IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1996] SGHC 136

SUIT NO 1715 OF 1995

Between

Raymond Construction Pte Ltd

… *Plaintiff*

And

Low Yang Tong
AGF Insurance (Singapore)
Pte Limited

… *Defendant*

GROUNDS OF DECISION

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

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Raymond Construction Pte Ltd v Low Yang Tong and Another

[1996] SGHC 136

SUIT NO 1715 OF 1995
Lai Kew Chai J
11 July 1996

Judgment:

GROUNDS OF JUDGMENT

1. The plaintiffs ("the contractor") are building contractors. The first defendant ("the owner") was at all material times the co-owner with his wife of the property known as 10B Yarwood Avenue, Singapore ("the property"). The plaintiffs and the first defendant in Aug 93 entered into a building contract to erect a 2 storey detached dwelling house ("the house") on the property.

The second defendants are an insurance company and their only role in these proceedings is limited to the performance guarantee dated 12 Oct 93 which they, at the request of the plaintiffs, issued to the owner in the sum of $40,419.05 which was payable unconditionally on demand. The first defendant and his family moved into the house on 30 May 95. The Temporary Occupation Permit was issued by the authorities on 3 Jul 95. It would be fair to note that the first defendant's case was that there were several defects in the construction of the house. In the circumstances, his solicitors made a demand in writing dated 26

Sep 95 on the second defendants to pay the sum of $40,419.05 under the guarantee by 29 Sep 95.

2. By an ex-parte application to the High Court, which was heard on 28 Sep 95, the plaintiffs obtained an injunction to restrain the second defendants from paying the said sum and to restrain the first defendant from receiving it. In a nutshell, the plaintiffs averred that the first defendant had wrongfully called for payment and that the demand was fraudulent, lacking in bona fides and wrongful as the plaintiffs were not in breach of agreement. It should be noted that no evidence of fraud as such was led by the plaintiffs. The attack against the first defendant was directed at his bad conduct and his bad faith. They said that they had substantially completed the works, as contracted and as subsequently varied by the parties, and that their claim No. 9 for interim payment was not dealt with by the architect at all because the first defendant, as the architect had confirmed, had unlawfully and oppressively prevented the architect from issuing the certificate of payment. In the result, the plaintiffs averred that the first defendant was owing them the substantial sum of $229,417.00, after conceding that they had, despite obstacles put up by the first defendant, repaired some defects and that certain minor repairs were still outstanding. These minor repairs could have been dealt with during the defects liability period but, owing to the obduracy of the first defendant, even these minor items were not put right. The assertions of the plaintiffs will have to be set out in some detail later in these grounds of judgment.

3. I should interpose at this stage with some references to a particular prayer of the plaintiffs in their ex parte application. The plaintiffs also sought an injunction restraining the first defendant from "demanding" the said sum from the second defendants, which, as was observed by the court during the hearing, was otiose, seeing that the first defendant through his solicitors had in fact made

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

the demand on 26 Sep 95. The court also observed that ordinarily parties such as the plaintiffs, having caused the issue of an instrument such as a guarantee, should not apply to restrain the beneficiary of the instrument from making a demand under it. That would on the face of it be an unacceptable interference with contractual rights and could, if the injunction be issued, cause a time bar to set in against the beneficiary. The purpose was clearly to prevent payment by the issuer or receipt of payment by the beneficiary and injunctions limited to and specifically directed against those acts would have been appropriate. The arguments proceeded on the basis, as was clear from the plaintiffs' affidavit, that the plaintiffs' solicitors had in mind restraining the first defendant from making "further" demands; the matter was left at that.

4. Not unexpectedly, the first defendant filed a summons- in-chambers on 20 Oct 95 for an order that the injunction granted ex parte by Lai Siu Chiu J be discharged, that the second defendants be ordered to pay the sum of $40,419.05 to the first defendant and that there be an inquiry as to whether the first defendant had sustained any and if any what damages which the plaintiffs ought to pay under the undertaking given to the court and for interest thereon. The first defendant also asked that he be at liberty to enter judgment against the plaintiffs for the amount of such damages, interest thereon and costs. The background and averments of the first defendant would also have to be elaborated. Very briefly, the first defendant's case was that it was his undoubted legal right to demand payment under the guarantee, that the plaintiffs had breached his contract and it was even admitted by the plaintiffs that the defects, on their figures which the first defendant did not accept, would cost $26,000 to make good and the omissions were worth $17,000, making a total of $43,000. Learned counsel for the first defendant strenuously pressed the point that there was no justification

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

at all to look into the other circumstances, e.g. as to the reason why the 9th interim certificate was not issued by the architect of the project.

5. At the conclusion of the adjourned hearing on 26 Jan 96, this court observed as follows:-

"Bocotra Construction Pte Ltd v AG (No.2) < 1995 > lays down the rule of law that there must be compelling evidence capable of proving fraud or unconscionability before an injunction may be granted restraining payment under instruments which contain unconditional and irrevocable obligations to pay on demand. The concept of "unconscionability" to me involves unfairness, as distinct from dishonesty or fraud, or conduct of a kind so reprehensible or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party. Mere breaches of contract by the party in question (in this case, the first defendant) would not by themselves be unconscionable. Where breaches are alleged, there would generally be (counter- allegations and) disputes when the case is before the court. Therefore the first defendant's breaches alone would not have sufficed. In my view, Royal Design Studio (Thean J as he then was) and Kvaerner Singapore (Selvam J) are illustrations of the circumstances where payments would have been unconscionable." (Words within brackets are added)

6. So as to place the context in which these remarks were made, there were really two matters which the court was addressing. First, on the authorities considered, the court was elaborating on what would amount to unconscionability sufficiently grave and serious for equity to intervene. That proceeded on the basis that equity would step in to prevent the enforcement of any legal right if such enforcement would have been unjust. Any allegation of fraud was put aside. Secondly, learned counsel for the first defendant contended

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

that mere allegations of breaches of contract by the first defendant did not amount to unconscionability. I agreed with him.

7. Contrary to the contention advanced on behalf of the first defendant, I came to the conclusion after reading all the affidavits and the exhibits that I had to look at all the circumstances, which I did. I was very conscious of the fact that all I had before me were affidavits and exhibits and that I could not in an interlocutory matter make any finding of fact or draw any inferential fact without the benefit of viva voce evidence, unless any fact was not in or beyond controversy or was agreed as common ground. But there were considerable compelling evidence adduced by the plaintiffs which drove me to the conclusion that I had to restrain the first defendant from insisting on and obtaining his strict legal rights. In my judgment, he had to be stopped from acting in an unfair, harsh and unconscionable manner. In my minute, I described the first defendant's conduct as "most unfair" and stated that "he should be restrained". I accordingly dismissed his application with costs fixed at $5,000.

The background

8. On 10 Aug 93 the plaintiffs entered into a construction contract with the first defendant to erect the house on a piece of land at Denham Close and Yarwood Avenue for the sum of $808,381.00. Under the contract the plaintiffs agreed to provide a security deposit, which was 5% of the contract sum, to ensure their due performance of the contract. The plaintiffs requested the second defendants to and they did issue in favour of the first defendant a performance guarantee under which the second defendants agreed to pay to the first defendant on demand and unconditionally the sum of $40,419.05. The guarantee provided that it took effect from 5 Oct 93 to 4 Oct 95 inclusive of the 12 months maintenance period and shall continue to be in effect unless and until the works have been certified by the architect, Mr Loo Kek Chew, to have been completely

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

executed in accordance with the conditions of the contract. The construction works commenced in or about Oct 93.

9. There was a site meeting on 8 Aug 94. Those who attended were the first defendant, his wife, the architect and a director of the plaintiffs, Wong Chun Weng. At the end of the meeting, several variations were agreed to be made to the contract ("the variation agreement"). The variation agreement is evidenced in a letter dated 11 Aug 94 and written on the stationery of the plaintiffs by Wong Chung Weng. This letter was signed by the first defendant, apparently on 29 Aug 94, and the architect. The letter recorded that certain "circumstances and several events" had developed along the course of the project. As a result, it was further agreed in the following words:-

1. The contract completion date shall be 31 Dec 94.

2. Practical completion is defined as when the followings are achieved:

(a) Electricity turn-on
(b) Water supply turn-on

It has been agreed that the front boundary drain is excluded from the above definition.

3. The defects liability periods commences upon issuance of certificate of practical completion.

4. The mode of payment shall remain as per contract, i.e. 14 days from the date of Architect's Certificate. The contractor will not have any liaison with the owner's finance company. Any delay on the part of the owner's finance company is deemed to be delayed by the owner.

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

5. The contractor must obtain the Architect's and Owner's written approval prior to installation of all finishing materials supplied by contractor.

6. Any changes or variation requested by Architect or Owner must be in writing from both parties to take effect.

7. Any changes or variation from original plan shall constitute extension of time with cost in preliminaries. However, if both parties agreed to changes without time implication shall be recorded as variation without time extension.

8. Material approval schedule must be adhered to strictly. Any delay on this is subject to time extension.

9. Final payment less any unsettled variation must be paid prior to handing over of keys. (Note: the first defendant added the following sentence in what appeared to be to his hand-writing: "Final payment will (be)? less the Contract retention Amount certified by the Architect."

The plaintiffs' case

10. In his first affidavit Wong Chun Weng asserted that the works were completely executed by 19 Apr 95 when both the Public Utilities Board and the Ministry of Environment had certified the works. He conceded that there were however some disputes regarding several defects by the first defendant. The correspondence relating to the defects and incomplete works was exhibited. The plaintiffs asserted that they had attended to all the major defects. The plaintiffs claimed that there had been other delays and these were "caused solely by the first defendant". They claimed that the tiling works, which were outside the parties' contractual scope, and which the first defendant had agreed to carry out were not carried out on time before the inspection by officers of the Ministry of

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

Environment on 6 Apr 95. The first defendant failed to pay the connecting fees to PUB on time and this delayed the installation of the water meter.

11. The plaintiffs produced documentary evidence which were compellingly capable of showing that the first defendant had been a very poor paymaster and that he had resorted to several tactics in several and repeated defective drawing of his cheques. I should mention some of the instances. The cheques were dated one year earlier, the name of the plaintiffs as the payee was incorrectly stated, the errors were not initialled and so on. The nature of these mistakes was not at all accidental or inadvertent but bore the badge of a certain deliberateness. A cheque of the first defendant was also dishonoured by his bankers. An amount of $3,000 being the GST payable under Certificate of Payment No. 8 has remained to date unpaid by the first defendant: see the list of details of the tactics used and delays caused by first defendant in para 22 at p.9 of the second affidavit of Wong Chun Weng. To show that the first defendant was remarkably predisposed not to honour his financial commitments as they fell due, references were made to several bankruptcy notices issued against him and to several suits against him in the High Court. The wife of the first defendant was adjudged a bankrupt on 30 Jun 95 by M/s Gimwah Pte Ltd, a firm supplying tiles, presumably in connection with such supplies to the house.

12. I now come to the evidence regarding the 9th claim of payment by the plaintiffs. Such interim claims by a contractor, certification by the architect and payment by an owner are an essential mechanism to ensure proper claims and prompt payment as the work progresses. It will avoid contractors being overpaid and owners delaying payments which could severely affect the cashflow of contractors who have to pay for the labour and the materials. The plaintiffs rendered their 9th claim on 17 Aug 95 for the sum of $229,417.03, which was at least a quarter to a third of the contract sum. This matter was more fully

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

investigated in the course of the hearing. The plaintiffs made the broad allegation that the first defendant had in breach of contract unlawfully interfered with the work of the architect, especially in those areas where the architect alone had to make an independent determination.

13. The architect had discharged himself from further acting for the first defendant. In his letter of 23 Nov 95, which was written obviously under legal guidance, he stated two reasons why he had terminated his services. The "first principal reason" was that he had found his position as architect for the project had become "untenable". The second reason has to do with the fact that his fees had not been paid by the first defendant; whether his four invoices were disputed or not was not mentioned. I have to observe that the first defendant was yet again involved in a dispute over the payment of his debt with another crucial party to his building project.

14. What was of considerable importance was the architect's elaboration of his first principal reason. It is best to quote the passage:

In respect of the 1st principal reason, after the contractor had made Progress Claim No.8, I proceeded, as requested, to ascertain the value of the work done. The owner, after discussions with me agreed that there was a value of $100,000/- worth of work done. With the knowledge and consent of the owner, I proceeded, as requested, to issue Certificate No.8.

However, after the issue of Certificate No.8, I received numerous complaints from the owner against the contractor. Amongst other things, the owner required me to withdraw Certificate No.8.

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

During the construction stage, I found my task very difficult to perform. I was asked to look into the several complaints of defects by the owner before practical completion. Yet, the contractor did not raise objection to the owner's raising of complaints. Instead, the contractor attempted to attend to the owner's complaints, at the same time trying to meet his schedule to complete the project.

There were numerous occasions when the contractor and owner were at loggerheads. That made my task even more difficult.

I tried my level best to have both sides come to an agreement of some sort. One of the main bone of contention was that concerning the practical completion date. The parties had on their own previously come to an agreement to define practical completion date. From my knowledge and experience, I had never come across such a definition of practical completion date. It was in the following terms:

Practical Completion is defined as when the followings are achieved. a) Electricity turn on b) Water supply turn on It has been agreed that the front boundary drain is excluded from the above definition.

The contractor claimed that there was practical completion when water which was supplied by PUB to him was made available to the owner. The owner claimed that permanent water supply must be made available to the owner. Not being an arbitrator or a judge, I did not wish to take sides in this matter. Instead, I used my good office to try to help the parties come together to resolve this matter. The owner sometime on 29/08/95 informed me that he would come to an agreement to settle the contractor's claim. He requested me to draft a letter proposing his terms of settlement. I complied with the owner's request and prepared a draft letter setting out his instructions.

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

After I sent the draft to the owner, the owner's response was that the draft was generally acceptable to him, but he queried me:

Could we not:- a) Terminate the contractor for his obvious non-performance.

Being put in such an impossible situation, I immediately decided to terminate my services as architect for the project as it was very evident then that I could no longer discharge my duties effectively.

15. The clear impression was that this was very strong evidence capable of proving that the first defendant had been in breach of his obligations under the contract. It was quite shocking that he even suggested that the architect withdraw Certificate of Interim Payment No. 8 simply because he had disputes with the contractor over alleged defects.

16. As for the architect's lack of response to the plaintiffs' 9th claim, he referred to the fact that the parties were in disputes and he could not ascertain the merit of each item of the numerous claims. Without entirely exonerating the plaintiffs totally, the court noted these words of the architect: "When I thought that the parties were on the verge of an amicable settlement, the owner practically in a surprising turn of events asked me to terminate the contract. It was then that I realised that my hopes and belief that the dispute between contractor and owner could be resolved, could not be realised. When the owner indicated that he effectively wanted to have the contract terminated, it was even more impossible at that stage to even ascertain the value of the contractor's Progress Claim 9."

17. When asked for the various occasions when the first defendant interfered with his work, he preferred not to answer this question. The ground he gave was noteworthy. He claimed that it was a matter that concerned only the owner and

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

himself; not so if the matter in issue, like the proper and just certification of the value of any claim, also involved the rights or liabilities of the plaintiffs as the contractor. In any of those matters, the architect should take no orders from either party. It appeared to me that the architect was too reluctant to exercise his judgment and duties and was too predisposed to settle everything. In that sense, he was weak minded. The other self-evident point was the fact that the architect did not deny any interference on the part of the first defendant.

What the architect was prepared to disclose, however, amounted to very strong evidence that could ground a finding of fact that the first defendant wrongfully stopped the issue of Certificate of Payment No. 9 involving about 30% of the contract sum.

18. If one added to the sum withheld under the 9th progress payment the 2 % retention sum of $20,209.53, the plaintiffs were being away from more money. In fact, the first defendant had retained in his hands the sum of $40,419.05, being 5% of the amounts certified by the architect.

19. Turning to allegations of delays and the enormous claims for liquidated damages, the plaintiffs exhibited a letter which confirmed that the completion had been extended to 15 Jan 95. But the principal case of the plaintiffs was that even this date would inevitably have to be extended because a substantial portion of the work, namely marble works, tiling works, slate finishes and turfing works were taken out of the contract and agreed to be carried out by M/s IBS Engineering, the contracting firm of the first defendant. The plaintiffs had written to the architect and the first defendant about the delays by the sub-contractors of IBS Engineering, over which obviously the plaintiffs had no control, and there had been no response. The plaintiffs exhibited photographs taken in Apr and May 95 showing that the tiling, kitchen and turfing sub-

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

contractors of the first defendant or IBS Engineering had not completed their works. It was not true that there were several incomplete works. First, regarding the original skylight, its original design was abandoned and no new design had been given to the plaintiffs in response to their letter of 4 May 95; they said that their responsibility for this item had therefore ended.

Similarly, the marble trimmings were abandoned and were omitted in their 9th Claim for progress payments. In fact, the cornices and cavity were completed. As for the door stoppers, spot lights and skirting to the staircase, these were not within the contract. The plaintiffs also pointed out that the marble cladding for the spiral staircase had been changed by the first defendant and the architect to wrought iron railing and balustrade and had accordingly been completed.

20. The plaintiffs pointed to many instances of obstruction by the first defendant. He did not choose the marble, repeatedly changed his mind in respect of the marble newel post etc., kept changing the curvatures of the cornices, delayed in the construction of the culvert to the house (which was his responsibility) with consequential delays to the plaintiffs' construction of the pillars to house the PUB water and electrical meter. He even prevented the plaintiffs from installing the extra water tank by alleging trespass.

21. The plaintiffs referred to the letter of the architect dated 9 Jun 95 which the first defendant exhibited. It was clear on the face of it that it was written under the instruction of the first defendant whose overbearing interferences left the architect no alternative but to resort to the drastic step of terminating his services. The first defendant and his family had moved into the house by 30 May 95 and therefore the house could not be described as not in a "liveable condition". Referring to the letters of the architect about defects and delays, the plaintiffs referred to their replies and the fact that the works were either

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

completed satisfactorily or were abandoned because no design plans were furnished to them. They exhibited copies of their letters.

22. The plaintiffs then claimed that they would be entitled to an extension of 291 days. Particulars were set out in para 39 of Wong's affidavit.

23. I now turn to the items and the value of the alleged defects. First of all, there was of course the defects liability period within which the first defendant had the right to have them rectified and, equally, the plaintiffs had the right to put them right before the first defendant could call in another party.

Secondly, they went on to state that in fact all the defects mentioned in the correspondence within exhibit "LYT-5" had been rectified by them but the first defendant persistently rejected the rectifications. Thirdly, the plaintiffs asserted that the first defendant's list of defects was inflated in number and costs for the purpose of calling on the performance guarantee. The architect's letter of 9 Jun 95 indicated that the first defendant had brought up 5 items of defects. They were all addressed by the plaintiffs in their replies. In the letter from the first defendant dated 4 Aug 95, which Wong Chun Weng said he saw for the first time when he read the first affidavit of the first defendant, the first defendant set out and alleged more than 100 items of defects. It was also apparent from the letter that the first defendant had instructed the architect to terminate the contract with the plaintiffs without even waiting for the architect to confirm the defects list, as was the contractual regime, let alone giving the opportunity to the plaintiffs to put them right.

24. In relation to the cost of putting right the defects, the plaintiffs referred to the quotation of M/s Allegiance Building Services dated 1 Sep 95. One glaring item had to do with all painting "touch up" work. The quote was $33,300. In

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

sharp contrast and I had noted that the plaintiffs' original contract price for painting the whole house including both the internal and external walls was only $9,000. A quantity surveyor, Lim Kah Soo, of 17 years standing, filed an affidavit to evaluate (1) the quotation of M/s Allegiance Building Services; (2) the cost of carrying out the outstanding works as stated in the first defendant's affidavit; and (3) the cost of the variation claim submitted by the plaintiffs. His inspection of the house was scheduled for only one hour between 9.30 am and 10.30 am., as insisted by the first defendant. The inspection commenced only at 10.15 am because the first defendant refused to allow three persons to carry out the inspection. He would only allow two of them to inspect. One would have thought that it would be reasonable to afford the plaintiffs the opportunity to obtain a quotation from a third party. The three were Wong Chun Weng, Lim Kah Soo (the QS) and Tang Hee Sung of M/s Teambuild Construction Ltd who were engaged by Wong Chun Weng to quote for certain rectification work. He valued the rectification works quoted by M/s Allegiance Building Services at only $26,158.70. In relation to the valuation for incomplete works Items A to J set out at p. 4 of the first defendant's affidavit, he valued them at only $16,861.90. Finally, in relation to variations (i.e. additions and omissions) which were claimed and submitted by the plaintiffs at $117,515.44, the valuation of Lim Kah Soo was $96,707.50. The difference was not remarkable.

25. Tang Hee Sung of M/s Teambuild Construction Ltd elaborated on and confirmed the rude reception the inspection party received from the first defendant. He quoted on the basis of the defects found and where they were not found he indicated them with the shorthand "N.A.". He could not say if the defects were due to the defective work of the plaintiffs. He confirmed that the defects that needed to be put right would cost $17,750.

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

26. On 23 Nov 95 the first defendant filed an affidavit affirmed by one Kenneth Jones, holder of a British Passport, a building surveyor in the employ of BKP Associates Pte Ltd. He is not a member of the Singapore Institute of Surveyors and Valuers. The court had no information as to his credentials. In contrast, Lim Kah Soo is a member of SISV since 1983 and it was of interest to note that he had been upgraded to become a Fellow of the Royal Institution of Chartered Surveyors (U.K.) since 1992. Kenneth Jones carried out two inspections in Oct and Nov 95 and opined that "the works were not constructed in accordance with the Contract Specifications and that the standard of workmanship was poor in addition to incomplete works." He estimated the costs of rectification of the defects and completion of the remaining works at $284,944.00.

27. I now recite the observations of Lim Kah Soo. He had based his valuation on the remedial actions proposed by M/s Allegiance Building Services in their undated quotations but which saw life, as was the common ground, on 1 Sep 95. During his inspection on 17 Nov 95 he found the remedial actions as proposed by them "to be appropriate and sufficient." His valuation was only $26,158.70 whereas the quote of M/s Allegiance Building Services was $137,130.00. M/s BKP Associates Pte Ltd had proceeded on the bases that several items had to be totally replaced with new works instead of remedial actions and examples were in relation to the sliding doors, rust marks on the ceiling and painting and plaster finishes.

He also noted that some of BKP's estimated costs, which were much higher than his own valuation, could not be reconciled with the defective item concerned. The examples related to all the doors (and it appeared that cost of replacing the windows was included although it had been dealt with under another item in their report). In summary, he made a number of observations. They are: (1) many of BKP's bases of cost estimate were on the total replacement instead of

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

rectification to make good the defects; (2) some of their estimates are high in relation to the defects; (3) they included new items; (4) in relation to items of incomplete works, BKP proceeded on the basis that these works would be carried out by other contractors instead of being treated as omissions of the works and in consequence the figures tended to be high because they included the "unpopularity" element and the "Consultant Supervision Fees"; and (5) BKP applied the "unpopularity" element and the said fees to other items throughout their report which resulted in the overall higher figures.

The first defendant's case 28. He asserted that the plaintiffs failed to complete the works by 31 Dec 94 in breach of the Variation Agreement. He produced the letters of the architect. In those letters, the architect noted that on the progress of work so far it was not possible for the plaintiffs to achieve "practical completion" within the unusual meaning set out in the Variation Agreement by 15 Jan 95. He also indicated that unless the plaintiffs could make out a case for extension of time the liquidated damages of $800 per day would be imposed on the plaintiffs.

29. In his affidavit affirmed on 19 Oct 95, the first defendant claimed that 8 items were uncompleted by the plaintiffs. They were: (1) The main skylight; (2) Marble trimmings; (3) Cornices; (4) The Cavity Wall; (5) Door stoppers; (6) Skirting to staircase; (7) Some spot lights; and (8) Spiral staircase post and marble cladding thereto.

30. He observed that the architect had not granted the plaintiffs any extension of time. However, on the evidence and if the architect is to be believed it was the first defendant who had been responsible in causing the architect to terminate his services.

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

31. He claimed that under the Variation Agreement completion included the obtaining of permanent water supply which the plaintiffs failed to obtain because the water tank they installed failed to meet with PUB's requirements. It was the plaintiffs who by their letter of 4 May 95 informed the first defendant and his wife that the water tank size had to be increased from 1.0m3 to 2.0m3. In their letter of 2 Oct 95 the plaintiffs addressed the issue of larger water tank which PUB required. They suggested that another l.0m3 tank be built beside the small one provided in the drawings of the architect. The plaintiffs were plainly not at fault. It was clear that the plaintiffs had built the smaller water tank according to the drawings of the architect. They could not be held responsible for any delay because of this item which was not acceptable to PUB. On the basis that the work, principally the water supply, was not completed up to the date he deposed to his affidavit, the first defendant claimed that as at 16 Oct 95 the plaintiffs were liable to the first defendant in the sum of $231,200 as liquidated damages which continued to run so long as the water tank was not built in accordance with PUB requirements.

32. The first defendant then averred that the plaintiffs had carried out certain work in an unworkmanlike manner and had supplied materials which were inferior and/or unmerchantable quality and/or unfit for the intended purpose. He referred to the list of defects as at 4 Aug 95 and alleged that the cost of rectification of the internal defects was $137,130.00, according to a quotation from M/s Allegiance Building Services.

33. It was in those circumstances that he instructed his solicitors to call on the guarantee. He also alleged that the first affidavit of Wong Chun Weng accordingly had misled the court at the ex-parte hearing.

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

34. As for the plaintiffs' claim of $229,417.03 the first defendant pointed out the legal position that in the absence of the architect's certificate no sum was due under the contract. In this instance, he was long on technicalities and short on the material evidence. There was no hint that the architect had terminated his services because of non-payment or, at the least, disputes over his fees. Nor was there any indication that in view of the termination of the services of the architect no certificate would be forthcoming from the architect. In any case, the first defendant went on to contend that his claims for liquidated damages and defects totalled "at least $368,330.00" which exceeded the plaintiffs' total claim of $249,626.56. Later, in the course of the adjourned hearing, he exhibited the valuation of Kenneth Jones who valued the defects and incomplete items at $259,040.00.

Conclusion

35. Having considered all the evidence, I was driven to the conclusion that evidence was strongly suggestive that the conduct of the first defendant from first to last was most unfair and it was against the court's conscience to have allowed him to insist on his pound of flesh. Plainly he could not be allowed to get at the money and add insult to injury until trial. There were strong evidence that he would postpone meeting his financial commitments by tactics of all sorts. The way he drew his cheques and the delays in his payments were legendary and habitual, if one took into account the fact that he has the unusual hallmark of being the subject of bankruptcy notices and suits for defaults in meeting his commitments. Although the Temporary Occupation Permit had been issued and he and his family had been in occupation since May last year he claimed it was not in a "liveable condition". The claims for defects and uncompleted items kept on escalating. He interfered with the work of the architect who had no choice but to terminate his services. In consequence, the

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

plaintiffs were not paid for the work done and materials supplied which formed the items under their 9th progress claim which up to the date of hearing was not dealt with and disposed off. The first defendant even pressurised the architect to withdraw his 8th Certificate. The architect had four outstanding invoices for his fees relating to this project which were not settled; the architect was too gracious to elaborate.

36. One of his major complaints was that he was not supplied the utilities by PUB, which parties used as a fact to define "practical completion". On closer examination, the unacceptable tank by PUB had nothing to do with the plaintiffs who built it in accordance with the drawings, a fact which was never disputed. They suggested building an additional tank and when they attempted to do so they were accused of trespassing by him!

37. The overall picture was this. The first defendant and his family was and had been installed in the 2 storey detached bungalow since May 95. The plaintiffs had not been paid or had not had the benefit of the use of nearly 30% of the contract sum. The evidence strongly suggested that it was the plaintiffs' misfortune to have contracted to build a house for a person such as the first defendant. The defects were identified by a party requested by the first defendant and on that list the valuation of Lim Kah Soo was only $26,158.70. These defects, in ordinary circumstances, would have been attended to by the plaintiffs during the defects liability period but for the obduracy of the first defendant. I am bound to observe that the claims of the first defendant for liquidated damages and for defects and uncompleted items appear to be wholly disproportionate, looking at the contractual sum and all the extraordinary circumstances of this project where the owner/employer indulged in a number of proven tactics to delay payments when they fall due.

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

LAI KEW CHAI

< Judge >

Singapore,

11 July 1996.

Lai Kew Chai J

Hee Theng Fong with Doris Lee [Hee Theng Fong & Co] for the plaintiffs
Raymond Chan with Tan Joo Seng [Chan Tan & Partners] for the first defendant
Tan Lee Cheng [Lee Bon Leong & Co] for the second defendant

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