

Desin Construction Pte Ltd v Cattell Engineering Pte Ltd
[2009] SGHC 203

Case Number : Suit 311/2008
Decision Date : 11 September 2009
Tribunal/Court : High Court
Coram : Kan Ting Chiu J
Counsel Name(s) : Pavan Kumar Ratty (P K Ratty & Partners) for the plaintiff; Ang Cheng Ann Alfonso (A Ang Seah & Hoe) for the defendant
Parties : Desin Construction Pte Ltd — Cattell Engineering Pte Ltd
Contract – Building and Construction Law

11 September 2009

Judgment reserved.

Kan Ting Chiu J:

1 This case arose out of a contract between the plaintiff, Desin Construction Pte Ltd, and the defendant, Cattell Engineering Pte Ltd in connection with a construction project named “Diversion of Private Services at Jurong Island Highway (Phase 2) – Civil”.

2 The owner of the project was the Jurong Town Corporation (“JTC”) and the project was managed by SembCorp Utilities (“SUT”). The defendant wanted to secure the project, and had obtained a complete set of tender documents and drawings from SUT. However, its intention was not to carry out the work itself. Discussions were held with the plaintiff for the plaintiff to execute the works, and a set of the tender documents and drawings were forwarded to the plaintiff.

3 After receiving and studying the documents and drawings, the plaintiff submitted to the defendant its quotation. The first page of it [\[note: 1\]](#) read:

RE: Services Diversion At Jurong Island OASIS and TEIJIN Sites

Thank you for invit[ing] us to quote for the project above.

SUMMARY OF BILLS

1.1	Preliminaries	\$	1,960,000.00	
3.1	Culvert Type B with Manholes	\$	2,087,000.00	
3.2	Culvert Type C	\$	651,000.00	
3.3	Access Shaft Type B	\$	1,080,000.00	
3.4	Access Shaft Type C	\$	560,000.00	

3.5	Access Shaft Type D	\$	595,000.00	
3.6	Pipe Jacking	\$	1,000,000.00	
3.7	Pipe Sleeper, Rack, supports	\$	268,000.00	
3.8	Pipe Markers	\$	-	INCLD
3.9	External works	\$	75,000.00	
3.10	Any other items	\$	-	Nil
4.1	Culvert Type A with Manholes	\$	2,115,000.00	
4.2	Access Shaft Type A	\$	578,000.00	
4.3	Pipe Sleepers, Racks, Support	\$	228,000.00	
4.4	Pipeline Markers	\$	-	INCLD
4.5	External Works	\$	315,000.00	
4.6	Any other items	\$	-	Nil
	<u>Sub-Contract Total</u>	\$	<u>11,512,000.00</u>	

4 This was followed by 11 pages, each listing the items of work and the cost for each of the items. (The works will be referred to collectively as "the contracted works".)

5 The defendant accepted the plaintiff's quotation of \$11,512,000.00 and instructed the plaintiff to start work. No formal agreement was executed by the parties, nor was there any exchange of correspondence to record any terms with regard to the execution of and payment for the works. The paucity of written records and communications was to continue through the execution phase of the contract up to the end of the project, and this left matters in dispute in this case which contemporaneous records would have avoided.

6 The plaintiff did not have funds to carry out the contracted works. In its opening statement, it asserted that "the costs of materials were to be paid for by the Defendants and these would be deducted" from payments due to the plaintiff,[\[note: 2\]](#) and it alleged in its closing submissions that "the Defendants had agreed to enter into contracts with all the contractors supplying materials and doing work and to then deduct these sums ...".[\[note: 3\]](#)

7 The defendant's case was that the parts of the contracted works which the plaintiff was unable to carry out were withdrawn from the contract (the withdrawn works), and the plaintiff was left with the "excavation and Reinforced Concrete works"[\[note: 4\]](#). The defendant then arranged with other contractors to complete the withdrawn works.

The claim

8 The plaintiff pleaded in its statement of claim that the agreement was for "the lump sum amount of \$11,512,000", [\[note: 5\]](#) which was to be paid "within a reasonable time after the completion of the Diversion project or a particular part of the project and or upon submission of their progress claims or tax invoice." [\[note: 6\]](#)

9 The plaintiff claimed that although it had completed the project to the satisfaction of the defendant and had received some payments for the works, the defendant did not make full payment for them. The plaintiff set out its claim thus: [\[note: 7\]](#)

Total Contract Sum		\$11,512,000.00
Less:	a) 5% retention	\$575,600.00
	b) previous payments without GST	\$2,987,248.70
	c) deductions for materials purchased by Defendants on Plaintiffs behalf	\$5,186,616.07
		\$8,749, 464.77
Add:		<u>\$2,762,535.23</u>
	7% GST	<u>\$193,377.46</u>
		\$2,955,912.69

10 Alternatively, the plaintiff claimed damages for breach of contract, or for payment on a *quantum meruit*.

The defence and counterclaim

11 The defendant's pleaded defence is that it was a condition that "payments were to be made only when work carried out by the Plaintiff was completed as and when they were approved by the Defendants and the superintending officer." [\[note: 8\]](#) In its closing submissions, the defendant stated that payments were "subject to the basic premise that the Plaintiffs must have actually performed and satisfactorily completed the works before they are entitled to any payment whatsoever", [\[note: 9\]](#) with no reference to the superintending officer's approval. What was important was that by either formulation, the defendant only had to pay for work done to its satisfaction.

12 The defendant's case was that it had not only paid for the works the plaintiff had carried out, but it had overpaid the plaintiff to the sum of \$577,304,09, and incurred a further \$1,165,000 in rectifying the plaintiff's works.

13 This was explained in its closing submissions that: [\[note: 10\]](#)

- i. In respect of all works satisfactorily completed by the Plaintiff they had already been paid in full the sum amounting to \$2,977,248.71 such value being based on the Rates and Prices set out in the Plaintiffs' quotation of \$11,512,000.00.
- ii. In respect of works partially completed or performed by the Plaintiffs, they have also been fully paid by the Defendants again based on the rates and prices set out in the Plaintiffs' quotation and the Defendants' estimate of the extent of work completed by the Plaintiffs. The Defendants, following the final assessment of the Plaintiffs' work, discovered that the Plaintiffs had in fact been overpaid by the sum of \$577,304.09 (the subject of the Defendants' counterclaim).
- iii. In respect of the works done by the Plaintiffs, numerous defects were discovered by the Employer which the Plaintiffs failed to rectify despite numerous requests to do so by the Defendants. As a consequence of the Plaintiffs' failure to rectify the defects in their work, the Defendants undertook the rectification works themselves and incurred costs amounting to the sum of \$1,165,000.00 in rectification works (also the subject of the Defendants' counterclaim).
- iv. In respect of the works that the Plaintiffs failed to perform, the Plaintiffs were therefore not entitled to be paid. These works (as itemized and priced in the Plaintiffs' own quotation) amounted to a total value of \$9,112,055.38 and were completed by the Defendants (whether directly or through subcontractors subsequently engaged by the Defendants).

The plaintiff's quantification of its claim

14 The plaintiff had worked out its claim as set out in para 9 above with the full contract amount of \$11,512,000.00 as the starting point. From this, it deducted (a) the retention money, (b) the payments the defendant made to the plaintiff, and (c) payments the defendant made on the purchase of materials by the defendant on behalf of the plaintiff.

15 While the plaintiff claimed that it had completed the contracted works, [\[note: 11\]](#) this was denied by the defendant which blamed the plaintiff for failing to perform its contractual obligations and leaving the defendant to complete the works instead. [\[note: 12\]](#)

16 The plaintiff's principal witness was its director, Chua Pea Hoo ("CPH"). In his affidavit of evidence-in-chief, CPH did not claim that the plaintiff had completed the contracted works, and he did not give any particulars on the execution and completion of the works. To the contrary, he deposed that \$92,700 for work done for trial holes or trenches and \$127,500 for work on a reinforced concrete drain were to be deducted from the full contract sum. [\[note: 13\]](#) (The plaintiff in its closing submissions accepted that a further \$90,000 was to be deducted, [\[note: 14\]](#) bringing the total deductions to \$312,200.) The acknowledgment that deductions were to be made for these items of work was significant as it was an admission that the plaintiff did not carry out all the contracted works.

17 As the plaintiff was making a claim for payment, the burden was on it to prove that it was entitled to the payment claimed. Instead of producing proof of the works it had carried out, the plaintiff sought to rely on the fact that the contracted works were found to be complete or

substantially complete at a final inspection on 18 February 2008 attended by representatives of JTC, SUT, the plaintiff and the defendant. The plaintiff submitted in its closing submissions that "(t)he importance of this inspection in confirming the substantial completion of the Plaintiffs works cannot be over emphasised."[\[note: 15\]](#) There was a fallacy in this argument in that while the final inspection may have confirmed the substantial completion of the contracted works, but it did not confirm that all the contracted works were carried out by the plaintiff.

18 The plaintiff also made the argument[\[note: 16\]](#) that it was entitled to payment because:

According to Keating on Construction Contracts 8th Edition:- (at 4-008 & 009)

In the ordinary lump-sum contract the employer cannot refuse to pay the contractor merely because there are a few defects and omissions. If there is substantial completion he must pay the contract price subject to a deduction by way of set-off or counterclaim for the defects.

What is substantial completion? One test to be applied is whether the work was "finished" or "done" in the ordinary sense, even though part of it is defective. And "it is relevant to take into account both the nature of the defects and the proportion between the cost of rectifying them and the contract price."

19 Two questions arose from this contention. First, was the contract between the plaintiff and the defendant an ordinary lump sum contract? The full contract sum of \$11,512,000 was the aggregate of the 13 sums in the summary of bills set out in para 3 above. The breakdown of the 13 sums was in turn set out over 11 further pages. The \$11,512,000 was, in fact, the aggregate of itemised costs.

20 Second, assuming that the agreement was a lump sum contract, the plaintiff acknowledged that it did not complete works amounting to \$312,200. In addition to that, it also admitted that it paid to the defendant \$349,000 rectification costs (see para 37 hereof). It cannot be said that the plaintiff had completed the contracted works except for "a few defects and omissions".

21 In the circumstances, the plaintiff had to prove that it was entitled to any payment unless it was admitted by the defendant.

The payments received

22 CPH exhibited[\[note: 17\]](#) in his affidavit a summary of the payments of \$3,131,511.14 the defendant made.

23 Ong Chin Eik ("OCE"), a director of the defendant, deposed in his affidavit that the defendant had paid the plaintiff \$2,977,248.71. He also exhibited the defendant's payment vouchers for the payments made to the plaintiff.[\[note: 18\]](#) The payments recorded also added up to \$3,131,511.14. These vouchers recorded that the payments were made as payments towards the plaintiff's invoices, and as advance payments.[\[note: 19\]](#)

24 The plaintiff's alleged receipt of \$2,987,248.70 and the defendant's alleged payment of \$2,977,248.71 were not reconciled. However, as the defendant's case was that it only had to make payment for works that were satisfactorily completed, its statement on the payment of \$2,977,248.71 was an admission that works to that value were done. Consequently, the plaintiff did

not have to prove that it was entitled to the payment of \$2,977,248.71, but it had to prove that it is entitled to any further payment.

25 The plaintiff's presentation of its claim was unsatisfactory. The plaintiff did not show positively the extent and value of the works it completed. Instead, it made its claim on the premise that the full contract amount was payable with deductions from payments made to it and to the suppliers of materials purchased on its behalf.

26 The plaintiff should show (a) the value of the works it had completed, (b) the payments due from the works completed, (c) the payment it had received, and (d), that (b) minus (c) is \$2,955,912.69. The plaintiff had not done that, and the defendant's admission of \$2,977,248.71 was the only evidence of the value of the works.

27 For the foregoing reasons, the plaintiff's claim for a further payment of \$2,955,912.69, as well as the alternate claims for damages for breach of contract, or payment in *quantum meruit*, are dismissed.

The defendant's counterclaim for the overpayment of \$577,304.09

28 The claim pleaded in para 12 of the counterclaim state:

The Defendants claim that the Plaintiffs had failed to perform their contractual obligations and the Defendants were required to purchase materials, provide the workmen including plant, equipment, machineries, related overhead expenses and carry out the works at their expense. Less the costs of the omissions that were not carried out by the Plaintiff, and the overpayment to the Plaintiffs, the Plaintiffs are indebted to the Defendants in the sum of \$577,304.09.

29 OCE deposed in his affidavit of evidence-in-chief [\[note: 20\]](#) that the plaintiff had actually completed works of the value of \$2,399,944.02, but he had not obtained the figure by adding up the value of the works the plaintiff completed. This figure was apparently arrived at by deducting from the full contract sum of \$11,512,000 (a) the value of works the plaintiff failed to complete, and (b) the value of the works undertaken by the defendant due to the plaintiff's omissions, but he did not set out the sums of the omissions and the works carried out by the defendant. Proceeding on the premise that the works carried out by the plaintiff had a value of \$2,399,944.62, it followed that the payment of \$2,977,248.71 was an overpayment of \$577,304.07.

30 Another witness for the defendant, its Assistant Project Manager, Chua Jiun Chyang ("CJC") also stated that the works done by the plaintiff amounted to \$2,399,994.62, but he came to that figure in a different way from OCE. [\[note: 21\]](#) CJC proceeded with the "costs of work actually done by Desin + cost of materials purchased by Cattel on Desin's behalf" of \$3,361,000 and deducted from it the "Cost of Materials supplied by Cattel on Desin's behalf" of \$961,055.38 and arrived at \$2,399,994.62 as the amount due to Desin.

31 No explanation was offered for the use of the different methods of computation. By whichever method, the defendant's claim of overpayment was inconsistent with its stance that payments were to be made to the plaintiff for works completed to the satisfaction of the defendant, and that all the payments made were approved by the defendant. Under that scheme, no payment for works the plaintiff did not do, the cost of materials purchased by the defendant, or the cost of work undertaken by the defendant as a result of the plaintiff's omissions would be approved or paid.

32 The defendant's payment records should also be looked at. In the cheque vouchers which approved payments to the plaintiff's invoices for works carried out, there were no reservations that the payments were subject to verification or revision. If the payments were subject to such reservations, it would be logical for that to be inserted and acknowledged by the plaintiff when it received the payments. In contrast, when advance payments were made to the defendant, the related cheque vouchers specifically recorded that they were advance payments (and therefore not payments for work done.)

33 The defendant made these payments after the plaintiff had submitted its invoices, and it made payment of the sums it approved and paid without qualification. No deduction should be made from the payment of \$2,977,248.71 made to the plaintiff, and the claim for the overpayment is dismissed.

The defendant's counterclaim for \$1,165,000 for the costs of rectification works

34 This claim is pleaded in para 13 of the counterclaim:

The Defendants also claim a sum of \$1,165,000.00 being the costs of rectification works done by the Defendants as a result of the failure of the Plaintiffs to rectify defects.

35 The defendant subsequently gave further and better particulars of the defects it alleged the plaintiff had failed to rectify. The particulars were:

- (a) Construction debris was not removed from both Oasis and Teijin sites for inspection by owners
- (b) Damage done to newly laid pipelines due to construction of top slab
- (c) Omission to clear civil punchlist items
- (d) Culverts constructed by Plaintiffs were leaking due to poor workmanship
- (e) RC drain invert level was wrong due to poor workmanship, level at downstream was higher than upstream.
- (f) Civil works by Plaintiffs were behind schedule
- (g) Plaintiffs failed to perform works during critical stage of project

It is to be noted that three of the items were not defects. Items (c) and (g) were omissions, and item (f) related to delayed work.

36 CJC produced a breakdown of this claim under seven items in his affidavit of evidence-in-chief. [\[note: 22\]](#) I set out a simplified version of it:

ITEMS TO DEDUCT FROM DESIN PAYMENT FOR FAILURE TO FULFILL OBLIGATIONS		
	DESCRIPTION	Amount (S\$)

1	Supply manpower & general tools to clear construction debris (both Oasis & Teijin sites) for inspection by owners	\$10,000.00
2	All materials & works for cleaning and recoating of newly laid pipelines in culvert B (damage due to construction of top slab).	\$20,000.00
3	All materials & works to clear civil punchlist items	\$35,000.00
4	All materials & works to rectify water seepage into culverts and carry all liabilities for 10 years warranty	\$200,000.00
5	All materials & works to rectify workmanship defects (wrong invert level) for 3.5m RC box drain at Teijin (Duration 35 days)	\$500,000.00
6	Additional cost to piping contract due to Desin failure to meet contractual milestones	\$200,000.00
7	Extraover for CE to take over and complete the works at short notice	\$200,000.00

37 The plaintiff's responses [\[note: 23\]](#) to the claims were:

Item 1 – disputed as there were no invoices produced.

Item 2 – disputed as there were no prior documented complaints, or invoices produced.

Item 3 – admitted.

Item 4 – \$7,913 admitted, \$192,087 disputed as no warranty was produced.

Item 5 – admit to \$349,000 as quantified previously by the defendant. [\[note: 24\]](#)

Item 6 – claim was withdrawn by the defendant.

Item 7 – claim was for accelerated work and was not related to rectification works.

38 The defendant replied to some of the plaintiff's responses. [\[note: 25\]](#)

Items 1 and 2 – the defendant had tabulated the costs and expenses. (This did not address the plaintiff's point that there were no invoices, and no letters of documented complaints for item 2.)

Items 3 to 5 – no reply.

Item 6 – the defendant did not withdraw this claim.

Item 7 – this was a claim for additional costs and expense incurred by the defendant and

liabilities and risks the defendant faced because of the plaintiff's failure to complete the contracted works.

39 My findings on these items are:

Item 1 – I allow the claim of \$10,000 because the plaintiff did not dispute that the work was done, did not assert that the \$10,000 claimed was excessive.

Item 2 – I disallow this claim because there was no record of any complaint by the defendant of defective work when the plaintiff left the site.

Item 4 – I disallow the claim for \$192,087. The amount claimed was for the costs for preparing and conducting 10 future inspections. There was no evidence that the inspections were necessitated by the rectification works.

Item 5 – I allow the \$349,000. The defendant did not dispute this figure.

Item 6 – I disallow this claim. I agree with the defendant that the claim was not withdrawn, but I find that the claim was not for rectification works.

Item 7 – I disallow this claim. The defendant had not explained its nature and basis for it, and it had not shown that it was a claim for rectification works.

40 Having examined the merits of the plaintiff's claim and the defendant's counterclaims, my orders are:

- (i) the plaintiff's claim is dismissed with costs,
- (ii) the defendant's counterclaim for overpayment is dismissed with costs, and
- (iii) there be judgment for the defendant's counterclaim for rectification costs in the sum of \$401,913 and costs.

[\[note: 1\]](#) Defendant's Core Bundle of Documents page 1

[\[note: 2\]](#) Plaintiff's Opening Statement para 2

[\[note: 3\]](#) Plaintiff's Closing Submissions para 3

[\[note: 4\]](#) Defendant's Opening Statement para 8; Ong Chin Eik's Affidavit of Evidence-in-Chief para 29

[\[note: 5\]](#) Statement of Claim para 4

[\[note: 6\]](#) Statement of Claim para 6

[\[note: 7\]](#) Statement of Claim para 8

[\[note: 8\]](#) Defence and Counterclaim para 6

[\[note: 9\]](#) Defendant's Closing Submissions para 24

[\[note: 10\]](#) Defendant's Closing Submissions para 2

[\[note: 11\]](#) Statement of Claim para 7

[\[note: 12\]](#) Defence and Counterclaim para 7

[\[note: 13\]](#) Chua Pea Hoo's Affidavit of Evidence in Chief para 15

[\[note: 14\]](#) Plaintiff's Closing Submissions para 53

[\[note: 15\]](#) Plaintiff's Closing Submissions para 40(c)

[\[note: 16\]](#) Plaintiff's Closing Submissions pages 27–28

[\[note: 17\]](#) Chua Pea Hoo's Affidavit of Evidence in Chief page 127

[\[note: 18\]](#) Ong Chin Eik's Affidavit of Evidence in Chief para 35

[\[note: 19\]](#) Ong Chin Eik's Affidavit of Evidence in Chief pages 125–140

[\[note: 20\]](#) At paras 33 – 34

[\[note: 21\]](#) Chua Jiun Chyang's Affidavit of Evidence-in-chief para 20

[\[note: 22\]](#) At pages 374 – 376

[\[note: 23\]](#) Plaintiffs Closing Submissions para 80

[\[note: 24\]](#) Chua Jiun Chyang's Affidavit of Evidence-in-Chief page 451

[\[note: 25\]](#) Defendant's Reply to Plaintiffs paras 23 –25

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