IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1998] SGHC 414

Suit 2118/1997

Between

Four Seas Construction Co Pte Ltd

… *Plaintiff*

And

The Tai Ping Insurance Company Limited
Yeo Hiap Seng Limited

… *Defendant*

GROUNDS OF DECISION

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

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Four Seas Construction Co Pte Ltd v The Tai Ping Insurance Company Limited and Another

[1998] SGHC 414

Suit 2118/1997
Tay Yong Kwang JC
30 December 1998

Judgment :

GROUNDS OF DECISION

1 The application before me was taken out by the Second Defendants to set aside an interim injunction granted on 16 December 1997.

THE WRIT OF SUMMONS

2 On 16 December 1997, the Plaintiffs commenced this action against the Tai Ping Insurance Company Limited ("Tai Ping") as the sole Defendants, stating in the endorsement on the writ that their claim was for a declaration that the call made on 9 December 1997 by Yeo Hiap Seng Limited ("YHS") on the Performance Bond issued by Tai Ping was made fraudulently and for an order that Tai Ping be restrained from making payment to YHS under the said bond.

THE EX PARTE APPLICATION

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3 On the same day, the Plaintiffs took out an *ex parte* application in Chambers for an interim injunction to restrain Tai Ping from paying out $3,206,093.00 or any sum whatsoever under the said Performance Bond until after the trial of this action or until further order. This was supported by an affidavit deposed to by Lim Ming Woei, the Plaintiffs' Senior Manager.

4 It appeared from this affidavit that on 10 May 1996, the Plaintiffs entered into a contract with YHS to construct a eight-storey factory and a three-storey office building for YHS at Senoko Way for a sum of $32,060,930.00. The contract required the Plaintiffs to furnish a Performance Bond in favour of YHS for 10% of the contract sum. The Performance Bond issued by Tai Ping to YHS read as follows:

> "**WHEREAS** by a Contract ("the Contract") in writing made on the 10th day of May 1996 between yourselves as Employer **and MESSRS. FOUR SEAS CONSTRUCTION CO PTE LTD** (hereinafter called the "Contractor") the Contractor has agreed to carry out, complete and maintain the **8-STOREY FACTORY AND 3-STOREY OFFICE BUILDING ON LOT 2353 MK 13 AT SENOKO WAY, SINGAPORE** ("the Works") for the consideration therein mentioned.
>
> AND WHEREAS
>
> We **THE TAI PING INSURANCE COMPANY LIMITED** of 62 Cecil Street #B1-00, #03-04-00 TPI Building, Singapore 049710 have been requested by the Contractor and have agreed to guarantee due performance of the Contract in the terms hereinafter appearing.
>
> NOW THIS DEED WITNESSETH:-
>
> 1. In consideration of you not insisting on the Contractor paying **SINGAPORE DOLLARS THREE MILLION TWO HUNDRED AND SIX THOUSAND AND NINETY THREE ONLY ($3,206,093.00)** as a security deposit for the Contract, we hereby irrevocably and unconditionally undertake, covenant and firmly bind ourselves to pay to you on demand any sum or sums which from time to time may be demanded by you up to

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a maximum aggregate of **SINGAPORE DOLLARS THREE MILLION TWO HUNDRED AND SIX THOUSAND AND NINETY THREE ONLY ($3,206,093.00)** ("the said sum"). 2. Should you notify us in writing, at any time prior to the expiry of this Bond, by notice purporting to be signed for and on your behalf that you require payment to be made of the whole or any part of the said sum, we irrevocably and unconditionally agree to pay the same to you immediately on demand without further reference to the Contractor and notwithstanding any dispute or difference which may have arisen under the Contract or any instruction which may be given to us by the Contractor not to pay the same. 3. We hereby confirm and agree that we shall be under no duty or responsibility to inquire into: 3.1 the reason or circumstances of any demand hereunder, or 3.2 the respective rights, obligations and/or liabilities of yourselves and the Contractor under the Contract, or 3.3 the authenticity of your notice or the authority or entitlement of persons signing such notice, but that we shall be entitled to and shall rely upon any written demand by you hereunder. 4. Any payment to be made by us hereunder shall be made without any set-off, deduction or counterclaim whatsoever. 5. We agree that our liability hereunder shall not be discharged, affected or impaired in any way by reason of any modification, amendment or variation in or to any of the conditions or provisions of the Contract or the Works or by reason of any breach or breaches of the Contract by the Contractor, whether the same are made with or without our knowledge or consent. We further agree that no invalidity in the Contract nor its avoidance, suspension or termination shall discharge, affect or impair our liability hereunder and that no waiver, compromise, indulgence or forbearance, whether as to time, payment, performance or any other matter afforded by you to the Contractor under the Contract, shall discharge, affect or impair our liability hereunder. 6. We confirm that our liability hereunder shall be a continuing liability and that this Bond shall remain in full force and effect until the first to happen of the following events: 6.1 the original of this Bond is returned by you to us at our address aforesaid; or 6.2 expiry of this Bond as hereinafter provided. 7. This Bond shall expire as to any undrawn portion of the said sum at the close of banking business on the day which **one hundred and eighty (180) days after the expiry of the Maintenance Period or one hundred and eighty (180) days after the date of issue of the Maintenance Certificate under the Contract whichever is the later**. Notification of demand for payment may be presented to us at any time prior to expiry. "**Undrawn portion**" shall mean the said sum less the aggregate amount which shall have been the subject of notification by you of your demand for payment as hereinbefore provided. 8. This Bond shall be governed by and

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> construed in accordance with the laws of Singapore and we hereby agree to submit to the non-exclusive jurisdiction of the Courts of Singapore."

5 Work at the site commenced with the architect issuing interim progress certificates from time to time. The Plaintiffs complained that the amounts reflected in the certificates were insufficient and, in particular, failed to take into account the proper value of variation works instructed by the architect and carried out by the Plaintiffs. By the time the tenth certificate was issued in early February 1997, the Plaintiffs' cash flow was seriously affected.

6 The Plaintiffs then had discussions with YHS. YHS agreed to assist the Plaintiffs by lending them money to pay their domestic subcontractors timeously to make up for the shortfall in the architect's certificates. This agreement was evidenced by a letter dated 10 March 1997 and a Deed of Guarantee by Tan Guan Seng, a director of the Plaintiffs, given on the same date. The letter dated 10 March 1997 from YHS to the Plaintiffs was in the following terms:

> "**REQUEST FOR ADVANCE PAYMENT** YEO HIAP SENG FACTORY AT SENOKO WAY ("the Project") We refer to your request for an advance payment of S$1.5 million (Singapore Dollars One Million Five Hundred Only) in respect of the final 25% of your works in the Project. We are agreeable to advancing the sum requested provided that you agree to the following terms: 1 That the sum advanced of S$1.5 million shall be applied progressively in payment of all sums due to you after 75% of the Project is completed until the said sum is exhausted. 2 That if before 75% of the Project is completed: a. you shall become insolvent or unable to pay your debts as they fall due or make a composition with your creditors; or b. any petition or application to wind you up or to appoint a judicial manager or receiver and/or manager over you; or c. any resolution to wind you up is passed; or d. any execution is levied on you or your properties; the said advance payment of S$1.5 million may be set-off against all payments due to you in the period prior to the achievement of a 75% completion of the Project. If for any reason the works on the Project or the Contract between you

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> and ourselves relating thereto is terminated or suspended, the sum advanced or any part thereof not applied towards payment due to you in the Project in accordance with the terms of this letter shall be repaid immediately upon written demand and our written demand and the sum stipulated therein shall be conclusive evidence against you of the sum due and payable to us. If you are agreeable to the above terms, please signify your agreement by appending the signature of a duly authorised officer in the space denoted below and returning the original signed copy of the letter to us."

The terms were agreed to by the Plaintiffs. Further loans/advances were made by YHS to the Plaintiffs for the same purpose.

7 The total amount of loans from YHS to the Plaintiffs was $5,977,925.26 while the direct payments made by YHS to the subcontractors totalled $9,744,831.66.

8 The architect continued to issue interim certificates in favour of the Plaintiffs, deducting the amounts that the Plaintiffs were obliged to credit to YHS as at the time of the certificates in respect of the loans/advances. From certificates number 16A dated 9 September 1997 to number 19A dated 28 November 1997, a total of $4,597,025.85 should have been paid to the Plaintiffs.

9 In early December 1997, Jenssen Lee, Vice-President of Property Development in YHS, "were going to demand payment of $3,206,093.00 from the Defendant to cover the amount of the loans/advances which Yeo Hiap Seng Limited had made to the Plaintiffs". On 9 December 1997, YHS wrote to Tai Ping to demand payment of the said amount by the next day.

10 According to the Plaintiffs, the demand made on the Performance Bond was dishonest because YHS knew that it was not made in respect of a matter concerning the terms of the underlying contract but was made in respect of the loans/advances agreement which was supported by the guarantee by Tan Guan

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Seng. YHS deliberately misled Tai Ping by not stating this in their letter of demand.

11 The demand was also dishonest because YHS knew that as at 9 December 1997, the Plaintiffs were not indebted to them in the sum of $3,206,093.00 in respect of the loans/advances agreement. In certificate number 19A, the architect certified the indebtedness of the Plaintiffs to YHS at $4,500,000.00 and set off amount in the same certificate. Therefore the total amount owing by YHS to the Plaintiffs was $4,597,025.85 (ie the total from certificates number 16A to 19A). It was thus YHS who were owing money to the Plaintiffs and not the other way round.

12 On 13 December 1997, the solicitors of YHS wrote to the Plaintiffs stating that the amount owed by the Plaintiffs in respect of the loans/advances was $10,736,881.78. That was untrue. The correct status ought to be:

Total loans/advances	$15,722,756.92
Less: Deduction Certified by architect	$ 4,500,000.00
	$11,222,756.92
Less: Unpaid Certificates	$ 4,597,025.85
	$ 6,625,731.07

13 However, the Plaintiffs also disputed that they owed this amount of more than $6 million to YHS as the works were virtually completed. Clearances for Temporary Occupation Permit were due to be finalized by 29 December 1997 and that meant the works must be 97% completed. Since the adjusted contract sum was said to be $33,744,753.49 (as indicated in certificate number 19A), there was an under-certification by the architect of about $1,248,373.93 worked out as follows:

97% of adjusted contract sum	$32,732,410.88

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Less : Retention (5%)	$ 1,603,046.50
	$31,129,364.38
Less: Previous certificates	$29,880,990.45
	$ 1,248,373.93

That meant that the maximum indebtedness of the Plaintiffs to YHS, after deducting this under-certified amount from the $6.6 million or so debt, was less than $5.4 million.

14 The only conceivable valid demand that could arise under the Performance Bond at that point in time was if the Plaintiffs were in breach of the building contract and none had been alleged. However, the extended contract completion date was 11 June 1997 and the works were expected to be completed by 29 December 1997. In theory, the Plaintiffs would have been liable to pay liquidated damages for 181 days at $4,000 per day, working out to a sum of $724,000. This was only on the assumption that the Plaintiffs were not entitled to any further extension of time.

15 YHS’s demand was made deliberately to damage the Plaintiffs’ financial standing. If Tai Ping paid out the amount demanded by YHS, the Plaintiffs and their directors and shareholders would have to reimburse Tai Ping under the terms of a counter-indemnity given to Tai Ping. If that happened, "it may cause impairable havoc to the Plaintiffs’ financial position and even lead to the Plaintiffs’ having to discontinue business". If the Plaintiffs’ business collapsed and the company had to be wound up, it would not be possible to start the same again.

16 The Plaintiffs had by way of their letter dated 15 December 1997 informed Tai Ping that YHS’ demand of 9 December 1997 was dishonest. Tai Ping

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therefore knew of the dishonest demand made in respect of an entirely separate agreement and not in respect of the building contract at all.

17 On the basis of the above affidavit, an interim injunction was granted on 16 December 1997 to restrain Tai Ping from paying on the Performance Bond.

THE PLEADINGS

18 On 22 December 1997, Tai Ping entered an appearance in this action, stating that they required a Statement of Claim to be filed and served.

19 On 27 April 1998, the Plaintiffs filed their Statement of Claim repeating in essence the main matters, shorn of the detailed computations, alleged in the affidavit supporting their application for the interim injunction. They claimed that YHS's demand had been made wrongfully, dishonestly and/or fraudulently. This Statement of Claim was filed only after the Registrar of the Supreme Court had conducted a pre-trial conference on 13 April 1998.

20 On 18 May 1998, Tai Ping filed their Defence, which was understandably a neutral one professing no knowledge of the material facts supporting the Plaintiffs' averment that YHS's demand was wrongful, dishonest and/or fraudulent.

THE SUMMONS FOR DIRECTIONS

21 On 5 June 1998, the Plaintiffs took out a Summons for Directions. On 1 July 1998, the Registrar made the directions sought and fixed the action for trial on 10 September 1998.

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YHS'S APPLICATION TO SET ASIDE INJUNCTION

22 On 15 July 1998, YHS intervened in this action by taking out a summons seeking to set aside the interim injunction obtained on 16 December 1997 and an inquiry as to damages sustained by YHS as a result of the said injunction. This is the application before me. I will delve into the merits of this application shortly.

23 On 31 August 1998, the Plaintiffs applied to add YHS as Defendants in this action and for consequential orders to amend the Writ and the Statement of Claim. In his affidavit supporting that application, the Plaintiffs' solicitor referred to YHS's application to set aside the injunction and the three affidavits filed in support thereof and said it appeared from those affidavits that YHS ought to be joined as a party to the proceedings. If that was done, he said, "all matters in this cause can be completely determined and adjudicated upon". He went on as follows:

> "5. The relief sought against the Defendants affects Yeo Hiap Seng Ltd. Since the latter now seeks to set aside the Injunction Order, the Plaintiffs wish to join them as a party so that all issues relating and connected with the reliefs sought for and as to how they affect Yeo Hiap Seng Ltd can be conveniently dealt with in this action."

The application was granted by the Assistant Registrar.

24 Rider Hunt Levett & Bailey, YHS's consultant quantity surveyors for the building project, stated that their interim valuation for the architect's certificate number 20 was a gross valuation of $29,282,604.49 as at 9 December 1997. They maintained that their valuation had been done strictly in accordance with the provisions of the contract and based on the Plaintiffs' progress payment claim number 20 dated 29 November 1997 and supporting documentation.

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25 The estimated final valuation of the contract as at 15 April 1998 was $37.8 million based on available information and in the absence of further progress claims from the Plaintiffs after interim certificate number 20. This estimated final valuation comprised structural, architectural and M & E services costs. The valuation of all M & E services work for both periods of times was done by the consultant services engineer.

26 DP Architects Pte Ltd were the consultant architects for the project. They denied the allegations of the Plaintiffs that they had under-certified the amounts in the interim certificates, maintaining that certificates number 1 to 20 had been issued in accordance with the provisions of the contract. It was natural to have differences between the amount claimed by the Plaintiffs as contractors and the amount certified by the architects.

27 Contrary to the Plaintiffs' first affidavit, the architect did not certify that the Plaintiffs' indebtedness to YHS as at 21 November 1997 was $4.5 million. In interim certificate number 19A, the total amount deducted for advance payments was $1,977,925.26 and not $4.5 million. This was derived from interim valuation number 16, 17, 18, 19 and 19A.

28 It was also not true that the project was virtually completed on 9 December 1997 or even 16 December 1997. As at 9 December 1997, the project was about 85% completed. The amount certified by the architects on 9 December 1997 was also about 86% of the total contract sum. From then on, the Plaintiffs gave up the administration of the contract. The Plaintiffs' site personnel dwindled and YHS and their consultants had to take over the administration of the project to prevent further delay. The Plaintiffs were not able to perform the works required to complete the project in default of their own subcontractors.

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29 The clearance for the Temporary Occupation Permit was supposed to have been obtained by 29 December 1997 but was not finalized until 15 February 1998. This was due to the Plaintiffs' delay in completing the sanitary, plumbing and minor sewerage works. The superstructure was completed only on 21 November 1997 and it was unrealistic to expect the Temporary Occupation Permit by 29 December 1997 since various testing, commissioning, certification and inspections had to be done first.

30 Sin Hai Chuan, the Assistant Manager, Property Development of YHS, explained that YHS's manufacturing activities were situated on two plots of land, one at Dunearn Road and the other at Bukit Timah Road. YHS entered into the building contract with the Plaintiffs for the Senoko Way premises because YHS intended to re-develop the two plots of land.

31 Under the Government's rezoning scheme in the area, YHS's land was rezoned from industrial to residential use and the plot ratio was increased by 0.3. YHS had to vacate and cease all industrial activities at the two sites by 23 February 1998 in order to qualify for the increased plot ratio and be exempted from paying development charges. This meant savings in development charges of some $3.5 million and $6.3 million for the Bukit Timah and the Dunearn Road sites respectively.

32 It was therefore crucial for YHS that their new premises at Senoko Way be completed at least two months before 23 February 1998 to allow time for the relocation of the machinery and to get it running at the new location. YHS could not vacate their existing sites before the new premises were completed as that would have affected their operations. The Plaintiffs were aware of the far-reaching financial implications if YHS failed to vacate by 23 February 1998.

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The original completion date for the new premises was 26 March 1997. This was later extended by the architect to 11 June 1997.

33 There were two letters of demand sent by YHS to Tai Ping – one on 9 December 1997 and the other a week later on 16 December 1997. Sin Hai Chuan had earlier spoken to Tai Ping's officer, Yew Kai Hau, who admitted their liability to pay on the Performance Bond but claimed that the approval of his superior was required before payment and that he was overseas.

34 YHS could not take out the present application earlier as they were under tremendous pressure to ensure that the Senoko Way facility was completed and not delayed any further. As at 9 December 1997, it was only about 85% completed and the deadline of 23 February 1998 was fast approaching. Because of this, all of YHS's consultants and personnel were geared towards this objective. The festive season at the end of the year followed by the Chinese New Year and Hari Raya holidays compounded YHS's difficulties as workers would not be available and seasonal demand for its products was at its traditional peak. YHS also had to deal directly with the Plaintiffs' subcontractors because of the Plaintiffs' financial crisis. By November 1997, the Plaintiffs had reduced their personnel on site to a handful and had lost interest in the management of the project. Some subcontractors forced YHS to re-negotiate their subcontracts while others abandoned their work because of non-payment by the Plaintiffs.

35 The construction of the Senoko Way facility was practically completed by 15 February 1998 and a Temporary Occupation Permit was given on 16 February 1998. However, YHS had begun shifting their operations to the new site from about 2 January 1998 and just managed to beat the deadline.

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36 YHS never had any doubt that they were entitled to call on the Performance Bond but had their first real opportunity to properly consider and prepare the rebuttal to the Plaintiffs' allegations in this action only recently. The documents involved in the project were voluminous and it took time to collate and study them. YHS also had to seek the assistance of their consultants to answer the allegations. Further, as this action involved a substantial amount of money, the approval of higher management was needed. All this had to be done in the midst of resolving the problems left behind by the Plaintiffs and of relocating the entire operations.

37 Money was advanced to the Plaintiffs under the contract but they were not to make up for any alleged shortfall in the architect's certificates. This was clear from the express terms of YHS's letter dated 10 March 1997 to the Plaintiffs. The advances were made to help the Plaintiffs overcome their financial problems. The allegation that YHS were making the demand to cover the alleged loans/advances was baseless.

38 The Plaintiffs had misled the Court as to the real causes of their financial problems. On 26 November 1997, the Plaintiffs had applied in Originating Summons 1301 of 1997 for leave to call a meeting with their secured and unsecured creditors under Section 210 Companies Act. In his affidavit filed in that application, the Plaintiffs' Tan Guan Seng had stated unequivocally that the Plaintiffs were in serious financial straits and that the best solution was for a Scheme of Arrangement to be entered into with their creditors to whom a total of almost $50 million was owing. At the subsequent meeting of the Plaintiffs' creditors, the claims lodged by unsecured creditors alone stood at more than $78 million. There were also a pending winding-up petition presented against the Plaintiffs and numerous pending legal proceedings. The cause of the Plaintiffs'

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financial problems was also set out comprehensively in Tan Guan Seng's affidavit in the Originating Summons and it was apparent that the problems were not of recent origin.

39 By early 1997, the Plaintiffs were already in deep financial straits. On 31 January 1997, the Plaintiffs appealed to YHS for a $1.5 million advance, purportedly to reduce the amounts owing to their suppliers in order to instill confidence and to ensure continuity of supplies, and to achieve project completion in September 1997 when the extended deadline was 11 June 1997. Left with no real choice, YHS agreed to the advance of $1.5 million to be used for the final 25% of the project which had yet to be achieved then. The advance payments were not loans but were monies paid in advance and which would be set-off against sums due to the Plaintiffs.

40 The Plaintiffs' financial position did not improve but deteriorated further, necessitating more advances from YHS. With the deadline approaching, YHS had no choice but to continue the advances which totalled almost $6 million as at 9 December 1997.

41 In addition to the advances made, YHS were also forced into a position where they had to make direct payments to sub-contractors who threatened to stop work or terminate supplies unless they were assured of payment. Various Direct Payment Schemes were entered into between YHS and the subcontractors. The main contract between YHS and the Plaintiffs was also varied in September 1997 to allow YHS to deduct payments made under the schemes from payments due to the Plaintiffs. The total amount paid under the schemes as at 9 December 1997 was more than $9 million.

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42 YHS also had to engage other subcontractors and suppliers to replace those who had abandoned their work or stopped their supplies because of non-payment by the Plaintiffs. The total amount paid to such subcontractors and suppliers as at 9 December 1997 was about $175,000.

43 As at 9 December 1997, the total amount certified as due to the Plaintiffs by the architect was about $17.6 million while the total of payments made directly to the Plaintiffs, the advances, the payments under the Direct Payment Schemes and the payments made to new subcontractors/suppliers was about $28 million. Including an amount of about $8 million paid out to nominated subcontractors, more than $36 million had been paid out as at 9 December 1997 while the gross valuation of the project which was only 85% completed then was about $29 million. YHS therefore had to call on the Performance Bond to defray the costs of completing the project, and these additional costs would not have been incurred if the Plaintiffs has not breached their obligations under the main contract to carry out the works properly and expeditiously.

44 The architect had certified that the Plaintiffs were not entitled to further extension of time for completion of the project by issuing a Delay Certificate on 12 June 1997. As at 9 December 1997, the liquidated damages payable for the 181 days of delay stood at $724,000.

PLAINTIFFS' AFFIDAVIT IN REPLY

45 Tan Guan Seng, in his affidavit filed in reply to YHS's three affidavits above, disputed YHS's preliminary estimate of the total value of variation works at about $5.4 million. He claimed that the notes made by the Plaintiffs' quantity surveyor showed an undervaluation by YHS of some $1.1 million. Tan also

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maintained that the architect had under-certified the value of the variation works even as at 9 December 1997. The certificates number 19, 19A and 20 showed that the variation works were valued at no more than $1.58 million or so. That would mean that between 9 December 1997 to the date of practical completion on 16 February 1998, some $3.8 million worth of variation works had been done. This, he said, would be a monumental if not impossible task since the main scope of works would also have to be done at the same time.

46 It was Tan who anticipated that this problem of under-certification would result in the Plaintiffs being unable to pay their own subcontractors. He therefore approached Philip Ng from the Far East Organization (which owned a substantial stake in YHS) who was also a director of YHS about this problem and informed him that the Plaintiffs would require about $1.5 million to improve their cash flow. Philip Ng said that he would look into the matter and assist if possible. A few days later, YHS's Jenssen Lee called Tan and asked him to go to YHS's solicitors' office to sign a personal guarantee for $1.5 million.

47 After the advance of $1.5 million was made, more variation works came in or were due to start making the loan amount insufficient to pay the Plaintiffs' subcontractors. To avert abandonment of work by the subcontractors, Tan again approached Philip Ng and proposed the Direct Payment Scheme which was accepted by YHS. The Plaintiffs agreed that YHS could deduct the monies paid under the scheme from the Plaintiffs' interim certificates from 1 September 1997 onwards. It was understood by both parties that in the event the total amount advanced exceeded the final contract sum payable to the Plaintiffs, the Plaintiffs would pay back the loans/advances within three months of demand by YHS. YHS also had additional security in the form of Tan's personal guarantee.

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48 Tan maintained that the Plaintiffs were not in breach of the building contract. There was no delay by the Plaintiffs. They had asked for 15 weeks extension of time to complete the ninth storey added to the factory but were given only 11 weeks. The Plaintiffs were undeniably entitled to further extension of time in view of the extensive variation works ordered although they had yet to submit their final claim for such extension. Accordingly, the Delay Certificate should not have been issued and the Plaintiffs were not liable for any liquidated damages. The certificates issued after 11 June 1997, the extended completion date, made no deduction for liquidated damages anyway.

49 There was no decrease in the Plaintiffs' personnel on site up to late November 1997 because YHS had also agreed to provide advances to pay the site personnel. In December 1997, YHS suspended the Direct Payment Scheme because they were aware by then that the Plaintiffs had applied for a Scheme of Arrangement. YHS continued to pay only the subcontractors whom they felt were essential to achieve the Temporary Occupation Permit.

50 If the Plaintiffs were truly indebted to YHS as at 9 December 1997, there would have been no reason for the Plaintiffs to remain on site and to carry out the works to obtain the Temporary Occupation Permit. If the Plaintiffs did not hold the belief that the YHS were obliged to grant further extensions of time and that there would be substantial payment from YHS to the Plaintiffs at the end of the day, they would have stopped work and left the debt owing to YHS to be compounded at 20% of its value under the terms of the Scheme of Arrangement.

51 YHS's demand made on the Performance Bond was subsequent to their being informed that the Plaintiffs had applied to Court under Section 210

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Companies Act. It was motivated by their fear that the Plaintiffs would not complete the project and consequently the loans/advances made by YHS would not be recoverable. After YHS became aware of the interim injunction, Jenssen Lee was upset and told Tan that since the Plaintiffs "were going down anyway", the Plaintiffs should let YHS call on the bond to cover their loans/advances. Tan replied that the Plaintiffs intended to complete the project, which they did. YHS were aware of the injunction several days after it had been granted but had waited for the Plaintiffs to complete the project in February 1998 and while the claims for the variation works were now being processed, were trying to set aside the injunction to attempt to pressurize the Plaintiffs into accepting their amount of $4.1 million when it should be much higher.

YHS's AFFIDAVITS IN REPLY

52 YHS's architect said that on or about 19 August 1996, the Plaintiffs requested an extension of time of 15 weeks and were granted an extension of 11 weeks under Clause 23(2) of the Conditions of the Building Contract. The original completion date of 26 March 1997 was thus pushed back to 11 June 1997. The said Clause 23(2) provided:

> "It shall be a condition precedent to an extension of time by the Architects that the Contractor shall within 28 days notify the Architects in writing of any event or direction or instruction which he considers entitles him to an extension of time, together with a sufficient explanation of the reasons why delay to completion will result."

Since then, there was no further request by the Plaintiffs for any extension of time to complete and the Plaintiffs were not entitled to make any now in any event.

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53 No deductions had been made for liquidated damages because YHS had not instructed the architects to do so. YHS were entitled to deduct such damages at any time up to and including the Final Certificate, which could take into account any permitted deductions not yet made by YHS.

54 YHS's consultant quantity surveyors' reply to Tan was that their valuation of the variation works was a final and not a preliminary estimate. The Plaintiffs had not submitted their claims for all the variation works yet. Some $1.38 million also should have been deducted from the amount of about $5.4 million resulting a net valuation of slightly more than $4 million. Their valuation of the variation works at about $1.58 million as at 9 December 1997 was done strictly in accordance with the provisions of the contract and in the absence of adequate supporting documents from the Plaintiffs. Prior to Tan's affidavit in this action, there was no record of any allegation of under-variation or under-certification.

55 Jenssen Lee explained that Tan had quoted him out of context to mislead the Court. In late November 1997, YHS called for a meeting between the Plaintiffs' and YHS's officers to discuss the financial plight of the Plaintiffs. Lim Ming Woei (who affirmed the affidavit supporting the *ex parte* application) told Jenssen then that the Plaintiffs would need another $7 million to $8 million more to complete the remaining works. Aware that Tan was already in financial difficulties as OCBC Ltd had called on a Performance Bond in respect of one of the Plaintiffs' other projects, Jenssen mentioned it to Tan and asked him if he was already going down with that claim. He denied having told Tan that since the Plaintiffs were going down anyway, they should allow YHS to call on the bond or that YHS wanted to call on the bond to cover the loans/advances made to the Plaintiffs.

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56 Tan's allegations that the Direct Payment Scheme was suspended in December 1997 and that the Plaintiffs' personnel were on site were denied. As for the security of the personal guarantee of Tan, the Court records showed that Tan had been made a bankrupt on 21 August 1998, before he affirmed his affidavit in this action.

THE DECISION OF THE COURT

57 The decision of the Court of Appeal in *Bocotra Construction Pte Ltd & Others v Attorney-General (no. 2)* [1995] 2 SLR 733 has made it clear that (at page 746I):

> "… whether there is fraud or unconscionability is the sole consideration in applications for injunctions restraining payment or calls on bonds to be granted. Once this can be established, there is no necessity to expend energies in addressing the superfluous question of 'balance of convenience'. It does not lie in the mouth of the defendant to claim that damages would still somehow be an adequate remedy."

Further at page 747C, the Court of Appeal noted:

> "To allay these concerns, we need only note that dispensing with consideration of the balance of convenience does not make an injunction any easier to obtain. Indeed, a higher degree of strictness applies, as the applicant will be required to establish a clear case of fraud or unconscionability in interlocutory proceedings. It is clear that mere allegations are insufficient."

58 The Plaintiffs' affidavits revealed at best a commercial dispute arising out of a building contract. The allegations concerning under-valuation and under-certification were nothing extraordinary in such cases. YHS were entitled to their considered view as to how much work had been accomplished just as much as the Plaintiffs were free to claim a higher value. YHS's consultants have given their assessment and tendered documents in support. Unless it could be shown

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that such assessment was so absurd and such documents were concocted or so irrationally done that no reasonable person could honestly believe in them, I fail to see how even a *prima facie* case of fraud or unconscionability could be said to have been established. The Plaintiffs have unjustifiably elevated the parties' differences to the level of fraud or unconscionability. YHS had paid out much more than the value of the works as at 9 December 1997 and the discrepancy was more than the amount provided in the Performance Bond. They were therefore entitled to call on the full amount.

59 The advances made by YHS to the Plaintiffs were all necessitated by the Plaintiffs' impecuniosity and were all related to the project in question. They were not separate and distinct from the main contract. It would be highly ironical for YHS to be holding back monies due to the Plaintiffs by allowing the under-valuation and under-certification to persist and then releasing generous torrents of financial assistance to the Plaintiffs to ease their cash flow problems. Far from wanting the Plaintiffs to founder, YHS were doing everything possible to rescue them and consequently the Senoko Way project. YHS had every reason to want the project to be completed expeditiously and certainly well before the 23 February 1998 deadline. It was a $9.8 million question coupled with a 0.3 plot ratio increase for their Bukit Timah and Dunearn Road sites which YHS intended to develop for residential use.

60 The Plaintiffs' brazen allegations that YHS were trying deliberately to damage their financial standing by calling on the Performance Bond showed not only ingratitude but also a careless disregard for the truth. YHS were practically pouring in money to finance and run the project by their advances, the Direct Payment Scheme and the payments to the various new subcontractors. The cost overruns and delay were caused in the main by the Plaintiffs' own problems.

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Further, by 9 December 1997, the Plaintiffs had applied for and had been granted the orders under Section 210 Companies Act. If what Tan Guan Seng said in his affidavit in that application was correct, what "financial standing" did the Plaintiffs still possess as at 9 December 1997 for YHS to want to deliberately damage?

61 The affidavit supporting the *ex parte* application boldly denied any breach by the Plaintiffs of the building contract while acknowledging that the works were expected to be completed on 29 December 1997 when the extended completion date was 11 June 1997. It was apparent from the date of the Temporary Occupation Permit that even 29 December 1997 was too optimistic. The Plaintiffs have sought to argue their way out of Clause 23(2) on applications for extension of time. I do not think they can still seek an extension of time at this very, very late stage. In any event, with so many financial woes plaguing the Plaintiffs outside of this project and the dire straits the Plaintiffs were in in respect of the Senoko Way project, the picture of equilibrium painted by the Plaintiffs as at December 1997 was hardly a credible one. YHS's account of the mess and confusion left at the site by the Plaintiffs accorded with the events that were unarguably taking place – that is, YHS practically stepping into the Plaintiffs' abandoned boots.

62 Finally, the tactical procedural ploy employed in this action showed quite clearly the total lack of *bona fides* on the Plaintiffs' part. They commenced this suit against only Tai Ping, at best an incidental party, while leaving YHS totally out of the picture. All of their allegations were directed at YHS and not at Tai Ping. To fail to see for eight whole months that YHS were a necessary party to these proceedings is to walk along the Great Wall of China without seeing it. This could only happen if one shuts one's eyes deliberately and that was

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precisely what happened in the Plaintiff's case. I asked the Plaintiffs' Counsel why YHS were not made a party to these proceedings until after they had applied to set aside the injunction. He told me the reason was that the Plaintiffs did not want to embarrass YHS, a publicly listed company, with the allegations of dishonesty. He said that the solicitors had been instructed to leave YHS to decide whether they wished to be joined as Defendants as the Plaintiffs were still doing work for YHS and did not wish to bite the hand that was feeding them. In my opinion, however, the affidavits filed by the Plaintiffs and their inaction until goaded by the Registrar did not bear testimony at all to their professed noble intentions. The Plaintiffs' only object was to stall any action on the Performance Bond for as long as they could.

63 Of course the related question then arose – what took YHS so long to take out this application? I had no difficulty appreciating and accepting their explanation that their primary concern in the earlier half of this year was to clear up the mess left behind by the Plaintiffs and to get the project completed on time and then transfer all their operations from the old sites. It was thus entirely logical that their manpower was mustered to accomplish those ends before they moved on to deal with the injunction in this action.

64 The Plaintiffs had failed to show any hint of fraud or unconscionability on the part of YHS and the injunction obtained on 16 December 1997 should be discharged accordingly. Since the injunction resulted in the amount stated in the Performance Bond being withheld unlawfully from YHS, the damages that flowed from this should be the amount of interest that would have accrued if the money had been placed in YHS's hands upon their demand. I therefore awarded interest at 6% per annum on the amount of the Performance Bond with effect from 9 December 1997 as damages to be paid by the Plaintiffs to YHS. The

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Plaintiffs were also ordered to pay the costs of this application to Tai Ping and to YHS, such costs to be taxed or agreed between the Parties.

TAY YONG KWANG

JUDICIAL COMMISSIONER

SUPREME COURT

30 December 1998

Tay Yong Kwang JC

Joseph Liow (Derrick Ravi & Pnrs) for the plaintiffs
Brij Raj Rai with Edric Pan (Rajah & Tann) for the first defendants
Ho Chien Mien (Allen & Gledhill) for the second defendants

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