IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1994] SGHC 49

Suit 1473/1991

Between

Brani Readymixed Pte Ltd

… *Plaintiff*

And

Yee Hong Pte Ltd

… *Defendant*

GROUNDS OF DECISION

Commercial Transactions — Sale of goods; Contract — Breach; Contract — Breach

Version No 1: 29 Oct 2026 (23:45 hrs)

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Brani Readymixed Pte Ltd v Yee Hong Pte Ltd

[1994] SGHC 49

Suit 1473/1991
Goh Joon Seng J
28 February 1994

1 Cur Adv Vult

2 The plaintiffs are suppliers of ready mixed concrete. The defendants are building contractors.

3 In or about July 1990 the defendants were awarded the contract by the Port of Singapore Authority (`PSA`) to build the Service Complex at the Brani Terminal, Pulau Brani.

4 Shortly thereafter, the defendants entered into negotiations with the plaintiffs for the supply of ready mixed concrete required for the project. The quantity required was some 16,000 cubic metres. At that time the plaintiffs were supplying ready mixed concrete to another contractor Hyundai-Chuan Joo JV at the Brani Terminal whose requirement was around 313,600 cubic metres, that is 20 times the amount required by the defendants.

5 As a result of these negotiations the plaintiffs by their letter of 27 September 1990 offered to supply the defendants ready mixed concrete on the terms therein. The material provisions were:

Version No 1: 29 Oct 2026 (23:45 hrs)

> (i) by cl 2 the prices for the various grades were ` ***fixed irrespective of any fluctuation in the cost of cement and sand except 20 mm coarse aggregates which is based on [the] current market price of S$25.50 per ton delivered (Pulau Brani)*** `. Therefore only if there were fluctuations in the price of aggregates would adjustment in the price be made;
>
> (ii) by cl 5 the duration of supply was from September 1990 to December 1991;
>
> (iii) by cl 11, payment was ` ***45 days prompt from the date of invoice*** `;
>
> (iv) by cl 12, in the event that payment was not made by due date, the plaintiffs could refuse further supply pending payment;
>
> (v) by cl 13 the defendant ` ***is required to provide a casting schedule for the whole project and daily orders must be placed 24 hours in advance*** `;
>
> (vi) by cl 14 the defendant ` ***shall obtain approval from PSA for the concrete supply from the [plaintiffs`] concrete batching plant at Pulau Brani*** `.

6 Following receipt of this offer there was a further meeting between Chua Eng Hin (`PW1`), Chua Hock Lye (`PW2`) and Poa Kheng Sin (`PW3`) representing the plaintiffs and Tan Eng Siong (`DW1`) representing the defendants.

7 At this meeting several amendments were agreed to. The material one was to cl 13. Amended cl 13 read:

> *The contractor is required to provide casting schedule for the whole project and daily orders exceeding 50 m3, 24 hours advance notice must be given in the event that the supplier fails to supply due notice having given [sic] the contractor shall have the right to source for its concrete requirement from alternative supplier and any costs difference shall be recovered from the supplier.*

8 After the several amendments were agreed to, the offer as amended was accepted by the defendants.

Version No 1: 29 Oct 2026 (23:45 hrs)

9 Pending defendants` obtaining the approval of PSA for the plaintiffs to supply ready mixed concrete to the defendants from their batching plant set up specifically for the Hyundai-Chuan Joo JV project, plaintiffs` supply to the defendants was on ad hoc approvals from PSA on a case by case basis. No concreting schedule was provided by the defendants.

10 PSA`s oral approval was obtained in December 1990. However the written confirmation given on 9 February 1991 was on condition that a separate silo had to be set up to distinguish the cement to be used for batching concrete to be supplied to Hyundai-Chuan Joo JV from that to be used for batching concrete to be supplied to the defendants.

11 After PSA`s approval had been obtained, the defendants continued to request supply by means of daily or weekly orders in the form of memoranda without the casting schedule. It is however alleged by the defendants that they furnished the plaintiffs with a copy of the ` ***master programme*** ` submitted by the defendants to PSA on 30 August 1990. The plaintiffs however denied having received a copy of the master programme. In any case the master programme is not a casting schedule in that it did not state the quantity of ready mixed concrete required for the work scheduled in the master programme. The defendants did however on 2 January 1991 give the plaintiffs a memorandum stipulating the quantities of ready mixed concrete required for the months of January, February and March 1991.

12 Daily orders then continued to be placed by memoranda delivered to the plaintiffs` site office.

13 However the supply from the plaintiffs appeared to be unsatisfactory right from the initial stages of the contract. There were short and irregular

Version No 1: 29 Oct 2026 (23:45 hrs)

supplies and even non-delivery at times. This is evidenced by a memorandum from DW1 to PW1 dated 4 January 1991 which read:

> *In spite of our tele-conversation this morning, we regret to inform you that you are unable to supply concrete to our above project today and tomorrow as advised by your representative on site.*

14 Please understand our tight construction schedule and contact the undersigned whether you could supply us the concrete tomorrow.

15 Following this, there was a meeting between PW1 and DW1 at which it was agreed that henceforth the memoranda would be addressed to PW1 at his office with a copy to plaintiffs` site office.

16 Notwithstanding this arrangement, the defendants found plaintiffs` supply still unsatisfactory including failure to deliver according to the casting intervals of 45 minutes. Complaints were accordingly registered with the plaintiffs from time to time.

17 On 4 and 16 April 1991 the defendants were given warnings by PSA that concreting was not cast continuously to construction joints. This was due to concrete supplies being delivered to the site at intervals of more than 45 minutes.

18 The defendants` complaints culminated in their letter to the plaintiffs of 7 May 1991 which read:

> *On 6 May 1991 we have requested for 20 m3 of Gr 30 concrete to be delivered at 1440 hours.*

19 On 7 May 1991, we have also placed orders for 20, 30, 15 m3 of concrete to be delivered at 9am, 1pm and 4pm respectively. Till now, we are still waiting for your concrete supply.

Version No 1: 29 Oct 2026 (23:45 hrs)

20 By virtue of our sub-contract agreement, we shall proceed with order from our alternative supplier and the consequential costs incurred shall be borne by you.

21 No doubt the defendants were relying on amended cl 13 of the contract. The alternative supplier turned out to be Rite-mix Pte Ltd (`Rite-mix`), a company in which the main shareholders of the defendants had the majority interest. The two companies also had common directors. The defendants had earlier on entered into an agreement dated 18 April 1991 with Rite-mix for the supply of a minimum quantity of 8,000 cubic metres of ready mixed concrete, this being the remaining quantity estimated to be required by the defendants to complete their works.

22 Although this agreement with Rite-mix was entered into without the knowledge of the plaintiffs, the plaintiffs must have known or at least suspected that the defendants were seeking an alternative source of supply because Rite-mix`s batching plant was set up near the defendants` site. Besides this, there were principally only two contractors at Pulau Brani at the time, Hyundai-Chuan Joo JV and the defendants, and the plaintiffs were the sole supplier of ready mixed concrete to Hyundai-Chuan Joo JV. The concrete required for the foundation for Rite-mix`s batching plant was also ordered by the defendants from and delivered by the plaintiffs to the foundation site for Rite-mix`s batching plant.

23 On 9 May 1991, the plaintiffs replied refuting the defendants` allegations and giving reasons why the supplies ordered could not be delivered. The plaintiffs rejected the applicability of amended cl 13 by their ultimate paragraph which stated: ` ***As about the agreement of concrete supply, we could not accept to [sic] the conditions you mentioned, as those were your alteration***

and amendment without our official approval. We therefore could not agree to whatever consequential costs claimed by you. ` It was however conceded at the hearing that the parties were governed by amended cl 13.

24 On 20 May 1991 the defendants replied giving their version of what transpired leading to their letter of 7 May 1991, and stating in the ultimate paragraph ` ***We have no other alternative but to purchase concrete from other sources and all differential costs will be borne by you*** .` In the meantime from 11 May 1991 onwards no orders were placed by them with the plaintiffs for supply of ready mixed concrete. The construction of the Rite-mix batching plant and the defendants` insistence on seeking alternative supplies and the fact that no further orders had been placed since 11 May 1991 clearly evinced an intention on the part of the defendants to put an end to their contract with the plaintiffs for their remaining concrete requirements.

25 Notwithstanding that, however, the plaintiffs did not accept this renunciation or repudiation. Instead by their letter of 30 May 1991 they stated:

> *... Furthermore, please note that you are in breach of cl 12 of our agreement for failing to pay the following due invoices:*
>
> *Date Invoice No Amount ($)*
>
> *28.2.91 0019 481.50*
>
> *31.3.91 0016 135,433.25*
>
> *31.3.91 S0032 523.50*
>
> *$136,438.25*
>
> *Please let us have a proper advance casting schedule and arrange to make payment of the outstanding invoices within 3 days hereof, failing which we will treat our agreement as having been terminated by your breaches, and take necessary action as we deem fit.*

26 On 6 June 1991 the defendants wrote to the plaintiffs as follows:

Version No 1: 29 Oct 2026 (23:45 hrs)

> *... Since you are unable to filfill your contractual obligation in supplying us the ready mixed concrete to our Brani Terminal Project diligently, we are compelled to source our concrete requirement from alternative supplier in accordance with relevant clauses of the sub-contract agreement.*

27 All costs difference shall be recovered from you ...

28 On 7 June 1991, the plaintiffs followed up with another letter which obviously crossed the defendants` letter of 6 June 1991. It read:

> *We refer to our letter dated 30 May 1991 and regret the lack of response from you.*

29 As you have failed to give us a proper advance casting schedule and have failed to make payment of the outstanding invoices, you have repudiated our agreement with you. Your repudiation is accepted but we reserve the right to claim all outstanding sums from you as well as damages for breach of contract.

30 Kindly arrange to make payment of the sum of $278,969 and confirm your agreement to pay us damages within 5 days hereof. A breakdown of the sum of $278,969 is as follows:

> *Date Invoice No Amount ($)*
>
> *28.02.91 0015 481.50*
>
> *31.03.91 0016 135,433.25*
>
> *31.03.91 S0032 523.50*
>
> *30.04.91 0017 116,565.75*
>
> *30.04.91 S0047 420.00*
>
> *31.05.91 0018 25,545.00*
>
> *$278,969.00*

Version No 1: 29 Oct 2026 (23:45 hrs)

31 No payment was made by the defendants in compliance with the plaintiffs` demand. Accordingly on 11 July 1991 the plaintiffs commenced these proceedings for recovery of the total sum of $278,969 and damages by way of loss of profits. The defendants counterclaimed for $253,598.08 being the additional cost incurred in procuring supplies from Rite-mix. On an appeal by the plaintiffs against the order of the assistant registrar of 2 November 1991 granting the defendants leave to defend, I gave judgment to the plaintiffs in the sum of $253,424 with leave to the defendants to defend in respect of the sum of $25,545 for which the credit period of 45 days had not expired at the date of commencement of these proceedings. I also ordered a stay of execution on the judgment pending hearing of the counterclaim upon the defendants furnishing a banker`s guarantee for $253,424.

32 The plaintiffs subsequently obtained leave to amend their statement of claim to leave out the claim for $25,545 with liberty to file a fresh action for this amount. The hearing then proceeded on only the plaintiffs` claim for damages amounting to $92,648.26 by way of loss of profits in respect of the 9,940.6 cubic metres of ready mixed concrete purchased by the defendants from Rite-mix. The defendants on the other hand counterclaimed for $253,598.08 being the additional costs incurred by their procuring supplies from Rite-mix.

33 The plaintiffs` claim is based on breaches of contract on the part of the defendants in failing to (i) make payment of the amounts due and (ii) furnish the casting schedule.

34 On failure to pay the amounts due, up to the letter of 30 May 1991, the defendants had been prompt in paying within the credit period. On stipulation as to time of payment, s 10(1) of the Sale of Goods Act 1979 provides:

Version No 1: 29 Oct 2026 (23:45 hrs)

> *Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not of the essence of a contract of sale.*

35 Benjamin`s Sale of Goods (4th Ed, 1992) at p 418 para 9-044 states:

> *By s 10(1) of the Sale of Goods Act, 1979, unless a different intention appears from the terms of the contract, stipulations as to time of payment are not of the essence of a contract of sale. Thus if time is not of the essence, a default by the buyer in making payment at the time specified in the contract will not entitle the seller to treat himself as discharged from further liability ... unless the buyer`s neglect or refusal to pay the price makes it plain that he is unwilling or unable to perform the contract.*

36 By cl 12 of the contract the remedy available to the plaintiff was the right to withhold further supply until after payment of the outstandings had been made but it did not discharge the plaintiff from further performance of the contract. On the other hand, if the defendants` failure to pay within the stipulated time amounted to a repudiation or renunciation of the contract, the plaintiff did not accept the repudiation thereby affirming the contract. They instead gave the defendants three days notice to rectify the breach. But the notice in my view was not a reasonable one in that it coincided with the weekend and failure to comply with that notice therefore did not entitle the plaintiffs to treat the ` ***agreement as having been terminated by your [defendants`] breaches*** `.

37 In respect of the casting schedule, up to May 1991 that is nine months into the contract period, the plaintiffs were able to supply according to the defendants` orders without the casting schedule and when they were unable to do so, it was never alleged that their inability was in any way due to the lack of the casting schedule. Therefore this breach on the part of the defendants could not amount to repudiation or renunciation of the contract. If it did, for similar reasons the repudiation had not been accepted.

Version No 1: 29 Oct 2026 (23:45 hrs)

38 Accordingly the plaintiffs were not discharged from further performance of the contract and their letters of 30 May and 6 June 1991 constituted wrongful repudiation of the agreement on their part. Their claim for damages against the defendants is therefore dismissed.

39 This disposes of the plaintiffs` claim for loss of profits. But as this matter may be taken further I will deal with the issue of quantum as well.

40 At the hearing the plaintiffs reduced their claim from $92,648.26 to $79,522.38 arrived at as follows:

Sale price of balance of concrete
of 9,940.6 m3 based on the plaintiffs`
contract with the defendants $ 1,031,636.25
Less:
(i) Adjustment for fluctuation $ 33,809.90
in the price of aggregates
(ii) Costs of materials 828,731.00
(iii) Costs of production
(a) trucking charges 69,584.20
(b) fuel for plant etc 2,783.37
(c) water 2,056.41
(d) maintenance 7,057.83
(e) labour costs 8,091.16
952,113.87 - 952,113.87 = **$79,522.38**

41 On costs of materials there was no allowance for wastage. If we allow 1% for wastage, and this would be a conservative allowance, an additional cost of $8,287.31 would have been incurred. On transport costs the price of sand and

Version No 1: 29 Oct 2026 (23:45 hrs)

aggregate supplied to the plaintiffs did not include transport costs of unloading from the barge to the jetty and from there to the batching plant site. Taking these two items into account and allowing $1 per ton for such transport cost for the 7,622.44 tons of sand and 10,403.09 tons of aggregates that would have been used for batching the remaining concrete required, I assess the quantum of the plaintiffs` loss of profit at $50,000.

42 I now deal with the defendants` counterclaim. At the material time there were outstanding payments in respect of which the credit period had expired. Accordingly under cl 12 of the contract the plaintiffs could refuse further supplies to the defendants until they received payment of the amounts due. They never did. Further the defendants` counterclaim, if any, is for damages for wrongful repudiation of the contract by the plaintiffs arising out of their letters of 30 May and/or 7 June 1991. The defendants however had before that entered into the agreement with Rite-mix on 18 April 1991 under which the defendants had agreed to take the supply for their remaining requirement from Rite-mix at additional costs. Therefore their loss by way of such additional costs was not due to the subsequent repudiation by the plaintiffs of their contract with the defendants. It was incurred pursuant to their agreement with Rite-mix. Accordingly the defendants` counterclaim fails.

43 On quantum the defendants` counterclaim for $253,598.08 is arrived at as follows:

(1) reimbursement of costs for preparation of site
for setting up batching plant 20,000.00
(2) reimbursement of mobilisation charges 30,000.00
(3) additional costs due to differentials in price 108,362.25
(4) sea transport for cement tankers

Version No 1: 29 Oct 2026 (23:45 hrs)

290 loads at $140 per load 40,600.00
(5) materials management costs for
sand at site 8,848.40
(6) materials management costs for
aggregates at site 11,319.00
(7) costs of water supply 2,468.43
(8) reimbursement of rental for
batching plant 32,000.00
$253,598.08

44 On item (1), the site was prepared by the defendants with concrete ordered by them from the plaintiffs. The costs were not incurred by Rite-mix who would not therefore be entitled to reimbursement. The date of the invoice for the same is stated to be 4 May 1991. But it was received by the defendants on 14 August 1991, that is after the commencement of these proceedings.

45 In respect of item 2 the date of the invoice is stated to be 11 May 1991. But it also was received by the defendants on 14 August 1991. Items 4, 5, 6, 7 and 8 suggest that the defendants were batching their own concrete. In any case the claim for these items in addition to item 3 for price differentials due to the higher prices purportedly charged by Rite-mix casts doubts on the bona fides of their counterclaim and the terms of their agreement with Rite-mix of 18 April 1991. I therefore reject the defendants` evidence on the quantum of their alleged loss.

46 Consequently the defendants` counterclaim is dismissed.

47 On costs, as counsel for the plaintiffs wishes to be heard on costs in the event the plaintiffs` claim for damages is dismissed, I will hear counsel for both parties on costs and make a separate order thereon.

Version No 1: 29 Oct 2026 (23:45 hrs)

48 ***Claim and counterclaim dismissed.***

Goh Joon Seng J

George Lim (Wee Tay & Lim) for the plaintiffs
Lee Mun Hooi (Lee Bon Leong & Co) for the defendants

Version No 1: 29 Oct 2026 (23:45 hrs)