting by J to the Plaintiff. In closing, Counsel for the Plaintiff only submitted that there was no Declaration submitted in respect of any sub-contracting by J to the Plaintiff, which the Plaintiff contended was required under the DSD Contract, as the Defendant had the duty to ensure its subcontractors report on their subcontracting arrangements and changes thereto. It is pertinent, as Counsel for the Defendant rightly pointed out, that the Court only has before it the terms contained in the DSD Contract, and there is no evidence presented to the Court as to how those provisions were operated in practice between the DSD and the Defendant in the course of the 4 years of the term of the DSD Contract, and the 4,000 Task Orders which were issued thereunder relating to the hundreds of sites throughout Hong Kong. Whether the contract provisions (with regard to the SMP and the Declarations) had been varied by mutual consent of the relevant parties, or had been waived, is unknown and is not for determination by this Court. The Defendant's case on the SMP and the Declarations is on the premise that the Defendant and J should have complied with their obligations set out in the DSD Contract and the Subcontract, and were not in breach thereof. However, these questions are not in issue between the parties to the DSD Contract and the Subcontract, and evidence has not been called in this action on the operation and implementation of the DSD Contract, as the issue in dispute is not whether the Defendant, and/or J, are in breach of their contractual duties to DSD. As opposed to assumptions and the lack of evidence on the actual workings of the DSD Contract between DSD and the Defendant and J, there is evidence adduced in this action which goes against the existence or conclusion of the Works Contract contended by the Plaintiff. Bearing in mind that the burden of proof is on the Plaintiff in this case, my judgment is that it is unreliable and inappropriate to decide the Plaintiff's case on the assumption that the Declarations were true, and that the SMPs are entirely correct in their description of the respective roles of the Plaintiff and J, as the Plaintiff urged this Court to do. It is particularly inappropriate to proceed on the assumption that J would not act in breach of its contractual obligations, when there is clear and undisputed evidence that it had been in breach of its duty, to make payment to the Plaintiff of the sums it had received from the Defendant for the specialist works carried out by the Plaintiff.

Disposition

For all the above reasons, my finding is that there is no direct contractual relationship between the Plaintiff and the Defendant, such that the Defendant is not liable to the Plaintiff for any outstanding payments under the contracts in question. The Plaintiff's claims made in this action are dismissed, with costs to the Defendant. Such order shall be made absolute unless application for variation is made within 14 days. For avoidance of any doubt, the costs order includes

17 / 17