

DIESEL CONSTRUCTION CO., INC., Petitioner, VS. UPSI PROPERTY HOLDINGS, INC., Respondent.

G.R. No. 154885. March 24, 2008

Ponente: VELASCO JR., J.

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VELASCO JR., J.:

The Case

Before the Court are these petitions for review under Rule 45 separately interposed by Diesel Construction Co., Inc. (Diesel) and UPSI Property Holdings, Inc. (UPSI) to set aside the Decision[1] dated April 16, 2002 as partly modified in a Resolution[2] of August 21, 2002, both rendered by the Court of Appeals (CA) in CA-G.R. SP No. 68340, entitled UPSI Property Holdings, Inc. v. Diesel Construction Co., Inc., and FGU Insurance Corporation. The CA Decision modified the Decision dated December 14, 2001 of the Arbitral Tribunal of the Construction Industry Arbitration Commission (CIAC) in CIAC Case No. 18-2001, while the CA Resolution granted in part the motion of Diesel for reconsideration and denied a similar motion of UPSI.

The Facts

The facts, as found in the CA Decision under review, are as follows:

On August 26, 1995, Diesel, as Contractor, and UPSI, as Owner, entered into a Construction Agreement[3] (Agreement) for the interior architectural construction works for the 14th to 16th floors of the UPSI Building 3 Meditel/Condotel Project (Project) located on Gen. Luna St., Ermita, Manila. Under the Agreement, as amended, Diesel, for PhP 12,739,099, agreed to undertake the Project, payable by progress billing.[4] As stipulated, Diesel posted, through FGU Insurance Corp. (FGU), a performance bond in favor of UPSI.[5]

Inter alia, the Agreement contained provisions on contract works and Project completion, extensions of contract period, change/extra works orders, delays, and damages for negative slippage.

Tasked to oversee Diesel's work progress were: Grace S. Reyes Designs, Inc. for interior design and architecture, D.L. Varias and Associates as Construction Manager, and Ryder Hunt Loacor, Inc. as Quantity Surveyor.[6]

Under the Agreement, the Project prosecution proper was to start on August 2, 1999, to run for a period of 90 days or until November 8, 1999. The parties later agreed to move the commencement date to August 21, 1999, a development necessitating the corresponding movement of the completion date to November 20, 1999.

Of particular relevance to this case is the section obliging the contractor, in case of unjustifiable delay, to pay the owner liquidated damages in the amount equivalent to one-fifth (1/5) of one (1) percent of the total Project cost for each calendar day of delay.[7]

In the course of the Project implementation, change orders were effected and extensions sought. At one time or another, Diesel requested for extension owing to the following causes or delaying factors: (1) manual hauling of materials from the 14th to 16th floors; (2) delayed supply of marble; (3) various change orders; and (4) delay in

the installation of shower assembly.[8]

UPSI, it would appear, disapproved the desired extensions on the basis of the foregoing causes, thus putting Diesel in a state of default for a given contract work. And for every default situation, UPSI assessed Diesel for liquidated damages in the form of deductions from Diesel's progress payments, as stipulated in the Agreement.[9]

Apparently irked by and excepting from the actions taken by UPSI, Diesel, thru its Project manager, sent, on March 16, 2000, a letter notice to UPSI stating that the Project has been completed as of that date. UPSI, however, disregarded the notice, and refused to accept delivery of the contracted premises, claiming that Diesel had abandoned the Project unfinished. Apart therefrom, UPSI withheld Diesel's 10% "retention money" and refused to pay the unpaid balance of the contract price.[10]

It is upon the foregoing factual backdrop that Diesel filed a complaint before the CIAC, praying that UPSI be compelled to pay the unpaid balance of the contract price, plus damages and attorney's fees. In an answer with counterclaim, UPSI denied liability, accused Diesel of abandoning a project yet to be finished, and prayed for repayment of expenses it allegedly incurred for completing the Project and for a declaration that the deductions it made for liquidated damages were proper. UPSI also sought payment of attorney's fees.[11]

After due hearing following a protracted legal sparring, the Arbitral Tribunal of the CIAC, on December 14, 2001, in CIAC Case No. 18-2001, rendered judgment for Diesel, albeit for an amount lesser than its original demand. To be precise, the CIAC ordered UPSI to pay Diesel the total amount of PhP 4,027,861.60, broken down as follows: PhP 3,661,692.60, representing the unpaid balance of the contract price; and PhP 366,169 as attorney's fees. In the same decision, the CIAC dismissed UPSI's counterclaim[12] and assessed it for arbitration costs in the amount of PhP 298,406.03.[13]

In time, UPSI went to the CA on a petition for review, docketed as CA-G.R. SP No. 68340. Eventually, the appellate court rendered its assailed Decision dated April 16, 2002, modifying that of the CIAC, thus:

WHEREFORE, premises considered, the petition is GRANTED and the questioned Decision is MODIFIED in this wise:

- The claim of [UPSI] for liquidated damages is GRANTED to the extent of PESOS: ONE MILLION THREE HUNDRED NINE THOUSAND AND FIVE HUNDRED (P1,309,500.00) representing forty-five (45) days of delay at P29,100 per diem;

- We hold that [Diesel] substantially complied with the Construction Contract and is therefore entitled to one hundred percent (100%) payment of the contract price. Therefore, the claim of [Diesel] for an unpaid balance of PESOS: TWO MILLION FOUR HUNDRED FORTY-ONE THOUSAND FOUR HUNDRED EIGHTY TWO and SIXTY FOUR centavos (P2,441,482.64), which amount already includes the retention on the additional works or Change Orders, is GRANTED, minus liquidated damages. In sum, [UPSI] is held liable to [Diesel] in the amount of PESOS: ONE MILLION ONE HUNDRED THIRTY ONE THOUSAND NINE HUNDRED EIGHTY TWO and sixty four centavos (P1,131,982.64), with legal interest until the same is fully paid;

- The parties are liable equally for the payment of arbitration costs;

- All claims for attorney's fees are DISMISSED; and

- Since there is still due and owing from UPSI an amount of money in favor of Diesel, respondent FGU is DISCHARGED as surety for Diesel.

Costs de officio.

SO ORDERED.[14]

Therefrom, Diesel and UPSI each sought reconsideration. On August 21, 2002, the CA issued its equally assailed Resolution denying reconsideration to UPSI, but partially granting Diesel's motion, disposing as follows:

WHEREFORE, the Motion for Reconsideration of [Diesel] is partially GRANTED. The liquidated damages are hereby reduced to P1,146,519.00 (45 days multiplied by P25,478.20 per diem). However, in accordance with the main opinion, We hold that [UPSI] is liable to [Diesel] for the total amount of P3,661,692.64, representing the unpaid balance of the contract price plus the ten-percent retention, from which the liquidated damages, must, of course, be deducted. Thus, in sum, as amended, We hold that petitioner is still liable to respondent Diesel in the amount of P2,515,173.64, with legal interest until the same is fully paid.

The main opinion, in all other respects, STANDS.

SO ORDERED.[15]

Hence, these separate petitions are before us.

Per its Resolution of March 17, 2003, the Court ordered the consolidation of the petitions.

The Issues

In its petition in G.R. No. 154885, Diesel raises the following issues:

- Whether or not the [CA] has the discretion, indeed the jurisdiction, to pass upon the qualifications of the individual members of the CIAC Arbitral Tribunal and declare them to be non-technocrats and not exceptionally well-versed in the construction industry warranting reversal and nullification of the tribunal's findings.
- Whether or not the [CA] may intervene to annul the findings of a highly specialized agency, like the CIAC, on the ground that essentially the question to be resolved goes to the very heart of the substantiality of evidence, when in so doing, [CA] merely substituted its own conjectural opinion to that of the CIAC Arbitral Tribunal's well-supported findings and award.
- Whether or not the [CA] erred in its findings, which are contrary to the findings of the CIAC Arbitral Tribunal.[16]

On the other hand, in G.R. No. 154937, UPSI presents the following issues:

I

Whether or not portion of the Decision dated April 16, 2002 of the Honorable [CA] denying additional expenses to complete the unfinished and abandoned work of [Diesel], is null and void for being contrary to clean and convincing evidence on record.

II

Whether or not portion of the Decision x x x of the [CA] finding delay of only forty five (45) days is null and void for being not in accord with contractual stipulations upon which the controversy arise.

III

Whether or not the resolution of the Honorable Court of Appeals denying the herein petitioner's motion for reconsideration and partially granting the respondent's motion for reconsideration is likewise null and void as it does not serve its purpose for being more on expounding than rectifying errors.[17]

The issues shall be discussed in seriatim.

The Court's Ruling

We resolve to modify the assailed CA Decision.

First Issue

Diesel maintains that the CA erred in its declaration that it may review the CIAC's decision considering the doctrine on the binding effect of conclusions of fact of highly specialized agencies, such as the CIAC, when supported by substantial evidence.

The above contention is erroneous and, as couched, misleading.

As is noted, the CA, in its assailed resolution, dismissed as untenable Diesel's position that the factual findings of the CIAC are binding on and concludes the appellate court. The CA went to clarify, however, that the general rule is that factual conclusions of highly specialized bodies are given great weight and even finality when supported by substantial evidence. Given this perspective, the CA was correct in holding that it may validly review and even overturn such conclusion of facts when the matter of its being adequately supported by substantial evidence duly adduced on record comes to the fore and is raised as an issue.

Well-established jurisprudence has it that "[t]he consequent policy and practice underlying our Administrative Law is that courts of justice should respect the findings of fact of said administrative agencies, unless there is absolutely no evidence in support thereof or such evidence is clearly, manifestly and patently insubstantial." [18]

There can be no serious dispute about the correctness of the CA's above posture. However, what the appellate court stated later to belabor its point strikes the Court as specious and uncalled for. Wrote the CA:

This dictum finds greater application in the case of the CIAC because x x x as pointed out by petitioner in its Comment, the doctrine of primary jurisdiction relied upon by [Diesel] is diluted by the indubitable fact that the CIAC panel x x x is not at all composed of technocrats, or persons exceptionally well-versed in the construction industry. For instance, its chair x x x is a statistician; another member, x x x a former magistrate, is a member of the Bar. Doubtless, these two are preeminent in their fields, and their competence and proficiency in their chosen professions are unimpeachable. However, when it comes to determining findings of fact with respect to the matter before Us, the said panel which they partly comprise cannot claim to have any special advantage over the members of this Court. [19]

The question of whether or not the findings of fact of the CIAC are supported by substantial evidence has no causal connection to the personal qualifications of the members of the arbitration panel. Surely, a person's undergraduate or postgraduate degrees, as the case may be, can hardly be invoked as the sole, fool proof basis to determine that person's qualification to hold a certain position. One's work experiences and attendance in relevant seminars and trainings would perhaps be the more important factors in gauging a person's fitness to a certain undertaking.

Correlatively, Diesel, obviously having in mind the disputable presumption of regularity, correctly argues that highly specialized agencies are presumed to have the necessary technical expertise in their line of authority. In other words, the members of the Arbitral Tribunal of the CIAC have in their favor the presumption of possessing the necessary qualifications and competence exacted by law. A party in whose favor the legal presumption exists may rely on and invoke such legal presumption to establish a fact in issue. One need not introduce evidence to prove that the fact for a presumption is prima facie proof of the fact presumed. [20]

To set the records straight, however, the CA did not cast aspersion on the competence let alone the bona fides of the members of the Arbitral Tribunal to arbitrate. In context, what the appellate court said—in reaction to

Diesel's negative commentary about the CA's expertise on construction matters—is that the said members do not really enjoy a special advantage over the members of the CA in terms of fleshing out the facts from the evidence on record.

In any event, the fact remains that the CA stands justified in reviewing the CIAC decision.

Second and Third Issues

The next two issues, being interrelated, shall be discussed jointly.

Diesel submits that the CA, in reaching its decision, substituted its own conjectural opinion to that of the CIAC's well-grounded findings and award.

Even as Diesel's submission has little to commend itself, we deem it prudent to address its concern by reviewing the incongruent determinations of the CIAC and CA and the factual premises holding such determinations together.

As it were, the CA reduced the award for unpaid balance of the contract cost from PhP 3,661,692.60, as earlier fixed by the CIAC, to PhP 2,441,482.64, although it would consider the reduction and revert to the original CIAC figure. Unlike the CIAC which found the award of liquidated damages to be without basis, the CA was of a different disposition and awarded UPSI PhP 1,309,500, only to reduce the same to PhP 1,146,519 in its assailed resolution. Also, the CA struck out the CIAC award of PhP 366,169 to Diesel for attorney's fees. Additionally, the CIAC's ruling making UPSI alone liable for the costs of arbitration was modified by the CA, which directed UPSI and Diesel to equally share the burden.

The CIAC found Diesel not to have incurred delay, thus negating UPSI's entitlement to liquidated damages. The CA, on the other hand, found Diesel to have been in delay for 45 days.

In determining whether or not Diesel was in delay, the CIAC and CA first turned on the question of Diesel's claimed entitlement to have the Project period extended, an excusable delay being chargeable against the threshold 90-day completion period. Both were one in saying that occurrence of certain events gave Diesel the right to an extension, but differed on the matter of length of the extension, and on the nature of the delay, that is, whether the delay is excusable or not. The CA deemed the delay, and the resulting extension of 14 days, arising from the manual hauling of materials, as undeserved. But the CIAC saw it otherwise for the reason that Frederick W. Crespillo, the witness UPSI presented to refute the allegation of Diesel's entitlement to time extension for the manual hauling of materials, was incompetent to testify on the issue. As CIAC observed, Crespillo lacked personal knowledge of the real situation at the worksite.

The CIAC's reasoning, however, is flawed, assuming that the onus rested on UPSI, instead of on Diesel, to prove that the delay in the execution of the Project was excusable. Diesel explained that there was no place for its own hoisting machine at the Project site as the assigned location was being used by the General Contractor, while the alternative location was not feasible due to power constraint. Moreover, Diesel could not use the site elevator of the General Contractor as its personnel were only permitted to use the same for one hour every day at PhP 600 per hour.

The provisions in the Agreement on excusable delays read:

2.3 Excusable delays: The Contractor shall inform the owner in a timely manner, of any delay caused by the following:

2.3.a Acts of God, such as storm, floods or earthquakes.

2.3.b Civil disturbance, such as riots, revolutions, insurrection.

2.3.c Any government acts, decrees, general orders or regulations limiting the performance of the work.

2.3.d Wars (declared or not).

2.3.e Any delays initiated by the Owner or his personnel which are clearly outside the control of the Contractor.

2.3.1 Delays caused by the foregoing shall be excusable. A new schedule or adjustments in contract time shall be negotiated with the Owner. As time is of the essence of this agreement, all other delays shall not be excusable.[21]

As may be noted, a common thread runs among the events listed above, that is, the delaying event is unforeseeable and/or its occurrence is beyond the control of Diesel as contractor. Here, the lack of a location to establish Diesel's own hoisting machine can hardly be tagged as a foreseeable event. As the CA aptly observed:

[U]nder the terms of the contract, it is Diesel that would formulate the schedule to be followed in the completion of the works; therefore, it was incumbent upon Diesel to take into account all factors that would come into play in the course of the project. From the records it appears that the General Contractor x x x had been in the premises ahead of Diesel; hence it would have been a simple matter for Diesel to have conferred with the former's officer if the use of its equipment would be viable. Likewise, it would not have been too much trouble for Diesel to have made a prior request from UPSI for the use of its freight elevator – in the face of the denial thereof, it could have made the necessary remedial measures x x x. In other words, those delays were foreseeable on the part of Diesel, with the application of even ordinary diligence. But Diesel did all of those when construction was about to commence. Therefore, We hold that the delays occasioned by Diesel's inability to install its hoisting machine x x x [were] attributable solely to Diesel, and thus the resultant delay cannot be charged against the ninety-day period for the termination of the construction.[22]

There can be no quibbling that the delay caused by the manual hauling of materials is not excusable and, hence, cannot validly be set up as ground for an extension. Thus, the CA excluded the delay caused thereby and only allowed Diesel a total extension period of 85 days. Such extension, according to that court, effectively translated to a delay of 45 days in the completion of the project. The CA, in its assailed decision, explained why:

- All told, We find, and so hold, that [Diesel] has incurred in delay. x x x However, under the circumstances wherein UPSI was responsible for some of the delay, it would be most unfair to charge Diesel with two hundred and forty (240) days of delay, so much so that it would still owe UPSI, even after liquidated damages have eaten up the retention and unpaid balance, the amount of [P4,340,000.00]. Thus, based on Our own calculations, We deem it more in accord with the spirit of the contract, as amended, x x x to assess Diesel with an unjustifiable delay of forty-five (45) days only; hence, at the rate of 1/5 of one percent as stated in the contract, [or at P1,309,500.00], which should be deducted from the total unpaid balance of [P2,441,482.64], which amount already includes the retention on the additional works or Change Orders.[23]

The CA, in its questioned resolution, expounded on how it arrived at the figure of 45-day delay in this wise:

- x x x We likewise cannot give Our assent to the asseveration of [Diesel] that Our calculations as to the number of days of delay have no basis. For indeed, the same was arrived at after taking a holistic view of the entire circumstances attendant to the instant case. x x x

But prescinding from the above, the basis for Our ruling should not be hard to discern. To disabuse the mind of [Diesel] that the forty-five day delay was plucked from out of the blue, allow Us to let the records speak. The records will show that while the original target date for the completion x x x was 19 November 1999 x x x, there is a total of eighty-five (85) days of extension which are justifiable and sanctioned by [UPSI], to wit: thirty (30) days as authorized on 27 January 2000 by UPSI's Construction Manager x x x; thirty (30) days as again consented to by the same Construction Manager on 24 February 2000 x x x; and twenty-five (25) days

on 16 March 2000 by Rider Hunt and Liacom x x x. The rest of the days claimed by Diesel were, of course, found by Us to be unjustified in the main opinion. Hence, the project should have been finished by February 12, 2000. However, by 22 March 2000, as certified to by Grace S. Reyes Designs, Inc. the project was only 97.56% finished, meaning while it was substantially finished, it was not wholly finished. By 25 March 2000, the same consultant conditionally accepted some floors but were still punch listed, so that from 12 February 2000 to 25 March 2000 was a period of forty-one (41) days. Allowing four (4) more days for the punch listed items to be accomplished, and for the “general cleaning” mentioned by Grace S. Reyes Designs, Inc., to be done, which to Us is a reasonable length of time, equals forty-five (45) days.

This is why We find the [conclusion] made by the CIAC, x x x that there was no delay whatsoever in the work done by [Diesel], too patently absurd for Us to offer Our unconditional assent.[24]

Aside from the fact that the CA seemingly assumed contradictory positions in the span of two paragraphs, its holding immediately adverted to above is patently erroneous. The CA completely failed to factor in the change orders of UPSI to Diesel—the directives effectively extending the Project completion time at the behest of UPSI.

Section V of the Agreement on the subject Change Orders reads:

V. CHANGES IN SCOPE OF WORK AND EXTRA WORK

Any changes or extra work in the SCOPE OF WORK recommended by the INTERIOR DESIGNER/ARCHITECT or directed and approved by the OWNER shall be presented to the CONTRACTOR. Within the shortest time possible, the CONTRACTOR x x x shall also inform the OWNER if such changes shall require a new schedule and/or revised completion date.

The Parties shall then negotiate mutually agreeable terms x x x. The CONTRACTOR shall not perform any change order or extra work until the covering terms are agreed upon [in writing and signed by the parties]. [25]

Pursuant thereto, UPSI issued Change Order (CO) Nos. 1 to 4 on February 3, 2, 8, and 9, 2000 respectively. Thereafter, Diesel submitted a Schedule of Completion of Additional Works[26] under which Diesel committed to undertake CO No. 1 for 30 days from February 10, 2000; CO No. 2 for 21 days from January 6, 2000; CO No. 3 for 15 days, subject to UPSI’s acceptance of Diesel’s proposal; and CO No. 4 for 10 days after the receipt of the items from UPSI.

The CIAC found that the COs were actually implemented on the following dates:

CO No. 1 – February 9 to March 3, 2000

CO No. 3 – February 24 to March 10, 2000

CO No. 4 – March 16 to April 7, 2000[27]

Hence, as correctly held by the CIAC, UPSI, no less, effectively moved the completion date, through the various COs, to April 7, 2000.

Moreover, as evidenced by UPSI’s Progress Report No. 19 for the period ending March 22, 2000, Diesel’s scope of work, as of that date, was already 97.56% complete.[28] Such level of work accomplishment would, by any rational norm, be considered as substantial to warrant full payment of the contract amount, less actual damages suffered by UPSI. Article 1234 of the Civil Code says as much, “If the obligation had been substantially performed in good faith, the obligor may recover as though there had been a strict and complete fulfillment, less damages suffered by the obligee.”

The fact that the laborers of Diesel were still at the work site as of March 22, 2000 is a reflection of its honest intention to keep its part of the bargain and complete the Project. Thus, when Diesel attempted to turn over the

premises to UPSI, claiming it had completed the Project on March 15, 2000, Diesel could no longer be considered to be in delay. Likewise, the CIAC cited the Uniform General Conditions of Contract for Private Construction (CIAP Document 102), wherein it is stated that no liquidated damages for delay beyond the completion time shall accrue after the date of substantial completion of the work.[29]

In all, Diesel cannot be considered as in delay and, hence, is not amenable under the Agreement for liquidated damages.

As to the issue of attorney's fees, Diesel insists that bad faith tainted UPSI's act of imposing liquidated damages on account of its (Diesel's) alleged delay. And, this prompted Diesel to file its petition for arbitration. Thus, the CIAC granted Diesel an award of PhP 366,169 as attorney's fees. However, the CA reversed the CIAC on the award, it being its finding that Diesel was in delay.

The Court resolves to reinstate the CIAC's award of attorney's fees, there being sufficient justification for this kind of disposition. As earlier discussed, Diesel was not strictly in delay in the completion of the Project. No valid reason, therefore, obtains for UPSI to withhold the retention money or to refuse to pay the unpaid balance of the contract price. Indeed, the retention and nonpayment were, to us, as was to the CIAC, resorted to by UPSI out of whim, thus forcing the hand of Diesel to sue to recover what is rightfully due. Thus, the grant of attorney's fees would be justifiable under Art. 2208 of the Civil Code, thus:

Article 2208. In the absence of stipulation, attorney's fees and expenses of litigation x x x cannot be recovered, except:

x x x x

(5) Where the defendant acted in gross and evident bad faith in refusing to satisfy the plaintiff's plainly valid, just and demandable claim.

And for the same reason justifying the award of attorney's fees, arbitration costs ought to be charged against UPSI, too.

Fourth Issue

UPSI urges a review of the factual basis for the parallel denial by the CIAC and CA of its claim for additional expenses to complete the Project. UPSI states that the reality of Diesel having abandoned the Project before its agreed completion is supported by clear and convincing evidence.

The Court cannot accord the desired review. It is settled rule that the Court, not being a trier of facts, is under no obligation to examine, winnow, and weigh anew evidence adduced below. This general rule is, of course, not absolute. In *Superlines Transportation Company, Inc. v. Philippine National Construction Company*, the Court enumerated the recognized exceptions to be:

x x x (1) when the findings are grounded entirely on speculation, surmises or conjectures; (2) when the inference made is manifestly mistaken, absurd or impossible; (3) when there is grave abuse of discretion; (4) when the judgment is based on a misapprehension of facts; (5) when the findings of facts are conflicting; (6) when in making its findings the [CA] went beyond the issues of the case, or its findings are contrary to the admissions of both the appellant and the appellee; (7) when the findings are contrary to the trial court; (8) when the findings are conclusions without citation of specific evidence on which they are based; (9) when the facts set forth in the petition as well as in the petitioner's main and reply briefs are not disputed by the respondent; (10) when the findings of fact are premised on the supposed absence of evidence and contradicted by the evidence on record; and (11) when the Court of Appeals manifestly overlooked certain relevant facts not disputed by the parties, which, if properly considered, would justify a different conclusion.[30] (Emphasis

supplied.)

In the instant case, the factual findings of the CIAC and CA, with regard to the completion of the Project and UPSI's entitlement to recover expenses allegedly incurred to finish the Project, do not fall under any one of these exceptions. As things stand, the factual findings of the CIAC and CA are supported by evidence presented during the hearing before the Arbitral Tribunal. Consider what the CIAC wrote:

This Tribunal finds overwhelming evidence to prove that accomplishment as of the alleged "period of takeover" was 95.87% as of March 3, 2000 and increased to 97.56% on March 15, 2000 based on Progress Report # 18. x x x This is supported by the statement of [UPSI's] witness, Mr. Crespillo x x x where he conceded that such admissions and statements bound [UPSI, the Owner]. By that time, [Diesel] had substantially completed the project and only needed to correct the items included in the punchlist.[31]

The CA seconded what the CIAC said, thus:

- Neither are We prepared to sustain UPSI's argument that Diesel left the work unfinished and pulled-out all of its workmen from the project. This claim is belied by the assessment of its own Construction Manager in Progress Report No. 19 for the period "ending 22 March 2000," wherein it was plainly stated that as of that period, with respect to Diesel, there were still twenty-three laborers on site with the project "97.56%" complete x x x. This indicates that the contracted works of Diesel were substantially completed with only minor corrections x x x, thus contradicting the avowal of UPSI that the work was abandoned in such a state that necessitated the engagement of another contractor for the project to be finished. It was therefore not right for UPSI to have declined the turn-over and refused the full payment of the contract price, x x x.[32]

Given the 97.56% work accomplishment tendered by Diesel, UPSI's theory of abandonment and of its having spent a sum to complete the work must fall on its face. We can concede hypothetically that UPSI undertook what it characterized as "additional or rectification" works on the Project. But as both the CIAC and CA held, UPSI failed to show that such "additional or rectification" works, if there be any, were the necessary result of the faulty workmanship of Diesel.

The Court perceives of no reason to doubt, much less disturb, the coinciding findings of the CIAC and CA on the matter.

The foregoing notwithstanding and considering that Diesel may only be credited for 97.56% work accomplishment, UPSI ought to be compensated, by way of damages, in the amount corresponding to the value of the 2.44% unfinished portion ($100\% - 97.56\% = 2.44\%$). In absolute terms, 2.44% of the total Project cost translates to PhP 310,834.01. This disposition is no more than adhering to the command of Art. 1234 of the Civil Code.

The fifth and sixth issues have already been discussed earlier and need not detain us any longer.

WHEREFORE, Diesels petition is **PARTIALLY GRANTED** and UPSI's Petition is **DENIED** with qualification. The assailed Decision dated April 16, 2002 and Resolution dated August 21, 2002 of the CA are **MODIFIED**, as follows:

- (1) The award for liquidated damages is **DELETED**;
- (2) The award to Diesel for the unpaid balance of the contract price of PhP 3,661,692.64 is **AFFIRMED**;
- (3) UPSI shall pay the costs of arbitration before the CIAC in the amount of PhP 298,406.03;
- (4) Diesel is awarded attorney's fees in the amount of PhP 366,169; and
- (5) UPSI is awarded damages in the amount of PhP 310,834.01, the same to be deducted from the retention

money, if there still be any, and, if necessary, from the amount referred to in item (2) immediately above.

In summary, the aggregate award to Diesel shall be PhP 3,717,027.64. From this amount shall be deducted the award of actual damages of PhP 310,834.01 to UPSI which shall pay the costs of arbitration in the amount of PhP 298,406.03.

FGU is released from liability for the performance bond that it issued in favor of Diesel.

No costs.

SO ORDERED.

Quisumbing (Chairperson), Carpio-Morales, Tinga, and Chico-Nazario, JJ., concur.

[*]Additional member as per Special Order No. 494 dated March 3, 2008.

[1] Rollo (G.R. No. 154885), pp. 62-75. Penned by Associate Justice Romeo A. Brawner (Chairperson) and concurred in by Associate Justices Jose L. Sabio, Jr. and Sergio L. Pestaño.

[2] Id. at 51-60.

[3] Id. at 98-125.

[4] Id. at 100.

[5] Id. at 77.

[6] Id. at 64.

[7] Id. at 99-100.

[8] Id. at 85-89.

[9] Id. at 64-65.

[10] Id. at 65.

[11] Id. at 77.

[12] Id. at 96.

[13] Id. at 97.

[14] Supra note 1, at 73-74.

[15] Supra note 2, at 59.

[16] Rollo (G.R. No. 154885), p. 24.

[17] Rollo (G.R. No. 154937), pp. 63-64.

[18] Blue Bar Coconut Philippines v. Tantuico, No. L-47051, July 29, 1988, 163 SCRA 716, 729; citations omitted.

[19] Supra note 2, at 56.

[20] Tison v. Court of Appeals, G.R. No. 121027, July 31, 1997, 276 SCRA 582, 593.

[21] Supra note 3, at 99.

[22] Supra note 1, at 66.

[23] Supra note 1, at 71-72.

[24] Supra note 2, at 57-59.

[25] Supra note 3, at 104.

[26] Rollo (G.R. No. 154885), p. 165.

[27] Id. at 94.

[28] Id. at 71.

[29] Id. at 94.

[30] G.R. No. 169596, March 28, 2007, 519 SCRA 432, 441; citations omitted.

[31] Rollo (G.R. No. 154885), p. 91.

[32] Supra note 1, at 71.

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