AL Stainless Industries Pte Ltd v Wei Sin Construction Pte Ltd
[2001] SGHC 243

Case Number : Suit 221/2000/H

Decision Date : 28 August 2001

Tribunal/Court : High Court

Coram : Woo Bih Li JC

Counsel Name(s) : Winston Quek (B T Tan & Company) for the plaintiff; Nishith Shetty (Wong Partnership) for the defendant

Parties : AL Stainless Industries Pte Ltd — Wei Sin Construction Pte Ltd

Judgment

GROUNDS OF DECISION ***Cur Adv Vult***

BACKGROUND

1. The Defendant Wei Sin Construction Pte Ltd ('Wei Sin') is the main contractor of two projects by the Housing and Development Board ('HDB') at Jurong West. The contracts are known as Neighbourhood 2 Contract 6 and Neighbourhood 6 Contract 28. I will refer to them as the N2 contract and the N6 contract respectively and the neighbourhoods as N2 and N6 respectively.

2. At all material times the Plaintiff AL Stainless Industries Pte Ltd ('AL') was the sub-contractor of Wei Sin for the supply, delivery and installation of metal work in respect of the N2 and the N6 contracts.

3. The letters of award from Wei Sin to AL for the sub-contracts were each dated 15 March 1999. They incorporated, inter alia, attached Standard Conditions of Contract for Supply and Install Sub-Contract ('the Standard Conditions'). Each letter of award was accepted by AL on or about 20 April 1999.

4. The initial sub-contract sum in respect of N2 was $450,291.19. The additional sum for variation and for any item not previously priced was $205,857.86. The total sub-contract sum for N2 was therefore $656,149.05.

5. The initial sub-contract sum in respect of N6 was $509,241.39. The additional sum for variation and for any item not previously priced was $68,678. The total sub-contract sum for N6 was therefore $577,919.39.

6. In due course, AL submitted progress claims for payment. Wei Sin was often late in payment and also did not pay the entire sums claimed. As a result, AL was chasing for payments to be made.

7. In the meantime, Wei Sin alleged that that there was delay in AL's works and also defects.

8. Eventually, AL's solicitors B T Tan & Company ('B T Tan & Co') sent a fax dated 4 September 1999 to Wei Sin on both the sub-contracts to allege that Wei Sin was in breach of contract and to require that arrears in payment under both contracts be paid in full by 9 September 1999, failing which AL would terminate the sub-contracts.

9. In response, Harry Elias Partnership ('HEP'), who were the then solicitors of Wei Sin, replied on 10 September 1999 to deny any breach by Wei Sin. They alleged severe delay and numerous defects

in AL's work and purported to terminate the two sub-contracts under Clause 7(a), (b) and (c) of the Standard Conditions.

10. B T Tan & Co then replied also on 10 September 1999 to, in turn, purportedly terminate the two sub-contracts.

11. I will refer to these three faxes in greater detail later.

12. AL then commenced this action to claim the payments that AL said were due to it under the two sub-contracts for work done and damages for Wei Sin's repudiation of both contracts. At trial, Mr Winston Quek for AL said the claim for damages was for loss of profit.

13. The trial proceeded on the basis that AL would attempt to prove its claim for the amounts that should be paid to it for work done. If it is entitled to claim damages for repudiation, such damages would be assessed. AL's request was for assessment to be done by a registrar.

14. Wei Sin in turn counter-claimed that it was entitled to terminate the sub-contracts and did so by HEP's fax. Wei Sin claimed damages all of which were to be assessed. Wei Sin wanted the question as to who was to assess the damages to be left open until after liability was determined.

15. Wei Sin's main claims were for having to engage other sub-contractors (a) to do the outstanding work and (b) to rectify AL's defective work. Another main claim by Wei Sin was for liquidated damages against AL for alleged delay by AL in carrying out its works in each of N2 and N6.

16. Lastly, Wei Sin claimed various sums for other items which I shall deal with later.

WITNESSES AND REFERENCES

17. The witnesses for AL were:

(a) PW1 - Sim Kim Seng (Alex) -A director and a shareholder of AL.

(b) PW2 - Teo Teng Siu Francis - A chartered quantity surveyor who was AL's expert witness.

18. The witnesses for Wei Sin were:

(a) DW1 - Vergara Rogelita - An architect employed by Wei Sin as project co-ordinator for N2.

(b) DW2 - Soh Eng Chong - Project Director of Wei Sin for N2 and for N6.

(c) DW3 - Poon Lok Yuen - Senior Contracts Manager of Wei Sin.

19. I will refer to the Agreed Bundle as 'AB', each Affidavit of Evidence-in-chief as 'AEIC', the Bundle of Affidavits of Evidence-in-chief as 'BAEIC' and the Notes of Evidence as 'NE', followed by the page number and, where applicable, the line number.

AL'S CLAIMS FOR WORK DONE (N2 AND N6)

20. It was not disputed that AL was entitled to be paid a further sum for each of the sub-contracts for work done. The issue was how much more for each of the sub-contracts.

21. Although the allegations of AL about under-payment and late payment of its progress claims will be more directly material to the question as to whether Wei Sin was in repudiatory breach of contract, I will deal with them here as this will provide a back-drop to AL's claims for work done.

Clause 4 of the letter of award

22. Under each of the letters of award, the terms of payment were:

> '4. TERM OF PAYMENT
>
> Term of payment shall be monthly. Progress claim shall be submitted to us before the 25th of each month. There will be a retention of 5% on the value of work done which shall be release to you after the issuance of the Main Contract's Maintenance Certificate. We reserve the right to deduct any monies that is due to us.'
>
> [Emphasis added.]

23. Mr Nishith Shetty for Wei Sin submitted that the last sentence of Clause 4 allowed Wei Sin to deduct any amount that Wei Sin might claim to be due to it from AL over and above the 5% retention sum.

24. The Interpretation of Contracts, Second Edition, by Kim Lewison states at p 245 and 246:

> ' INTERNAL INCONSISTENCY
>
> If a clause in a contract is followed by a later clause which destroys the effect of the first clause, the later clause is to be rejected as repugnant and the earlier clause prevails. If, however, the later clause can be read as qualifying rather than destroying the effect of the earlier clause, then the two are to be read together, and effect given to both.
>
> It often happens that two clauses in a contract are found to be in some measure inconsistent. This is particularly the case where the contract is based upon a standard form which the parties have not negotiated to which special clauses or conditions have been added. In such circumstances the court has developed a number of principles for dealing with the inconsistency. Provisions are inconsistent if they cannot sensibly be read together.
>
> In *Walker v. Giles*, Wilde C.J. said:
>
> > "And as the different parts of the deed are inconsistent with each other, the question is, to which part effect ought to be given. There is no doubt, that, applying the approved rules of construction to this instrument, effect ought to be given to that part which is calculated to carry into effect the real intention, and that part which would defeat it should be rejected."

As a statement of general principle that cannot be criticised. However, it is not of great assistance in determining how to ascertain the real intention to which effect must be given. A more specific principle was described in *Forbes v. Git*, in which Lord Wrenbury said:

> "The principle of law to be applied may be stated in a few words. If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails. In this case the two clauses cannot be reconciled and the earlier provision in the deed prevails over the later. Thus if A covenants to pay 100 and the deed subsequently provides that he shall not be liable under his covenant, that later provision is to be rejected as repugnant and void, for it altogether destroys the covenant. But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole. Thus if A covenants to pay 100 and the deed subsequently provides that he shall be liable to pay only at a future named date or in a future defined event or if at the due date of payment he holds a defined office, then the absolute covenant to pay is controlled by the words qualifying the obligation in manner described."

….

It should be noted that a contrary rule applies to the construction of wills. In the case of inconsistency between two provisions in a will, the later provision prevails. ….

The contract may, however, itself indicate which of two inconsistent clauses is to prevail. …'

25. If Mr Shetty's interpretation of the last sentence of Clause 4 is correct, it would destroy the 5% limit. The last sentence should therefore be rejected as being repugnant to the 5% limit.

26. However, Mr Shetty also ran his argument in another way. He argued that the 5% retention sum was for latent defects whereas the last sentence of Clause 4 was to cover patent defects. I do not agree. If the defects were patent, then that would have been taken into account by Wei Sin when Wei Sin was valuing each progress claim by AL. Wei Sin is not entitled to make a further deduction for patent defects on top of its own valuation.

27. Thirdly, if there is any ambiguity about Clause 4, then under the contra proferentem rule, the ambiguity would be resolved against the party who drafted the provision i.e Wei Sin.

28. Accordingly, I am of the view that the last sentence of Clause 4 has no effect. Alternatively, at most, it will allow Wei Sin to deduct any sum over and above the 5% retention sum provided the deduction is to meet a liability that is already due from AL to Wei Sin either by admission or by

judgment.

29. In any event, whatever rights that Wei Sin may have under Clause 4 must be exercised bona fide and not capriciously.

Common law right of set-off

30. Mr Shetty also submitted that Wei Sin had a common law right of set-off so long as this right was not excluded by contract.

31. Hudson's Building & Engineering Contracts 1995, Eleventh Edition, states at p 623:

> 'Payment obligations are, in many international and some producer-influenced domestic construction contracts, enforceable by express contractor's termination provisions, usually conditioned upon A/E certification of interim payments due. Even in those cases, however, *a fortiori* if no termination provision is present, the possibility of valid deductions or set-off, whether expressly contemplated or permitted by the contract or not, must be borne in mind by a party contemplating termination or rescission. Only express wording can serve to exclude the right to set-off, and this will apply equally whether the remedy sought is a common law rescission or a contractual termination for non-payment of certified sums, so that even contractual terminations by contractors supported by certificates may be perilous if the owner is able to establish a set-off against sums certified or due.'

32. However, the next para states:

> 'However, in these cases, set-off will need to represent a bona fide known present loss or entitlement by the deducting party, it is submitted, and not some possible or even likely future loss, if non-payment is to be justified and termination avoided in these situations. It will certainly not invalidate a termination for non-payment, whether at common law or under a contractual provision, if the set-off was unknown to the defaulting payer at the time, since such a set-off could not displace the intention not to be bound by the contract, which is the essential test in deciding the validity of such a common law rescission or interpreting a contractual termination power, it is submitted. Nor will it justify a deduction for anticipated further liquidated or other damages for delay made by an owner before expiry of the contract or extended contract period, it is submitted.'
>
> [Emphasis added.]

33. Accordingly, one of the key requirements to this right of set-off is that it must be exercised bona fide and even Mr Shetty accepted this in para 75 of his Closing Submission.

How AL's progress claims were valued

34. The valuation of AL's progress claims was done by quantity surveyors employed by Wei Sin. For N2, the quantity surveyor was Daniel Chong and for N6 it was Sim Poh Chuan. I will refer to the quantity surveyor as 'the QS'. Neither QS was called by Wei Sin to give evidence.

35. No explanation was given as to why Daniel Chong was not called to give evidence for Wei Sin.

36. As for Sim Poh Chuan, DW2 Mr Soh said he was no longer employed by Wei Sin. However, this does not justify the omission to call him as a witness. If a person is a material witness then he should be contacted and be asked to provide material evidence. There was no suggestion of any difficulty in contacting him or in obtaining his assistance.

37. Instead of calling either QS to give evidence for it, Wei Sin called DW3 Mr Poon.

38. Mr Poon is a Senior Contracts Manager of Wei Sin. He said that he is in charge of all the quantity surveyors employed by Wei Sin. They report to him on various matters including certification of payment for sub-contractors (NE 173 line 10 to 14).

39. His evidence at NE 174 line 4 to 175 Line 5 was:

> 'Q Please explain why there is a difference between this sum at D2-5 and $23,248.35 at D2-4?
>
> A Refer to D2-6. Total value of work done is $34,428.80. Retention is $1,700. He [the QS] deducted previous payment of $6,555. This gave a sub-total of $25,745. Add GST of $722.35 it becomes $26,517.35.
>
> That was the recommendation he made to the Defendants' Project Manager and Project Director who were Ng Boon Hoo and Mr Soh Eng Chong respectively.
>
> The practice in Defendants is that all the quantity surveyors are stationed at head office. They are handling not only one job but maybe 2 or 3 jobs concurrently. Because of that situation, the submission of claims by sub-contractors by 25th of each month becomes very important for quantity surveyors. Upon collection of sub-contractors' claim by 25th of the month, the QS then goes down to the respective site which he must do by 30th of the month. His visit to the site is 2 fold. Firstly it is to assess the status of the work for submission of claims to the clients like HDB. Secondly he will be assessing the sub-contractors' claim. Both of these functions will be done for each project in the same one day. Therefore whatever he recommends is limited to what he has seen. With that in mind, he does his assessment on a broad basis, recording only the general status of work done. He goes back to office and comes up with computation as shown in D2-5 and 6. He will then take them to the Project Manager and Project Director for further discussion. Because of that, there may be additions or omissions to his recommendation. With that he will come up with Progress Payment certificate as in D2-4 and it is processed by accounts department. At the same time, the QS will get the recommendation by the Contracts Manager and approval by one of the directors. Someone has to check the quantification is alright and approval is by a director.'

40. In summary, Mr Poon was saying that the QS's assessment and subsequent recommendation was based on the QS's limited site attendance and it was the Project Manager and Project Director

for the relevant project, who had more intimate knowledge of the project, who would make adjustments to the QS's recommendation. The QS would then prepare the Progress Payment certificate, payment would be recommended by the Contracts Manager and approved by one of the directors (on the board of directors).

Recommendations by the QS and Wei Sin's decisions on payment

41. I set out below the recommendation of the QS for each of the progress claims for N2 and for N6 respectively and Wei Sin's decision thereon:

N2

Amounts as recommended by the QS compared with amounts as decided by Wei Sin after deduction of 5% but including 3% GST

Claim No.	QS's Recommendation	Wei Sin's decision
1.	$37,109.47 (BAEIC 160)	$30,000.00 (BAEIC 155)
2.	A) QS originally recommended: $78,727.16 (BAEIC 164) b) But changed to: $61,705.02 (BAEIC 163)	- $61,705.02 (BAEIC 156)
3.	$90,022.00 dated 21/7/99 (BAEIC 167)	-
4A.	$62,897.98 dated 10/8/99 (BAEIC 170)	-

N6

Amounts as recommended by the QS compared with amounts as decided by Wei Sin after deduction of 5% but including 3% GST (information from Exhibit D2)

Claim No.	QS's Recommendation	Wei Sin's decision	
1.	$ 6,751.65	$ 6,751.65	
2.	$26,517.35	$23,248.35	$3,269.00
3.	$18,591.97	$17,946.50	$ 645.47
			$3,914.47

N2

42. It will be seen that for N2, Wei Sin had decided to reduce the recommended sum to be paid on Progress Claim No 1 by about $7,000.

43. For Progress Claim No 2, the initial recommendation was amended by the QS by about $17,000. As I will elaborate below, this was done on the instruction of a Project Director.

44. For Progress Claim No 3 and 4A, the QS had recommended payments of about $90,000 and $62,000 but no payment was made by Wei Sin.

N6

45. For N6, Wei Sin's decision after the recommendation for Progress Claim No 2 resulted in a reduction of about $3,000.

46. For Progress Claim No 3, Wei Sin's decision after the recommendation for payment resulted in a reduction of about $600.

47. DW2 Mr Soh is the Project Director for both N2 and N6. He is also the brother of the Managing Director of Wei Sin, Aaron Soh.

48. I asked him to explain the reason for the difference between the figures recommended for payment by the QS and the figures for payment as decided by Wei Sin for Progress Claim No 1 and No 2 under N2, since N2 had the more substantial differences.

49. His evidence at NE 170 line 11 to NE 171 line 15 states:

'Ct to DW2	Refer to BAEIC 160. Defendants' Recommendation for Progress Payment No. 1 for N2. Recommendation was for $37,924.85 before 5% retention and GST. Compare with 155 where estimated value of work done is $30,659.17. Why did Defendants certify payment at 155 for $30,659.17 when the Recommendation for payment was $37,924.85?
DW2	The intention was to pay $30,000. That's why we worked backwards.
Ct to DW2	Why did Defendant intend to pay $30,000 when the Recommendation for payment was about $37,000?
DW2	We took into account the defects and outstanding work.
Ct to DW2	How did Defendants derive the difference of about $7,000?
DW2	Based on estimates, to take into account those defects and outstanding work.
Ct to DW2	Refer to 164 and 163. Why was the valuation in 164 at $111,116.15 reduced to $93,720 at 163? [NB: this question relates to the gross figures initially recommended for Progress Claim No 2 whereas the figures in the table above are net figures.]
DW2	I instructed the QS to reduce by 20%.
Ct to DW2	Why did you do that?
DW2	To take into account slow progress on site, defects and outstanding work.
Ct to DW2	Wouldn't Defendants' QS already take into account defects and outstanding work when he recommends for payment?
DW2	QS may not be aware that some items may have to be removed and re-installed eventually.'

[Emphasis added.]

50. It is clear to me that Wei Sin had decided to cut down on the figures recommended by its own QS not because the QS had been unaware of the incomplete work or defects or because Mr Soh had more intimate knowledge of the works of AL. It was simply because Wei Sin wanted to pay a lower sum to AL because of some general concern about slow work and defects.

51. Neither Mr Soh or anyone else in Wei Sin had gone into any detailed discussion with the QS on his valuations to reach the lower figures. The lower figures which Wei Sin had decided for payment were therefore arrived at in an arbitrary manner.

Delay in or withholding of payment and differences between amounts claimed by AL and paid by Wei Sin

52. Under Clause 4 of the Letter of Award, progress claims were to be paid monthly and submitted by the 25th of each month. It was accepted by AL that this means payment would be made

by the 25th of the following month.

53. Aside from paying lower figures to AL than were originally recommended by the QS, Wei Sin had also been late in making progress payments.

54. I set out below the details of the progress claims for N2 and for N6. The details will also show the difference between the sum claimed under each progress claim and the payment by Wei Sin, if payment was made.

Progress Claims and Payments for N2

Claim No.	Date	Claim Amount after 5% retention but with GST	Due Date of Payment	Actual Date of Payment	Payment Amount after 5% retention but with GST	Difference between amount claimed and paid, if paid
1.	24/04/99	$ 47,821.69	25/05/99	01/06/99	$ 30,000.00	$ 17,821.69
2.	24/05/99	$ 66,809.84	25/06/99	a) 20/07/99 b) 31/07/99 or 06/08/99	a) $ 30,000.00 b) $ 31,705.02 _____ $ 61,705.02	$ 5,104.82
3.	24/06/99	$ 94,536.70	25/07/99	-	-	$ 94,536.70
Sub-total as at 11/08/99 and also as at 10/9/99		$209,168.23	-	-	$ 91,705.02	$117,463.21

4A.	27/07/99 (No 4 was submitted on 24/7/99 and substituted by 4A on 27/7/99)	$ 53,927.04	25/09/99	-	-	$ 53,927.04
5A.	30/08/99 (No 5 was submitted on 27/8/99 and substituted by 5A on 30/8/99)	$126,781.01	25/10/99	-	-	$126,781.01
Total		**$389,876.28**			**$ 91,705.02**	**$298,171.26**

Progress Claims and Payments for N6

Claim No.	Date	Claim Amount after 5% retention but with GST	Due Date of Payment	Actual Date of Payment	Payment Amount after 5% retention but with GST	Difference between amount claimed and paid, if paid
1.	24/04/99	$ 7356.51	25/05/99	09/07/99	$ 6,751.65	$ 604.86
2. (Amended)	28/05/99	$ 41,714.93	25/07/99	09/07/99	$23,248.35	$18,466.58
3.	24/06/99	$ 7,128.69	25/07/99	07/08/99	$17,946.50	$(10,817.81)

4.	24/07/99	$ 22,242.16	25/08/99	-	-	$22,242.16
Sub-total as at 10/9/99		$ 78,442.29	-	-	$47,946.50	$30,495.79
5A.	30/08/99 (No 5 was submitted on 27/8/99 and substituted by 5A on 30/8/99)	$ 68,396.58	25/10/99	-	-	$68,396.58
Total		**$146,838.87**			**$47,946.50**	**$98,892.37**

55. It can be seen from the above tabulations that Wei Sin was often late in making payment, except for Progress Claim No 2 for N6. This was paid 'early' but only because AL had re-submitted an amended claim after 25 May 1999. Wei Sin took advantage of this and treated it as having been made for June 1999 whereupon the due date for payment became 25 July 1999 instead.

56. It can also be seen that Progress Claims No 3, 4A and 5A under N2 and Progress Claim No 4 and 5A under N6 were not paid at all. In fairness, I should mention that as at the date of purported termination i.e 10 September 1999, only Progress Claim No 3 for N2 and No 4 for N6 were due for payment. However, even though the others were not due for payment yet, they subsequently became due but were not paid.

57. As regards Progress Claim No 5A, Mr Shetty said that his instructions were that Wei Sin did not receive it for each of the sub-contracts until after the action was commenced (para 5 of the Defence and Counterclaim refers wrongly to Progress Claim No 5). However, he did not question PW1 Mr Sim about No 5A. While DW2 Mr Soh had alleged in his AEIC that the last progress claims dated 30 August 1999 (i.e No 5A) for each of the sub-contracts was not even forwarded to Wei Sin prior to the action, he did not elaborate as to when they were received.

58. Besides, in evidence, Wei Sin did not dispute receiving Progress Claim No 5 for each of the sub-contracts. Each of the Progress Claims No 5A is not significantly different from No 5 in dollar value.

59. Furthermore, I note that when B T Tan & Co sent its fax demand dated 4 September 1999, it referred to five progress claims for each sub-contract, the last ones being numbered '5' in its letter. The error is repeated in the Statement of Claim. However, from the date and the amount of each of the fifth claims, it seems to me that B T Tan & Co's reference for that claim should actually be to 5A and not 5.

60. Also, when HEP replied, HEP did not dispute that Wei Sin had received five progress claims from AL for each sub-contract. Neither did HEP say that the amounts claimed were incorrectly stated by B T Tan & Co.

61. As for the differences between AL's progress claims and the payments by Wei Sin, the differences were larger for N2.

Did Wei Sin agree on 11 August 1999 to make some payment to AL <u>for N2</u>? If so, why was the payment withheld?

62. As can be seen from the above tabulation at para 54, as at 11 August 1999, Wei Sin had paid AL less than half of what AL had claimed for N2. I also stress that although Wei Sin had made three payments for N2, there was no payment in respect of Progress Claim No 3 contrary to the assertion in para 142 of Mr Shetty's Closing Submission. Although AL's statement of account (at BAEIC 49) and PW1 Mr Sim had assumed that the third payment from Wei Sin was for Progress Claim No 3, the fact of the matter is that the third payment was in respect of Progress Claim No 2 as was the second payment. This is evident from the documentary evidence i.e Progress Payment No 2 (at BAEIC 156) which was confirmed by DW2 Mr Soh during cross-examination (see NE 163 line 14 to NE 164 line 11). That is why I grouped the second and third payments as payments for Progress Claim No 2 in the tabulation for N2 at para 54 above.

63. On 11 August 1999, there was a meeting between PW1 Mr Sim, representing AL and Lawrence Soh (the CEO of Wei Sin), Steven Soh, Mark Koh and one Ms L F Yip representing Wei Sin. I was informed that DW2 is also known as Steven Soh.

64. Mr Sim alleged that at this meeting, Lawrence Soh had agreed to pay AL $90,000 for Progress Claim No 3 within the next one or two days. However when AL did not receive such payment, he contacted Mr Soh's office and spoke to Ms Yip who informed him that the figure would be $70,000. The $70,000 would be paid between 16 to 25 August 1999.

65. According to DW2 Mr Soh, Wei Sin did not agree to pay AL $90,000 but only $70,000 and this payment would be made between 16 and 25 August 1999. However, he also said that Wei Sin did not pay the $90,000 (which had been recommended by the QS for N2 Progress Claim No 3, see para 41 above) because Wei Sin wanted to make provision for liquidated damages for AL's delay in N2.

66. In the context of Progress Claim No 4, he gave additional reasons. He said that Wei Sin had to take into account the additional costs of rectifying defects and completing outstanding work, if AL did not do these works (NE 155 line 12 to 157 line 23). Progress Payment No 4A was not due for payment until 25 September 1999 (NE 158 line 5 to line 16).

67. The faxes on the subject are stated below.

68. On 12 August 1999, Wei Sin sent a fax to AL's Mr Sim (AB 172) stating:

> 'Jurong West N2C6
>
> We refer to the meeting between your goodself, our Mr Lawrence Soh, Steven Soh, Mark Koh and the undersigned on 11 August 1999.
>
> We would like to place on record that we had clarified to you on the following matters:-

1. There is no outstanding amount due to you for Jurong West N6C28.

2. As for Jurong West N2C6, the outstanding amount due to you (for work done in June '99 which is due in end July '99) is S$90,000 instead of a few hundred thousands as alleged by your goodself.

3. We will inform you on the dates where you could expect the payment of S$90,000.

Thanks & regards.'

69. On 15 August 1999, Wei Sin sent a fax to AL's Mr Sim (AB 173) stating:

'Jurong West N6C28

I would like to highlight to you that the following issues:-

1. Blk 656D

I am surprise to see that till today, there is not much progress for the balcony railing and cloth drying racks which has jammed up the progress of plastering work. ….

2. Blk 656A [which should read 657A]

Please note that the plastering work will commence on 16 August 1999 and there will be about 60 plasterers carrying out the work. With your progress for Blk 656D, I foresee the same thing like Blk 656D will happen to this block unless extra effort are put in by your company.

I was informed that you are chasing my office everyday for the payment after since the meeting on 11 August 1999 and I understand my office had committed a schedule to you. With this, I hope you could spend more time on site to supervise the work since you are more familiar with the site progress. It will then be beneficial to both parties when your progress of work are back to track.

I reiterate that I want to see all your necessary works to be completed in order not to cause any delays to other trades before we talk about the next payment.

Your immediate action will be necessary.

Thanks & regards.

Lawrence Soh'

70. On 16 August 1999, AL's Mr Sim sent a fax to Wei Sin's Lawrence Soh (AB 175) stating:

'1. ….

2. ….

3. ….

4. As agreed on meeting 11th Aug 99 on the following:

a) Progressive payment for 24th Jun 99 shall be S$90,000.00 instead of S$70,000.00

b) You promised to inform us in one to two day time, I was informed on third day and we supposed to get payment between 16th Aug 99 to not later by 25th Aug 99 and it S$70,000.00 (Ms Yip informed)

c) As our contract have indicated clearly that we supposed to get progressive payment for every month for the two sites

d) With the above progressive payment it will relay (*sic*) our payment by another two or three week (submission end of every month & payment immediate end the month)

e) The relay (*sic*) progressive payment caused us the overhead of our company, such as paying salaries to employee, purchasing of materials & consumable items

f) We hopefully that we would very much continue to work with your company and complete all the work in time

g) We hope you will expedite on our progressive payment in time as we require to pay our salaries, suppliers and to purchase other materials for other fabrication works (Sun breaker, Sun Lourve, Car-park Mesh, Parapet materials)'

71. On the same day, Wei Sin replied (BAEIC 331):

'JURONG WEST N6C28 AND N2C6
METAL WORK SUB-CONTRACT

We refer to your fax F001-0899WSN6C28 dated 16 Aug 99.

We like to clarify that in the meeting we have never promise you a payment of $90,000.00. We only agreed to inform you on the payment as soon as possible. We stress again your workmanship for the two projects is not acceptable and we have to retain monies for future rectification work. Your work is also way behind sites work schedules despite of reminders.

….

….

WE ARE VERY CONCERN ON THE STATUES (*sic*) OF THE SUNBREAKER AND SUN-LOUVRES. YOU ARE TO WRITE TO US BY TOMORROW ON YOUR DECISION AND YOUR PROPOSAL TO CATCH UP ON THE DELAY CAUSED.

WE MAY, OUT OF NO CHOICE BUT TO RESORT TO OTHER ALTERNATIVES TO MITIGATE THE DELAY CAUSED TO OUR PROJECTS.'

72. Then on 18 August 1999, Wei Sin sent a fax to AL's Mr Sim (BAEIC 335 to 336). It complained about slow progress of works for N2 and for N6. The penultimate paragraph states:

> 'As our projects are been delayed by you (and may suffer liquidated damages as a result) and the higher cost of completing your outstanding work, the outstanding payment of $90,000.00 will be withhold until the project is completed.'

73. Having considered the oral and the documentary evidence, I find that Wei Sin did agree on 11 August 1999 to pay AL $90,000 and AL was to be informed in one or two days as to when it could collect payment.

74. This was not a situation where Wei Sin would inform AL within one or two days as to how much Wei Sin would pay as was suggested by Mr Shetty during cross-examination of Mr Sim.

75. Wei Sin then changed its mind and on or about 14 August 1999, informed AL that it would pay $70,000, instead of $90,000, and this would be paid between 16 and 25 August 1999.

76. Wei Sin then changed its mind again and decided to withhold payment even of the $70,000 primarily because of its concern about the slow progress of work by AL.

77. However, Wei Sin did not adduce any evidence as to just how much AL's works in N2 had delayed the main contract works as at 18 August 1999, or even thereafter up to 10 September 1999 (which is the date of termination of the sub-contracts).

78. Neither did it adduce any evidence as to its own assessment <u>at the material time</u> of the costs of rectifying defects for N2.

79. It is clear to me that, again, Wei Sin had acted in an arbitrary manner in withholding payment for N2 Progress Claim No 3 which was already due to be paid by 25 July 1999.

80. I would add that the agreement on 11 August 1999 and Wei Sin's failure to pay the $90,000, or even the $70,000, might have provided AL with a separate defence to any allegation of slow progress of work or of failure to rectify defective work for N2 subsequent to 11 August 1999. However, as this was not pleaded as a separate defence, I need not say anything more about it.

81. I have already mentioned, in the earlier part of my judgment, the fax demand sent by AL's solicitors B T Tan & Co dated 4 September 1999, the purported termination of the sub-contracts for N2 and N6 by Wei Sin's solicitors HEP on 10 September 1999 and the purported termination of the sub-contracts for N2 and N6 by B T Tan & Co on 10 September 1999 (see paras 8, 9 and 10 above).

82. I will elaborate on the fax demand and each of the purported notices of termination later. Suffice it to say for now, that, by 10 September 1999, the sub-contracts for N2 and N6 were terminated.

The amount to be paid to AL for N2 and N6

83. Leaving aside the counter-claims of Wei Sin for the time being, it was clear that AL was entitled to further payment.

84. Indeed, Wei Sin conceded the following:

> (a) For N2, the 95% payment to AL should be $307,604.99 (including GST) although AL claimed $389,876.28. As AL has received $91,705.02, AL is entitled to be paid at least another $215,899.97.
>
> (b) For N6, the 95% payment to AL should be $103,474.50 (including GST), although AL claimed $146,838.87. As AL has received $47,946.50, AL is entitled to be paid at least another $55,528.

85. On the differences, AL relied on the details forwarded with its progress claims which were attached to the AEIC of Mr Sim and the evidence of PW2 Mr Teo, its expert witness. However, Mr Teo did not go to the site to check the actual work done and his evidence was really a commentary on the valuations done.

86. As for Wei Sin, it relied on the evidence of DW2 Mr Poon. It will be recalled that he is a Senior Manager (Contracts) of Wei Sin. He is in charge of all the quantity surveyors of Wei Sin but he was not the quantity surveyor who did the valuations for N2 and for N6.

N2 – 1st item of dispute

87. The 1st item of dispute for N2 was the barricade railing.

88. In AL's Progress Claim No 5A, BAEIC 142, items 15 and 16, AL had claimed 70% of 705 metres for this item, i.e 494.2 metres.

89. Mr Poon's valuation at BAEIC 625, S/No A item 6, alleged that only 345.8 metres of this item had been done by AL.

90. However, the measurements of Wei Sin for this item as at 30 July 1999, i.e one month earlier than the date of Progress Claim No 5A, had already stated the total measurement of barricade railing done by AL to be 423.6 metres, see BAEIC 171 items 6 and 7. This was a point made by Mr Teo at NE 124 line 1 to 4 and he was not challenged on it.

91. Furthermore, when Mr Poon gave evidence for Wei Sin, he did not explain how it was that Wei Sin had stated the total measurement for barricade railing to be 423.6 metres at BAEIC 171, items 6 and 7, but yet had come up with 345.8 metres in his subsequent report at BAEIC 625 item 6.

92. Indeed, he did not give any explanation as to how he had come up with 345.8 metres for this item.

93. Accordingly, I find that there is no basis for Wei Sin's measurement of 345.8 metres which is

in any event contradicted by its earlier measurement of 423.6 metres.

94. In addition, its earlier measurement of 423.6 metres was for work done as at 30 July 1999 and this is not inconsistent with AL's claim of 494.2 metres under No 5A which is for work done as at 30 August 1999.

95. Furthermore, Mr Sim who gave evidence for AL was not challenged on AL's measurement for this item.

96. Accordingly, I find for AL for this item. The difference in the respective measurements in BAEIC 625 is 494.2 metres – 345.8 metres = 148.4 metres x $150.45 per metre (which rate is not disputed) = $22,326.78, before taking into account the 5% to be retained and GST.

N2 – 2nd item of dispute

97. The 2nd item of dispute is the Air-condition Ledge Railings and Cloth Drying Racks 'L-shaped'.

98. AL claims that 406 sets were supplied and installed but Wei Sin alleges that 303.9 sets were installed, see BAEIC 625 S/No A item 18.

99. While DW3 Mr Poon accepted that 406 sets were installed by AL, he alleged that the sets installed were not complete. He said that each set was made up of three parts, i.e:

Part 1 - cow horn

Part 2 - air-con ledge

Part 3 - aluminium clothes rack

100. He said that the percentage of work done for each part was:

Part 1 - 30%

Part 2 - 45%

Part 3 - 20%

101. Based on this, he then came up with the figure of 303.9 sets. Further details are in BAEIC 627 which is part of his report.

102. However, he also said that the quantity done for each part was told to him. In other words, he had no personal knowledge of the work done or not done (NE 179 line 11 and 12).

103. In re-examination at NE 187 line 15 to 21, he further said:

> 'Q You mentioned you were provided with information. Who provided the information?
>
> A For N2, Daniel Chong, the QS of the project at the material time. Ms Rogelita, the Project Co-ordinator of N2. Soh Eng Chong, the Project Director of N2.

For N6, Daniel Chong, the QS and Soh Eng Chong, the Project Director.

For the valuations in my affidavit, Daniel Chong and Soh Eng Chong went to the site to do physical measurement.'

104. As I have previously said, Daniel Chong is the QS for N2 only. The QS for N6 is Sim Poh Chuan. Neither was called to give evidence on this item or on any other point for that matter. I draw an adverse inference against Wei Sin for this omission.

105. Ms Rogelita was called to give evidence as DW1 but not on the valuation of this item.

106. Mr Soh was called to give evidence as DW2 but also not on the valuation of this item.

107. Furthermore, there was a discrepancy on Wei Sin's side. The total number of sets under AL's sub-contract for N2 for this item was 518. If only 303.9 sets were supplied and installed by AL, then the remaining quantity to be supplied and installed by another sub-contractor would be 214.1 sets.

108. However item 3 of BAEIC 630, which is part of Mr Poon's own report, shows that the remaining quantity to be supplied and installed was 112 sets only and not 214.1 sets.

109. The 112 sets tally with AL's claim of 406 sets as the two quantities added together make up the 518 sets required under AL's sub-contract before termination.

110. Accordingly, I find for AL for this item. The difference in BAEIC 625 is 406 – 303.9 sets = 102.1 sets x $433.65 per set (which rate is not disputed) = $44,275.67, before taking into account the 5% to be retained and GST.

N2 – 3rd item of dispute

111. The 3rd item of dispute is SS304 Pipe Sockets (for Ground Floor Unit only), see BAEIC 625 S/No B, item 7.

112. AL claimed seven sockets at the rate of $140 per socket.

113. Wei Sin alleged only five sockets were supplied and installed and the correct rate was $130 per unit.

114. AL did not pursue the quantity of seven in cross-examination.

115. As for the rate, BAEIC 171 at Variation Work Order Ref No 8 indicates the rate to be $140 per unit. BAEIC 171 is part of the valuation by Wei Sin's QS.

116. However, BAEIC 300 which is a document from Wei Sin entitled 'Breakdown of Variation Work' shows the rate to be $130 per unit. The rate of $140 per unit used by the QS was probably an error.

117. Accordingly, I reject AL's claim for the difference both in terms of quantity and rate.

N2 – 4th item of dispute

118. The 4th item of dispute is Long Galvanised Steel Railing.

119. AL's sub-contract had originally provided for the installation of this item which is identified at BAEIC 625 S/No A items 8, 11 and 12.

120. However as the items were subsequently taken out from the sub-contract (and replaced by other items), AL did not claim payment for the omitted items.

121. Notwithstanding this, Wei Sin proceeded to deduct the dollar value of these items from AL's claim.

122. I do not agree that Wei Sin is entitled to make the deductions. The issue is not what the value of AL's sub-contract is but the value of AL's works done. As AL had not claimed payment for these items in the first place, Wei Sin was wrong to make deductions for them.

123. The deductions for these items total $10,089 which should be added back to the monies payable to AL. This does not yet take into account the 5% to be retained and the GST.

N2 – 5th item of dispute

124. The 5th item of dispute is Galvanised Steel Railing below ramp at Deck 1A.

125. AL claims $1,520 for this item.

126. Wei Sin says it was not done by AL. However, this item is not reflected as an outstanding item which had to be done by another sub-contractor of Wei Sin in BAEIC 630 and there was no suggestion that this item was taken out from the main contract altogether. So it must have been done by AL.

127. Accordingly, I find for AL for this item of $1,520 before taking into account the 5% to be retained and GST.

Summary for N2

128. Although Mr Shetty submitted that Wei Sin's valuation for N2 was largely unchallenged, this was not true. Mr Quek had challenged the valuation for the items in dispute.

129. Indeed, the shoe is on the other foot, Mr Shetty did not challenge Mr Sim on AL's claims for N2 as to whether certain work had in fact been done by AL.

130. The further sum to be paid to AL for work done under N2 taking into account the 5% to be retained and adding GST would be:

(a) Amount conceded by Wei Sin: $215,899.97

(this amount already takes into account the 5% retention and GST)

(b) Add the following:

- Under para 96 : $22,326.78

-	Under para 110	:	$44,275.76
-	Under para 123	:	$10,089.00
-	Under para 127	:	$ 1,520.00
			$78,211.45
Less 5%, so 95%		:	$74,300.88
Add 3% GST		:	$ 2,229.03
			$76,529.91
			$ 76,529.91

$29

N6 – 1st and only item of dispute

131. The 1st and only item of dispute for N6 is the Air-Condition Ledge Railings and Cloth Drying Racks 'L-shaped'. This is the same item as the 2nd item of dispute in N2.

132. For N6, AL were claiming for the supply and installation of 282 sets whereas Wei Sin said only 179.81 sets were supplied and installed, see BAEIC 639 S/No A item 7.

133. It is true that Mr Quek did not challenge DW3 Mr Poon on this item. However, in his report at BAEIC 103, PW2 Mr Teo had already challenged the quantity alleged by Wei Sin by pointing out a discrepancy on Wei Sin's side. I will elaborate on the discrepancy later.

134. Secondly, the basis for Wei Sin's arriving at 179.81 sets for N6 was not explained by Mr Poon at trial. He gave an explanation for this item only in the context of N2. Nor was any supporting document for this figure found with his AEIC, although one is found in an earlier affidavit of one Tan Beng Choo filed in Order 14 proceedings. Tan Beng Choo was not called as a witness.

135. Thirdly, if I were to apply Mr Poon's evidence for N2, I would conclude infer that Mr Poon also did not have personal knowledge about how much was done or omitted for this item in N6.

136. Fourthly, there was a discrepancy on Wei Sin's side as pointed out by Mr Teo. The total number of sets under AL's sub-contract for N6 for this item was 334. If only 179.81 sets were supplied and installed by AL, then the remaining quantity to be supplied and installed by another sub-

contractor would be 154.19 sets.

137. However, item 1 of BAEIC 641, which is part of Mr Poon's own report, shows that the remaining quantity was 51 sets and not 154.19 sets.

138. The 51 sets just about tallies with AL's claim of 282 sets as the two quantities added together make up 333 sets, just one short of the 334 sets required under AL's sub-contract before termination.

139. Mr Teo's point about the discrepancy was not challenged by Mr Shetty (see NE 124 line 20 to NE 125 line 8). Neither did Mr Shetty challenge PW1 Mr Sim on the number of sets claimed by AL for this item.

140. Accordingly, I find for AL for this item. The difference is 282 – 179.81 sets = 102.19 sets x $433.65 per set (which rate is not disputed) = $44,314.69 before taking into account the 5% to be retained and GST.

141. The further sum to be paid to AL for work done under N6 taking into account the 5% to be retained and adding GST would be:

(a) Amount conceded by Wei Sin: $55,528.00

(this amount already takes into account the 5% retention and GST)

(b) Add the following:

- Under para 140 : $44,314.69

Less 5%, so 95% : $42,098.96

Add 3% GST : $ 1,262.97

$43,361.93

$43,361.93

$98,

WHETHER WEI SIN OR AL HAD VALIDLY TERMINATED THE N2 AND THE N6 SUB-CONTRACTS

142. Clause 1 of each Letter of Award states:

'1. PROGRAMME OF WORK

Time is the essence of this contract. The Sub-Contractor shall execute his work on strict compliance with the agreed schedule and programme.'

143. However this provision must be read in the context of the rest of the terms.

144. As I have mentioned, each Letter of Award incorporated the Standard Conditions.

145. Clause 7 of the Standard Conditions states:

> '7. TERMINATION OF CONTRACT
>
> This Sub-contract shall be terminated in the event the Sub-Contractor default in the followings:
>
> (a) fails to proceed with the sub-contract works with due diligence and expedition after being required in writing to do so by the Main Contractor, or
>
> (b) refuses or neglects to remove defective materials or make good defective work after being directed in writing to do so by the Main Contractor, or
>
> (c) fails to perform his obligations in accordance with the sub-contractor (*sic*) after being required in writing to do so by the Main Contractor
>
> (d) commits an act of bankruptcy or goes into liquidation.
>
> For items (a) to (c), the Sub-Contractor will be given three (3) days to comply. Upon such determination, the rights and liabilities of the Main Contractor shall be the same as if the Sub-Contractor have repudiated this contract. The Main Contractor reserve the right to recover all loss and cost from the Sub-Contractor.'

146. Wei Sin's case was that for each of the sub-contracts, it was entitled to terminate and did terminate the sub-contract under Clause 7(a), (b) and (c) of the Standard Conditions.

147. However, there was no discrete allegation of breach under Clause 7(c) which was not already supposed to be covered by Clause 7(a) or 7(b).

148. Wei Sin relied on various minutes and correspondence and faxes in which AL was told of delay and defects in its works for each sub-contract.

149. AL's position was that it had not been paid on its progress claims and because of this its works had progressed more slowly and defects were not rectified.

150. AL also took the position that there was no written schedule for its work and that the schedules were orally given. However, the correspondence and faxes appeared to refer to written schedules and some also contained written schedules. Eventually, AL's Mr Sim had to concede that some of the schedules were in writing although some were oral.

151. Although Mr Sim also suggested that the manner in which Wei Sin co-ordinated the works was haphazard, nothing material turns on this allegation as he did not elaborate with specifics.

152. I will deal with the sub-contracts separately as they are two different contracts in law.

153. However, unless it is material, I will not regurgitate the contents of all the minutes, correspondence and faxes which I was referred to. For N2, I will refer to the dates of these documents with a brief elaboration. For N6, I will summarise the documentary evidence since the material evidence for N6 is the same documents as pertain to N2.

154. References in the documents to 'GI' means galvanised iron, 'MS' means mild steel and 'SS' means stainless steel.

Termination of N2 sub-contract

155. (a) April 1999 (BAEIC 317). Fax from Wei Sin to AL. The heading refers to Catladder and SS Railing at Substation 1 & 2. It complains about very slow progress on site

(b) 12 April 1999 (BAEIC 318). Fax from Wei Sin to AL to chase for submission of sunbreaker.

(c) 13 May 1999 (BAEIC 319). Fax from Wei Sin to AL forwarding HDB's comments on the design for sunbreaker. Reminder that AL would be held liable for any delay due to delayed submission of response to the comments.

(d) 17 May 1999 (BAEIC 322). Fax from Wei Sin to AL. The fax notes the very slow progress of MS and GI railing works for the Multi-storey car park ('MSCP'). Wei Sin will not hesitate to charge AL for any cost implication due to delay in the work.

(e) 21 May 1999 (BAEIC 313 to 315). Minutes of a site meeting but the minutes are not material.

(f) 21 May 1999 (BAEIC 323). Fax from Wei Sin to AL. It complains about works at the MSCP being too slow. The welding quality is too poor especially at the central void area.

(g) 16 June 1999 (BAEIC 324). Fax from Wei Sin to AL. It sets out a schedule of completion for the fixing of drying clothes racks for various blocks of flats.

(h) 18 June 1999 (BAEIC 325). Fax from Wei Sin to AL stating that the shop drawing for one of the items did not meet the requirements.

(i) 19 June 1999 (BAEIC 326). Fax from AL to Wei Sin to reschedule the completion dates for the clothes drying racks due to 'no stock of certain material (other suppliers)' and 'time consuming to fabricate'. There was a note at the bottom. It states:

> 'The above schedule can be met if:
>
> (a) All the hacking required may have been completed.
>
> (b) Payment for the Progressive Claim must be in time'

(j) 19 June 1999 (BAEIC 327). Wei Sin forwarded a revised completion schedule to AL for the fixing of drying clothes racks. Wei Sin also states that, 'A fine of $500 per day will be imposed to you for each block if you could not complete in time'.

(k) 24 July 1999 (BAEIC 328). Fax from Wei Sin to AL referring to AL's Statement of Account showing differences between amounts claimed by AL and amounts paid by Wei Sin. It mentions

that if there is no full welding etc, Wei Sin cannot certify full payment but a certain percentage. Test results of pull out tests at Blk 656A reveal 40% failure. It mentions the ability to follow closely to Wei Sin's schedule is another important criteria for payment.

(l) 24 July 1999 (BAEIC 329). Fax from Wei Sin to AL stating that the supply and installation of mesh to MSCP cannot be put on hold. AL is to start fabricating the mesh for the MSCP and complete it by 31 August 1999.

(m) 2 August 1999 (BAEIC 330). Letter from Wei Sin to AL. It states:

> 'Ref: WSCPL/COR/JWN2C6/0645/08
>
> 2nd Aug 1999
>
> AL STAINLESS INDUSTRIES PTE LTD
>
> No. 6 Tuas Ave 9
>
> Singapore 639171
>
> Attn: Mr Alex Sim
>
> **JURONG WEST N2C6**
>
> METAL WORK SUB-CONTRACT
>
> Please be inform that your verbal request to omit the aluminium sun-breakers from your contract was never acceded. You are to proceed with your work as per the site's schedule.
>
> Please be reminded that under the term of the sub-contract (Clause 13 of the Standard Conditions of Contract) we reserve the right to engage others to carry out the work and recover from you all additional cost and any loss suffered. This includes liquidated damages suffered as a result of your delay.
>
> Yours Faithfully,
>
> KOH LEE SENG
>
> Contracts Manager'
>
> [Emphasis added.]

(n) 16 August 1999 (BAEIC 521). Fax from AL to Wei Sin about payment of $90,000. Contents of this fax have been set out in para 70 above.

(o) 16 August 1999 (BAEIC 331). Fax from Wei Sin to AL denying any promise to pay $90,000. Some of the contents of this fax have been set out in para 71 above but as it is material to the point about termination as well, I set out the contents in toto here:

> 'JURONG WEST N6C28 AND N2C6

METAL WORK SUB-CONTRACT

We refer to your fax F001-0899WSN6C28 dated 16 Aug 99.

We like to clarify that in the meeting we have never promise you a payment of $90,000.00. We only agreed to inform you on the payment as soon as possible. We stress again your workmanship for the two projects is not acceptable and we have to retain monies for future rectification work. Your work is also way behind sites work schedules despite of reminders.

You are well aware that all railings are to be under your contract. It was with disappointment that only now did you discover that there is no rate for the access balcony parapet railing. Attached is the variation order for the access balcony parapet railings for your immediate action.

Please be informed the sunbreakers for Jurong West N2C6 is scheduled to be installed by end-Aug 1999. For Jurong West N6C28 you only recently submit two colours for approval which is insufficient for the Architect decision. The project is all ready for the last one week for your installation of the sunbreakers.

WE ARE VERY CONCERN ON THE STATUES (*sic*) OF THE SUNBREAKER AND SUN-LOUVRES. YOU ARE TO WRITE TO US BY TOMORROW ON YOUR DECISION AND YOUR PROPOSAL TO CATCH UP ON THE DELAY CAUSED.

WE MAY, OUT OF NO CHOICE BUT TO RESORT TO OTHER ALTERNATIVES TO MITIGATE THE DELAY CAUSED TO OUR PROJECTS.

Yours Faithfully,

KOH LEE SENG

Contracts Manager'

(p) 17 August 1999 (BAEIC 333 to 334). Fax from Wei Sin to AL attaching a statement (English translation is at BAEIC 334A) from the external plasterer. The plasterer is informing Wei Sin's Mr Teo/Steven that much of the steel installation works for Blk 276D are not yet completed. Provisions for empty spaces will be made and any touching up is not the responsibility of the external plasterers. Wei Sin tells AL that it is responsible for touching up.

(q) 18 August 1999 (BAEIC 335). Fax from Wei Sin to AL referring to unacceptable work progress and workmanship in the two sub-contracts. It identifies earlier correspondence and sets out Wei Sin's position:

'Ref: WSCPL/COR/JWN 0677/08/99

18th Aug 1999

AL STAINLESS INDUSTRIES PTE LTD

No. 6 Tuas Ave 9

Singapore 639171

Attn: Mr Alex Sim

JURONG WEST N6C28 AND N2C6

METAL WORK SUB-CONTRACT – WORK PROGRESS

Further to our letter ref: WSCPL/COR/JWN 0673/08 dtd 16 Aug 99, we have receive no reply from you as of now (6.00pm, 17 Aug 99) and it clearly reflect your interest in our projects.

Your work progress and workmanship in the two projects are unacceptable. The delay in your installation work have delayed our work progress and have come to a point that we can foresee unless drastic action is taken by us, our completion will be delayed by your performance. It is obvious from the followings:

Jurong West N6C28

1. Only two workers working July 99. Slow work is delaying our plastering work. – Our letter ref. WSCPL/COR/JWN6C28 99/07/151 and 152. Dtd 27/7/99

2. ….

3. ….

4. ….

5. ….

It is obvious since July 99, the work progress have been slow down considerably.

Jurong West N2C6

1. Letter on the slow progress of your work.

- our letter ref: WCPL/JWN2C6/SS/45/4/99 dtd 6/4/99

2. ….

3. ….

4. ….

You have time and again failed to proceed with your works with due diligence and expedition after being required in writing to so.

In order to mitigate our loss, we have no choice but to engage other sub-contractors to complete your outstanding mild steel and galvanised steel

work in both projects. Sun breakers and sun louvres will also be omitted from your contract. You will only carry on with the stainless steel work. A further one week grace will be given to you to complete all outstanding work, failing with, we will engage another party to help you on your work. Without further reference to you if your (*sic*) fail to complete all outstanding work, we will engage a new sub-contractor who will be in force with effect from 25/8/99.

Please note that you are still totally liable for the project, and we will claim all losses and expenses incurred including liquidated damages suffered.

As our projects are been delayed by you (and may suffer liquidated damages as a result) and the higher cost of completing your outstanding work, the outstanding payment of $90,000.00 will be withhold until the project is completed.

The above will be of immediate effect.

Yours Faithfully, Acknowledged by

KOH LEE SENG

Contracts Manager _____

Name:

Date:

cc. JWN6C28

JWN2C6 (Do not want to acknowledged)'

[Emphasis added.]

(r) 20 August 1999 (BAEIC 337). Fax from Wei Sin to AL to expedite the corridor stainless steel railing for Blk 276A and 274C and warning AL that it would be held responsible for any delay in the work of other trades.

(s) 30 August 1999 (BAEIC 338). Fax from AL to Wei Sin on a work schedule for various blocks. The note at the bottom of the fax states:

> 'The above schedule given subjected (*sic*) to prompt payment of progressive claim as to purchase material and fabrication, if payment not prompt, above schedule will be effected.'

There were a number of asterisks to denote shortage of material.

(t) 31 August 1999 (BAEIC 339 and 340). Fax from Wei Sin to AL on a revised work schedule. The revised schedule includes a reference to MS staircase for various blocks even though mild steel work is supposed to have been given to other sub-contractors as mentioned in the fax dated 18 August 1999.

(u) 1 September 1999 (BAEIC 341). Fax from Wei Sin to AL complaining about insufficient expansion bolts at the base plate at Blk 274C. This was also noted by HDB's clerk of works. AL is also told about the screeding of the SS clothes rack ledge (presumably by another sub-contractor) and that AL will be held responsible for any delay in respect of the schedule of the other sub-contractor. AL is told that it will be held liable for complaints by HDB's clerk of works for failure to comply with standards.

(v) 4 September 1999 (AB 207 to 209). Fax from AL's solicitors B T Tan & Co. It states:

> '4th September 1999 VIA FAX & POST
>
> M/s Wei Sin Construction Pte Ltd
>
> 235 Ubi Avenue 4
>
> Intrepid Warehouse
>
> Singapore 408819
>
> Dear Sirs
>
> **SUB CONTRACTS FOR THE SUPPLY, DELIVERY AND INSTALLATION OF METAL WORK**
>
> **- (1) JURONG WEST N2 C6**
>
> **- (2) JURONG WEST N6 C28**
>
> We act for AL Stainless Industries Pte Ltd and we refer to the above matter.
>
> We are instructed by our clients that by 2 contracts both evidenced by your letters dated 15th March 1999 to our clients, our clients agreed to carry out the metal works stated therein for the projects at Jurong West N2 C6 for the price of $450,291.19 and Jurong West N6 C28 for the price of $509,241.39 on the terms and conditions therein.
>
> It was a term under both contracts that the term of payment shall be monthly, and that progress claims are to be submitted to you before the 25th of each month.
>
> Pursuant to the contracts, our clients proceeded to supply, deliver and install the metal works for the project under both contracts and submitted their progress claims to you accordingly.
>
> In breach of both contracts, you failed to pay the progress claims promptly and are in arrears of payment todate as follows:-
>
> [*Various details about the progress claims are set out such as the dates and amounts thereof. However the fax assumes that the dates of the claims are also the due dates for payment which is not correct.]*

You will no doubt appreciate that progress payments form the life-blood of any contractor and our clients are no exception. In view of your failure to pay the progress payments punctually or in full, and thereby in breach of the contract, our clients are unable to continue to supply and carry out the contractual works when payment is not forthcoming.

Despite promises on your part to pay our clients the arrears owing on the progress payments, you have not done so todate.

By reason of your breach of contract, you have left our clients with no alternative but to insist that the arrears owing on the progress payments under both contracts and totalling $397,063.62 are to be paid in full by 9th September 1999. On receipt of payment, our clients will then revert to you on such work schedule for the remaining works. However, if we as solicitors for our clients, do not receive full payment of the arrears by the stated deadline, then our clients will accept your breach of contract and terminate the contracts.

In such an event, our clients will claim against you the arrears of payment and such damages consequent on your breach.

Yours faithfully

cc clients'

I should also mention that the penultimate paragraph had combined the sums claimed under both sub-contracts although they are separate contracts.

(w) 7 September 1999 (AB 210). Fax from Wei Sin to AL complaining that there were only two workers on site who were in any event doing nothing.

(x) 10 September 1999 (AB 211 and 212). Fax from HEP to B T Tan & Co. It states:

'10 September 1999

Messrs B T Tan & Company BY FAX & POST

10 Anson Road #27-16 Fax No. 224 2917

International Plaza

Singapore 079903

Dear Sirs

SUB CONTRACTS FOR THE SUPPLY, DELIVERY AND INSTALLATION OF METAL WORK

- (1) JURONG WEST N2 C6

- (2) JURONG WEST N6 C28

(hereinafter referred to collectively as "the Contracts")

1. We refer to your letter dated 4th September 1999 addressed to our clients. We set out our clients' substantive reply to your letter.

2. We confirm that the Contracts were awarded to your clients on 15th March 1999 and were in fact only accepted by your clients on 20th April 1999.

3. Our clients wholly deny any breach of the Contracts as alleged by you or at all.

4. We are instructed that shortly after the appointment of your clients as the metal works sub-contractor for the above captioned projects, your clients fell into severe delay in respect of their scheduled installation works. Further, your clients were haphazard in the installation of their metal works resulting in numerous defects in the said installation. Despite repeated written and verbal notifications and reminders from our clients, your clients failed and/or refused to expedite their work so as to meet the schedule and rectify the defective works.

5. In fact as early as 14th April 1999, our clients had written to your clients in respect of a considerable number of defects in the sample unit (N6 C28 project). Enclosed in our clients' letter to your client was a copy of the Architect's comments with respect your clients' defective works.

6. Following this, our clients had written to your clients on numerous occasions concerning their slow and tardy work and the resultant defects in the same. On 12th August 1999, your clients submitted to our clients a revised works schedule which your clients had promised would be fulfilled. Despite their promise, the said works schedule was not fulfilled. On 18th August 1999, our clients' Contracts Manager had again written to your clients setting out a detailed list of our clients' previous correspondence to your clients concerning their slow and defective work. To date, this situation has not been rectified by your clients.

7. Insofar as you alleged that our clients have breached the Contracts by failing to pay progress payments promptly, we would highlight Clause 4 of the Contracts and Clauses 1, 12 and 13 of the our clients' Standard Conditions of Contract for Supply and Install Sub-Contract ("the Standard Conditions"). Pursuant to the terms of the Contracts, your clients work is subject to the approval of HDB's representatives and all relevant authorities. Needless to say, your clients' work has not been approved by the relevant authorities.

8. We would also highlight that despite the considerable amount of correspondence from our clients to your clients concerning their defective and slow progress of works, your clients have failed to put forward any remedial plan of action as required under Clause 7 of the Standard Conditions.

9. In light of the above, we, for and on behalf of our clients, hereby give your clients notice of termination of the Contracts pursuant to Clauses 7(a), 7(b) and 7(c) of the Standard Conditions.

10. Our clients hereby reserve their rights to look to your clients for all costs, loss and damage which are incurred or will be incurred by our clients as a result of your clients breaches of their obligations under the Contracts.

Yours faithfully

(Michael Palmer)

cc. clients'

(y) 10 September 1999 (AB 213). Fax from B T Tan & Co to HEP. It states:

'10th September 1999

VIA FAX NO. 4380550 & POST

M/s Harry Elias Partnership

9 Raffles Place

#12-01 Republic Plaza

Singapore 048619

Dear Sirs

RE: SUB CONTRACTS FOR THE SUPPLY, DELIVERY AND INSTALLATION OF METAL WORK

(1) JURONG WEST N2 C6

(2) JURONG WEST N6 C28

We refer to your letter of 7th September 1999.

Our clients deny the allegations of breach of contract by your clients as stated in your said letter.

In view of your clients' breach of contract, our clients hereby accept your clients' breach and as solicitors for our clients, we hereby give your clients notice of termination of the contracts.

Kindly let us know whether you have instructions to accept service of legal process on behalf of your clients.

Yours faithfully

LEUNG WING WAH

cc. clients'

156. Both sides accept that the sub-contracts for N2 and N6 were terminated on 10 September 1999 but disagree as to who had validly terminated the same.

157. As regards Wei Sin's reliance on Clause 7 of the Standard Conditions, I have to bear in mind that written notices about delay and/or about poor workmanship are not uncommon. Accordingly, I am of the view that it is not every written notice about the same that will constitute a written notice pursuant to a provision for termination. If that were the case, life would be impossible for the recipient of the written notice.

158. It is incumbent on a party who wishes to exercise its right to terminate a contract or sub-contract to make it clear that the written notice is being given pursuant to the provision for termination.

159. Ideally, the written notice should identify the provision that it is issued pursuant to, although I do not say that this is always necessary (see *Supamarl Ltd v Federated Homes Ltd* [1981] 9 Con LR 25). However the recipient must be left in no doubt that the notice was sent pursuant to a particular provision since complaints or chasers in the construction industry are not uncommon.

160. AL have admitted to some delay but have not conceded that they would have been unable to catch up with the delay.

161. As for defects, Wei Sin has a few photos of defective works for N2 but they are by no means comprehensive. AL have admitted to the existence of defects but said they were minor.

162. Prior to 2 August 1999 there were various faxes or letters from Wei Sin primarily about delay, although concern was also expressed about the adequacy of expansion bolts and workmanship. However, none of the documents from Wei Sin referred to Clause 7. Neither was there any intimation therein that any was sent pursuant to Clause 7 or any other provision.

163. It was only in the letter dated 2 August 1999 that a reference is made to one of the terms in the Standard Conditions (see para 155(m) above). Even then, the reference was to Clause 13 and not Clause 7. Secondly the reference to Clause 13 then was in the context of the aluminium sunbreakers only.

164. Clause 13 states:

> '13. FAILURE TO PERFORM
>
> If the Sub-Contractor should fail to carry out any part of the work under this contract, the Main Contractor reserve the right to engage others or carry out the work himself and recover from the Sub-Contractor all additional cost and any loss suffered as a result.'

165. In the next notice i.e the fax dated 16 August 1999 from Wei Sin, the primary concern was about delay, although unacceptable workmanship was also mentioned (see para 155(o) above).

166. However, the concern about delay was focussed on the sunbreakers and sun louvres. The

threat to resort to other alternatives was, in my view, also in the context of the delay in respect of these items.

167. I find that the 16 August 1999 notice was also sent pursuant to Clause 13 coming as it did after the notice dated 2 August 1999 and in view of the substance of the 2 and 16 August 1999 notices. The threat was not to terminate the sub-contract but to engage other sub-contractors for certain specific areas of work supposed to be done by AL.

168. In the fax dated 18 August 1999, Wei Sin informed AL that it was engaging others to complete outstanding MS and galvanised steel work. Sunbreakers and sun louvres would be taken out from AL's sub-contract. AL was to carry on with stainless steel work and given a week's grace period to complete all outstanding stainless steel work (see para 155(q) above).

169. This fax also does not refer to any particular provision of the Standard Conditions. Again, I find that Wei Sin was in fact acting pursuant to Clause 13 and not Clause 7.

170. Finally, I revert to HEP's fax dated 10 September 1999 which was sent pursuant to Clause 7(a), (b) and (c) of the Standard Conditions.

171. There are various errors in that fax.

172. For example, it is not true that AL's work is subject to approval of HDB so that absence of such approval would disentitle AL to payment. Clause 12 of the Standard Conditions refers not to approval for the purpose of paying progress claims but that final acceptance of AL's works would be subject to approval by HDB and all relevant authorities. Secondly, Clause 7 does not require a remedial plan from AL.

173. In any event, under Clause 7, AL was to be given three days to comply with a prior written notice before Wei Sin can terminate the sub-contract.

174. In response to my question as to whether the prior notice under Clause 7 had been given, Mr Shetty referred to the one week grace period given in Wei Sin's fax dated 18 August 1999. He submitted that this was more than the three days prior written notice required under Clause 7.

175. I have the following observations about this response.

176. First, Wei Sin's Defence and Counterclaim does not identify the 18 August 1999 telefax as the prior notice under Clause 7.

177. Secondly, as I have mentioned, that fax did not refer specifically to Clause 7. Mr Shetty had assumed it was sent pursuant to Clause 7. He had not taken into account that it might have been sent pursuant to Clause 13 instead. Neither did he take into account the earlier notice dated 2 August 1999 from Wei Sin which specifically refers to Clause 13 and not Clause 7.

178. Thirdly the fax dated 18 August 1999 had purported to tell AL that other sub-contractors had been engaged for mild steel and galvanised steel work. The one week grace period was given only in relation to stainless steel work and not in relation to the entire sub-contract for N2.

179. Fourthly, none of the witnesses for Wei Sin had alleged that the intention was to send the 18 August 1999 fax pursuant to Clause 7. For example, DW1 Ms Rogelita said that she had drafted most of Wei Sin's correspondence for N2 but she did not say that the 18 August 1999 fax was sent

pursuant to Clause 7.

180. I find that the fax dated 18 August 1999 was not the prior three day notice required under Clause 7.

181. The truth is that Wei Sin had never intended to terminate the sub-contract prior to HEP's fax dated 10 September 1999. This is reinforced by its faxes subsequent to 18 August 1999 which I have referred to above.

182. However after Wei Sin was faced with the demand fax dated 4 September 1999 from B T Tan & Co, it decided on a pre-emptive strike. That is why the fax dated 10 September 1999 from HEP was sent before B T Tan & Co acted to terminate the sub-contract.

183. Had HEP given the three day prior written notice instead, B T Tan & Co would have terminated the sub-contract before the expiry of the three day notice.

184. I find that the purported termination notice by HEP pursuant to Clause 7 was not a valid one.

185. As Wei Sin have not pleaded or submitted that AL's conduct or the fax demand dated 4 September 1999 from B T Tan & Co constituted a repudiatory breach by AL in any event, I need not consider this point any further.

186. I come back to the fax dated 10 September 1999 from B T Tan & Co (see para 155(y) above).

187. It refers to HEP's letter dated 7 September 1999. There is no such letter before me, only the one from HEP dated 10 September 1999. There is, however, a 7 September 1999 fax from Wei Sin (see para 155(w) above). The reference to 7 September 1999 was probably an inadvertent error.

188. However, I also note that B T Tan & Co's fax dated 10 September 1999 does not specify whether Wei Sin's breach of contract is only as regards the failure to pay the progress claims or it includes the invalid notice from HEP dated 10 September 1999. The Statement of Claim seems to refer to both as repudiatory breaches by Wei Sin but again this is not clear.

189. As for the closing submissions, para 120 of Mr Quek's Closing Submission submits that the HEP notice was an anticipatory breach and Mr Shetty's Closing Submission at para 2(ii) and 8(2) assumes that AL have raised the argument that the HEP notice was a repudiatory breach.

190. Accordingly, I will deal with both points, i.e whether Wei Sin's failure to pay and whether HEP's notice each constituted repudiatory breaches.

191. As regards the question whether delay in payment would constitute a repudiatory breach, I need refer to the following authorities only.

192. Hudson's Building and Engineering Contracts 1995 Eleventh Edition states at p 622 to 623:

> '**(e) Payment obligations and set-off**
>
> Mere breach of a payment obligation does not constitute a common law repudiation. The principle is to consider whether the circumstances of the non-payment show an intention not to be bound: "The principle to be

applied in these cases is whether the non-delivery or the non-payment amounts to an abandonment of the contract or a refusal to perform it on the part of the person making the default". Thus in *Mersey Steel & Iron v. Naylor* where a supplier of steel to be delivered by instalments was not entitled to refuse to deliver a late delivery on the ground of non-payment of the instalment for an earlier delivery, Lord Blackburn said:

> "There was a statement that for reasons which they thought sufficient, they were not willing to pay for the iron at present, and if that statement had been an absolute refusal to pay … I will not say it might not have been evidence to go to the jury, for them to say whether it would not amount to a refusal to go on with the contract, for a man might reasonably so consider it. But there is nothing of that kind here."

So a clear indication of refusal or inability to pay future instalments will be a repudiation, as also a repeated failure to pay on time in response to warnings, if raising the inference of an intention to pay late habitually so as to derive financial advantage, it is submitted. Generally, delay in making payments, if sufficiently serious and persisted in after warnings, may, after a suitable notice, justify rescission, the more so in the absence of provisions for interest on late payment in the contract.'

193. Halsbury's Laws of Singapore Volume 2 p 374 to 375 states:

'**[30.290] Repudiation in general**

The defaulting party repudiates the contract when he intimates by words or conduct that he does not intend to honour his obligations under the contract when they fall due. A repudiation can be made explicitly or implicitly. A breach of contract can also be anticipatory and the innocent party would be entitled to treat it as repudiated if the threatened non-performance has the effect of depriving him 'of substantially the whole benefit which it was the intention of the parties that he should obtain from the primary obligations of the parties under the contract'. There can be repudiation where one party insists on carrying out his obligations in his own way that is substantially inconsistent with his obligations under the contract. Not every refusal to proceed with the contract can be regarded as a repudiation. If the decision is taken bona fide based on an erroneous interpretation of the contract, put in a way that is open to correction, it may not necessarily be regarded as repudiation.

[30.291] Repudiation by employer

Instances of repudiatory breaches include the employer's failure to give possession of the site to the contractor or where the contractor is wrongfully ejected from the site and where the architect or contract administrator refuses to certify payment at the appropriate time or constantly under-certifies the amount due arising from undue interference by the employer. A mere failure or delay by the employer in making payment

per se would not amount to a repudiation. However, the position would be different if it can be demonstrated that the employer was 'not merely stalling for time to make payment' to the contractor but that he did not intend to pay the contractor 'at all and perform the contract'. It is possible that a general and consistent refusal to pay instalments for goods on the due dates or make interim payments may be considered either as a demonstration of such a intention or by itself suffice to constitute repudiatory conduct. ….'

194. Law and Practice of Construction Contract Claim by Chow Kok Fong, Second Edition, states at p 264:

> 'A party to a building contract may find it necessary to bring his involvement in the contract to an end where the other party has committed a breach of contract and this breach is so serious as to undermine the fundamental commercial objectives of the innocent party under the contract. In deciding to resort to this recourse, the innocent party will take into account both the magnitude and nature of the breach. Thus a single instance of late payment may not be sufficient to warrant termination, but a persistent course of payment delays or a protracted delay in the payment of a very substantial amount may lead a contractor to contemplate termination as a means of mitigating his loss.'

At p 277:

> 'It is suggested that it would not be sufficient if the non-payment arises only from the employer's belief that the amount due to the contractor should be set off against the contractor's liability for liquidated damages or defective work. On the other hand, clearly, non-payment becomes a serious breach if it intimates an intention by the employer not to be bound by the payment terms of the contract regardless of how well the contractor fulfilled his obligations under the contract.'

195. In *Brani Readymixed Pte Ltd v Yee Hong Pte Ltd* [1995] 1 SLR 205, the Court of Appeal recognised that the mere failure or delay in making payment per se would not amount to a repudiation. However, on the facts in that case, the Court of Appeal found that there was repudiation.

196. I have already set out above in detail the extent of the arbitrary conduct of Wei Sin regarding the progress claims by AL for N2 resulting not only in delay in payment but also in under-paying AL even when payment was paid. Indeed, initially, AL did not know that Wei Sin had been paying less than what its own QS had recommended as there was no indication from Wei Sin that it was withholding sums, beyond the 5% retention, for delay or defects. This culminated in Wei Sin withholding the entire $90,000 for Progress Claim No 3 even after it was (a) recommended for payment by the QS, (b) due for payment and (c) after Wei Sin had agreed to pay the same.

197. The entire $90,000 was withheld without any attempt by Wei Sin to assess at the material time the impact of AL's delay on the main contract works or the cost of rectifying defects.

198. I find that while Wei Sin wanted AL to carry out its obligations, it was content to exercise its obligations in its own way substantially inconsistent with such obligations. Wei Sin had acted in an

arbitrary and, indeed, oppressive manner and was quite content not to abide by such obligations as and when they fell due if this suited its purpose.

199. I find that Wei Sin's conduct prior to HEP's notice dated 10 September 1999 was repudiatory in nature.

200. As regards the question whether an invalid notice of termination may constitute repudiation, Halsbury's Laws of Singapore Vol 2 states at p 381:

> '**[30.300] Procedural requirements**
>
> Most standard form contracts specify a procedure for the party seeking termination to carry out. To avoid any sudden and unexpected termination or any uncertainty as to whether a termination has taken place, most of these procedures laid out require the party seeking termination to go through at least two stages where certain specific actions must be taken or notices given. The SIA form (5th Ed), for instance, provides for the issuance of a termination certificate by the architect and a notice of termination by the employer. Similarly the PSSCC95 provides for the issuance of a termination certificate by the superintending officer. On the issuance of such a certificate and the occurrence of certain specified events, the employer 'may give to the contractor notice in writing of the termination of the employment of the contractor'. An employer's purported termination that did not comply with the procedural requirements or which is found to be invalid for other reasons may amount to a repudiation of the contract that the contractor is entitled to accept. …
>
> **[30.303] Wrongful exercise of purported right to terminate**
>
> A party who asserts a right to terminate that is later found to be unjustified or wrong may find his own conduct held to be repudiatory. This can occur where some procedural requirement has not been complied with, where the grounds of termination are not made out, where the party alleged to be in breach has in fact been released from its obligations, where termination was made on the basis of a purported fundamental breach or breach of a fundamental term that was later found to be not fundamental or where the party seeking termination has himself caused the alleged defaulting act.'

201. I am of the view that Wei Sin did not genuinely believe that it was entitled to terminate the sub-contract for N2. It was trying to prevent AL from exercising its right to terminate first. I find that the invalid notice by HEP also constituted a repudiatory breach by Wei Sin.

202. Each of these repudiatory breaches has been accepted by B T Tan & Co and the sub-contract for N2 has been terminated by AL.

Contractor's right to suspend work or go slow

203. On another point, Mr Quek had submitted in para 18 of his Closing Submission that one of the main issues was whether any act of prevention by Wei Sin had resulted in the delay of the work by AL.

204. However, this allegation was not pleaded.

205. Secondly, the evidence of PW1 Mr Sim on this point was general and vague. It seems to me that the failure by Wei Sin to pay on time and to make full payment had caused a cash-flow problem for AL but not something more desperate. Certainly there was no concrete evidence about financial impossibility.

206. Thirdly, while Mr Quek mentioned the argument as to whether there was any act of prevention by Wei Sin in his Closing Submission, Mr Quek did not develop this argument.

207. Therefore, it is not necessary for me to deal with this argument any further save that I should mention a point of law that Mr Shetty had raised in connection with it.

208. Mr Shetty sought to persuade me that even if Wei Sin had defaulted in its payment obligations, this did not entitle AL to suspend its work or to go slow. He cited the following passage from the judgment of Woodhouse and Cooke JJ, delivered by Cooke J, in the New Zealand case of *Canterbury Pipe Lines Ltd v The Christchurch Drainage Board* [1979] 16 BLR 76 at p 95:

> '… we are against recognising such a right [to stop work by reason of substantial default by the employer in paying a certified progress payment] when the architect or engineer has declined to issue the certificate stipulated for by the contract as the condition precedent to the employer's duty to pay. It would disrupt the scheme of the contracts. It could encourage contractors to take the law into their own hands…. In such cases, if the contractor cannot prove impossibility or its equivalent, he will be left with whatever remedies regarding the recovery of progress payments may be available to him under the contract.'

209. I have read the judgment delivered by Cooke J. It is not authority for the wide proposition that Mr Shetty was advocating and the passage that he had cited was taken out of context by him.

210. The judgment makes it clear that it is confined to the situation where a consultant has declined to issue a certificate as a condition precedent to the obligation to pay and left the issue open as regards other situations where, as in the case before me, the obligation to pay is not dependent on such a certificate.

211. Indeed, the judgment of McMullin J in the same case seems to favour a right on the part of a contractor not to proceed with work if the party obliged to pay withholds and continues to withhold payment, and thereby makes it financially impossible for the contractor to carry on.

212. At p 119, McMullin J said:

> 'Although I have been unable to find any case where the wrongful withholding of a progress payment has been held to be a breach of the rule that a party to a contract shall not profit by his own wrong and, to that extent the judgment may appear to be breaking new ground, there would seem to be no difference in principle between an employer who keeps a contractor out of his land (*Holme v Guppy*), or fails to supply the requisite plans (*Roberts v Bury Commissioners*), or unjustifiably interferes in the course of building (*Russell v Bandeira*), and an employer who keeps his contractor out of payment for work already done, declares his intention to

> keep him out of payments in the future, denies him arbitration on these very matters and requires him to continue with the work. The differences go only to the means by which the wrongs were done, not to their effect. The Board's acts were such as to prevent and make impossible the performance of the contract as effectively as if it had denied appellant access to the works. …'

213. Mr Shetty also relied on a passage in the judgment of Judge Hawser QC in the case of *Supamarl Ltd v Federated Homes Ltd* [1981] 9 Con LR 25 at p 28:

> 'Even if Federated were in breach of contract in failure to pay, I do not think that this would exercise or justify failure by Supamarl to proceed with their work in a proper manner.'

214. However, Judge Hawser did not cite any authority for the proposition he had mentioned.

215. Therefore, I will say only that the question whether a contractor or sub-contractor may suspend work or go slow if there is default in payment to it and this has rendered its performance financially impossible is not a simple one.

Other arguments by Mr Shetty

216. Mr Shetty had various other arguments.

217. He submitted that AL was incapable of fulfilling its obligations for two reasons: (a) financial incapability and (b) lack of materials.

218. As regards the first reason, there is insufficient evidence to establish that AL was financially incapable of carrying out its obligations even if Wei Sin had not withheld payment.

219. As for the second reason, PW1 Mr Sim has explained and I accept that there was a shortage of material on AL's part because Wei Sin withheld payment from AL.

220. In any event, these two reasons do not advance Wei Sin's case much as I have found HEP's termination notice to be invalid.

221. Mr Shetty also suggested that AL was trying to put pressure on Wei Sin by going slow as AL knew that Wei Sin would be liable for liquidated damages to HDB. He relied on a sentence in the evidence of PW1 Mr Sim at NE 65 line 5 to 12:

> 'Q Instead of Plaintiffs' increasing manpower on site for N6 and improving progress, Plaintiffs' lawyers sent a letter of demand 4 days later?
>
> A Yes. But for more than one month there was all talk of payment. Defendants also asked us to do additional work. We bought material. <u>We felt that if they keep delaying it will ultimately affect the Defendants having to pay LD to HDB</u>. If Defendants keep delaying and we continue doing the work, for new work there would be a problem, no money coming in for us to buy material and pay workers. For touch up, no problem.'
>
> [Emphasis added.]

222. I do not think that the isolated sentence which Mr Shetty was relying on shows that AL was trying to put pressure on Wei Sin by going slow. AL was aware that if Wei Sin is faced with a claim for liquidated damages due to AL's delay, Wei Sin would in turn claim the same liquidated damages against AL.

223. The totality of Mr Sim's evidence during the trial was that AL was concerned that if they did the work, Wei Sin would still withhold payment.

Summary on termination of N2 sub-contract

224. In summary, the termination of the sub-contract for N2 by HEP on behalf of Wei Sin is not valid. On the other hand, B T Tan & Co have validly terminated the sub-contract on behalf of AL.

Main claims by Wei Sin for N2

225. Accordingly, Wei Sin is not entitled to claim damages for engaging other sub-contractors to complete the outstanding work of AL in respect of N2. However, Mr Quek has conceded in para 95 of his Closing Submission that Wei Sin may claim damages for engaging other sub-contractors to rectify AL's defective work, subject of course to Wei Sin proving the nature and extent of defective work and the quantum of rectification.

226. As for damages for delay, Wei Sin did not claim it is entitled to this even if its termination for N2 is invalid. As its termination is not valid, it is not entitled to claim damages for delay. However, for completeness, I will deal with this claim on the assumption that Wei Sin's termination is valid.

227. Under Clause 8 of the Standard Conditions, AL is to pay liquidated damages payable for delay to Wei Sin at rates which are pegged to the rates payable by Wei Sin to HDB. For N2, Wei Sin is claiming $1,412,670 as liquidated damages against AL.

228. However, I had ascertained from DW2 Mr Soh that HDB was not making any claim for liquidated damages against Wei Sin for N2 as sufficient extension of time had been granted by HDB to Wei Sin.

229. Subsequently, I asked Mr Shetty why Wei Sin was claiming liquidated damages for N2.

230. He said that he was of the view that Wei Sin was entitled to claim the theoretical maximum. He suggested that Wei Sin had claimed damages to be assessed and not liquidated damages as such. He also said that Wei Sin had given up something to HDB in exchange for HDB not claiming liquidated damages for N2.

231. I am of the view that this is an unsatisfactory explanation. AL is liable to pay liquidated damages to Wei Sin only if Wei Sin is liable for liquidated damages to HDB for delay caused by AL. That is why the rates of liquidated damages which may be payable by AL are identical to that which may be payable by Wei Sin to HDB. As HDB is not claiming any liquidated damages against Wei Sin for N2, Wei Sin cannot claim any liquidated damages against AL.

232. Although the Defence and Counterclaim had claimed damages generally, the Voluntary Particulars thereof had mentioned specifically liquidated damages and the sum claimed under this head.

233. I am of the view that Wei Sin's claim for about $1.4m liquidated damages was a fraudulent

claim. Wei Sin had included this claim for two reasons.

234. First, if this claim had not been made, the quantum of the rest of Wei Sin's counterclaim would have been less than the balance amount which Wei Sin had conceded was to be paid to AL. The claim for liquidated damages was therefore to justify Wei Sin's withholding any further payment to AL in the meantime.

235. Secondly, the huge sum claimed for liquidated damages was to put undue pressure on AL.

236. If indeed Wei Sin had to give up something to HDB in exchange for an extension of time to avoid liquidated damages, that is a different matter altogether which must be pleaded but was not. Neither was there any evidence alluding to it.

237. Accordingly, even if Wei Sin's termination of the sub-contract for N2 is valid, Wei Sin is not entitled to claim any damages, whether liquidated or not, for alleged delay by AL in respect of N2. It is not a question of leaving this head of claim to be assessed.

Termination of N6 sub-contract

238. As in N2, there were faxes or letters from Wei Sin to AL in respect of N6 complaining about delay and poor workmanship.

239. There were also minutes of meetings raising these points but it was not suggested that these constitute written notification under Clause 7 of the Standard Conditions.

240. I do not intend to list out the faxes or letters as I did for N2.

241. Suffice it for me to say that, as in N2, none of the faxes or letters from Wei Sin prior to 2 August 1999 referred to Clause 7 of the Standard Conditions. Neither was there any intimation in any of them that it was sent pursuant to Clause 7 or any other provision.

242. As in N2, there was a similar letter from Wei Sin for N6 dated 2 August 1999 (but this is at BAEIC 511) referring to Clause 13. Furthermore, the contents of Wei Sin's fax dated 16 August 1999 and 18 August 1999 and HEP's fax dated 10 September 1999, which I have referred to above, apply both to N2 and to N6.

243. Accordingly, the views I have expressed on the letter dated 2 August 1999, and the faxes dated 16 August, 18 August and 10 September 1999 also apply in the context of N6.

244. The correspondence and faxes between Wei Sin and AL for N6 between 2 August 1999 and 10 September 1999 which I have not specifically identified in my judgment but which I have read, do not alter the views I have expressed on the material letter and faxes identified above.

245. Accordingly, I find that the purported termination notice by HEP pursuant to Clause 7 in the context of N6 was also not valid.

246. Again, Wei Sin has not pleaded or alleged AL's conduct or the fax demand dated 4 September 1999 from B T Tan & Co as constituting a repudiatory breach of the sub-contract for N6 and I need not consider this point any further.

247. My views in paras 186 to 195 on the fax dated 10 September 1999 from B T Tan & Co and the law on delay in payment as a repudiatory breach also apply to N6.

248. However the question is still whether the conduct of Wei Sin regarding the progress claims for N6 was also repudiatory in nature.

249. On this point, I note that both AL and its solicitors often treated the sub-contracts for N2 and N6 as one, although they are separate contracts. A repudiatory breach by Wei Sin of the sub-contract for N2 does not necessarily mean that Wei Sin had also been guilty of a similar breach for N6.

250. As at 16 August 1999 (i.e when Wei Sin had sent its fax to say that other sub-contractors had been engaged for some of the work and to give one week for the stainless steel work to be completed), the difference between AL's Progress Claim Nos 1 to 3 and Wei Sin's payment was only $8,400.

251. PW1 Mr Sim accepted that this did not evince an intention by Wei Sin not to make further payments to AL (NE 34 line 21 to 23).

252. I also recall that payment for Progress Claim No 2 for N6 was made 'early' although this was because of the reason I have mentioned in para 55 above.

253. However, the position as at 4 September 1999, i.e the date of the fax demand from B T Tan & Co, was quite different. By then, the difference between the amount claimed by AL and due for payment on the one hand and the amount paid by Wei Sin on the other hand had increased to $30,495.79 (see the tabulation in para 54 above). This was because no payment was made for Progress Claim No 4 which was due for payment on 25 August 1999.

254. The reason given for non-payment was one of the same general reasons given for N2 i.e concern that AL's 'work was very slow and may delay completion of project' (see NE 149 line 19).

255. However, again, Wei Sin did not adduce any evidence as to how much AL's works in N6 had delayed the main contract works to justify withholding every cent from Progress Claim No 4.

256. I am of the view that the although the amount that has been withheld and the frequency of delay or withholding of payment are relevant, I should also take into account the motive or reason behind Wei Sin's conduct in withholding payment.

257. I find that as in N2, Wei Sin was content to exercise its obligations for N6 in its own way substantially inconsistent with such obligations. Wei Sin was content not to abide by such obligations as and when they fell due if this suited its purpose. Wei Sin was in repudiatory breach.

258. As regards the question whether HEP's invalid notice was also a repudiatory breach, my views in para 200 to 201 above also apply to N6.

Summary on termination of N6 sub-contract

259. In the circumstances, I find that Wei Sin was also in repudiatory breach of contract for N6 in withholding payment of Progress Claim No 4 and also in respect of HEP's invalid notice. The repudiation has been accepted.

260. My views in paras 203 to 223 above on a contractor's right to suspend work or go slow and on Mr Shetty's other arguments also apply for N6.

Main claims by Wei Sin for N6

261. Accordingly, Wei Sin is not entitled to be paid the additional costs in engaging other sub-contractors to complete outstanding work of AL for N6 but is entitled, in the light of Mr Quek's concession in para 95 of his Closing Submission, to claim damages for engaging other sub-contractors to rectify defects in AL's work, subject to proof of the same.

262. As for damages for delay, Wei Sin did not claim it is entitled to this if its termination for N6 is invalid. As its termination is not valid, it is not entitled to claim damages for delay. However, for completeness, I will deal with this claim on the assumption that Wei Sin's termination is valid.

263. As in N2, Clause 8 of the Standard Conditions for N6 allows Wei Sin to claim liquidated damages for delay at rates which are pegged to the rates payable by Wei Sin to HDB.

264. Wei Sin is claiming $2,158,650 as liquidated damages against AL for N6.

265. However, DW2 Mr Soh said that for N6, HDB had claimed about $400,000 as liquidated damages against Wei Sin. Mr Soh also admitted that Wei Sin did not take into account the liquidated damages sought by HDB when Wei Sin claimed liquidated damages against AL (NE 168 line 21 to 23).

266. In my view, the quantum of Wei Sin's claim of about $2.15m as liquidated damages was therefore yet another fraudulent claim by Wei Sin to put undue pressure on AL, although Wei Sin might have been able to claim a lesser sum, subject to proof, if it had validly terminated the N6 sub-contract.

267. As regards any suggestion that Wei Sin might have given up something to reduce the liquidated damages claimed by HDB in N6 and that AL should bear what Wei Sin had to give up, this must be pleaded but was not. There was also no evidence on it. Accordingly, AL is also not liable for such damages.

AL'S CLAIMS FOR LOSS OF PROFIT (N2 AND N6)

268. As regards AL's claims for loss of profit for N2 and for N6, I note that in *Canterbury*, the New Zealand Court of Appeal decided that the contractor should not be entitled to loss of profits because it had wrongly withheld its work even though the notice of termination from the developer was invalid.

269. Although no authority was cited for this approach and the decision may have been because the contractor had not terminated the contract, AL also has not established that it was entitled to go slow.

270. I am of the view that where it is fortuitous as to who first terminates the sub-contracts, a claim for loss of profit should not be allowed.

271. Accordingly, I will disallow AL's claims for loss of profit for each of the sub-contracts.

OTHER CLAIMS

AL's claims for retention sums (N2 and N6)

272. As for the retention sums for N2 and N6, Mr Quek made a claim for them in his oral reply.

273. In view of my findings above, the quantum of the retention sums (including GST) are:

(a) For N2, 95% = (already paid) $ 91,705.02

(to be paid)

$292,429.88
+

$384,134.90

5 % = $ 20,217.63

(b) For N6, 95% = (already paid) $ 47,946.50

(to be paid)

$ 98,889.93
+

$146,836.43

5 % = $ 7,728.23

274. However, Mr Shetty has objected to the retention sums being claimed as they were not sought in the Statement of Claim or in evidence. Accordingly, I will not grant judgment in respect of these sums and AL will have to sue afresh for them if it thinks it is entitled to payment of the same.

Wei Sin's claims for fines (N2 and N6)

275. Wei Sin also claimed $10,000 and $2,000 being fines imposed by HDB for failure of anchor bolts in pull out tests for N2 and N6 respectively. I am of the view that unless HDB has a contractual basis to impose these fines, it is not entitled to do so and correspondingly Wei Sin is not entitled to claim them against AL. If Wei Sin is prepared not to challenge the imposition of such fines for commercial reasons, then Wei Sin must bear such fines.

276. There was no evidence before me that HDB is contractually entitled to impose such fines. Therefore I disallow Wei Sin's claim against AL for such fines.

Wei Sin's claims for re-test on anchor bolts (N2 and N6)

277. I will, however, allow Wei Sin's claim for cost of re-test on anchor bolts for N2 and N6 in principle since AL has accepted that it is partially responsible for the failure of such bolts. This is subject to proof as to how much AL was to blame for the failure and the quantum of such loss.

Wei Sin's claim for mobilisation (N2)

278. Wei Sin's claim for $60 for mobilisation of personnel and equipment on site for N2 is disallowed. It is a general claim and there is inadequate evidence to establish that it was incurred because of AL.

Wei Sin's claim for administrative charge (N6)

279. Wei Sin's claim for $2,000 as administrative charge imposed by HDB for non-compliance of Sunbreaker dimension in N6 is also disallowed. There was no evidence before me that HDB was contractually entitled to impose such a charge.

OVERALL SUMMARY

280. I make the following orders:

<u>For N2</u>

<u>(</u>

1) Wei Sin is to pay AL $292,429.88 (under para 130 above) for N2 forthwith with interest thereon at 6% per annum from the date of the Writ of Summons to the date of payment.

(2) AL's claim for damages in the form of loss of profit is dismissed.

(3) AL is to pay Wei Sin damages to be assessed by a person to be determined by the court for (a) the rectification of AL's defective work and (b) the cost of re-test of anchor bolts in N2.

(4) The rest of Wei Sin's counterclaim is dismissed.

<u>For N6</u>

(5) Wei Sin is to pay AL $98,889.93 (under para 141 above) for N6 forthwith with interest thereon at 6% per annum from the date of the Writ of Summons to the date of payment.

(6) AL's claim for damages in the form of loss of profit is dismissed.

(7) AL is to pay Wei Sin damages to be assessed by a person to be determined by the court for (a) the rectification of AL's defective works and (b) the cost of re-test of anchor bolts in N6.

(8) The rest of Wei Sin's counterclaim is dismissed.

281. I will hear the parties on (a) the person who should assess the damages and (b) costs of the action.

Sgd:

WOO BIH LI

JUDICIAL COMMISSIONER