Anti-Corrosion Pte Ltd *v* Berger Paints Singapore Pte Ltd
[2012] SGHC 101

Case Number : Suit No 989 of 2009

Decision Date : 08 May 2012

Tribunal/Court : High Court

Coram : Philip Pillai J

Counsel Name(s) : Jonathan Yuen and Joana Teo (Harry Elias Partnership LLP) for the plaintiff; Sathiaseelan s/o Jagateesan, Kenneth Lim and Ramesh Kumar (Allen & Gledhill LLP for the defendant.

Parties : Anti-Corrosion Pte Ltd — Berger Paints Singapore Pte Ltd

Contract

8 May 2012 Judgment reserved.

Philip Pillai J:

Introduction

1 The plaintiff is a painting contractor and the defendant is a manufacturer and supplier of paint. The full account of the background to the dispute arising between the parties is set out in *Anti-Corrosion Pte Ltd v Berger Paints Singapore Pte Ltd and another appeal* [2011] 1 SLR 427 ("the CA decision").

Background

2 For the purpose of this judgment, which deals solely with the assessment of damages, it suffices to set out the following salient facts. The plaintiff was subcontracted to paint the surfaces of a building project at Bukit Batok Street 23 ('the Bukit Batok project") which included:

(a) a 9-storey ramp up building ("Building A"); and

(b) a 30-storey building ("Building B").

It bought the defendant's paint for that purpose. The plaintiff applied the paint to the surfaces of the building project based on the defendant's proposed paint system. However, there was extensive discolouration. The plaintiff bought replacement paint from a third party, Haruna (S) Pte Ltd, and repainted both the discoloured and adjacent areas in the buildings. Although the original painting works took 7.5 month to complete, the repainting works took 16 months. Subsequently, the plaintiff brought the present action claiming damages for the expense of repainting. It claimed that the defendant had given a warranty for the paint so long as the use of the paint was based on the defendant's proposed paint system. The defendant denied that the paint was defective and brought a counterclaim against the plaintiff for the contract price of the goods supplied. It also denied that it had given any enforceable warranty covering the paint supplied.

3 In *Anti-Corrosion Pte Ltd v Berger Paints Singapore Pte Ltd* [2010] SGHC 351, I found that the plaintiff had not proven its case (namely that the defects in the paint had caused the discolouration)

on a balance of probabilities. I also observed *obiter* that if I had decided on the issue of the warranty, I would have found that the defendant had warranted all its products used in any of the plaintiff's projects for a period of five years, provided that the use was based on a proposed paint system by the defendant. The plaintiff appealed. The defendant cross-appealed on the question of the warranty.

4 The Court of Appeal dismissed the defendant's cross-appeal on the warranty at [27]:

> ... Joseph Yong made his statements to Vincent Lim intending the latter to rely on them. We therefore find the following assurances given by Joseph Yong were express terms of the contract:
>
> (a) the Respondent's Decora Emulsion paint would be fit for application on the internal surfaces of the Bukit Batok project, without the need for a sealer coat; and
>
> (b) the provision of a five-year warranty for the paints used in the Bukit Batok project, provided the use of paint was based on a proposed paint system by the Respondent: see [9] and [10] above as well as [42]-[45] below.

5 The Court of Appeal allowed the plaintiff's appeal and made the following findings:

> 38 Accordingly, we find that the paint discolouration was more likely than not caused by defects in the Decora Emulsion paint supplied by the Respondent. There has therefore been a breach of the express term of the contract that the Respondent's paint would be free from defects and fit for application on the internal surfaces of the Bukit Batok project, without the need for a sealer coat (see [27(a)] above). This finding obviates the need to consider whether there is a breach of the implied terms of the SGA.

6 This assessment of damages follows the Court of Appeal's findings.

My decision

7 The plaintiff's claim of $1,185,545.60 for special damages is as follows: [note: 1]

No.	Description	Amount
1.	Worker's Salary for rectification works	$631,685.09
2.	Dinner for Workers (OT)	$34,668.00
3.	Foreign Worker Levy	$63,115.00
4.	Consumable Tools	$11,428.35
5.	Upkeep for Vehicle GQ 859L	$11,613.78
6.	Accommodation for workers by AC Creative Pte Ltd and Cheer Keong Contractor & Construction	$29,393.20
7.	Administrative Charge	$16,000.00
8.	Rental of Portable Scaffolding, Scissors Lift and Boom Lift from Hup Seng Aluminium Construction Pte Ltd	$81,579.95

9.	Purchase paint from Haruna (S) Pte Ltd for repainting	$52,242.75
10.	Paint Investigation by Setsco Services Pte Ltd	$10,700.00
11.	Sub-Contractor for repainting works by Swiss Plan Construction Pte Ltd	$224,000.00
12.	Repainting works for project at No. 2 Toh Tuck Link	$9,482.50
13.	7% GST	$82,313.60
14.	Set-off for Defendants' invoice for paint materials	[less] $72,676.62
TOTAL		**$1,185,545.60**

8 The general rule is that special damages have to be strictly proven and are otherwise not recoverable (*Wee Sia Tian v Long Thik Boon* [1996] 2 SLR(R) 420 at [15]). Where oral evidence is inconsistent with documentary evidence, and no adequate explanation has been provided, the court may well be justified in relying solely on what can be proven through documentation and not the oral testimony, as was the case in *Bocatra Construction Pte Ltd v Thorkildsen* [1994] 2 SLR(R) 387 at [31]. I bear these principles in mind as I turn to consider each item claimed by the plaintiff.

9 The plaintiff claims that the entire area that required repainting were as follows:

(a) 176,882 m² being the equivalent of about 6 out of 9 storeys of Building A; and

(b) 100,883 m² being the equivalent of about 19 out of 30 storeys of Building B.

This means that three storeys of Building A and 11 storeys of Building B did not require repainting by reason of discolouration or had not been originally painted with the Berger paint. The plaintiff had originally issued a letter of demand for repainting, of $443,243.20 (excluding the cost of paint). The plaintiff also claims the costs of a sub-contractor who repainted Building B.

Purchase Paint from Haruna (S) Pte Ltd for repainting

10 The plaintiff claims $52,242.75 for its purchase of 43,400 litres of replacement paint from Haruna (S) Pte Ltd.

11 In its closing statement, the defendant acknowledged that: [note: 2]

> … the Plaintiff is entitled to recover this head of claim should the Defendant be found liable for the discoloration and if the Defendant is permitted to recover damages beyond what the parties had contractually agreed.

12 The defendant has since been found by the Court of Appeal to be liable for the discolouration and damages. Accordingly, the plaintiff is entitled to claim for $52,242.75 under this head.

Sub-Contractor for repainting works by Swiss Plan Construction Pte Ltd

13 The plaintiff claims the sum of $224,000.00 as the cost of hiring Swiss Plan Construction Pte Ltd ("Swiss Plan") to carry out the repainting works of the 2nd storey to the 19th storey of the 30-storey building (Building B), comprising the units' ceiling and wall and basement-corridor ceiling. This

was completed by March 2009. As this is fully documented in Swiss Plan's statement of final account dated 23 March 2009, and is not disputed, I allow this head of claim.

Other heads of claims

14 What remain to be assessed are the plaintiff's other heads of claim arising out of the plaintiff's repainting works for 6 of the 9 storeys of Building A, comprising 176,882 m^2. It is in evidence from the on-site supervisor, that the units were repainted for handover by February 2009 and the corridors and external areas were completed between March and September 2009. The plaintiff submits invoices and pay slips for these other heads of claim. The defendant has a common objection to these claims, that the plaintiff has not provided any evidence to show that these were for costs incurred exclusively for the repainting of six storeys of Building A. These costs cannot be proved with complete certainty and I shall accordingly attempt to make an assessment based on the available evidence. *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* (*A Firm*) [1979] AC 91 at 106.

15 I note that the number of workers originally deployed in the paintworks was a monthly average of about 20 whilst it was claimed that a monthly average of 23 workers for the repainting. From the invoice submitted by the subcontractor, Building B was completed by the sub-contractor by March 2009. Taking into account that the repainting of Building B had been subcontracted out, and that the plaintiff only repainted 6 storeys of Building A, it would be safer to adopt a measure of the work done by reference to the 7.5 months taken to repaint both Building A and Building B which was 7.5 months and to take into account the respective paint surfaces.

16 Based on the constant of the surface area, Building A comprised around 63.7% of the total surface area originally painted (*ie*, 176,882 ÷ 277,765 x 100%), all things else being equal, I would apportion the time taken to repaint Building A (subject to adjustments below) to be around 4.78 months (*ie*, 63.7% x 7.5= 4.78 months).

Workers' Salary for Rectification Works

17 The bulk of the plaintiff's damage claim is for $631,685.09 allegedly being the cost of paying its workers to carry out its repainting works. To support its claim, the plaintiff produced monthly payslips acknowledged by its workers. Based on the payslips, the plaintiff allegedly took 16,142 man days, or 16 months, to repaint the affected area. [note: 3]

18 As the plaintiff had already sub-contracted the repainting works of Building B to Swiss Plan, the plaintiff is only entitled to recover the workers' salary for repainting 6 storeys of Building A.

The additional time required for repainting

19 However, I was mindful that the plaintiff had submitted that extra time was required in repainting given the following:

(a) An extra 15% time to account for the difficulty of re-painting around windows and fixtures that had to be protected;

(b) An extra 50% to account for the 50% less manpower that the Plaintiffs deployed (due to the necessity of continuing with the on-going contract works);

(c) An extra 10% to account for the Plaintiffs not using scissors lifts when they had the use of them during the original painting works; and

(d) An extra 10% for the sanding off of the discoloured paint before re-painting works could start.

20 The defendant disputes item (a) in quantum but not in principle. The difference in the position taken by the respective parties lies in the fact that the defendant's expert allowed for a 10% increase in time "in view of the difficulties encountered during repainting works due to the installed mechanical and electrical services", whereas the plaintiff's expert found that 20% would be a more realistic cost "resulting from difficulties encountered due to the need to cut-in around installed mechanical and electrical services, and the protection to windows". In its closing submissions, the plaintiff adopted the middle ground of 15% in its computations. The figure of 15% appears to have been accepted as a reasonable one by the defendant's expert in cross-examination. Taking all the above into account, I accept that the figure of 15% is not unreasonable.

21 With respect to item (b), I note the plaintiff's expert witness's evidence that the plaintiff had deployed an average of 19.89 workers per month during the original painting works, and 23 workers per month during the repainting works. Given that more workers were used on average during the repainting works than the original painting works, I had difficulty accepting that the time for repainting would have been extended at all due to shortage of labour, let alone by such a wide margin as 50%. This is especially since the repainting work for Building B had been outsourced to Swiss Plan which had completed all of its sub-contracted works by February 2009. The plaintiff's workers only had to repaint 6 storeys of Building A. Based on the foregoing, I would reject the plaintiffs uplift based on item (b).

22 As for Item (c), the plaintiff is claiming that it took extra time for repainting due to the lack of a scissors lift, which it used during the original works. However, the plaintiff additionally claims $81,579.95 for the "Rental of Portable Scaffolding, Scissors Lift and Boom Lift" for the entire period of repainting as evidenced by an invoice for the period June 2008 to September 2009 for "scaffolding, scissor lift and boomlift". As I have allowed some claim for extra time on Item (a) and (d), I would make no double counting arising from the alleged non-use of the scissors lift in the repainting.

23 As for Item (d), the plaintiff has led evidence to show that sanding off was an additional step required before repainting could take place given that no sealer coat was applied. Although the defendant challenged whether the plaintiff did or needed to sand off the entire painted surface, *ie*, specifically the internal surfaces to be repainted, no alternative reasonable figure was proposed and given that in cross-examination, the defendant's witness Chin Cheong appeared to have accepted the sanding-off in principle, I find that the figure of 10% submitted by the plaintiff is not unreasonable.

24 In the premises, I find that the plaintiff's claim of 16 months for repainting was inflated. The claim should be reduced to a figure of approximately 6.05 months, arising from the following:

4.78 months x 115% x 110% = 6.05 months.

25 The plaintiff is therefore only entitled to recover $238,855.93 for the salary costs of its workers' deployed to repaint Building A (*ie*, 6.05 ÷ 16 x $631,685.09 = $238,855.92).

Dinner for workers

26 The defendant challenges the sum claimed under this head (*ie*, $34,668.00) on largely the same basis as it challenges the amount claimed for worker's salary. Given my adopting of a 6.05 months proxy for the completion of repainting the 6 storeys of Block A, and not the 16 months claimed, I accordingly reduce the sum claimed proportionately to $13,108.84 , *ie*, $34,668.00 x (6.05 ÷ 16) =

$13,108.84.

Foreign Worker Levy

27 Like the other heads of claim, the sum of $63,115 should be reduced proportionately to $23,865.36 following the application of the 6.05 months proxy for completion of repainting of Building A, *ie*, $63,115 x (6.05 ÷ 16) = $23,865.36.

Consumable tools

28 The plaintiff claims $11,428.35 as the costs incurred to purchase consumable tools to carry out the repainting works. It has produced receipts to prove that these costs were incurred. The defendant do not dispute that these tools were purchased. In similar vein to Item 3, however, it does challenge whether these tools were purchased *for the purpose of the repainting works*. Its case is that unless the plaintiff discharges its burden of showing that these tools were purchased for the purpose of the repainting, I should only grant nominal damages. It is more likely than not that in the course of the repainting, consumable tools such as turpentine and brushes would be required. The plaintiff's has produced evidence of these tools and affirmed that these tools were purchased and used in the repainting works. There is no reason to disbelieve the plaintiff. Absent evidence to the contrary, the plaintiff has proven its claim under this head.

Upkeep for Vehicle GQ 895L

29 In this item, the plaintiff claims petrol, parking and servicing fees as upkeep for Vehicle GQ 895L ("the Vehicle"), which it says it used during the repainting works. The defendant objects to the plaintiff's claim under this head on a number of grounds. First, it repeats its point that the plaintiff should not be awarded damages unless it can show that a particular item was used solely for the purpose of the repainting works and no other. Second, it cites the plaintiff's expert's belief that a reasonable deduction should be made to account for the "higher running costs" of using an older vehicle as compared to a brand new one.

30 As to the first objection, the plaintiff has produced receipts verifying that it has spent $11,613.78 on petrol, parking and servicing in relation to the Vehicle. Its factual witness testified that these sums were expended in relation to the repainting works. I accept that testimony. The defendant has not adduced any evidence to show that the Vehicle was used for other purposes. It has not adduced any evidence to show that the expenses were incurred in relation to a different vehicle. I see no basis for finding that the expenses or the Vehicle were used for purposes other than the repainting works.

31 As for the second objection, the defendant is entitled to claim damages for expenses reasonably incurred. I do not think it unreasonable that it should use its existing company vehicle for the purpose of the repainting works. It was not obliged to obtain a new vehicle for the purpose. The defendant has also not quantified how the discount should be applied.

32 What is relevant, however, is the fact that the sum claimed under this head was incurred over a period of 16 months which should be adjusted to 6.05 months proxy. As such, the plaintiff is awarded:

$11,613.78 x (6.05 ÷ 16) = $4,391.46

Accommodation for workers by AC Creative Pte Ltd and Cheer Keong Contractor &

Construction

33 The plaintiff claims $29,393.20 for accommodation of the workers utilised for repainting works who could not stay on the site of the building project after February 2009 when the Building A units were handed back to the main contractor. As such, the plaintiff claims that alternative accommodation had to be secured for them with AC Creative Pte Ltd and Cheer Keong Contractor & Construction for period March to September 2009.

34 The defendant is not challenging the fact that the site was handed back in February 2009. However, it raises the same objections – first, that the plaintiff has premised its claim on more man days than actually expended, and second, that the plaintiff has not proven its case that all the workers living in the alternative accommodation were used solely for the purpose of the repainting works.

35 The first objection is valid in light of my allocation of 6.05 months to repaint 6 storeys of Building A. It is in evidence that Building A was handed back to the main contractor in February 2009. Whilst only the corridors and external areas of Building A remained to be repainted, the plaintiff has produced no evidence to establish the number of workers that he utilised for this remaining area and the duration of their work and accommodation costs. Accordingly the plaintiff has not established this head of claim.

Administrative charge

36 The plaintiff claims $16,000 as administrative charges for the additional time spent by the managing director of the plaintiff and his clerical staff in the administration of the additional work incurred when repainting became necessary. The plaintiff submits that $1,000 per month is not unjustified as a measure of value of this work. It is clear that additional management time would have had to be deployed for the repainting works. I would accordingly award $6,050 (*ie*, 6.05 x 1,000) to the plaintiff.

Rental of Portable Scaffolding, Scissors Lift and Boom Lift

37 The plaintiff has adduced an invoice from Hup Seng Aluminium Construction Pte Ltd which shows that the Portable Scaffolding, Scissors Lift and Boom Lift were leased to the plaintiff from 1 June 2008 to 30 September 2009 (16 months) for $81,579.95.

38 Given my allocation of 6.05 months, I would allow the rental costs for this duration. This amounts to $30,847.42 (*ie*, $81,579.95 x 6.05 ÷ 16).

Paint Investigation by Setsco Services Pte Ltd

39 The plaintiff originally made a claim of $10,700 as the costs of engaging Setsco Services Pte Ltd to prepare a report on the paint supplied by the defendant. It has since withdrawn its claim for this item, and rightly so, as this should be considered at the taxation stage and not the assessment of damages stage. An expert report obtained in view of a dispute that has arisen is a matter for taxation and not assessment of damages.

Repainting work for project at No. 2 Toh Tuck Link

40 The plaintiff did not proceed with its claim under this head at trial. In its closing submissions, it confirmed that it was not making a claim for this item.

GST

41 The plaintiff claims 7% GST of all the Items 1-12 in the table above at [7]. The defendant has disputed the plaintiff's entitlement to this. It is surprising, however, that the plaintiff's closing submissions and reply submissions do not address this claim at all. That the plaintiff may have paid GST on some but not all of the items is clear.

42 The plaintiff has failed to show that GST was paid or payable on several of the items, *eg*, workers' salary and dinner, consumable tools, vehicle upkeep, administrative charge, foreign worker levies. Whilst other invoices like the paint and subcontractor invoice did include GST, the plaintiff in issuing its own invoices for this work to the owner/main contractor would be able to recover GST thereby, it bearing only the differential burden of value added. It has provided no evidence of this amount. Accordingly I would disallow this claim.

Set-off for Defendants' invoice for paint materials

43 Parties are agreed that the defendant is entitled to a set off for paint supplied in the sum of $72,676.62. I accordingly apply a deduction.

Summary of findings

44 In the light of my findings above, the plaintiff's claim should be adjusted as follows:

No.	**Description**	**Amount**
1.	Worker's Salary for rectification works	$238,855.92
2.	Dinner for Workers (OT)	$13,108.84
3.	Foreign Worker Levy	$23,865.36
4.	Consumable Tools	$11,428.35
5.	Upkeep for Vehicle GQ 859L	$4,391.46
6.	Accommodation for workers by AC Creative Pte Ltd and Cheer Keong Contractor & Construction	$0.00
7.	Administrative Charge	$6,050.00
8.	Rental of Portable Scaffolding, Scissors Lift and Boom Lift from Hup Seng Aluminium Construction Pte Ltd	$30,847.42
9.	Purchase paint from Haruna (S) Pte Ltd for repainting	$52,242.75
10.	Paint Investigation by Setsco Services Pte Ltd	$0.00
11.	Sub-Contractor for repainting works by Swiss Plan Construction Pte Ltd	$224,000.00
12.	Repainting works for project at No. 2 Toh Tuck Link	$0.00
13.	7% GST	$0.00
14.	Set-off for Defendants' invoice for paint materials	(less) $72,676.62
TOTAL		**$532,113.48**

Conclusion

45 In the light of my findings above, I award damages of $532,113.48 payable by the defendant to the plaintiff.

46 The plaintiff shall be entitled to interest on the above amount at the rate of 5.33% per annum from the date of writ (23 November 2009) until the date of payment.

47 Costs are to be taxed if not agreed.

[note: 1] Plaintiff's Closing Submissions, p 68.

[note: 2] Defendant's Closing Submissions, at para 304.

[note: 3] Defendant's Exhibit D-1.

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