IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1999] SGHC 260

Suit 1004/1998

Between

McConnell Dowell South East Asia Pte Ltd

… *Plaintiff*

And

Tan Hee Seng Construction Pte Ltd
Tan Peck Shya
Tan Jing Seng

… *Defendant*

GROUNDS OF DECISION

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

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McConnell Dowell South East Asia Pte Ltd v Tan Hee Seng Construction Pte Ltd and Others

[1999] SGHC 260

Suit 1004/1998
Chao Hick Tin JA
02 October 1999

JUDGMENT:

1 The plaintiffs (McConnell) are specialist civil contractors and the first defendants, Tan Hee Seng Construction Pte Ltd (THS), a company carrying on the business of a general building contractor. The second and third defendants are directors of THS.

2 THS were appointed the main contractor under a contract of 10 January 1996 with the Public Works Department (PWD) to construct a public jetty and look-out tower at Tanjong Rhu ("the project"). On 25 March 1996 McConnell entered into a sub-contract with THS to execute and complete the required marine piling works for the project. Under the terms of the sub-contract, the second and third defendants were required to be guarantors for the payment due to McConnell from THS. Accordingly, they executed a guarantee to that effect in favour of McConnell and are being sued herein as guarantors. The second and third defendants do not dispute that if THS are liable for any amount, then they would in turn be liable for the same as guarantors.

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

Claim and counterclaim

3 McConnell's claim against the defendants is for the balance sum of $68,981.03 due and payable under the sub-contract and variation costs of works amounting to $65,824.00, making a total of $134,805.03. McConnell also claim for late payment interest pursuant to clause 7.2(b)(ix) thereof.

4 THS' defence is that McConnell had breached the terms of the sub-contract as the piles installed by them between gridlines 11-15 at the project site had tolerance exceeding the limit of 75mm in any direction permitted under the sub-contract. This is referred to as "the excessive eccentricities". In plain terms "eccentricity" means the pile as installed is out of the specified position. Accordingly, THS aver that McConnell were under an obligation to make good the defects by providing additional compensating piles or making changes to the beam design. This McConnell had failed to do. THS, having suffered losses on account thereof, claim the right of set-off and/or damages.

Quantum of plaintiffs' claim

5 Besides the right of set-off, THS have challenged the correctness of McConnell's claims, stating that what is due to McConnell is not a total of $134,805.03 but only $95,563.98, and the details of the claims which THS alleged are excessive are as follows:-

(a) Excess claims under the sub-contract	
(i) overclaim for three 700mm piles	$26,460.00
(ii) overclaim for installation of 700mm - piles by 137.01 m	$10,275.75
(iii) overclaim for installation of 900mm - piles by 1.9 m	$ 190.00

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

Total	$36,925.75

(b) Variation claims

Excess claim of $ 1,567.30.

6 The three 700mm piles were originally meant for bent No. 2 (gridline 2). Because of the soil conditions at that location, those piles were found not to be suitable and were omitted. McConnell said that by the time the non-suitability was established, the three 700mm piles had already been delivered to site. Mr Dundas (PW1), McConnell's Contracts Manager, said that the three piles were subsequently taken away for disposal. More importantly, by a letter of 3 June 1996 (2AB617) THS agreed to pay McConnell for the three 700 mm piles as well as the estimated cost of driving those three piles at $11,475, in addition to paying for the supply and installation of the three new 900 mm piles. In the circumstances, I do not see how THS can be heard to contend that McConnell are not entitled to make the claims of $26,460 and $10,275.75 (reduced from $11,475 in the light of actual measurements).

7 As regards the sum of $190.00, it is a question of measurement and in the light of the measurements carried out by PWD there is an overpayment of that sum. As regards the variation claim, THS's challenge is again based upon PWD's measurements. I note McConnell's contention that PWD's measurements were not contractually binding on them. That may be so. But it seems to me the whole question is one of accuracy. I accept the PWD's measurements. Accordingly, the amount $1,567.30 represents the excessive claim.

8 In addition to the foregoing, THS also claim that they had paid upon McConnell's request for concrete required for bent No. 2 and that came up to

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

$748/-. THS received the invoice in question on or about 15 June 1996 and yet failed to submit the invoice to McConnell until 27 October 1998, leaving the latter with no opportunity to verify. THS said that Dundas was told of the invoice verbally. Why was the invoice not forwarded soon thereafter? Accordingly, I am unable to accept this claim.

9 In the light of the above I hold that McConnell's claim should only be reduced by $190 and $1,567.30, leaving a net of $133,047.73.

Relevant provisions

10 Before I turn to the main issues of the proceedings, which concerned the excessive eccentricities and the counterclaim, I would like to refer to some of the pertinent provisions of the sub-contract. Particular Specification ("PS") 47.15 of the sub-contract provides that "the positional and verticality tolerances of all vertical piles shall not exceed 75mm and 1:50 respectively in any direction." This means that each pile must be installed within a radius of 75mm from its designated spot. It is clear that 18 out of 40 piles (between gridlines 11 and 15) have excessive eccentricities.

11 Some of the other relevant provisions are the following:-

> Clause 3.1 of sub-contract
>
> "(McConnell) assume and perform … all the obligations and liabilities of [THS] under the Main Contract in relation to the Sub-Contract Works so far as they are not repugnant or inconsistent with the express provisions of this Sub-Contract."
>
> Clause 10.4 of sub-contract

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

"The Sub-Contractor shall indemnify and save harmless the Contractor against and from:-

(a) .....

(b) Any act or omission of the Sub-Contractor his servant or agents in breach of this Sub-Contract which involves the Contractor in any liability either to the Employer under the Main Contract ... in connection with the Main Contract Works and

(c) Any claim demand proceeding damage cost charge or expense due to or resulting from any negligence or breach of duty on the part of the Sub-Contractor ... caused by or arising in connection with the execution of the Sub-Contract Works.

Clause 8 of the main contract

"8.1 Accurate Setting Out

The Contractor shall be responsible for:

(a) the accurate setting out of the Works in relation to the original points, lines and levels of reference given by the Superintending Officer in writing;

(b) the correctness of the position, levels dimensions and alignment of all parts of the Works; and

(c) the provision of all necessary instruments, equipment, apparatus and labour in connection with the foregoing responsibilities.

8.2 Errors in Setting Out

If any time during the execution of the Works, any error appears in the position, levels, dimensions or alignment of any part of the Works, the Contractor, on being required so to do by the Superintending Officer shall, at his own costs, rectify such error to the satisfaction of the Superintending Officer."

PS 31

"31.1 The [Sub-Contractor] shall be fully responsible for the checking of pile alignment and pile eccentricity after piling works. He shall carry out necessary works to satisfy the SO that the piles have been reasonably and accurately installed.

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

> 31.2 All eccentricity drawings shall be fully endorsed by both the [Sub-Contractor's] Registered Surveyor and Professional Engineer.
>
> 31.3 The [Sub-Contractor] shall be liable to design and provide additional compensating piles, or make changes to the beam design, as a result of unacceptable eccentricities."
>
> PS 40.1
>
> "Notwithstanding Clause 3.11 of the General Specification, the Contractor on completion of the works shall submit to the S.O. the following "as built" drawings:-
>
> (a) Final setting out plan showing the setting out dimensions;
>
> (b) Drawings showing the actual positions and eccentricities in perpendicular directions of the piles at their cut-off levels;"

Collateral agreement

12 McConnell's case is that before the execution by the parties of the sub-contract there were numerous discussions between McConnell and Betty Tan (the second defendant, and Contract Administrator and Quantity Surveyor of THS) for THS, wherein it was agreed that THS would provide McConnell with an initial set out reference gridline endorsed by THS' registered surveyor. This is referred to as the "RG Collateral Agreement". McConnell contended that the deletion of PS29.1 from the sub-contract is wholly consistent with the fact that there was such a collateral agreement between the parties. PS 29.1 reads:-

> "The Contractor shall be responsible for the setting out of the entire works. He shall make due allowance in his tender for engaging a registered surveyor to set out the entire works as indicated in the contract drawings using the existing boundary stones and reference points which shall be checked for correctness. The registered surveyor shall also be required to endorse all setting out drawings."

13 McConnell further allege that after the sub-contract was awarded to them there were various discussions between Dundas and Betty Tan during the period

12-27 April 1996. McConnell aver that instead of giving them a single set of coordinates for the control point as required under the RG Collateral Agreement, THS gave them three different sets of coordinates for the control point. As a result THS and McConnell further agreed that the latter would use the best estimate from the three contradictory reference coordinates in obtaining the initial reference gridline and in turn THS would bear the risk of any pile eccentricities and carry out the necessary changes required under PS 31.3 at THS' own costs. This is referred to as "the Understanding".

Excessive Eccentricity

14 McConnell allege that the excessive eccentricities were brought about by an error in the coordinates of the control point (control error) given by the THS. THS were in breach of the RG Collateral Agreement when they failed to provide McConnell with an accurate set of coordinates for the control point which would enable McConnell to properly set out the piling works. Instead, as mentioned before, what McConnell were given were three different sets of coordinates for the single control point, which was to be the corner of the seawall, though they were also instructed that the approach of the proposed new jetty should flush with the direction of the existing seawall at the site.

15 The installation of the piles were completed by McConnell sometime on or about 20 June 1996. On 2 July 1996 McConnell submitted to THS an "as built" drawing in compliance with PS 40.1. This is called "the first as-built survey drawing" and it covered only gridlines 11 to 15. The as-built survey drawing for gridlines 2-10 had already been furnished earlier. This first as-built survey drawing showed eccentricities only at four piles, mainly, 11G, 11I, 12I and 12J. The design of the superstructure was accordingly revised, taking into account

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

these eccentricities. Thereafter THS proceeded with the superstructure works, which included the setting out of the formwork and the introduction of reinforcement bars for the casting of beams.

16 On 19 August 1996, during an inspection by PWD, it was discovered that there were excessive eccentricities on various piles between gridlines 11 and 13 and which were not shown on the first as-built survey drawing. As a result further works had to be stopped. Thereafter, McConnell instructed their surveyors (United Surveyors) to carry out another survey. This led to the production of the "second as-built survey drawing" which was forwarded by McConnell to THS on 26 August 1996 and which showed that some eighteen piles had excessive eccentricities. The second as-built survey drawing had accordingly demonstrated that the first as-built survey drawing was not accurate (hereinafter referred to as "the first drawing" and "the second drawing"). The second drawing was submitted by THS to PWD the next day. When asked to clarify the differences between the two drawings, McConnell explained on 6 September 1996 that the error in the first drawing was due to a 40 mm error in the survey control which resulted in a 40 mm error in the easting of the first survey. A revised second drawing was submitted by THS to PWD on 9 September 1996.

17 The case of McConnell is to place the blame squarely on THS, namely, the latter’s failure to provide an accurate set of coordinates for the control point as was agreed to in the alleged RG Collateral Agreement Because of this failure, McConnell had to use a best estimate from the three sets of coordinates furnished. Pursuant to the Understanding, THS should therefore bear the consequences.

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

Existence of Collateral Agreement

18 Central to McConnell's case is the question whether there was in fact such a collateral agreement between the parties. Furthermore, even if the answer to that question is in the affirmative, can evidence of such an oral agreement be adduced to contradict or vary the terms of the written sub-contract executed subsequently between the parties?

19 It would be noted from clause 3.1 of the sub-contract and clause 8 of the main contract that McConnell were to be responsible for the accurate setting out of the piling works. McConnell are saying that by virtue of the RG Collateral Agreement all that had changed. To prove that there was the collateral agreement, first they relied upon their quotation of 8 February 1996 where the following was stated:-

> "we have allowed for a full-time surveyor to align the piles. Initial set out gridline survey by licenced surveyor is to be provided by main contractor."

20 Dundas said this was agreed to orally by Betty Tan. Next, they relied upon the fact that PS29.1 (quoted in paragraph 12 above) had been omitted from the sub-contract. They said that this omission is significant. It is consistent with what they asserted, which is, that THS were to provide the initial reference gridline.

21 However, I do not think the omission of PS29.1 supports their contention. Two things are covered in PS29.1. One is the duty to set-out the works and the other to engage a register surveyor. Looking at what was stated by McConnell in their quotation letter - that they could only provide for the services of a full-time surveyor and not a licenced surveyor - I am inclined to think that that was

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

the reason why PS29.1 was omitted, not because McConnell was not responsible for setting out the piling works. Indeed, McConnell did set out the piling works. McConnell are not saying it was not their responsibility to set-out the piling works. Their contention is that THS were to provide the initial set-out gridline. But PS29.1 has nothing to do with the initial set-out reference gridline.

22 That aside, what is even more significant is the fact that McConnell's quotation was accepted by THS subject expressly to "our solicitor contract agreement." Both parties were represented by solicitors in working out the formal sub-contract which the parties executed on 25 March 1996. In fact both parties wanted a proper agreement signed in order to avoid possible difficulties. The requirement that the "initial set out gridline survey by licenced surveyor is to be provided by main contractor" stated in McConnell's quotation was not incorporated into the written sub-contract. The only plausible explanation is that there was no agreement that THS would furnish the initial set-out gridline and I do so find accordingly.

Parol evidence rule

23 I turn next to consider the question, even if there was such an oral agreement between the parties, is evidence on that oral agreement admissible to modify the written sub-contract. Section 93 of the Evidence Act provides that no other evidence may be adduced in proof of the terms of the contract which has been reduced into writing. Pre-contract negotiations or statements made by the parties are not admissible to vary, contradict, add to or subtract from the terms of the written agreement: s.94 of Evidence Act.

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

24 However, McConnell are relying upon proviso (c) to s.94 of the Evidence Act to contend that the alleged collateral agreement is admissible. Proviso (c) prescribes that "the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligations under any such (written) contract" may be proved. But it is important to distinguish between a collateral agreement which alters the legal effect of a written agreement from a collateral agreement which provides that the written agreement should not be effective until some condition is fulfilled: see per Lord Wright in Privy Council's decision in *Rowland Ady v The Administrator-General of Burma* [1938] 40 Bom LR 1075 and *Ng Lay Choo Marion v Lok Lai Oi* [1995] 3 SLR 221.

25 Counsel for McConnell argued that on the authority of the Malaysian Federal Court case, *Tan Swee Hee Co Ltd v Ali Hussain Brothers* [1980] 2 MLJ 16, evidence on the alleged collateral agreement is admissible. With respect, I do not agree as the fact situation in *Tan Swee Hee Co Ltd* is quite different. The following conclusion of Raja Azlan Shah CJ (at p.19) is pertinent:-

> "In our view those cases are strong authority for the proposition that an oral promise, given at the time of contracting which induces a party to enter into the contract, overrides any inconsistent written agreement. This device of collateral contract does not offend the extrinsic evidence rule because the oral promise is not imported into the main agreement. Instead it constitutes a separate contract which exists side by side with the main agreement."

26 There was no evidence of any inducement offered by THS to McConnell to enter into the contract. What we see was a proposal by McConnell to THS that THS should provide the initial set-out reference gridline. This was not reflected in the written sub-contract which the parties signed. The RG Collateral Agreement on its own makes no real sense. It is no more, no less, an attempt to modify the terms of a written agreement. Accordingly, I find that the collateral

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

agreement (even if it existed) would be inadmissible to contradict the terms of the written sub-contract. The alleged oral agreement is not in the nature of a condition precedent.

The Understanding

27 It is not in dispute that there were three different initial reference coordinates shown in three drawings, YJP96008, YJP96008L and PWD/CCE/1217/95/TE/2. The first two were from the surveyors of THS and the third from PWD. There was correspondence between the parties on this and a meeting was held on 22 April 1996 to discuss that question. On the evidence there is a dispute as to who were present at the meeting. McConnell's witnesses (M/s Dundas and Christadoulou) said that no PWD officer was present, only Christadoulou, a representative of JYP (THS' surveyors), one Tan Ho Say from United Surveyors (McConnell's surveyors) and Tan Jing Seng, the third defendant. Betty Tan was not present. She was told by Tan Jing Seng that the PWD engineer Victor Lian (Lian) and Senior Technical Officer Lim Tong Kwang (Lim) were present. This is obviously hearsay. But Lim testified and confirmed that he was present. Lian could not recall if he was at the meeting but said that, if he was, then he would have given instructions that the approach of the new jetty should be in line with the existing sea-wall.

28 I hold that at the meeting of 22 April 1996, the two PWD officers were present. I cannot imagine that the parties could discuss and decide the issue, which was undoubtedly important, without some imput, if not directions, from PWD. I hold that Lian did instruct that the new jetty be built in line with the existing sea-wall and that the surveyors should use the corner of the existing seawall as the physical origin point for setting out the piles.

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

29 According to Mr Philip Jones, a Chartered Structural engineer and a chartered surveyor, with such an instruction from PWD, McConnell could proceed with the setting out survey of the piles. But according to Mr Hatfield, McConnell's expert, while a point and a line is theoratically sufficient, they are "practically insufficient". He felt that it would be good to have two points, with known coordinates. Hatfield is not a surveyor but a civil and structural engineer. Even taking Hatfield's position, that you need two points, it seems to me, as pointed out by Jones, McConnell could take any two points from the existing seawall and the coordinates of these two points could be obtained by a survey traversed to the nearest Government bench marks. These coordinates would then be sufficient to enable McConnell (or their surveyors) to carry out the set-out survey of the piles.

30 The evidence of the parties is also at variance as to what was discussed and agreed to between Dundas and Betty Tan during the period 12-27 April 1996. McConnell asserted that in view of THS' failure to provide precise and accurate coordinates (this was on the premise that there was the RG Collateral Agreement), Betty Tan agreed that THS would "bear the risks of any error or any discrepancy in the set out survey and any error which would be transferred to the positioning of the piles as a consequence." McConnell averred that they gave "no warranty as to the accuracy of their set-out of the pile position" and that THS would "carry out any necessary changes to the beam design … at their own cost to overcome any eccentricities of piles installed by the plaintiffs." Firstly, I have found that there was no such collateral agreement. Secondly, I entertain serious doubts about this alleged understanding as it was obviously a very important matter (literally absolving McConnell from any responsibility) and yet it was not recorded or reflected in any contemporaneous communication, bearing in mind that the parties were in constant

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

correspondence at the time. The alleged understanding was also not referred to by McConnell after the eccentricities problem had surfaced or even after THS' solicitors wrote on 11 March 1997 making a claim against McConnell. Thus, I do not accept that there was such an understanding.

Cause of eccentricities

31 In the light of my findings above, I hold that McConnell should bear the consequences arising from the excessive eccentricities. They are contractually bound to install the piles with eccentricity of not more than 75 mm in any direction. I have noted that both Dundas and Hatfield said that a tolerance of 75 mm was tight and difficult to achieve in marine piling works. But that was what McConnell bound themselves contractually to achieve.

32 That apart, and assuming the best estimate of the initial reference gridline adopted by the parties were errorneous, it has not been shown that the cause of excessive eccentricities in the eighteen piles were due to that and not due to poor piling as such. The co-relation has not been established. I would have thought that if there was an error in the initial reference gridline, then that error should affect the set-out survey of all the piles. There should have been a pattern in the set-out survey. As pointed out by Jones "if an error in coordinates did occur the eccentricity translation shift would be uniform for all piles surveyed and as no uniform translational shift occurred, coordinate errors are not a cause of the discrepancies between as-built surveys." Furthermore, Jones felt that the error is irrelevant to errors in the eccentricity survey as the origin point's coordinates were not required to either set out the piles or to measure the as-built eccentricity. A physical origin point and the alignment as provided by PWD should suffice.

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

33 McConnell alleged that there was a 40mm error in the reference gridline for gridlines 11 and 12 which error was attributable to THS' default in providing the initial reference gridline (the control error). Dundas said that this control error "probably caused the additional pile eccentricities." In my view, he had no real knowledge. He based it on what McConnell's in-house surveyor told him. But the in-house surveyor was not called upon to testify. Similarly Christodoulou's evidence on this aspect was also based on what he heard.

34 Interestingly, in his report, McConnell's expert, Mr Hatfield, made no mention of this "control error". He even said that the "control error" was a "red herring". He did not think that the alleged 40mm control error was relevant. In his evidence, he said that eccentricities of the kind found are quite common for this type of project. He would not even bother to look for any error of reference point to explain the excessive eccentricities.

35 My conclusion on this question is this. First, whatever may be the error in the coordinates of the control point, it is wholly irrelevant as both Jones and Hatfield said. Secondly, it seems to me whatever may be the error in the initial reference gridline, it would have been incorporated in the set-out survey done by McConnell. The set-out survey would indicate the theoretical position where each pile should be installed. The set-out survey was accepted by PWD. If McConnell had installed the piles correctly in accordance with their set-out survey, there could be no question of excessive eccentricities. Here we have a situation where McConnell did not install 18 piles within the tolerance limit. I accept Hatfield's opinion that piles with excessive eccentricities are not uncommon. Corrective measures can be taken. What is the cause of the counterclaim is that McConnell provided an as-built drawing (the first drawing) which did not show the piles eccentricities correctly. It only showed four piles

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

(instead of 18) had excessive eccentricities. No proper explanation was given as to why the first drawing missed out the excessive eccentricities of the other 14 piles. Based on the errorneous first drawing, the superstructure design was modified to take into account only the four piles which were identified to have excessive eccentricities. Thereafter, superstructure works were commenced by THS. All that had to be undone.

36 Hatfield tried to suggest that THS should not have relied entirely on the first drawing in carrying out the superstructure works as oscillation of 20 to 30mm of the piles would not be uncommon. Jones however said that based on HDB's measurements of the sea-current in that location, being a sheltered area and which does not exceed 0.5 knots, any movement of piles would not be noticeable. In his view, oscillation of 20-30mm would be an exaggeration. It is true that Jones did not carry out any measurement of sea current there; neither did Hatfield. The burden of proof is on the person who asserts. Thus, Hatfield's assertion is at best a general observation. He did not make any study of the sea-current condition at Tanjong Rhu or take into account the data published by HDB.

Damages: removal of formwork and reinforcement bars

37 THS have claimed that with the installed piles being outside the tolerance limit, this had caused delay to the works and additional works were required in respect of design checks, re-design of beams and abortive construction works with a consequent need for additional plant, labour and material.

38 I now turn to examine the question of damages suffered by THS. One of the items of loss claimed by THS relates to the dismantling of the formwork for the

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

beams at gridlines 11 and 12 and the removal of the reinforcement bars/cages thereat. McConnell have asserted that THS are not entitled to claim for this because there was a 50mm error in the setting out positions of the concrete headstocks for the beams at gridlines 11 and 12 (setting out error) and the superstructure works already carried out by THS, even without the problems caused by excessive eccentricities, would have to be removed in any event. This assertion rests entirely upon the second drawing. No one from United Surveyors, who did the survey leading to the drawing, has come forward to testify. McConnell have no knowledge of the alleged 50mm setting out error. As pointed out by Jones, no reference was made whether the survey done was up to the internal or external face of the formwork. McConnell thus fail on the burden of proof.

39 A fair amount of evidence touched on how Tan Jing Seng, actually went about setting out the formwork. It was alleged that he used a tape, which could not yield accurate results. Tan Jing Seng chose not to testify. Therefore, I would be inclined to infer that he did, in fact, use a tape to measure and set-out the formwork even though Lim testified that he saw Tan Jing Seng using the theodolite to measure. They are not inconsistent. He could have used both methods. In fact, Lim also said that Tan Jing Seng used the tape for certain purposes. In any case, the use of a tap to measure does not per se indicate how inaccurate the formwork set-out is.

40 Even if it were true that there was a setting out error, was that the cause for the removal of the superstructure works at gridlines 11 and 12? In each fact situation, what is the effective or dominant cause of the loss must be determined by the circumstances there. It is not possible to lay down any hard and fast rule or test for causation. At the end of the day it is a matter of common sense. Here,

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

because of the excessive eccentricities, whether the setting out of the superstructure works was correct or otherwise, the works had to be removed for remedial measures to be undertaken, as redesigning would be involved. If it were only a matter of setting out error, then it would be a much simpler task of re-aligning the formwork for the beams to be erected at gridlines 11 and 12. There would not be any need to remove the formwork completely, including the reinforcement bars/cages

41 Considerable emphasis was also placed on the fact that one pile (12H) shown at photograph 15 was clearly out of position and that THS should not have proceeded to place the reinforcement bars/cages in the formwork; they should have seen that that pile was out of position once the formwork was put up, before the reinforcement bars/cages were placed therein. I do not see how McConnell could be heard to so complain when (i) they were the ones who installed the piles; (ii) they furnished to THS the first drawing which showed only 4 piles had excessive eccentricities; and (iii) if it is contended that THS should have seen that pile (12H) to be out of position then surely McConnell should also have seen it, after all they are the experts in the setting out, designing and installing of piles. By the first drawing, they had represented to THS that the piles were properly installed, knowing full well that THS would proceed with the superstructure works.

42 I would, at this juncture, like to make a general observation on photograph 15. It was a photograph produced by THS. It was taken from an angle. The object of that photograph was to show the stage at which works had been carried out by THS. From that photograph one cannot obtain a clear picture as to how obvious that pile was out of position. If McConnell had wished to make the point that the pile was so obviously out of position, then they should have

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

produced a photograph taken centrally showing the pile. The fact that they did not do so suggests two things (i) the out of position could not have been that obvious; and (ii) the point was really an afterthought.

Deterioration of reinforcement bars/cages and formwork

43 Under the provisions of PS31.3, McConnell are obliged to "design and provide additional compensating piles or make changes to the beam design, as a result of unacceptable eccentricities." After the excessive eccentricities had been established, McConnell refused to undertake the re-design works. This caused a further delay. THS had to get their own consultants to do the re-design and PWD's approval was only obtained on 2 October 1996 so that the works could proceed. Meanwhile the formwork and the reinforcement bars/cages were exposed to the sun and the saline environment for some two months. The reinforcement bars/cages rusted badly and the formwork had warped. Lim expected the rustiness would be quite bad. As a result, all the material had to be replaced by new ones, as instructed by the PWD.

44 It is true that THS had to make four submissions before finally obtaining PWD's approval to the revised design. But every submission was copied to McConnell and there was no comment/suggestion from the latter. Looking at the matter fairly, I do not think that there had been any undue delay on the part of THS or that any steps taken by THS were unreasonable. It must be borne in mind that the situation was brought about entirely by the default of McConnell. They were obliged to carry out the necessary redesign works. But they refused. THS were left with the burden of rectifying the defects. While one could, clinically analysing the situation *ex-post facto,* say that THS should have taken

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

this or that step with greater expedition, I do not think I can say that those delays were really inordinate.

Overheads loss

45 McConnell made the point that THS need not have suspended work upon discovery of the excessive eccentricities. Dundas said that works on casting of light post support, installation of handrail and erection of soffit for gridlines 13 to 15 could have been carried out. However, I accept THS' contention that it was neither practical nor possible to carry out those works. While it may be possible to cast the light post-support or install the handrail between gridlines 2-10, the works would run the risk of being damaged by vehicles which would have to use that part of the jetty for access to gridlines 11-15.

Quantum of THS' counterclaim

46 The total counterclaim of THS on account of McConnell's breach amounted to $206,567.63, made up as follows:-

Change in beam design $ 4,809.90

Abortive & dismantling works $150,809.86

Unabsorbed overheads $ 37,779.58

Accelerated measures $ 1,645.64

Sinviet's re-design cost $ 7,750.00

MOE disposal charges $ 3,772.65

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

McConnell accept that the item of claim for $4,809.90 is reasonable. Furthermore, from the documentary evidence I accept that THS did pay $7,750 to Sinviet, being re-design cost. The confusion would appear to have been caused by a statement of account of Sinviet.

47 Under the sum $150.809.86, (abortive and dismantling works) the biggest item is the claim for loss of $102,788.50, being increased recurrent preliminaries costs arising from the abortive work period (from 25 July – 18 August 1996) and the stop work period (19 August – 2 October 1996), a total of some ten weeks. The preliminaries costs would cover general administration and resources (plant and site establishment). McConnell argued that such preliminaries costs would only arise after the original contract period and not to a claim for delay within the original contract period. The original completion date was 22 January 1997. Notwithstanding the interruption caused by the excessive eccentricities, THS' revised construction programme of 10 October 1996 was that the completion date of the works would still remain the same. However, as at the time PWD had indicated that they would wish to amend the tower design, the programme expressly noted that it did not include the amendment to the tower, which at the time was still not yet finalised by PWD. When eventually the tower design amendment was finalised in December 1996, THS and PWD agreed that the completion date be extended to 25 April 1997 and that THS would not claim for losses or damages in consequence of any delay. In the light of the revised construction programme indicating that notwithstanding the interruption the works could still be completed within time, and in the absence of further explanation, it seems to me that the eventual extension up to 25 April 1997 had all to do with the late approval given by PWD to the amended design of the tower. There is no evidence from the PWD that the tower design had to be amended because of the excessive eccentricity

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

problem, which problem had been taken care of by the re-design of the beams. Thus, I hold that THS are not entitled to claim for the cost of additional preliminaries.

48 The next major item under that head is $45,491.64 for labour cost. The details are set out in Attachment 8 to the affidavit of evidence-in-chief of Foster. Due to some duplications which Betty Tan admitted, this item would be reduced to $43,641.23. The major contention here is that there is no evidence to substantiate the assertion that foreign workers levy had been paid on account of those workers. According to the computation of McConnell's counsel, the levy would amount to some $19,868.52 which should be deducted from the amount claimed. But it is not denied by McConnell that the workers were foreign workers. Betty Tan was even asked how would Tan Jing Seng communicate with the foreign workers. It is the law in Singapore that an employer employing foreign workers must pay a levy. Thus, I do not think the mere fact that no statement of CPF was produced to show payment of levy necessarily means that this court could not take judicial notice of that. An employer is obliged to pay the levy.

49 The third item is $6,570.18 which is the cost of additional material incurred by THS during the period of the remedial works. That seems to me to be reasonable and would be allowed.

50 Turning to the claim for unabsorbed overheads of $37,779.58, for the same reasons given in respect of the claim for additional preliminaries, I do not think that should be allowed.

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

51 As for the claim for $1,645.64 which essentially represented cost of additional formwork for gridlines 14 and 15 in order to accelerate work, that was clearly caused by the disruption and should be allowed.

52 The claim of $3,772.65 (disposal charges) relates to the removal of debris during the period between January and June 1997. The dismantling of works at gridlines 11 and 12 took place around September 1996. Betty Tan said the debris were left by the side. There was space there. The debris from works relating to gridlines 2 to 10 had been removed earlier. It seems to me to be unlikely that all those charges relate exclusively to the debris from the dismantling of gridlines 11 and 12. There were still works for gridlines 13-15. Taking a broad brush, I think it would not be unreasonable to allow half of that.

53 In the result, the counterclaim of THS which I would allow are the following (using the heading of paragraph 46 above):-

> Change in beam design $ 4,809.90 Abortive & dismantling works $ 43,641.23 Accelerated measures $ 1,645.64 Sinviet re-design cost $ 7,750.00 MOE disposal charges $ 1,886.32 Total: $ 59,733.09

Failure to take out insurance cover

54 The final issue which I would have to consider is whether THS should bear the losses themselves for failing to take up an insurance cover for McConnell. Under clause 11.1 of the Sub-contract,

> "The Contractor shall effect and keep in force during all material times policies of insurance in such sums and as will in all respects cover adequately the Sub-Contractor's liabilities hereunder…… The Contractor shall when requested produce for inspection by the Sub-Contractor all such policies … but the omission of the Sub-Contractor to ascertain the names of the company or companies with whom the Contractor has effected such policies ……. shall not affect in any way the obligation

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

> of the Contractor to insure pursuant to this Clause. If the Contractor fails to comply with the provisions of this Clause the Sub-Contractor (without prejudice to any other rights and remedies) may (but shall not be obliged to) himself insure and any expenses so incurred shall be paid by and from the Contractor."

55 Dundas said that they were concerned about professional liability, this being a design and supply contract. Thus they would require professional indemnity coverage. McConnell submitted that as THS had failed, in breach of clause 11.1, to effect the requisite professional indemnity insurance cover, THS themselves must be taken to have assumed the risk of such losses and are thereby precluded from claiming against McConnell: see *Greenwood Shipping Plaza v Neil J Buchanan Ltd* 99 D.L.R (3d) 289.

56 It is important to examine whether what Dundas now alleges is borne out by their conduct. In their memorandum of 1 April 1996 McConnell asked THS to forward copies of the following insurance policies:-

(i) contractor’s all risk;

(ii) third-party liability;

(iii) Workmen’s compensation.

These were furnished by THS on 3 April 1996. There were no comments or further requests for additional coverage by McConnell, who then proceeded with the works. McConnell must therefore be satisfied with the three policies taken out by THS. I do not accept Dundas’ evidence that McConnell were then concerned about professional indemnity coverage. If so, why did McConnell

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

not ask that such coverage be obtained? In my view, this assertion is an afterthought in the light of the present litigation.

57 While the ambit of clause 11.1 seems to be wide, THS argued that McConnell are estopped from insisting that THS should fulfil to the letter the obligations under clause 11.1 and relied upon the case *Brown Noel Trading Pte Ltd v Donald & McArthy Pte Ltd* [1997] 1 SLR 1 where Thean JA, delivering the judgment of the Court of Appeal, said:-

> "In not raising the objections which they were entitled to raise and, further, in proceeding actively trying to fulfil the requirements of the contract, the third party led the defendants to believe that the third party had accepted the letter of credit with the terms therein. It would be unfair and unjust in the circumstances to allow the third party at such a late stage as shortly before the trial to assert that the letter of credit was not in confirmity to the contract in material aspects."

58 In my opinion, McConnell are estopped from asserting that THS were bound to take out a professional indemnity for them. McConnell, by their memorandum of 1 April 1996, had led THS into believing that the insurance policies which THS were required to take out were the three mentioned by McConnell and by so taking out the policies THS would have fulfilled their obligation under clause 11.1.

Judgment

59 In the result there shall be judgment for the plaintiffs against the defendants in the sum of $73,314.64 ($133,047.73 less $59,733.09).

On the question of costs, having borne in mind -

> (i) McConnell's claim is not disputed except for $38,487.05, and of this sum THS have succeeded to reduce it by $1,757.30; and

> (ii) The real issue of the trial centred on the counterclaim upon which THS have shown that McConnell were in breach of their contractual obligation and have succeeded to the extent of $59,733.09,

I think it would be fair, looking at the matter broadly and even though judgment for $73,314.64 is awarded to McConnell, that each party should bear its own costs.

60 The sum of $73,314.64 shall bear interest, as specified in clause 7.2(b)(ix) of the sub-contract, at the rate of 1• % per month from the date of the Writ.

Chao Hick Tin

Judge

Chao Hick Tin JA

Eric Low with Christopher De Costa (Khattar Wong & Partners) for the plaintiffs
Chong Yee Leong with Eileen Tay and Hilbert Lee (Rajah & Tann) for defendants

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