Chan Hong Seng Engrg & Const Pte Ltd v Vatten International Pte Ltd
[2002] SGHC 124

Case Number : Suit 1062/2000

Decision Date : 11 June 2002

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Tan Liam Beng and Yow Su Joan (Drew and Napier LLC) for plaintiffs; George Lim and Jinny Tan (Wee Tay and Lim) for defendants

Parties : Chan Hong Seng Engrg & Const Pte Ltd — Vatten International Pte Ltd

Building and Construction Law – Termination – Repudiation of contract – Whether wrongful repudiation of contract.

Building and Construction Law – Damages – Incomplete work – Damages for defects – Whether defects claim crystallised – Quantum of damages payable for uncompleted work.

Judgment

Cur Adv Vult

GROUNDS OF DECISION

Background

1. This case arises out of the third phase of the construction of the Seletar Sewage Treatment Works (the project). The main contractor for the project was Hyundai Engineering & Construction Co Ltd (Hyundai). Hyundai engaged Vatten International Pte Ltd (Vatten), the defendants, as their painting subcontractors and Vatten in turn appointed Chan Hong Seng Engrg & Const Pte Ltd (CHS), the plaintiffs, as their sub-subcontractors for almost the whole of the painting works. Vatten was, in effect, a one man company. They had no workers or even much expertise and they relied entirely on sub-sub-contractors like CHS to carry out their contractual obligations to Hyundai.

2. In the contract awarded to Vatten, the price of the painting works was fixed at $1,562,117.62. In the subcontract, the price of the works was fixed at $1,253,113, a sum amounting to approximately 80% of the price Vatten would be paid. The subcontract sum was based on a quotation sent by CHS to Vatten containing its rates for the various items that made up the painting works.

3. The subcontract was evidenced by the letter of intent dated 11 January 1997 issued by Vatten. This was almost identical to the letter of intent dated 28 December 1996 which Hyundai had issued to Vatten. For the purposes of the subsequent dispute, the most important term of the subcontract is clause 1 which reads as follows:

> 1. TERMS OF PAYMENT
>
> The "Cut Off Date for the application for Interim Payment shall be the 13th of each Calendar Month.
>
> Payment shall be based upon CHS Application for Interim Payment for work done and for cost of materials on Site (suppliers invoices to be submitted) but will be revised in accordance with the amount of related monies received by VFI [ie Vatten] from HYUNDAI. Such payment shall be made within

Ten (10) working days of receipt by VFI of such monies.

It is a Condition Precedent to the payment of any monies by VFI to CHS that CHS shall deposit a Performance Bond acceptable to VFI with VFP equivalent to Five (5) Percent of the Sub-Contract Price.

The payments by VFI to CHS shall be subject to Five (5) Percent Retention.

4. In accordance with the above term, CHS duly furnished Vatten with a performance bond from ING General Insurance International NV in the sum of $60,000.

5. Although the subcontract was entered into in 1997, the painting works only commenced sometime in January 1999. Work continued until October 2000. At that stage, there was a dispute between the parties. On or about 14 October 2000, Vatten called on the bond furnished by CHS and received payment of $60,000 thereunder. On 18 October 2000, Vatten terminated the subcontract on the basis that CHS had already repudiated it by stopping work. Whether CHS had in fact stopped work and if so, whether they were justified in doing so, are two of the issues to be considered in this case.

6. This action was commenced on 14 December 2000. By it the plaintiffs, CHS, are claiming:

(1) the sum of $560,392.24 (or such sum as the court may determine to be due) as the unpaid balance due in respect of works done under the subcontract; alternatively, the value of the works done on a *quantum meruit* and/or *quantum valebat* basis;

(2) the sum of $3,284.11 for loss of profit on the value of the remaining works; alternatively, damages to be assessed;

(3) the sum of $15,035 being the value of plant and materials belonging to the plaintiffs which Vatten, the defendants, took possession and control of;

(4) a declaration that Vatten deliver up to CHS the lorry which Vatten took possession and control of;

(5) damages to be assessed for the cost of rental of the said lorry from 1 December 2000 until the lorry is returned to CHS; and

(6) the sum of $60,000 by way of restitution or account being the money received by Vatten from the call on the performance bond.

7. Vatten is both contesting the claim and making a counterclaim. They allege that CHS did not carry out the subcontract works with reasonable skill and care and did not complete the works to the extent asserted. Vatten avers that they suffered loss and damage in order to rectify the breaches of CHS. They had to engage another contractor to complete and rectify CHS work. They had also overpaid CHS and are entitled to reimbursement of the amount overpaid. Vatten claims the return of these monies and damages to be assessed.

Issues

8. In their closing submissions, CHS set out a list of the issues to be determined in this case. Vatten has

accepted most of those issues as being the relevant ones while adding some of their own. In the result, the issues to be decided are:

(1) whether there was a change in the rates under the subcontract resulting from the change in the paint to be used for the internal plastered walls (including beams, columns, staircases, etc) from Super V-Tex Emulsion to Aclose AA Emulsion;

(2) whether Vatten had breached their payment obligation to CHS;

(3) was Vattens termination of subcontract on 18 October 2000 wrongful;

(4) what was the value of the works done by CHS as at 18 October 2000;

(5) whether there were defects in CHS works in respect of which Vatten is entitled to a set-off;

(6) whether Vatten is entitled to charge CHS for the cost of spark tests carried out by Hyundai;

(7) whether there was an agreement that CHS was to effect the textural painting of the digesters at the rate of $9 per square metre;

(8) whether Vatten seized plant and material belonging to CHS;

(9) whether CHS is entitled to a restitution of and/or an account of monies paid to Vatten under the performance bond; and

(10) if the issues relating to termination of the contract are decided in Vattens favour, whether Vatten is entitled to interlocutory judgment for damages.

Issues (5), (6), (7) and (10) are issues arising from Vattens defence and counterclaim.

Issue 1 : change of rates for internal walls

9. In the quotation that CHS submitted to Vatten, they had quoted the following rates for painting internal surfaces:

	Description of classes	Quoted Rates
(1)	Prepare and apply one undercoat and two finishing coats of acrylic emulsion paint internally, to plastered walls, beams, columns, etc	$2.20 per m2
(2)	Ditto, to plastered walls, beams, columns etc of width not exceeding 300mm	$1.80 per metre run
(3)	Ditto, to plastered walls, beams, columns etc of width 300mm - 1m	$2.00 per metre run

In their final submissions, CHS asserted that these rates had by agreement been revised to $2.85 per m, $2.34 per metre run and $2.56 per metre run respectively.

10. Vattens submission was that CHS was not entitled to claim the higher rates for their work because first, they had not pleaded an agreed variation in the rates and, secondly, on the evidence no variation had in fact been agreed to.

11. I must first consider the pleadings. The re-re-amended statement of claim contains two paragraphs that are relevant to this issue. First there is 2 which simply states that "by a contract dated 11 January 1997, the defendants subcontracted the painting works for the project to the [plaintiffs] at a contract sum of $1,253,113". This paragraph does not contain any breakdown of the works or the applicable rates. Subsequently in 15 the plaintiffs state that as at 18 October 2000 they had carried works to the value of $1,398,235.88, particulars of which are set out in Appendix 1. In Appendix 1 a description of all the works done is given and for the internal works the rates are stated as being $2.85 per m for the ceiling and wall finishes, $2.65 per metre run for the columns, and $2.45 per metre run for the beams. There is no express statement anywhere in the statement of claim that these rates are variations of originally agreed rates.

12. By 2 of the re-re-amended defence, the defendants admit 2 of the statement of claim except that they assert that CHSs quotation dated 11 June 1996 and the enclosed bill of quantities also form part of the contract. In 25 the defendants go on to state that 15 of the statement of claim is denied and by 27 (a) the defendants assert that "some of the rates used by the plaintiffs were not agreed upon". There is no other paragraph in the defence which deals with the rates or which identifies those rates which were allegedly not agreed upon.

13. CHS filed a re-amended reply and defence to counterclaim and by 2 of this pleading they aver that the rates set out in Appendix 1 of their statement of claim are the applicable rates.

14. Although the pleadings are not ideal, in my opinion they sufficiently disclose to the parties and the Court the dispute over the applicable rates. CHS had from the beginning indicated clearly what it considered these to be by specifying each rate in Appendix 1. Vatten had responded to the rates put forward by CHS by stating that some of these rates were not agreed. Whilst the defence did not specifically identify the items in dispute or assert what the correct rates for those items were, that inadequacy in the pleading, which could have been redressed by a request for further and better particulars, did not change the fact that issue had been joined as to whether the rates claimed had been agreed. This issue was made even more clear by the re-amended reply by which CHS reiterated the applicable rates being those set out in Appendix 1 of the statement of claim. In the premises I consider that Vattens objection to this issue that the pleadings do not raise the issue is not made out. The present case is distinguishable on its facts from the cited authority of *Tan Kia Poh v Hong Leong Finance Ltd* [1994] 1 SLR 270 on which Vatten relied.

15. I should also point out that Vatten was fully aware of exactly which rates were in dispute and no surprise was occasioned by the raising of this issue. Vattens counsel cross-examined the managing director of the plaintiffs, Mr Tan Geok Chen (GC Tan), at length on this issue. Secondly, the body of evidence in respect of the change in the rates was let in without objection by the defendants.

16. The second question is whether in fact any variation was agreed to and, if so, the quantum of that variation. As noted above, the original rates for the three classes of work which involved internal painting were $2.20, $1.80 and $2.00. In Appendix 1 the respective rates for these three items were claimed to be $2.85, $2.45 and $2.65. In CHSs closing submissions however the revised rates were claimed to be $2.85, $2.34 and $2.56. The rates in the submissions were based on the figures found in a Sub-Contract Interim Certificate issued by Vatten in December 1999. CHS adopted the rates used by Vatten in this certificate and submitted that those rates were the best evidence available to prove the agreed revised rates.

17. The evidence of Mr GC Tan was that when the original quotation for the painting works was submitted to Vatten, CHS had quoted for the internal works on the basis that the paint to be used would be Super V-Tex Emulsion. After the painting works commenced some two years later, the paint for the internal plastered walls was changed to Aclose AA Emulsion which is a more expensive paint as it is a weather-shield emulsion paint. Mr Tan stated that when the change in paint was made he had a discussion with

Jimmy Lim Chap Heng, Vattens alter ego, and the parties agreed to a corresponding change in the rates for the work. It was agreed that 65 cents would be added to each of the originally quoted rates to obtain the new rates. That was why CHS had subsequently billed for the work at the rates of $2.85, $2.45 and $2.65 instead of $2.20, $1.80 and $2.00.

18. The change in paint did not affect only the rates charged by CHS to Vatten. Mr Lim admitted during cross examination that Hyundai had agreed to adjust upwards the rates that Vatten could charge it for the internal paint works. The interim certificate issued by Hyundai to Vatten for work done up to January 1999 shows that in respect of painting of the internal walls the rates applied were $2.73, $2.23 and $2.48. The certificate Hyundai issued for the work done up to March 1999 shows that these three rates had subsequently been adjusted to $3.80, $3.10 and $3.45 respectively.

19. Although admitting that he had been able to obtain a change of rates from Hyundai to reflect the increase in the cost of paint to be used internally, Mr Lim denied that he had in turn agreed to an adjustment of CHSs rates for the same work. His denial that there was any adjustment at all was contradicted by a Sub-Contract Interim Certificate in respect of the plaintiffs works which Mr Lim himself prepared for the month of December 1999. In that certificate the rates applicable for the three classes of internal painting work were stated to be $2.85, $2.34 and $2.56 respectively. Mr Lim was questioned about the certificate. Mr Lims explanation for writing the rates this way was that he had made a mistake in that he had followed the rates inserted in CHSs own claim dated 29 December 1999. However, as was then demonstrated to the witness, although CHSs claim of 29 December 1999 did contain the first rate of $2.85 it did not contain the other two rates of $2.34 and $2.56. When confronted with that, Mr Lim sought to explain that he had arrived at these other two rates by calculation. That was an odd explanation since Vattens stand is that the original rates of $1.80 and $2.00 for these two classes are the applicable rates. If that was the case there would have been no need of any recalculation. It is also notable that at an earlier stage in his evidence Mr Lim had said that he really did not know how he had come up with the rates of $2.34 and $2.56 and that he may "have keyed in the wrong figures". A simple mistake in keying in figures seems unlikely since the figures of $2.34 and $2.56 were not inserted only once but appear many times in Vattens Interim Certificate of December 1999.

20. In their closing submissions, Vatten submitted that the CHS claim in Appendix 1 was not consistent with their closing submission on the applicable rates. The claim in Appendix 1 was based on Mr Tans assertion as to the agreed rates whereas the closing submission was based on the certificate issued by Vatten itself. Vatten also referred to their letter of 24 January 2000 to CHS wherein Mr Lim had, among other things, informed CHS that they should ensure that their claimed prices were the same as their offered prices in the June 1996 quotation. Counsel sought to make much of the fact that CHS had not replied to this assertion and that originally they had had no objections to this letter being part of the agreed bundle but that just two days before the trial CHS had objected to admissibility of the letter. It was submitted that CHS had tried to prevent the letter from being admitted because they knew that its contents were detrimental to their case as the letter was clear evidence that Vatten had not agreed to the higher rates claimed by CHS. If there had been an agreement to vary the rates Vatten would not have reminded CHS to keep to the original rates.

21. Having considered the evidence, I think that there was a change in the agreed rates for the internal painting works. It was not in dispute that the original paint for the internal works was a cheaper paint than the weather-shield paint subsequently specified. Hyundai had recognised the extra cost of materials by adjusting the rates it paid Vatten and it is completely consistent with this extra cost that CHS should have made a demand on Vatten for an adjustment of its own rates. I also note that the original rates applied to the original paint i.e. Super V-Tex Emulsion. CHS was not contractually obliged to supply Aclose AA Emulsion at those rates. If Vatten wanted the paint changed it had to negotiate a change in rates as well. It is, accordingly, more than probable that the parties agreed to new rates for the new paint. In this regard,

Vattens letter of 24 January 2000 is not relevant since the original quotation did not refer to Acclose AA Emulsion. Additionally, I was not impressed with Mr Lims evidence relating to the preparation of his certificate of December 1999. There was no reason for him to insert any rates other than those originally quoted if there had been no agreement on new rates. The very fact that the rates he typed in were different from those quoted showed that he had agreed to changes in rates to reflect the change in paint.

22. The only question that remains is what the varied rates were. As pointed out earlier, in closing CHS adopted the figures in Vattens December 1999 certificate. They had no other evidence apart from their own December 1999 progress claim as to what the agreed rates were since they did not confirm these rates in writing or even, after the issue of the Vatten December 1999 interim certificate, dispute in writing the rates applied by Vatten. In these circumstances I think it was correct of them to adopt the Vatten rates. Vattens certificate is evidence of Vattens agreement to those rates. I do not accept Mr Lims excuses for the insertion of those rates in the certificate. I do not think he made any mistakes in inserting those rates. He inserted them either because they had been agreed or because he believed that he could persuade CHS to accept them. Accordingly on the issue of the rates for the internal paint work I find in favour of CHS.

Issue 2: Had Vatten breached their payment obligations to CHS

23. In 14 of the re-re-amended statement of claim the allegation was that in breach of the subcontract, Vatten had persistently throughout the duration of the subcontract underpaid CHS in respect of their progress claims or in respect of the sums due to CHS from monies received by Vatten from Hyundai for the work carried out by CHS. Particulars of this allegation were given by way of the following table.

Progress Claims		Payments From Defendants To Plaintiffs			Payments From Hyundai To Defendants	
Date	Amount	Date	Invoice No	Amount	Date	Amount
-	$70,299.24	23/03/99 Credit Note	0203 VE01/0599	$30,835.73 -$7,419.34	06/04/99	$23,340.84 $22,259.92
25/05/99 20/06/99	$225,106.38 $293,123.94	20/06/99 21/07/99 16/08/99 20/08/99	0221 0227 0234 0235	$50,000.00 $60,000.00 $10,000.00 $150,000.00	18/06/99 12/07/99	$70,556.78 $126,730.93 $171,884.29

16/09/99	$448,172.35	30/09/99 27/10/99	0247 0252	$80,000.00 $60,000.00	17/09/99 19/10/99	$87,507.95 $110,167.89
19/11/99	$429,335.72	-	-	-	-	-
26/11/99	$409,032.57	10/12/99	0262	$73,000.00	02/12/99	**$73,635.92**
29/12/99	$446,032.38	21/01/00	0280	60,000.00	06/01/00	$62.147.92
08/01/00	$489,824.73	03/02/00 28/03/00 25/04/00	0281 0289 0306	$59,400.50 $90,000.00 $40,000.00	19/01/00 29/02/00 24/03/00 18/04/00	$61,434.55 $26,782.48 $120,521.89 $59,800.71
22/04/00	$270,665.46	30/05/00	0322	$50,000.00	17/02/00	$125,101.58
20/07/00	$220,666.47	01/08/00 01/09/00	0349 0361	$30,000.00 $20,000.00	03/07/00 21/07/00 24/08/00	$61,175.32 $36,582.03 $52,964.81
					21/09/00	$39,851.48
					18/10/00	$18,977.78

24. As can be seen from the table, from about July 1999 Vatten had received much more money from Hyundai than it had paid CHS. By 21 July 1999, CHS had submitted three progress claims totalling approximately $588,529.56; it had been paid $133,416.39; and Vatten had received $242,888.47 from Hyundai. There was a difference of approximately $109,000 between the amount received by Vatten and the amount paid out by it. A month later, on 16 August 1999, Vatten received a further $171,884.29 and on the same day it paid CHS $10,000 and a further $150,000 four days later. By then therefore Vatten had received over $414,000 and had paid out $293,416.39 increasing the difference to about $121,000. The gap between payments received and payments made continued and by the beginning of September 2000 Vatten had paid out something in the region of $850,000 while having received approximately $1.29 million.

This in itself does not prove the plaintiffs case, however, since there was a difference in the price that they quoted to Vatten and that which Vatten quoted to Hyundai and also there were certain parts of the painting works (although minor ones) which Vatten had not subcontracted to CHS.

25. The evidence of Mr CG Tan on this part of the claim was that from time to time the CHS had submitted its progress claims to Vatten for payment. These claims were evaluated by Mr Tan following measurements of the painting works carried out or completed from time to time. These measurements were taken by Mr Tan Ah San, another director of CHS and Mr CG Tans brother. Mr CG Tan conceded that the progress claims were not always submitted by the 13th day of the month as had been agreed between the parties (in fact only one of the nine claims submitted bears a date falling before the 13th day of the month in question and the claims were not submitted at regular monthly intervals). He said that the delay in submitting the claims was caused by delay of Mr Lim in attending the joint measurement session and also by the fact that sometime in April 1999 the submission date for the claims was changed to the 25th day of each month at the request of Mr Lim.

26. Mr Tan went on to assert that Vatten had never objected to nor strictly insisted that progress claims be submitted by the 13th day of each month. Vatten continued to make payment to CHS notwithstanding the late submission of the progress claims. What happened was that after the submission of each claim, Mr Lim would call Mr Tan and ask that CHS render an invoice for the progress claim submitted in an amount dictated by Mr Lim. For example the amount claimed in progress claim No.6 dated 26 November 1999 was $409,874.57 but Mr Tan was asked to render an invoice for $73,000. He was told that if such an invoice was not rendered no payment would be made to the plaintiffs in respect of that progress claim.

27. From November 1999 onwards Vatten did not pay any attention to the measurements taken by Mr Tan Ah San. Mr Lim would arbitrarily dictate amounts to be paid to CHS. The amounts were much less than the value of the actual works carried out but Mr Tan was warned by Mr Lim that if he did not accept the dictated amounts CHS would not be paid. Mr Tan kept asking Mr Lim for Hyundais certification of the works done from time to time. Mr Lim refused to entertain these requests. The gross underpayments by Vatten adversely affected CHS and caused them many problems in carrying out and completing the painting works. In substantiating his assertions of gross underpayment, Mr Tan referred to part of the table set out about ie that portion relating only to the progress claims and invoices made by CHS and the payments received by them from Vatten.

28. When it came to submissions, the plaintiffs case changed. Their new focus was on the obligation by Vatten under the sub-contract to pay CHS related monies. It was pointed out that Mr Lim had accepted this as a contractual obligation and that accordingly Vatten was obliged to pay CHS a proportion of the monthly payments that Vatten itself received from Hyundai. CHS submitted that its payment claims were irrelevant for consideration of the amount due to it as this amount was determined solely by what Hyundai had determined was due to Vatten based on Hyundais calculation of the work done to date.

29. CHS submitted that that part of the subcontract dealing with the submission of progress claims by CHS on a monthly basis became redundant and had been waived by Vatten as there was already a mechanism in place to determine the quantity of work done at the end of each month. They relied on the following evidence:

(1) Mr Lims admission that progress claims were only estimates of the quantity of work done each month;

(2) His further admission that the purpose of the submission by CHS of progress claims was to enable Vatten to make similar submissions to Hyundai;

(3) That in fact Hyundai had six quantity surveyors to survey and quantify the painting works done by CHS and that Vatten had left it to Hyundai to work out the monthly quantities. Mr Kim Suk Chul, a planning engineer employed by Hyundai who was engaged in preparing interim certificates for the painting works for this project, testified that Vatten had left it entirely to Hyundai to work out the quantities and had thereafter accepted the quantities so calculated. Mr Lim had never disputed any of these quantities although he was entitled under the contract to dispute them if he disagreed with t h e calculation.

30. CHS put their case on underpayment in the following way. First they identified the three areas of additional work which had not been done by them, namely, the painting works for the chemical store, the digesters and the GRC fins. Then they noted that since the first evaluation of the work at the GRC fins was done in September 2000 and it took two months after certification for Hyundai to pay Vatten, the payments made by Hyundai to Vatten before 18 October 2000 did not include the painting of the fins. Thirdly they relied on Mr Lims admission that in respect of payments for interim certificates Nos 1-14, the "related monies" received by Vatten from Hyundai were all in respect of the plaintiffs works.

31. Using the above points to evaluate the payments made by Hyundai to Vatten, CHS submitted that the amount of "related monies" received by Vatten from Hyundai in respect of the plaintiffs works in certificates Nos 10-18 were as follows :

Certificate No	Work done up till end	Date issued	Date paid	Cumulative Gross Amount ($)	Chemical Store	Digerster	Cumulative "Related Monies" ($)
10	Nov 99	23.12.99	19.01.00	829,919.49	-	-	829,919.49
11	Dec 99	23.12.99	29.02.00	858,706.60	-	-	858,706.60
12	Jan 00	20.02.00	24.03.00	989,765.82	-	-	989,765.82
13	Feb 00	13.03.00	18.04.00	1,054,275.75	-	-	1,054,275.75
14	Mar 00	-	19.05.00	1,189,886.26	-	-	1,189,886.26

15	Apr 00	19.05.00	03.07.00	1.257,392.58	27,873.70	-	1,229,518.88
16	May 00	15.06.00	21.07.00	1,298,649.25	27,128.64	-	1,271,520.61
17	June 00	14.07.00	24.08.00	1,356,770.56	27,128.64	57,738.83	1,271,903.09
18	July 00	14.08.00	21.09.00	1,400,350.63	27,128.64	76,985.16	1,296,236.83

32. CHS then stated that in December 1999 Vatten had worked out the monies payable to CHS from the monies received from Hyundai and reflected these in a certificate of sub-contract interim payment. That certificate showed that the payment due to CHS for works certified up to the end of November 1999 was $624,877.68. During cross examination, Mr Lim agreed that if this amount of $624,877.68 were to be divided by the sum of $829,919.45 (the amount received by Vatten from Hyundai for work up to end November 1999), a factor of 0.7529 would be obtained.

33. CHS went on to argue that in respect of certificate No 18 and on the assumption that the revised rates for the three classes of work for the internal walls applied, Mr Lim had worked out the corresponding value of CHSs work as being $1,006,099.10. On that basis the "related monies" paid by Hyundai for certificate No 18 had been worked out by the plaintiffs in the table at paragraph 33 above to be $1,296,236.83. If the corresponding value of $1,006,099.10 given by Mr Lim is divided by the "related monies" of $1,296,236.83 received from Hyundai, a factor of 0.7761 is obtained.

34. CHS then submitted that the corresponding value of their works from end November 1999 (certificate No 10) to end July 2000 (certificate No 18) when divided by the "related monies" received by Vatten from Hyundai must be a factor within the bounds of 0.7529 and 0.7761. They then stated that if the lower factor of 0.7529 were to be adopted for certificates Nos 11-17 the value of the plaintiffs works would be as follows :

Cert No	Cumulative "Related Monies" ($)	Factor	Cumulative Value of Plaintiffs Works ($)
10	829,919.49	0.7529	624,877.68

11	858,76.60	0.7529	646,520.19
12	989,765.82	0.7529	745,194.68
13	1,054,272.75	0.7529	793,764.21
14	1,189,886.26	0.7529	895,865.36
15	1,229,518.88	0.7529	925,704.84
16	1,271,520.61	0.7529	957,327.86
17	1,271,903.09	0.7529	975,936.70
18	1,296,236.83	0.7761	1,006,099.10

35. Using this same factor CHS worked out the amount by which they had been underpaid. The detailed calculations were shown in Appendix 1 of the plaintiffs submissions and are summarised in the following table:

Certificate No	Date Defendants received payment	Amount of Underpayment by Defendants ($)
11	29.02.00	3,069.10
12	24.03.00	8,590.27
13	18.04.00	16,115.56
14	19.05.00	65,412.18

15	03.07.00	93,207.06
16	21.07.00	92,487.29
17	24.08.00	89,782.39
18	21.09.00	118,749.06

36. CHS concluded their submission on this point by stating that underpayment by Vatten had increased over time. In May 2000, the under payment was in excess of $65,000. By July 2000 it was in excess of $90,000 and by September 2000 it was in excess of $118,000. Therefore there had been persistent underpayment by Vatten.

37. In response to the above submissions, the defendants drew the courts attention to the fact that the original claim made by CHS was that Vatten had breached the contract by failing to pay CHS the amount of $220,666.47 contained in one progress claim, that of 20 July 2000. On the first day of the hearing, CHS amended their statement of claim and inserted the allegation in 14 that Vatten had underpaid them in respect of ten progress claims. Eight days later they applied to re-amend 14 so that it averred that the alleged underpayments related to either the progress claims or the related monies from Hyundai. By the time of the closing submissions CHS had abandoned the issue of the progress claims altogether and, as has been indicated earlier, relied only on the alleged underpayments in respect of the related monies.

38. Vatten submitted that the two amendments made in the course of the hearing supported their contention that the plaintiffs allegations were not based on facts but were motivated by the need to bolster a weak case. They submitted that the table produced by CHS (reproduced in 36 above) showing the amount of alleged underpayments by Vatten was untenable as it was based on projections obtained by using a "factor" of 0.7529 instead of being based on evidence. Further, the figures in that table had not been adduced in evidence by any of the plaintiffs witnesses and Vatten had no opportunity to cross examine those witnesses on the figures. Nor was defence counsel able to put those figures to the plaintiffs witnesses. In addition, since the figures in the table were not pleaded and were quite different from the amounts of the alleged underpayments in fact pleaded by the plaintiffs in the further and better particulars filed by them on 6 August 2001, the court could not, and should not, accept them as part of the plaintiffs case.

39. Before I can decide whether there was persistent underpayment by Vatten, I have to establish exactly what Vattens payment obligations under the sub-contract were. The relevant contractual term is cl 1. This provides, in part that payment shall be based upon CHS application for interim payment for work done and for cost of materials on site but will be revised in accordance with the amount of related monies received by Vatten from Hyundai. No direct submission on the meaning of this provision was made by CHS.

40. Having considered the clause objectively, it appears to me that the intention behind it was that CHS would submit a claim for payment at monthly intervals based on the work done on site during the previous month and on the materials purchased. Using this as a basis, Vatten would submit their own claim to Hyundai who would then calculate the amount due based on the rates which Vatten had quoted it and its own measurement and evaluation of the work done and materials on site. Hyundai would then pay Vatten

in accordance with such assessment and, it appears to me, the clause contemplated that Vatten would be able to work out from the payment how the assessment had been made and revise the amount payable to CHS on the basis of CHSs rates for the work accepted by Hyundai. Contrary to the submission made on behalf of the plaintiffs, there was nothing in the sub-contract which obliged Vatten to pay CHS a certain percentage of each payment received from Hyundai or to calculate the amount payable to CHS based on any particular factor. The only way that such an argument could work is if such an obligation was implied by the use of the term related monies. The term related monies does not however have any particular legal meaning and no evidence was given by CHS that as between the parties it was understood to have a particular meaning in terms of the exact percentage of Hyundais payments that had to be passed on to CHS.

41. It therefore appears to me that in order to establish a claim for persistent underpayment, CHS would have to show what exactly it was entitled to based on the work done as assessed and paid for by Hyundai. It did not do this. As I stated earlier an examination of the table in 14 of the statement of claim and reproduced in 23 above, shows that there was at times quite a gap between what Vatten received and what it paid out. However, as I also stated earlier, this in itself did not prove the plaintiffs case because of the difference in prices between the main contract and the sub-contract. In this regard it was Mr Lims evidence that his profit margin varied depending on the items of work: in some cases it was 19% and in others it reached as high as 41%. As submitted by Vatten, it was also noteworthy that the basis of the plaintiffs claim for underpayment in this action changed several times in the course of the action and ended up being based on a premise which had neither appeared during the trial nor been pleaded ie that payments from Vatten to CHS had to be made in accordance with a consistent factor of at least 0.7529.

42. The change in the plaintiffs case was also evidenced by the affidavit filed by Mr CG Tan. I have set out his evidence at length above. There he referred to the progress claims and stressed his complaint that Vatten insisted on paying arbitary amounts which were much less than the value of the actual works carried out by CHS on site. He referred to a table showing and comparing the progress claims submitted by CHS and the payments made by Vatten and said that it was apparent from this that Vatten had always grossly underpaid CHS. In court too, Mr Tan reiterated that the allegations of underpayment were made in relation to the progress claims submitted by CHS to Vatten because of the comparison as shown in the table. Mr Tan did not base his complaints on Vattens failure to pay CHS the related monies or any particular proportion of the payments they received from Hyundai. His evidence supported a case based on underpayment of the plaintiffs progress claims and not one based on underpayment of related monies from Hyundai. It is clear therefore that when his affidavit was prepared the plaintiffs were proceeding on a different basis to that which they eventually adopted. CHS must, however, have realised in the course of the trial that it would be difficult to succeed on the original basis since Mr Tan admitted that all along the CHS progress claims were not accurate and were submitted simply for show and for Mr Lims approval. That must have been one of the reasons why the pleadings were amended and, in the final submissions, the issue of underpayment of progress claims was dropped altogether.

43. In my judgment, the plaintiffs have not established their allegation of a persistent underpayment by the defendants nor any clear basis for such an allegation.

Issue 3: Was Vattens termination of the subcontract on 18 October 2000 wrongful?

44. The plaintiffs submission that Vatten acted wrongfully in terminating the subcontract on 18 October 2000 is based on the following propositions:

(1) that Vatten had persistently underpaid them; and/or

(2) Vatten had no ground to terminate the subcontract because CHS:

(a) had not abandoned the works; or

(b) had justified to Vatten the reason for not being able to carry out further works; or

(c) had substantially completed the subcontract works.

I do not need to deal with the first proposition as I have already found that the plaintiffs have not proved their allegation of persistent underpayment.

45. On 18 October 2000, Messrs Wee Tay & Lim, Vattens solicitors, wrote to CHS. The material part of this letter read:

> We have been instructed that you were engaged by our clients as a sub-contractor to do the painting works for Seletar Sewage Treatment Works Phase III ("the Project").
>
> We have also been instructed that you have acted in breach of your obligations under the sub-contract and have stopped work.
>
> Our clients therefore treat your refusal to complete the works as a repudiation of the sub-contract. Our clients accept your repudiation. They will engage another sub-contractor to rectify your breaches and complete the work, and will seek damages against you.

It is common ground that if CHS had indeed stopped work without a sufficient justification, it would have acted in breach of the subcontract and Vatten would have been justified in terminating the subcontract. The dispute is over whether CHS did stop work and secondly, if it did so, whether it could justify its action as being caused by Vattens default.

46. According to Mr Lim, on 5 October 2000, the plaintiffs representative on site, Mr Tan Ah San, informed him that CHS had stopped work. Mr Tan did not give Mr Lim any reason for the stoppage. The next day, Mr Lim wrote to CHS stating that he wished to put on record that he had been informed by their site representative Ah San on 5 October that CHS had stopped work at the project. Mr Lim said that he could not understand and could not see any reason for this action. He asked CHS to justify. Vatten sent this letter out by fax and received two replies both written on the bottom of their own letter which was faxed back to them. The first one, written on 7 October, stated in English:

> Sir,
>
> > We have to stop work because we had not received the progress payment dued *(sic)* from you in time. Our works and material suppliers are all waiting for their payment.
>
> We will resume work once the payment is made.
>
> We wish you to look into this urgent matter closely. Thank you.

The second reply was written in Mandarin and dated 10 October 2000. It said:

> You are the boss.
>
> > Give money, start work straightaway. Because no money to pay wages. (No money

to buy materials) Make payment everything can, O.K. (No money to buy papers to issue invoices.)

In cross-examination, Mr GC Tan was shown both these replies and he confirmed that by them, CHS had explained to Vatten that they had to stop work because they had not received the progress payment in time. He also confirmed that in the second reply, that written on 10 October, there had been no denial that the plaintiffs had stopped work on the project.

47. Initially, the plaintiffs position in relation to the work stoppage was not in conflict with that of the defendants. In the statement of claim endorsed on the writ, CHS asserted that the refusal by Vatten to make full payment of their progress claim dated 20 July 2000 for the sum of $220,666.47 had severely affected their ability to carry on work on the project. In the original 10 CHS stated that they had had to stop work because of this as they were unable to make corresponding payments to their paint supplier, Messrs DNT Singapore Pte Ltd and their own workers. This was an admission on the part of CHS and this admission was repeated in the following paragraph when CHS averred that by their letter of 7 October 2000 they informed Vatten that they had to stop work because of Vattens failure to make payment and that they had assured Vatten that work could resume once payment was received.

48. Six months later, however, on the first day of the hearing, CHS applied to amend 10 of the statement of claim. The amendment in effect retracted the admission that work had been stopped because it stated that the work that was stopped was work in new areas and did not include touch-up work which the plaintiffs continued to do until they were forcibly ejected from the site on 18 October 2000.

49. Along with the amendments to the statement of claim came amendments to the affidavits of evidence-in-chief of both Mr GC Tan and his brother, Mr Tan Ah San. In the original version, both men had stated that on 18 October 2000, although the plaintiffs were hampered in their ability to carry out painting works on new areas, while three workers of the plaintiffs were on their way to carry out minor touch-up works on the door frames at Batteries A&B area, the defendants had forcibly ejected the workers from the site. In the amended version, the three workers were not on the way to do the touch-up works but were actually doing touch-up works at a different location, the Inlet Area, when they were forcibly ejected from the site. In the witness box, Mr GC Tan explained that when he had made his affidavit he had not asked his workers what had actually happened. Subsequently, he had clarified the date with them and found out that on 18 October they were at the Inlet Area whereas they had been around Batteries A&B on 16 and 17 October 2000. Mr Tan Ah San stated that the change in the evidence was because of a misunderstanding on his part as to what he had been told by the workers. He had passed the misinformation on to his brother and that was why Mr GC Tans first affidavit had the wrong data. This was only corrected when Mr Tan Ah San asked the workers again as to what had happened. He confirmed that his evidence was based on what the worker Ponniah Arumugam had told him.

50. In support of the amended version of the facts, CHS called their worker, Mr Ponniah Arumugam. He stated that he was a painter working on the project from 15 March 1999 to 18 October 2000. He confirmed that in the month of October 2000, he did painting works at the site everyday (except perhaps on 1 and 6 October 2000 which were Sundays) with two other workers. The painting works were mainly touch-up works. Specifically, on 15, 16 and 17 October 2000, the three men had carried out touch-up works at the Inlet Area from about 8 am in the morning until about 7 pm at night. On 18 October at about 8.30 am while the three were working at the Inlet Area, they were stopped by security personnel and asked to leave the site. They were then escorted to the security post at the entrance to the site. From the post, Mr Ponniah called Mr Lim on the telephone and told him what had happened. Mr Lim said that the painting works were finished already and asked Mr Ponniah to leave the site immediately. Mr Ponniah had no choice but to leave the site.

51. The oral evidence that CHS had continued work at the site after 5 October by sending three workers to do touch-up works at various locations was inconsistent with the two hand-written notes sent by CHS to Vatten on 7 and 10 October. If Vattens allegations were wrong and CHS had not stopped work, the natural response would have been for CHS to deny the allegation and set the record straight. However, CHS did the opposite: they confirmed that they had stopped work.

52. Secondly, the first two replies were hand-written ones and, perhaps, could be explained away as having been written or dictated by Mr GC Tan in ignorance of what was actually happening on site as he did not visit the site but relied on his brother for information. Surely, however, the true position would have become known within a reasonable time thereafter especially since Vatten used the alleged work stoppage as their reason for terminating the subcontract. It is interesting in this context that CHS did not take the opportunity to set the record straight until the beginning of the trial some eight months later.

53. After the termination letter, many letters were written by CHS to Vatten on various issues and on their claims against Vatten. The dates of these letters were 27 October, 3 November, 7 November, 14 November, 17 November, 22 November and 1 December 2000. In none of these letters did CHS deny Vattens allegation that they had stopped work on the project. In fact in the 1 December letter, CHS referred to their earlier reply of 7 October 2000 and repeated verbatim the words of that reply. Whilst specifically affirming that they had stopped work, CHS did not either in this letter or in any other assert that the stoppage of work was in relation to new areas only and that they had had three workers doing touch-up work in the old areas until these workers were forcibly ejected from the site.

54. I think that the contemporaneous correspondence must be given its due weight. The letters that CHS wrote after the termination were not prepared by either of its directors: neither of them were fluent in English. Instead, Mr GC Tan sought the help of one Francis Teo Teng Siu in the preparation and presentation of the plaintiffs claim against Vatten. Mr Teo is a quantity surveyor and also a qualified lawyer. He has been admitted to the Bar in both England and Singapore. He is the sole proprietor of Messrs Francis Teo & Associates, a firm engaged in quantity surveying and contractual claims for construction projects. Mr Teo was called by the plaintiffs as their expert witness in this action and, on their behalf, reviewed the evaluation of the plaintiffs works at the project that had been prepared by Vatten. In court, Mr Teo confirmed that he had written all the letters that I have mentioned in 53 above and had advised Mr GC Tan in general on the plaintiffs claim. Interestingly, Mr GC Tan in his evidence denied that Francis Teo had assisted him in drafting those letters. He even went so far as to say that Mr Teo had not given him any advice in respect of any of the letters and that in late 2000 Mr Teo had not advised CHS on their claim against Vatten.

55. I do not accept Mr Tans evidence that the letters were written not by Mr Francis Teo but by some friend of his also with the surname Teo whom he asked to help because Mr Tan himself did not know how to write in English. Mr Tan was not able to give the full name of the other Teo or any other details about him. I find it significant that in these letters written by a quantity surveyor with legal training who would have appreciated the consequences of an unjustified stoppage of work by a contractor, it was never asserted that there was no full stoppage and that work continued in some sort of fashion until the plaintiffs workers were forcibly removed from the site.

56. I do not accept the evidence of Mr Ponniah and the two Tan brothers that Mr Ponniah and his co-workers were on the site until 18 October 2000. Sending the workers to the site would have been totally inconsistent with the stand taken by CHS in their letters of 7 and 10 October. Tellingly, CHS did not protest in writing after their workers were allegedly illegally ejected from the site. Further there was no independent evidence of the presence of these workers on the site. On the contrary, such independent evidence as there was supported Vattens stand that after 5 October none of CHS workers did any work on the project. A joint site inspection took place on 13 October 2000. It was attended by one Johnny Choo

Seow Meng, a technical inspector for DNT Singapore (DNT), the paint supplier. Mr Choos evidence was that during the two to three hours he spent on the site that day, he did not see any workers carrying out painting work on site. Whilst Mr Choo admitted that he could not have covered every single part of the site during the inspection, it is likely that if there had been three men painting, he would have noticed them. Another person who attended the joint inspection was Mr Choy Wai Kong of Tech 3 International, the contracting firm that was employed by Vatten to take over the plaintiffs work. Mr Choy also testified that he did not see any painters during the site inspection.

57. Tech 3 Internationals workers started work on the project on 17 October 2000. According to Mr Choy, he did not see any other painters on the site after his workers commenced work. Neither did he receive reports from his workers of other painters. Further, CHS itself did not complain to Vatten on either 17 or 18 October that workers from another subcontractor were carrying out painting works. If CHS was on the site and had not stopped work, it is likely that they would have complained of someone else trying to muscle in on their works. The entry of other subcontractors could not but interfere with the plaintiffs works and affect their claim and thus any such entry would almost automatically have drawn objections.

58. I find therefore that on 5 October 2000, CHS had stopped work. The next question is whether they were justified in doing so or whether the stoppage constituted a repudiatory breach of the subcontract.

59. CHS submitted that even if it was found that they had in fact stopped work altogether on 5 October, they were entitled to rely on the defence that Vatten had persistently underpaid them to excuse themselves from further performance of the subcontract on the ground that such underpayments by Vatten constituted a repudiatory breach of the subcontract by Vatten. They went on to submit that even if in such circumstances their stoppage was a breach, since Vattens persistent breaches in the form of underpayment had preceded and caused the plaintiffs breach, it was the plaintiffs and not Vatten who had the right to terminate the subcontract. Since Vatten did not have the right to terminate the subcontract, they were in repudiatory breach when they issued their termination letter. Since I have found that CHS has not proved persistent underpayment by Vatten, the arguments based on that allegation must fail.

60. The alternative justification that CHS gave for stopping work was that as stated in their reply of 7 October. They had to stop work because they had not received the progress payment in time. Their workers and suppliers were waiting for payment and work would be resumed once payment was made. CHS asserted that they had not absolutely refused to carry out the work as they had stated in their reply that they would resume work once payment was made. By terminating the subcontract without warning and without regard to the justification given by CHS, Vatten themselves were in repudiatory breach of the subcontract.

61. CHS relied on the following proposition of law from *Keating on Building Contracts* (6th Ed) to support their arguments:

> Where one party has failed to perform a condition of the contract, the other party cannot rely on its non-performance if it was caused by his own wrongful acts. (at p 168)

62. CHS had pleaded in 10 of their re-re-amended statement of claim that they had had to stop work because they were unable to make corresponding payments to the paint supplier and to their own workers. This pleading was a reiteration of what was written in CHS reply of 7 October. In their submissions CHS quoted this reply once again. The question is whether that position was the true position.

63. To support the plaintiffs stand that they were not able to pay their paint supplier due to underpayment by Vatten, they produced a letter from DNT dated 24 August 2000 referring to the latters account of the

same date for the sum of $449,299.19 out of which $412,884.56 was due for immediate payment. DNT stated that the account was long overdue and gave CHS notice that unless they received payment of the amount due within 14 days, they would commence legal action.

64. In court, Mr Tan was referred to this statement of account. He confirmed that many of the items on the statement did not relate to the project. Instead they were in respect of paint supplied for other projects that CHS had been working on concurrently in 1999 and 2000. Mr Tan further agreed that despite the threat in DNTs letter, the latter in fact trusted CHS and allowed them to accumulate a large outstanding bill. This trust was also shown by the fact that up to 18 September 2000, CHS was still ordering paint from DNT and DNT continued to supply the paint ordered. Mr Tan confirmed that DNT had fulfilled all CHS orders and that their letter of 24 August 2000 had only been a warning. DNT trusted CHS because CHS ordered paint from them for all their projects. When it was put to Mr Tan that it was not true that CHS had to stop work because they could not make payment to DNT, his answer was If you dont pay me the money, I cant survive. Workers wages, everything, we need to pay. It would appear that whilst CHS did owe DNT a substantial amount of money, much of this was for material supplied for other projects and that CHS was not, as at 5 October 2000, in imminent danger of being sued by DNT for non-payment.

65. CHS did not produce any evidence of their inability to pay their workers. Mr Ponniah Arumugam who was working for them in October 2000 was still employed in May 2001 when he gave evidence in court. That fact is some indication of the plaintiffs ability to hold on to their workers and inconsistent with an inability to pay their workers. Overall, the evidence does show that CHS was experiencing some cash flow problems around August to October 2000 but not to the extent that continuing work on the project would have pushed them over the edge financially. According to a schedule produced by CHS, between January 1999 and September 2000, they had bought paint costing some $534,000 from DNT for the project. During that period, they had also been paid, according to their own calculations, $863,236.23 by Vatten. That sum was enough to settle, if not all, a substantial part (at least half) of their paint bill. The outstanding sum of $449,299.19 payable to DNT could not therefore be attributable entirely or even substantially to underpayment by Vatten.

66. In any case, difficulty in settling ones suppliers and workers bills would not justify breaching the subcontract by stopping work unless that difficulty was caused by a pre-existing breach in its payment obligations by Vatten. CHS accepted that one or two failures on the part of Vatten to make payment of amounts due would not justify a work stoppage. That is why they had submitted that there had been persistent underpayment and that the cumulative effect of such underpayment was a breach on the part of Vatten indicating an intention to repudiate the subcontract. Since that assertion of persistent underpayment was not established, any difficulty that CHS experienced with payments to their workers and suppliers could not be laid at Vattens door. I find that CHS has not justified its work stoppage.

67. The consequence of my findings up to this stage is that by stopping work on 5 October 2000, CHS was repudiating the subcontract and therefore Vatten was entitled to terminate it after CHS failed to resume work. The next point raised by CHS that in fact their work stoppage could not be considered a repudiation since by the time it occurred, the works under the subcontract had been substantially completed, can be conveniently considered in conjunction with the fourth issue which relates to the value of the plaintiffs works as at 18 October 2000.

Issue 4: What was the value of CHS work as at 18 October 2000 and had they by then substantially completed the subcontract works?

68. As an alternative, CHS asserted that the work stoppage did not constitute a repudiatory breach of the subcontract because they had already substantially completed their works. It appears to me from *Keating on Building Contracts* (6th Ed, pp 78 84) that the doctrine of substantial performance in building contracts

applies to lump sum contracts and usually relates to whether the contractor can claim payment of the lump sum price although he has not completed the works or whether he has to make a claim for payment on a quantum meruit basis. It is not usually applied to the issue of whether the contractor was entitled to stop work before finishing all that had to be done. In my view, if the contractor stops work and indicates that he is not prepared to continue with the work although there is still work to be done, he would be in breach of contract even if the outstanding work remaining incomplete is only a small percentage of the total work under the contract, since someone has to do that work.

69. In discussing what is meant by substantial completion, Keating states that One test to be applied is whether the work was "finished" or "done" in the ordinary sense even though part of the work was defective. Here, it was the plaintiffs case in their closing submissions that they had completed about 98% of the subcontract works by 18 October 2000. This submission has to be contrasted with Mr Tans assertion during cross-examination that the amount of work completed was 95% and the evidence adduced by the defendants on the amount of outstanding works.

70. As regards value, it is the plaintiffs case that as at 18 October, they had carried out painting works in the quantities shown in the table annexed to their letter of 27 October 2000 to Vattens solicitors. This showed the total value of work done to be $1,398,235.88. It was worked out on the basis of the plaintiffs pleaded rates for the internal painting works. Using the revised rates of $2.85, $2.34 and $2.86, the value of the works was calculated at $1,395,807.38. The plaintiffs claim for $557,963.74 (without GST) was calculated as the difference between the value of the works and the sum of $837,843.64 paid by Vatten (ie $863,236.23 less GST of $25,392.59).

71. The plaintiffs evaluation of the works was based on their own measurements of the works done up to 18 October 2000. Mr Tan Ah San confirmed that he and his foreman, one Ah Chwee, had done the measurements on which the evaluation was based. After completing the measurements he had passed them to Mr GC Tan to work out the claim. It was asserted that the accuracy of the measurements had not been challenged by Vatten save for what they considered to be the lack of qualifications of Mr Tan Ah San and Ah Chwee. However, Mr Francis Teo, the plaintiffs expert, had given evidence that to take measurements of painting, no qualifications are needed it is very simple and anyone can do it.

72. The plaintiffs case on this issue faces some difficulties. As stated, the assessment that 98% (or, alternatively, 95%) of the work had been completed was based on the measurements taken by Mr Tan Ah San and Ah Chwee. Neither of these persons had any technical qualifications (and Mr Tan Ah San had only primary school education) and even Mr GC Tan admitted in the course of cross-examination that all along the progress claims based on the measurements were not accurate.

73. The evidence adduced by the plaintiffs in support of their measurements has to be balanced against that adduced by the defendants. Mr Kim of Hyundai gave evidence that as of 30 September 2000, the extent of completion of the painting works for the architectural items (as opposed to the civil work items which had already been completed) was as follows:

(a) Inlet works	75.42%
(b) Batteries A&B	78.57%
(c) Sludge Processing Building	84.26%
(d) Power House	68.66%
(e) Digesters	32.14%

(f) Fuel Oil Storage 70.64%

(g) Transformer House 104.34%

(h) Additional Painting 90.51%

The painting works for the digesters and chemical store were not part of the subcontract. Even taking out those items, the evidence of Mr Kim establishes that the subcontract works were not 98% complete nor even 95% complete. The level of completion varied. According to a document produced by Mr Kim, overall, as at 30 September 2000, the architectural works were 87.72% complete. In the course of Mr Kims cross-examination, it became clear that the figure of 87.72% was an estimate and may not have been completely accurate. What also emerged, however, was that quite a bit of painting works had to be done after October 2000 and, as at the date of the hearing, there were still some painting works being carried on.

74. Another witness, Mr Choo of DNT, estimated that as at 13 October 2000, about 20% of the architectural painting works for four buildings (Inlet works, Batteries A&B, Sludge Processing Building and Power House) had not been completed. Mr Hwang of Hyundai was also adamant that the architectural painting works had not been completed by October 2000 although he was not able to give an exact estimate of the amount of work outstanding.

75. I accept the evidence adduced on behalf of the defendants in preference to that proferred by the plaintiffs. Hyundai had the backup of a large professional staff and they had to take measurements for their own progress claims to the employer. There was no reason for Hyundai to take the part of either the plaintiffs or the defendants or to lie about the substantial completion of the work as at October 2000. Whilst the Hyundai certificates may not have been completely accurate in terms of percentages, I accept the witnesses testimony that the painting works remained incomplete when the plaintiffs stopped work. As at that date it was not possible to say they were finished or done in the ordinary sense.

76. The plaintiffs have the burden of proving the assertion that the work was substantially complete as of 18 October 2000 when they say they were forced to leave the site. They have not discharged this burden. Mr Tan Ah Sans measurements were not even regarded as completely reliable by his own brother.

77. In terms of percentage of work completed, I have not been persuaded by the evidence adduced by the plaintiffs. This finding also impacts on the plaintiffs valuation of the work that they had done since that valuation was, like their assessment of percentage of completed works, based on the measurements of Mr Tan Ah San and Ah Chwee. The plaintiffs original valuation was $1,395,807.38. An alternative valuation put forward at the trial was that of Mr Francis Teo. He valued the work as being worth $1,275,000. In court Mr Teo admitted that his valuation was based on the measurements taken by the plaintiffs and also on a number of assumptions namely:

(a) that the information given to him by CHS about the quantity of paint was correct;

(b) that the paint in question had been used for the project; and

(c) that the paint was not used for reapplication for areas that were rejected.

Mr Teo admitted that he had no personal knowledge whether any of these assumptions were in fact justified. Since he did no measurements of his own and could not be sure of the quantities of paint used, it is not safe for me to rely on Mr Teos valuation as an alternative basis for assessing the value of the plaintiffs works.

78. The position put forward by the defendants as to the value of the plaintiffs works and the amounts due to them was as follows. As at 5 October 2000, Vatten had received payment for work done until 31 July 2000. This payment was made by Hyundai on 21 September 2000. Based on the quantities certified by Hyundai and the original rates quoted by CHS, the sum of $39,361.05 plus GST was due to CHS as at 5 October 2000. As no work was carried out by CHS between 5 and 18 October 2000, the same amount was due to CHS on 18 October. Vatten derived the sum of $39,961.05 from the following calculation:

Total value of works:	$926,805.09
Less:	
(a) 5% retention	$ 46,340.25
(b) Contra-charges	$ 9,613.61
	$870,851.23
Add: 3% GST	$ 26,125.54
Less:	
(c) Payments prior to August 2000	$780,890.18+ GST ($24,926.71)
(d) Payment on 1 August 2000	$ 30,000.00 (incl. GST)
(e) Payment on 1 September 2000	$ 20,000.00 (incl. GST)
Interim Amount due to Plaintiffs	$39,961.05 + GST

79. I cannot accept the defendants submission. Whilst in October 2000, CHS may only have been entitled to receive payment for work done up to the end of July that year since that was all that Vatten itself had received from Hyundai, this case was not commenced then. The action was started in mid December 2000. By then Vatten should have received payment for work up to the end of September 2000 since Hyundai had issued its status report on those works on 10 November 2000, and, subject to Vattens rights of set off and counterclaim, CHS would have been able to claim the monies due for their work up to the same date, less the agreed retention sums. There is no dispute that CHS did work on the site in August and September 2000. In these circumstances, I do not think that it is correct for me to assess the plaintiffs work only up to the end of July 2000 as contended by Vatten.

80. Among the documents which CHS managed to obtain from Hyundai were the latters 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 of the plaintiffs works as of the end of September 2000 if not as of 5 October 2000. 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.

81. CHS, on the basis that their employment had been wrongfully terminated by Vatten, also put in a claim for damages for the loss of profit that they would have earned had they been able to complete the works. CHS estimated that the value of the remaining works was $21,894.04 and that on the basis of a profit rate of 15%, they would have earned $3,284.11 on these works. Since I have found that Vatten was entitled to terminate the plaintiffs employment because of the latters breach, this claim for damages must fail.

Issue 5: Were there defects in CHS works in respect of which Vatten is entitled to a set-off?

82. The defendants claim a set-off in respect of the amount found to be due to CHS for their work. They rely on clause 6 of the letter of intent which provides that Vatten shall have the right to recover all their costs that arise from non-acceptable work performed by CHS and the re-performing of such work. I accept that if Vatten were able to prove that CHS had not performed the work properly and Vatten incurred costs in remedying those defects, they would be able to recover such costs. The problem here is that Vattens claim at this stage is inchoate.

83. In their submissions, the defendants pointed out that throughout the course of the painting works, they had received many complaints from Hyundai in relation to defects in the plaintiffs work. They gave a list of complaints that they had received relating to bad workmanship and unsatisfactory works. Vatten also stated that on 21 October 2000, after CHS left the site, Hyundai wrote to Vatten to complain about defects in the work. They made remarks like Final coat, colour no good and final coat no good in respect of various buildings painted by CHS. However, they did not give specific details of any of these defective works for example, the location and extent of the same, or of the costs that they had incurred or would incur to remedy them.

84. The plaintiffs response to the allegation of defective works was that there was no credible evidence to establish the same. It was submitted that all defects that had been noticed in the course of the work had been rectified as and when they were pointed out. Mr Lim himself had agreed in cross-examination that CHS was required to make good all defects to a particular coating before the next coating was permitted to be applied. Further, the contract required inspection and approval of each coating before CHS was allowed to apply the next coat. It is also material that in respect of the civil works the evidence was that all defects to them would have been rectified before handover to the employer in October 2000. Even Mr Choy, the subcontractor who took over after CHS stopped work, testified that he could not recall seeing any defective works at the site when he inspected it in October 2000.

85. There was one specific assertion of damage caused by the plaintiffs workers and that was in relation what were called the PSB labels on the doors. In Vattens closing submission, it was stated that this matter was only discovered after CHS had left the site and it would be taken up if interlocutory judgment was granted to Vatten. No amount has been specified in relation to this claim although there was a letter from Hyundai indicating that they would be holding Vatten responsible for the replacement of the damaged labels and all expenses incurred by Hyundai in this respect would be deducted from Vattens price. CHS has responded to this claim by pointing out that the first notification of it came on 21 October 2000, after they left the site, and asserting any damage done was caused by the workers of the replacement contractor.

86. On the general issue of defects, Vatten has not made out their case. If indeed there are any defects in the works done by CHS in respect of which Vatten will have to incur costs in rectification, Vatten is free to bring a claim for reimbursement as and when such defects materialise and/or the costs are incurred. At present, there is insufficient evidence to substantiate any damage caused to Vatten by reason of any inadequacy in the workmanship of CHS. The same reasoning applies to the claim for damage to the PSB labels. As of the date of the filing of the counterclaim, no monies had been deducted from Vatten for this claim. The claim had not crystallised. If monies are subsequently deducted and if Vatten can show that all or part of those monies are attributable to damage caused by the plaintiffs workers, they can make a claim against CHS at that stage.

Issue 6: Is Vatten entitled to charge CHS for the cost of spark tests carried out by Hyundai?

87. Section 3.3.5.3 of the specifications of the main contract between Hyundai and the Government is entitled Amine Cured Coal Tar Epoxy Protective Coating. It contains directions as to the type of coating to be used and how it is to be applied. In sub-section 3.3.5.3.6 it is stated that When completed, and again just before commissioning, coatings will be spark tested as directed by the S.O. at a minimum of 2500 volts

D.C..

88. Hyundais position was that by virtue of its subcontract with Vatten, Vatten was obliged to carry out the spark tests. It should be noted that clause 11 of that contract provided that Vatten would be responsible for testing of any materials as required under the [main] contract. Vatten incorporated a similar clause in their subcontract with CHS and took the stand that CHS as the back-to-back sub-subcontractor had undertaken this obligation. They also relied on Mr GC Tans admission under cross-examination that when CHS was working on the project, they were required to carry out spark tests to test the thickness of the paint. It was put to him that CHS had failed to conduct the spark tests as required under the subcontract. Mr Tans answer was: The problem is they went to do the spark test, they did not tell us. The consultant did the spark tests with Hyundais men. If he found defects he would mark the areas and we would do the rectification. He then said that CHS was not supposed to conduct the tests themselves but that the consultant had to be present. In the same answer, Mr Tan said that the plaintiffs had conducted their own tests. It was put to him that Hyundai had no choice but to deploy their own workers to do the tests because CHS had failed to do them. Mr Tans response was that DNT, the paint maker, had conducted the tests. This rather confused testimony left me with the understanding that at some basic level Mr Tan accepted that spark tests were the plaintiffs responsibility but that he thought they had good excuses for not carrying out that responsibility completely.

89. Mr Hwang Min Ju, a civil engineer employed by Hyundai on the project, gave evidence that as the plaintiffs had failed to conduct the tests, Hyundai had had no choice but to do them themselves as otherwise the project would have been delayed and the penalties for the delay were high. He also testified that Hyundai may deduct the sum of $70,000 for these works at the end of project.

90. As at the date of the hearing, no money had been deducted from Vatten by Hyundai to cover the costs of spark tests carried out by Hyundai. As such, it is my judgment that Vattens claim for reimbursement is premature. I accept that the plaintiffs were contractually obliged to carry out the spark tests and that they did not carry out all these tests. However, the amount which Hyundai is entitled to charge for having to carry out the tests themselves has not been established. The sum of $70,000 appears to be an estimate rather than an exact calculation of the costs that Hyundai incurred. 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.

Issue 7: Was there an agreement for CHS to do the textural painting of the digesters at the rate of $9 per square metre?

91. The background facts relating to this issue are that in January 1999, Vatten asked CHS if they would paint the digesters. CHS was interested and submitted a quotation to do the work at the rate of $12.50 per square metre. They also prepared a mock-up. Subsequently, Mr Lim asked Mr GC Tan whether he would reduce the rate to $9 per square metre. Vattens case is that CHS accepted the counter-offer and a contract came into being on that basis. According to Mr Lim, however, after Hyundai instructed Vatten to proceed with the digester works, he asked Mr Tan Ah San when the plaintiffs could do these works. At that stage Mr Tan stated that the plaintiffs did not want to do any additional work. Vatten then had to employ another subcontractor for this part of the works. CHS denies accepting the counter-offer. Mr Tan said that it was impossible for him to agree to Mr Lims proposal since the rate suggested was below his cost.

92. The contract, if any, was an oral one. The issue is whom to believe. I should point out here that both Mr Lim and Mr GC Tan did not always tell the truth in their testimony. Submissions have been made that I should regard Mr Lim as a habitual liar. Although he was forced to admit on several occasions that he was not telling the truth, this does not mean that everything Mr Lim said was untrue. In the case of the contract

for the digesters, his assertions were supported by Vattens letter of 24 January 2000 to CHS. This letter consisted of several paragraphs under various headings. Item (B) was entitled Texture Coating and it read:

> As per our discussion and your verbal confirmation of S$9.00 per m2 inclusive of labors and materials for the texture paint to the 6 nos. of digester of an area of approximate 6000 sq.m., we like to have your work schedule in order for us to arrange with Hyundai the necessary staging. The finishes should be similar to the sample done by you.

It was submitted that the above paragraph should be accepted as evidence of the verbal agreement since CHS had not at the time refuted the assertion of a contract.

93. CHS submitted that the letter could not be relied upon as evidence of an agreement. Counsel pointed out that during cross-examination Mr Lim had admitted that a statement made by him in the first sentence of the third paragraph of the same letter to wit We had in fact reminded you several times that Hyundai will only release payment upon giving them the calculation and drawing of the completed area was not correct. Counsel asserted that Mr Lim was capable of writing untruths in his letter and that it must be regarded as suspect since at that time CHS had made a claim for payment of $400,000 and Mr Lim would have been looking for grounds on which to resist that claim.

94. CHS submitted that a contract to paint the digesters at $9 per square metre could not have come into existence in January 2000 because:

(1) Vatten could not have agreed on a rate with CHS as their own rate for the works vis--vis Hyundai was not agreed then and in fact was not confirmed until 7 March 2000;

(2) Mr Lim had given evidence that he would not have proceeded with the works if the rate was not confirmed by Hyundai;

(3) since Hyundai had not asked Vatten to proceed with the works in January 2000, it was completely unnecessary for Mr Lim to require CHS to submit their work schedule in order to enable him to arrange the necessary staging with Hyundai;

(4) the evidence of the subcontractor eventually engaged by Vatten for the textural painting was that Mr Lim did not ask him for a work schedule before he commenced work nor did Mr Lim or Hyundai give him a time limit for that work; and

(5) in contrast with their reaction subsequently when CHS stopped work, Vatten did not complain in writing of the plaintiffs alleged refusal to carry out the textural painting of the digesters.

95. Having considered the plaintiffs points carefully, I think that in fact there was an agreement in the terms contended by Vatten. That agreement was evidenced by the 24 January letter. It was significant that at the hearing CHS at first objected to the admissibility of that letter. They did this even though the letter had been listed in the list of documents and the plaintiffs solicitors had included it as part of the Agreed Bundle. To counter the plaintiffs assertion that the letter had never been sent to them, the defendants adduced the original fax transmission which showed that the plaintiffs had received the letter. Mr Tan then asserted that he had not seen the letter even though it may have been received in his office.

96. The language of the letter is very clear. It states that a verbal confirmation had been given of the rate. If this was not true, the plaintiffs would have written to the defendants to rebut it. Mr Tan made much of the fact that he did not know English and that he had little administrative assistance. This deficiency did not

stop him from replying twice, once in English and once in Chinese, to the defendants subsequent letter protesting against the work stoppage. Further, in the years 1999 and 2000, the plaintiffs were involved in 12 projects and they employed a quantity surveyor and two other staff members. Just a week before the letter of 24 January, the plaintiffs had written to the defendants demanding payment of an outstanding amount of $400,000 by 20 January 2000. No doubt that was a brief letter but they could have written equally briefly to say there was no agreement at $9 per square metre.

97. As regards the argument by CHS that Vatten could not have come to an agreement with them in January 2000 because Hyundai had not awarded the job to the defendants then, Mr Lims evidence was that Hyundai had already confirmed that Vatten was to carry out the job. It was only the rate that had to be confirmed and the defendants were confident of obtaining a higher rate from Hyundai. If they had not been able to, they would still have had to pay CHS the agreed rate. In any case, if the rate of $9 per square metre was below cost, Vatten had reasonable grounds for believing that the rate awarded by Hyundai would be at least equal to if not more than that.

98. Further, when CHS backed out, Vatten employed Toh Hai Cheow to paint the digesters at the rate of $14.50 per square metre. This rate was higher by $2 than the plaintiffs original quotation. As Vatten submitted, if it was true that CHS had been prepared to carry out the works at $12.50 per square metre, it would have made commercial sense for Vatten to engage CHS to do the work at that rate instead of employing Mr Toh.

99. The evidence adduced by Vatten was that in respect of the digester work they had paid Mr Toh $49,564.82 and paid DNT $32,515.04 for the paint. The total incurred was $82,079.86 for an area of work covering 5,660.68 m. If CHS had done the same work at the contracted rate of $9 per square metre, Vatten would only have had to pay them $50,946.12. This means that Vatten incurred an extra $31,133.34 by reason of the plaintiffs refusal to carry out their agreement and Vatten is entitled to recover this sum from CHS.

Issue 8: Did Vatten seize any plant and material belonging to CHS?

100. CHS contended that Vatten had wrongfully seized their plant and materials having a value of $15,035 when they were forcibly ejected from the site on 18 October 2000. Although by a solicitors letter dated 20 February 2001, Vatten had informed CHS that they could repossess their property, when CHS personnel actually went to the site to retrieve the same, they were denied access by the security guards. It was submitted that even if Vatten had not seized the property, as a matter of law, Vatten had come under a duty to take reasonable care of the property on Vattens site after they ejected CHS from it.

101. I find great difficulty in this part of the plaintiffs case. The site did not belong to Vatten. Vatten was not in occupation and possession of the site. The person in occupation was Hyundai and it was Hyundai who controlled the site and it was Hyundais guards who would have ejected trespassers on the site. Even assuming that Mr Ponniah was removed from the site on 18 October 2000, this removal was not effected by Vatten but by Hyundai. If any plant and materials were left on the site, the same would have been within the custody of Hyundai and not within the custody of Vatten.

102. Further, the letter from the defendants solicitors which CHS referred to stated that CHS should let the defendants solicitors know when CHS intended to remove the items so that Vatten could make arrangements with Hyundai to give CHS access to the site. The plaintiffs solicitors never responded to this letter and in court, Mr GC Tan conceded that he had not replied to the offer. He said that instead of instructing his lawyers to reply to the letter so that Hyundai could be informed, upon receipt of the letter he simply went straight to the site to retrieve the items. Thus, CHS have only themselves to blame if they could not get access to the site.

103. One of the items claimed was a lorry. The evidence was that it was parked outside the security post in a public area and the keys were with Mr Tan Ah San. Mr Tan admitted to me that the keys had been with him since he had left the site. By November 2001, the lorry was no longer parked outside the site. Since the keys were with CHS, they must have removed it. In any case, there was nothing to stop them retrieving the lorry at any time.

104. The plaintiffs claim in respect of the plant and materials and the lorry is unfounded and must be dismissed.

Issue 9: Was the call on the performance bond wrongful?

105. In regard to this issue, the submission of CHS was that having regard to Vattens persistent breaches in underpaying CHS and their wrongful termination of the subcontract, the call on the bond by Vatten on 14 October 2000 and the receipt of the monies paid thereunder was wrongful. CHS asked for restitution and/or an account of the sum of $60,000 paid to Vatten. My findings that the allegation of persistent underpayment was not proved and that the termination by Vatten was lawful have, accordingly, removed the basis of the argument that the call on the bond was wrongful. As CHS was in breach of contract by stopping work before completion, Vatten was entitled to call on the bond. They will in due course have to account to CHS for the $60,000 received under the bond but this accounting will be part of the overall accounting for the project and not something arising out of a breach by CHS. If at the end of the day the calling of the bond means that Vatten has been over-compensated or CHS has been underpaid, the amount of the over-compensation or deficiency would have to be refunded by Vatten.

Issue 10: Is Vatten entitled to interlocutory judgment for damages to be assessed?

106. Vattens position on this issue was that by stopping work CHS had repudiated the contract and this repudiation was accepted by Vatten vide their solicitors letter of 16 October and 18 October 2000. Vatten then had to find another contractor on an urgent basis as otherwise they would become liable to Hyundai for damages for delay. Vatten obtained three quotations as follows:

(1) One Teck General Contractors $298,000

(2) SKK (S) Pte Ltd $285,000

(3) Tech 3 International $275,000

The works were awarded to Tech 3 International and it was agreed that Vatten would purchase the materials needed for the works and deduct the cost from the contract sum. The contract sum was high because Tech 3 was required to provide a warranty for all the works including the major portion done by CHS since Vatten considered that they could not rely on CHS to return to the site to carry out rectification works.

107. At the time of the hearing Vatten had purchased paint valued at $52,000 for work done by Tech 3s workers. They had also paid Tech 3 a sum of $84,800 in respect of the labour cost. According to Mr Choy of Tech 3, his company had been chasing Vatten for the balance due of $138,200 but had been asked by Mr Lim to wait until the final account was issued by Hyundai when Vatten themselves would be paid. At the date of the submissions, the final account had not been issued and the defendants therefore asked for interlocutory judgment for damages to be assessed to be entered against CHS. They agree that the bond of $60,000 should be taken into account when the damages are assessed.

108. CHS submitted that, even if Vattens termination of the subcontract was lawful, they were not allowed

to claim against CHS for the warranty procured from Tech 3. There was no reason to obtain such a warranty as Vatten still had their contractual right to demand that CHS make good any defects that may arise in the future.

109. What were the courses of action open to Vatten when CHS stopped work and Vatten consequently terminated the contract? The first was to employ another subcontractor simply to complete the uncompleted works and to rectify any defects in his own works. If that course was chosen and subsequently defects were discovered in CHS work, Vatten would have had to call on CHS to rectify their own defects and, in the event of CHS failing to do so, employ yet another subcontractor to do that work. The other alternative was to take the course that Vatten actually chose ie to award a lump sum contract for both the uncompleted work and rectification of all works. This meant not having to rely on CHS at all but having to pay a larger sum up front to cover defects without any idea of the extent of defective work that would actually manifest itself.

110. Was Vatten reasonable in choosing the second course? They had given a warranty to Hyundai for the painting work and had in turn received a warranty from CHS. This warranty considerably extended the period of the subcontractors liability for the works. Although I have found that Vatten has not established their claim for defective works at this stage, this does not mean that there is no reasonable likelihood of defects in the work appearing during the warranty period which will require rectification. Vatten did produce evidence of many complaints made by Hyundai on the quality of the works. The plaintiffs response was that any defects seen had been rectified by the time they left the site. They did not assert that no defects at all h a d manifested themselves. Taking into account that there were complaints about the plaintiffs workmanship and some defects at least manifested themselves while the plaintiffs were still on the site, there is a likelihood of more defects surfacing during the warranty period. Further, the circumstances of the termination made it reasonable for Vatten to judge CHS unlikely to honour their warranty commitments. In my judgment, it was reasonable for Vatten to employ Tech 3 to provide not only workers to complete the work but also to undertake the warranty obligations that should have been undertaken by CHS.

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.

Conclusion

112. My findings on the various issues are set out above. Basically, the plaintiffs have not succeeded on most of their claims, although I have found in their favour on the issue of the rates for the internal painting works and have also found that they should be paid for works up to October 2000. The defendants have succeeded on their claim for $31,133.34 in respect of the digesters and on the issue of an assessment of damages. They have, however, failed on other claims.

113. In the result, the plaintiffs are awarded judgment in respect of the amount due to them for work done up to 5 October 2000, such amount to be assessed by the Registrar. The remainder of the plaintiffs claims are dismissed.

114. The defendants are awarded judgment in the sum of $31,133.34 and are also awarded judgment for damages to be assessed in respect of the plaintiffs breach of contract which caused them to employ Tech 3 International at a lump sum of $275,000. These damages shall be assessed at the same assessment as that relating to the work completed by the plaintiffs as at 5 October 2000. The remainder of the defendants claims are dismissed.

115. I will see the parties on costs.

Sgd:

JUDITH PRAKASH

JUDGE

SINGAPORE

This does not merit reporting

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