# Chan Hong Seng Engineering and Construction Pte Ltd v Vatten International Pte Ltd [2004] SGHC 62

**Case Number** : Suit 1062/2000/D, NA 43/2003

**Decision Date** : 24 March 2004

**Tribunal/Court** : High Court

**Coram** : Thian Yee Sze SAR

**Counsel Name(s)** : Tan Liam Beng / Yow Su Joan (Drew and Napier) for plaintiffs; Ginny Tan / K Rajendran (Wee, Tay and Lim) for defendants

**Parties** : Chan Hong Seng Engineering and Construction Pte Ltd — Vatten International Pte Ltd

24 March 2004

**Senior Assistant Registrar Thian Yee Sze:**

This assessment of damages was pursuant to the judgment of Judith Prakash J dated 11 June 2002 arising out of a dispute between a subcontractor and a sub-subcontractor in the third phase of the construction of the Seletar Sewage Treatment Works. As the learned Judge had set out the background of the case in detail, it would suffice to highlight the gist of the factual matrix relevant to the assessment before me.

2 The main contractor for the project was Hyundai Engineering & Construction Co Ltd ("Hyundai"). Hyundai contracted with the defendants ("Vatten") to be the painting subcontractors at a price of $1,562,117.62. Vatten in turn appointed the plaintiffs ("CHS") as the sub-subcontractors for almost all the painting work for $1,253,113. As a result of a dispute between Vatten and CHS, Vatten called on the bond furnished by CHS in the sum of $60,000 on 14 October 2000. On 18 October 2000, Vatten terminated the subcontract with CHS on the ground that the latter had repudiated the contract by stopping work on 5 October 2000. CHS commenced an action against Vatten for wrongful termination of contract, and claimed various heads of damages as a result. Vatten counterclaimed against CHS, arguing that CHS did not carry out the subcontract works with reasonable skill and care, and did not complete the works. This caused Vatten to suffer loss and damage. They also had to engage another contractor, Tech-3 International, to complete and rectify CHS' work. Vatten in turn claimed for damages as a result of CHS' breaches.

3 The learned Judge found that CHS repudiated the contract by stopping work before completion, and that this repudiation was accepted by Vatten. In the circumstances, it was reasonable for Vatten to hire another contractor to complete the unfinished work and undertake the warranty obligations that should have been undertaken by CHS. The learned Judge dismissed most of CHS' and Vatten's various heads of claims, but awarded CHS judgment in respect of the amount due to them for work done up to 5 October 2000, the sum of which was to be assessed. The defendants were awarded $31,133.34 in respect of the painting of the digesters which CHS was found contractually bound to carry out. The defendants were also awarded interlocutory judgment with damages to be assessed in respect of CHS' breach of contract, which necessitated Vatten employing Tech-3 International at a lump sum of $275,000.

4 At the assessment before me, there were two heads of damages which I was to assess – (i) the amount payable to CHS for work done up to 5 October 2000 and (ii) the amount awarded to Vatten as a result of CHS' breach. I was guided by Prakash J's grounds of judgment on the method to be adopted towards this end. As set out clearly in paragraph 111 at page 64 of the learned Judge's

judgment:

> It appears therefore that the damages sustained by Vatten by the plaintiffs' breach of contract would be the sum of $275,000 less what they would have had to pay CHS had CHS completed the works … As against the damages recoverable from CHS, there will have to be set off what was payable to them for work done up to 5 October 2000. As stated therefore, the assessment will have to include evidence from Hyundai on what was completed as at end of September 2002 and a calculation of what was due to the plaintiffs based on the subcontract rates, as amended, and after deducting the retention amounts and previous payments made and those contra charges which the plaintiffs have accepted.

5 Before I delved into the actual calculation of damages to be awarded to the respective parties, it was critical that I addressed the issue of the method of calculation of damages. The methods of computing damages as put forth by CHS and Vatten respectively were at great variance. CHS engaged Mr Chng Heng Chong, a Chartered Quantity Surveyor, to work out the amounts under the two heads of damages. Mr Chng adopted one principal method of assessment (Methods 1 and 1A) and two alternative methods (Methods 2 and 2A and Method 3). On a thorough review of Mr Chng's Expert Report and CHS's contentions, I had a few concerns. First, I observed that CHS had not, save for Method 2A, relied on the quantities in Hyundai's interim certificate as at end September 2000. In Her Honour's judgment in paragraph 80 at page 47, it is clear that the quantities stipulated in the interim certificate as at end September 200 were to be relied on:

> Among the documents which CHS managed to obtain from Hyundai were the latter's subcontract interim progress payment status certificates for work done up to 31 August 2000 and 31 October 2000. Attached to each certificate was a summary for all works done as of the respective dates. ***Although I did not see it, there must be a similar certificate and summary for work done up to 30 September 2000. Using this information and the rates payable to CHS for the works done by them, Vatten should be able to calculate the value ofthe plaintiffs' works as of the end of September 2000 if not as of 5 October 2000 (Emphasis mine)*.** I cannot do so. At this stage, therefore, I can only find that as at 5 October 2000 there was at least $39,961.05 + GST due to CHS on the basis of work completed till the end of July and additional amounts due for the internal painting works calculated according to the revised rates and for the extra work done thereafter which must be separately assessed.

In my view, the learned Judge intended for the calculation of the amount to be awarded to CHS for work done to be premised on the quantities in Hyundai's interim certificate as at end September 2000.

6 Secondly, I observed that there were a fair number of estimated figures used in the various Methods propounded. For Methods 1 and 1A, Mr Chng gave a 20% deduction to give credit to painting works not completed by CHS. This was in accordance with Johnny Choo's affidavit of evidence-in-chief, which stated that on observation at a joint site inspection on 13 October 2000, 20% of the work had not been completed. Similarly, a 10% discount was given in Methods 2 and 2A to take into account the under valuation by Hyundai. Reading the testimony of Kim Sui Chul from Hyundai during the trial before Prakash J, I was of the opinion that CHS should not have given this 10% discount as any evidence of under valuation was, at best, equivocal. Furthermore, the learned Judge did not make a definitive finding in favour of CHS' contention that a 10% discount should be given.

7 Thirdly, on scrutinising the cross-examination during the assessment, it came across to me that Mr Chng had premised a number of his actual calculations on the presumptions which were not

verified. He was unable to verify whether CHS did carry out some of the works as alleged which were included in his calculations during cross-examination:

Q: Please see page 39 of your affidavit. At item 29. Do you know if this was part of plaintiff's scope of works?

A: There is no contract rate for this works. I do not think this is part of the original scope of works. As such, I think the plaintiff did not carry it out.

Q: Is that why you used the words "Assuming CHS had carried out these works".

A: As I had explained just now, this is our QS kind of presentation. I use these words – description is to refer to the rates of the works only. It is not a reference as to whether CHS carried out the works or not.

Q: Am I right to say that every time you use these comments, the rates were not found in original scope of works?

A: Not within the contract.

Q: See page 39. Put: Items 29 – 31 – these amounts should not be included in the valuation of plaintiff's work.

A: I should not put it in.

8 As for the additional works allegedly carried out by CHS, it would suffice for me to add that this was not substantiated by CHS on the evidence. I accepted Mr Lim Chap Heng's evidence during cross-examination that he had no instructions from Hyundai to carry out the alleged additional works, and as such, he would not have incurred extra costs himself by asking CHS to carry out the additional works which had not been requested by Hyundai. The learned Judge had cast doubts on the CHS' progress claims, upon which the additional works claimed were based. There were also a few calculation errors which were accepted by Mr Chng during cross-examination.

9 With respect, I think that it was unfortunate that Mr Chng's attention was not drawn to paragraph 80 of the learned Judge's judgment when he was preparing his Expert Report, as that would have shed much light on the method of calculation. For all these reasons, I did not adopt the various Methods of calculations put forth by CHS. In the circumstances, I could not rely on these calculations in coming to my award of damages in the present case.

10 In contrast, Vatten based its calculations strictly on the learned Judge's articulation in her grounds of judgment on the method to be applied in assessing damages. I went through the mode of calculation which was set out in great detail in Mr Lim Chap Heng's (Jimmy) affidavit dated 16 June 2003 and his supplementary affidavit dated 1 August 2003. Vatten used the quantities in Hyundai's interim certificate as at end September 2003, and applied the relevant rates between the parties in calculating the value of works carried out by CHS up to 5 October 2000. CHS contended that Mr Lim was a biased witness as he was a litigant in the present suit and an alter ego of Vatten. I found Mr Lim to be forthright in his testimony during the assessment hearing. He wsd also able to explain and substantiate the calculations in his two affidavits clearly and succinctly. I should point out at this juncture that there was no dispute by either party as to the relevant rate payable to CHS. There was also no real doubt raised as to the quantities stipulated by Hyundai in their interim certificate as at end September 2000.

11 I accepted Vatten's calculation at Exhibit "O" of the supplementary affidavit and found that the work carried out by CHS up till end September 2000 was $991,355.53. The 5% retention sum which Vatten was contractually entitled to hold (and spelt out by the learned Judge in her judgment as a component to be taken into account) was $49,567.78. However, as this sum would have to be paid to CHS at the end of the project, which was the case here, the retention sum could no longer be held by Vatten. It was not disputed that Vatten had made previous payments to CHS totalling $855,616.89. CHS had also accepted Hyundai's contra charges in the sum of $9,613.61. Hence, after deducting the previous payments to CHS in the sum of $855,816.89 and the agreed contra charges of $9,613.61 from $991,355.53, I assessed the amount payable to CHS for work done up to 5 October 2000 at $125,925.03.

12 I then turned to the amount of damages to be awarded to Vatten as a result of CHS' breach of contract. The learned Judge found that this would be the sum of $275,000 which Vatten paid to Tech-3 International less what they would have had to pay CHS had CHS completed the work. At the trial, an issue was raised as to whether Vatten was entitled to charge CHS for the cost of spark tests carried out by Hyundai. The learned Judge found that CHS was contractually obliged to carry out the spark tests but did not carry out all these tests. However, it was found that the claim by Vatten for this item was premature as the amount which Hyundai was entitled to charge for having to carry out the tests had not been established. As Her Honour explained in paragraph 90 at page 53 of her judgment:

> It is also not settled whether Hyundai will in fact make a claim against Vatten for the costs of the spark tests. If it does so in the future, Vatten will be entitled to reimbursement from CHS for such sum as was actually incurred by Hyundai on account of work that should have been done by CHS.

At the assessment before me, Vatten produced two letters from Hyundai dated 26 June 2003 and 20 September 2001, marked Exhibit "D1" and "D2" respectively. Exhibit "D2" stated that the total costs of carrying out the spark tests by Hyundai on Vatten's behalf was $85,000, and that they would "contra this amount from your repainting work (emulsion) of the following building …". Exhibit "D1" confirmed that Exhibit "D2" was a true original letter from Hyundai to Vatten. CHS raised a few objections to taking into account the sum of $85,000 in computing the damages due to Vatten, including the allegation that the letter of 20 September 2001 was fabricated and that CHS had carried out the basic level of spark test as required under the sub-contract. CHS further argued that the cost of repair/touch up work for the epoxy coal tar would have been covered under the warranty given by Tech-3 International. I did not accept CHS' contentions. In her judgment, the learned Judge made it very clear that Vatten was entitled to reimbursement from CHS for such sum as was actually incurred by Hyundai on account of work that should have been done by CHS, ie the spark tests. In my view, the carrying out of the spark tests to the areas with epoxy coal tar and rectifying the defects when the spark tests failed were inextricably linked and were part and parcel of CHS' contractual duty to carry out spark tests. This CHS had failed to meet, as held by the learned Judge. The allegation that the letter of 20 September 2001 was fabricated was unfounded. There was no concrete evidence at all to suggest this.

13 What then was the amount which Vatten would have had to pay CHS had the latter finished the work? Both parties did not raise this as a serious point of contention during the assessment hearing. I studied the calculations based on Hyundai's final certification set out in Mr Lim's affidavit dated 16 June 2003. I accepted the calculations made (as detailed in Exhibit "J" of the said affidavit and Exhibit "O" of the supplementary affidavit) and found the amount due to CHS had CHS finished the work to be $89,703.91. I noted that there was a slight discrepancy of $0.02 in the calculations in Exhibits "J" and "O", and I took the smaller figure. It was common ground that the performance

bond of $60,000 which Vatten called on was to be accounted to CHS.

14 After including the cost of the spark tests and deducting the sums of $89,703.91 and $60,000, I awarded Vatten damages in the sum of $210,296.09. After setting off the amounts payable by each party, the amount payable by CHS to Vatten in this assessment of damages was $84,371.06. There would be interest on this sum at a rate of 6% per annum from the date of the writ to the date of the judgment.

15 In respect of the cost of assessment, after hearing arguments from both counsel, I awarded two thirds of the cost of the assessment to the defendants, Vatten. This was fixed at $18,000 (which was two thirds of $27,000) payable by the plaintiffs, CHS, to Vatten forthwith.