Chan Hong Seng Engineering and Construction Pte Ltd v Vatten International Pte Ltd (No 2) [2004] SGHC 241

Case Number : Suit 1062/2000, RA 86/2004

Decision Date : 26 October 2004

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Tan Liam Beng (Drew and Napier LLC) for plaintiff; George Lim and Jinny Tan (Wee Tay and Lim) for defendant

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

Damages – Assessment – Damages given to sub-contractor for sub-sub-contractor's wrongful repudiation of contract – Judgment also given to sub-sub-contractor for work done by it – Whether certificate issued by contractor relevant in assessing work done by sub-sub-contractor – Whether deductions to be made for works allegedly not done by sub-sub-contractor – Assessment of damages payable to contractor for wrongful repudiation of contract.

26 October 2004 *Judgment reserved.*

Judith Prakash J:

Introduction

1 This action arose out of a construction project. The main contractor for the project was Hyundai Engineering & Construction Co Ltd ("Hyundai"). Hyundai engaged the defendant company, Vatten International Pte Ltd ("Vatten") as its sub-contractor for the painting works and Vatten in turn appointed the plaintiff company, Chan Hong Seng Engrg & Const Pte Ltd ("CHS") as its main sub-sub-contractor. CHS did a substantial amount of work but in October 2000, owing to a dispute between the parties, Vatten called on the bond for $60,000 furnished by CHS. Four days later, on 18 October 2000, Vatten terminated the sub-contract with CHS alleging it had stopped work. CHS then commenced an action against Vatten for wrongful termination of contract and Vatten put in a counterclaim on the basis that CHS had not carried out the works with reasonable skill and care and had not completed the works before termination.

2 I heard the claim and the counterclaim. I found that CHS had repudiated the contract by stopping work before completion and that this repudiation had been accepted by Vatten. It was therefore reasonable for Vatten to hire another contractor for $275,000 to complete the unfinished work and undertake the warranty obligations that should have been undertaken by CHS. Vatten was given interlocutory judgment for damages to be assessed in respect of the incomplete work. It was also awarded the sum of $31,133.34 in respect of certain painting works that CHS had not done. Whilst I dismissed most of CHS's claims, I did give it judgment in respect of the amount due for work done by it up to 5 October 2000. I ordered that the amount of such work be assessed by the Registrar.

3 The assessment took place before the Senior Assistant Registrar Thian Yee Sze. The hearing took several days. There were two main items which had to be assessed. The first was the amount payable to CHS for work done up to 5 October 2000 and the second was the amount that was payable to Vatten as a result of the breach of contract by CHS. In respect of the first item, the senior assistant registrar found that the value of work carried out by CHS up till end September 2000

was $991,355.53. After deducting previous payments totalling $855,816.89 and agreed contra charges of $9,613.61, she assessed the amount payable to CHS for work done up to 5 October 2000 as $125,925.03. In respect of the second item, the senior assistant registrar started from my finding that the sum of $275,000 incurred by Vatten in completing the work left uncompleted by CHS was reasonable. She deducted from this amount the sum of $89,703.91 which she found on the evidence would have been paid to CHS had it completed that same work. However, based on my finding that CHS was contractually obliged to carry out certain spark tests but had not done so and on certain additional evidence produced during the assessment, the senior assistant registrar awarded Vatten an additional $85,000 for these tests. She therefore found that the amount of damages payable by CHS to Vatten was $270,296.09 (*ie*, $275,000 + $85,000 - $89,703.91). As Vatten had already recovered $60,000 from the performance bond furnished by CHS, the senior assistant registrar deducted that sum and held that the ultimate amount payable was $210,296.09. She awarded Vatten $18,000 as the costs of the assessment.

4 CHS appealed against the whole of the decision of the senior assistant registrar. I heard the appeal on 1 July 2004. The parties put forward detailed and rather confusing submissions on the correct method of calculation. I could not make out exactly what they were saying and therefore asked for further submissions on the points on which they differed. These came in over the next four weeks. Having studied them I am still not completely sure how the figures work out. For that reason, in this decision I deal mainly with the points that have to be decided rather than the actual amounts. Those can be worked out subsequently on the basis of the findings that I make below.

The appeal

Value of work done by CHS up to 5 October 2000

5 For the purpose of the assessment, CHS adduced the evidence of one Mr Chng Heng Cheong, a chartered quantity surveyor. Mr Chng gave an expert report on the value of the work done by CHS based on the documents in the case. He was not involved in the construction at all. He used various methods to value CHS's work. His opinion came under attack because the methods adopted by Mr Chng were considered to be inconsistent with the indications that I had given previously in my judgment as to how the work done by CHS was to be assessed.

6 I had said in my judgment delivered on 11 June 2002 ([2002] SGHC 124) at [111]:

> 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. These damages cannot be assessed by me since there is insufficient evidence of exactly how much work remained to be done when CHS left the site and what would have been payable for such work. These items will therefore have to go for assessment. 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.

Re-looking at that paragraph and others of my judgment, I do not think that I meant that the parties were confined simply to Hyundai's certificates when it came to the assessment. My intention was to indicate that Hyundai's certificates would have to be adduced together with any other evidence there was available to determine the amount of work that CHS had done before it left the site. Thus, the

person conducting the assessment did not have to be guided by the certificates alone but could take all the evidence into consideration when coming to a determination on the matter.

7 Mr Chng's opinion contained five alternative methods of calculating the amount of work done by CHS. On the hearing of the appeal, CHS argued that Mr Chng's method no 2A should be adopted. This method involved accepting Hyundai's certification of the value of work done by the end of September 2000 and adding a further 10% to it on the basis that, for interim certificates and payments, Hyundai had a practice of undervaluing the amount of work done by between 10% and 15%. Vatten had no quarrel with using Hyundai's certificates as the basis of the calculation. It submitted, however, that no further percentage should be added as the certificates were themselves the correct reflection of the amount of work done.

Should 10% be added to the certified amounts?

8 The first thing to determine therefore is whether on the balance of probabilities Hyundai's certificates reflected the actual amount of work done or slightly less than that. CHS relied on the evidence given by Hyundai's Mr Kim Suk Chul at the trial to the effect that although every month Hyundai's quantity surveyors would calculate the amount of work completed during that month and submit that quantity for payment, subsequently, between 10% and 15% would be cut from the quantity submitted, even though Hyundai's measurements were accepted as accurate, because allowances had to be made for defective work that might be discovered subsequently. CHS submitted therefore that the quantities in Hyundai's certificates to its sub-contractor had been reduced so that Hyundai did not overpay the sub-contractor at the interim stage. Further, the 10% under-valuation adopted by Mr Chng was conservative given that the actual under-valuation was between 10% and 15%. I accept this argument. I heard Mr Kim's evidence. He was quite straightforward in admitting that the certificates issued by Hyundai reflected less than the actual amount of work completed. On the basis of what he said, it would be reasonable to hold that the value of the work certified was reduced by at least 10%. Therefore, if Hyundai's certificates are used as the basis of the work completed by 5 October 2000, then an additional 10% should be added to those certificates to reflect the under-valuation practised by Hyundai. In this case, the certificates issued for the period ending 30 September 2000 are to be used since that was the date of the measurement closest to the time when CHS stopped work. Also, CHS did not establish by any other evidence the amount of work it did between 1 and 5 October 2000 so as allow a valuation of such additional work.

How much should be deducted from the certified amounts?

9 As I read the submissions by both parties, they appear to agree that based on Hyundai's valuation of the architectural works, as at 30 September 2000, the value of those works was $680,340.83 and based on its valuation of the civil works at the same date, the value of those works was $479,492.06. These figures exclude the extra 10%. On this basis, the total value of work done as at 30 September 2000 was $1,159,832.89. At the assessment, Vatten contended that the total value of work was less than that, but on appeal, it accepted $1,159,832.89 as the starting point. The complication comes in because Vatten says that a further sum of $148,481.16 ought to be deducted from CHS's figures. Of that amount, CHS accepts a deduction of $123,992.91 being the value of painting work carried out by other sub-contractors in respect of three areas, namely the GRC fins, the digesters and the Chemical store (I shall refer to these three items as "the excluded works"). CHS does not accept this further deduction of $24,488.25.

10 Vatten justified the additional deduction of $24,488.25 as follows. First, it said, certain items amounting to $20,385.17 had not been done by CHS. Secondly, CHS had used the wrong rates in calculating the value of some of the work it had done.

11 Dealing first with the items that Vatten said CHS had not done, these comprised textural painting to the sludge processing building valued at $11,614.26, painting of the timber sliding door valued at $229.50, and textural painting of the inlet wall of the administrative building valued at $8,541.41. Vatten pointed out that during cross-examination at the assessment hearing, Mr Lim Chap Heng of Vatten had testified that apart from the excluded works, there were other items of work that CHS had failed to do. Further, in October 2000, CHS had carried out a valuation of the works it had done up to 18 October 2000 and had sent this valuation to Vatten on 27 October 2000. These disputed items had been left out of that valuation. Finally, Mr Chng had agreed that there were no contractual rates agreed between Vatten and CHS for the disputed items and explained that he had calculated the value of these works by using rates that were 15% lower than those agreed between Vatten and Hyundai. As no rates had been agreed, Vatten submitted that these works were clearly not part of the contract between itself and CHS and had not been carried out by CHS.

12 To refute those arguments, CHS relied on Mr Lim's testimony at the trial when he agreed that there were only three additional jobs not done by CHS, namely the excluded works. CHS pointed out that Mr Lim did not adduce any evidence at trial to show that there were other items of work that had not been done by CHS. Further, Vatten's valuation had omitted certain matters that it had previously agreed to. In its certification of CHS's works in December 1999, Vatten had accepted that CHS had carried out certain textural painting of the sludge processing building. Also, Hyundai had certified additional painting works done by CHS in its September 2000 certification but these additional painting works had been omitted from Vatten's valuation. Whilst Vatten had been able to give details of the persons engaged by it to effect the excluded works, it had not given similar details of the other contractors employed to do the disputed items.

13 CHS, as the party claiming payment, has the onus of proving that it has indeed done the work for which it claims. In my view, it has only discharged this onus in respect of the claim for textural painting to the sludge processing building as Vatten's December 1999 certification shows its acceptance that such work had been done by CHS. As regards the other two items, CHS has not discharged this onus as it has not adduced either oral evidence that it did this work or documentary evidence of the same. Rather, the documentary evidence adduced tends to belie CHS's stand. In October 2000, it sent Vatten a claim for the balance due in respect of all the work it had done. It claimed that the total value of this work was in excess of $1.39m. A detailed schedule of the work done and the value of each item of work was forwarded with the claim. The two items in question were not included in this claim. CHS explained this omission as being due to the inadvertence of its previous expert, Mr Francis Teo, who had prepared the claim. The question is why Mr Teo made the mistake. If there was evidence of this work having been done, it would have been before Mr Teo and included in the claim and it would have been before the court. There is, however, no contemporaneous document showing that the work was done unlike in the case of the sludge processing building work which was also left out of the October 2000 claim. There was also no agreed rate for the items in question. I do not accept that the valuation prepared by Mr Lim and annexed to his affidavit dated 1 August 2003 is an admission that such work was done. When Mr Lim was asked about the incomplete work at the trial, the question was very specific. He was asked whether he agreed that CHS had not done three additional jobs, *ie*, the excluded works. Mr Lim agreed. It was not put to him that all the other works had been done by CHS nor was he asked specifically about whether CHS had completed the three items that are now disputed. Accordingly, I hold that CHS has only proved that it did the first item. That item, according to Vatten's December 1999 certification, was worth $10,814.07. I will allow that but the sum claimed for the other two items must be deducted from the value of CHS's work.

14 The second factor contributing to the difference of $24,488.26 was the allegedly incorrect rate used by CHS in some of its calculations. There are two aspects to this second factor. First,

there is a difference of $940.76 between CHS's calculation and that of Vatten in relation to the application of acrylic emulsion paint to internal plastered walls of the sludge processing building. Vatten pointed out that during the trial I had held that the rate for such work should be $2.34 per unit whereas in his calculation, Mr Chng had used a rate of $2.64 per unit for this work. In its reply submissions, CHS admitted that Mr Chng had used the wrong rate and agreed that the amount of $940.76 be deducted from the value of its work. Accordingly, I so hold.

15 The second rate that was allegedly wrong was the rate of $4 which CHS used for the preparation and application of one coat of primer and one finishing coat to internal metal sections. Vatten contended that the correct rate was $3.60 as this rate was based on the quotation given by CHS on 11 June 1996. In this quotation, the rate for preparing and applying primer to metal sections was $2/m². The rate for preparing and applying two coats of finishing paint was agreed at $3.20/m². Therefore the rate for applying one finishing coat should be $1.60/m² and when this was added to the rate for applying primer, the total rate would be $3.60. Vatten contended that the difference of $0.40 in the rates meant that CHS had overcharged by a sum of $3,162.33.

16 In response, CHS submitted that the rate of $4 had been used by it since May 1999 as shown in the document at p 170 of the agreed bundle. Vatten had not objected to that rate at that time. CHS further submitted that it was not correct to argue that because the rate for the application of two coats of paint was $3.20, the rate for the application of one coat must be $1.60. In any item of work there would be some element of fixed costs, for example, mobilisation costs that would not change regardless of whether one or two coats of paint were applied. As such the cost of one coat of paint would not necessarily be half of the cost of two coats of paint. I accept CHS's submissions on this point. As the rate of $4 had been used previously by CHS without objection, I do not accept the current objection to the rate. There should not be any deduction from the value of the work on this account.

Conclusion on value of work as at 5 October 2000

17 In accordance with my findings above, the value of the work done by CHS as at 5 October 2000 must be recalculated. The parties should start out with the figure of $1,159,832.89 and deduct from that the values of the items of work that were not done by CHS (as conceded by CHS and as found by me in this judgment) but were included in the valuation and also the sum of $940.76. The resulting figure should then be increased by 10% in order to reflect the under-valuation practised by Hyundai.

Damages payable to Vatten

18 To obtain the figure representing the damages incurred by Vatten, it is necessary to determine the cumulative value of all works done by CHS and all works that CHS should have completed but instead were completed by the substitute contractor employed by Vatten, Tech-3 International ("Tech-3"). At the assessment, CHS submitted that if it had carried out its obligations under the contract, the final value of the works would have been $1,482,701.38. However, as CHS did not do the excluded works, a sum of $186,346.70 had to be deducted from this figure giving a final value of $1,296,354.68. Vatten, on the other hand, submitted that a sum of $384,380.70 (which figure included the value of the excluded works) ought to be deducted from CHS's figures and that, accordingly, the value of the works which would have been carried out by CHS if it had not breached the contract would be $1,098,320.68. There is therefore a difference of $199,401.99 between the parties' figures.

19 This difference of $199,401.99 arose from seven differences in calculation. Some of these

matters I have already dealt with above but for clarity I will enumerate each and deal with each in turn.

Items allegedly not done by CHS

20 The first difference arises from the items of work that Vatten alleged CHS had not done. I have dealt with these in [11], [12] and [13] above and my findings there apply to this part of the appeal as well.

Items for which the wrong rate has been charged

21 The first item in this category is the rate for the painting of the internal metal sections. That is dealt with in [16] above.

22 The second item in this category relates to the painting of the doors of the size 1,010mm W x 2,180mm H. CHS applied a rate of $37.50 for these doors whereas Vatten submitted that the applicable rate was only $10 as reflected in CHS's quotation of 12 December 1998. In response, CHS pointed out that in a valuation prepared in June 2003 for the assessment, Mr Lim had used the rate of $37.50. As this rate was not disputed at the assessment, it should be accepted by the court. Additionally, it appeared from Mr Lim's affidavit that Vatten was charging Hyundai at the rate of $39 for this item. As Vatten pointed out, however, it was not part of CHS's case during the trial that the rate was varied. Accordingly, CHS was, in my view, bound by the rate that it had quoted to Vatten and that had been accepted by Vatten. The fact that Vatten was able to persuade Hyundai to accept a vastly inflated rate for the same item cannot, unfortunately for CHS, justify its charging more than the contracted rate. Accordingly, a deduction of $1,952.50 must be made in respect of this item.

Items allegedly commissioned after October 2000

23 Vatten gave details of a number of work items which it said were additional works commissioned by Hyundai after October 2000 and carried out by other sub-contractors since CHS was no longer on site. These works had been included in the final certificate issued by Hyundai but it submitted that CHS should not be allowed to take credit for the same since CHS had not done these works. The total value of these works was put at $88,222.78.

24 CHS agreed that the specified works were additional works that had not been within its original scope of work. However, it submitted that the value of these works should be taken into account in assessing the value of the works that CHS would have done had it remained on site. It argued that these additional works had been done by Tech-3 and relied on the evidence of Mr Choy of Tech-3. Mr Choy had testified at the trial that after CHS was terminated on 18 October 2000, Tech-3 had done all the work needed to be done at the site apart from the painting of the digesters and the GRC fins. CHS also pointed out that after it had left the site, Hyundai paid Vatten the sum of approximately $152,000 in respect of variation or additional works done between October 2000 and November 2001. The value of the additional works should be taken into account in assessing the value of the works that CHS would have done.

25 I do not accept the submissions of CHS on this point. The evidence from Mr Choy of Tech-3 was that his quotation for $275,000 was to complete all the works that CHS had contracted to undertake. It was a quotation submitted after he had gone down to the site to see what the scope of the works to be undertaken was. This quotation did not cover any additional works which might be commissioned by Hyundai thereafter. It is also relevant that during cross-examination at the

assessment hearing, CHS's Mr Tan Geok Chen had admitted that if additional works had been commissioned by Hyundai and carried out after October 2000, Tech-3 or the contractors who carried out these works would be entitled to be paid more. CHS has accepted that additional work was commissioned by Hyundai after October 2000. That additional work was not part of the sub-contract between CHS and Vatten and there was no obligation on Vatten's part to give that work to CHS even if CHS had remained on site. The value of such work therefore cannot be included in assessing the value of the works that CHS would have done had it remained on site. Accordingly, I accept Vatten's submission that $88,222.78 has to be deducted from the final value of the work.

Quantity adjusted downwards in final certificate

26 Vatten submitted that in its final certificate, Hyundai had made downward adjustments in the quantities of work done. When compared with the certificate issued for the period ending September 2000, the final certificate showed a reduction in respect of the quantities of several items. The dollar value of these reductions was $20,274.08. Vatten submitted that as the contract between the parties was a "back-to-back" contract and would be "revised in accordance with the amount of related monies received by" Vatten from Hyundai, Vatten was entitled to make the necessary adjustments to the quantities certified in the final accounts and seek a "refund" of $20,274.08 from CHS from the value of the works which had been certified in September 2000.

27 In reply, CHS noted that the main bulk of the $20,274.08 adjustment sought by Vatten related to the painting works valued at $19,907.68 in respect of the ART Tanks for Batteries A and B. CHS had painted an additional coat of primer on these tanks and had charged the agreed rate of $2.60/m² for 7,656.80m² of work. It argued that this item of work was approved by Vatten in December 1999 as shown in its certification for that month. Vatten did not explain why Hyundai had removed this item totally though there was some suggestion that CHS had not done the work. Vatten had not, however, made any assertion either at the trial or at the assessment that this work had not been done by CHS. CHS was entitled to recover payment for the work.

28 In this instance, CHS had agreed that interim payments would be made to it by Vatten in accordance with the amount of related payments received by Vatten from Hyundai. That agreement, however, applied only to interim payments while the work was being carried on. There was nothing in the contract that said that in relation to the final accounts, Vatten was entitled to simply deduct from CHS any item of work not accepted by Hyundai without proving a legal basis for such deduction. In December 1999, Vatten had accepted that this particular item of work was done. It cannot go back on such acceptance without proving either that the work was not done or that the work was so defective that it should be considered not to have been done or establishing some other legal basis for rejecting the work. I therefore hold that Vatten is not entitled to a "refund" of $19,907.68 for this painting work. CHS is not disputing Vatten's entitlement to deduct the balance of $366.40 and therefore I accept that that amount should be deducted from the value of work done.

Deduction of $28,665.44

29 Vatten informed the court that Hyundai had deducted a certain sum from the value of the works because it had overpaid Vatten in respect of one coat of additional primer that was applied to the steel structure. In CHS's quotation of 11 June 1996, the rate for one coat of primer was fixed at $2/m². Using this rate, Vatten calculated that it was entitled to deduct $28,665.44 from CHS as being the overpayment it had made to CHS for this item.

30 CHS challenged Vatten's right to deduct this amount. It stated that whilst being re-examined, Mr Lim had tried to explain that the deductions had been effected because Hyundai had asked him to

apply an additional coat when it was not aware that the specifications already required such an additional coat to be applied. Hyundai had then paid Vatten for the additional coat. Thereafter it discovered that the additional coat was already in the specification. Mr Lim's evidence was as follows:

> When Hyundai asked me to do the additional coat, they were not aware that the specifications called for it. Hence, they are willing to pay me for the additional coat. Later on, they discovered that it is already in the specifications. So, I cannot pay for it. I have a letter showing the reason they deducted that figure from me. I have a letter with me.

CHS submitted that Mr Lim's evidence was not believable. He did not point out the specifications relied on by him and where those specifications could be found. It submitted that "the deduction" was probably a discount given by Vatten to Hyundai that had nothing to do with CHS. CHS had done "one coat of primer and one finishing coat to metal sections" in accordance with the description of the work and the rate for the work should not be reduced by reference to an "additional coat" which was not documented.

31 It is not enough for Vatten to assert that Hyundai overpaid it. In order to claim the deduction from CHS, Vatten has to establish that it in turn overpaid CHS. It is not clear to me from the evidence or the documents that this was the case. As Vatten has not discharged the onus on it, I do not allow the deduction.

Remaining differences

32 With regard to item A8 for works carried out in the Inlet Building, CHS applied a smaller quantity when it calculated the figures. Vatten therefore gave CHS credit of $1,450. CHS accepts that figure. Accordingly, it should be added to the value of the work.

33 Finally, an amount of $34,249.56 was included in the final certificate in respect of item 2k which involved the application of two primer coats on joints and one finishing coat on the GRC fins. Vatten submitted that as CHS did not carry out any work on the GRC fins, this amount should be deducted from the value of work done by it. CHS, on the other hand, submitted that as this item of work appeared from the evidence of Mr Choy of Tech-3 to have been done by Tech-3, it was correct in including the amount in the cumulative value of the final work. I do not accept this argument. It was not in dispute that CHS was not employed to carry out painting works to the GRC fins. Thus even if CHS had remained on the site, it would not have done this additional painting work. The sum must be deducted from the total value of the work.

Spark tests

34 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. I found that under the contract it was the obligation of CHS to carry out these spark tests but that it had not done so. I also found that the claim by Vatten for this item was premature as the amount which Hyundai was entitled to charge it for having to carry out the tests itself had not been established. I concluded that if Hyundai did make a claim for spark tests against Vatten, Vatten would be entitled to reimbursement of the costs of the same from CHS.

35 At assessment, Vatten produced two letters from Hyundai dated 20 September 2001 and 26 June 2003. The earlier letter stated that the total cost of carrying out these spark tests amounted to $85,000 and that Hyundai would "contra this amount from your repainting work (emulsion) of the following building …". The second letter confirmed that the first letter was an original letter from Hyundai. The writer of the second letter appeared in court to verify the second letter and that the

writer of the first letter was no longer in Singapore. The senior assistant registrar held that the $85,000 had to be taken into account in computing the damages due to Vatten since I had held that Vatten was entitled to reimbursement from CHS for the sum incurred by Hyundai.

36 On the appeal, CHS submitted that the senior assistant registrar had erred and should not have taken the $85,000 into account because:

(a) the letter purportedly dated 20 September 2001 was a fabrication;

(b) there was no such contra charge made by Hyundai;

(c) the matter allegedly complained of by Hyundai, if true, was the subject matter of warranty provided by Tech-3. The contra charge was not a contra charge that CHS had accepted.

37 As regards the first ground, the main point put forward by CHS was that the 20 September 2001 letter had not been disclosed until 28 April 2003. The trial itself had ended only in November 2001 and thus Vatten had had ample opportunity to produce the letter at the trial. Instead, it was not produced nor even referred to. The document was not disclosed in Vatten's list of documents filed for the assessment on 9 January 2003. Further, the maker of the letter did not attend the assessment and his colleague, Mr Kim Kyung Dong, who testified that the letter was authentic and emanated from Hyundai, could not confirm whether it had actually been written on 20 September 2001 or thereafter. It was also peculiar that this letter was sent by hand when most correspondence from Hyundai to Vatten went by facsimile transmission.

38 Vatten responded that the letter of 20 September 2001 was an authentic letter. Mr Lim had explained during the assessment hearing that he had not produced the letter during the trial because at that time he had overlooked it as he was rushing to complete the project and was also heavily involved in the trial. He had, however, been able to obtain confirmation from Hyundai that the letter was authentic. There was no reason for him to suppress the letter earlier as it was helpful to his case. I see no reason to reject the letter. Hyundai's representative came to court and confirmed its authenticity. Whilst it should have been produced earlier, since there was an opportunity for counsel for CHS to question Hyundai on the letter, CHS was not prejudiced by its late production. On the evidence, the authenticity of the letter cannot be doubted.

39 As regards the second objection raised by CHS, Mr Kim Kyung Dong also gave evidence that it was possible for sub-contractors to discuss the deductions to be made with Hyundai's planning managers without such deductions being reflected in the interim certificates. Whilst it would have been better for the deduction to be so reflected, the fact that it was not would not stop Hyundai from making a contra charge when the work was completed and the final accounts were issued. Hyundai had warned Vatten in September 2001 that it would be doing this and it was clear from the evidence before me at the trial that it was the responsibility of CHS to indemnify Vatten against such action on the part of Hyundai.

40 As for the third objection, I do not think that this is maintainable in view of my findings at the trial. Whether or not CHS accepts the contra charge is irrelevant. It has been found liable to indemnify Vatten and its appeal against my decision was dismissed. No further argument can be made on liability.

41 Accordingly, I agree with the decision of the senior assistant registrar that the cost of the spark tests had to be charged against CHS in ascertaining the damages that Vatten had incurred by

reason of the former's breach of contract.

Conclusion

42 For the reasons given above, I allow the appeal by CHS in part. The parties must now do their calculations on the damages in accordance with my findings. I will see them on the exact wording of the orders to be made as a result of these findings and on the issue of costs.