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Case Comment

ON CONTRACTUAL INTERPRETATION AND THE IMPORTANCE OF PLEADINGS AND SUBMISSIONS IN TECHNICAL DISPUTES

ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd [2022] SGHC 257

[2023] SAL Prac 7

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I. The facts

1 This case concerned a Public Utilities Board ("PUB") contract to construct a potable water pipeline[1] (the "Project"). PUB engaged Tiong Seng Contractors Pte Ltd ("TSC") as the main contractor. TSC then subcontracted the Project to Tiong Seng Civil Engineering Pte Ltd ("TSCE"), a company that is part of the same group of companies as TSC. TSCE in turn entered into a sub-subcontract with ICOP Construction (SG) Pte Ltd ("ICOP") "for the performance of microtunnelling works which constitute part of the Project".[2]

1 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [3].
2 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [3].

2 ICOP was engaged to install: "124m of DN1200mm Reinforced Concrete Composite Pipe with built in Mild Steel Collar" and "2229m of DN1600mm" of the same type of pipe.[3]

3 For a description of the works involved, it is convenient to reproduce para 7 of the judgment in full:

> 7 To this, I should call to attention three other points regarding the process of microtunnelling which are relevant in this dispute. First, pressure is transferred from the jacking frame through each pipe section. This being the case, it is clearly necessary for something to ensure the smooth transfer of pressure between each section. Ordinarily, timber pressure transfer rings (also known as 'chipboard') are used. However, ICOP also has superior hydraulic joints which enable pressure to be transferred more effectively, and, therefore, pipelines can be installed with a tighter curvature. Second, when exiting the launching shaft, the MTBM needs to break through a wall. This is called the 'headwall', and at its centre is a 'soft eye', a weak section of concrete and a watertight seal which allows the MTBM to be launched without water or other material flooding into the shaft. This function requires the seal to be able to sustain a certain amount of pressure, depending on various factors. *Lastly, upon reaching the receiving shaft, the MTBM needs to be lifted out as a whole by crane. Therefore, the whole length of the shaft needs to be free from protrusions that would block the path of the MTBM as it is being lifted out. Should there be obstructions, the MTBM would need to be dismantled prior to being removed, and this would result in additional costs.* [emphasis added]

4 Lee Seiu Kin J framed 11 issues that needed his determination. However, this case note will only deal with Issue 4, which concerned the recovery and extraction of the microtunnel boring machine ("MTBM") from the receiving shaft, namely:[4]

> Issue 4: Whether ICOP may recover, as damages, the additional costs it incurred from having to extensively dismantle the MTBM before it could be extracted from the receiving shaft of Drive 2 ('Shaft P5-1'). ICOP claimed that these steps were required because TSCE failed to construct Shaft P5-1 in accordance with

3 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [4].

4 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [11(d)].

> the specifications in the Subcontract, or its duty of care. On this, ICOP pleads that the losses it suffered amounts to $104,154.54.

5 The lifting process required the shaft to be free from protrusions that would block the path of the MTBM as it was being lifted out.[5] The shaft was not free from protrusions. This hindered the extraction of the MTBM and gave rise to Issue 4.

6 Because of the protrusions ICOP could not retrieve the MTBM without dismantling it. This cost ICOP $104,154.54.

7 Lee J made the following findings:

> (a) The lack of working space was a consequence of a protruding pipe cap in the shaft.[6]
>
> (b) In the case of Shaft P5–1 as the receiving shaft, various appendices to the Subcontract provided that the shaft was to be constructed with a minimum internal diameter of 7.5m "wall to wall".[7]
>
> (c) TSCE knew that the MTBM was to be extracted in one piece and that, in order to accomplish this, a certain minimum working space was required.[8]

8 The responsibility for the shaft construction fell on TSCE.[9]

9 ICOP's case is neatly summarised at para 39 of the judgment:

> 39 It is ICOP's primary case that TSCE was expressly obliged by the Matrix of Responsibilities ('MOR') to the Subcontract to construct shafts 'with flushed headwall/backwall and reinforced concrete base slab *according to the project design* and microtunnelling requirement' [emphasis added]. In the case

5 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [7].
6 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [38].
7 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [38].
8 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [40].
9 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [39].

> of Shaft P5-1 as the receiving shaft, various appendices to the Subcontract provided that the shaft was to be constructed with a minimum internal diameter of 7.5m 'wall to wall'. Relying on this term in the Subcontract, ICOP pleads that TSCE was obliged to construct Shaft P5-1 with 7.5m of 'working space' and/or 'free from any protruding objects'. As secondary legal bases for its claim, ICOP pleads that, even if TSCE was not obliged by the express terms of the Subcontract, such a term ought to be implied, or, in the further alternative, that such obligation should be imposed as a tortious duty of care.

10 This was the Protrusion Issue.

11 There was also another problem, the Alignment Issue:[10]

> 40 … Second, apart from its failure to ensure that Shaft P5-1 had 7.5m of 'working space' and/or was 'free from any protruding objects', ICOP submits that TSCE also failed to 'properly plan the alignment of the tunnel axis' such that the point at which the MTBM broke into the receiving shaft was off-centre. More specifically, ICOP submits that TSCE failed to 'account for a subterranean 400kV cable joint bay when it provided the initial tunnel alignment to ICOP' and, as a result, it was necessary for subsequent changes to be made. These changes led to the exit point in Shaft P5-1 being off-centre.

12 Lee J also made the following finding at para 41 of the judgment:

> 41 It can be seen from this diagram which illustrates the final alignment used in Shaft P5-1 that the exit point of the MTBM is not centred. In and of itself, this misalignment does not seem to have been problematic. ***However, alongside the protruding pipe cap, it was one of two features of Shaft P5-1 which collectively prevented ICOP from extracting the MTBM in one piece***. As ICOP submits, 'if the axis of the DN1600[mm] [Pipeline] [went] directly … past the axis of the shaft, … there would have been enough clearance for the MTBM to be removed *even though* the [pipe cap] was present'. In this connection, ICOP also submits that it had brought this issue to TSCE's attention prior to the commencement of Drive 2, but to no avail. Ultimately, TSCE was unable to either centre the exit point of the MTBM or

10 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [40].

> remove the pipe cap. [emphasis in italics in original; emphasis in bold italics added]

II. The Protrusion Issue

13 On the Protrusion Issue, the issue was this:

(a) What TSCE was to build: a Shaft P5-1 with a minimum internal diameter of 7.5m, "wall to wall" ("the 7.5m Spec").[11]

(b) What TSCE built: a shaft that failed to remove (or included) a protruding pipe cap.[12]

III. Whether TSCE fulfilled its contractual duty

14 While the court held that the Protrusion Issue and the Alignment Issue *jointly caused* the extraction issue faced by ICOP,[13] the case commentary looks at whether TSCE fulfilled its contractual duty of building a shaft with minimum diameter of 7.5m "wall to wall".

15 The court found at para 43 of the judgment that TSCE complied with the 7.5m Spec:

> 43 First, I reject ICOP's attempt to interpolate the words 'working space' and 'free[dom] from protruding objects' into the clear terms of the Subcontract. *The express words of the Subcontract simply provided that TSCE was to build Shaft P5-1 with a minimum internal diameter of 7.5m, 'wall to wall'. This is a plain, clear and strict obligation which TSCE fulfilled and, if ICOP (particularly, as the microtunnelling specialist) required TSCE to adhere to more particular specifications, the onus lay on it to prescribe those specifications during the contractual negotiation and drafting process. This is not an omission properly cured by way of interpretation after the fact.* Second, for the same reasons, I do not consider it appropriate to imply a term to this effect. The ordinary test for implication in

11 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [43].

12 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [41].

13 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [43].

> *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 applies, and there seems to me no gap which needs to be filled by the implication of such a specific duty. For completeness, I also note that ICOP does not make any submissions in respect of implication. It is simply asserted that such a term should be implied. [emphasis added]

16 It is curious that the court found, on a plain reading of the specification, that TSCE fulfilled its *strict* obligation to build a shaft with a minimum internal diameter of 7.5m "wall to wall" where the pipe cap protruded, giving rise to the Protruding Issue.

17 If what the court meant was that there was *in fact* a shaft which measured 7.5m wall to wall notwithstanding the presence of the single protruding pipe cap, then the question of how the limits of "compliance" of *this* nature are to be determined arises:

(a) How many more similar pipe caps were needed to protrude before the shaft failed the 7.5m Spec?

(b) What if the single pipe cap protruded by 2m?[14] Would it still comply with the 7.5m Spec at that position?

(c) What if the protrusions were not as large as a pipe cap but came in the form of rebars, with hundreds of them sticking out from the sides?

18 From the facts of this case, it is not entirely clear how the court concluded that the 7.5m Spec was in fact complied with *at the relevant position* by TSCE.

19 ICOP sought to imply terms to assist its claim. In the first place, it was perhaps unnecessary for ICOP to "interpolate the words 'working space' and 'free[dom] from protruding objects' into the clear terms of the Subcontract".[15]

20 One would have thought that compliance with the 7.5m Spec could be tested by passing a notional (or actual) disc with a

14 The protrusion appears to be about 1.55m long based on a measurement of drawing set out within the judgment.

15 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [43].

diameter of 7.5m, through the shaft. Any point along the path of the shaft that hindered the movement of the disc (from a plane perspective) would then have failed the test, and *a fortiori* the contractual obligation of a minimum internal diameter 7.5m wall to wall measurement.

21 One might argue that the 7.5m Spec might be interpreted to encompass a situation where the *removal or absence* of the protruding pipe cap would result in a hole or opening, and thereby extend (at that particular position) the limits of the shaft wall beyond 7.5m, thus perhaps complying with the "minimum diameter of 7.5m "wall to wall"" specification, even this interpretation would strictly be "wall to *broken* wall", and not "wall to wall".

22 This author would, however, argue that any *position* along the shaft that failed an effective measurement of an internal diameter of a minimum of 7.5m wall to wall cannot be said to comply with the 7.5m Spec.

23 Short of it being *de minimis*,[16] the nature of the failure, whether 1, 10 or 100 protruding studs, should not affect the analysis of strict compliance if the 7.5m Spec is in fact not achieved at a certain point within the shaft. On principle, it thus appears that any claim relating to the rectification or removal of a protruding stud should have been allowed.

24 *Chitty on Contracts* states that:[17]

> … The general rule is that a party to a contract must perform exactly what he undertook to do. When an issue arises as to whether performance is sufficient, the court must first interpret the contract in order to ascertain the nature of the obligation (which is traditionally considered to be a question of law); the next question is to see whether the actual performance measures

16 *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109; *Margonis Navigation Agency Ltd v Henry W Peabody & Co of London Ltd* [1965] 1 QB 300 at 316.

17 *Chitty on Contracts* (Sweet and Maxwell, 34th Ed, 2021) at para 24-001; see also Tham Chee Ho, "Discharge by Performance, Tender of Performance and Partial Performance" in *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2nd Ed, 2022) at para 16.012.

> up to that obligation (which is a question of 'mixed fact and law' in that the court decides whether the facts of the actual performance satisfy the standard prescribed by the contractual provisions defining the obligation). …

25 In *Arcos Ltd v E A Ronaasen & Sons*, Lord Atkin stated:[18]

> It was contended that in all commercial contracts the question was whether there was a 'substantial' compliance with the contract: there always must be some margin: and it is for the tribunal of fact to determine whether the margin is exceeded or not. I cannot agree. If the written contract specifies conditions of weight, measurement and the like, those conditions must be complied with. A ton does not mean about a ton, or a yard about a yard. Still less when you descend to minute measurements does ½ inch mean about ½ inch. If a seller wants a margin he must and in my experience does stipulate for it.

26 Applying the above test, it would appear that TSCE did not comply with the 7.5m Spec, at the very least at the position complained of by ICOP.

27 Given that the 7.5m Spec is reasonably clear, there was no reason to adopt a "belts and braces" approach to the 7.5m Spec by requiring additional drafting to specify in particular the circumstances where the 7.5m Spec should apply,[19] when the 7.5m Spec embodies a simple bright line test that does not require any technical expertise apart from the ability to measure in a straight line. Construction and engineering contracts are generally already complex, thick and unwieldy, and it is respectfully submitted that this finding by the court will not assist in ameliorating this.

18 *Arcos Ltd v E A Ronaasen & Sons* [1933] AC 470 at 479; see also Michael Sergeant & Max Wieliczko, *Construction Contract Variations* (Informa Law, 2014) at para 4.2, citing *Arcos Ltd v E A Ronaasen & Sons* [1933] AC 470: "The contractor is obliged to construct the project in accordance with the defined contract scope, unless and until the employer permits a change. The contractor may not depart from the required scope without permission, even to construct works which would be considered to be an improvement."

19 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [43].

IV. Importance of pleadings and submissions in technical disputes

28 The next part of this case note deals with the importance of pleadings and submissions in litigation, especially in technical disputes.

29 The court also found that the inability to remove the MTBM was caused by both the Protrusion Issue and the Alignment Issue having joint causal effect.[20]

30 However, the Alignment Issue was not pleaded by ICOP, and given that ICOP's submissions centred on a joint causal effect by both the Protrusion and Alignment Issues, it was unsurprising that the court dismissed the claim.[21]

31 Now, assuming ICOP simply submitted (without reference to any Alignment Issue) that when the MTBM exited into the receiving Shaft P5–1, the position of the shaft failed to comply with the 7.5m Spec and as such the MTBM could not be extracted, one would have thought that ICOP could have succeeded in the claim. After all, it would not lie for TSCE to assert that "Oh, but since we misaligned the shaft, you could not have retrieved the MTBM anyway", as that would have been met by the principles expounded in *Alghussein Establishment v Eton College* where a party in default cannot take advantage of its own wrong.[22]

V. Pleadings and submissions

32 The approach of the court in evaluating the interaction of the pleaded case to the relevant submissions as stated at para 46 of the judgment requires careful study.

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20 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [41] and [42].

21 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [42].

22 *Alghussein Establishment v Eton College* [1988] 1 WLR 587 at 594; applied in Singapore in *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR(R) 634; see also the case of *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [64]–[69].

33 The relevant paragraph of the judgment states:

> 46 I should also emphasise that I have considered ICOP's opposing submission that it did not need to plead the facts pertaining to the issue of misalignment because: (a) these were matters of evidence; and (b) in any event, TSCE was aware of this dispute and thus not taken by surprise. I do not accept (a). As just explained, these were material *facts* necessary and relevant to establishing proximity for the purposes of ICOP's tortious claim. In relation to (b), my view is that in technical disputes such as this, parties ought to be bound more strictly to their pleaded cases unless they are able to provide a satisfactory explanation for their omission. Cases of this sort tend to give rise to numerous intertwined and difficult issues, and it is not for an opponent and especially not the court to piece together unpleaded points in search of the best possible case a party may advance …

34 It is suggested that the Ideals in Order 3 rule 1 of the Rules of Court 2021 support this approach by the court.[23]

35 As the court stated, in technical and/or complex cases, the parties should be held to their pleaded cases. There are so many factual and technical permutations to a complex claim that it would be unrealistic, if not unfair, to expect a respondent to tease out the *real* but unpleaded issues, or to anticipate unpleaded issues.

36 If a particular factual causation is specifically pleaded, it must necessarily mean that other potential factual causes are irrelevant and/or not relied upon. The fact that these are then addressed in closing submissions is irrelevant. There are important reasons why.

37 Among others, this would place an undue (if not impossible) burden on the court, and indeed the opposing party, to excise irrelevant parts of the closing submissions to fit with the pleaded case, assuming one could even determine what was irrelevant.

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23 Pursuant to O 3 r 1 of the Rules of Court 2021, the court must seek to achieve the Ideals which include expeditious proceedings, cost-effective work and the efficient use of court resources.

38 Consider a dispute involving a power boiler. Say the pleaded case on under-performance relied only on the failure of *one* parameter involving a specific type of combustible material, but the closing submissions make reference to a failure of *two* parameters, with, for example, the unpleaded parameter relating to the material of the boiler interacting with the combustible material adversely. How would the court and/or the opponent then read the submissions in a manner that conforms with the pleaded case? How does one go about excising the irrelevant submissions, assuming this could even be logically carried out and why should this even be done for the other party?

39 Given that there is no legal duty to assist an opponent in dispute resolution proceedings,[24] and the court entitled to deal with the submissions as presented, in such a situation, a dismissal of the relevant claim(s) appears the fairest outcome.

40 From a natural justice point of view,[25] as TSCE was never put on notice of the Alignment Issue in pleadings, it was only natural for TSCE not to have addressed the Alignment Issue.

41 The dismissal of Issue 4 in the ICOP case thus serves as a timely reminder that submissions must meet the pleaded case, no more, and certainly no less.

VI. Intertwined submissions

42 But more important is the principle that the court *will* dismiss claims that are based on intertwined submissions (relating to pleaded and unpleaded matters) ("Intertwined Submissions").

43 What, however, is unclear is the level of entanglement that suffices for such a dismissal.

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24 *Woodward v Phoenix Healthcare Distribution Ltd* [2019] EWCA Civ 985.

25 See *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 at [147], where Vinodh Coomaraswamy J stated that "[a] tribunal will therefore deny a party a reasonable opportunity to respond to the case against it if it … requires the party to respond to an element of the opposing party's case which has been advanced without reasonable prior notice".

44 Unfortunately, from a legal practice point of view, it would take a rather confident lawyer to simply submit to the court that the opponent's submissions extended beyond the pleaded case, without at the same time *additionally* attempting to address the merits[26] of the very same issues complained of, *ex abundanti cautela*.

45 Even in such a situation, the author would argue that any claim that is the subject of Intertwined Submissions should not be cured by any *additional* counter submissions,[27] but that the unpleaded claim should nevertheless still be dismissed. And to be fair, a party successful in obtaining a dismissal of a claim based on Intertwined Submissions should also not be allowed costs for making the *additional* submissions, even if caution warranted it.

46 Future decisions expanding on this principle of dismissing claims based on Intertwined Submissions will undoubtedly have their factual matrices carefully scrutinised by lawyers seeking guidance on this issue of Intertwined Submissions.

47 Until more guidance by way of judicial decisions is published, lawyers will probably adopt a conservative approach to claims based on Intertwined Submissions by both raising a dismissal submission and at the same time addressing the same out of an abundance of caution, on the potential that their assessment that the submissions were Intertwined Submissions is wrong.

48 The public interest in controlling the costs of litigation include both party-and-party costs and solicitor-and-client costs.

49 If litigation costs are to be reined in, especially in complex construction matters, it is hoped that a body of case law may be

26 It is beyond the ambit of this case note to consider the issues of objections to the unpleaded evidence. If the court allows the unpleaded evidence to be given at trial leaving admissibility to be submitted upon in closing submissions; should the innocent party even apply to admit additional evidence?

27 See, *eg*, *Abani Trading Pte Ltd v BNP Paribas* [2014] 3 SLR 909 at [70]–[89] and *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 231 at [18], although these cases may have to be reviewed in the light of the Rules of Court 2021.

built upon the approach in this case to guard against allowing opposing submissions (made out of an abundance of caution) to cure claims based on Intertwined Submissions, save for extremely clear and *de minimis* instances.

50 The construction bar undoubtedly awaits the next case applying this principle.