IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1999] SGHC 228

Suit 864/1998

Between

Choon Construction Pte Ltd

… *Plaintiff*

And

L & M Concrete Specialists Pte Ltd formerly known as L & M Repair Technology Pte Ltd

… *Defendant*

GROUNDS OF DECISION

Version No 1: 20 Nov 2026 (00:35 hrs)

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Choon Construction Pte Ltd v L & M Concrete Specialists Pte Ltd formerly known as L & M Repair Technology Pte Ltd

[1999] SGHC 228

Suit 864/1998
Lai Siu Chiu J
31 August 1999

JUDGMENT:

Cur adv vult

The background

1. **Choon Construction Pte Ltd** (the plaintiffs) are building contractors while **L & M Concrete Specialists Pte Ltd** (the defendants) as their name implies are specialists in concrete works in particular for piling works for the foundation of buildings; they are a subsidiary of a public listed company known as **L & M Group Investments Limited**.

2. By a letter of award dated 5 May 1995, the Hyundai-Ssangyong Consortium (the main contractor) appointed the defendants as their subcontractors for Suntec

City – Package 5 (the project), to carry out demolition, reconstruction and strengthening works (the works) to parts of the structures at basements one (B1)

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and two (B2) and level one. In turn, the defendants subcontracted the works (less preliminaries and provisional items) on a lump sum basis to the plaintiffs, by a letter of intent dated 21 February 1995 (the letter of intent).

3. The plaintiffs said they started the works in March 1995 and completed the same (including variations) in April 1996. However, due to several disputes with the defendants, the plaintiffs were not paid in full for the works, which agreed price (the contract price) they said was $2.23m whereas the defendants contended it had been revised to $2,125,303.00. The disagreement between the parties related inter alia to:

> a. an additional sum of $973,552.30 claimed by the plaintiffs for variation works, (initially claimed at $1,005,695.15);
>
> b. backcharges (amounting to $2,175,066.25) claimed by the defendants for supplying materials, manpower, equipment and machinery to the plaintiffs at their request;
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> c. the defendants' claim against the plaintiffs for 15% overhead and administrative fees relating to the backcharges.
>
> d. the defendants' under-payment of progress claims submitted by the plaintiffs.

The pleadings

4. The last payment made by the defendants to the plaintiffs was in August 1996 in the sum of $35,195.77. All in, the plaintiffs received sums totalling $1,569,226.83 from the defendants. In February 1998 the defendants purportedly sent final accounts to the plaintiffs showing that a sum of $3,442,895.46 was owed by the plaintiffs, after deducting what was owed by the defendants to the plaintiffs. The plaintiffs refused to accept the purported final accounts and in June 1998 they commenced these proceedings, initially to recover the balance sum of $715,898.71 from the defendants.

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5. The original defence filed by the defendants contained a one sentence/one line denial. After numerous amendments, the final version of the defendants' pleadings as reflected in the (re-re-amended) defence and counterclaim asserted inter alia that:

> a. the contract price was reduced to $2,125,303 from $2.35m because of certain omissions and revision of prices of certain items in the works;
>
> b. it had been orally agreed between the plaintiffs and the defendants that for any item of variation submitted by the plaintiffs to the defendants, the defendants would re-submit the same to the main contractor. Accordingly, the variation claims submitted by the plaintiffs to the defendants were submitted to the main contractor who certified the same at the amount of $473,984.89 of which the defendants had valued $314,028.90 as due and owing to the plaintiffs. The defendants denied the plaintiffs' claim for variations in the sum of $973,552.30;
>
> c. it was agreed that the plaintiffs would purchase all materials and rent all machinery and equipment necessary for the carrying out and completion of the works. Subsequent to the agreement however, the plaintiffs requested of the defendants who agreed, to procure directly from suppliers all necessary materials, machinery and or equipment; the plaintiffs agreed to reimburse the defendants the charges for such supplies;
>
> d. the defendants and or the main contractor also supplied to the plaintiffs who accepted, additional workers to supplement the plaintiffs' inadequate work-force; the expenses incurred were charged to the defendants who claimed from the plaintiffs in turn;
>
> e. despite the defendants' request, the plaintiffs failed/refused to rectify defective works as which result the defendants incurred expenses in hiring other contractors to carry out the necessary works.
>
> f. the plaintiffs were obliged but failed to, furnish a 5 year and 10 year indemnity respectively, against defects in quality of materials and workmanship pertaining to floor hardeners and waterproofed areas.

6. The defendants counterclaimed from the plaintiffs the sum of $1,139,806.08 arrived at as follows:

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Value of original works executed $2,125,303.00

Add:

Certified variations

314,028.90

Total value of works executed 2,439,331.90

Less: Backcharges (2,055,616.78) Payments (1,523,521.20)
Amount owing to defendants $1,139,806.08

7. After numerous amendments and after the case had been part-heard, the plaintiffs did a volte-face on their original pleadings -- initially they had accepted backcharges totalling $1,225,381.85 from the defendants. They subsequently applied to court to retract that admission and substitute a lower figure as accepted backcharges; I shall revert to this issue later. In the process, the plaintiffs' claim was also (slightly) reduced to $712,355.41.

8. Before trial commenced, I had informed the parties that for expediency, I would only determine the issue of liability; the question of damages if any, depending on which party was held to be liable for breach of contract, would be assessed by the Registrar at a later date. Before trial commenced, the parties succeeded in resolving liability on 35 items and settled other items leaving eventually, only eight (8) items of the plaintiffs' claim to be decided by the court on liability, as two (2) items were conceded by the defendants in the course of trial. On their part, the plaintiffs withdrew one variation claim. Counsel for the defendants also informed the court that his clients did not wish to waste time on

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disputed items of the backcharges (in Table A) which were less than $2,000 each.

9. At the outset, I should point out one fact which was not disputed by the plaintiffs – their contract with the defendants was a lump sum contract whereas the defendants' contract with the main contractor was both lump sum and measurement.

The evidence -- the plaintiffs' case

(a) variation claims

10. I turn now to the testimony starting with that adduced from the plaintiffs' witnesses. The plaintiffs' project supervisor for the works Lee Tuck Meng (Lee) was their first witness. Lee (who has since left the plaintiffs' employment) said the plaintiffs' scope of works was set out in the defendants' bill of quantities (BQ) with a breakdown of the prices (see 1AB3-300) for the items comprised in the works. Lee testified that only the items which were stated in the BQ and priced accordingly came within the plaintiffs' scope of works. Any extensions of work beyond the grid references stated in the BQ were treated as variation orders (VO) by the plaintiffs. For that reason, the plaintiffs made variation claims on the defendants for items which Lee asserted were outside the plaintiffs' scope of works; these included:-

> a. a mock-up of a pile cap enlargement to demonstrate that air would not be trapped between the top concrete layer and the top of the pile cap foundation;
>
> b. casting of a new ramp from B2 to B1; the plaintiffs were only responsible for demolishing an existing and building a new, ramp from B1 to level 1. The BQ and relevant construction drawing (SB.006D1) did not provide for extension of the new

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> ramp from B2 to B1; the ramp was initially a provisional item and hence was not priced by the plaintiffs in the BQ;
>
> c. casting of staircases (2) from B2 to B1 and from B1 to level 1; for the staircase from B2 to B1 the reasons were as per (b). For the staircase from B1 to level 1, the reason was because the profile of the staircase had been changed. In the original contract drawing, it was a straight flight of stairs without a turn whereas the revised drawing created a break in the staircase;
>
> d. re-connection of rainwater down-pipes of floor traps at B2 area; this item was not covered by the BQ under the heading **demolition and alteration** (1AB6) which required the plaintiffs to 'make good all works disturbed'. This was because the plaintiffs had to do a diversion which involved a change in position altogether, it was not a question of disconnecting and then re-connecting the down-pipes in the same location;
>
> e. disposal of hardcore and excess earth at the defendants' request, after excavation works were done by L & M Geotechnic (L & M); otherwise, the plaintiffs were unable to excavate pits for pile-caps in the same area of work;
>
> f. preparatory work for construction joints which required the plaintiffs to hack all existing beams and slabs to a certain thickness to expose the reinforcement bars (rebars) prior to jointing. The plaintiffs were also required to drill holes in concrete prior to embedding short lengths of (starter) bars therein; the starter bars were "extras". This work went beyond the plaintiffs' contractual responsibility to undertake preparatory work for existing structures to enable new work to be done including, connections to be made to the new bars;
>
> g. the plaintiffs had to raise the floor slab by 500mm at B1 and level 1, besides the contracted work of roughening existing slabs and beams.

Initially, in the hope of achieving a quick settlement, Lee said the plaintiffs had reduced their variations claims from $1,005,695.15 to $973,552.30 as, the higher figure had been rejected by the defendants. Subsequently however, it became apparent that a quick settlement with the defendants was not forthcoming as the defendants only certified a sum of $301,695.90 as due to the plaintiffs for variation claims.

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11. Cross-examined, Lee maintained that the drawings counsel referred to (4AB1-19) were not part of the drawings given to the plaintiffs before construction commenced – those were revised drawings which were received by the plaintiffs on or about 5 April 1995. Counsel drew Lee's attention to the fact that it was only after the letter of intent, that the defendants received the main contractor's letter dated 5 May 1995 (see 1DB3-6) attaching therewith the contract drawings (both structural and architectural) which were those produced in court by the defendants. That being the case, it was not possible for the defendants to have given the plaintiffs the contract drawings earlier. However, Lee contended that the defendants' drawings were different from those given to the plaintiffs' managing director Phua Choon Lye (Phua) by Francis Cheah (Francis) for preparation of the BQ, before issue of the letter of intent. Subsequently, revised drawings (2) were given to Lee by the defendants' Ang Teck Hin for additional works to be done at B2 level, namely construction of the beams, slabs and the staircase (to B1) and also for construction of the staircase from B1 to level one. Lee also denied receiving the preambles to the main contract between the defendants and the main contractor; the plaintiffs were only given the BQ and the structural drawings for construction purposes, not the specifications.

12. At one stage, Lee changed his testimony (N/E 57F) and testified that revised drawings may have been given to the plaintiffs before they commenced work but, if the related work was not specified in the BQ, it was still outside the plaintiffs' scope of work. He also considered as variations (N/E 58C) whatever drawings given to him after the plaintiffs had commenced work in March 1995. Lee however, was unable to produce any of the drawings upon which the plaintiffs priced their BQ, apart from one at 1AB690. Indeed no other witness

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for the plaintiffs produced any drawings to support his testimony, while Phua testified that he had returned to Francis whatever drawings he was given.

13. Re-examined, Lee explained that the additional works were usually done on the instructions of the defendants' project manager Francis who agreed each of the items as well as the rates, with him. Those instructions included preparing the pile cap mock-up, diverting the rainwater down-pipes and removing the earth excavated by L & M. Lee also said that he first saw the letter of intent only in these proceedings.

14. Phua (PW2) confirmed that he was responsible for pricing the BQ for the plaintiffs' tender for the works. As Phua is not literate in English, Francis (who had invited him to tender in November 1994) helped him to fill in the prices for the various items comprised in the BQ the purpose of which was to enable the plaintiffs to submit progress payments. Phua said he received the letter of intent but he did not know of and did not see, the main contractor's letter of award to the defendants dated 5 May 1995 (the letter of award) until his appearance in court, neither did the plaintiffs receive subsequently, the defendants' letter of award and subcontract as indicated in the letter of intent. The attachments to the letter of award included contract drawings, specifications, BQ, preambles and the main contractor's standard articles and conditions of subcontract for the project.

15. Phua corroborated Lee's testimony on the plaintiffs' variation claim for disposal of excess earth; it resulted mainly from excavation and piling works done by L & M. The plaintiffs removed the earth in May 1995 at the request of Francis who told Phua to bill the defendants. In turn, the defendants engaged three companies to dispose of both the plaintiffs' (5%) as well as L& M's (95%)

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soil; the entire operation took about 3-4 months. One of the companies Cheng Hwee Engineering Company (Cheng Hwee) charged the plaintiffs a lump sum ($70,000) for soil removal whereas the plaintiffs were charged on lorry load basis for the soil removed on behalf of L & M. Closer examination of the invoices from Cheng Hwee revealed that the company did more than soil removal – it did hacking and excavation work for the plaintiffs as well. Questioned by the court, Phua clarified that Cheng Hwee was the plaintiffs' subcontractor for such works.

16. Cross-examined, Phua admitted that some mixing of the soil excavated by L & M with that excavated by the plaintiffs was inevitable. This was because of site constraints. L & M excavated for micro-piles but both companies deposited the excess earth at the same location; L & M's soil had to be removed first before the plaintiffs could deposit their excavated soil. However, a lorry which removed the soil of L & M may leave a lorry load behind and the plaintiffs' soil would then be deposited on the top. Unless the excavated soil was removed, the plaintiffs would either not be able to do their work or would have their work delayed, the main contractor would also complain.

17. Lee and Phua denied that the contract sum for the works had been revised/reduced to $2,125,303. Phua added he had initially offered to carry out the works for $2.7m but reduced the price to $2.3m after negotiations with the defendants' general manager Dr Ho Nyok Yong (Dr Ho) and Francis.

(b) the backcharges

18. In para 7, I had alluded to the plaintiffs' change of heart on the defendants' counterclaim touching on backcharges and I turn to that claim now, starting with

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the plaintiffs' version as adduced from Lee and Phua, who were their only two (2) witnesses.

19. Lee had (in his affidavit of evidence in chief) deposed that in the course of carrying out the works, the plaintiffs found it more convenient and expedient to obtain supply of certain materials from the defendants; these included supply of concrete, rebars, waterproofing and hardener materials, reinforcement wire-mesh and construction grout. For the same reason, the plaintiffs also agreed to rent machinery and equipment from the defendants including a dump truck, mechanical compressor, electrical generator for welding purposes and bar-bending and cutting machines. However, the plaintiffs did not agree with the defendants on labour supply nor for the supply of any items other than those listed above.

20. Lee deposed that the arrangement between the parties was, that the charges for supplies and rental payable to the defendants would be set-off against the plaintiffs' monthly progress payments and would be reflected in the defendants' progress payment certificates to the plaintiffs as deductions.

21. According to Lee, the defendants issued sixteen (16) payment certificates (the last being dated 21 August 1996) for a total payment of $1,569,226.83 (including GST) to the plaintiffs. After the plaintiffs' receipt of the 16th payment, Lee said he repeatedly pressed the defendants to finalise the accounts for the works. The defendants did not do so save that by their (without prejudice) letter dated 13 February 1998 (1AB527-528) signed by their quantity surveyor Alastair Gray (Gray) the defendants gave a summary (the summary) of the plaintiffs' outstanding accounts for all projects (6) in which the plaintiffs were involved. The summary purportedly showed that the plaintiffs owed the

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defendants total backcharges of $3,226,203.90 of which the sum of $2,765,162.75 was for the project; no details or documents were attached to the letter to enable the plaintiffs to verify the defendants' figure of $2,950,674 owed by the plaintiffs arrived at as follows:-

(i) Contract sum: $2,075,026.00

(ii) Certified Variation Orders 253,964.00

(iii) Backcharges 2,765,162.75

(iv) Amount Paid 2,403.001.25

(v) Retention sum 111,500.00

Amount payable to the defendants $2,950,674.00

The above figures were inconsistent with the defendants' 16th payment certificate (1AB475) not to mention that the backcharges exceeded the contract sum of $2.23m; the 16th payment certificate contained the following breakdown:

(i) Value of work executed $2,229,475.00

(ii) Variations 300,000.00

(iii) Gross value to-date 2,529,475.00

(iv) Less: Retention 100,000.00

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(v) Net value of works to-date 2,429,475.00

(vi) Add: 3% GST 72,884.25

(vii) Subtotal $2,502.359.25

Less:

Cumulative contra accounts (backcharges) $ 808,866.41

3% GST to contra account 24,266.00

Previous payments 1 to 15 1,634,031.07

Total value of deductions 2,467,163.48

Total amount payable to plaintiffs $ 35,195.77

22. The plaintiffs disagreed with the summary and on 24 February 1998 (1AB529) Phua wrote to the defendants for documentation to substantiate the backcharges. The defendants responded by faxing to the plaintiffs a summary of the 'contra' charges. The plaintiffs' attempts to meet with Gray and his successor Tan Chye Seng (after Gray was transferred to another department) were unsuccessful. After their repeated written reminders produced no response from the defendants, the plaintiffs decided to and did, send to the defendants their summary of final accounts on 13 April 1998 (1AB534-537) wherein the plaintiffs accepted the sum of $1,225,381.85 from the defendants as 'proper' backcharges and indicated a balance of $468,288.73 was owed to the plaintiffs.

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23. Lee deposed that the plaintiffs rejected the balance of $1,539,780.90 ($2,765,162.75 - $1,225,381.85) relating to the defendants' backcharges for a number of reasons – a large number of the charges were unjustified (including the defendants' charge of $283,704.29 for overheads and administration) whilst others were double-billed or had already been reimbursed to the defendants. He noted that the defendants had reduced the original claim for backcharges by $590,000 to $2,175,066.25 ($2,765,162.75 - $2,175,066.25) in their Counterclaim, which showed their vacillating stand. I should point out that the defendants' backcharges were reduced further to $2,055,616.78 in court on the oral application of their counsel, which I granted.

24. In court, the defendants had re-produced from the plaintiffs' (third set of) Further and Better Particulars of the Amended Statement of Claim (filed on 14 May 1999) a list (table A) which contained a breakdown of all the backcharges incurred by the defendants including:

a. hire of dump trucks from: (i) Grove Heavy Equipment Pte Ltd (ii) Choon Huat Engineering Pte Ltd (iii) Kheng Sun and (iv) Multistates Trading Co Pte Ltd (Multistates);

b. rental charges of skid loader(s) from G & W Industries Pte Ltd;

c. rental charges of a bar-cutter and bar-bender from Aktio Singapore Pte Ltd;

d. rental charges of welding machines/welding sets from Klie Rentals Pte Ltd;

e. charges for various machinery parts supplied by Hiaplite Traders;

f. supply of wet and dry vacuum cleaners by Klenco (Singapore) Pte Ltd;

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g. supply of flats and wire-mesh by Eastern Wire Pte Ltd;

h. purchase of a Tsurami pump from Istar Trading;

i. supply of waterproofing compound, hardeners and waterstop by Cementaid (SEA) Pte Ltd (Cementaid);

j. rental of a generator, air-compressor, welding set and welding generator, engine overhaul and repair charges from, JPN Equipment Pte Ltd;

k. supply of high tensile deformed bars by Legend Building Supplies (Pte) Ltd;

l. supply of mortar, emulsion, construction grout, resin and jiffy paddle by MBT (Singapore) Pte Ltd (MBT);

m. supply of chilled water and chilled caltite by Pioneer Concrete (S) Pte Ltd;

n. supply of labour (with attendant overtime and CPF contributions) by SNS Renovation Contractor Pte Ltd, Mini Environment Service Pte Ltd and by the defendants themselves;

o. supply of breakers, plywood and timber by Geopet Industrial Pte Ltd;

p. rental of a breaker from Tiong Lee Huat Machinery & Construction Pte Ltd;

q. repair charges for vehicles (Nos. YG 1512A and YG 2261S) paid to Hock Yew Trading;

r. charges for tensile tests done on rebars by Setsco Services Pte Ltd;

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s. charges (without supporting invoices) for supply of manpower by HDEC (HIKI);

t. charge for damage to gas-pipe (without supporting invoice);

u. charges for temporary support/steel propping and additional beams (without supporting invoice);

v. charges for welding the rebars of retaining wall at ramp (without supporting invoices);

w. hire of a crane from Tiong Woon.

25. Under cross-examination, Lee explained why the plaintiffs rejected some of the defendants' backcharges and changed their mind by accepting a lower amount of backcharges, after the first part hearing in February 1999. The primary reason for the plaintiffs' volte face was because despite repeated requests, the plaintiffs were not given the supporting invoices for the backcharges until discovery stage for the trial; the defendants only sent their own statements of account to the plaintiffs without invoices. Having finally seen the supporting documents for the backcharges, Lee (and the plaintiffs' chief administrator Phua Eng Hui) said the reasons for the plaintiffs' rejection of some of the backcharges are as follows:

> a. Lee noted from invoice no. T/09/0305/95 dated 4 September 1995 of Grove Heavy Equipment Pte Ltd (Grove) that three (3) dump trucks were rented by the defendants; the plaintiffs had requested for only one (1) dump truck. Prior to discovery, the plaintiffs did not know from the defendants' statement of account that the charges of Grove related to 3 not 1 dump truck(s). Further, the plaintiffs should not be responsible for Grove's charges to overhaul the engine resulting from wear and

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tear of the dump truck(s). Neither should the plaintiffs be liable for area licence fee ($11) charged by Multistates;

b. the plaintiffs hired cranes themselves from Teck Choon and there was no reason for the defendants to hire one from Tiong Woon whose charge of $150 was also not substantiated;

c. skid loaders rented from G & W Industries Pte Ltd were used for clearing and taking away rubbish from the site – housekeeping and general cleaning did not come under the plaintiffs' scope of works but were the responsibility of the defendants -- the plaintiffs removed their construction debris by dump trucks;

d. he retracted his earlier affidavit admission (that the plaintiffs had requested the defendants to supply waterproofing material) because he had ascertained from Phua subsequently, that waterproofing was not within the plaintiffs' scope of works, notwithstanding that the item appeared and was priced, in the BQ (1AB6). Accordingly, the plaintiffs were not liable for nor should they provide a warranty for, the supply of Caltite (waterproofing additive) from Cementaid; the plaintiffs would only be liable for the company's supply of cement hardener;

e. the plaintiffs were not liable for the rental of air-compressors and generators from JPN Equipment Pte Ltd (JPN) because power and water on site was supplied by the main contractor; the generator (model 100KVA) which supplied power (for lighting and air-conditioning) to the defendants' site office could not supply sufficient power to the welding generators used by the plaintiffs. The plaintiffs used a number of small compressors, not the big models (Denyo) rented from JPN; neither should they be liable for the engine overhaul and repair charges of those compressors;

f. the charges for construction grout, Barra Mortar L and Barra Emulsion 57 supplied by MBT were either excessive or for periods after the plaintiffs had completed their works. Apart from the three items, other materials supplied by MBT were not used at all by the plaintiffs;

g. charges for tensile tests done on rebars formed part of preliminaries which were omitted from the BQ but were the defendants' responsibility; in any event the tests were not within the plaintiffs' scope of works;

h. the plaintiffs completed the works in April 1996; yet without the plaintiffs' knowledge, the defendants purportedly supplied them with general workers thereafter. Accordingly, the plaintiffs disputed the charges of SNS Renovation and charges for NTS

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> (non traditional source) workers a number of which were not supported by invoices;
>
> i. the plaintiffs did not use the vacuum cleaners supplied by Klenco (Singapore) Pte Ltd.

26. To resolve the issue of the plaintiffs' entitlement to the variation claims, in view of the conflicting testimony put forward by both parties, Francis (whose whereabouts had finally been located by the plaintiffs before the second hearing) was called to testify; he was a court witness (CW1) so that both sides could cross-examine him. Francis (who worked for the defendants between May 1989 and October 1997) testified in a forthright and candid manner, he said:

> a. he was the defendants' project manager for Suntec City and was answerable to Sim Moh Wee, the defendants' Assistant General Manager and to the General Manager Dr Ho; if an item was outside the scope of a contractor's work, he could give site instructions for work to be done but whether an item was or was not a variation claim, was not for him but for the defendants' contracts department to decide;
>
> b. the mock-up of the pile-cap was required by the architect, he did not agree with the plaintiffs that they could charge separately for this item; pile-cap strengthening was part of the plaintiffs' scope of works and although not stated in the BQ, they had to provide the mock-up when requested;
>
> c. the plaintiffs were required to enlarge columns to cater for additional loading. Floor traps and rainwater down-pipes were attached to the columns. Since the columns were being enlarged, it was necessary to shift or divert the rainwater down-pipes -- he considered that as part of, not an addition to, the plaintiffs' scope of works;
>
> d. waterproofing and hardening were never part and parcel of the plaintiffs' scope of works from day one. The plaintiffs were asked to price their BQ without waterproofer and hardener but, due to his oversight, those items were not deleted from the BQ. The defendants agreed to do the waterproofing themselves because they had in-house waterproofing material. However, after negotiations with the main contractor, it was agreed that the defendants would use Caltite additive, the same explanation applied to the hardener;

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> e. because of site constraints and the fact that there was no specific soil dumping area, the soil of L & M and the plaintiffs (who were both working in the same area) became mixed. L & M were doing micro-piles as a separate subcontractor for the main contractor, which work also involved excavations which were in the plaintiffs' scope of works. The defendants were requested by the main contractor to remove the excavated soil. L & M did remove some of the soil but the plaintiffs had to remove what was left over and, they removed more soil than what they excavated. He did not tell Phua to remove L& M's soil nor to charge the cost to the defendants;
>
> f. he could not recall the work which entailed the plaintiffs having to raise the floor slab by 500mm; he did not instruct them to do the work but reconstruction work at B1 and level 1 at sporadic locations was part of the plaintiffs' scope of works; this item of work did not entitle them to claim a variation;
>
> g. he could not recall any particular instances where he had authorised a VO although he may have instructed the plaintiffs at site to do work and claim it as a VO. This usually occurred where there was a revised drawing showing a new location to be done, which was not in the latest drawings the plaintiffs/he had on site.

27. Cross-examined by counsel for the plaintiffs, Francis agreed he had done a costing exercise (2DB432) for the defendants in which he had given a breakdown of prices for the project, it included $70,000 in the sum of $199,997 set aside for preliminaries *'for absorbing Caltite for concrete*'. The same document also contained Dr Ho's hand-written figure $2.23m, this indicated he was willing to subcontract out the works at that price. I would point out that Francis' estimate of $70,000 for waterproofing is to be contrasted with the actual cost incurred by the defendants. Although counsel for the defendants claimed the figure came to $140,000, the invoices (7) of Cementaid (at 2DB1918 and 2680) which Francis identified in court (N/E193) as relating solely to waterproofing totalled $91,355 ($88,192.50 $3,162.50) although I accept that those invoices may not be exhaustive.

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28. Questioned by counsel for the defendants, Francis recalled that he agreed verbally with Phua to omit waterproofing from the plaintiffs' scope of works when they met to negotiate on the plaintiffs' original price of $2.7m for the works; that was before he did his costing exercise and recommendation to Dr Ho. Besides himself, Francis said Dr Ho would be aware of the agreement with Phua. Francis acknowledged that he had signed the defendants' tax invoice CS/015/0297 (2DB1917) 'by mistake' billing the plaintiffs $490,152.06 (inclusive of GST) for materials supplied which amount included the invoices of Cementaid pertaining to waterproofing additive. Francis explained this was because he was in charge of 10-12 other jobs besides the project. He had instructed the accounts department of the defendants what not to backcharge but, due to the lag time between the supply of materials and the generating of backcharging records by the accounts department, there was a lot of confusion which the defendants hoped could be resolved in the final accounts. The confusion was compounded by the fact that sometimes, there would not be materials on site at the last minute and supplies had to be ordered immediately.

29. Francis confirmed Phua's testimony that he had assisted the plaintiffs to fill in the prices in the BQ (although the plaintiffs' contract with the defendants was on a lump sum basis) so that the plaintiffs could submit progress claims.

(ii) the defendants' case

(a) variation claims

30. The defendants called a quantity surveyor from Davis Langdon Seah (DLS) to testify. Wong Sin Tin (Wong) testified that his firm had issued a set of drawings for the main contract; DLS had no dealings with any of the

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subcontractors including the defendants. Wong said his firm issued BQ and drawings as part of the tender documents; eventually amended drawings were issued or re-issued. As it was a huge project, the tender period was longer than usual (2 months). Wong confirmed that the set of structural drawings produced in court (4AB1-17) formed part of the tender documents and became the contract drawings; no amendments were made to the BQ nor were other structural drawings issued, after the tender closed on or about 4 November 1994. Accordingly, 4AB12 (which structural drawing no. S83.001 contained the slab details for B1 and B2) was already issued by the date of the tender together with the other drawings referred to in the BQ. Wong explained that in the BQ, his firm would only use the description number for drawings, not the revisions; it was up to the tenderer to cross-refer the description given in the BQ with the actual drawings listed in the tender documents.

31 Tan Chye Seng (Tan) the defendants' contracts manager who is a qualified quantity surveyor also testified on the variation claims. Tan (DW2) said the defendants' valuation of the plaintiffs' progress claims was done by Ang Teck Hin, their site engineer (who has since left their employment). As he was transferred in August 1997 to the defendants' office from a sister company (which he joined in 1996), Tan's testimony was not particularly helpful because the plaintiffs had completed (in April 1996) the works as well as the rectification (in October 1996) of defective works, by then.

32. What Tan did was to speak to people like Ang Teck Hin, Francis and Gray on the variation claims, when he was tasked with verifying the plaintiffs' work to finalise the accounts and, to rely on documents to make his own assessment. Tan said when the plaintiffs submitted their last progress payment (no. 17 in July 1996), he confirmed with the main contractor, the quantities of the works

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done and compared the same with the records of the defendants which were based on Ang Teck Hin's certification. Tan even wrote to and obtained, the main contractor's confirmation (1DB391-394) that the defendants' records were correct (save for one item). However, Tan had no personal knowledge of what the plaintiffs had done nor of site conditions nor of what transpired or was agreed between the plaintiffs' and the defendants' representatives.

33. In support of Tan's testimony, the defendants called a representative from the main contractor to testify. Thomas Leong Pak Kung (Leong), the assistant manager of Hyundai's quantity surveyor department confirmed he was the person who forwarded to Tan a list of the works for which his company paid the defendants, based on measurements. However, like Tan, Leong (DW1) had no personal knowledge of what happened as he was not involved in the project but in other packages for the construction of Suntec City.

34. As it was only an interim certificate, Tan said he did not countercheck the defendants' 16th payment certificate with either the signatory (Francis) or Ang Teck Hin or even Sim Moh Wee (the maker) even though he was of the view that the value ($2,229,475) of work stated therein to be executed was wrong. It was only at end 1997 that he realised there were omissions in the plaintiffs' works which needed to be deducted from the contract sum.

35. One observation I would make is, that a number of questions put to Tan in cross-examination were premised on the basis that the plaintiffs were entitled to receive from the defendants what the defendants had received from or submitted to, the main contractor.

(b) the backcharges

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36. Like his views on the variation claims, Tan's testimony on the defendants' claim for backcharges was based not on his own personal knowledge but, on his perusal of documents and records maintained by the defendants.

37. I move next to the testimony of another witness for the defendants, that of Kwan Hong Kong (Kwan). As the defendants' project co-ordinator, Kwan (DW3) reported to Francis and Ang Teck Hin at the material time. He was in charge of day-to-day operations and oversaw the plaintiffs' work to ensure compliance with technical requirements and co-ordination with the programmes of, other subcontractors, the main contractor and the defendants. The persons responsible for ensuring that the plaintiffs actually carried out their work were Lee, Phua and their foreman.

38. According to Kwan, the plaintiffs' work was behind schedule. Despite repeated reminders from him and other site representatives of the defendants, the plaintiffs failed to take steps to remedy the situation. Consequently, the defendants were obliged to provide the plaintiffs with additional workers to supplement their insufficient workforce. Kwan said he personally handed over these additional workers at the start of a working day to the plaintiffs' site foreman Tan Lai Huat (or Ah Choon) who would then set tasks for and supervise, the workers. Kwan said if he signed the work orders form addressed to SNS, it meant that the workers were deployed on his site. Similarly he signed for materials if they were for his work. He disagreed with counsel's suggestion that the plaintiffs' progress was slowed down by having to do rectification works, pointing out that such remedial works were only carried out after the plaintiffs had completed the works; Kwan also disagreed that the additional labour ordered by the defendants was for the purpose of accelerating the works at the main contractor's request. Tan had testified that the defendants' claim on

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the main contractor for accelerated works was neither certified nor paid. The court was also informed by their counsel that the defendants had instituted proceedings against the main contractor for sums outstanding under the main contract which claim (in the lower courts) was still pending.

39. Kwan testified that the plaintiffs also failed to carry out certain outstanding works and rectification of defective works, despite his repeated requests. In support of his allegations, Kwan referred to letters from Francis and Ang Teck Hin to the plaintiffs dated 15 July 1995 and 21 September 1995 respectively and to his own letters to them variously dated May, September and December 1996 (see 3DB46-48 and exhibit KHK2-4 in his affidavit). As a result, the defendants and the main contractor were compelled to carry out the work for the plaintiffs. The outstanding items included coring, earthworks and testing of reinforcement bars as provided in the specifications of the BQ (Section 03100 General pg 25) and which stated:

> **15.2 Test certificates**
>
> The contractor shall supply the Architect with test certificates from the steel manufacturer showing compliance with specified requirements. In addition at least one tension test shall be made for each lot of 50 tonnes in each diameter supplied for the works in an independent testing laboratory as directed by the Architect.

The defendants engaged Mason Pte Ltd to do the coring works (at $10,196.20), Hwee Contractor & Trading to do the earthworks (at $60,690) while Setsco carried out the tests for rebars (at $11,501). The defendants were also backcharged ($275,737.08) by the main contractor for the supply of labour and for rectification works which the plaintiffs failed to carry out; Kwan referred to

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numerous letters to the defendants from the main contractor dated September 1995, May, July, December 1996 and January 1997 in support of his contention.

40. Cross-examined on the plaintiffs' claim for pipe re-connections, Kwan said that the re-connections required the installation of elbow joints for each of the 11 cast-iron down-pipes and involved the hacking of the lower (buried) portion. He clarified that for each diversion, the plaintiffs had to unscrew a pipe (which took 5-10 minutes) and then use a hand-held mechanical breaker to hack the slab to expose the elbow joint, which operation took about • day. After a column had been enlarged, the same pipe (if not damaged) was re-connected together with a new piece (which had to be cut by a plumber at site) to fit the elbow joint, an operation which he estimated took 2• hours all in; the plaintiffs had 2-3 teams of workers to do this work.

41. Kwan confirmed that the plaintiffs had done additional works relating to small pile caps (as shown by counsel for the plaintiffs in yellow at 4AB19). However, he was unable to confirm whether Cheng Hwee was the plaintiffs' subcontractor although he was aware that the former did excavations (in the area marked in yellow at 4AB19). Kwan also said that although L & M worked in the same area as the plaintiffs, their work and materials were very different from the defendants'. Therefore, it was not possible that the backcharges claimed by the main contractor against the defendants (and charged in turn to the plaintiffs) related to work done or materials supplied, by L & M.

42. Kwan disputed the plaintiffs' contention that they did not use skid loaders – skid loaders were used for all three (3) levels for scooping up debris from demolition and excavation works. The materials were then offloaded into dump trucks. He disagreed with Lee's testimony that skid loaders could not have been

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used because they were too small to hold excavation material – the concrete was not in huge chunks but hacked into smaller pieces. Skid loaders were used because they were smaller and more manoeuvrable than excavators.

43. Kwan also rebutted Lee's testimony that the plaintiffs did not use the 100 KVA generator; those generators were used by the defendants for their site office as well as to supply power to the plaintiffs to cut slabs on level 1, they also used the Denyo compressor. The defendants also brought in additional welding generators as the plaintiffs did not have enough of their own to cope with the number of pile caps they had to work on.

44. On the additional grouting material charged to the plaintiffs, Kwan explained that initially, grouting was used for the columns. When the defendants did the pile caps, they discovered, after concreting the first layer, that there were voids inside which the defendants could not fill up with concrete; the defendants used grouting instead for both the columns and the pile caps. The formwork for columns was fabricated up to a certain height by the plaintiffs but, beams were of different depths and the height of columns was dependant on the depth of beams. In turn, the grouting area was dependant on the height of columns and the depth of beams. The plaintiffs used a standard height of 0.45m for the columns to calculate the quantities of grout (76 bags) they would or had used, with 5% allowance for wastage, when the height of columns differed from area to area. The plaintiffs did the formwork and cast the columns but because they had an inadequate workforce, the defendants provided the labour to do grouting.

45. On the concrete cube test, Kwan confirmed that the defendants were required to take a cube from every truck as a sample whenever concrete mixture was supplied. The clerk of works would specify the number of cubes to be

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tested, in the form of cube mould of 150mm; testing was done every 7th and 28th day.

46. One of the items counterclaimed by the defendants against the plaintiffs was 15% (on the total backcharges) *for overheads and administrative charges.* Tan testified the claim was based on company policy (N/E245) and on the instructions of his 'boss'. Tan disagreed under cross-examination, that there was no market practice for such a charge to be levied -- the defendants' entitlement was grounded on a clause in the standard Singapore Institute of Architects (SIA) contract and, the defendants themselves had incurred this charge from other main contractors although not in this case. However, he did not identify or produce the relevant clause in the SIA contract.

47. At this juncture I should point out that the main contractor had imposed backcharges totalling $275,737.08 on the defendants which the latter counterclaimed from the plaintiffs. Questioned on why the defendants billed the plaintiffs and the main contractor for the same amounts in some instances, Tan explained it was a precaution so that if the latter did not pay, the defendants could have recourse against the former. Conversely, if the main contractor paid, the defendants would pass the payment onto the plaintiffs.

48. Tan was cross-examined on a certificate of payment (at 3DB329) dated 23 March 1995 in favour of Nutech Trading Pte Ltd where, against the column **Project** the words *Tan Tock Seng Hospital – Waterproofing* had been deleted and replaced by *Suntec City*. He was unable to explain the hand-written correction which appeared to have been made by Ang Teck Hin nor was he sure whether the bill should have been charged to the Hospital or to some contractor other than the plaintiffs. Tan's attention was also drawn to two (2) invoices

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(3DB111 and 131) of Mini Environment Service Pte Ltd to the defendants which related to jobs other than package 5 of Suntec City. Tan explained that the invoices were for labour supplied to various projects handled by the defendants in June and August 1995; the defendants apportioned the charges to the various projects including the plaintiffs' works, based on job codes which I shall elaborate on in the next paragraph.

49. Chen Seok Hong (Chen) the defendants' finance manager, was in the same position as Tan in that he had no personal knowledge of the documents which the defendants relied on for the backcharges, the relevant persons in the accounts staff having all left. Chen himself joined the defendants in November 1995 and was in charge of accounts for several companies (within L & M Group Investments); he handled and generated the accounts from a single location, with software from the Human Resource department of L & M Prestressing; hence the job allocation report was issued by L & M Prestressing. According to Chen, for accounting purposes, every project done by companies within the Group was allotted a job code; for project 5 of Suntec City the code was **R227**. The labour charges were recorded in job cost allocation reports or accounts ledger based on time cards (if the labour was provided or employed by the defendants themselves) or on invoices of third parties whilst charges for materials and equipment were based on suppliers' invoices. Each worker employed by the defendants had a time card which was signed by the site supervisor or project manager at the close of each working day. Twice monthly, the time cards were submitted to the Human Resource department which keyed the data into the computer database and generated the job cost allocation report(s) therefrom which showed how much labour cost related to a particular source of labour and project. Upon receipt of the job cost allocation report, the defendants' accounts department would prepare an accounts ledger to allocate

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the costs to each project handled by the defendants. Similarly, all invoices received from suppliers of materials and equipment would be sent to the defendants' accounts department to be keyed into the database. Thereafter, the accounts department would similarly prepare an accounts ledger based on that data. Chen said he only took care of accounts and was not involved in paying contractors. Unfortunately, with the passage of time, the time cards for the project and some invoices from suppliers could not be located.

50. In his closing submissions, counsel for the plaintiffs pointed out that because of: (i) Chen's lack of personal knowledge, (ii) the fact that the accounts of 6-7 companies in the Group were all handled by one office, (iii) the defendants' witnesses were junior officer bearers who had to make sense of documents not created by them or their responsibility and (iv) Francis had testified that the defendants had a tendency to collate backcharges in the hope of sorting them out later at the final accounts stage, there could be room for error. Further, despite the request made early in the proceedings by (then) counsel for the plaintiffs, the defendants chose not to call Dr Ho to testify, even though he was the person in charge.

51. Counsel for the defendants countered that the fact the people in charge of the relevant accounts had left the defendants' employment did not necessarily mean that the accounts were in a mess. The defendants were able to produce 12 volumes of documents for the trial with very few errors, which feat in itself rebutted the plaintiffs' argument. There was no necessity for Dr Ho to testify as Kwan was the best person to testify to what happened on site.

52. As pointed out earlier (para 9) the plaintiffs' contract with the defendants was lump sum whereas the latter's with the main contractor was lump sum plus

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measurement. Further, the defendants subcontracted out their entire contract from the main contractor to the plaintiffs save for preliminaries and the provisional items (which counsel for the plaintiffs contended was the measurement part of the main contract). Consequently, in their closing submissions, the plaintiffs argued that if the defendants had subcontracted the main contract to them on a 'back to back' basis, then the plaintiffs would be entitled to what the defendants had been paid or had claimed from the main contractor; they highlighted the following items as their entitlement on that premise:

> i) casting of ramp from B2 to B1 for which the defendants received $73,255 from the main contractor;
>
> (ii) casting of staircase from B2 to B1 which item was certified a variation by the main contractor;
>
> (iii) casting of staircase from B1 to level 1 which item was also certified a variation by the main contractor;
>
> (iv) preparatory work including roughening and hacking existing slabs and beams to receive new concrete at B1 and level 1 including raising the concrete slab by 500mm which item the defendants claimed as a variation from the main contractor.

53. Apart from making their claim on a 'back to back' basis, the plaintiffs also pointed out (in their closing submissions) that another reason for their entitlement to the items in para 52 [save for item (iv)] was because they were not stated and/or not priced in the BQ. This reasoning applied equally to the plaintiffs' claim for re-connection of rainwater down-pipes, the pile cap mock-up and disposal of hardcore/excess earth. Further, these items did not appear in the construction drawings.

Observations

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54. Before I go into my findings, I wish to make some preliminary observations. Firstly, the defendants did not produce any other witnesses apart from Kwan, to testify to site conditions and events. One notable absentee was Ang Teck Hin, the defendants' then site engineer and Kwan's immediate superior whose testimony I am certain would have assisted the court to fill the gaps in Francis' recollection of events and on the issue of omissions, if any, from the plaintiffs' scope of works. Whilst Francis was not on site all the time, being in charge of 10-12 other projects, Ang Teck Hin was usually on site. Secondly, in their closing submissions, the defendants adopted an ambivalent attitude towards the testimony of Francis -- where it suited their purpose to do so, they relied on his testimony to dispute the plaintiffs' variation claims. Where it suited them otherwise, the defendants disavowed his evidence in particular, on the issue of whether the plaintiffs were liable for waterproofing cost; the defendants blew hot and cold. I have no doubt however that Francis was a truthful witness, albeit his recollection may be faulty at times. As he pointed out (N/E 195), if he held any grudge against the defendants, he would have agreed to all the variation claims made by the plaintiffs and not only to those to which they were rightfully entitled. I consider him together with the quantity surveyor Wong, to be independent witnesses. On the plaintiffs' part, their weakness was their inability to produce or identify the actual drawings given to them by Francis for the purpose of preparing their quotation; they could only deny (without much conviction), that the drawings produced in court by the defendants were not those given to them for purposes of quotation as well as construction.

The issues

55. There are four issues to be decided pertaining to liability between the parties:-

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> (i) What was the contract sum? Was it $2.23m as the plaintiffs contended or $2,125,303 as the defendants argued?
>
> (ii) Were there and if so what were, the variations which entitled the plaintiffs to claim for works over and above the contract sum?
>
> (iii) Were the plaintiffs late or slow in their progress or did they omit some of the works, thus justifying the defendants' employment of additional labour on their behalf?
>
> (iv) Did the defendants provide the materials and equipment as claimed in their backcharges?

I should state at the outset, that my decision turns solely on findings of fact and whose testimony I find the more credible.

(i) what was the contract sum?

56. On this issue, Tan asserted (without producing any documentary evidence to substantiate) that there were omissions from the works or price revisions of certain items, whereas Francis testified, (according to the defendants' 16th progress payment certificate) that the plaintiffs had completed all the works. In his closing submissions, counsel for the defendants relied on the testimony of Leong, a representative of the main contractor as supporting Tan's contention that there were omissions. With respect, that submission is misconceived. What Leong did (N/E 71) was to confirm what the main contractor had paid the defendants for the works Tan listed out (in 1DB 389-394), based on measurements which was not the basis on which the plaintiffs were paid. In view of my earlier observation (para 32) that Tan was not privy to what transpired on site nor for that matter Leong, and Ang Teck Hin did not testify, coupled with the fact that Kwan's testimony did not touch on this issue at all, I accept the plaintiffs' contention that the contract sum was and remained at,

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$2.23m; there were no omissions to warrant a reduction to $2,125,303 or to any other sum.

(*ii) the variation claims*

57. I can find no fault in the plaintiffs' reasoning that if the defendants were paid (as VOs) by the main contractor those items which the plaintiffs now claim, then the plaintiffs should similarly be paid, since the main contract and subcontract were on a 'back to back' arrangement. Accordingly, the plaintiffs are entitled to their variation claims for those items on which the defendants have been paid by the main contractor or who certified/approved them as variations. I have placed emphasis on recognition or payment by the main contractor as preconditions to the plaintiffs succeeding against the defendants. This is because of the plaintiffs' other argument, that if the defendants had submitted the same variation claims to the main contractor, then they must also accept the plaintiffs' claim -- that is not good enough. The defendants had informed the court that they have a pending suit against the main contractor [DC Suit (T) 50339/99] arising out of the project. Until and unless the defendants are paid the same variation claims by the main contractor or until the final certificate issued by the main contractor incorporates the same, they are not liable to the plaintiffs.

58. I turn next to the second proposition put forward by the plaintiffs for their entitlement – that the items were not reflected in the BQ or in the drawings. In this regard, I am not convinced, as claimed by Lee, that the plaintiffs had been given a set of drawings for quotation/construction which differed from those produced in court by the defendants. As indicated earlier, the plaintiffs could not substantiate this contention not to mention that it was effectively rebutted

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by the evidence of the main contractor's quantity surveyor Wong. As for the BQ, it is arguable that if the items of work which resulted in the variation claims were not mentioned in the BQ, they may, not that they must, fall outside the plaintiffs' scope of works; I say this for two (2) reasons:

> (i) Francis (and Phua) said the main (if not sole) purpose of the BQ was to enable the plaintiffs to submit progress claims periodically; therefore the description of works set out may not be exhaustive;
>
> (ii) in addition to the BQ, the plaintiffs had been given a set of (structural) drawings which according to Wong, were the contract drawings.

Therefore, the plaintiffs' scope of works was reflected in either the BQ or the drawings or both. If the plaintiffs failed to cross-check the works described in the BQ with the relevant drawings (as would appear to be the case according to Phua's and Lee's testimony), they only have themselves to blame for their present predicament. Phua should not have relied totally on Francis (let alone some unnamed Indian engineer) to fill in the BQ for the plaintiffs. Not being literate in English, Phua should have taken precautions to ask Lee or other members of his staff to cross-check the BQ against the drawings to ascertain the exact scope of works required of his company.

59. Accordingly, I am of the view that the plaintiffs can succeed on their variation claims if the exact same items had been certified and or paid to the defendants as variations by the main contractor. Alternatively, they are entitled to be paid for those works if they were not mentioned in the BQ and did not appear in the contract drawings. As an example, if the drawings indeed show that the design of the staircase from B1 to level 1 was a straight flight of steps which was subsequently changed to one with a bend or break, the plaintiffs are entitled to claim the change as a variation.

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60. Phua had testified that the plaintiffs subcontracted out to Cheng Hwee the hacking and excavation portion of the works as well as removal of the excavated material. That factor, coupled with Francis' denial that he had asked Phua to remove the excess soil of L & M (and bill the defendants for the removal), means the plaintiffs do not succeed on their variation claim for disposal of hardcore and excess earth; the plaintiffs would not know whether Cheng Hwee did or did not mix the soil they excavated with the materials excavated by L & M. However, it does not preclude the plaintiffs from making a fresh claim against L & M.

61. The plaintiffs are entitled to their variation claims for the following items:

> a. the cost of preparing the pile cap mock-up, the defendants not being able to point to any description in the BQ that can possibly cover this item. Although Francis had opined that the plaintiffs are not entitled to this claim, his reasoning is flawed – although the plaintiffs' scope of works included strengthening of the pile caps, the request for a mock up was made to the defendants by the architect. Lee's contention that the plaintiffs did not receive the specifications and preambles from the defendants was not successfully challenged. That being the case, the plaintiffs would not know or even be aware of the defendants' obligation to provide the mock-up to the main contractor if required; they may well have priced for it had they been forewarned;
>
> b. the cost of each new elbow joint as well as the labour charge for cutting and fitting it, but not for the diversion and re-connection of the original rainwater down-pipe, which I consider to be within the description in the BQ under the portion relating to **demolition and alteration works** *'to make good all works disturbed'*;
>
> c. the plaintiffs are entitled to their variation claim for raising the floor slab by 500mm but not for the other preparatory work of hacking and roughening the existing concrete slabs and beams;
>
> d. the plaintiffs are entitled to their variation claim for pile caps work done by Cheng Hwee in the yellow area marked on drawing at 4AB19 based on Kwan's confirmation (N/E239).

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The backcharges

62. Turning next to the defendants' counterclaim for backcharges, I believe counsel for the plaintiffs made a pertinent point when he raised the possibility that there could be errors in the manner in which the defendants kept the accounts for the project. As an example of the possibility of error, I refer to the labour charges debited to the plaintiffs for completing the works and rectifying defects. No one who was personally involved in preparing the ledger accounts therefrom was available to testify to how the cumulative labour charges were apportioned between numerous companies in the Group, let alone that it was done properly/correctly. I cannot rule out the possibility of human error; this was highlighted by the example of the certificate of payment in favour of Nutech Trading Pte Ltd (3DB329) where the words **Tan Tock Seng Hospital** were cancelled and replaced by **Suntec City.** Another example can be found at invoice no. 1177 at 3DB3696 which related to coring work at Fort Canning park. No reason was offered by Tan or Chen for the substitution of Suntec City for Tan Tock Seng Hospital. If Ang Teck Hin made the correction, he should but did not testify; no reasonable explanation was tendered for his absence from court; the fact he had left the defendants' employment (in June 1998) is not good enough, bearing in mind that the plaintiffs managed to procure the attendance in court of the defendants' other ex-employee, Francis.

63. With the above observation in mind, I disallow the following backcharges:

> a. all charges of Cementaid pertaining to supply of Caltite waterproofing additive, I accept the testimony of Francis and Phua in this regard. The defendants could have but did not call Dr Ho to rebut Francis' contention that Dr Ho knew of the deletion of waterproofing from the plaintiffs' scope of works; indeed Francis invited the defendants to challenge his testimony (N/E 195). On the principle enunciated in *Browne v*

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Dunn (1893) 6 R 67 HL the plaintiffs have successfully defended this claim;

b. any and all charges for which the defendants had no supporting invoices or did not adduce any evidence;

c. labour charges pertaining to acceleration of works requested by the main contractor -- the plaintiffs are only liable for manpower supplied by the defendants either to complete any outstanding portion of the works or, rectification of defects in what they had already done for the project (not other sites either in Suntec City or elsewhere) which works the plaintiffs failed to carry out after being requested by the main contractor and in turn by the defendants to do so;

d. charges indiscriminately billed to the plaintiffs with no relation to the supply of labour, materials or equipment for the project; these would include area licence fee ($11) charged by Multistates and repair/overhaul of any vehicles, engines or equipment rented by the defendants;

e. rental of 100KVA generators and Denyo compressors from JPN;

f. rental of a crane from Tiong Woon;

g. charges for materials supplied by MBT other than construction grout, mortar and emulsion;

h. rental charges of two (2) other dump trucks from Grove; the plaintiffs are liable for rental charges of only one (1) truck;

i. 50% of the rental charges for skid loaders supplied by G &W Industries Pte Ltd. As the plaintiffs subcontracted to Cheng Hwee the work to excavate the pile caps and remove the excavated material, neither Phua nor Lee would know if Cheng Hwee used the skid loaders to transport the waste material to the dump trucks. On the other hand, the defendants themselves testified that L & M worked in the same area as Cheng Hwee, doing micro-piles. Therefore the use and cost of the skid loaders should be apportioned equally between the plaintiffs and the defendants/L & M;

j. charges of Setsco Services Pte Ltd for tensile tests done on rebars and charges for concrete cube tests. The defendants did not hand to the plaintiff a set of the specifications and preambles received from the main contractor at or before they issued the letter of intent; indeed Tan tacitly admitted that the plaintiffs did not receive the specifications (at N/E 216B). Neither did the plaintiffs see the (main contractor's) letter of award until this trial. Without those documents, the plaintiffs

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> were not aware of their obligation to furnish test certificates under cl 15.2 of the section in the BQ specifications Kwan referred to. These items in any case form part of preliminaries which were excluded from the plaintiffs' scope of works;
>
> k. charges of Klenco (Singapore) Pte Ltd and Istar Trading relating to the supply of vacuum cleaners and Tsurami pump respectively;
>
> l. charges for temporary support/steep propping, structural steel works not being part of the plaintiffs' scope of works. This was confirmed by Francis (N/E 186) and admitted by Kwan (N/E 236);
>
> m. work done by Cheng Hwee in the yellow area marked on drawing at 4AB19; it was outside the plaintiffs' scope of works;
>
> n. administrative and overhead charges be it at 15% or any other rate; this unilaterally imposed charge is completely unjustified and baseless; at the very least the plaintiffs should have been but were not, forewarned that the defendants would impose such charges for time and effort spent in attending to complaints and in liasing with the main contractor, it should have been but was not, included as a term in the letter of intent;
>
> o. any charges which related to house-keeping, that being a preliminary or provisional item excluded from the plaintiffs' scope of works.

64. In the light of my finding in para 63(a), it follows that the defendants are not entitled to the two (2) indemnities pleaded in para 17 of the (re-re-amended) defence and counterclaim. My view is reinforced by Lee's testimony that the main contractor requested the defendants who requested Cementaid in turn, to rectify leaks arising from waterproofing works; Cementaid as the waterproofer/hardener supplier, gave a ten (10) year warranty for water tightness.

65. For the record, the parties had agreed to the following items of claim either in their pleadings or in these proceedings:

> a. before commencement of trial, the defendants agreed to $39,851.39 of the variation claims over and above those they had certified;

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> b. the defendants conceded liability on items 16.28 and 16.35 (in 3AB6 and 3AB8) in the course of these proceedings (see N/E 23 and 28);
>
> c. the plaintiffs withdrew their claim (item 16.64 in 3AB15) for demolition of slab and construction of escalator pit (N/E 26);
>
> d. the plaintiffs admitted to the (revised) sum of $988,423.91 as backcharges in their pleadings.

The decision

66. There will be interlocutory judgment for the plaintiffs based on $2.23m as the contract sum, on their claim. Assessment of the balance due and owing on the contract sum together with the allowed variation claims will be done by the Registrar at a later stage; costs of such assessment are reserved to the Registrar together with the issue of interest on the assessed amount. It would be neater if the sums agreed/admitted by the defendants as variations, are included in the eventual sum assessed by the Registrar.

The counterclaim

67. In their amended pleadings, the plaintiffs accepted a lower figure of $988,423.91 in place of the original admitted sum of $1,225,381.85 for the backcharges. The defendants made much of the plaintiffs' last minute change of mind, submitting that their explanation therefor was incredible. In the alternative, the

defendants submitted that the plaintiffs were estopped from reneging on their earlier admission; their counsel also took the stand that the amendments to the statement of claim were a sham; with respect, I disagree. I am of the view that Lee gave a reasonable explanation why the plaintiffs changed their mind late in the day. Any inconvenience suffered by the defendants resulting from the

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amendment has been more than adequately compensated by my award of costs thrown away on an indemnity basis in their favour. The defendants harped on the fact that the plaintiffs were awarded costs on an indemnity basis on 1 December 1998 when trial could not proceed that day because the defendants chose to discharge their then counsel that morning. Their counsel submitted that the plaintiffs' then counsel misled the court that morning when he said that his clients were fully prepared for trial when that clearly was not the case. The defendants however, are not comparing like with like as the reasons for the 2 adjournments for trial in December 1998 and in April 1999 are vastly different. The defendants compiled 15 ring files for this trial; it would be a Herculaen task for anyone never mind the plaintiffs, to inspect the defendants' documents thoroughly before trial, to verify their claim for backcharges. That Lee managed to pinpoint errors and overlapping of some charges in some of those documents is commendable in itself. The thrust of Lee's explanation for the late amendment was, that the defendants' statements of accounts sent to the plaintiffs periodically, did not include copies of the supporting invoices. As an example he referred to the rental charges of Grove; without sight of the supporting invoices, the plaintiffs did not know until the trial stage, that the defendants rented and charged 3 dump trucks instead of 1, to the plaintiffs' account. I am therefore of the view that the defendants are partly to blame for the plaintiffs' late amendments of their pleadings.

68. The defendants in their closing submissions said that the plaintiffs hardly touched on the defendants' core bundle of documents (3DB1-394) which encapsulated the defendants' claim for backcharges and by which the defendants 'stood or fall'. As the documents therein were found in the other bundles compiled by the defendants, I see little merit in that criticism.

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69. On the counterclaim therefore, while the defendants are entitled to interlocutory judgment, they are not entitled to a separate set of costs as a consequential order. The defendants knew that the plaintiffs admitted to certain backcharges right from the beginning, albeit the quantum was reduced halfway during the trial. They on the other hand, made no concessions at all on the plaintiffs' variation claims until the morning (9 February 1999) when trial actually commenced. Therefore, in the exercise of my discretion, I hold that the issue of costs for the trial should also be reserved to the Registrar doing the assessment. Assessment of the defendants' counterclaim should follow immediately after assessment of the plaintiffs' claim. Again, it would be neater if the admitted backcharges are included in the final sum assessed by the Registrar on the defendants' counterclaim. The Registrar's assessment shall also include damages, if any, resulting from the plaintiffs' delay in completing the works or in rectifying defective works. If the plaintiffs' claim is found to exceed the defendants' counterclaim, the plaintiffs are entitled to one set of costs for the proceedings (claim and counterclaim) plus disbursements (including hearing fees) less the defendants' disbursements for the counterclaim. Such disbursements however do not include reimbursement of any hearing fees paid by the defendants. In the event the defendants' counterclaim when assessed exceeds the plaintiffs' claim, then the defendants would be entitled to one set of costs for the proceedings plus disbursements, which would include hearing fees they had paid but less the plaintiffs' disbursements on the claim.

70. As I envisage that the parties may encounter difficulties in implementing the various orders made herein, I hereby give them liberty to apply.

LAI SIU CHIU

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JUDGE

Lai Siu Chiu J

Ng Kai Ming (as counsel) with Tan Lam Siong and Michael Han (Tan & Koh Partnership), George Tan (as counsel) with Monica Neo for the plaintiffs
H E Cashin (as counsel) with Desmond Ong (John Koh & Co) for the defendants

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