Jia Chen Construction Pte Ltd v Wei Sin Construction Pte Ltd
[2000] SGHC 73

Case Number : Suit 730/1999

Decision Date : 28 April 2000

Tribunal/Court : High Court

Coram : Tay Yong Kwang JC

Counsel Name(s) : Tan Liam Beng with Julian Lim (Drew & Napier) for the plaintiffs; Hari Prasad with Kelvin Aw (Harry Elias Partnership) for the defendants

Parties : Jia Chen Construction Pte Ltd — Wei Sin Construction Pte Ltd

JUDGMENT:

GROUNDS OF DECISION

THE PLAINTIFFS' CASE

1 The Plaintiffs were the Defendants' subcontractors appointed for the purpose of supplying labour and equipment for carpentry and steel benders work, installation of pre-cast components and concreting works. These works will be referred to as structural works. The project in question was a public housing estate in Jurong West termed N2C6. The Defendants were the main contractors appointed by the Housing & Development Board ("HDB") on 30 May 1998 for this project.

2 The project comprised one multi-storey carpark block (Block 276) and five blocks (Blocks 274C, 276A, B, C and D) of residential units. The commencement date was 22 June 1998 except for Block 276B whose commencement date was 6 July 1998. The structural works of the entire project were initially subcontracted by the Defendants to Kent Loong Construction Pte Ltd which commenced works in June 1998. In that same month, the Defendants decided to take three blocks (Blocks 276B, C and D) out of Kent Loong's scope of works and requested the Plaintiffs to give a quotation for doing the structural works in respect of these three blocks.

3 By a letter of award dated 16 July 1998, the Defendants awarded the said works for the three blocks including five linkways to the Plaintiffs. The period of contract was stated as 22 June 1998 to 8 February 2000 although the Plaintiffs commenced work only in July 1998. The contract sum was $3,250,000 on a lump sum basis except for variations required by the HDB which shall be based on the Standard Schedule of Rates less 10%. The Plaintiffs were required to provide 6,000 certified mandays and if monies were deducted by the HDB for any shortfall, they shall be deducted from the Plaintiffs' entitlement. In respect of payment, the Plaintiffs were required to submit progress claims by the 29th and the 12th days of each month and payments would be made on the 3rd and the 18th days respectively. If the submission date was not met, payment in respect of that particular claim would only be made on the next date of payment.

4 As Kent Loong still could not cope with its remaining scope of works, the Defendants awarded the works for the carpark block to the Plaintiffs as well on 30 September 1998. It was agreed that the value of the works for the carpark block would be $860,000, raising the entire subcontract sum to $4,110,000. The commencement date for this block was stated as 1 September 1998 and the completion date as 25 November 1999.

5 On 22 December 1998, the parties agreed to vary the dates for the submission of claims and payment. The fax from the Defendants to the Plaintiff dated 26 December 1998 stated:

"We refer to our meeting on 22 December 1998.

As agreed by both parties your payment shall be released on the 17th and 30th of every month. In view of this, you are requested to submit your progress claim (for work done as at 12th and 25th) on every 12th and 25th of the month.

Thank you."

The Plaintiffs averred that the Defendants were obliged to pay on the 17th and 30th days for claims submitted within a reasonable time before those days and that the submission dates provided by the Defendants were only by way of request and were not pre-conditions for payment on the next payment dates.

6 By a fax dated 2 February 1999, the Defendants required the Plaintiffs to increase the certified mandays from 6,000 to 7,560 in view of the additional block (carpark) undertaken by the Plaintiffs. The fax also expressed the Defendants' concern about the prevailing number of certified mandays as at the end of November 1998, reminded the Plaintiffs that "the cost is $50 for every manday not provided" and stated that they foresaw that the cost would be in the region of $250,000 (i.e. about 5,000 mandays) at the conclusion of the Plaintiffs' scope of works. The Defendants added that that was "the reason why we are still imposing a 10% retention on your value of work done".

7 The retention of 10% of the value of work done was objected to by the Plaintiffs.

8 On 26 March 1999, the Plaintiffs submitted their 16th progress claim for $404,501.60 for work done up to 25 March 1999. The Defendants failed to pay that amount or any part thereof by 30 March 1999. On 10 April 1999, the Plaintiffs' solicitors sent a letter of demand to the Defendants demanding payment of this amount.

9 On 12 April 1999, the Plaintiffs submitted their 17th progress claim for $507,522.20. The Defendants' Steven Soh reviewed their Quantity Surveyor's certification of this progress claim and varied the amount due to $419,055.50.

10 On 17 April 1999, the Defendants paid $128,230.88 on the 16th Progress Claim.

11 On 19 April 1999, the Plaintiffs' solicitors sent a letter of demand to the Defendants' solicitors demanding payment of $290,824.62, the balance due under the certified 17th progress claim. That same day, the Defendants sent by fax to the Plaintiffs a Variation Order omitting from their scope of works the structural works to the lift motor room of the three residential blocks and to the motor room of the carpark block, the installation of pre-cast parapet wall and the five linkways, valued at $323,600. This was not accepted by the Plaintiffs. The omitted works were given to Kent Loong to perform.

12 The Plaintiffs averred that they had not been paid $290,824.62 (for work done up to 12 April 1999) and another $113,588.40 for further work done up to 25 April 1999 when they left the project site. They only received a total of $3,206,826.00 from the Defendants.

13 On 23 April 1999, the Defendants' solicitors wrote to the Plaintiffs' solicitors that the payment of $128,230.88 had been agreed to be full and final payment of the 16th progress claim and that the amount verified under the 17th progress claim amounted to a negative sum of $15,207.95. They also

claimed that the Plaintiffs had completed 89% of the contract but provided only 13.58% of the requisite certified mandays. The Defendants therefore demanded the return of $128,230.88 (if the Plaintiffs denied that that amount was full and final payment of the 16th progress claim) and the said $15,207.95.

14 On 24 April 1999, the Plaintiffs' solicitors wrote to the Defendants' solicitors to deny all their allegations and to state that the Plaintiffs accepted the Defendants' repudiation of the contract.

15 The Plaintiffs averred that it was within the contemplation of the parties and therefore a term of the agreement that the maximum retention sum was to be 5% of the contract sum of $4,110,000, which would be $205,500. Instead the Defendants held back 10% of the value of works as the retention sum without regard to the 5% overall limit.

16 The Plaintiffs therefore claimed $404,413.02 (i.e. $290,824.62 + $113,588.40 as indicated in paragraph 12 above) or, alternatively, quantum meruit. This was revised at the trial to $405,443.02 because of an erroneous belief by the Plaintiffs that the total contract sum was slightly higher. They also claimed the value of the omitted works ($323,600) or loss of profits or damages for wrongful repudiation. They further claimed the retention sum held by the Defendants or, alternatively, damages.

17 The Plaintiffs called five witnesses and one expert. Teo Tian Yeo, the Project Co-ordinator of the Plaintiffs, testified that he was involved in the administrative aspects of the N2C6 project. He was not on site but the Plaintiffs' site engineer, Thuan Khac Nguyen, would show him all the correspondence between the Plaintiffs and the Defendants. Initially, the working relationship between the parties was good.

18 In late August 1998 or so, Lawrence Soh, the Managing Director of the Defendants, informed the Plaintiffs' Managing Director (Phua Choon Seng), Kent Loong's Managing Director and Teo to attend a meeting which was held at about 8 pm at the Defendants' office. At this meeting, Lawrence Soh said that the Defendants were unable to pay the monies due to the Plaintiffs and to Kent Loong on time as the HDB had not paid the Defendants and told them to anticipate such delays in payment. He also told them not to divulge this information to other subcontractors. No minutes of the meeting were taken.

19 Since that meeting in August 1998, the Defendants had been irregular in payment and had totally refused to pay on the 16th and 17th progress claims. As a result, the Plaintiffs experienced great financial difficulty and were unable to pay their workers and their subcontractors, who, although unhappy, carried on with their work according to schedule after the Plaintiffs persuaded them to. However, the Plaintiffs could not proceed any further and had to accept the Defendants' breach of contract or face further financial losses.

20 Wong Kim Yong, the Plaintiffs' foreman, joined the N2C6 project in August 1998. He would accompany the representatives from the Defendants and the HDB on joint inspections held about once every two weeks. Whenever there were complaints of defects, he would instruct the Plaintiffs' workers or subcontractors to rectify them.

21 The HDB would give a progress report after each inspection to the Defendants indicating whether they could proceed to the next stage of work. Although the Plaintiffs were not given a copy of such reports, the Defendants would notify Wong if there was a negative report and the Plaintiffs would have to rectify the defects before proceeding further. Between August 1998 to March 1999, there were only complaints of minor defects, expected in any construction project.

22 In about March 1999, the Defendants started withholding payment to the Plaintiffs resulting in the Plaintiffs being unable to pay their workers and subcontractors. Inspite of that, the work progressed without delay.

23 Thuan Khac Nguyen was the Plaintiffs' site engineer from mid August 1998 to June 1999. He testified via video-conferencing facilities from Victoria, Australia. In his statement of intended evidence-in-chief, he said that he prepared the 16th progress claim on 25 March 1999 with a letter accompanying the same. He then approached the Defendants' site manager to verify the claim and to get feedback from him. Some differences and typographical errors were discovered and, as a result, he had to amend the progress claim and submit it formally the next day. Since the spreadsheet programme he was using had an auto-date function, the print-out showed the date as 26 March 1999. Essentially the new print out showed the claim was increased by some $20,000.

24 When the expected payment did not arrive on 30 March 1999, the Plaintiffs waited a few more days before checking with the Defendants' head office. When they contacted the Defendants' Project Director, Steven Soh, he told them that the cheque had been issued but was awaiting the signature of the Defendants' other director who was then overseas.

25 The Plaintiffs waited another week and when that other director returned, Thuan asked Steven Soh repeatedly about the payment. Each time, Steven Soh would ask him to wait. In the meantime, the Plaintiffs' workers were getting frustrated and angry as they had been receiving late and partial payments. Steven Soh raised some concern about the workers' unwillingness to take instructions and to work overtime and Thuan explained to him that the Plaintiffs must receive payment on their 16th progress claim.

26 Steven Soh then told Thuan that if they could finish the casting for the roof slab of Block 276C, he would release the payment for the 16th progress claim. Thuan then urged the workers to speed up and they managed to complete the work. However, Steven Soh did not keep his promise.

27 Steven Soh then asked them to complete the carpark roof, again promising payment on the 16th progress claim thereafter. The Plaintiffs did that but Steven Soh reneged on his promise again and asked them to carry out another job.

28 When that was completed, Steven Soh handed a cheque to Thuan on 17 April 1999, more than two weeks past the due date of 30 March 1999, but only for $128,230.88. Thuan was also shown a letter from the Defendants which he was asked to sign. As he thought it was only an acknowledgment of receipt of the said letter, Thuan signed. That letter dated 17 April 1999 on the Defendants' letterhead stated:

> "We acknowledge receipt for the payment of $128,230.88 for progress payment No. 16 and agreed that it is the agreed valuation of work done as at 25 Mar' 99."

29 After Thuan had signed that letter, the Defendants asked him to place the Plaintiffs' company stamp on it. He then realized that the reason for that request was to make that letter appear as the Plaintiffs' and that the Defendants were attempting to use underhanded tactics to extract an agreement from the Plaintiffs regarding the payment. He then told the Defendants that he could not accede to their request as he had not agreed that the said amount was to be the valuation or the full and final payment for the 16th progress claim.

30 Thuan added in oral testimony that the Plaintiffs' workers and subcontractors were on site in April 1999 and that all the roof slabs of the blocks in question had been cast. Most of the defects were minor. He was confident that the Plaintiffs would have finished the entire works by August 1999 if they did not have to leave the site. He estimated that it would have taken the Plaintiffs 12 to 14 months to complete the blocks in question. He did not remember anyone telling him that the structural works had to be completed by June 1999.

31 Thuan did not know who filled in the number of workers in the Defendants' daily manpower record. He did not recall the number of workers from the Plaintiffs to be as low as the records indicated.

32 Although the progress claim was to document all work done up to the day of submission, Thuan would have preferred that the cut-off date for works done be at least a day before the submission date. Thuan prepared the 16th progress claim although he did not sign it. He had discovered that the amount paid by the Defendants was usually less than what the Plaintiffs had claimed and so he tried to check with the Defendants' engineer before formally submitting the 16th progress claim as he wanted to minimize the discrepancies. It was already past 5 pm on 25 March 1999 when the difference and errors were noted and the Defendants asked him why not bring the progress claim the next day. He did not think that if he submitted on 26 March 1999, the payment would not be made on 30 March 1999.

33 Thuan reiterated that when he was told to sign the acknowledgment letter on 17 April 1999, he had not received his March salary which was usually paid at the end of the month. Since he was a foreigner working here, he needed the money to pay his rent. The Plaintiffs' workers wanted their salaries too. The Defendants' representative – he was not sure whether it was Steven Soh – told him that he would hand over the cheque only if he signed that letter. Therefore, although he knew it was not merely an acknowledgment of receipt, he signed it. He thought it was alright anyway as the 16th progress claim was for works done up to 25 March 1999 and the Plaintiffs could claim progressively in the next claim.

34 Thuan agreed that the first few progress claims were paid promptly but commented that the time of payment lengthened and the discrepancy between the amounts paid and the amounts claimed increased in respect of the later progress claims.

35 He left the Plaintiffs at the end of his one-year employment pass. He and his wife decided to return to Australia because the economic climate there looked brighter than that for Asia then. He was currently working for an Australian local council called Wyndham City Council. He could not take leave to come to Singapore to testify as he had taken two and a half weeks of leave during the New Year season and to do so again might affect his career prospects. Asked whether his reason for not returning to Singapore was due to a bankruptcy order made against him on 10 December 1999, Thuan claimed that he was not aware of such order. He acknowledged that he and his wife had several credit cards and owed money on them but both of them were working to pay off the credit card debts.

36 Thuan added in re-examination that the Defendants had not intimated that the 16th progress claim was submitted one day late and had not discussed with him the quantum of payment at all. After he was told to sign the letter dated 17 April 1999, he was actually told to sign another letter with the same content but, as he remembered it, without any letterhead. He refused to sign the second letter. It was because of this that he felt something was wrong or unusual and that caused him to look at the wording again and he noticed that it forced him to accept the valuation.

37 Mock Sang Shen was the Plaintiffs' site supervisor. He was assigned to the N2C6 project around October 1998. He would accompany Thuan and Wong (the foreman) on the joint inspections with HDB and the Defendants. He was also responsible for ensuring that the works progressed according to the Defendants' schedule provided to all the Defendants' subcontractors during the weekly site meetings. The rest of his testimony was essentially the same as Wong's.

38 Asked what minor defects they had to rectify, Mock explained that they were things such as non-alignment of the formwork and some gaps. These were rectified immediately.

39 Mock agreed that it would take about five to six months to complete one block of 16 floors on an average of two to three floors per month. Thuan would give the detailed instructions on the time-cycle for casting.

40 Phua Choon Seng was the Project Manager and effective head of the Plaintiffs. He stated that the Defendants persistently breached their payment obligations by paying late or making only partial payments. As this caused unhappiness among the Plaintiffs' workers, Phua protested frequently to the Defendants, in particular Steven Soh. As a result, Lawrence Soh (Steven's brother) proposed that the submission dates be brought forward by a few days so as to give the Defendants more time to pay the Plaintiffs. The Plaintiffs were in fact disadvantaged by the new arrangements as their cut-off date for claims would be the 25th day while they had to pay their workers up to the end of the month. The change was meant to accommodate the Defendants. It was impracticable to evaluate the work done up to the day of submission as there would usually be overtime work up to 10 pm. The Plaintiffs could therefore submit their claims the following day only.

41 In respect of the 16th progress claim, Phua was handed a copy of the table, containing the computation of the work done, by Thuan. The table also contained the assessment done by Steven Soh and countersigned by him. Steven Soh would adjust the percentages of the work done. It was in keeping with past experience that the Defendants would under-evaluate the progress claim. However, as such claims were interim in nature and to avert unnecessary arguments, the Plaintiffs would not normally dispute the Defendants' adjustments.

42 Even if the percentages adjusted by Steven Soh were correct, the amount due on the 16th progress claim would be $282,549.60. It was therefore not true that the Plaintiffs had agreed the value of the 16th progress claim was to be $128,230.88. There were also fundamental differences between the parties concerning the retention sum held back by the Defendants.

43 The Defendants had also breached their payment obligations by failing to pay the 17th progress claim by 17 April 1999 when that claim was submitted on 12 April 1999 as stipulated.

44 Phua denied any delay on the part of the Plaintiffs in performing their scope of works. After the Plaintiffs' solicitors' letter of demand dated 10 April 1999, the Defendants unilaterally and wrongfully engaged Kent Loong to take over the remaining works while the Plaintiffs were still carrying out the works on site. Phua was confident that the works would have been completed in another four months (i.e. by August 1999) if the Defendants had not repudiated the contract and that would be way before the completion date of 8 February 2000 stipulated. The Plaintiffs had therefore lost profits on the remaining works which Phua estimated to be about 15% of the value of such works.

45 Phua went on to state that it was the usual practice in the construction industry to have a retention sum of 10% of the value of the works done subject to a maximum of 5% of the contract sum (which would work out to $206,500). Phua was wrong in computing this figure as he thought the

total contract sum was somewhat more than the said $4,110,000. However, the Defendants deducted a retention sum of $366,314.00 in their 16th progress payment despite the Plaintiffs' oral and written protests.

46 In respect of the revision of the number of certified mandays from 6,000 to 7,560 on 2 February 1999, the Plaintiffs had not been informed of the increase until then. In any event, the Plaintiffs replied on 4 February 1999 to state that they were confident they would be able to meet the target by the time the works were completed. It was unfair to deduct alleged penalties when the contract had provided that deduction would only be made if HDB did so from the Defendants. Even if there was a shortfall in the mandays, the Defendants would have to prove that it was attributable to the Plaintiffs and not to the other subcontractor involved in the project.

47 Phua elaborated on how he estimated profits to be 15% of the value of the works. The overheads for salaries (for him, his employees and his labourers) would be about $30,500 per month. Divided by four blocks, that would work out to be $7,625 per block. If two floors were cast each month, each floor would incur overheads of almost $4,000 per month. He paid his subcontractors slightly more than $41,000 per floor. The Defendants would however pay the Plaintiffs $57,600 per floor (although it was a lump sum contract). The Plaintiffs would therefore make about $12,600 in profit per floor (i.e. $57,600 minus $4,000 and $41,000). $12,600 out of $57,600 would be 21.8% profit. Therefore his claim of 15% profit was reasonable. It was clarified later that his computation of salaries did not take into account CPF contributions.

48 Where the wastage of concrete alleged by the Defendants was concerned, Phua testified that the Defendants, as the main contractors, did the ordering of concrete and had never complained of any wastage by the Plaintiffs. The wastage, if any, would be half to one cubic metre of concrete in any event. The Defendants' other subcontractors (e.g. for sanitary works, for drainwork and the apron slab) would also use concrete. Even the Defendants themselves would use concrete for the base of the tower crane. No record of concrete usage was given by the Defendants to the Plaintiffs.

49 Phua said in cross-examination he did not know that the completion date (8 February 2000) for the Plaintiffs' works was the same as that in the main contract between the HDB and the Defendants. The non-structural works (architectural, plumbing and M & E) did not need to wait until all the structural works were completed. They could follow the Plaintiffs upwards as they completed each floor.

50 The Plaintiffs had about 40 skilled labourers capable of logging about 1200 mandays per month. Phua was therefore certain that the Plaintiffs would be able to meet the requisite mandays requirement by the end of the contracted works.

51 Phua was then referred to the subcontract wherein wastage of concrete was to be limited to 3%. Phua said that not every slab casting used the same quantity of concrete. The Plaintiffs had never checked the exact quantity of concrete used.

52 For the pre-cast slab at the carpark block, the Plaintiffs would hoist up the pre-cast plans and then do the steel work and casting. The pre-cast rectangular plans would be joined one after the other. If there was leakage, that would be the manufacturers' fault. Shown photographs taken of the carpark, Phua agreed that there were small ponding problems.

53 As for the bulging concrete, Phua explained that there were bound to be some problems in casting concrete and that the bulging concrete problems here were small. It was not necessary to use skilled workers to erect the formwork.

54 The required number of certified mandays was met cumulatively month to month although the figures were submitted each month for the previous month. The Plaintiffs had submitted the necessary documents for certifying mandays to the Defendants by fax. When the Plaintiffs left the site in April 1999, no submission was made in May 1999 by the Defendants to the HDB.

55 Asked whether there was an advance payment of $222,665.40 on 9 October 1998 for the 5th progress claim, Phua said there was none. The payment was actually made in two instalments. From this claim onwards, the Defendants asked Phua to change the dates of submission to the 5th and 20th days of the month with the respective payment dates also changed to 10th and 25th. Phua did not mention this in his Affidavit of Evidence-in-Chief as the only progress claims in issue then were the 16th and the 17th progress claims. He disagreed that there were other advance payments.

56 In December 1998, there was another change in the dates for submission and payment. Phua insisted that the Defendants give him a letter which they did on 26 December 1998. Phua maintained that the submission date did not need to be strictly adhered to as delays of a few days were quite common.

57 The 13th progress claim dated 5 February 1999 was in respect of works done up to 10 February 1999 because that was an exceptional case. Chinese New Year was round the corner and the Defendants wanted the Plaintiffs to make an estimate of the work done until they stopped work before the festivities.

58 Asked whether the Plaintiffs' workers would work overtime if the works were proceeding according to schedule, Phua said that the earlier the work was done, the earlier the subcontractors would be paid. He would therefore always press his subcontractors to work longer hours.

59 In respect of the letter dated 17 April 1999 which Thuan had signed when he received the Defendants' cheque for $128,230.88, Phua explained that Thuan had told him that the Defendants wanted him to sign a letter failing which they would not release the cheque to the Plaintiffs. Thinking that it was only an acknowledgment of receipt, Phua told Thuan to go ahead and sign. It was only later when Phua saw the letter brought back by Thuan to the office for the company's stamp to be affixed that he realized what the contents were. Phua did not accept that letter and therefore refused to affix the company's stamp on it. Subsequently, the Defendants asked Thuan to sign another letter but he refused to do so.

60 Phua insisted that the Plaintiffs' workers were on site until 24 April 1999 although the Defendants' manpower record showed otherwise from 12 April 1999. Phua conjectured that it could have been due to the Plaintiffs' foreman failing to report the daily workforce on site. He pointed out that Steven Soh's Affidavit of Evidence-in-Chief acknowledged that the Plaintiffs left the site "sometime about 20 April 1999" and also produced some job cards of the Plaintiffs' workers which indicated that they were on site until 24 April 1999. The Plaintiffs' subcontractors had also made claims for payment on 13 April 1999 and 22 April 1999.

61 Phua was then referred to the Defendants' draft letter dated 16 April 1999 which was not sent out. That letter, addressed to the attention of Phua, read:

> "Further to meeting with yourself, Mr Raymond and Mr Thuan K. N. on the 14th Apr 99, we tabulate the following as discussed:

Jia Chen Constn PL will continue to complete all outstanding works with diligent.

1. The following will be omitted from work as omission variations:

- Lift motor room
- Installation of precast parapet wall
- Linkways
- Roof fascia

..."

Phua denied having attended any meeting on 14 April 1999 or giving any consent to have the works omitted. It was also the first time he was looking at this letter (which was tendered only during the trial).

62 In re-examination, Phua explained that the practice on retention sums was as follows. For external subcontractors, after the plastering work was completed, 2.5% would be released by the main contractors. After the paintwork was completed, the other 2.5% would also be released. For labour subcontractors, the retention sum of 5% would be released after the external plastering work was completed.

63 The final witness for the Plaintiffs was Francis Teo Teng Siu, a Quality Surveyor and the sole proprietor of a firm engaged in quantity surveying and contractual claims for construction projects. In his report, Francis Teo stated that he was instructed by the Plaintiffs to review the valuation carried out by the Defendants' expert, Paul Tan Keng Hoon, on the outstanding works and rectification of defective works as at 26 April 1999.

64 The first comment that Francis Teo had on Paul Tan's report was that the latter's list of items of outstanding and defective works was too brief. Sizes and quantities of works, necessary for accurate pricing, were omitted. No drawings, plans and photographs were annexed to that report. The report was therefore subjective and unreliable.

65 Paul Tan adopted the HDB's Standard Schedule of Rates for the pricing of the outstanding works and the rectification of defective works but added 15% as establishment charges and profit. That was tantamount to saying that a main contractor and not a subcontractor, would be engaged in place of the Plaintiffs.

66 The valuation method adopted by Paul Tan was, in Francis Teo's opinion, wrong. The subcontract stipulated that variations shall be valued based on the standard schedule of rates less 10%.

67 Paul Tan's pricing was inconsistent. For instance, the rate for rectification of bulging concrete beams at various locations was $145.44 throughout irrespective of the number of defective concrete beams. Similarly, for bulging concrete beams, the rate adopted varied from $18.18 to $96.96. The valuation should be based on the lower rates worked out by Paul Tan. There was therefore an over-pricing of some 51.08%.

68 The valuation of the outstanding works should be $314,791.75 and that for the rectification works was $15,016.66, making a total of $329,808.41. The value of the Plaintiffs work as at 26 April 1999

was therefore $4,110,000 minus $329,808.41, which was $3,780,191.59.

69 In cross-examination, Francis Teo agreed that his valuation of the defects was based on Paul Tan's report only and not on site visits. Asked whether a premium had to be paid to a subcontractor brought in to replace the original subcontractor, Francis Teo replied that that was the general belief but the market conditions in Singapore were very important factors. From January 1998 to January 1999, construction costs had gone down 20%. Paul Tan stated that his pricing reflected the market price but he used the HDB rates as at January 1998. The labour-rate method should not be used for the outstanding works. Instead, the volume of concrete work should be calculated and the market rate for labour per cubic metre applied. Rectification of defective works would always cost 50% or even 100% more than new or outstanding work. The rates for rectification works could not therefore be used for outstanding works.

70 Francis Teo disagreed with the suggestion that skilled labour was required for hacking works. He stated that only one labourer and one skilled worker were needed.

THE DEFENDANTS' CASE

71 Steven Soh, the Project Director and a shareholder of the Defendants, affirmed two Affidavits of Evidence-in-Chief. After setting out the terms of the subcontract awarded to the Plaintiffs, Steven Soh said that by virtue of the letter dated 26 December 1998, confirming the agreement made on 22 December 1998, the parties agreed to a variation of the submission and payment dates (i.e. 12th for payment on 17th, 25th for payment on 30th). Since the 16th progress claim was submitted on 26 March 1999, payment was due only on 17 April 1999 and the Defendants did pay $128,230.88 on that date.

72 The Defendants would not pay the full amount claimed in each progress claim but would have their site engineers assess the value of work done at the site and pay accordingly. The Plaintiffs had accepted the Defendants' assessments all along. The Plaintiffs were therefore not entitled to claim a breach of agreement when the Defendants paid only $128,230.88 on the 16th progress claim on 17 April 1999. The Plaintiffs' Thuan had accepted the cheque for that amount and acknowledged it as the agreed valuation of work done as at 25 March 1999.

73 Steven Soh denied that he had certified the amount due to the Plaintiffs as $419,055.50 as at 12 April 1999. The Defendants had assessed the value of the Plaintiffs' work as $3,663,280.00 in their 17th progress claim and, after accounting for all requisite payments and deductions, there was an overpayment of $15,207.95. The Defendants had also deducted $285,505.00 as provision for shortage of certified mandays.

74 Any contractor involved in HDB projects would know the requirement of the HDB for certified mandays and that a penalty of $50 would be deducted for each shortfall of one manday. This was provided in the main contract with the HDB. The records submitted by the Plaintiffs to the Defendants showed that the Plaintiffs provided only 1,371 certified mandays between August 1998 to December 1998. The Plaintiffs would therefore have had to provide another 6,189 certified mandays to meet the requirement of 7,560 within the next four months as that was the end of the period by which the Plaintiffs must complete their works. At the end of December 1998, the Plaintiffs had been paid some 45% of the total contract value but had provided only 18% of the manday requirement.

75 The Defendants were extremely anxious about this shortfall and hence wrote to the Plaintiffs on 2 February 1999 and 9 September 1999 to highlight the issue. Oral reminders were also given. The Defendants had a right to retain any monies due on the shortfall. The HDB would not recognize the mandays of workers whose CPF or levy had not been paid by the Plaintiffs and a number of the Plaintiffs' workers' CPF and levy were not paid.

76 On 19 April 1999 or so, when Steven Soh noted that the Plaintiffs had made no attempts to increase their certified mandays, he instructed his engineer to withhold $285,050.00 being the estimated shortfall of 5,701 mandays as at 24 April 1999. As a result of this deduction from the 17th progress claim, the Plaintiffs were overpaid by $15,207.95.

77 After the Plaintiffs started work at the site, problems began to surface. In October and in November 1998, two of the Plaintiffs' workers were found to have forged work permits. From January 1999, the Defendants complained in writing about the slow progress of works. On 25 March 1999, the Defendants wrote to record a meeting with the Plaintiffs' Mock on 17 March 1999 where it was agreed that the Defendants would provide their own men to carry out housekeeping works.

78 Steven Soh went on to state that sometime around 20 April 1999, the Defendants realized that the Plaintiffs had practically stopped all work on site. They had also received the Plaintiffs' solicitors' letter dated 10 April 1999 demanding payment on the 16th progress claim even though it was not due. As the Plaintiffs were in a litigious mood and did not wish to mobilize their workers to fulfil their contractual obligations, the Defendants had no choice but to engage Kent Loong to help out in providing labour. The Defendants then instructed their solicitors to write to the Plaintiffs' solicitors that the Defendants accepted the Plaintiffs' repudiation of the contract by abandoning the works and a letter dated 26 April 1999 was sent accordingly.

79 When the letter of demand dated 10 April 1999 was received in respect of the 16th progress claim, the Defendants were very busy trying to complete the project in view of the delays caused by the Plaintiffs. Instead of engaging in litigation, Steven Soh authorized payment of $128,230.88 to the Plaintiffs being the value of the work assessed by the Defendants. He took the precaution of getting the Plaintiffs' Thuan to sign the letter dated 17 April 1999 because of the Plaintiffs' solicitors' letter of demand. Thuan was the Plaintiffs' site engineer and was expected to have full authority to acknowledge payment and to agree on the value of the work done.

80 That same day (17 April 1999), the Defendants' solicitors wrote to the Plaintiffs' solicitors to inform them that the 16th progress claim had been settled.

81 Steven Soh was shocked when the Plaintiffs' solicitors replied on 19 April 1999 denying that the payment was full and final payment of the 16th progress claim and went on to demand payment on the 17th progress claim. By that time, he was certain that the Plaintiffs were no longer interested in carrying on with the contract and, being concerned about the shortfall in the number of mandays, instructed that $285,050 be held back. He also instructed that the variation order dated 19 April 1999 be issued to omit the uncompleted works (mentioned earlier) from the Plaintiffs' scope of works.

82 The Plaintiffs' work was assessed at $3,663,280 by the Defendants. That meant that they had not completed works to the value of $446,720 (i.e. $4,110,000 minus $3,663,280). The Defendants then engaged their expert, Paul Tan, to evaluate the costs of completing the outstanding works and of rectification of the defective works. The total indicated was $1,138,787.72. From the report, the Defendants would need to pay $1,101,559.88 to Kent Loong just to finish up the uncompleted works.

After deducting the retention sum and the value of the uncompleted works left by the Plaintiffs, the Defendants would have to pay an extra $368,000 or so to Kent Loong.

83 Besides incurring this amount of damages, the Defendants would also have to pay the costs of rectification of defective works estimated at some $37,000 as at 15 June 1999. More defects had surfaced between then and October 1999 and the Defendants would be asking Paul Tan to assess the costs of the additional defects when the project was ready to be handed over to the HDB. Further, the Plaintiffs had provided only 4,584 mandays, a shortfall of 2,976, the penalty for which would be $148,800. There were also potential liquidated damages resulting from the delays caused by the Plaintiffs. The total quantifiable losses would therefore be more than $550,000 (excluding the additional defects and the possible liquidated damages and the retention sum held by the Defendants). Such retention sum would be held back until after the expiry of the defects liability period of one year after hand over to the HDB. The Plaintiffs had also not constructed the height of the kitchens according to specifications, resulting in insufficient floor clearance to install the door frames. The length of the kitchens was also 7,100 mm for Blocks 276B and 276D instead of the stipulated 7,000 mm. The Defendants were concerned that further damages would be imposed on them as a result of all this.

84 The above stated losses formed the subject of the Defendants' Counterclaim against the Plaintiffs. In the course of the trial, the Defendants added a further Counterclaim for concrete wastage beyond the 3% allowance in the agreement. Accordingly, the Defendants asked that Judgment be given to them with damages to be assessed after the completion of the N2C6 project.

85 In oral testimony, Steven Soh corrected his first Affidavit of Evidence-in-Chief by adding that there were two new subcontractors who replaced the Plaintiffs – Kent Loong did the formwork and steel work while Goh Beng Huat did the concreting work. In respect of the draft letter dated 16 April 1999 to the Plaintiffs concerning the omitted works, Steven Soh explained that it was drafted by Koh Lee Seng, the Defendants' Contracts Manager, who asked for his comments and approval but the letter was not sent due to an oversight on the part of the Defendants.

86 In his second Affidavit of Evidence-in-Chief filed in response to Phua's Affidavit of Evidence-in-Chief, Thuan's Statement of Intended Evidence and the amendments made to the Statement of Claim, Steven Soh stated that the Defendants had made advance payments to the Plaintiffs on 23 December 1998, 18 January 1999, 1 and 13 February 1999. He denied that Phua had made many complaints about alleged late payments to him. The parties only held informal discussions on payment issues. The Defendants had numerous other projects and numerous subcontractors and the Defendants had proposed the changes to the dates of submission and payment only as an administrative and procedural measure to lighten the burden on their quantity surveyors who had to deal with all the claims of the various subcontractors at the same time previously. The Plaintiffs had never denied that they had consented to the variation.

87 Steven Soh also denied using "underhanded tactics" as alleged by the Plaintiffs to create the acknowledgment signed by Thuan on 17 April 1999. Since Thuan was authorised to act for the Plaintiffs and he had agreed on the valuation, it was logical to require the Plaintiffs' company stamp to be placed on the document.

88 As at the date of his testimony in Court, the rectification works were still proceeding.

89 In cross-examination, Steven Soh said he was in charge of two HDB projects at the material time and that he was stationed on site. The contract value of the project in question between the Defendants and the HDB was $42,644,444.00. Initially, Kent Loong was the subcontractor for all the

structural works but it could not cope due to lack of manpower and after discussions, it was agreed that the Defendants subcontract some of the blocks to others and that was done on 16 July 1998. Kent Loong's subcontract would be similar to that of the Plaintiffs. The carpark block was likewise removed from Kent Loong's scope of works and given to the Plaintiffs on 30 September 1998. Although time was lost, Kent Loong had in fact done some of the works by the relevant dates.

90 The "Standard Schedule of Rates" mentioned in the subcontract referred to rates fixed as between the Defendants and the HDB. The subcontractor's rates would be 10% less. Asked whether the works omitted from the Plaintiffs' scope in April 1999 would therefore be given to Kent Loong for the same value, Steven Soh said that because of time constraints then, he gave an assurance to Kent Loong that he would reimburse Kent Loong for any extra expenses incurred which could be worked out at a later date.

91 As at August 1999, the requirements on mandays had been met. This was confirmed in a report by the HDB received by the Defendants on 29 November 1998. The Defendants had retained 10% of the value of works done in respect of both Kent Loong and the Plaintiffs and all other subcontractors because of the projected shortfall in mandays, which were cumulative figures until the end of the subcontract. There was no specific target per month for the number of mandays. While Steven Soh agreed that the Plaintiffs could have complied with the mandays requirement if they had carried on for another four months or so, he said that was premised on the proper signing in of the records and the payment of CPF and levy by the Plaintiffs.

92 As experienced subcontractors, the Plaintiffs should know when they must complete their works although the subcontract stated the completion date as 8 February 2000. This date was inserted because the Plaintiffs had to build the linkways as well and it was difficult to estimate when they would be constructed. The Plaintiffs should know that there would be a time gap between the structural works and the building of the linkways during which they could do rectification works.

93 Progress claims would have to be vetted by the Project Manager of the Defendants first, then by Steven Soh before they were submitted to the Defendants' Quantity Surveyor together with his comments for processing. Steven Soh would have the same intimate knowledge of the work done as the Project Manager as he would walk around the site. He disagreed with Phua's evidence that the submission dates were changed from the 12th and 29th days to the 5th and 20th days from progress claim number 4 onwards. There was no discussion to affect such a change between Phua and Steven Soh's brother (Lawrence) as Lawrence would have informed him about it.

94 The advance payments were made out of goodwill by the Defendants as Phua had appealed to them for help. They were also conditional upon the good progress of the works.

95 Asked whether the Defendants had defaulted in paying on the 8th progress claim by paying in three instalments, Steven Soh disagreed and said there was no problem at that time and no complaint was raised by the Plaintiffs. He pointed out that some payments were made on the very day of the submission of the claims. The Plaintiffs could not expect the full claim to be paid each time as the HDB also deducted from the Defendants' claims. He also maintained that some were advance payments as stated in the Payment Vouchers and were not part payments. In fact, payment number 13A was a separate deal between the Defendants and the Plaintiffs' subcontractor whereby the Defendants agreed to reward the latter $30,000 if they could complete the carpark slab and they did. However, $20,000 out of the $30,000 were taken by the Plaintiffs who paid only $10,000 to their subcontractor.

96 Asked whether he constantly under-certified the amounts payable, Steven Soh explained that the valuation given by the Defendants' site staff was still subject to his scrutiny. The Defendants' site

engineer could have made some errors in the certification. Steven Soh said he might have made some adjustments which he has forgotten about now.

97 Steven Soh disagreed that the letter dated 26 December 1998 changing the dates of submission and payment did not make compliance with the submission deadlines a pre-condition for payment on the next available date. He also disagreed that Thuan could expect payment on the 16th progress claim by 30 March 1999 and not 17 April 1999 based on the previous conduct of the parties. The Defendants' directors could of course waive strict compliance with the submission deadlines if the Plaintiffs were doing their work well and they were not.

98 Steven Soh said there was no contractual document between the Defendants on the one hand and Kent Loong and Goh Beng Huat on the other in respect of the works omitted from the Plaintiffs' scope in April 1999. The agreement was verbal only because of the time constraints. Asked when the new subcontractors were engaged to do the omitted works, Steven Soh could only remember that it was not long after the Plaintiffs had left the site around 24 April 1999. Asked whether Kent Loong had been paid for the omitted works done by them, Steven Soh said they had been but could not recall the amount.

99 Steven Soh disagreed that unskilled labour could be employed for hacking works which would use air or electrical breakers. They would not know how deep into the structure to hack and if they hacked too deep, that might cause problems to the structure. He could not confirm whether all the defects indicated in the Defendants' expert's report had been rectified. Asked how the door frames could have been installed already if the clearance from the floor was insufficient, Steven Soh said they either had to cut the bottom of the doors or hack off the concrete floor underneath. Such rectification was still going on. They could not hack the floor before installing the door frames because inspection was going on for the more than 500 units which had three doors each and this could not be done in one day.

100 The photos taken in September 1999 tendered by the Defendants were merely to illustrate the kinds of defects at the carpark block. They did not show every defect. The photos showed ponding or stagnant water problems because there was no gradient leading to the drainage points.

101 Steven Soh maintained that the 1,600 bags of Smartscreed ordered by the Defendants were used for the carpark block's rectification works. Each bag of 25 kg would cover one square metre at a minimum thickness of 20 mm. There were therefore some 1,600 square metres of defects in the carpark block.

102 In respect of the concrete wastage, Steven Soh agreed that concrete would also be used for other works such as the plumbing and sanitary but a lower grade would be used. Building structures would require a higher grade of concrete. The Defendants did not produce the invoices for supply of concrete from one of their two suppliers. The invoices tendered in respect of the other supplier were not complete – there should be more. There was also a third supplier at the latter part of the construction.

103 Asked how the Defendants managed to differentiate the amounts of concrete used by the Plaintiffs and by Kent Loong, Steven Soh referred to the remarks typed in at the bottom of the invoices which indicated the block that each particular load was meant for. A table comparing the actual quantity of concrete used with the measured quantity was relied upon by the Defendants to illustrate that there was wastage beyond the allowed 3% without attempting to quantify all the wastages (DB 441). The measured quantity, taking into account the 3% allowance, was taken from the drawings.

104 The concrete which was sent to the site by the suppliers would be acknowledged by the Defendants' foreman. The Defendants did the ordering of concrete based on their estimated needs. The invoices of the suppliers were not given to the Plaintiffs and the Defendants did not inform the Plaintiffs if there was wastage. Steven Soh reiterated that it was the Plaintiffs' responsibility under the subcontract to check on the amounts supplied.

105 In re-examination, Steven Soh explained that the extra expenditure paid to other subcontractors was in respect of outstanding works and not the omitted works. The Plaintiffs had a complete set of drawings from which they should be able to calculate the quantity of concrete to be used.

106 The only other witness for the Defendants was Paul Tan Keng Hoon, a Quantity Surveyor, engaged by the Defendants to inspect the site and to report on the outstanding works and the costs of completing such works and the defects and the costs of rectification thereof. He inspected the site on 6, 10 and 13 May 1999.

107 Paul Tan estimated the costs of completing the outstanding works at $1,101,599.88 and the costs of rectification at $37,187.84 (revised during his testimony to $34,901.68 because of the calculation error pointed out earlier by the Plaintiffs' expert witness). The outstanding works based on the contract, according to Paul Tan, were worth $645,363.20. Based on his evaluation and after adding approximately $285,000 for the shortfall of 3,932 certified mandays and another $1,619.20 for removal of debris, he arrived at the said $1,101,599.88. The amount of costs for rectification included $5,000 as "Preliminary Costs (Provision to tools and equipment by main contractor)".

108 As the subcontract here was a lump sum one, and as a third party was required to complete the works abandoned by the Plaintiffs, the rates should not be the same as those in the original subcontract but should be based on a fair market value (i.e. rates used in HDB building projects and a commonly accepted 15% mark up for the contractor's establishment charges and profits). He therefore used the average hourly rate for skilled workers (carpenter, concretor and steel bender/fixer) plus 15% which worked out to $9.09 per hour. For unskilled labour and plasterer, he used an hourly rate of $5.06 and $10.47 respectively.

109 For the defective works, the rectification of which involved mainly hacking off excess concrete, Paul Tan calculated the costs based on a gang of two men multiplied by the aforesaid average skilled labour rate of $9.09 per hour.

110 Paul Tan filed a second Affidavit of Evidence-in-Chief in reply to the Affidavit of Evidence-in-Chief of the Plaintiffs' expert witness. His reply was set out in a letter dated 11 January 2000 to the Defendants' solicitors as follows:

> "1. **Pricing**
>
> > In our professional point of view, the 15% markup for Contractor's establishment Charges, tools and equipment and Profit as stated in our report reference PT/JW/6/99 dated 15.06.1999 is a necessity which is required to offset the administrations costs incurred by the Main Contractor for the urgency of another sub-contractor to complete the remaining works in such a short period.
>
> 2. **Omission According to Contract**

> We are aware that the sub-contract states that all variations shall be based on the Standard Schedule of Rates less 10%. But in our professional point of view, this method applies only to variation works and shall not applies to cases when another sub-contractor is to be engaged to salvage and complete remaining works.

3. **Costing on the rectification of defective works**

> The quantity were actually given in our report as inspected on site. Sizes were not given in our report because bulging of concrete is always in irregular shapes. The different rates applied reflect the difference in sizes of defects as inspected on site.

4. **Photographs**

> We wish to highlight that all defective works had been seen on the site and shown in photographs and a copy of all photographs had been passed to the Main Contractor.
>
> Lastly in our opinion, the method of assessment by the Plaintiff's expert is considered to be illogical without referring to actual site conditions of defects and without giving establishment charges to the Main Contractor."

111 In cross-examination, Paul Tan clarified that he was not at the site for the entire three days of inspection. He was there with his staff and would leave if he had a meeting elsewhere to attend. He had however seen all the outstanding and the defective works because photographs were taken on site. For the defects listed in his report to which he ascribed the costs of rectification, he had looked at every individual item on site. He bore the following factors in mind:

> (1) The nature of the defects – whether they were external and therefore requiring the workers to be on the scaffolding, resulting in more time being needed;
>
> (2) The size and regularity of the defects;
>
> (3) The thickness of the bulging concrete – if it was very thin, the repairs would take less time.

The rectification would include the patching up of the hacked surface. The red lines marking the bulging concrete in the photographs were not placed by him but by the plastering subcontractors who found those marked areas unacceptable.

112 Paul Tan explained that it was very easy to hack past the concrete to the steel reinforcement and that was why skilled labour was required. If the hacking was not level, patch up work, not plastering, would be necessary. Unskilled labour could only do hacking if the intention was to break up the whole thing and discard it, or if the thing to be hacked would not affect the structure or the aesthetics of the building.

113 Asked whether Steven Soh briefed him on the subcontractor who was to take the Plaintiffs' place, Paul Tan said he did not. His report was premised on the open market tender basis. The outstanding works comprised not the standard repetitive floors but things like the motor room, watertank, the apron works and the linkways. Therefore a new set of formwork was necessary. It was only for standard items that the Standard Rates minus 10% could be used. For such "leftover" items, one could not use the rate per cubic metre to work out the costs. Paul Tan also explained that the 15% mark-up was not all profit. It included the work of four persons – the project manager showing the works to all the tenderers, the Quantity Surveyor preparing a contractual document, the secretarial staff typing out the contract and Steven Soh spending time negotiating with the tenderers.

114 Paul Tan went on to say that he did not look at the claims of the Plaintiffs and what percentage of the work they claimed to have completed. He only looked at where the outstanding works were. He said he could have been misled by Steven Soh that the Plaintiffs did not challenge the works allegedly not done.

115 Asked whether there was a general drop in construction prices of 20% in June 1999 when the outstanding works were supposed to have been carried out, Paul Tan agreed that there was a drop in prices in June 1999 although he could not say by how much. In any event, he had to look at the contractual date between the parties and that was 1998. He therefore based his assessment on the original contract.

THE DECISION OF THE COURT

116 I accepted the Plaintiffs' evidence that there were changes to the submission and payment dates in the course of the works culminating in the final arrangement on 26 December 1998. I could not accept, however, the Plaintiffs' contention that the deadline for submission therein was not a pre-condition to payment on the immediate next payment date and that submission within a reasonable time before the next payment date would suffice. It was meant to be a pre-condition but the course of dealings between the parties did show that the deadlines were not strictly enforced in practice and the Defendants could not insist now on strict compliance without first having given reasonable notice of their change in stance. That was why, when the 16th progress claim was submitted formally on 26 March 1999 instead of 25 March 1999 and when the Plaintiffs' Thuan pressed for payment well before 17 April 1999, Steven Soh did not retort by telling him that he was seeking payment prematurely. Instead, and I so found, Steven Soh was trying to fend Thuan off with excuses such as the unavailability of his brother to sign the payment cheque. The Defendants also failed to state their purported position when the first letter of demand dated 10 April 1999 was sent to them. The Defendants ought to have paid up by 30 March 1999 but did not.

117 In any event, the Defendants failed to make proper payment of the 16th progress claim by 17 April 1999. Steven Soh was disingenuous in making a huge deduction in the claim unjustifiably and then trying to make it appear that the Plaintiffs had agreed to accept the much reduced amount as complete satisfaction of the claim. I accepted Thuan's evidence that the Plaintiffs were practically held to ransom by Steven Soh's promise upon promise which he obviously did not intend to or could not fulfil.

118 I did not think that the letter of acknowledgment dated 17 April 1999 signed by Thuan extinguished the Plaintiffs' 17th progress claim at all. The progress claims were meant to be cumulative

in nature subject to final adjustments. Steven Soh could not and did not claim to have made the final adjustments as at 17 April 1999. Indeed, he was to allege six days later that he had overpaid the Plaintiffs. Even if they did pay on the 16th progress claim, what about the 17th progress claim which was undeniably submitted on time? The Defendants' solicitors' letter dated 17 April 1999, while alleging that the Plaintiffs had accepted $128,230.88 as full and final payment of their 16th progress claim (i.e. for work done as at 25 March 1999), did not allude to the 17th progress claim which became due the same day.

119 I found the Defendants breached their payment obligations for both the 16th and 17th progress claims. They had also made late or only partial payments on the various earlier claims. I rejected Steven Soh's evidence that there were advance payments made to help out the Plaintiffs. They were nothing more than money which was due to the Plaintiffs. The payment vouchers that purported to show that the payments were advances carried very little weight when the overall scheme of payments was looked at.

120 It was not disputed that the Defendants could hold a retention sum. The Plaintiffs said it should not be more than 5% of the total contract sum (i.e. a maximum of $205,500 based on the total contract sum of $4,110,000). The Plaintiffs had been protesting against a larger retention sum since early February 1999 but their protests had fallen on deaf ears. It was still early in the contract and the Defendants had no real grounds for projecting a breach of contract in respect of the required mandays. After all, the total number of mandays was supposed to be cumulative and was not reckoned on a month-by-month basis. The Plaintiffs had shown credibly that they could have completed all the contracted works by August 1999 or so and there was no good reason to assume that the 7,560 mandays would not be fulfilled. If the Defendants were seeking to impose a deadline for the completion of the works different from that stated in the subcontract, they had only themselves to blame for inserting 8 February 2000 as the completion date in their own document. If they had intended 8 February 2000 to apply to the linkways only, why did they not say so? After all, they were quite careful to state a different completion date (25 November 1999) when they took the carpark block out of Kent Loong's scope and gave it to the Plaintiffs on 30 September 1998.

121 Whatever the position might have been, it was clear by August 1999 that the requisite number of mandays had been complied with and there was no further justification, assuming there was previously, for holding any money in excess of the said 5%. Yet the Defendants adamantly refused to change their blinkered outlook.

122 The Plaintiffs submitted that they were entitled therefore to the interest that would have accrued to them in respect of the excess retention sum as damages. As this was not pleaded or alluded to during the trial, I did not allow the claim for such interest.

123 Where the omitted works were concerned, the Defendants appeared to me to be running inconsistent arguments. Steven Soh insisted that the Plaintiffs had agreed to the "variations", relying as proof thereof on the draft letter dated 16 April 1999 which he acknowledged was never sent to the Plaintiffs due to the Defendants' oversight and which emerged from the files of the Defendants only during the trial. Leaving aside the sheer incredibility of this part of his evidence, if the parties had agreed as alleged, on what basis were the Defendants claiming damages from the Plaintiffs for having to engage other subcontractors to do the omitted works, assuming for the moment that those other subcontractors extracted a higher contract price from the Defendants? By the same token, why did the Defendants not sue Kent Loong for the agreed variations first for the three residential blocks and then for the carpark block? If their answer was that they did not have to pay the Plaintiffs anything over and above what they had contracted to pay Kent Loong for the same works, it would be

interesting to know why they alleged to the contrary when these omitted works were reverted to Kent Loong (and also Goh Beng Huat, as claimed by Steven Soh in his oral testimony).

124 It should also be noted that variations were permitted under the subcontract only "where there are variations issued by the client" (HDB). That provision could not possibly be stretched in meaning to encompass the juggling acts performed by the Defendants between the Plaintiffs and Kent Loong. Clearly, the Defendants breached the subcontract by wrongfully subtracting from the Plaintiffs' scope of works without their consent.

125 The omitted works, as valued by the Defendants, were worth $323,600. I accepted Phua's estimate of profits at 15% of the value of works. Although he did not factor in the employer's CPF component for the salaries, which incidentally was reduced in April 1999, I was satisfied that the CPF element was compensated for by his reduced claim of 15%. I also accepted that apart from the occasional hiccups, understandable in any construction project lasting more than half a year, there was no delay on the part of the Plaintiffs in progressing with the works.

126 By virtue of all the above, the Defendants had repudiated the subcontract with the Plaintiffs. In particular, the Defendants' conduct in the month of April 1999 was oppressive and appeared calculated to bring the subcontract to a premature end.

127 The evidence pointed to the reality that works were still being done by the Plaintiffs between 12 April until about 24 April 1999. The Plaintiffs' own subcontractors had submitted claims for this period. Steven Soh had agreed that there was casting of the roof slab during this period. The Defendants' records that there were none of the Plaintiffs' workers on site must therefore be wanting in accuracy. I accepted that the Plaintiffs were therefore entitled to the full value of works performed up to the roof level of all the blocks in question and to 20% of the value of the works done for the motor rooms of Blocks 276 and 276B. The value of works done by the Plaintiffs up to the date they left the site would therefore be $3,805,960 (as shown in the annexures to Phua's Affidavit of Evidence-in-Chief at pages 91 and 92 of the Plaintiffs' Bundle of Affidavit of Evidence-in-Chief). Deducting from this the amount of $3,206,826.00 already paid to them and the 5% retention sum of $205,500 and adding thereto the 3% Goods and Services Tax of $11,809.02, the Plaintiffs were entitled to another $405,443.02. It followed from the above that there was no overpayment of $15,207.95 as alleged by the Defendants.

128 I have already indicated that the Defendants were not entitled to remove the omitted works from the Plaintiffs' scope and that if the parties did agree to the omission, there was no basis for the Defendants to make any claim for having to engage other subcontractors at an allegedly higher price. Assuming the Defendants had the right to make such a claim, they failed miserably to prove their allegations that they had to pay more to the substitute subcontractors. More than ten months after the tumultuous events in April 1999, and the omitted works must have been completed some time ago since the blocks were almost ready now to be handed over to HDB, Steven Soh still could not quantify what he had paid Kent Loong and Goh Beng Huat for those omitted works. It will be remembered that he managed to recall he had another subcontractor (Goh Beng Huat) only when he took the witness stand. He was also completely nebulous about what he had promised Kent Loong for the omitted works. He appeared to be saying in Court that he would pay whatever Kent Loong wanted if they did the works. There was no written agreement, or any agreement for that matter, on what was to be paid to the subcontractors who took over the job. It was completely ironical that in the year 2000, the Defendants were still relying on Paul Tan's projection of what the Defendants needed to pay other subcontractors to take over the job when those subcontractors had already started work since April 1999, even before Paul Tan's site inspections.

129 The issue of defects had the same unsatisfactory features. Whatever defects caused by the Plaintiffs would surely have been rectified by now, bearing in mind the common ground of both parties that the other trades could not proceed with the subsequent stages of construction until after the Plaintiffs had finished their work, the Plaintiffs stating of course that the other trades could move up the block after the Plaintiffs as each level was progressively completed. The Defendants must have the amounts expended on rectification two months before handover to the HDB, especially when the expert engaged by them had given them all the photographs and a complete list of alleged defects by July 1999. Again, the evidence was not forthcoming. Despite Steven Soh's claim that 1,600 square metres of the carpark block were defective, he could only say that the photographs adduced in Court were only illustrative of the defects and did not purport to show all of them.

130 Accepting, like the Plaintiffs did, that no construction job could be 100% perfect, I was prepared to make some deductions in favour of the Defendants. I accepted the Plaintiffs' expert's opinion that a gang of one skilled worker and one unskilled labourer could do the hacking needed and accepted his and Phua's estimates of what the rectification of the defects alleged by the Defendants would cost. The total came up to slightly more than $22,000 but I rounded the figure up to $23,000.

131 In respect of the alleged concrete wastage beyond the permitted level of 3%, the Defendants fell far short of proving that there was such wastage and that the appropriate amounts were attributable to the Plaintiffs. Steven Soh appeared unsure on the method of apportionment of the amount of concrete used by the subcontractors – it was first apportioned according to contract value, then according to the number of blocks within their respective purview. In any event, Steven Soh could not even show the total amount of concrete ordered by the Defendants for the site.

THE ORDERS

132 I therefore gave judgment for the Plaintiffs for:

(1) $405,443.32 (being the value of work done and not paid for);

(2) $48,540 (for loss of profits on the omitted works); and

(3) $205,500 (being the 5% retention sum).

The retention sum was ordered to be returned to the Plaintiffs on 24 April 2000, which would be one year after the repudiation was accepted by the Plaintiffs. In the absence of an express term, the Defendants' contention that it should be retained until after the expiry of the Defects Liability Period (of 12 months from the handover to HDB) could not be correct. If the subcontract had been allowed to run its full course, the retention sum could rightly be withheld for 12 months after the completion of the works under the subcontract. Since it was prematurely terminated, it was only logical that the 12 months commenced from the date of termination.

133 I gave judgment for the Defendants' Counterclaim in respect of the defects, the verification of which I quantified at $23,000. It followed that the rest of the Counterclaim was dismissed.

134 Other than the retention sum, all the above sums would carry interest at 6% per annum from the date of the writ of summons to the date of judgment.

135 As the Plaintiffs had succeeded on practically all counts, I thought it just that the Defendants

should pay the Plaintiffs 95% of the costs of the entire action, the deducted 5% being attributable to the limited success of the Counterclaim. There should be only one set of costs.

TAY YONG KWANG

JUDICIAL COMMISSIONER