

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1998] SGHC 215

Suit 1222/1996

Between

Leye Systems Pte Ltd

... Plaintiff

And

D-Systems Pte Ltd (formerly
known as Amcol Building
Supplies Pte Ltd)

... Defendant

GROUND OF DECISION

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**Leye Systems Pte Ltd v D-Systems Pte Ltd (formerly known as
Amcol Building Supplies Pte Ltd)**

[1998] SGHC 215

Suit 1222/1996
Judith Prakash J
29 June 1998

1 **Judgment:**

2 **Cur Adv Vult**

3 1. This dispute arises out of building works at a building project known as the Pontiac Marina Project. The main contractor appointed for the construction of the building was Messrs Dragages et Travaux Publics (S) Pte Ltd ('DTP'). DTP awarded the defendants a sub-contract for the supply and installation of false ceilings at the office and retail blocks of the construction. The defendants in turn sub-contracted this work to the plaintiffs.

4 2. The plaintiffs started work in late 1994 and remained at the site until the end of September 1995 by which time they had completed about 90% of the work relating to the office block and a substantial portion of the ceilings for the retail block. The plaintiffs claim that the defendants still owe them \$588,947.08 for the work which they did. The defendants take issue with the plaintiffs' account and allege that, in breach of the sub-contract, the latter failed to complete the work in consequence of which the defendants had to do so and

thereby suffered loss or damage. The defendants counterclaim the sum of \$494,923.16 alternatively damages of \$300,000 for loss of profits.

5 Background

6 3. The plaintiffs' project manager for the Pontiac Marina Project was one Mr Gordon Sim Siam Chye. He had actually been instrumental in the setting up of the plaintiff company as prior, to its establishment, he had been working in the construction industry for 17 years and had specialised in roofing systems. Some time in October 1993, the defendants approached Mr Sim for help in obtaining a contract from DTP in relation to the false ceilings at the project since they themselves lacked the technical expertise and experience in handling construction works of the scale and magnitude required. In about June 1994, it was confirmed that the sub-contract for the installation of the ceilings would be awarded by DTP to the defendants (although the actual letter of award came out considerably later) and thereafter the defendants further sub-contracted the work to the plaintiffs. The basic arrangement was that all the work would be done by the plaintiffs while the defendants would be the financiers.

7 4. Under the main contract between the defendants and DTP, the defendants were to be paid a lump sum of \$2,480,000 plus GST for the main works. They would get extra for any variations ordered subsequently. The sub-contract between the defendants and the plaintiffs provided for a fixed lump sum sub-contract price of \$2,180,000 (exclusive of GST) being 12% less than the lump sum under the main contract. Under the terms of the sub-contract, all materials required for the works at the project were to be supplied and paid for by the defendants. The costs of these plus a three per cent service charge would be deducted from the lump sum price. It was agreed that the defendants' profit

margin would be maintained at 12% throughout the term of the contract and this would be reflected in the profit to be made under any variation works which DTP might order. It was also agreed that the lump sum contract would be apportioned as follows: 40% for labour costs (ie the services provided by the plaintiffs) and 60% for materials.

8 5. The sub-contract further provided for a downpayment of 10% of the 40% labour costs to be payable to the plaintiffs upon confirmation of the sub-contract. The balance was to be paid through interim progressive claims submitted as the work went on. It was also stated that 60% of all payments approved would be deducted for materials supplied and 10% would be deducted as retention monies. The deduction of retention monies was subject to an overall limit of five per cent of the contract price. Half of the retention monies was to be released upon the satisfactory completion of the total work and the other half would be released after the expiry of the maintenance period of 12 months.

9 6. Two provisions of the sub-contract should be quoted. First, in relation to the progress claims, it is stated:

‘Submission of Progress Claims must be on or before 15th day monthly, by hand to our Site Co-ordinator. Payment will be made to you [ie plaintiffs] 30 days of approved claim except for the first claim which will be paid to you after 60 days of submission of claim.’

10 Secondly, the paragraph under the heading ‘Scope of Works’ reads:

‘As per Main Contract Letter of Award, Ref. JPLF/PWi/SW/ml/4682/94 Vol 1.2 special conditions except/otherwise stated in this Letter of Award.’

11 7. The plaintiffs duly started work. Their first progress claim to the defendants was submitted on 17 November 1994, their second on 28 February

1995 and thereafter claims were submitted monthly until 1 December 1995. In the interim, various difficulties were encountered during the works. The plaintiffs ascribed these difficulties to the fact that the defendants had been dilatory in paying for the materials needed and this had resulted in either late delivery or no delivery at all of such materials. As a consequence, the plaintiffs said, their workers were kept idling at the site with little to do. There are several letters in the bundles (starting from March 1995) containing the plaintiffs' frequent requests to the defendants to ensure prompt delivery of materials by making prompt payment and which indicate that the works were being adversely affected by reason of lack of materials.

12 8. In April 1995, the plaintiffs also complained that they had not yet received payment of their monthly claim for the month of February 1995. They stated that they had expected payment to be made within 30 days and that they urgently required payment if the works were to proceed on site. This complaint was repeated on 13 May 1995 and 16 May 1995. In a letter dated 31 May 1995, the plaintiffs complained that they were faced with significant numbers of workers being absent from the site because of non-payment. They asked for immediate payment. In court, the plaintiffs' stand was that because of the defendants' delays in meeting their progress claims they had faced low worker morale, had been unable to maintain a sufficient work force for the works, and had finally had to give up the project. The defendants ascribed the plaintiffs' difficulties to their own lack of capitalisation (the plaintiffs' paid up capital is only two dollars) and contended that the plaintiffs did not have the financial muscle which was needed to sustain the work.

13 9. By 1 June 1995, the plaintiffs had put in five progress claims with a total accumulated value of \$683,805.89. The plaintiffs' fifth progress claim

dated 1 June 1995 showed that of the total claim of \$683,805.89, the plaintiffs calculated \$186,170.12 as being due to them. They derived this figure by taking 40% of the total progress claim as the labour costs. This worked out to \$273,522.36. The plaintiffs then deducted from that amount the sums of \$27,352.24 being the ten per cent retention monies and the sum of \$60,000 which they said they had received as payment from the defendants. An examination of this progress claim shows the areas of disagreement between the plaintiffs and the defendants. First, the plaintiffs did not deduct the defendants' profit of 12% from the total progress claim. Secondly, in May and December 1994, the defendants had paid the plaintiffs sums totalling \$85,000 as a deposit for the works. No part of this deposit was credited in the progress claim. The plaintiffs gave the defendants credit only for the sum of \$60,000 which the defendants had paid them on 16 May 1995.

14 10. Even if the plaintiffs' calculation was correct, the amount due to the plaintiffs as of 1 June was not \$186,170.12. This is because the contract provided that payment was due only 30 days after approval. One of the issues in this trial is whether the term '30 days of approved claim' meant 30 days after the defendants' quantity surveyor accepted the plaintiffs' claim or 30 days after DTP issued a certificate approving the works. But even if the former interpretation, which is the plaintiffs' interpretation, is accepted, since the fifth progress claim was only submitted on 1 June 1995, the whole amount thereunder would not be due until 1 July 1995 and as at 1 June the amount due would be the amount representing the work done at the time of the previous progress claim (though as the fourth claim was submitted on 9 May the amount would have been due on 8 June). If the fourth progress claim is calculated in the same way as the plaintiffs calculated the fifth progress claim, then the amount due under it was 40% of \$453,494.95 ie \$181,397.98 less ten per cent retention

ie \$18,139.80 which would give \$163,258.18. The defendants paid \$60,000 on 16 May and a further \$60,000 on 2 June 1995 so that by 8 June 1995, the amount unpaid was \$43,258.18.

15 11. The plaintiffs were not at all happy with the manner in which payments were made. They had received nothing between December 1994 and 16 May 1995 although they had delivered progress claims at monthly intervals from February 1995 onwards. The plaintiffs had a meeting with the defendants on the issue and this resulted in the defendants' letter to the plaintiffs dated 16 June 1995. In that letter, the defendants stated that Mr Sim had informed them that the plaintiffs were not able to carry out the works on the basis of the terms of the contract. The defendants went on that therefore, in order to accommodate the plaintiffs' request and to ensure that the site operations would be smooth thereafter, they were willing to implement some payment changes. First, they would defer until August 1995, the deduction of the 12% that was due to them from payments made by DTP as well as the deduction of the deposit of \$85,000. Secondly, they would defer to a later date the deduction of the three per cent handling charges on the materials supplied. Thirdly, as far as the site operations were concerned, they agreed that payment of up to 40% for the plaintiffs' labour would be 'paid on time at site in accordance with the works specified by' the defendants' quantity surveyor. A calculation of the plaintiffs' claim was attached to this letter and this showed that according to the defendants under the progress claim submitted up to 9 May 1995, the amount claimable by the plaintiffs was \$163,258.18. With the letter, the defendants sent the plaintiffs a cheque for \$43,258.18 and thereby settled all amounts calculated due under the fourth progress on the basis set out in the said letter. The calculation also indicated that the amount due under the fifth progress claim was \$246,170.13 of which \$163,258.18 had been paid and a balance of \$82,911.95 remained to

be settled on the due date of 20 June 1995. This amount was paid by the defendants on 29 June 1995.

16 12. Despite the above discussions and payments, the plaintiffs continued to experience cash flow problems which they ascribed to non-payment by the defendants in accordance with the agreed schedule. The sixth progress claim was submitted on 1 July 1995 and the incremental amount due thereunder by 1 August 1995 was \$172,223.16. The defendants paid \$30,000 on 24 July 1995 and a further \$76,297.03 on 27 July 1995. On 1 August 1995, the plaintiffs delivered their seventh progress claim under which \$156,782.73 was payable. Of this, \$65,926.13 (being the balance due under the July claim) should have been paid by the 1 August itself. The defendants, however, part paid \$20,000 on 17 August and a further \$40,000 on 23 August. The eighth progress claim was delivered on 1 September 1995. The amount due thereunder was \$248,160.78 of which \$96,782.73 should have been paid by the 1 September itself. The defendants made their last payment to the plaintiffs on 5 September 1995 and this was of the sum \$58,508.63, leaving outstanding \$38,274.10 due under the seventh progress claim. The ninth, tenth and eleventh progress claims were submitted on 1 October, 1 November and 1 December 1995 respectively but no further payments were received.

17 13. The difficulties experienced at the work site led the parties to discuss a change in the scope of the sub-contract. These discussions were referred to by the plaintiffs' witnesses as relating to segregation of the works. Mr David Chambers who was a contracts manager of the plaintiff company at the material time and who represented the plaintiffs in any dealings between them and the defendants with respect to the sub-contract works, testified that pursuant to the request of the defendants for segregation of the works sometime in August 1995,

he was involved in joint inspection of the site with the defendants' representatives. The segregation suggested was that the plaintiffs would leave the site and the defendants would take over their work.

18 14. In a letter to the defendants referring to various discussions with them, Mr Chambers confirmed that the plaintiffs would accept the defendants' offer to provide manpower to complete plastering of domes in the retail section. The sum of \$1,600 would be deducted from the works progress payment certificate to cover the defendants' manpower costs. Mr Chambers went on to state that the defendants had proposed two options relating to the completion of the works and that the plaintiffs, having considered these, were prepared to agree to option two. This was that the defendants would complete all works not yet started or near completion in the retail section but that the plaintiffs would complete the works within the office tower and also the works that were currently reaching completion in the retail section.

19 15. The above letter was dated, incorrectly, 10 August 1995 but was actually sent out on 17 August 1995. The next day the plaintiffs sent to the defendants a further proposal in relation to the segregation of the works. This was followed by a meeting on 25 August 1995 and what happened in that meeting was set out in a letter from the plaintiffs dated 28 August 1995. On 7 September 1995, the plaintiffs complained that the defendants had not officially endorsed the agreed segregation works and the terms and conditions thereof. They confirmed that the defendants had, however, deployed manpower and conducted construction activities to various areas of the site in accordance with the agreed segregation of works as stated in the letter of 28 August.

20 16. The defendants' operation manager at the material time was one Mr Leong Ting Boon. He was the main witness for the defendants. His evidence was that in early September 1995 he went down to the site and conducted an investigation of the plaintiffs' works. He found the plaintiffs to be behind schedule. Mr Leong recorded this finding in a letter dated 12 September 1995 to the plaintiffs wherein he added that in order to help the plaintiffs the defendants had no other alternative but to assist the plaintiffs in their work. He also stated that the plaintiffs' quality of work had been poor despite numerous complaints from DTP and the defendants themselves and that whilst the defendants had agreed on work segregation as stated in the plaintiffs' letter of 28 August 1995, they did not agree to the plaintiffs' proposals as to the way in which the contract sum should be broken down between the parties. This would only be agreed when the work had been fully completed and handed over to DTP.

21 17. On 14 September Mr Leong went down to the site again. He found that there were defective and uncompleted works. He then held a meeting with Mr Chambers and showed him these works. Mr Chambers made no comment. After the meeting, Mr Leong wrote to the plaintiffs stating that in view of the plaintiffs' lack of co-operation and constant threat to abandon work, the defendants had no alternative but to take over the remaining works at the retail and podium areas. He asked the plaintiffs to hand over all materials to the defendants the next day and then hand the site over within three days.

22 18. The plaintiffs wrote to the defendants around the same time. Their letter is dated 14 September but refers to a meeting with the defendants on 15 September and it is therefore not clear exactly when it was sent out. The letter does not refer to the defendants' complaints. It simply sets out various terms

relating to the segregation of the works which the plaintiffs considered had been agreed to by the defendants as well as a table of interim payments which had to be adjusted between the parties. The plaintiffs asked the defendants to sign this letter but the defendants did not do so. The plaintiffs sent the defendants a further letter on 25 September and, among various complaints, stated that they were disappointed with the defendants' inability to settle the segregation of the works. The letter also recorded that the defendants had asked the plaintiffs to supply workers to do work in the area which the defendants were to take over. They noted also that they had not been paid for the month of September.

23 19. The parties were not able to come to any further agreement and after September 1995, the plaintiffs no longer went to the site. Their stand is that they stopped work pursuant to an agreement with the defendants on segregation since the defendants were not able to pay them promptly. The defendants' stand is that the plaintiffs simply abandoned the works and that they had to take over and as a result incurred costs.

24 The plaintiffs' claim

25 20. The figure of \$588,947.08 which the plaintiffs claim contains two components: a figure which represents the unpaid balance of the work which the plaintiffs did and a sum for 'backcharges'. The term 'backcharges' which I first came across in this case refers in fact to the extra expenses which the plaintiffs say that they incurred by reason of breaches of contract on the part of the defendants. It is in the nature of a claim for special damages.

26 21. The plaintiffs' final statement of account to the defendants shows how they derived the amount due to them. For clarity this statement is reproduced below.

27 **'Statement of Account**

1 FINAL WORK DONE			
A Office Tower	\$1,630,438.11		
B Retail [Area]	\$377,697.86		\$2,008,135.97
2 VARIATION			
A Office Tower	\$114,301.90		
B Retail [Area]	\$31,395.04		\$145,696.94
*Sub-total 1			\$2,153,832.91
LESS:			
3 AMCOL PROFITS (12%)			(\$258,459.95)
*Sub-total 2			\$1,895,372.96
ADD:			
4 BACKCHARGES FOR ADDITIONAL COSTS INCURRED			
A Workers overtime wages	\$60,888.00		
B Contract and Project Managers costs	\$72,000.00		
C Others expenses	\$52,209.66		\$185,097.66
*Sub-total 3			\$2,080,470.62
GST 3%			\$62,414.12
*Sub-total 4			\$2,142,884.74
LESS:			
6 FINAL MATERIALS &			

OTHERS PURCHASES			
A Amcol's invoices	\$46,456.09		
B Debit/Credit Note (Materials)	\$424,528.39		
C Debit/Credit Note (Armstrong)	\$456,281.08		
D Debit/Credit Note (Other expenses)	\$70,696.31		(\$997,961.87)
7 PAYMENT RECEIVED			(\$555,975.79)
AMOUNT DUE TO PLAINTIFFS			\$588,947.08'

28 22. The plaintiffs' contention is that they are entitled to judgment in, at least, the sum of \$213,277.64, based on an admission in the pleadings. In paragraph 10 of their defence and counterclaim filed on 26 July 1996, the defendants set out a copy of their own final statement of account. The first portion of this states:

29 'Particulars

WORK DONE (SUBJECT TO THE DEFENDANTS' CLAIMS)		
i) Retail [Area]	\$ 140,126.23	
ii) Office Tower	\$1,500,764.01	\$1,640,890.24
VARIATION APPROVED (SUBJECT TO THE DEFENDANTS' CLAIMS)		
i) Retail [Area]	\$ 114,276.70	
ii) Office Tower	\$ 22,996.53	\$ 137,273.23

* PROVISIONAL SUB TOTAL 1	\$1,778,163.47'	

30 23. The plaintiffs say that this pleading is a clear admission that the monetary value of the work done by the plaintiffs amounted to at least \$1,778,163.47. They made a submission that based on the pleaded positions of the parties, the contested difference came to \$375,669.44 and they were entitled to judgment for the uncontested difference of \$213,277.64. Whilst there is basis for the legal submission, my conclusion on the figures is somewhat different from that of the plaintiffs.

31 24. I accept the submission that the defendants are bound by their pleadings. It is significant that the pleading was based on the final statement of account which the defendants themselves prepared after all the works had been completed and after they had had a chance to inspect the works. Further, the defendants used the final statement of account as the basis for the claim that they mounted against the plaintiffs. This was first made known to the plaintiffs when the final statement of account was incorporated in the defendants' solicitors' letter to the plaintiffs dated 6 May 1996. It is also material that this letter was sent out after the defendants had received DTP's own final account dated 19 March 1996 and signed by the defendants on 25 March 1996. The defendants did not lead any evidence to suggest that their solicitors' letter was not based on instructions or was otherwise in error. On the contrary, the defendants' witness Mr Leong stated that he agreed with the final accounts prepared by the defendants' employee, Mr Tiong.

32 25. The above being the case, and the defendants having thereafter repeated the admission in the final account by setting it out in their defence and counterclaim, the defendants must be taken to have admitted that the value of the works done by the plaintiffs at the site amounted to at least \$1,778,163.47. They cannot resile from this admission.

33 26. I do not, however, think that the same holds for an earlier admission made by the defendants. In a letter dated 28 December 1995 the defendants' contract manager stated that the monetary value of the work done by the plaintiffs was \$1,979,725.69. Whilst that admission might have told against the defendants initially, subsequently they corrected their position when they prepared their final statement of account and it was clear to the plaintiffs from 6 May 1996 that the figure which the defendants had ultimately accepted was \$1,778,163.47. The plaintiffs in their own statement of claim filed in July 1996 did not in any way rely on the defendants' earlier letter of 28 December 1995. This must have been because they realised that it was an interim position estimated before final assessment. In my judgment, the material admission on which the plaintiffs can rely is that made in the pleadings and the final statement of account.

34 27. On the basis that the total value of work done by the plaintiffs amounted to \$1,778,163.47, then according to my working, the defendants would still owe them an additional \$ 57,789.71. This is derived as follows.

35 28. I think that the defendants owe the plaintiffs far more than
\$57,789.71. The evidence adduced in the case establishes, on the balance of
probabilities, that the work done by the plaintiffs exceeded the figure admitted
by the defendants although the plaintiffs were not able to establish the total
figure which they had put in their statement of account. The evidence I refer to
consists of the ‘Sub-contractor Payment Certificates’ which DTP issued in
respect of the works after each progress inspection. These certificates constitute
independent evidence of the work done on site, month by month.

36 29. It would be recalled that whilst there was some segregation of works
in August/September 1995, the plaintiffs’ labourers left the site entirely at the
end of September. DTP’s certificate no. 10 issued for the month of September
1995 showed the accumulated value of the work up to the end of that month to
be as follows:

37 (1) Retail Area \$ 432,512.52

38 (2) Office Tower \$1,520,387.99

39 (excluding basement)

40 (3) Retail Area - variations \$ 16,349.00

41 (4) Office Tower - variations \$ 51,308.16

42 The plaintiffs claimed \$1,630,438.11 for the office tower. This figure exceeds the value given by DTP but this was an adjusted figure. At the beginning of October 1995, the plaintiffs had claimed only \$1,530,137.20 for work done up to the end of September and, although they did no further work on the site thereafter, in their next claim dated 1 November 1995, they valued the work for the office tower at \$1,652,149.23 which was a higher figure than that ultimately included in their statement of account and their statement of claim. In these circumstances, I think the correct figure to be accepted for work done up till end September 1995 must be that given by DTP after inspection.

43 30. As regards the work done in the retail area, DTP assessed the monetary value of that work as \$432,512.52 up to end September 1995. The plaintiffs' claim was for \$377,697.86. This amount was claimed consistently by them from October 1995 right through to their pleadings. The plaintiffs' claim appears to be consistent with what happened and their figure of \$377,697.86 also reflects the proportion of completed work at the retail section at the time the plaintiffs stopped work. According to their witnesses, 45% of the total amount of work to be done on that area was completed when the plaintiffs left the site. The plaintiffs' claim amount was also about \$54,000 less than the total amount of work actually completed up to the end of September as certified by DTP and this difference is consistent with the implementation of the segregation agreement which resulted in the defendants taking over portions of the work on the retail section during that month.

44 31. The defendants' initial challenge to the sum claimed by the plaintiffs was based on their estimate in the final accounts that the work done in the retail area was valued at only \$140,126.23. They did not, however, bring Mr Tiong, their employee who had prepared the statement, to testify as to how he had

derived that figure. In their final submissions, the defendants did not rely on that figure either. Instead they sought to persuade me to disregard it and instead reduce the value of the plaintiffs' work at the retail area by a sum of \$297,337.74. Their argument was that they had had to demolish work to this value done by the plaintiffs at the retail area because of poor finish and workmanship on the part of the plaintiffs and therefore the plaintiffs should not be paid for such demolished work. The plaintiffs' witnesses admitted that certain sections of the relevant work had been demolished and replaced but said that this was due to a change in the design and therefore the plaintiffs should not be penalised by a reduction in the amount due to them. I accept the plaintiffs' evidence on this point. Their witnesses were the persons who were present at the site and who knew what the designs were and what work had to be done. They also produced drawings showing the original design and photographs indicating the differences in the finished work. The defendants' witness Mr Leong did assert that he was present at the site almost every day but he made no positive assertion that the plaintiffs' works had been demolished only because of bad workmanship and that there had been no design change at all in the replacement of the works. The defendants were not able to substantiate the change in their position and I therefore accept the plaintiffs' figure of \$377,697.86 for the retail area. It should be noted that the defendants themselves in asserting that they had demolished work worth \$297,337.74 admitted that work of at least this value had been done by the plaintiffs in the retail area.

45 32. As regards the variation orders, the plaintiffs claimed a total of \$145,496.94 made up of \$114,301.90 for the office tower and \$31,395.04 for retail area. The defendants admitted in their final statement of account that the plaintiffs had done variation works totalling \$137,273.13 although their breakdown was different in that they valued the office works at \$22,996.53 and

the retail works as \$114,276.70. According to DTP's statement for September 1995, the variation works to the office tower were worth \$51,308.16 and the retail works were valued at \$16,349. Their estimation seems to support the plaintiffs' valuation to the extent that more of the variation work was done to the office tower rather than to the retail area. I find it impossible to reconcile the three sets of figures and have concluded that in this area I must be bound by the defendants' admission that the value of the variation works totalled \$137,273.13 (disregarding their breakdown which was probably an error in allocation).

46 33. As a result of the above, I have assessed the total proved value of the plaintiffs' works as being \$2,035,358.98 (ie \$1,520,387.99 + \$377,697.86 + \$137,273.13). This means that the amount which is still due to the plaintiffs is derived as follows:

Final work done	\$2,035,358.98
Less:	
Defendants' profit at 12%	(\$ 254,353.34)
	\$1,781,005.64
Plus:	
3% GST	\$ 53,430.17
	\$1,834,435.81
Less:	
(a) purchases made by defendants	(\$ 997,961.87)
(b) payments received from defendants	(\$ 555,975.79)
	\$ 280,498.15

47 34. From paragraph 33 above, it would be noted that the plaintiffs gave the defendants credit for the sum of \$997,961.87 being purchases made by the defendants on the plaintiffs' behalf. The defendants contended in their counterclaim that in fact they had paid more money on behalf of the plaintiffs and it is convenient for me to deal with this contention here as it affects the

amount recoverable by the plaintiffs. The sum of \$997,961.87 is made up of four components. The second component reads: 'B. Debit/ Credit Note (Materials) \$424,528.39'. The invoices produced in the plaintiffs' bundle, however, showed the value of the materials supplied by the defendants amounted to \$456,741.53. The fourth component of this section reads: 'D. Debit/Credit Note (Other Expenses) \$70,696.31'. The invoices produced in the plaintiffs' bundle showed these other expenses to total \$72,627.50. The defendants have thus spent \$32,213.14 more for materials and \$1,931.19 more for the other purchases than the plaintiffs have given them credit for. These additional amounts have to be deducted from the \$280,498.15 which I have found to be due to the plaintiffs in paragraph 33 above. After such deductions have been made, the amount due is \$246,353.82.

48 35. The next component of the plaintiffs' claim, that of \$185,097.66 for backcharges, is made up of three parts. First, they claim \$60,888 in respect of overtime wages which they had to pay their workers. Secondly, an amount of \$72,000 is claimed for contract and project managers costs and finally, \$52,209.66 is claimed as 'other expenses'. In my judgment the plaintiffs have not been able to establish these charges.

49 36. First, as far as workers' overtime wages are concerned, in order to claim the same the plaintiffs have to establish that they would not have incurred such charges except by reason of the defendants' default in prompt delivery of the materials for installation. It is well known that in the construction business it is usual for workers to work overtime in order to complete the construction works on schedule. The fact that the plaintiffs incurred overtime charges does not therefore automatically mean that these charges arose from any default on the part of the defendants.

50 37. In this instance, Ms June Leng, a director of the plaintiff company and the person in charge of its administration, admitted in court that she had no records to substantiate the plaintiffs' allegation that workers had to work overtime because of delays in delivery by the defendants leading to low morale and a number of workers absenting themselves from the site. Without records to show that during normal working hours the plaintiffs' workers could not work because there were no materials to install and that therefore these workers had to be employed overtime when the materials arrived the plaintiffs cannot justify their assertion that the overtime charges must be borne by the defendants.

51 38. The second item of the backcharges sought is even less justifiable. It turned out that the sum claimed was made up of the wages of Mr Chambers and Mr Sim over a 12 month period. These persons were expressly employed by the plaintiffs in order to perform the sub-contract works. Their salaries were necessary expenses that the plaintiffs had to bear regardless of whether the defendants were in breach of contract or not. The plaintiffs should have factored the cost of these two men into their sub-contract price and have no basis to claim that cost as backcharges.

52 39. The final item 'other expenses' was made up of meals purchased by the plaintiffs for their workers and the cost of preparing design shop drawings. The plaintiffs were not able to establish that they purchased meals because of the defendants' default as they had no records to indicate the circumstances in which such purchases were made. The design shop drawings were within the scope of the plaintiffs' work as described in the sub-contract and accordingly the costs of preparing the same is part of the lump sum price for the sub-contract.

53 40. The defendants' original objection to the plaintiffs' claim for backcharges was on principle and not on quantum. The defendants said that the contract price was a lump sum price and therefore the plaintiffs could not claim anything more from them. I agree with the plaintiffs that this objection is not sustainable since the claim for backcharges is actually a claim for damages for breach of contract and an agreement on a lump sum price does not mean that the only amount that is payable is that price even though the paying party has by reason of its breach of contract caused the innocent party to suffer monetary loss.

54 41. The plaintiffs also argued that since the defendants had objected to the backcharges on principle only, once I decided that the same were claimable, the defendants would be precluded from challenging the quantum of the charges. Whilst the defendants' pleadings were deficient in not challenging quantum, they did not go so far as to admit the amounts and therefore I do not consider that the court is bound to accept the plaintiffs' claims without proof. In any case which comes for trial before the court, the court is entitled to require the claim to be proved on a balance of probability before entering judgment even if the defendant does not appear at all. In this case, the plaintiffs have not discharged the onus upon them in relation to their claim for backcharges.

55 42. My conclusion is, therefore, that the plaintiffs have a claim against the defendants for the sum of \$246,353.82 being the balance due to them for the work which they did under the sub-contract. The amount of the judgment which should be entered for the plaintiffs depends, however, on my conclusions on the defendants' counterclaim to which I now turn.

56 The defendants' counterclaim

57 43. The nub of the defendants' counterclaim depends on findings as to the defendants' payment obligations under the sub-contract. The plaintiffs' position is that the defendants were always late and this led to an agreed segregation in the works and their finally leaving the site. The defendants say they made payment on time and that the segregation was forced on them by the plaintiffs' inability to do the work promptly and thus they are entitled to claim losses incurred as a result of having to complete the works.

58 44. In relation to payment various questions arise. First, at what stage were the defendants entitled to take credit for the deposit of \$85,000 paid to the plaintiffs? Secondly, whether the valuation of the plaintiffs' works as indicated in their second and subsequent progress claims was subject to the approval of the main contractor before payment was to be made to the plaintiffs. Thirdly, at what point of time were the plaintiffs entitled to payment on their progress claims?

59 45. Resolution of the above questions depends on the construction of the sub-contract. The relevant terms were stated under the heading 'Conditions of Payment'. This read:

'A downpayment of 10% on 40% for labour of the contract value will be payable to you upon confirmation of this contract.

The balance will be paid through Interim Progressive Claims.

All payments will be subject to a 60% for materials and a 10% subject to maximum of 5% retention. Half of the retention will be released to you upon the satisfactory completion of the total contracted work and the other half will be released after the expiry of the maintenance period (12 months).

Submission of Progress Claims must be made on or before 15th day monthly, by hand to our Site Co-ordinator. Payment will be made to you 30 days of approved claim except for the first claim which will be paid to you after 60 days of submission of claim.'

60 46. Construing the above, it appears to me that the first progress claim was to be submitted to the site co-ordinator before the 15th of the month and time for payment would begin to run from the date of submission. The defendants had the option to make payment any time within 60 days of submission of the first progress claim, whether approved or not. Non-payment within this period was a breach of payment obligation. In this case, the first progress claim was submitted on 17 November 1994 and payment of the same was therefore due on 16 January 1995. By that time the defendants had paid the plaintiffs \$85,000 as the ten per cent downpayment and if this downpayment was to be set off against the progress claim, then the progress claim had been paid in full. However, if the ten per cent downpayment was to be ignored, then the defendants were in breach of contract on 16 January 1995 and remained in breach until 16 May 1995.

61 47. The sub-contract did not state expressly how the downpayment was to be treated in relation to the progress claims unlike the main contract which provided that the deposit thereunder was to be repaid at the rate of 15% to be deducted from each of the progress payments that were to be made to the defendants. The plaintiffs' stand was that the downpayment was to be deducted only at the end of the work whereas the defendants contended that it should be deducted progressively from each claim. I agree with the plaintiffs' stand. The sub-contract is very specific about what amounts are to be deducted from payments to the plaintiffs. This is shown not only in the section 'Conditions of Payment' reproduced above but also in the final paragraph of the section entitled 'Lump Sum Price' and in the two paragraphs under the section entitled 'Options'. If it had been intended that the downpayment should be deducted progressively from the progress claims, this would have been stated expressly in the same way as all the other deductions.

62 48. The next issue arises from the interpretation of the provisions relating to the second and subsequent progress claims. According to the sub-contract submissions of these claims had to take place before the 15th day of each month to the site co-ordinator. However, the defendants were not obliged to make payment of the amount as claimed by the plaintiffs, rather they were only obliged to make payment of the amount approved. Time for payment of the second and subsequent progress claims begins to run from the date such claim is approved and must be made within 30 days of the approval. If payment is withheld after the expiry of 30 days from the date of the approval, the defendants would be in breach of their payment obligations.

63 49. The grey area relates to the phrase ‘approved claim’. The defendants submitted that this phrase, to the knowledge of the parties, referred to progress claims being approved by DTP and that the 30 days ran from the date of that approval. In paragraph 3 of their amended reply, the plaintiffs pleaded that payment was to be made ‘a reasonable time after submission of progressive claims’. In his evidence, however, the plaintiffs’ Mr Sim contended that the time for payment began to run from the date of a joint site inspection made by the plaintiffs’ representative, Mr Chambers, and the defendants’ quantity surveyor.

64 50. I agree with the defendants’ submission that quite apart from Mr Sim’s version contradicting the plaintiffs’ pleading, it cannot be correct. The plaintiffs did not tender any document showing the dates when the joint site inspections took place. Further, Mr Chambers had stated in his affidavit that the joint site inspection sometimes took place even before a progress claim was submitted. Accordingly, if the approval was to come by way of a joint site inspection it would be tantamount to saying that approval of a progress claim could take place even before submission of the claim. In cross-examination, Mr

Sim admitted that when the joint site inspection was carried out, the particulars of the monetary value for the work done were not available to the parties' representatives. Obviously, in the sub-contract the phrase 'approved claim' must refer to the monetary value of the work done that had to be approved. This requirement is absent in respect of payment of the first progress claim. The only documents that are dated and pertain to approval of the monetary value of the work done are the certificates of payment to sub-contractor issued by DTP. The contents of those certificates indicate that a progress claim has to be reviewed and verified by a number of personnel before it is approved and approval is not simply achieved by strolling through the building without detailed particulars of the work done or the monetary value of the same. I therefore agree with the defendants' submission that the approving authority for the monetary value of the plaintiffs' second and subsequent progress claims was DTP, the main contractor.

65 51. The above holding is also supported by the fact that if DTP rejected any work the defendants would not be paid for it and the plaintiffs who actually carried out the work could not expect payment. From the beginning the plaintiffs were aware that their sub-contract was back-to-back with the contract awarded to the defendants (Mr Sim would, in fact, have me believe that the defendants only got their contract because of his assistance) and they knew the procedures for submission and approval of claims by the defendants. In using the phrase 'approved claim' in their sub-contract, the plaintiffs must be taken to have been referring to the approval of DTP and not to the approval of the defendants. It is also apparent from the correspondence that although the plaintiffs complained several times about delays in payment, at no time before various concessions were made by the defendants, did the plaintiffs assert that their claims had been approved by the defendants' representative and that the time limit for payment

ran from such approval. In fact, the time limit for payment ran from the approval of the main contractor.

66 52. The parties' understanding of the sub-contract was also reflected in the defendants' letter of 16 June 1995 which referred to a meeting between Mr Sim and Mr Tiong wherein Mr Sim had informed the defendants that the plaintiffs could not carry out the works 'as based on the terms set out in the award'. As a result, the letter went on to make some modification to the payment terms. Implicit in this letter was the recognition that under the sub-contract, progress payments had to be approved by a third party rather than the defendants before payment. When Mr Sim was asked about this in cross-examination, he asserted that he had never made the admissions set out in the defendants' letter but he had to concede that although he had read the letter and knew what the defendants were saying the plaintiffs had never written to refute their statements. It should be pointed out that on 28 June the defendants sent the plaintiffs a letter that was identical to that of 16 June except for the amendment of one word. The plaintiffs did not respond to this either.

67 53. I have come to the conclusion that under the sub-contract the defendants were obliged to pay the plaintiffs in respect of their second and subsequent progress claims the amount of such claims as approved by DTP and that such payments were to fall due 30 days from the date of such approval. Further, the downpayment was not to be deducted from payments under the second and subsequent progress claims. This was the original understanding on which the parties worked and it was only on 16 June 1995 that this position was changed pursuant to the defendants' letter of that date.

68 54. If the payment situation is analysed according to the original understanding, then as stated earlier, the plaintiffs' first progress claim dated 17 November 1994 should have been paid by 16 January 1995. The plaintiffs valued the work done to that stage as being \$31,883.76. They deducted ten per cent as retention monies and claimed payment of \$29,556.24. This calculation was incomplete. The plaintiffs should also have deducted 12% as the defendants' profit (ie the difference between the sub-contract lump sum price and the lump sum price chargeable by the defendants to DTP) and claimed 40% of that amount as their labour charges. The other 60% was the proportion due for materials which would be paid by the defendants on the plaintiffs' behalf. Calculating their claim in this way, the amount due to the plaintiffs on 16 January 1995 was \$10,403.80 (or \$10,715.91 inclusive of GST). Up to 16 May 1995 this amount was not paid and the defendants were therefore in breach.

69 55. On 28 February 1995, the plaintiffs put in their third progress claim and asked for payment of \$156,664.09 which included the amount due under the second progress claim. DTP issued its payment certificate no. 3 for the month of February 1995 on 27 March 1995. The amount approved for payment was \$166,097.42 and this meant that after the various deductions referred to above had been made a sum of \$52,619.66 was due to the plaintiffs. This amount was due to the plaintiffs 30 days after DTP's certificate ie on 27 April 1995. The defendants failed to make payment on the due date.

70 56. The plaintiffs' third progress claim was submitted on 30 March 1995. Under DTP's payment certificate dated 19 April 1995, the new accumulated approved amount was \$223,416.10 whilst the approved amount for March 1995 itself was \$57,318.68. This meant that the additional amount due to the plaintiffs 30 days later ie on 19 May 1995 was \$18,348.64. Thus on

20 May 1995, the total amount due to the plaintiffs (ie under paragraphs 53, 54 and 55) was \$81,372.10 excluding GST. On that date, the defendants paid the plaintiffs \$60,000 leaving a balance of \$21,372.10. This was covered when the defendants paid the plaintiffs a further \$60,000 on 2 June 1995. By 2 June therefore, the defendants were no longer in breach.

71 57. In the meantime, on 9 May 1995, the plaintiffs had submitted their fourth progress claim. This was approved by DTP on 16 June 1995 and the additional amount that became payable to the defendants was \$230,078.82. Of this, \$72,888.97 was due to the plaintiffs. Under the original scheme, this would have been payable on 16 July 1995. However, the position had changed in the interim. In the defendants' letter of 16 June, the defendants had agreed as far as site operations were concerned to pay 40% for the plaintiffs' labour on time at the site in accordance with works as specified by their quantity surveyor. They also agreed that they would defer deduction of the 12% due to them until August. The plaintiffs too recorded the change in the payment arrangements. Their letter of 7 July 1995 confirmed that as previously agreed by the defendants, payment to them was to be made 30 days from the date on which they submitted their claims to the defendants.

72 58. I will now examine the defendants' payment record in the light of the changed terms. On 15 June, the plaintiffs had already submitted their fifth progress claim dated 1 June. On the changed scenario, this claim fell due for payment only on 1 July. Accordingly, as at 15 June, the plaintiffs were entitled to payment on their claims up to and including the fourth progress claim dated 9 May. The plaintiffs estimated the work done up to then as being worth \$453,494.95. The plaintiffs were entitled to be paid 40% of the balance remaining after deduction of the ten per cent retention monies ie \$163,258.18.

The defendants had paid \$120,000 of this by 2 June and on 16 June itself when they agreed to the change in the payment terms, they forwarded a cheque of \$43,258.18 to the plaintiffs to settle the balance. The defendants were then up to date in payment.

73 59. Under the plaintiffs' fifth progress claim, due for payment on 1 July 1995, the total value of work done was \$683,805.89. This meant that the portion due to the plaintiffs was \$246,170.12. By 16 June 1995, the plaintiffs had received \$163,258.18. On 29 June 1995, the defendants paid them a further \$82,911.95 bringing the total paid up to \$246,170.13. This meant that on 1 July 1995, there were no monies due to the plaintiffs.

74 60. The plaintiffs' sixth progress claim was submitted on 1 July 1995. It was therefore payable on 31 July 1995 and showed work totalling \$1,093,822.99. This meant \$393,776.28 was the plaintiffs' portion. On 24 July, the defendants paid the plaintiffs \$30,000 and on 27 July they paid them another \$76,297.03. By 31 July 1995 therefore, the plaintiffs had received a total of \$352,467.16. The defendants still owed them some \$41,000. The defendants made two payments in August totalling \$60,000. By 31 August when the plaintiffs' seventh progress claim fell due, the defendants had paid \$412,467.16 as against a total of \$474,003.18 due. On 5 September the defendants paid a further \$58,508.63 and this meant that they had short paid the plaintiffs by only \$3,027.39.

75 61. From the above, it can be seen that the defendants were somewhat slow in their payments to the plaintiffs but after May 1995 such delays were not substantial. In fact, I think that the defendants did accommodate the plaintiffs' needs to the best of their ability. Accordingly, there was no justification for the

plaintiffs to first, require segregation of the works and secondly, to stop work altogether. Further, as counsel for the defendants submitted, even if the plaintiffs' activities and finances had been adversely affected by the defendants' failure to supply materials promptly, the plaintiffs never gave the defendants notice that unless the defendants' breaches of contract relating to supply and to prompt payment were rectified they would consider themselves discharged from all further obligations to the defendants. The plaintiffs were thus not entitled to stop work in the way that they did. I consider there to be a lot of force in the defendants' submission that the main reason for the stoppage was under-capitalisation on the part of the plaintiffs and not default on the part of the defendants. Accordingly, I find the plaintiffs to have been in breach of contract when they asked the defendants to take over part of the works and when they later stopped work altogether.

76 62. The next question is what damages the defendants are able to prove they suffered. In their original defence and counterclaim, the defendants claimed the sum of \$494,923.16 which included backcharges by DTP as well as other expenses they incurred in completing the works. At the end of the trial, however, the defendants applied to amend their defence and counterclaim by adding an alternative claim for damages in the sum of \$300,000 being the profit that they would have made had the plaintiffs completed their work in accordance with the sub-contract for the lump sum price specified therein. I allowed this amendment even though it was made at a late stage as I considered that it involved mainly a question of law as to whether the claim could be substantiated and as the defendants were not intending to adduce further evidence to support it. Further, it was clear to me from the evidence that had already been given that the plaintiffs had all along been aware of the terms of the defendants' contract with DTP and had structured their sub-contract on the

basis that the defendants would earn 12% of whatever the plaintiffs charged under the sub-contract. I considered that no prejudice resulted to the plaintiffs' by reason of the amendment since it did not change the basis of the defendants' assertion that the plaintiffs were in breach of contract.

77 63. I will consider each head of damages in turn. First, the backcharges. Most of the sum claimed was not substantiated. As the defendants conceded in their submissions, the only proof of their claim for the backcharges imposed by DTP related to the amount contained in a tax invoice no. 16/95 dated 13 October 1995 issued by the plaintiffs. This invoice showed that the plaintiffs had billed DTP directly for works done to the office tower for the month of September 1995. The value of the works was \$50,000 and the total amount of the invoice (including GST) was \$51,500. In court, Ms Leng admitted that the plaintiffs had received this money directly from DTP but that they had not credited the same to their account with the defendants. Although Ms Leng contended that this invoice related to other works, she had to concede that it bears the same contract number and references as the sub-contract given to the plaintiffs for the project. Therefore I hold that it does relate to the sub-contract works which were, in any case, the only reason for the plaintiffs being on the site. It is also obvious from the face of the document that DTP intended to backcharge this amount to the defendants. This was actually done as shown in the documents attached to the final account which DTP sent the defendants. Any payment which the plaintiffs received directly from DTP in respect of works done to the office tower should have been credited to their account with the defendants. All the more so if these were, as hinted, rectification works. The defendants have been charged by DTP for the amounts so paid and they are entitled to recover the same from the plaintiffs.

78 64. As regards the defendants' claim for \$300,000 as being the loss of profit which they would otherwise have made in respect of this project, whilst I agree with the defendants' stand that if by reason of the plaintiffs' default, they had lost all or any part of this amount they would be entitled to recover the same as the plaintiffs were aware from the beginning of the profit the defendants stood to make from the works, the defendants still have to prove their loss as a matter of fact. They would have to show that it cost them more to complete the works after the plaintiffs left the site than it would have cost them had the works been completed by the plaintiffs themselves. As the cost of the materials concerned was not affected by the plaintiffs' breach of contract, the only additional cost that the defendants would have incurred would relate to employing labour to complete the project. The defendants therefore needed to show that their labour costs exceeded the amount that they would otherwise have had to pay the plaintiffs. The defendants did not, however, establish exactly how much they had to spend in respect of labour and related costs in order to complete the works. Therefore, I am not able to make the necessary calculations as to the defendants' loss, if any.

79 65. The defendants were severely hampered in the substantiation of their counterclaim by their inability to produce witnesses. As far as the counterclaim is concerned, I find that they have only established the sum of \$51,500 as being due to them from the plaintiffs.

80 Conclusion

81 66. In the result, there should be judgment for the plaintiffs in the sum of \$194,853.82 being the amount due to them under paragraph 34 less the amount of \$51,500 which the defendants are entitled to set off against the

plaintiffs' claim. The plaintiffs are also awarded interest on the said sum of \$194,853.82 at 6% per annum from the date of the writ and costs of the claim. As regards costs of the counterclaim, the plaintiffs are awarded 80% of these costs as the defendants were only able to establish a small portion of the amount originally claimed.

82 JUDITH PRAKASH

83 JUDGE

84 SINGAPORE

Judith Prakash J

Manjit Singh with Sharanjit Kaur (Manjit, Samuel & Partners) for the
plaintiffs
James Ponniah (Wong & Lim) for the defendants
