

28

In the Privy Council.

No. of

38 OF 1969

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG

BETWEEN

TAK MING COMPANY LIMITED

(2nd Defendant) Appellant

AND

YEE SANG METAL SUPPLIES COMPAY

(Plaintiff) Respondent

Record of Proceedings

UNIVERSITY OF LONDON
 INSTITUTE OF ADVANCED
 LEGAL STUDIES
 - 7 APR 1972 -
 25 RUSSELL SQUARE
 LONDON, W.C.1.

LENNOX BYWATER & CO.,
 40 ADAM HOUSE
 ONE FITZROY SQUARE
 LONDON, W1P 6HB

Solicitors for the Appellant.

SHARPE PRITCHARD & CO.,
 109, KINGSWAY,
 LONDON, W.C.2.

Solicitors for the Respondent

In the Privy Council.

No. of
38 OF 1969

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG

BETWEEN

TAK MING COMPANY LIMITED

(2nd Defendant) Appellant

AND

YEE SANG METAL SUPPLIES COMPANY

(Plaintiff) Respondent

RECORD OF PROCEEDINGS

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In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG

BETWEEN

TAK MING COMPANY LIMITED

(2nd Defendant) Appellant

AND

YEE SANG METAL SUPPLIES COMPANY

(Plaintiff) Respondent

10 RECORD OF PROCEEDINGS

No. 1.

WRIT OF SUMMONS AND STATEMENT OF CLAIM

IN THE SUPREME COURT OF HONG KONG

Original Jurisdiction.

Action No. 2212 of 1966.

Between YEE SANG METAL SUPPLIES COMPANY. . . . Plaintiffs

and

DEFAG CONSTRUCTION COMPANY. 1st Defendants

TAK MING COMPANY LIMITED 2nd Defendant

*In the
Supreme
Court of
Hong Kong.*

*Original
Jurisdiction*

No. 1.
Writ of
Summons
and
Statement
of Claim
16th
November
1966.

20 ELIZABETH II, BY THE GRACE OF GOD OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND OF HER REALMS AND TERRITORIES, QUEEN, HEAD OF THE COMMONWEALTH, DEFENDER OF THE FAITH.

To Defag Construction Company of No. 116 Argyle Street, 9th floor, A, Kowloon in the Colony of Hongkong, Building Contractors, and Tak Ming Company Limited whose registered office is situated at Nos. 68-78, Sai Yee Street, Kowloon aforesaid,

30 WE command you that within eight days after the service of this writ on you, exclusive of the day of such service, you cause an appearance to be entered for you in an action at the suit of Yee Sang Metal Supplies Company

*In the
Supreme
Court of
Hong Kong.*

*Original
Jurisdiction*

No. 1.
Writ of
Summons
and
Statement
of Claim
16th
November
1966.
continued.

of Room 625 Man Yee Building, Queen's Road Central Victoria in the said Colony, Building Materials Suppliers,

and take notice that, in default of your so doing, the plaintiff may proceed therein, and judgment may be given in your absence.

WITNESS The Honourable Sir Michael Hogan Kt., C.M.G.
Chief Justice of Our said Court, the 16th day of November, 1966.

(Sgd.) **C. M. STEVENS**
Registrar.

STATEMENT OF CLAIM

The Plaintiffs' Claim is for the sum of \$367,645.75 being balance due and 10 owing by the Defendants in respect of work done and materials supplied at the 2nd Defendant's property at Kowloon Inland Lot No. 1571 Sec. A under a Chinese Contract in writing made between the 1st Defendants of the one part and the Plaintiffs of the other part and dated the 20th January 1965 and in pursuance of a written undertaking given by the 2nd Defendants to the Plaintiffs in respect thereof dated the 9th February 1965, particulars of which have been rendered to the Defendants.

PARTICULARS

12.2.1965 to 5.9.1966	To work done and materials supplied under Chinese Contract and undertaking as aforesaid	\$1,251,645.75	20
21.9.1965 to 9.7.1966	Less payments on account:	884,000.00	
	Balance due:	<u>\$367,645.75</u>	

The Plaintiffs also claim the costs of this action.

(Sgd.) **HASTINGS & CO.**
Solicitors for the Plaintiffs

And the sum of \$350.00 for costs.
If the Amount claimed is paid to the Plaintiffs or their Solicitors or agents within four days from the service hereof, further proceedings will be stayed.

This writ was issued by HASTINGS & CO., Marina House, 1st Floor, Victoria, Hong Kong, Solicitors for the Plaintiffs, who carry on business at Room N. 625 Man Yee Building, Queen's Road Central Victoria in the Colony of Hongkong.

(Sgd.) **HASTINGS & CO.**

No. 1A

IN THE SUPREME COURT OF HONG KONG

Original Jurisdiction.
Action No. 2212 of 1966.

Between YEE SANG METAL SUPPLIES COMPANY Plaintiffs
and
DEFAG CONSTRUCTION COMPANY 1st Defendants
TAK MING COMPANY LIMITED 2nd Defendant

*In the
Supreme
Court of
Hong Kong*

*Original
Jurisdiction*

No. 1A
Statement
of Claim
against
2nd
Defendant
13th March
1967.

STATEMENT OF CLAIM AGAINST 2nd DEFENDANT

10 1. The Plaintiffs are a firm and carry on the business of, inter alia, steel works contractors, and they have a place of business at Room 625 Man Yee Building, Queen's Road Central, Victoria in the Colony of Hongkong.

2. The 2nd Defendant is a limited company incorporated under the Companies Ordinance in Hongkong and its registered office is at Nos. 68-78 Sai Yee Street, Kowloon in the said Colony.

3. The 2nd Defendant is the registered owner of the property registered in the Land Office as Section A of Kowloon Inland Lot No. 1571.

4. The 1st Defendants are building contractors with a place of business at No. 116 Argyle Street, 9th floor, Kowloon in the said Colony. The Plaintiffs
20 have obtained judgment against the 1st Defendants for the amount of their claim, but the said judgment has not been satisfied, and the Plaintiffs are proceeding against the 2nd Defendant for the same amount, as the 2nd Defendant is jointly and severally liable to the Plaintiffs for the same amount.

5. By a contract in writing between the 1st Defendants and 2nd Defendant No. 574 dated 27th October 1964, the 1st Defendants contracted to build a 16-storey building on the 2nd Defendant's above-said property for use as a school to be known as the Tak Ming Middle School.

6. By a contract in the Chinese language made between the Plaintiffs and the 1st Defendants dated 20th January 1965, (hereinafter called "the said
30 contract") the Plaintiffs undertook to carry out the steel work for the proposed school building at the above said property. In payment the 1st Defendants by the said contract promised to pay the Plaintiffs the amounts of money specified therein and according to the instalments set out therein. By the said contract the 1st Defendants promised to pay to the Plaintiffs the sum of \$100,000.00 and further promised that the balance of the price namely the sum of \$950,000.00 would be paid by the 2nd Defendant through its solicitors. By an oversight a sum of \$70,000.00 which was also payable under the said contract was omitted from the said contract.

*In the
Supreme
Court of
Hong Kong*

*Original
Jurisdiction*

No. 1A
Statement
of Claim
against
2nd
Defendant
13th March
1967
continued.

7. Pursuant to the promise contained in the said contract, the 1st Defendants wrote to the solicitors of the 2nd Defendant by letter dated 8th February 1965 authorising them to pay by the instalments therein mentioned the above said sum of \$950,000.00 as well as the above said sum of \$70,000.00 to the Plaintiffs.

8. By a letter dated 8th February 1965 addressed to the Plaintiffs and copied to the 1st Defendants, the 2nd Defendant by its solicitors promised that the 2nd Defendant would pay to the Plaintiffs the sums of money set out in the above said letter from the 1st Defendants dated 8th February 1965. In its letter the 2nd Defendant requested the Plaintiffs to confirm that they were prepared to finance the 1st Defendants in the light of the conditions contained in that letter. 10

9. The Plaintiffs by their solicitors' letter dated 16th February 1965 addressed to the solicitors of the 2nd Defendant confirmed that they were prepared so to finance the 1st Defendants.

10. The Plaintiffs will say that at law the arrangement pleaded in the preceding paragraphs constituted a binding obligation on the part of the 2nd Defendant to pay the sums of money in question to the Plaintiffs.

11. Further or in the alternative the Plaintiffs furnished consideration for the 2nd Defendant's promise to pay because, in the absence of such a promise, the Plaintiffs would not have entered into their said contract with the 1st Defendants whereby they were financing the 1st Defendants, and the 2nd Defendant knew that this was so at all times, and requested the Plaintiffs to finance and/or continue their financing of the 1st Defendants in return for its promise to pay the Plaintiffs. 20

12. Further or in the alternative, the Plaintiffs will say that, in contracting for the 2nd Defendant to pay the Plaintiffs the sums of money in question, the 1st Defendants were acting as trustees for the Plaintiffs, wherefore the Plaintiffs, as beneficiaries of the agreement between the 1st Defendants and 2nd Defendant evidenced by the above said letters each dated 8th February 1965, are entitled to sue the 2nd Defendant on the agreement hereinbefore mentioned. 30

13. Further or in the alternative, the Plaintiffs do also rely on the exchange of correspondence between the Plaintiffs and the 2nd Defendant direct, which said correspondence was the culmination of earlier discussions between Mr. Yu Tak Yee of the Plaintiffs and Mr. Chun Yuen Cheng of the 2nd Defendant, and the said correspondence consists of a letter in the Chinese language from the Plaintiffs to the 2nd Defendant dated 5th February 1965 and the reply in English of the 2nd Defendant dated 9th February 1965. By its said letter dated 9th February, 1965, the 2nd Defendant undertook to the Plaintiffs that in the event of a breach of the contract between the 1st Defendants and the 2nd Defendant on the part of the 1st Defendants, and in the further event of the 2nd Defendant and the Plaintiffs failing to reach an agreement for the continuance of the contract between the Plaintiffs and 1st Defendants, the 40

2nd Defendant would pay the Plaintiffs for the work done on the 2nd Defendant's said property.

*In the
Supreme
Court of
Hong Kong*

14. The Plaintiffs performed their contract with the 1st Defendants on the strength of the 2nd Defendant's promises to pay contained in their above said letters dated 8th February 1965 and 9th February 1965 respectively.

*Original
Jurisdiction*

15. During the course of the work carried out by the Plaintiffs, it was agreed between the Plaintiffs, 1st Defendants and 2nd Defendant that, in view of the rise in market price of round steel bars, the price of such steel bars should be increased from the price of \$48.00 per picul mentioned in the contract between the Plaintiffs and the 1st Defendants to a new price of \$50.00 per picul.

No. 1A
Statement
of Claim
against
2nd
Defendant
13th March
1967.
continued.

16. Further on the instructions of the 2nd Defendant's architects and by agreement between the Plaintiffs, 1st Defendants and 2nd Defendant, the Plaintiffs supplied extra materials and performed extra work at the 2nd Defendant's said property. The said extra materials and extra work totalled \$31,645.75.

17. Further during the course of the said works, the Plaintiffs, 1st Defendants and 2nd Defendant agreed to a revision of the schedule of payments heretofore agreed including the payment of a further sum of \$100,000.00 to the Plaintiffs.

18. The 2nd Defendant purported to terminate the 1st Defendants' contract with the 2nd Defendant on or about 3rd September 1966 on the grounds that the 1st Defendants had been in breach of that said contract. The Plaintiffs and 2nd Defendant have been unable to agree to the continuation of the Plaintiffs' above said contract with the 1st Defendants.

19. The Plaintiffs have totally performed their side of the contract with the exception of some iron-binding work to the roof top water storage at the said property costing about \$600.00 because of the refusal of the 2nd Defendant to permit the Plaintiffs to complete the said work after the 2nd Defendant had terminated the 1st Defendants' contract.

20. There is a total sum owing to the Plaintiffs of \$367,645.75, full particulars of which have been separately supplied to the 1st Defendants and 2nd Defendant.

Particulars

Original contract price:	\$1,120,000.00
Amount of revision:	100,000.00
Extra works	31,645.75
	<u>\$1,251,645.75</u>
Less part payment:	884,000.00
(including the 1st Defendants' initial payment of \$100,000.00)	<u>\$ 367,645.75</u>

*In the
Supreme
Court of
Hong Kong*

*Original
Jurisdiction*

No. 1A
Statement
of Claim
against
2nd
Defendant
13th March
1967.
continued.

21. The Plaintiffs claim against the 2nd Defendant:—

- (a) The above said sum of \$367,645.75.
- (b) Interest thereon at the rate of 8% per annum from the commencement of this action to payment under Order 15 Rule 7 of the Code of Civil Procedure.
- (c) Costs.
- (d) Further and other relief.

Dated the 13th day of March, 1967.

(Sgd.) **John J. Swaine**
Counsel for the Plaintiffs.

No. 2.

STATEMENT OF DEFENCE OF THE 2ND DEFENDANT

IN THE SUPREME COURT OF HONG KONG

Original Jurisdiction.

Action No. 2212 of 1966.

Between YEE SANG METAL SUPPLIES COMPANY. . . . Plaintiffs

and

DEFAG CONSTRUCTION COMPANY. 1st Defendants
TAK MING COMPANY LIMITED 2nd Defendant*In the
Supreme
Court of
Hong Kong.**Original
Jurisdiction*No. 2
Statement
of Defence
of the 2nd
Defendant
4th May
1967

10 STATEMENT OF DEFENCE OF THE 2ND DEFENDANTS

1. Paragraphs 1, 2 and 3 of the Statement of Claim are admitted.

2. Save that the first sentence in paragraph 4 of the Statement of Claim is admitted, paragraph 4 of the Statement of Claim is denied.

3. Save that the 2nd Defendants say that the Building Contract dated 27th October 1964 was for the construction of a 16-storey building comprising shops, a school to be called Tak Ming School and ancillary works thereto, paragraph 5 of the Statement of Claim is admitted.

20 4. The scope of the contract datd 20th January 1965 (hereinafter called the said contract) between the Plaintiffs and the 1st Defendants was for the erection of a steel structure on the said site in accordance with the Structural Plans prepared by the Architect. Under the said contract the 1st Defendants agreed to pay the Plaintiffs as follow:—

(i) \$100,000.00 on completion of the fixed work in respect of foundation blocks and foundation beams;

(ii) \$50,000.00 on completion of the reinforcement to the floor slabs of each of the floors mezzanine floor to the 9th floor in 10 separate payments; and

(iii) \$45,000.00 on completion of each of the floors from 10th floor to the roof slab in 10 separate payments.

30 The said payments were to be made in accordance with the 1st Defendants' Schedule of payments under the said Building Contract which provided for interim payments to be made by the 2nd Defendants under the Architect's certificates. Save as is hereinbefore expressly admitted paragraph 6 of the Statement of Claim is denied.

5. It is admitted that by a letter dated 8th February 1965 the 1st Defendants wrote to the 2nd Defendants' Solicitors authorizing the 2nd

*In the
Supreme
Court of
Hong Kong.*

*Original
Jurisdiction*

*No. 2
Statement
of Defence
of the 2nd
Defendant
4th May
1967
continued.*

Defendants' Solicitors to pay to the Plaintiffs the sums pleaded in sub-paragraphs (ii) and (iii) above together with one sum of \$70,000.00 making a total of \$1,050,000.00. The said payments were to be deducted as to the payments under sub-paragraph (ii) from the 1st Defendants Interim Payments Nos. 1 to 10 under the Building Contract and as to payments under sub-paragraph (iii) from Interim Payments Nos. 11 to 20 under the said Building Contract. The said letter dated 8th February 1965 further stated that the Plaintiffs' official receipt for the said sums would be accepted by the 1st Defendants as payment under Interim Payments Nos. 1 to 20 and 21 under the said Building Contract. By letter bearing the same date the 2nd Defendants' Solicitors confirmed the said arrangement, and that payments would be made to the Plaintiffs in accordance with the schedule for interim payment aforesaid against Architect's certificates.

10

6. Pursuant to the said arrangement the 2nd Defendants' Solicitors paid to the Plaintiffs six payments of \$50,000.00 each upon the Architect's certificate being issued in each case certifying that interim payments were due to the 1st Defendants under Payments Nos. respectively 1 to 6 as provided for in the Building Contract.

7. By a letter dated 14th January 1966 the Plaintiffs and the 1st Defendants jointly informed the 2nd Defendants that the said contract between the Plaintiffs and the 1st Defendants had been varied in that the Plaintiffs were thereafter to receive \$40,000.00 each under the 7th to 10th Payments and to receive \$36,000.00 each under the 11th to 20th Payments and to receive \$230,000.00 under the 41st Payment. The Plaintiffs confirmed the variation of the said contract as pleaded in this paragraph by signing the said letter dated 14th January 1966.

20

8. The 2nd Defendants' Solicitors have, pursuant to the arrangement pleaded in paragraph 5 hereinbefore as varied by the said letter dated 14th January 1966, paid to the Plaintiffs the further sum totalling \$584,000.00. The said sums were paid as each Architect's certificate for Payments Nos. 7 to 19 inclusive was issued certifying that payments were due to the 1st Defendants as provided for in the said Building Contract. The payments made by the 2nd Defendants' Solicitors to the Plaintiffs pleaded in paragraph 5 hereinbefore and in this paragraph totalling 19 separate payments amounted in all to \$884,000.00. Each said payment was received and acknowledged by the Plaintiffs. The Defendants say that if, which is denied, the Plaintiffs have any legally enforceable rights against the 2nd Defendants under the arrangement pleaded in paragraph 5 hereinbefore, the Plaintiffs' entitlement to payment has been fully discharged.

30

9. Save as is hereinbefore expressly admitted each and every allegation pleaded in paragraphs 7 to 12 (inclusive) of the Statement of Claim is denied.

40

10. As to paragraph 13 of the Statement of Claim, it is admitted that the Plaintiffs wrote a letter in Chinese dated 5th February 1965 to the 2nd Defendants and that the 2nd Defendants replied thereto in English by letter dated 9th February 1965. By the said letter dated 9th February 1965 the 2nd Defendants agreed that, in the event of the 1st Defendants' employment as contractor being terminated and the Plaintiffs and the 2nd Defendants not

being able thereafter to reach mutual agreement on the continuation of the Plaintiffs' employment on the site, they (the 2nd Defendants) would pay the Plaintiffs for work done against the Architect's certificates in issued in accordance with the said Building Contract. The 2nd Defendants say (i) that the Plaintiffs have already received payment under the Architect's certificates certifying payment due under Payments Nos 1 to 19 as pleaded in paragraphs 6 and 8 hereinbefore and (ii) that the Architect has never issued any certificate certifying payment under Payments Nos. 20 and 41. The 2nd Defendants accordingly say that if, which is denied, the Plaintiffs have any enforceable rights under the said letter dated 9th February 1965 against the 2nd Defendants the Plaintiffs are not entitled to payment by virtue of the matters pleaded in this paragraph. If, which is denied, there are any steel structural works done on the said site for which the Plaintiffs have not been paid, the Plaintiffs' right to payment is against their own employer the 1st Defendants. Save as is hereinbefore expressly admitted each and every allegation in paragraph 13 and 14 of the Statement of Claim is denied.

*In the
Supreme
Court of
Hong Kong.*

*Original
Jurisdiction*

*No. 2
Statement
of Defence
of the 2nd
Defendant
4th May
1967
continued*

10

11. Each and every allegation in paragraphs 15, 16 and 17 of the Statement of Claim is denied.

20

12. Paragraph 18 of the Statement of Claim is admitted. The 2nd Defendants further say that the said Building Contract was lawfully terminated.

13. Paragraph 19 of the Statement of Claim is denied.

14. The contract sum agreed between the Plaintiffs and the 1st Defendants for the erection of the said steel structure was \$1,050,000.00. Save that the Plaintiffs have been paid a total of \$884,000.00 by the 2nd Defendants' Solicitors each and every allegation in paragraph 20 of the Statement of Claim is denied.

15. Save as is hereinbefore expressly admitted each and every allegation and each and every claim in the Statement of Claim is denied as if set out herein and traversed seriatim.

30

Dated this 4th day of May, 1967.

(Sgd.) **H. LITTON.**

Counsel for the 2nd Defendants.

*In the
Supreme
Court of
Hong Kong.*

No. 3.

REPLY TO STATEMENT OF DEFENCE OF 2ND DEFENDANTS

*Original
Jurisdiction*

IN THE SUPREME COURT OF HONG KONG

No. 3
Reply to
Statement
of Defence
of 2nd
Defendant
15th
September
1967

Original Jurisdiction.

Action No. 2212 of 1966.

Between YEE SANG METAL SUPPLIES COMPANY. . . . Plaintiffs

and

DEFAG CONSTRUCTION COMPANY. 1st Defendants

TAK MING COMPANY LIMITED 2nd Defendant

REPLY TO STATEMENT OF DEFENCE OF 2ND DEFENDANTS 10

1. Save for admissions contained herein and subject to the matters contained herein, the Plaintiffs join issue with the 2nd Defendants on their Statement of Defence.

2. In reply to paragraph 4 of the Statement of Defence, it is admitted that the payments were to be made by the instalments pleaded therein and in accordance with the 1st Defendants' payment dates, but this was subject to the overriding condition in the said contract that the Plaintiffs should be paid in full within twenty days after the completion of the reinforcement fixing work. The Plaintiffs are entitled to be paid because they have long since completed the said work save for the minor work to the roof top water storage as pleaded in paragraph 19 of the Statement of Claim. Further the Plaintiffs will say that the provision for the Plaintiffs to be paid according to the 1st Defendants' payment dates related only to the time of payment and did not make the payments to the Plaintiffs contingent upon certificates in favour of the 1st Defendants, save that under the said contract the Plaintiffs' work was subject to the final approval and satisfaction of the architects and of the Public Works Department. The Plaintiffs' work has been carried out satisfactorily as is borne out by the 2nd Defendants' architects certifying the Plaintiffs' work up to and including the reinforcement work for the roof. 20

3. In reply to paragraph 5 of the Statement of Defence, it is denied that the payments to the Plaintiffs were ever made contingent upon certificates being issued in favour of the 1st Defendants, and in this context the Plaintiffs repeat paragraph 2 above. 30

4. In reply to paragraph 6 of the Statement of Defence, it is admitted that the 2nd Defendants' solicitors paid to the Plaintiffs six payments of \$50,000.00 each.

5. It is admitted that the Plaintiffs confirmed the variation of payments set out in the letter dated 14th January 1966 from the 1st Defendants to the 2nd Defendants and as pleaded in paragraph 7 of the Statement of Defence. The revised payments did not include the sum of \$70,000.00 which was paid 40

by the 2nd Defendants to the Plaintiffs by a cheque for that amount post-dated to 15th July 1966. The 2nd Defendants however stopped payment on this cheque. The Plaintiffs agreed to their payments being deferred in order to assist the 1st and 2nd Defendants and at their entreaty, and no consideration was given for the Plaintiffs' agreement, wherefor the 2nd Defendants cannot rely upon any such agreement to defeat the Plaintiffs' claim.

*In the
Supreme
Court of
Hong Kong*

*Original
Jurisdiction*

6. In reply to paragraph 8 of the Statement of Defence, it is admitted that the total sum of \$884,000.00 has been paid to the Plaintiffs. This is the part payment pleaded in the statement of Claim.

No. 3
Reply to
Statement
of Defence
of 2nd
Defendant
15th
September
1967
continued.

10 7. In reply to paragraph 10 of the Statement of Defence, the Plaintiffs say that the 2nd Defendants' obligations contained in their undertaking dated 9th February 1965 are distinct from their obligations contained in their solicitors' letter dated 8th February 1965 in that their obligations contained in the undertaking dated 9th February 1965 arise in the event of the 2nd Defendants terminating the 1st Defendants' contract and not continuing with the Plaintiffs' contract, and these obligations are for the 2nd Defendants to pay the Plaintiffs for the work done against the certificates of the architects for such work. The Plaintiffs have done all that they had contracted to do save for the minor work mentioned before and their work has been certified
20 by the 2nd Defendants' architects, the last of such certificates being No. 17 certifying the completion of the reinforcement work up to and including the roof. The Plaintiffs further say that they are not precluded from obtaining payment for the work which they have done by reason of the absence of any certificate to the 1st Defendants in respect of the 1st Defendants' interim payments Nos. 20 and 41, as payment No. 20 is in respect of brick work and payment No. 41 is related to the issue of an occupation permit. Further the 2nd Defendants have received the benefit of the work done and materials supplied by the Plaintiffs but have not paid the Plaintiffs in full for the same.

Dated the 16th day of August, 1967.

30

(Sgd.) **JOHN J. SWAINE**

Counsel for the Plaintiffs.

8. In the alternative, the Plaintiffs say that since the filing of this Reply, the 2nd Defendants have obtained an occupation permit for the building, namely in March, 1968, and have therefore no excuse for not paying the Plaintiffs.

Dated the 25th March, 1968.

(Sgd.) **J. JOHN SWAINE**

Counsel for the Plaintiffs.

*In the
Supreme
Court of
Hong Kong.*

*Original
Jurisdiction*

No. 4
Further
Amended
Statement
of Claim
Against 2nd
Defendant
14th
October
1968.
continued

No. 4.

**FURTHER AMENDED STATEMENT OF CLAIM
AGAINST 2ND DEFENDANT**

IN THE SUPREME COURT OF HONG KONG

Original Jurisdiction.

Action No. 2212 of 1966.

Between YEE SANG METAL SUPPLIES COMPANY. . . . Plaintiffs

and

DEFAG CONSTRUCTION COMPANY. 1st Defendants

TAK MING COMPANY LIMITED 2nd Defendant 10

Further amended as underlined
in green pursuant to be order
made by the Honourable Mr.
Justice Pickering dated 9.10.1968.

Amended as underlined in red
pursuant to the Order made by
the Honourable Mr. Justice
Greedon dated the 25th day of
March this 26th day of March
1968.

(Sgd.) S. H. Mayo
Assistant Registrar,
15th October, 1968.

(Sgd.) S. H. Mayo
Assistant Registrar,
26th March, 1968.

**FURTHER AMENDED STATEMENT OF CLAIM AGAINST 2ND 20
DEFENDANTS**

1. The Plaintiffs are a firm and carry on the business of, inter alia, steel works contractors, and they have a place of business at Room 625 Man Yee Building, Queen's Road Central, Victoria in the Colony of Hong Kong.

2. The 2nd Defendant is a limited company incorporated under the Companies Ordinance in Hong Kong and its registered office is at Nos. 68-78 Sai Yee Street, Kowloon in the said Colony.

3. The 2nd Defendant is the registered owner of the property registered in the Land Office as Section A of Kowloon Inland Lot No. 1571.

4. The 1st Defendants are building contractors with a place of business at No. 116 Argyle Street, 9th floor, Kowloon in the said Colony. The Plaintiffs have obtained judgment against the 1st Defendants for the amount of their claim, but the said judgment has not been satisfied, and the Plaintiffs are proceeding against the 2nd Defendant for the same amount, as the 2nd Defendant is jointly and severally liable to the Plaintiffs for the same amount. 30

5. By a contract in writing between the 1st Defendants and 2nd Defendant No. 574 dated 27th October 1964, the 1st Defendants contracted

to build a 16-storey building on the 2nd Defendant's above-said property for use as a school to be known as the Tak Ming Middle School.

6. By a contract in the Chinese language made between the Plaintiffs and the 1st Defendants dated 20th January, 1965, (hereinafter called "the said contract") the Plaintiffs undertook to carry out the steel work for the proposed school building at the above said property. In payment the 1st Defendants by the said contract promised to pay the Plaintiffs the amounts of money specified therein and according to the instalments set out therein. By the said contract the 1st Defendants promised to pay to the Plaintiffs the sum of \$100,000.00 and further promised that the balance of the price namely the sum of \$950,000.00 would be paid by the 2nd Defendant through its solicitors. ~~By an oversight a sum of \$70,000.00 which was also payable under the said contract was omitted from the said contract.~~ These were not final figures and the said contract provided that the weight should be calculated according to the plans. Later an interim adjustment of \$70,000.00 was agreed between the Plaintiffs and 1st Defendants.

7. Pursuant to the promise contained in the said contract, the 1st Defendants wrote to the solicitors of the 2nd Defendant by letter dated 8th February 1965 authorising them to pay by the instalments therein mentioned the above said sum of \$950,000.00 as well as the above said sum of \$70,000.00 to the Plaintiffs.

8. By a letter dated 8th February 1965 addressed to the Plaintiffs and copied to the 1st Defendants, the 2nd Defendant by its solicitors promised that the 2nd Defendant would pay to the Plaintiffs the sums of money set out in the above said letter from the 1st Defendants dated 8th February 1965. In its letter the 2nd Defendant requested the Plaintiffs to confirm that they were prepared to finance the 1st Defendants in the light of the conditions contained in that letter.

9. The Plaintiffs by their solicitors' letter dated ~~10th~~^{16th} February 1965 addressed to the solicitors of the 2nd Defendant confirmed that they were prepared so to finance the 1st Defendants.

10. The Plaintiffs will say that at law the arrangement pleaded in the preceding paragraphs constituted a binding obligation on the part of the 2nd Defendant to pay the sums of money in question to the Plaintiffs.

11. Further or in the alternative the Plaintiffs furnished consideration for the 2nd Defendant's promise to pay because, in the absence of such a promise, the Plaintiffs would not have entered into their said contract with the 1st Defendants whereby they were financing the 1st Defendants, and the 2nd Defendant knew that this was so at all times, and requested the Plaintiffs to finance and/or continue their financing of the 1st Defendants in return for its promise to pay the Plaintiff.

12. Further or in the alternative, the Plaintiffs will say that, in contracting for the 2nd Defendant to pay the Plaintiffs the sums of money in question, the 1st Defendants were acting as trustees for the Plaintiffs, wherefore the Plaintiffs, as beneficiaries of the agreement between the 1st Defendants

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and 2nd Defendant evidenced by the above said letters each dated 8th February 1965, are entitled to sue the 2nd Defendant on the agreement hereinbefore mentioned.

13. Further or in the alternative, the Plaintiffs do also rely on the exchange of correspondence between the Plaintiffs and the 2nd Defendant direct, which said correspondence was the culmination of earlier discussions between Mr. Yu Tak Yee of the Plaintiffs and Mr. Chun Yuen Cheng of the 2nd Defendant, and the said correspondence consists of a letter in the Chinese language from the Plaintiffs to the 2nd Defendant dated 5th February 1965 and the reply in English of the 2nd Defendant dated 9th February 1965. By its said letter dated 9th February, 1965, the 2nd Defendant undertook to the Plaintiffs that in the event of a breach of the contract between the 1st and the 2nd Defendant on the part of the 1st Defendants, and in the further event of the 2nd Defendant and the Plaintiffs failing to reach an agreement for the continuance of the contract between the Plaintiffs and 1st Defendants, the 2nd Defendant would pay the Plaintiffs for the work done on the 2nd Defendant's said property.

10

14. The Plaintiffs performed their contract with the 1st Defendants on the strength of the 2nd Defendant's promises to pay contained in their above said letters dated 8th February 1965 and 9th February 1965 respectively.

~~15. During the course of the work carried out by the Plaintiffs, it was agreed between the Plaintiffs, 1st Defendants and 2nd Defendant that, in view of the rise in market price of round steel bars, the price of such steel bars should be increased from the price of \$48.00 per picul mentioned in the contract between the Plaintiffs and the 1st Defendants to a new price of \$50.00 per picul.~~

20

~~16. Further on the instructions of the 2nd Defendant's architects and by agreement between the Plaintiffs, 1st Defendants and 2nd Defendant, the Plaintiffs supplied extra materials and performed extra work at the 2nd Defendant's said property. the said extra materials and extra work totalled \$31,645.75.~~

30

15.

~~17. Further during the course of the said works, the Plaintiffs, 1st Defendants and 2nd Defendant agreed to a revision of the shedule of payments heretofore agreed including the payment of a further sum of \$100,000.00 to the Plaintiffs.~~

~~16a. In respect of the items in paragraphs 15 and 16 above, Messrs. Johnson, Stokes & Master, then acting for the 1st Defendants, requested the Plaintiffs by letter dated 4th August 1966 to confirm that the balance due to the Plaintiffs upon completion of the building was apromixately \$16,000.00 and the Plaintiffs so confirmed, wherefore the Plaintiffs now limit their claims in these two paragraphs to \$16,000.00.~~

40

16. Messrs. Johnson, Stokes and Master, then acting for the 1st Defendants, requested the Plaintiffs by letter dated 4th August, 1966 to confirm that the balance due to the Plaintiffs upon completion of the building was approximately \$16,000.00 and the Plaintiffs so confirmed, but the balance has now been calculated to be \$12,565.37.

17.
~~18.~~ The 2nd Defendant purported to terminate the 1st Defendants' contract with the 2nd Defendant on or about 3rd September 1966 on the grounds that the 1st Defendants had been in breach of that said contract. The Plaintiffs and 2nd Defendant have been unable to agree to the continuation of the Plaintiffs' above said contract with the 1st Defendants.

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10 ~~19.~~ The Plaintiffs have totally performed their side of the contract with the exception of some iron-binding work to the roof top water storage at the said property costing about \$600.00 because of the refusal of the 2nd Defendant to permit the Plaintiffs to complete the said work after the 2nd Defendant had terminated the 1st Defendants' contract.

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 Further
 Amended
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 of Claim
 Against 2nd
 Defendant
 14th
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 1968.
 continued*

19.

~~20.~~ There is a total sum owing to the Plaintiffs of \$367,645.00, full particulars of which have been separately supplied to the 1st Defendants and 2nd Defendant.

\$348,565.37
~~\$352,000.00~~

PARTICULARS

	Amount after interim adjustment:	\$1,120,000.00
	Original contract price:	
	Amount of revision:	100,000.00
	Extra works plus rise in price:	31,645.75
		16,000.00
20	Balance upon completion	12,565.37
		<u>\$1,251,645.75</u>
		\$1,236,000.00
		\$1,232,565.37
	Less part payment:	<u>\$884,000.00</u>
	(including the 1st Defendants' initial payment of \$100,000.00)	\$367,645.75
		\$352,000.00
		<u>\$348,565.37</u>

20.

30 ~~21.~~ The Plaintiffs claim against the 2nd Defendant:—
 (a) The above said sum of ~~\$367,645.75~~ ~~\$352,000.00~~ \$348,565.37
 (b) Interest thereon at the rate of 8% per annum from the commencement of this action to payment under Order 15 Rule 7 of the Code of Civil Procedure.
 (c) Costs.
 (d) Further and other relief.

Dated the 14th day of October, 1968.

(Sgd.) JOHN J. SWAINE
 Counsel for the Plaintiffs.

*In the
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Hong Kong.*

**COPY OF NOTES OF THE TRIAL JUDGE, THE HONOURABLE
MR. JUSTICE PICKERING**

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IN THE SUPREME COURT OF HONG KONG

Original Jurisdiction.

Action No. 2212 of 1966.

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Between YEE SANG METAL SUPPLIES COMPANY. . . . Plaintiffs

and

DEFAG CONSTRUCTION COMPANY. 1st Defendants

TAK MING COMPANY LIMITED 2nd Defendant 10

Coram: Pickering J.
Swaine (Hasting & Co.) for Plaintiffs
Litton (Johnson, Stokes & Master)
for 2nd Defendant

JUDGE'S NOTES

9th October 1968

YIU Tak Kee affirmed in Shanghai

Managing partner plaintiff firm. Office at 625, Man Yee Building.

Have obtained judgment against 1st defendants. Wholly unsatisfied.

In bundle "C" at page 144 is contract in Chinese between 1st defendants and my company dated 20.1.65. Letter of same date by 1st defendants to my company is identification "E". The two documents were signed on same date. Method of weight calculation in contract is according to scales of plans. In letter "according to the total amount of iron used". 20

In Chinese contract amounts set out are:—\$100,000.00. Then 10 instalments at \$50,000.00 each and 10 at \$45,000.00 each—installing \$1,050,000.00. Between Koo and myself this was not to be the final price for my work and materials. Reason for putting in clause about weight being calculated according to plans—\$1,050,000.00 was a figure fixed temporarily. Final figure would be ascertained from the plans after my work was finished.

Temporary figures were put in. 30

Litten: Oral evidence on a document?

Swaine: "Surrounding circumstances" paving way.

Court: Ambiguity in document as to payment—admissible to clear up ambiguity.

The figures were put into the contract though temporary to coincide

with payments received by 1st defendants from 2nd defendant through Johnson, Stokes & Master, 2nd defendant's solicitors. We wanted the money which should have been paid to 1st defendants, paid to us, plaintiffs.

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Last paragraph at "E". That \$100,000.00 is not part of the \$1,050,000.00 in the Chinese contract. It represented part of the iron incorporated in the foundation.

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10 It was not put into the Chinese contract because its payment was provisional upon 1st defendants getting \$250,000.00 from 2nd defendant. If they did not get that, it was not payable until 41st instalment. Its payment could not fit into the schedule of payments made between 1st and 2nd defendants. So it would have to wait till 41st payment which was to be a big payment upon obtaining an Occupation Permit.

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Litten: Hearsay and inadmissible as to what Defag intended. Nothing in "E" or Chinese contract about determent to 41st instalment.

Swaine: I shall be calling evidence from 1st defendants.

Litten: Let it be made clear he is giving evidence at a conversation then, I would not be on my feet.

20 Mr. Koo of 1st defendant company told me of deferment to 41st payment if they could not get the loan of a quarter of a million dollars from 2nd defendant.

At 149 at bundle "C" is copy of my letter to Cheng Yun Choi of 2nd defendant. I and met him previously in Mandarin and I had said that if Defag did not continue the work, 2nd defendant should pay plaintiffs for any work done. He said "It can be done." and then I wrote 149. Record reply of 9.2.65—document 152.

30 At 150 is copy of letter from 1st defendants to Johnson, Stokes and Master authorizing them pay plaintiff company 10 instalments at \$50,000.00 each and 10 instalments at \$45,000.00 each plus 1 payment of \$70,000.00. I discussed this sum of \$70,000.00 with Koo. He said it was part of the money mentioned in the Chinese contract of 20.1.65. between plaintiff company and 1st defendant company. It is not included in the \$1,050,000.00 in the Chinese contract. It was not put in there because Koo said he had to go home and consider after which payment the payment at \$70,000.00 should be fitted in.

Document 159 in bundle "C" bears my signature in Chinese at bottom. In it I acknowledge cheque \$100,000.00 postdated to 10.6.65. from 2nd defendant. That figure is included in the \$1,050,000.00 and that cheque was paid.

40 Document 178 in "C" is letter from Defag to Johnson, Stokes & Master confirmed by my signature at foot; dated 9.9.65. In it 1st defendants ask that instalments due from 2nd defendant should be reduced from \$45,000.00 to \$37,500.00 in respect of 18th, 19th and 20th payments and 21st from \$70,000.00 to \$52,000.00. Deficit of \$40,000.00 is put back to 22nd to 25th payments inclusive.

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Document 179 is a letter from 2nd defendant to plaintiff company of 13.1.66. and in English confirmed by Defag. In it 2nd defendant notify plaintiff company they have drawn cheque postdated to 15.7.66. For \$70,000.00 to take the place of the 21st payment which was originally for \$70,000.00.

180 is a letter from 1st defendants to Johnson, Stokes & Master bears my confirmation at the foot. It notifies the further revision of the instalment payments. 7th to 10th reduced to \$40,000.00 each 11th to 20th to \$36,000.00 each. Total deficit is therefore \$130,000.00. Against 41st payment there appears the figure \$230,000.00. That is made up of the \$130,000.00 and \$100,000.00 from 1st defendants because they had not made it previously not having obtained the loan of \$250,000.00. **10**

250 is letter in Chinese bearing my signature for plaintiff company. In it, plaintiff company and other parties request 2nd defendant hold back the 27th and 29th payments to 1st defendants. 1st defendants were then indebted to plaintiff company for cement concrete supplied—nothing to do with the Chinese contract.

260 in English is further letter on same subject dated 13.6.66.—signed by six people (not including me) and confirmed by Mr. Koo. I did not sign because I was not present at the time.

Page 127 at bundle "B" is amendment to principal contract and is dated 12.6.66. extending completion date to 20.9.66. In that document 1st defendant submit work schedule to architect within 3 days of the amendment. Since 12.7.66. I have seen a work schedule relating to this job signed by Mr. Koo. It was posted on the wall at his office. (I identify copy) ("F") at Tak Ming Working site. 1st item is R.C.C. and on face of it shows completion date is 12.7.66. Plaintiff company finished the work it had undertaken to do under the Chinese contract, before 12.7.66. **20**

Top surface of a water tank on roof is not completed. After we had placed the iron bars somebody poured the concrete. That job was not properly done. It had to be knocked off. 2nd defendants refused allow us to complete this top surface which work would cost \$600.00 to \$700.00. **30**

Our job was finished on 12.7.66.

At 265 of C is letter in English 9.7.66 from 2nd defendant to plaintiffs saying postdated cheque for \$70,000.00 will not be met because building not completed before end May 1966 but would be paid in accordance with 2nd building mortgage.

At 266 plaintiff company asked for cheque to become payable on 22.10.66 on grounds date of completion had been extended to 22.9.66.

At 268 2nd defendant refused.

At 267 is copy of bank slip notifying payment of cheque stopped. **40** I had presented it for payment before I got 2nd defendant's letter at 268.

At 276 is letter in English from Johnson, Stokes & Master to plaintiff company dated 4.8.66. and requests confirmation balance is approximately \$16,000.00. I agreed and promised accept instalments as in letter.

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Document shown to me I have seen before. It is in Chinese addressed to plaintiff company from 1st defendants (M.F.I. "L").

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291 at "C" is letter from quantity surveyors to me dated 6.10.66. I went to their firm. I asked them to calculate the quantity of iron I had used because I had difference of opinion with 2nd defendant about quantity plaintiff company had used. No difference of opinion with 1st defendants. 10 I did ask the surveyors act as arbitrators. 2nd defendant never agreed as far as I know.

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301 is my statement of account (translated at 302) to 1st and 2nd defendants. Item for \$3,000.00 described as transportation charges for material at beginning of reinforcement work—these charges were incurred because they left us no room to bend the metal at the site and we had to move it to work on it and then bring it back to the site. Adjourned to 10.00 a.m.

10th October, 1968.

10.05 a.m. Resumed—Appearances as before.

Yiu Tak Kee on former affirmation:—

20 285, letter of 3.9.66 from owner's architects to 1st defendants terminating the principal contract. After I learned of this I spoke to Mr. Cheng of 2nd defendant. Identify him in court. I asked him whether we were required to complete the top surface of the water-tank. He said if I wanted to do it I had to sign a contract with the new principal contractor. I said I would not do that.

Our work was finished (except for that tank) before 12.7.66. I could not have worked any faster because I had to keep pace with the rest of the work. We had to co-ordinate.

30 2nd defendant had a copy of the Chinese contract of 20.1.65. I saw it in July or August 1966 in their office. It was taken out by Cheng and we discussed something about it. He had a copy.

Chinese newspaper clipping shown to me was cut out by my employee on my instructions (Shing Tao 25.8.67). Produce it (Exh. M.)

Swaine: 2 claims in my Statement of Claim.

1. From solicitors correspondence beginning with document 150 1st defendants to Johnson, Stokes & Master; 151, Johnson, Stokes & Master to plaintiffs; 155, Hastings to Johnson, Stoke & Master and 156, reply Johnson, Stokes & Master to Hastings.

These letters form 1 item in my claim—it is entered in paragraphs

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7 to 12 of Statement of Claim.

Single issue for this court is whether on the promise to pay at 152 (9.2.55) there is liability on part of 2nd defendants to pay for the work done and if the answer is yes, quantum falls for assessment on unit prices in Chinese contract \$48.00 per picul—mild; \$58.00 per picul—high tensile. Method for assessment would be weight of steel incorporated. Transportation charges (minor issue) is also for determination.

Swaine: We have agreed that document “G” and “H” may be formally exhibited.

I am abandoning claim contained in paragraphs 7 to 12 inclusive. **10**

In essence my claim is now confined to last 2 lines at p. 13.

Cross-examined.

I have been in building trade since 1960. I am familiar with phrase “lump sum contract” i.e. I will supply material and labour and everything, and be remunerated by calculation from the plans.

Ordinarily speaking construction companies would enter into “lump sum” contracts—contractor providing all labour and material and being remunerated by.....

“Would you explain a little?” I look at exhibit B—contract between 1st and 2nd defendants. At page 60 item 46 refers to “lump sum” basis. \$4,692,000.00 is the lump sum gure noted at page 24. That is figure they would receive if they completed in accordance with contract and there were no variations. **20**

As long as contractor constructs building in accordance with plans and specifications he would receive ultimately the lump sum agreed. The building owner takes no risk regarding fluctuations in price of materials or labour. If materials go up, the contractor suffers the loss. If materials go down the contractor profits. No concern of the owner.

Speaking generally, when a contractor tenders for a lump sum contract he makes some estimate of material and labour required to complete the job and the owner is not concerned with those estimates. If contractor has over-estimated, e.g., quantity at steel or concrete, he would make a profit. Consequently under-estimation would result in loss to contractor. Again the owner is not concerned. All he is conerned with is that building be built to plans and specifications and if that is done he must pay the lump sum price. **30**

Page 79 at B—item 16, says contractor to supply all mild steel bars. Last paragraph on page says.....

It does appear it was obligation of 1st defendants to supply steel bars and have them fixed in position in accordance with plans and specifications.

When I signed Chinese contract of 20.1.65 with 1st defendants, Plaintiff company became sub-contractor of 1st defendants in respect of this work at p. 79.

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Before I entered into contract with 1st defendants I did not know the quantity of steel required to do the job. I had no idea as to quantity required. 1st defendants entered into possession of the site—I do not clearly know when. P. 40 of “B” gives 1.11.64 as date for possession. Before Chinese agreement was signed I did not come into the picture. Had dealings with 1st defendants before signing of Chinese agreement at 20.1.65. Koo of 1st
10 defendants very often came to my office in connection with other sites and it was he who suggested we should become steel sub-contractor on this site. This was after 1st defendants had entered into the building contract with 2nd defendant dated 27. 10.64.

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Koo told me the job was a \$4,000,000.00 odd job. Did not discuss it more clearly than that. He told me it would be a 16 or 17-storey building. Did not tell me date of completion; at that time our company had not decided to “sign up” with 1st defendant therefore date of completion was not very important to me. It took us a few weeks to decide to “sign up” with them. Chinese contract is dated 20.1.65 and was executed on that date. Koo just
20 approached me probably around and December 1964. I considered for some time.

By the time I entered into Chinese contract with 1st defendants as far as my memory goes, Koo had not told me date of completion of the building but only as to the job I was to do.

It was a matter of concern to me how quickly I had to do the job. When I entered into contract on 20.1.65. the site formation was almost complete and I expected my steel fixing work to start a few days after 20.1.65. I still had no idea of quantity of steel I would require.

We had some stock of mild steel bars of 785 B.S.S. quality. It
30 could be easily replenished from merchants in same line of business. If I had too much I could sell some to people in same trade.

Under Chinese contract I had to receive \$1,050,000.00 as a temporary figure. Eventual amount had to be calculated according to the plans.

I was going to get a “cut” of the payments made by 2nd defendant to 1st defendants.

In January, 1965, I was 1st defendants’ creditor in respect of \$167,000.00 which they owed in respect of something else. The Chinese contract providing for a “cut” was not a means of discharging this debt.

The figure of \$1,050,000.00 was arrived at.....Koo was very
40 frank. He asked me help him in connection with this site of 2nd defendant’s. Told me of the contract between 1st and 2nd defendants and the payments he was to receive thereunder; he told me generally the dates and numbers of payments. I now say not the dates. It was within their knowledge how much

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steel would be required at the time they tendered and he told me that He said amount of \$1,200,000.00 odd would be paid to plaintiffs and \$1,050,000.00 would be put down in Chinese agreement. This \$1,050,000.00 was just to be put down in the Chinese agreement to co-ordinate with the payments from 2nd defendant to 1st defendants. Koo also explained there would be many lines of work in progress—not just mine and every line of trade working there would be entitled to payments. We arranged payment schedule to total \$1,050,000.00. Oral agreement with Koo all along was. I was to receive over \$1,200,000.00. Naturally it was my intention to work a profit. 7% to 8% a legal profit. 7% to 8% before deduction of excess on \$1,200,000.00 odd. 10

I could work that calculation from price per picul of iron, cost of labour for building and transportation to site and waste.

I thought I would receive from Defag \$1,200,000.00 odd. Could work out cost of steel bars from price per picul and approximately how many piculs were needed for the job. I could arrive at approximate figure.....

I did not know how much steel was required on 20.1.65. I was to be paid \$1,200,000.00 odd. Less than 1.3m. I could calculate gross profit because Mr. Koo had told me how many piculs I would be required to supply, i.e., he had given me his estimate of the quantity of steel required. Had his estimate been wrong I would not have been affected because payment was to be calculated in accordance with the scale of the plans when accounts came to be settled. 20

My contract with 1st defendants was not a lump sum contract but one bearing a tentative figure which would have to be adjusted when the building was completed. The \$1,050,000.00 was a temporary one. That was my understanding of my contract with 1st defendants all along.

When they, 1st defendants, wrote Johnson, Stokes & Master on 8.2.65. there was an increase of \$70,000.00 (150 in "C").

It provided for \$950,000.00 in 20 instalments. I had had the deposit of \$100,000.00 paid by 1st defendants to 2nd defendant making \$1,050,000.00 and letter authorises \$70,000.00 from 21st payment to be paid over to me. Mr. Koo told me about that \$70,000.00 on 20.1.65. 30

11.50 a.m. Adjourned.

12.10 p.m. Resumed.

Yiu Tak Kee on former affirmation:—

Cross-examination continued.

The \$70,000.00 was not put in the Chinese contract because Mr. Koo said he had to consider just when to pay this \$70,000.00. It was not by oversight that it was left out of the Chinese contract. He had to consider between which payments received from 2nd defendant it had to be squeezed. 40 That was why it was not put in the Chinese contract.

Paragraph 6 of Amended Statement of Claim as it stood at date

of original trial did refer (before amendment) to an oversight. Agree it looks as though it was the understanding of my legal advisers until March that Chinese contract was for a lump sum of \$1,120,000.00. That was not my own understanding right up to March. It was only a temporary figure. Final Statement would be in accordance with scale plans. Contract was for more than \$1,200,000.00. I had only Koo's word for it that that was so. I had made no calculations myself. Understanding of my legal adviser as stated in paragraph 6 of Statement of Claim (before amendment) was wrong.

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10 My contract with 1st defendants was based on the quantity of steel we were to supply and fix and the payment of \$1,050,000.00 was a provisional figure.

Amendment says "later interim adjustment of \$70,000.00 was agreed between plaintiffs and 1st defendants." Word "later" should not have been there.

Unit price for steel which 1st defendants promised pay as present to the Chinese contract was 48 per picul for mild steel bars, \$55 per picul for high tensile bars.

20 I had no idea of quantities of steel I had to supply when I signed the contract. 1st defendants' payment would cover cost of steel, labour of fixing steel bars and our profit. In arriving at our figure of 7 to 8% profit I made arithmetical calculations. We took the purchase price per picul of steel plus labour per picul plus transportation per picul plus waste per picul plus accidental waste in transportation and instalment. If I had arrived at \$53.00 per picul for high tensile steel I would have worked out profit margin by taking \$53.00 from \$55.00. Difference was gross profit. For high Tensile steel we took the figure of \$55.00. For mild steel—contract says \$48.00 so in discussion with Koo of 1st defendants \$50.00 per picul was agreed.

30 Remember swearing affidavit of documents. Exhibit "E" (letter from 1st defendants to me dated 20.1.65). I did not disclose because not find it. It is part of the contract which I signed. I do not remember if I was required to disclose documents I had had but which were no longer in my possession. I was unable to find it. I looked for it.

40 Figure \$50.00 for mild steel was not put in Chinese contract because at the time of signing contract Koo told me he had a little problem. The contract we were to sign a copy of which would have to be produced to Cheng of 2nd defendant and it was stipulated in contract between 1st and 2nd defendants that unit price for mild steel was \$48.00. Koo said it did not look good if 1st defendants' unit price from us no higher than 2nd defendant from 1st defendants. It showed 1st defendants was doing business at a loss. \$2.00 was omitted so that would not know about it. Temporarily that was kept from them.

On 7.9.66. by letter No. 287 of "C" I made a claim against 2nd defendant enclosing account (translated at 302). I was making that claim pursuant to their letter to me—document 152 of 9.2.65 in which I understand they had promised pay me for mild steel at \$50.00 per picul and that is why

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I made the claim in 287, even though in January 1965, I had deliberately concealed the figure of \$50.00 per picul from Tak Ming. It is my present understanding that under 152 2nd defendants are liable to pay me \$50.00 per picul for mild steel.

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12.50 p.m.:— Adjourned to 2.30 p.m.

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2.35 p.m. Resumed.

Yiu Tak Kee (P.W.1.) on former affirmation:—

Cross-examination continues.

Once I signed contract 20.1.65 I was bound to supply steel and do the steel fixing work as 1st defendants' sub-contractor on site. There was no question on that date of my having any rights against 2nd defendant. Once 1st defendants had signed contract it was their duty to instruct 2nd defendants to pay me the sums set out in Chinese contract rather than to 1st defendant direct. It is not my view that simply because 1st defendants instructed 2nd defendant to pay me part of the money due to 1st defendants under principal contract that gives me any rights against 2nd defendant. It was my understanding that as work progressed, 1st defendants would from time to time obtain payment from 2nd defendant and that when 1st defendants received right to payment from time to time part of the schedule payments under principal contract ("B") would be paid to me in accordance with my Chinese contract with 1st defendants. Under Chinese contract, 1st defendants' duty was to inform 2nd defendant of this so that 2nd defendant would act accordingly. 2nd defendant were not concerned with how much I had agreed that we would be paid under our agreement with 1st defendants. I was to be paid that if Defag, 1st defendants, was there, i.e., if Defag, 1st defendants was still a party to the principal contract. If 1st defendants for some reason no longer received payment from 2nd defendant it was my view that we had right of payment against 2nd defendant—i.e. my view as at 20.1.65. What gave us such a right, in my view, was the letter of 9.2.65 addressed to us by from 2nd defendant. For some reason 1st defendants were not going to get payment 2nd defendant so we (Plaintiffs) were entitled to get payment from 2nd defendant.

My understanding of plaintiff's legal position immediately after signing of contract on 20.1.65. was that it was 1st defendants' obligation to instruct 2nd defendant to make certain payments from the scheduled payments to us. I did not think that conferred on us a legal right to sue 2nd defendant for these sums as set out in the Chinese contract—before receipt of the letter 9.2.65. Before 9.2.65. we had committed ourselves to doing all the steel work and had no right of payment except against 1st defendants.

So when I saw Cheng of 2nd defendant at Mandarin I asked that if 1st defendant should be forced to discontinue, Cheng should be responsible for payment because 1st defendants was then already owing me money and there was no reason why I should do anything else for them. 1st defendants owed me \$167,000.00. When I saw Cheng at Mandarin I had entered into binding contract with 1st defendants to do the steel work.

Before I met Cheng at Mandarin 1st defendants had sent 2nd defendant the letter 140 of 20.1.65 authorising 2nd defendant to release 1st defendants' deposit of \$100,000.00 to us, plaintiffs, instead of to 1st defendants. In that letter 1st defendants gave plaintiffs business address, 625, Man Yee Building and asked 1st defendants to confirm to us, plaintiffs, that they were willing to release the money to us. On same day 2nd defendant did write to us, plaintiffs, (letter 145). The \$100,000.00 a deposit 1st defendants had made with 2nd defendant under the principal contract. 2nd defendant said quite clearly in this letter that this deposit would be released to plaintiffs upon completion of whole of foundation works certified by the architect. Certificate referred to is a certificate issued by the architect under the principal building contract. Under that contract there was only one contractor, i.e., 1st defendants. Any reference to certification under that contract is reference to certification of work which 1st defendants had contracted to do under that contract.

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Main contract or no main contract Cheng, of 2nd defendant, knew about plaintiffs' participation. 1st defendants had written to 2nd defendants about this on 20.1.65. Agree any arrangements plaintiffs had with 1st defendants cannot alter 2nd defendants' position under principal contract. When architect issues certificate under principal contract he is not concerned with who did the work but that it had been done and done in accordance with principal contract. Those words in letter 145 "whole works certified by the architect" mean certified under the principal contract between 1st and 2nd defendants.

Met Cheng at Mandarin. My first request to him was not that in event of 1st defendants being evicted as contractor and plaintiffs not then having finished their work on the site, plaintiff would be engaged as principal contractors. Nor was it that in that event 2nd defendant should continue the Chinese contract of 20.1.65 which we had entered into with 1st defendants. I merely asked him to hold himself responsible for the payment.

My letter (148) was written by me to 2nd defendant shortly after the interview at the Mandarin and my intention was to put in writing what I had orally requested at Mandarin. Letter containing 2 request—first for written guarantee that if work let out to another contractor, the agreement entered into between plaintiffs and 1st defendants should remain effective. I had made same request orally at Mandarin. One of the points, I was requesting, was that if 1st defendants kicked out, 2nd defendant would continue the Chinese contract with plaintiffs. That was one of the requests.

At Mandarin Cheng promised outright and he also asked me to do him favours. The contract between 1st and 2nd defendants was \$4,000,000.00 odd but he had only \$3,000,000.00 in hand and no means of making payments. If I should continue to work on binding the iron work it would be of great advantage to him. If another sub-contractor should come in and do the work, that sub-contractor would not have so much capital to do this job. In the course of the work he always asked my help in continuing the work.

In reply to my first request he promised in presence of Mr. Koo to continue Chinese contract in that event. 2nd defendant replied to my

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letter 148 by 152. In terms of paragraph (1) thereof. He says in that paragraph they "may" by mutual agreement continue the contract. I mean to say if 1st defendants kicked out then Chinese contract could be continued by mutual agreement and if no mutual agreement 2nd defendant would pay for work done by plaintiffs up to that stage.

Mr. Cheng acceded to my first request at Mandarin. He agreed that in event of 1st defendants being kicked out 2nd defendant would continue that Chinese contract of 20.1.65 with plaintiffs. When I left Mandarin no problem. Whatever obligation existed under Chinese contract, 2nd defendant would take over if 1st defendants got kicked out. 2nd defendants were to take over the whole contract. If 1st defendants were kicked out plaintiffs would become the principal contractor in respect of steel. And whatever agreement had been made between 1st defendants and plaintiffs would be binding on 2nd defendant. 10

So when 2nd defendant replied in terms of paragraph (1) of 152 they were going back on oral agreement at Mandarin.

We did nothing about 2nd defendants' going back on their word but continued the work.

148 was written after the meeting at the Mandarin. When I wrote it I had already got Mr. Cheng's verbal promise. When I wrote that letter there was no problem—the oral agreement existed. Second request in my letter 148 was necessary because that request contemplated the position of 1st defendants still remaining the contractor. All second request meant was that out of sums payable by 2nd defendant to 1st defendants certain amounts should be deducted and payable to plaintiffs. So in 152 when 2nd defendants were replying to my second request all they were saying in second paragraph was promising that whenever money was owing to 1st defendants by 2nd defendant and at the time 1st defendants owed plaintiffs money under Chinese contract, 2nd defendant would deduct and pay to plaintiffs. 20

What I am really suing on is the oral promise given by Cheng in Mandarin. 30

I identify my signature on four sales invoices shown to me and relating to high tensile steel. They were for incorporation into the building at this site. The respective prices were the prices I paid for the steel. I produce them (Exhibit I(1) to (4)).

3.55 p.m. Adjourned at Mr. Litton's request.

4.05 p.m. Resumed.

P.W.1 on former affirmation:—

It has been a long time but probably I had only the one meeting in Mandarin with Cheng. That was two or three days before my letter of 5th February. Throughout meeting Cheng and I and also Koo were present. Absolutely Koo was there. I was there. As a matter of fact it was Koo who 40

arranged for Cheng to be there and have tea.

I was not asked at trial which started before late Creedon J. whether anybody else was present at that meeting. That is why I did not say it.

I recovered judgment against Koo trading as Defag Construction Company in sum of \$167,064.41 in October 1966. This was in respect of the money Defag owed me at time I entered into the Chinese contract.

10 I recall your cross-examining me upon letter from quantity surveyors (document 291) in the trial before late Creedon J. Vaguely remember it. Do remember your cross-examining me about the differences between myself and 1st defendants regarding the quantity of steel. I accept that on morning of 28.3.68 before late Creedon J. I said in regard to document 291 "the difference of opinion about the quantity of steel between 1st and 2nd defendants".

In evidence in chief before this court I said I went to quantity surveyors to ask them estimate quantity of steel used because there was a difference between 2nd defendant and plaintiffs as to quantity of steel used. All that I meant by that was that on 7.9.66 I wrote to 2nd defendants asking them pay me \$367,000.00 and they refused. I mean no more than that in speaking of dispute re quantity of steel. That is why I need an arbitrator.

20 If Tak Ming's attitude was that they were not concerned at all with the quantity of steel used, sometime in August or July I said to Cheng and to Mr. Bryson of Johnson, Stokes & Master that architect from Eric Cumine would certify amount of steel. The architect refused and as a result a surveyor was produced.

4.25 p.m. adjourned to 10 a.m.

11th October, 1968. 10.05 a.m.

Resumed as before.

P.W.1 Re-examined.

Yiu Tak Kee on former affirmation:—

30 Clause 1 of Tak Ming's letter was interpreted to me while I was being cross-examined. When a was questioned about 2nd paragraph there was no interpretation of it at that time.

Swaine: asks to go on record as observing that witness's evidence as to what he understood aragraph 2 of 152 to mean has been recorded in narrative form and not question and answer form.

Litton: That would be to distort the matter because the whole cross-examination was recorded in narrative form.

Court: I agree. And will record merely what is self-evident that the cross-examination was recorded in narrative form.

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(Interpreter interprets clause 2 of 152 to witness)

Having recorded 152 I accepted position as set out in clause two and now interpreted to me.

After 2nd defendant terminated 1st defendants' contract on 3.9.66 (document 285), I went to see Cheng of 2nd defendant about whether I should finish the work on the water tower. Subsequent to that interview I wrote 287 to 2nd defendant sending them our outstanding accounts with 1st defendants and asking them to confirm they prepared to take over the liabilities.

Understanding of 16th July referred to in my letter relates to the \$70,000.00 (at document 268). When I spoke in my letter of the understanding of 9.2.66..... 10

Litton: I did not cross-examine on 287. He cannot now re-examine and ask what understanding is referred to in 287. He is being asked "what did you mean by 287?" but he was not cross-examined on 287.

Swaine: These questions are to elucidate a point in cross-examination. "You are only suing on the promise at the Mandarin?" and the answer was "yes".

Court: I will allow the question.

.....the understanding I referred to was that if Defag discontinued the contract payment for all work done on site by plaintiffs would be responsibility of 2nd defendant. 20

In letter from Hastings to Johnson, Stokes & Master at 293, 2nd paragraph shows what they were claiming.

At 297 Hastings say to Johnson, Stokes & Master that plaintiffs had complied with conditions in final paragraph of 152 (9.2.65.)

At 299 from Hastings to Johnson, Stokes & Master.....

Paragraph 13 of Statement of Claim also relies on correspondence between plaintiffs and 2nd defendant direct, i.e., letters of 5.2.65 and 9.2.65.

Litton: He is cross-examining his own witness. He has an unequivocal answer in cross-examination that witness is suing on oral promise. He is trying to get witness contradict that on basis of letters from solicitors and counsel's pleading. End result will be question "Do you still say you are suing only on the oral promise?" 30

Swaine: I was going to lead up to ask him did he maintain cause of action under paragraph 13 or did he abandon it? It amounts to elucidating his answer as to a question.

Litton: Counsel must frame his case in accordance with the evidence and other side meets the case as pleaded. He is not seeking to clarify an

ambiguity of evidence but to reconcile two contradictory assertions of a legal right.

(Swaine has nothing to add).

Court: I will permit the question Mr. Swaine proposed to pose as to paragraph 13.

(Paragraph 13 interpreted to witness).

I stand by that paragraph. I did say in cross-examination yesterday that I was only suing on the oral promise at the Mandarin.

No.

10 Q. Why did you say 'yes' yesterday?

A. All I meant to say was that the discussion between the three of us at Mandarin was just the same as the letter. The culmination of the discussion was the letter and we now rely on letter of 9.2.65 to sue the 2nd defendant.

At the Mandarin my principal object was to ask Cheng to undertake to pay plaintiffs all the money for work done by plaintiffs on behalf of 1st defendants in event of 1st defendants discontinuing the contract.

I said yesterday that when I went to see Cheng at Mandarin I had already contracted with 1st defendants and that it was a binding contract. I said "terms had already been agreed before 20.1.65". Terms I was talking about was that if 1st defendant was to be responsible for payment. Before signing the Chinese contract I had spoken to 1st defendants and asked 1st defendants to ask 2nd defendant to sign such an undertaking. I trusted 2nd defendant and not 1st defendants because 1st defendants were already my debtor at that time.

P.W.2. Koo Kaun Ching affirmed in Shanghai:—

Assistant architect with Eric Cumine Associates. Eric Trimble and Stanley Kwok whose signatures appears on correspondence and documents in this case are not in Hong Kong. I only know a little about this job. There were so many posts e.g. engineering, architecture. I produce from our office custody a schedule of works in respect of Tak Ming School signed by the then principal contractor, Mr. Koo of Defag and Company (1st defendants) (Exhibit F).

No cross-examination.

P.W.3. Koo Lin Sang affirmed in Shanghai:—

Of 73 Waterloo Road, 2nd floor. I was sole proprietor of Defag Construction Company (1st defendants) and as such contractor for erection of Tak Ming Middle Schoole.

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I look at document 144. (The Chinese contract) dated 20.1.65. Between 1st defendants and plaintiffs. It bears my signature.

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“Weight shall be calculated according to the scales on the plans” was put in because his work was to bind the iron bars and I knew the quantity to be used but plaintiff did not.

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Contract contains provision for \$100,000.00 plus 20 instalments and total figure is \$1,050,000.00. That figure was put in because the money I received from the owner was not enough for me to meet my expenses so I deliberately put a figure about \$200,000.00 less in the contract. Mr. Yiu of plaintiffs knew because I had told him “about this money (about \$200,000.00) you will have to wait for it until completion of the job.” I say “about” because figures would depend upon the quantity of the iron used. 10

I look at letter in Chinese of 20.1.65. Produce it (Exhibit E). Bears my signature. Dated 20.1.65 and executed on that day. Chinese contract is dated 20.1.65 and was also signed that day. In letter I promised pay plaintiffs \$100,000.00 if 2nd defendant agreed to lend my firm, 1st defendants, \$250,000.00. That \$100,000.00 had I been successful in getting the loan would have been paid immediately. If I did not get the loan the payment would be delayed and by that time the operation had stopped and he was requested by me, with the owner, to accept a delay in payment. Foundations were completed after 20.1.65. Owner (Cheng) and I asked him (plaintiffs) to wait for this payment. It was because the operation had to be speeded up and the procedure in respect of this 100,000.00 was not effected. Payment waited to 41st instalment. 20

I sent a letter to Johnson, Stokes & Master (180 in bundle). Provision is made in that letter for the \$100,000.00. Owner, 2nd defendant, was consulted and know what the \$100,000.00 was for, i.e. for iron bars.

11.30 a.m. Adjourned.

12 noon Resumed.

P.W.3. Examination-in-chief continued

30

Koo Lin Sang on former affirmation.

Owner was consulted about deferring that payment to 41st instalment. Mr. Cheng of 2nd defendant requested me to give him a copy of the Chinese contract between plaintiffs and 1st defendants. I handed him a copy in his office. This was about three to four days after 20.1.65.

My letter to Johnson, Stokes & Master of 8.2.65 (at 150) authorizing (inter alia) payment to plaintiffs of \$70,000.00 out of interim payment No.21. That \$70,000.00 was money for the iron bars after the completion of the foundation work. That sum was not put in the Chinese letter (Exhibit “E”) because I did not get my due of \$700,000.00 in respect of the foundation, therefore I told him he would have to receive payment from subsequent payments. Did not put it in the Chinese letter. He was to be paid the 40

\$70,000.00 in the course of the work as it progressed.

The \$100,000.00 depended on my getting advance of \$250,000.00. Cheng promised give me loan of \$250,000.00 on completion of foundation work. It was completed about 3 months after the date of Chinese contract. The \$250,000.00 was to come from the mortgagee—Henry Fok.

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I look at document 160 and identify my signature at 161. Letter dated 21.6.65 and in it I say the foundation work has been finished. I wanted \$250,000.00 at that time because the price of iron bars had gone up. I could not continue to do my job. I requested owner, on completion of foundation work, that I should receive \$250,000.00. It was because plaintiffs wanted \$100,000.00 that I wanted \$250,000.00 from him. I told the owner, Cheng, this.

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The \$70,000.00 in my letter of 8.2.65 to Johnson, Stokes & Master—I spoke to the owner about this and with agreement if Yiu of Plaintiffs I wrote that letter. That job plaintiffs had contracted for was worth about \$1,200,000.00 but only \$1,050,000.00 appeared in the Chinese contract.

The price of iron bars had come up and plaintiffs requested \$100,000.00 on completion of footings, \$100,000.00 and \$70,000.00 to be apread over the payments. I told Mr. Cheng about the \$70,000.00. I told him job plaintiffs had contracted for was \$1,200,000.00 and I had only put down \$1,050,000.00.

In Chinese letter "E" there is a promise by me to pay plaintiffs an extra \$2.00 per picul for mild steel bars. That extra \$2.00 was not put in the Chinese contract because I had to provide a copy of the Chinese contract to owner. In my contract with owner price was \$48.00 per picul and I could not seem to exceed that amount in my contract with the plaintiffs.

I was present at meeting in Mandarin between Yiu and Cheng. This was first meeting we had. I think it was after the signing of the Chinese agreement. I arranged the meeting because Yiu of plaintiffs had some doubt about the \$100,000.00 payment in respect of the completion of the foundation work and also his work was to be paid for by the owner under any circumstances thereafter. By "under any circumstances thereafter" I mean if I should discontinue to do the job plaintiffs would have the right to make 2nd defendant responsible for the payments.

At Mandarin Yiu made 2 requests and asked Cheng if he would agree. Mr. Cheng agreed. The two requests were:—

1. That after completion of foundation work and with a loan of \$250,000.00 plaintiff, Yiu, was to be paid \$100,000.00.
2. any job done after completion of foundation work, Mr. Cheng was to be held responsible for payment. Mr. Cheng said to Yiu "You will write me a letter and I will give you a reply".

At one stage my solicitors Gunston and Smart gave notice of termination to 2nd defendant on the ground that 2nd defendant had delayed interm

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payments to me. This matter was compromised by an amendment to the principal contract (last page of bundle "B"). Amongst the terms was an extension of the time for completion to 100 days from date of signing amendment. In the amendment I was to submit a new work schedule to the architect. I did that. Identify it (Exhibit "F"). Original went to architect and there was a copy at the site. Extended completion date for R.C.C. work to top of roof was 12.7.66.

I look at a certificate by me in favour of plaintiffs. It bears my signature. Produce it (Exhibit L). I certify that with exception of water tower on roof rest of work had been completed. The work was completed 10 on 2nd or 3rd July. I refer to end of July in the certificate because there were two walls and we requested plaintiffs to do the iron binding work in respect of these two walls and said we would give him certificate after walls completed. The walls were completed around the end of July. They were at the entrance on the ground floor. The value of plaintiffs work in connection with those two walls was about \$1,000.00 odd. It was on my request that they did them at a later stage to facilitate the smooth flow of the various works.

Principal contract continues at page 43 my estimates in regard to steel bars—items (A) and 8 and (B) 8 and 9. The combination of these two sets of estimates gives 12,350 piculs high tensils and 18,830 mild.—total 31,180. 20

The Chinese account at end of bundle "C" shows high tensile at just over 14,000 piculs and mild at over 9,500 or total of 23,569.94 piculs. I had no dispute with plaintiffs regarding weight of steel used according to these accounts. Plaintiffs worked out the figures. I made a check. Estimated weight is so much higher than actual weight of steel employed first because you have to take into account waste and secondly the expenses incurred on the site in respect of my employees and every employee on duty each day. I made the estimates higher to take into account the expenses I would have to incur on the site.

12.50 p.m. Adjourned to 14.30.

30

2.30 p.m. Resumed.

Koo Lin Sang on former affirmation:—

Cross-examinaed.

It is a fact that in about January 1964 before Chinese contract was entered into, I owed plaintiffs about \$167,000.00. That debt was contracted within period 1964 to 1965 and was a debt I was unable to repay plaintiffs.

They had been pressing for repayment from time to time. They could have sued me and obtained judgment. They did not do so.

I first approached plaintiff about sub-contracting the Tak Ming Steel work to them in November, 1964—about a week after I signed the Tak Ming (principal) contract, i.e. within the first week of November, 1964. If Mr. Yiu has given evidence I first approached him at end December, I say 40

at beginning November when this question was first brought up, plaintiffs declined accept this contract. When I first approached plaintiff re sub-contracting the steel work to them they raised the question of the \$167,000.00 I owed them. Whilst we discussed this sub-contract we also discussed some method of settling my debt of \$167,000.00. It was not intention of plaintiff and myself that by thus entering into the sub-contrat for steel work the debt of \$167,000.00 should be extinguished. Plaintiff was not content to let us owe them \$167,000.00 without seeking satisfaction of the debt. Arrangement was we would wait until completion of Tak Ming building when, if there should be a profit, I would repay plaintiff out of my profit.

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In my letter to 2nd defendant of 20.1.65 (140) I authorized 2nd defendant to pay the \$100,000.00 which should have been repaid to me, to plaintiffs. This was not part of our arrangement under the Chinese contract. At that time Mr. Yiu had already completed the work to \$300,000.00 and when that happened my deposit was to be payable to him. The \$100,000.00 mentioned in the Chinese contract is the sum I should advance in event of my getting \$1/4 m. loan from 2nd defendant. The \$100,000.00 at page 141 is not this \$100,000.00.

20 I was to pay him \$100,000.00 after completion of the foundation work. The second \$100,000.00 was upon condition that the owner should make me a loan of \$250,000.00.

On 20.1.65 I signed two documents—Chinese contract (144) and the letter Exhibit “E” was intended to be suppressed from the knowledge of Tak Ming. Under the Chinese contract there is mention of \$100,000.00 which I had agreed to pay the plaintiffs on completion of foundation works. This is not the same \$100,000.00 I authorized 2nd defendant to release to plaintiffs in my letter (145). The \$100,000.00 is 145 is the figure mentioned in letter Exhibit “E” the document intended to be suppressed from 2nd defendant’s knowledge.

Two documents were signed on 20.1.65 because one (Chinese contract) was intended to be seen by 2nd defendant and the letter was intended to be suppressed. In the Chinese contract sums I had agreed to pay amounted to \$1,050,000.00. By the time document 180 was written by me to Johnson, Stokes & Master I had agreed to pay total of \$1,05,000.00 i.e. 1,050,000.00 plus \$170,000.00 more.

Chinese contract did not commit me to pay plaintiffs \$1,050,000.00
14.58—Adjourned at Mr. Swaine’s previous request he having a sudden summons before the Senior Puisne Judge.

40 3.28 p.m. Resumed.

P.W.3. Koo Lin Sang on former affirmation.

Cross-examination continued.

\$1,200,000.00 odd was amount I contracted with plaintiff firm but

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in Chinese contract I put \$1,050,000.00. The entire job was worth \$4-1/2m. The owner only made payments to extent \$3,000,000.00 but after the completion of the job if there was anything left it would be inculbent on me to pay him (points to method of calculation of weight in Chinese contract).

I was not committed to paying plaintiffs at least \$1,050,000.00. If the weight calculations at end showed that that figure was in excess of what plaintiffs should have received they were not to pay me back any excess. The amount was bound to be larger than that.

The Chinese contract was treated by me as the contractual document under which I incurred no legal obligations. Although I signed it I incurred **10** no legal liability to plaintiffs under it. That was not because my relationship with plaintiff at that time was so intimate that it was purely a case of personal relationship and not legal relationship.

I would pay the appropriate amount for the work he did.

I did agree under contract to pay first \$100,000.00 on completion of foundation work, and \$50,000.00 on completion of each floor from mezzanine to 9th (10 payments) and from 10th floor to roof slab, 10 separate payments of \$45,000.00 amounting to \$1,050,000.00. I did—consider I had committed myself under Chinese contract to pay at least \$1,050,000.00 to plaintiffs. I withdraw my previous evidence when I said I had not so committed myself. **20**

I look at document 180 of 14.4.66 from me

Master authorising payment to plaintiffs by way of deduction of payments certified to me under the principal contract, \$1,220,000.00 (\$1,050,000.00 plus \$170,000.00). In January, 1965 I had not committed myself to \$1,050,000.00 under the main contract. It was a provisional figure. Final figure would have to be calculated. I had committed myself to pay plaintiffs at least \$1,050,000.00.

By the time document 180 was written I had committed myself to paying \$1,220,000.00 at least to be deducted from certified payments to me under the contract. **30**

41st payment was to be made on issue of Occupation Permit and on its issue I was due to receive over \$600,000.00 from 2nd defendant, i.e. \$667,000.00 less 25%. The idea was that out of that figure a deduction of \$230,000.00 was to be made and paid to plaintiffs. Out of that figure there was ample to pay the \$230,000.00. By January, 1966 when I wrote 180, plaintiffs were to receive at least \$1,220,000.00. By the time Occupation Permit was to be issued, there would be no difficulty whatever in calculating the weight of steel. When building was about complete the owner drove me out and he was to be responsible for all the sub-contractors.

Steel fixing work would have been finished very many months **40** before issue of Occupation Permit and weight calculation contemplated under Chinese contract could have been done months and months before the issue of the Occupation Permit.

Yet in 180 I promised pay \$230,000.00 to plaintiffs on issue of Occupation Permit and did so without any reference to the weight calculation. There is such a provision in the Chinese contract. Whatever the weight I would have paid plaintiffs minimum of \$1,220,000.00. There could have been no mistake. Figures on each side would have been checked.

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Had I completed principal contract and paid plaintiffs \$1,220 he should still press me for the \$167,000.00 I owed him previously.

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In September 1966 I was ejected from the site and shortly thereafter plaintiffs started action against me for the \$167,000.00 odd. I was not in
10 Colony at that time and judgment was recovered in that sum in October, 1966.

Plaintiffs refused to work because since signing of contract, price of iron bars had gone up and because there was a bank run at that time and it was his condition that he must be paid \$100,000.00 in event of owner giving me advance of \$250,000.00. I refer to time Canton & Commercial Trust closed its doors. Do not remember month exactly. Perhaps slightly less than a month after the Chinese contract had been signed. The increase of \$100,000.00 was discussed between plaintiffs and me in about mid—February, 1965. Could not get a loan from bank. Plaintiffs requested me give them extra \$100,000.00 after completion of foundations. Cheng, the owner, promised
20 if he get a loan of \$4,000,000.00 plaintiffs would be paid \$100,000.00 Cheng had approached the mortgagee for that loan sometime after 21.2.65.

Chinese contract signed (144) 20.1.65. My letter to Johnson, Stokes & Master (150) 8.2.65. incurring provisional payments to plaintiffs by \$70,000.00. Bank run and increase in steel prices—mid-February, Yiu of plaintiffs asked for increase of \$100,000.00 after completion of—about mid-February footings and he wanted \$200,000.00 instead of \$100,000.00. This was the condition before he would continue work.

Document (160) is my letter for the financiers, Henry Fok Estates.-reporting completion of foundation or “footing” works. I think they were
30 completed early in May. In that letter I asked Financiers advance \$1/4 m. upon completion of foundation work. Plaintiffs would stop work immediately should this loan fail. About time of this letter there were discussion also with Cheng of 2nd defendant who was also to approach plaintiffs to request payment of the \$100,000.00 to be deferred. This \$100,000.00 was in Exhibit “E” and was with agreement of owner at Mandarin.

The \$100,000.00 in “E” is not the same as the \$100,000.00 plaintiff demanded before continuing the work.

I had already got the agreement of the owner and I also had promised pay him the \$100,000.00 at the signing of the contract. Plaintiffs refused to
40 continue to work and in fact stopped work. After operations stopped it was I who arranged to have Cheng (owner) and Yiu (of Plaintiffs) meet at Mandarin. At that meeting the figure of \$100,000.00 was discussed. Present were the three of us—Cheung, Yiu and myself. This was on either 3rd or 4th February, 1965 in the Mezzanine in the afternoon. The plaintiffs made two requests:—

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1. He wanted to make sure he would be paid \$100,000.00 in event of a loan of \$1/4m. to 1st defendants and
2. Plaintiffs wanted an undertaking from headmaster of school that any work done for school would be object of payment by Mr. Cheng. Mr. Cheng asked Yiu to write him a letter and there would be a reply. Idea of writing a letter was for Yiu to put into writing what he had requested orally at the Mandarin. I have no knowledge of the correspondence between them.

Deny that at beginning of February I arranged the meeting but was not present at it. How could they have met if I had not been there? 10
4.28 p.m.—Adjourned to 10 a.m. on 14.10.58.

14th October, 1968.

Appearances as before.

P.W.3 Koo Lin Sang on former affirmation.

Cross-examination continues.

In about June, 1966, I did have a clash with plaintiffs in respect of work. Not work which they had contracted to do under the Chinese contract. He wanted to control my work. I was principal contractor. Plaintiffs came on to the works site because they had sub-contracted the steel fixing work. Clash was in about June, 1966. Plaintiffs did not finish steel fixing work till 20 about end of July, 1966—they finished it apart from a very minor part.

I look at letter 291 in "C" addressed to plaintiffs from quantity surveyors and dated 6.10.66—a few months after I first clashed with plaintiffs. By October 1966 I had—mended my relations with plaintiffs—naturally. I say "naturally" because he did not come to control my work so there was no further clash. Clash continued for two to three weeks and was resolved since he did not come to control my activities in respect of the work. By October 1966 our relations had been mended. Plaintiffs did start action against me for \$167,000.00. Plaintiffs forced me to write a letter to them undertaking to give them whatever money was in surplus after job was finished. That 30 money was to be given to plaintiffs by owner. The letter was written in September (between 10th and 15th) 1965, i.e., three or four months after completion of the foundation works. It was because he did not receive the \$100,000.00 that all the more he pressed for the \$167,000.00. In that letter of September 1967 I undertook that whatever monies were surplus after completion of the job those monies were to be given to plaintiffs, i.e., any surplus after all the sub-contractors had been paid under certificates.

Any money over and above my costs and my legal profit. Legal profit would probably be two to three lakhs. By "surplus" I mean any

profit I might make included in that two or three lakhs. The money was to be paid direct to plaintiffs by 2nd defendant and 2nd defendant wrote a letter to plaintiffs to this effect. By "surplus" I did not mean after deducting my costs and my legal profit. Any money due to me I was not to receive and 2nd defendant undertook to pay it to plaintiffs. I was to receive what was left over. This money was to be taken out of the payment of \$1,200,000.00, the mortgage money which 2nd defendant owed me. It was envisaged that that money would be paid to me after the completion of the building. From the 41st instalment a sum of \$123,000.00 was to be paid to the plaintiffs—at least

10 that amount. I wrote a letter on or about 8.2.65 to Johnson, Stokes & Master and that letter was to be the payment schedule under which plaintiffs were to receive payment. That was a condition laid down by plaintiffs.

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I look at my letter 180 authorizing Johnson, Stokes & Masters (inter alia) to make a payment of \$230,000.00 out of the 41st instalment. That \$230,000.00 had to be paid. I had not also agreed to pay plaintiffs an additional \$123,000.00 out of the last certified instalment. The \$123,000.00 was inclusive of the \$100,000.00 which had been due on completion of the foundations. I do not adhere to statement that out of last instalment a sum of \$123,000.00 had to be paid to plaintiffs.

20 In September, 1965 I entered into arrangement with plaintiffs to discharge my debt to them of \$167,000.00. Method was for the surplus I was to receive under the main contract to be paid by the 2nd defendant to plaintiffs upon completion of main contract. 2nd defendant owed me \$1,200,000.00 and from that mortgage the sum of \$167,000.00 should be payable to plaintiffs. The \$1.2m. was payable to me on completion of the building in accordance with the contract but when the building was about to be finished 2nd defendant ganged up with the sub-contractors and drove me out. The owner said to the sub-contractors that he was not in a position to pay the 1.2m. and he would pay by instalments of \$80,000.00 p.m. to the

30 sub-contractors, i.e., they would receive \$80,000.00 p.m. between them.

In September, 1965 I entered into the arrangement with plaintiffs to discharge my debt of \$167,000.00. 2nd defendant wrote a letter signifying their agreement. At time I entered into that arrangement I had already executed a mortgage—document 128 in "A".

I see second recital in that document. Last payment in second schedule provides for instalments. My understanding of the arrangement under that mortgage was that.....(becomes irrelevant).

The \$1.2m. was to be paid to me so that I could discharge the \$167,000.00, after all the work had been finished—about a month after. Usual

40 gap of time between completion of works and issue of Occupation Permit—as soon as building completed I can always apply for inspection of the building and an Occupation Permit will be issued immediately. My arrangement with plaintiffs to discharge the \$167,000.00 was to do so upon issue of the Occupation Permit.

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If there were no letters relating to payments to be made to plaintiffs except those where I authorized deduction from certified instalments, as 140, 150 (both written before our September arrangement for discharging the debt of \$167,000.00) 178 (Written **after** our September arrangement for discharging the debt of \$167,000.00 but having nothing to do with the mortgage with plaintiffs for discharge of \$167,000.00 on completion of the building and making no reference to deductions on completion of the building, I now say 178 was written before the arrangement for repayment of the \$176,000.00 and was not written pursuant to that arrangement and folio 180. The \$167,000.00 is not mentioned in that letter either. A total of \$1,230,000.00 was to be 10 paid to plaintiffs (including the \$100,000.00) on completion of the building.

Thus there are no letters disclosed which suggest I had authorized the payment of \$167,000.00 from authorized instalments. I asked the owner, 2nd defendant, write such a letter to plaintiffs but plaintiffs have not exhibited it.

Re-examined:

This figure of \$1,230,000.00 at least (including the \$100,000.00 which was to have been paid on completion of the foundations) was my estimated figure of value of plaintiffs work to completion.

In contract between 2nd defendant and myself, at page 42. Last 20 paragraph says 75% of the scheduled payments is to be paid and the balance of 25% to be paid within 30 days of Occupation Permit.

Mortgage at 128 of "A" says the 25% is payable within 6 months of Occupation Permit but for last five months of that period interest is payable at 1.5% p.m. Now you mention it I recall this provision for six months and payment of instalment for five.

When I say I was to receive any money "left over" I mean after deducting \$167,000.00 in favour of plaintiffs.

41st payment. I said \$123,000.00 should be paid to plaintiffs from that payment. I now say it was at least \$230,000.00 and this was to be paid 30 to plaintiffs from 41st instalment and included the \$100,000.00 due at time of completion of foundations. I say 'at least' because I knew amount of iron he must have put into the building. That letter, 180, was more than a year after Chinese contract. I know from experience how much iron he must have used. I know it by calculations made about October 1964—my estimates for the contract. When plaintiffs came in and started the steel work the architect would make a check on the amount of steel used. I would have checked and found it to be correct first and then architects would re-check before the pouring in of the cement.

Chinese contract provided for payment of \$100,000.00 on completion 40 of fixing works for foundation. That was paid by 2nd defendant to plaintiffs who used my deposit of \$100,000.00 with them for that purpose.

In Chinese letter exhibit "E" there is reference in last sentence to

\$100,000.00. This \$100,000.00 has not been paid to the plaintiffs because 2nd defendant went back on his promise of a \$1/4m. loan. Arrangement eventually made for payment of that \$100,000.00—2nd defendant asked plaintiffs do him favour and allow that sum to be paid at time of 41st payment.

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I did say that Chinese letter was intended to be suppressed from 2nd defendant. I could not very well let 2nd defendant know I was paying more for steel than he was paying me.

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10 Cheng of 2nd defendant approached mortgagee for loan of \$1/4m. sometime after January 1965 and wrote a letter to mortgagee for it. Unsuccessful. Later I wrote a letter to mortgagee. 2nd defendant had promised approach mortgagee just after the signing of the Chinese contract and before the Mandarin meeting. I introduced Cheng of 2nd defendant and Yiu of plaintiffs at the Mandarin. Cheng **first** promised **me** that he would approach the mortgagee for advance of \$1/4m. on completion of the footing. Mr. Yiu of plaintiffs did not believe me as to the owner's promise so I arranged the meeting at the Mandarin.

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At 11.40 a.m. Court adjourned.

At 12.00 noon Court resumed.

P.W.3 on former affirmation:—

20 Because of bank crisis Plaintiffs had not enough working capital and so was pressing me for the \$100,000.00. Price of steel was rising. This was before the meeting at the Mandarin. Plaintiffs had to finish his work first before payment of the \$100,000.00.

Plaintiff refused to work in event of 2nd defendant not getting the loan of \$1/4 million. It was one of plaintiffs' conditions that owner was to get this loan and that owner was to be held responsible for the work the plaintiffs had done on the site. These conditions were suggested during the tea at the Mandarin but 2nd defendant asked plaintiffs to write him a letter.

30 Plaintiffs started work after my preparatory work—I think in March 1965. After he received a letter of guarantee, i.e., after the Mandarin meeting. After completion of the footing plaintiff slacked on the work; he did not stop altogether. Plaintiffs were pressing me for \$100,000.00 and I was pressing 2nd defendant to get \$1/4 million loan. The footing was completed some time in May or June. As result of plaintiffs pressing me pressed 2nd defendant. Do not remember if I wrote any letters.

Swaine: I ask to be exhibited by consent Occupation Permit dated 30.3.68.

40 **Litton:** It is by consent but I cannot see relevance in view of fact that paragraphs 7 to 12 of Statement of Claim are not relied on. (Exhibit N)

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D.W.1 Charles Cheng Yuen Choi affirmed in Punt

63 Cumberland Road, Kowloon. Director of 2nd defendant Company and principal of Tak Ming Middle School. Been a school principal for six or seven years.

2nd defendant is owner of the site and on 27.10.64 executed this building contract with 1st defendants, Exhibit B. We did so because 1st defendants approached financier, Henry Fok Estates, first. 1st defendants were recommended by Henry Fok Estates on basis that if 1st defendants were engaged the further charge of \$1.5m. would be granted by Henry Fok Estates. 10
Further charge was executed—bundle "A".

Letter of 20.1.65 (140 in "C") from 1st defendants to us. Before receipt of that letter, I had heard from Koo of 1st defendants that plaintiff had undertaken to supply some steel as a sub-contractor. This was first time I had seen the Chinese agreement (144) and first time I saw it was, I think, on 21.2.65 when Koo handed me photostat.

In 145 I confirmed to plaintiffs the deposit of \$100,000.00 would be paid to them.

Next thing in connection with the sub-contract was that plaintiffs started work on the site a few days after. From time to time I went to the site. I was the director principally concerned with this contract. I signed all the letters and contracts. 20

I recall seeing Yiu of plaintiff firm on site once but we did not know each other—so many people on the site. We were not formally introduced by Koo. First time I met Yiu was when Koo made arrangement for us to meet at Mandarin. He telephoned me and told me Yiu wanted to see me and asked for a time and I gave him the time and place. Met Yiu for first time at Mandarin. I went there and one lady and one gentleman came close to me and said they were Mr. and Mrs. Yiu, the persons Koo had arranged for me to meet. 30

Letter 148 of "C" of 5.2.65 was written one or two days after meeting at Mandarin. That meeting was on 3/2 or 4/2. We spoke in Shanghai dialect. I asked why Koo was not there and Yiu said he wanted to talk to me privately in absence of Koo and he asked me first question about payment direct to him through Johnson, Stokes & Master out of monies certified due to 1st defendant under Architect's certificates. I said that so long as we had authority from 1st defendants to do that we did not mind doing it. I had already had 1st defendants' authorisation to pay the deposit of \$100,000.00 to plaintiffs.

Mr. Yiu then mentioned possibility of Koo of 1st defendant being ousted from the site. He asked me whether I would consider, in that event, 40
continuing with the contract made between plaintiffs and 1st defendants. I understood him to mean he would want to continue to work on the site. My reply was quite simple. We could not accept any contract signed between

plaintiffs and 1st defendants because we had no control over what they negotiated and agreed: but we might consider new negotiation with plaintiffs and might then consider to continue the contract if we reached agreement with him.

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10 He continued to ask if he would not be employed by us to continue to work on the site, whether we would be prepared to pay him the money for the work he had done for 1st defendants. My reply was very clear and simple, i.e., that we did not mind paying him for the work he had done for 1st defendants but only out of the money we had to pay to 1st defendants as this would not make any difference to us at all. Naturally we wanted authorisation from 1st defendants first.

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148 came to be written as a result of my suggestion at Mandarin meeting that there should be an exchange of letters.

152 was my reply.

150 was from 1st defendants to Johnson, Stokes & Master authorising deductions from certified payments due to 1st defendants, to plaintiffs. Johnson, Stokes & Master replied on 8.2.65. (151).

Exhibit E is dated 20.1.65 and written by 1st defendants to plaintiffs. I first saw it at the last hearing before late Creedon J. In January/February 1965 I was not familiar with the market price of steel bars.

20 Document 160 in "C" from 1st defendants to Henry Fok Estates was copied to us. It is requested by 1st defendants for an advance of \$250,000.00. As I understand it, the money would have been paid to us and we would have paid the whole of it to 1st defendants after architect's certification. Mr. Koo of 1st defendants told me had arrangement with Mr. Lai On of Henry Fok Estates, Ltd. to advance \$250,000.00 to us so that we could pay it to him. That was long before this letter of 21.6.65 I believed Koo because he had obtained the second mortgage for \$1-1/2m. for us with Henry Fok Estates.

30 On 24/6 I wrote a letter to Henry Fok Estates. Progress of work around fourth week of June 1965 was that foundation work had just been completed.

In letter 164, second paragraph I knew Koo and Lai On had discussed this.

Before there was any amendment to building contract completion was due in 360 days including inclement weather, i.e. at end of October 1965. First amendment to building contract at 174 dated 11.8.65 came about because Mr. Yiu of plaintiffs came to me and asked me to give Koo of 1st defendants an extension of time. Our architect had determined the principal contract on 10.8.65 Yiu's signature is on 174 as a witness.

40 Letters at end of bundle "C". Contract was fully determined by letter 285 of 3.9.66 and 7.9.66. Plaintiffs wrote us asking us pay \$367,000.00. I replied at document 290 referring to 152 of 9.2.65. My attitude when I

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wrote that letter we would only pay plaintiffs in accordance with certificates issued under the 1st defendants' building contract. He asked us to confirm his figures with but we had no authority to do that.

4.28 p.m. Adjourned to 10 a.m.

15th October, 1968.

D.W.1. Cross-examined.

Cheng Yuen Choi on former affirmation:—

Building mortgage with Henry Fok Estates was to secure a total loan of \$5m. and dated 18.1.64. Mortgage was for immediate advance of \$3.2m. and balance was to be paid by instalments according to progress of building 10 work. The \$3.2m. was to redeem the original mortgage to another financier—Stewarts. This previous mortgage was realised before I joined the company I think part of it was used for piling—four to five lakhs—less than 5. From the balance of 2.7 m. less than one lakh was paid to the architect. Original mortgage was for 2.9m. approximately. Balance of \$2.3m. related to matters other than this project. The balance of 1.8m. under the mortgage to Henry Fok was not enough to finance the whole building project and it was necessary to go for another 1.5m. under the Further Charge.

Under the principal contract of 27.10.64 at page 42 the amount of the scheduled payments was \$4.5. 75% was payable and 25% to be retained 20 and be payable within 30 days of Occupation Permit. This was the financier's idea. They came to all these arrangements with Mr. Koo of 1st defendants.

Under the building mortgage of 6.11.64 which 2nd defendant executed direct with 1st defendants there was provision for the 25% to be retained for six months, interest being payable at \$1.5% p.m. after the first 30 days. This was because we were unable to pay immediately on completion and needed a margin of time.

Bundle C, letter from 2nd defendant to 1st defendants of 24.10.64. We confirmed that in addition to the \$1.2m. which was to be outstanding under the second building mortgage. 1st defendants would advance to 2nd defendant 30 a further \$1/2m. by way of unsecured loans (Folio 21). This was because 2nd defendant was in such financial difficulty we had to get loan from contractor. The building contract is dated 27.10.64 and when provision was made for 25% to be retained 2nd defendant, Mr. Koo had brought up subject of \$300,000.00. If there had been no understanding about this \$1/2m. loan and the \$300,000.00 had been kept in reserve the retention money must have been more than 25%. But Koo of 1st defendants wanted to have payment of \$300,000.00 for lifts and electrical installation and in return offered to lend \$1/2m. All we wanted was to have the necessary funds to complete the building and we, 2nd defendants were very short of the necessary funds. Letter 21 40 never came to realisation.

In building contracts at page 41 1st defendant was to construct the R.C.C. pile caps to value of about \$700,000.00 but to get no payment as such

on completion of the pile-caps. This was financier's idea and we warned 1st defendant of seriousness of proposal and Koo said they could do it.

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2nd defendant was short of money, financier was imposing harsh conditions and 1st defendant was stretching himself beyond his means. We did not know that at the time. According to original mortgage we still had to pay interest on \$250,000.00 which was not advanced by the financier. That \$250,000.00 is referred to at page 17 in bundle A in first mortgage—about 10 lines from bottom. That \$250,000.00 was never lent by the financier. It was amended by the Further Charge—see foot of page 4 of Further Charge at A. Instead of getting \$250,000.00 on completion of foundations there was substituted a provision for payment of \$50,000.00 on completion of foundations plus the completion of R.C.C. work to mezzanine floor. It was a much harsher term towards the contractor than previously. Made no difference to us.

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The revised schedule of payments under Further Charge completely replaced payments proposed under first mortgage.

By January, 1965 it became apparent to us, 2nd defendants that contractor, 1st defendant, was running into serious difficulties. In November and December, 1964 there was very little progress at the site. I had frequent discussions with Koo about the lack of progress. He did not tell me he was short of money. He said he had arrangements with a financier and said "don't worry. I will carry the work out in time for you". He had been making arrangements with Canton Trust Bank. He told me this when I pressed him. At time of contract I felt he was in a financial position to start work on 1.11.64 and finish it in time. It was a little bit of a disappointment to us to learn he had not succeeded in getting a financier. But we still trusted him as he had had the influence to get us a loan of \$1.5m.

Delay was serious to us as it was costing us interest to Henry Fok even though no money might have been advanced because no architect's certificates issued. Interest was payable according to the time-schedule in the mortgage. Mortgage contemplated architect's certificates at certain periods of time and interest payable from that notional time even though the work had not been done.

In January, 1965 conditions at site were no better than in November/December. I was getting more and more impatient with Koo. He did not come and tell me he was making arrangements with a sub-contractor to do the steel work. I first knew 1st defendants had made such an arrangement with plaintiffs on 20.1.65 when he brought me photostat of Chinese agreement and with the letter 140. He did not tell me previously he was arranging for a sub-contractor to do the steel work on terms of credit.

I was pressing him in November/December/January. He said arrangements with Canton Trust had fallen through. He did not tell me what alternative arrangements he was making. All I could do was to press him.

On 20.1.65 Koo brought the photostat of the Chinese contract between 1st defendants and plaintiffs. I read it at the time he handed it to me because

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I was concerned to have the work done. He pointed out \$100,000.00 should be paid to plaintiffs. That is why Koo showed me the contract. At page 141 it says \$100,000.00 is to be paid forthwith and at third paragraph on page 142 It is not mentioned in the contract that the \$100,000.00 was to be paid from the deposit lodged with us by 1st defendants. Koo told me that was to happen.

Position on 20.1.65 was that we were a little bit worried. You can say we were beginning to lose confidence in 1st defendants. I was interested in the sub-contract for steelwork because all I wanted was that the work should be done. We had no right to interfere with the contractor. My own interest was only for the work to be done. The sub-contract was Mr. Koo's responsibility. I did not care what it said because it was Koo's responsibility. I was conscious that in so far as the work did not progress we would be more and more indebted to Henry Fok. Whether I was interested in the terms of the sub-contract or not, I could do nothing about it. If it had not been workable they would not have signed it. I was satisfied on 20.1.65 that the sub-contract was workable. In so satisfying myself I did not pay attention to price payable by 1st defendants to plaintiffs for steel bars. Whatever was in the contract, we would have to pay. 10

I considered the tender of 1st defendants but did not go through the details. \$4.5m. to complete the whole building was what interested me. This had been arranged previously between Koo and financier. I had no choice. Either accept or do not accept. During period of over a month between tender and contract I paid no attention to details. Mr. Lai On had told me if I agreed to \$4.5m. there would be an advance of \$1.5m. I did not compare the unit prices for steel bars in the sub-contract with those in the tender. Sub-contractor might well have charged prices far in excess of those in the tender. It made no difference to me—I did not consider that had that been the case it would have meant that Koo was still further extending himself. If I had experience I would have considered that point and looked at the prices. 30

Have been a school principal for six or seven years. Formerly a deputy principal. I joined Tak Ming as a director after its incorporation. I became a director about time I became a principal—six or seven years ago. I am 41. I was a deputy for three to four years. Before that I was studying international law in University of Paris. Before that I studied in China at University—also law, Chinese law; not confined to international law. Specified in Public International law in Paris—post-graduate.

Mr. Koo came with copy of Chinese contract and letter of 20.1.65 and asked for the release of the \$100,000.00 to plaintiffs. Deposit clause in principal contract is clause 36 at page 37. Deposit was released to plaintiffs after foundations completed because contractor had had nothing and financier considered it would be safe to do that once foundations completed. He agreed this before the contract was signed. On 20.1.65 contractor was entitled to this. It was not the situation that deposit was to safeguard the entire contract. That was the agreement all along. Koo discussed this with me and Lai On. I think it is in the building contract or some other document. I was acting in accordance with that understanding when I considered 1st defendants' 40

request for value of the deposit to plaintiffs. I then wrote 145 to plaintiffs and handed it to Mr. Koo.

Koo said in evidence I had asked to see the Chinese contract and that is why he brought me a copy. I did not specifically ask to see this contract but told him I wanted proof of anything he might promise because I was beginning to lose confidence in him. He wanted me to write a letter. I wanted to be sure I had the right to do it. By "promise" I mean Koo's undertakings as to the future and I wanted proof he could carry it out. He did not consult me first about sub-contracting this to plaintiffs. I knew he had to sub-contract
10 all the works not only steelwork. He did not consult me before 20.1.65 about sub-contracting steelwork. He only said he would order supplies of steel and showed me sales-notes.

I wanted satisfy myself dealings with Koo were in writing or afterwards recorded in writing.

Koo did not tell me that one of his difficulties was the rise in price of steel bars. Never told me that.

Document 146 from 2nd defendant to Henry Fok Estates. 1st defendants were in financial difficulties at that time and work at site had completely stopped at 21.1.65. This request for revision was for \$250,000.00
20 to be paid on completion of foundations instead of \$50,000.00 to be paid on completion of foundations and R.C.C. to mezzanine floor.

I know Chinese law. Quite different from law here. There is a law of contract, cheques, Common Law etc. I have studied these.

"Deadlock" at 21.1.65 was fact that work had come to standstill owing to 1st defendants' financial situation. Koo asked me to write 146. He did not tell me that if the \$250,000.00 was lent he was going to advance \$100,000.00 to plaintiffs. Request for \$250,000.00 had nothing to do with the Chinese contract so far as I know. He said it was to facilitate work on the upper structure.

On 20.1.65 piling, foundation work and wooden shuttering around
30 foundations had been done. There had been no steel work in the foundations. My understanding was plaintiffs would supply steel and do the steelwork for foundations as well as for the upper structure.

I knew plaintiffs were also concerned in the upperstructure. Koo requested the \$250,000.00 on the day after that on which he brought me the Chinese contract. He said he had made the verbal arrangement for advance of \$250,000.00 with the financier and asked me to write 146. At page 2 I did refer to commencement of foundation works being dependent upon the advance of \$250,000.00 Koo did not tell me he wanted the \$250,000.00 so that he could pay plaintiffs \$100,000.00 and plaintiffs wanted that to start
40 the foundation works. Mr. Koo was not so frank with me at that time.

At 11.35 a.m. Court adjourned.

At 11.50 a.m.—Court resumed.

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In January 1965 2nd defendant was, I think, already paying interest to Henry Fok Estates. Cannot recall date when we started paying interest. First building mortgage was dated January, 1964. Further Charge was dated October 1964. I do not think interest was paid before execution of Further Charge. Monthly interest was according to the schedule in the original mortgage. Interest was paid on \$250,000.00 due to be paid on completion of the foundation works. It was paid on the promise to advance \$250,000.00 and interest could have been paid before the execution of the Further Charge. Sure that in January, 1965 we were already paying interest on \$250,000.00.

When Koo arranged appointment with Yiu I already knew Yiu by sight but not personally. Not true Yiu's firm started work in March, 1965. He started a few days after the signing of the Chinese contract. On Chinese contract I saw name 'Yee Sang' and Yiu Tak Yee signing for 'Yee Sang'. I did not then know who was Yiu Tak Yee. Had never seen him on that date—20.1.65. Had he come to see me on that date I would not have recalled him as somebody I had seen at the site. **10**

A few days after signing contract I became aware of Yiu at the site but did not know who he was or that he had any connection with plaintiffs.

In January, piling, excavation and wooden shoring to foundations done. Next stage was to put in the iron. A few days after the signing of Chinese contract some iron was delivered at the site. Position had improved from that at 21.1.65 when all work was at a standstill. **20**

Document 150 in "C"—1st defendants to my solicitor Johnson, Stokes & Master with copy to me. 151 Johnson, Stokes & Master to plaintiffs with copy to 1st and 2nd defendants. Last paragraph—they ask for confirmation plaintiffs proceeding to finance 1st defendants. That does not suggest to me that plaintiffs had not yet started to finance 1st defendants. Solicitors were not well informed about the conditions on site. My solicitors had consulted me by telephone before sending 151. 150 is simply an authorisation to pay to plaintiffs. My solicitors wrote last paragraph of 151 without consulting me specifically on the point. Possibly Mr. Koo told them that. I said nothing to my solicitors about "proceeding to finance". **30**

Koo consulted me before he wrote 150. He did not tell me that over and above the instalments in Chinese contract he was now arranging to pay an extra \$70,000.00. When I got my copy of that letter I did not pay much attention to this. If Koo says he consulted me beforehand and told me this sum was for steelwork, he did not tell me that. All he told me was he would arrange for payment direct to plaintiffs. He told me this about 7th or 8th February. Payment direct had already been covered in the Chinese contract—page 142. I think I was aware of that—but I did not pay much attention. When Koo came to see me on 7th or 8th February there was nothing new to discuss. Koo said in evidence he told me that the value of the sub-contract with plaintiffs was about \$1.2m. but that he had put down \$1,050,000.00 He never told me that. He never discussed sub-contracts with me. Simply asked me to give consent to making payments direct to sub-contractors. **40**

After telephone conversation with solicitors my letter of 9.2.68 was

written. At that time I had not received the copy letter from my solicitors (151). I did not take much notice of it—just filed it. Now I read it, it contains no surprises. I received 148 before receiving copy of 150.

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So there were two sets of exchange of correspondence around the same time. Between solicitors and between us and Yee Sang. I did tell solicitors much later of my letter of 9.2.65 to plaintiffs. Told them before 1st defendants were ousted—much before. I gave solicitors a copy a few weeks or maybe one or two months after it was sent.

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- Koo arranged the Mandarin appointment but did not attend it.
- 10 Yiu told me he had a matter he wanted to discuss without Koo's presence. First subject he brought up was that 2nd defendant should pay plaintiffs direct instead of to 1st defendants through solicitors and on basis 1st defendants continued to be principal contractor. He went on to discuss position which would arise should 1st defendants be ousted from the site and requested that in that event I would consider continuing the contract between 2nd defendant and plaintiffs. I said we could not accept any contract between plaintiffs and 1st defendants but might consider new approach with plaintiffs. Idea was that if 1st defendant was ousted we would study the Chinese contract and, if it was agreeable to us, continue it; but if not we must negotiate new terms.
- 20 I did not wish to study it while 1st defendants still on site. No concern of ours. I would have asked new contractor to study the Chinese contract had it become necessary. I did not tell Mr. Yiu. It was just running through my mind.

At 12.50 p.m.—Adjourned to 14.30.

At 2.35 p.m.

Court resumed.

P.W.1 on former affirmation.

- I told Yiu I would agree to payment direct to plaintiffs subject to Koo's authorisation. I did not ask him write me a letter. He said it would be arranged through solicitors. This particular part of the discussion, about direct payment to plaintiffs through Johnson, Stokes & Master on basis of architect's certificates was to be handled through solicitors. My consent was subject to 1st defendants' approval which was to be obtained by plaintiffs.
- 30

- The payments which were to go to plaintiffs direct through Johnson, Stokes & Master—I knew what they were because I already had a copy of the Chinese contract. At that time, in Mandarin, I did realise that the Chinese contract was essentially a method by which plaintiffs were financing 1st defendants. On 20.1.65 when Koo gave me copy of Chinese contract, I realised the same thing, i.e., plaintiffs were doing the job for Mr. Koo I did not realise that they were doing this by a method which involved the plaintiffs financing 1st defendants. I did not catch. I change my answer. I did not get word "financing". At Mandarin it did not occur to me that Chinese contract was a method by which plaintiffs were financing 1st defendants. That is correct. Quite later that occurred to me. I fully realised quite sometime later—may be 5,6 or 7 months later—half a year or a little bit more.
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I agreed to Yiu's first request subject to authorisation by Koo and it was a matter for the solicitors to handle. I had an idea of the amount of payments from the Chinese contract. When 1st defendants wrote to Johnson, Stokes & Master at (150) it did not occur to me that there was now a sum of \$70,000.00 which was not in the Chinese contract. Mr. Koo told me later what the \$70,000.00 was for. I think this was after the work was completely stopped after foundations completed—about middle of 1965 he told me that the \$70,000.00 was a balance and that Yiu kept pressing him for more money. I did not understand it to be a balance over and above the Chinese contract. I did not study it. Did not concern me because I had to pay a lump sum figure to Mr. Koo (1st defendant). 10

In the documents there is also the figure of \$100,000.00 over and above those in the Chinese contract. I became aware of that during this hearing. Neither Koo nor Yiu ever told me what that \$100,000.00 was for. I still do not know what this sum was for. Up to this date I do not know. Yes, that is right, that is my answer.

Yiu's second request was that in event of Koo being ousted, would 2nd defendant continue the Chinese contract. I said only if we could reach mutual agreement. Yiu (plaintiff) asked if he was not to be employed by 2nd defendant, 2nd defendant would pay him for the work he had done for 1st defendants. I said "only out of the money we had to pay to Defag and subject to Koo's (1st defendants') authorisation". These second and third requests were requests made in event of 1st defendants being ousted from the site. I suggested he should write to me. He himself also said that. I made no firm promise that 2nd defendant would continue the Chinese contract in event of 1st defendants being ousted—only by mutual agreement. 20

When plaintiff wrote to me (149) on 5.2.65. I appreciated that he was raising the same two requests, i.e., second and third—exactly the same. In that letter he asks us to give written guarantee that in vent of 1st defendants being ousted the Chinese contract should remain unaffected. I had refused that already at the Mandarin Hotel. I had already refused second request because this was a matter for mutual agreement. In 149 Yiu was asking for something I had already rejected. I did not suggest to him how he ought to put his request in writing. He said he would write to me and I said yes because conversation not so useful. I don't remember who first suggested an exchange of letters. There were probably suggestions of exchange of letters on both sides—made before we parted and after we had had our conversation, i.e., after I had told Yiu confirmation of Chinese contract would be subject to mutual agreement. So at 149 he was asking for something I had already rejected. 30 40

As for the later portion of the letter "money, labour and materials, etc." I understood this to embody the third request made at Mandarin Hotel. That portion of letter is not preceded by the words such as "however if you do not give any such guarantee then"....."the money for labour materials, etc."

I deny my version of discussion at Mandarin is quite untrue.

Deny I had told Yiu 2nd defendant would agree to the confirmation of the Chinese contract. Do not agree only other matter Yiu raised with me was that if 1st defendants remained as principal contractor 2nd defendant should pay plaintiffs out of the allotted construction costs.

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My reply at 152. Second paragraph is the one in dispute. My case is that in paragraph 2 the position would arise in event of two things:—

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1. 1st defendants being ousted, and
 2. failure to agree between 2nd defendant and plaintiffs to confirmation of Chinese contract.

In those two events 2nd defendant would pay plaintiffs for the works done against architect's certificates in accordance with the building contract.

I say that that paragraph correctly embodies my answer to Yiu at Mandarin to his third request—exactly. It was clearly understood by Yiu at Mandarin. By “we shall pay you for the works done” I meant according to our schedule of payments with 1st defendants.

20 Exact situation was that Yiu raised question of what would happen if 1st defendant was ousted and requested if plaintiffs had not calculated money to become due under a certificate to be issued, he could get the money direct because he did not trust Koo.

30 It was my understanding that on termination of 1st defendants' contract monies due to 1st defendants but not yet subject of architect's certificate, would be paid to plaintiffs in accordance with works done by plaintiffs for 1st defendants. I did not know if plaintiffs would be paid off in full. I told them we had no funds in hand—only monies from financier on basis of architects' certificates. It did not occur to me at Mandarin whether my consent to Mr. Yiu's third request would or would not pay up plaintiffs in full for the work done on the site by plaintiffs for 1st defendants. As far as I was concerned I was promising to pay for the work done against architect's certificates according to the scale of payment in the building contract, i.e., in accordance with our scheduled payments with 1st defendants. This was clearly understood by Yiu. I was not promising to pay for the work done in accordance with the schedule of payments in the Chinese contract. That did not concern us.

In that second paragraph of my letter I have not simply promised to pay plaintiffs for whatever work they may have done on the site at the time principal contractor ousted just so long as there were architect's certificates covering their work.

40 Architect gave his certificate for entire R.C.C. structure on 5.7.66 (194 in bundle “D”).

Position under my letter of 9.2.65 is not simply that architect's having issued that certificate I was obliged to pay plaintiffs for all the work done

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on termination of 1st defendants' contract. That would mean we had to pay twice. Pay the contractor (1st defendants), and pay plaintiffs. Money under this certificate has been paid.

My promise was not to pay plaintiffs for actual work done up to time of termination of principal contract so long as there was an architect's certificate to cover that part of the work. We have paid 1st defendants under that certificate already. Do not have to pay twice.

Did not make such a promise because we were rejecting plaintiffs' request that the Chinese contract would remain effective.

I did not envisage when I wrote that letter that on termination of 10
contract between 1st and 2nd defendants we, 2nd defendant, might have claims against 1st defendants. Did not occur because relations between 1st and 2nd defendants had nothing to do with plaintiffs. We would pay plaintiffs out of monies due to Defag, 1st defendants, under schedule of payments with Defag.

Plaintiffs' share of scheduled payments was a portion only of each individual scheduled payments. We would estimate how much to pay to plaintiffs if contract had been breached by 1st defendant before architect's certificate No. 17 given (when all R.C.C. work had been done) we would have paid plaintiffs amount Koo of 1st defendants authorised us to pay—not 20
the whole \$130,000.00 unless he authorised that.

When I wrote letter of 9th February it was in my mind money I might eventually have to pay would be the money in the schedule in the Chinese contract—subject to Koo's authorisation. We would be allowing to Mr. Koo what we certified to him but deducting from it such monies as he might owe the plaintiffs under the Chinese contract. That is, no more and no less than our solicitors were promising to do by the letter of 8.2.65.

In my letter of 9/2 (second paragraph) I was promising more than had been put up by 1st defendants in the letter of 8/2 to Johnson, Stokes & Master giving them irrevocable authority—there was one difference. On 30
determination of contract my understanding was that 1st defendants would be paid for work done up to that date provided eventually an architect's certificate was forthcoming.

Mr. Koo's irrevocable authority would empower my solicitors to deduct and pay to plaintiffs whatever was outstanding on the terminatin of the principal contract. That was Yiu's fear at Mandarin—that Koo would be paid direct—this despite the irrevocable authority given by Koo on 8.2.68.

In last paragraph of my letter there are two conditions—not confirmed in my solicitor's letter. By 9.2.65 I had not familiarized myself with the contents of the Chinese contract. These two conditions were put in at Mr. Koo's 40
request. According to him, he had no control over Mr. Yiu. He wanted to put something in to frighten him into carrying out the works expeditiously.

I was imposing the conditions in return for a promise which gave

Yiu, on my evidence, just one item over and above what was promised in the solicitor's letter. When I put in the first condition I was not very familiar with the terms of the Chinese contract.

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Some weeks after, I told our solicitors about this private arrangement which I did not take very seriously regarding it as almost the same arrangement as that made by the solicitors. Told them of it for no special reason.

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The private correspondence was not a hard exchange of promise for promise with Yiu wanting me continue Chinese contract in event of ouster of 1st defendants and I, not being prepared to do that, writing this letter.

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- 10 Koo wanted these conditions put in to control Yiu on site. Said he could not control him on site. Those two conditions did not represent my requirements in exchange for my promise in paragraph 2.

Agree it was in our interests and that of Koo of 1st defendants that plaintiffs should complete the R.C.C. work expeditiously and promptly.

- 20 Letter 160 from 1st defendants to Henry Fok Estates. It is correct Mr. Lai On had requested verbal consent. This was on the site after letter 146 had been sent. At this time (June 1965) foundations had been completed. Upper structure had not reached mezzanine level. Almost no work had been done on upper structure. Koo never told me he wanted pay \$100,000.00 to plaintiffs from the \$250,000.00 he requested from financier on completion of foundations. When 160 was written, foundations were finished any very little work had been done on super-structure. Koo told me once he had \$250,000.00 then he could pay subcontractor for foundations because if he did not they would not get on with the super-structure. He did not exactly say that but he did say that without the money he could not carry on work on the super-structure smoothly.

- 30 164 of "C" my letter to 1st defendants complaining of slow progress. Paragraph 3. At that time I was trying to find sources of financial aid. We negotiating with a money lender. Many people approached Koo and me with offers of financial assistance but wanted assurance the work would continue. By "trying very hard" I mean they would not lend, though approaching me, until work was in progress. They did not trust Defag 1st defendants and wanted 2nd defendant to control 1st defendants. I had no means of doing so. Their approaches came to nothing.

In July 1965 I was trying to get 2nd and 1st defendants out of a difficult position. Had had much the same problem in January 1965. Many negotiations in July 1965. Deny very same difficulty in January 1965 prompted me to enter into direct contact with plaintiffs to pay them according to method Mr. Yiu has given in evidence.

- 40 Assistance given to metal supplier—means plaintiffs. Reference is to both agreement through solicitors and the provisional agreement. By "support" I mean the solicitors deducting payment from 1st defendants' certified instalments.

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Document 166, my letter to architect of 9.7.65. Paragraph 3 "by the time, etc."—probably refers to a Mr. Sun. Letter does suggest we were making progress in direction of finance—but if work does not carry on, nobody would have confidence to lend to us. If we get a financier to finance 1st defendants things would go smoothly. As owner I would have to exercise control over 1st defendants in order to attract finance. Had work gone smoothly I would not have entered into direct negotiations with financier. We wanted 1st defendants to do this. We were weak financially and not in a position to take the risk. We wished to introduce financier to 1st defendants and to convince financier to lend without any engagement by 2nd defendant to the financier. **10**

At 4.30 p.m.—Adjourned to 10 a.m.

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At 10 a.m.—Court resumed

Cross-examination continued

Cheng Yuen Choi on former affirmation:—

Letter 164 of "C". "Support" referred to in paragraph to concrete supplier referred to our deducting sums from payments due to 1st defendants and paying these sums to Pioneer the concrete supplier. That is all I meant by "support" in that connection. A contract had been signed between 2nd defendant, 1st defendants and Pioneer. This was round about the time of the Chinese contract between plaintiffs and 1st defendants. Purpose of 2nd defendant's signing was that they wanted to have those deductions made. It could have been accomplished by an exchange of solicitor's letters without our signing a contract but they wanted us to sign. By so signing we..... **20**

(Litton objects: irrelevant and not before the Court")

Swaine: If it can be shown he was more than a passive party it goes to credit for he has said he had no interest in the sub-contractor.

Litton: Cannot be permissible on credit. He is being asked his legal opinion on a document not before the court. **30**

Swaine: He is a lawyer by academic training. Not a babe in the woods.

Court permits the question "for what it is worth".

.....we did not go beyond the agreement we had made with the plaintiffs. It was a similar type of agreement to that with plaintiffs. We did not undertake to pay from our own pockets if 1st defendants did not pay—so far as I remember.

I look at copy of agreement of 13.2.65 between 2nd defendant, 1st defendants, and Pioneer. Identify my signature on it. (Exhibit 0).

My letter (170) to architect of 23.7.65. second last paragraph refers to "Our guarantee." By that I meant in regard to plaintiffs we granted the payment out of deductions we had made from monies due to 1st defendants. That is all I meant by "guarantee." I was speaking both of our solicitor's letter and of my own letter of 9.2.65. "Guarantee" to concrete supplies in that letter meant the same thing. We did not want to make the payments out of our own, 2nd defendant's pocket but out of monies due to 1st defendants. By "credit facilities" I meant plaintiffs and Pioneer were to do the work first and get payment later. It was about this time I realised plaintiffs' arrangements with 1st defendants amounted to credit facilities. I realised Pioneer was giving credit to 1st defendants when Koo told me so before the signing of the contract with Pioneer. In case of Pioneer I was aware of the credit facilities given by Pioneer before I was aware of the credit facilities given by plaintiffs—because I took part in the negotiations with Pioneer. Pioneer would not give any credit facilities to 1st defendants and wanted me to join in the negotiations. That was not the case with plaintiffs for 1st defendants negotiated with them first and gave me copy of the contract. I agree I negotiated with plaintiffs at Mandarin but only for direct payment to them. I was not concerned whether credit was being given by plaintiffs to 1st defendants.

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Document 172 2nd defendant to architects of 4.8.65. When that letter went off it was in my mind that 1st defendants had already caused us damage by delay. Second last paragraph is not very clear. I meant that we wanted to be fair to 1st defendants because we had not paid them any money after completion of the foundation work—so we wanted architect to survey cost of foundation work; then after completion of the building we would have settlement of accounts with Defag balancing cost of foundation works against damage they had caused us by delay.

This 17th instalment was payable on certificate of completion of whole R.C.C. Structure. Thus if R.C.C. concrete had just been completed because architect had only issued 16 certificates, he would go on to certify the 17th payment which would be paid to whoever was entitled to do it—be it 1st defendants or a sub-contractor. By the notice of intention to give notice to terminate (167) dated 15.6.65. When I wrote (172) I was already thinking of the consequence of determination of the contract. In hypothetical example given above, by 4.8.65 principal contract had been determined and R.C.C. work had been completed but there had been no certificate for 17th payment, architect would issue 17th certificate. In addition I would ask for survey of actual cost of foundation works. They were valued at about \$700,000.00 and under the arrangement between financier, 1st and 2nd defendants, spread over 41 payments subject to deduction of 25% at each stage. What I envisaged by my letter (172) was really a survey of the actual cost of the entire work done by 1st defendants up to date of termination. We wanted to know whether certain beams (which had not been put in at date of termination) belonged to foundations or superstructure, i.e., to know whether or not they should have been installed by 1st defendants as part of the foundations. When I wrote that letter only pile-caps had been done and foundation beams had not been done. There was a question whether these belonged to the foundation works or not. Before 4.8.65 there was a letter from architect to say the foundation works had been completed. It was handed to Koo who handed it to financier

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to try to get advance of \$250,000.00—though contract does not provide for any payment on completion of foundations.

If on the termination of 1st defendants' contract in August 1965 the R.C.C. work had been completed up to second floor but architect had certified only second payment, 1st defendants would have been entitled to a third payment in respect of completion up to that level, i.e., there would be three payments to 1st defendants of \$170,000.00 each or \$510,000.00. They would not even come to the value of the foundation works. In that event the work would have stopped and we would await a settlement with the principal contractor on completion of the building. We may have asked architect to make survey. In fact on 4.8.65 we had asked architect to make such a survey. Architect said it was not necessary at that time. 10

Letter of 4.8.65 never went very far because soon after there was a compromise of our dispute with 1st defendants.

Supposing the survey had been made after 4.8.65 and had amounted to \$650,000.00 we would have called in a new contractor to estimate for the remaining work on building then after completion of whole building we would have a settlement with 1st defendants whether we had to pay them or they had to pay us balancing work on foundations against damage to us. If the extra-expense involved by employing new contractor had come to \$300,000.00 and delay had cost us \$100,000.00 we would pay 1st defendants in this, e.g., \$250,000.00. 20

Our negotiations with the new contractor took place before 4.8.65 and put a doubt in my mind if foundations had been completed. On my understanding of position on 4.8.65 I contemplated determining just what the foundation works really constituted but not so as to have an estimate of value of work done by 1st defendants and then ultimately when building was finished deduct from that extra cost of new contractor and damage and pay 1st defendants the balance. Only motive in my mind was to determine if the foundations had been contemplated. My last answer "no" was wrong. My motive was surveyor and on completion of building by new contractor deduct extra cost and damaged from amount due to 1st defendants. That follows from last part of paragraph 3 of 172. I have no doubt at all now. 30

Coming back to example of completion up to second floor level. Three instalments would have totalled \$510,000.00—less than cost of foundations. I would not then have asked for a similar survey of actual cost up to second floor level.

Litton: hypothetical. All that had been completed were pile-caps. Any answers on remote hypothesis of no assistance to Court.

(Witness withdraws).

40

Swaine:—yesterday re second paragraph of 152 he said that he would work payment to the plaintiffs out of monies accruing to 1st defendants up to the actual stage of work even if at the time there was no architect's certificate so long as such certificate so long as such certificate was subsequently forthcoming.

I asked what would be position if on termination plaintiffs had claims

against 1st defendants and he said that would have nothing to do with 2nd defendant. Whatever was deductable he would deduct and pay to plaintiffs.

172 appears to be, at face value, a direct contradiction of that understanding of plaintiffs' engagement because he says survey is so that 2nd defendant can submit it to the court "for assessment of our claim". Well, what happens to the plaintiffs in that event? This appears to be contradiction of his interpretation of paragraph 2 of 152. If that version is contradicted by this statement then that version cannot be supported. If his yesterday's version goes that clears the way for another version or at worst I have established a contradiction
10 which must go to credit.

Litton:—That would have been perfectly fair question, i.e., "Had the contract in fact been terminated in August 1965 and had there been a survey and had there been found to be money due to 1st defendants what in that event would have happened to plaintiff?". Answer would possibly have been plaintiffs' rights were against 1st defendants because deductions were to be made out of amounts certified due by architect. Statement of accounts on completion of building would not have been on certificates under the principal contract.

Unfortunately that is not the question my learned friend put but
20 question based on two hypotheses. Too remote hypotheses and puts an unfair burden on imagination of witness.

Swaine. Would be simpler but would not accomplish object. No scheduled payments were available on 4.8 because only foundations completed. My hypothesis is had they been available would he have asked for a survey and would he at end of day have struck a balance and what would have been position of plaintiffs? Would he have envisaged striking a balance if work had got up to first floor level?

Court:—I will allow you to build your hypothesis, Mr. Swaine, but the weight to be attached to answers to questions based upon it will be
30 a question for very careful assessment.

(Witness recalled).

I was confused with what happened on 3.9.66. I **would** have asked for a similar survey in those circumstances. Object would have been for purpose of settling accounts, with 1st defendants afterwards, i.e., cost of 1st defendants' work, cost of subsequent contractor's work, plus damage we had suffered and if the costs of the subsequent contractor plus damage came in excess of \$4.5m. 1st defendants would not get any money from us but would be asked to pay us damages. If end result was less than \$4.5m. we would pay excess 1st defendants.

40 In example given second certificate has been issued and money paid third certificate has not been issued although the works have been done. I would make payment of that third payment if certificate issued after the determination. My survey would be as to the cost of work of subsequent contractor in finishing building plus damage for delay-contrasted with \$4.5m.

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My position is that work done up to date of termination and only subsequently certified, I would pay to 1st defendants: Not through the solicitors because all arrangements made previously would have terminated with termination of contract. It is borderline whether we would seek to hold such money to await eventual statement of accounts or pay it straight away to 1st defendants, because this money was issued against architect's certificate issued after determination of the contract. Money would come from financier to owners. Borderline.

At 11.30 a.m.—Court adjourned.

At 11.50 a.m.—Court resumed.

10

Cheng Yuen Choi on former affirmation:—

Cross-examination continued.

Document 178 in "C" letter of 9.9.65 from 1st defendants to my solicitors authorising solicitors to reduce the amounts deductible in favour of plaintiffs and to postpone the deficiency to later instalments in the schedule of payments. It represents a concession by plaintiffs in favour of 1st defendants. I did not take part in persuading plaintiffs to agree to this concession. Plaintiffs came to me and asked us to let 1st defendant continue his contract with us. Plaintiffs offered that concession to 1st defendants and said to me if I would let 1st defendants continue the contract and give them an extension plaintiffs would carry on the works with 1st defendants. At time Yiu of plaintiffs came to see me to persuade me let 1st defendants continue he did not raise question of this concession. He did say he would help 1st defendants to carry on the works. It was this intercession that persuaded me to compromise our differences with 1st defendants, 174 resulted. Our architects did not advise us at that time it was better to let 1st defendants continue rather than to have a new contractor. It would have been to our advantage to have a new contractor at that time. Quite simple. We had \$3.3m. in hand to come from the financier and it would have been easy find a new contractor. Koo arranged with Lai On for the further \$1.5m.

20

30

Mr. Henry Fok himself asked me to employ another contractor. As regards the concession made by plaintiffs to 1st defendants at 178 question of my persuading plaintiffs to make it simply never arose. I add, I accepted the comprise only on the ground of a soft heart because plaintiffs came to me and said they had done the work for 1st defendants and 1st defendants for me and consequences would be drastic if I did not let 1st defendants continue the contract. I made a serious mistake; should have had new contractor as advised by Henry Fok.

178 was not copied to me. I did not see a copy. My solicitors did not consult me about the variation—no concern of ours. I first knew of this particular concession re 18th to 21st payments—I was never aware of it—not concerned. I did not know these details until this case came up.

40

3rd paragraph re insufficiency of money to be collected through our solicitors as the reason for the concession, I know nothing of any insufficiency

of money. Not correct. There was no variation as far as we were concerned. We were still paying 1st defendants according to original agreement.

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179 of 13.1.66 from us to plaintiffs and confirmed by 1st defendants I was aware at that time of 9.9.65. I don't think they had given me a copy but I knew that the \$70,000.00 which was to have come out of the 21st payment had been deferred. Koo and Yiu had told me verbally. I first had knowledge of the deduction of \$70,000.00 from 21st payment when copy of 150 was sent to me in February 1965 but I did not check up on it. I did not pay much attention to this letter.

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- 10 179 refers to \$70,000.00 having been **originally** due from 21st payment. When I wrote that letter I knew that it had been deferred. Mr. Koo had told me. I was aware of that particular detail of the letter 178 before this case came to court—through I was not aware of the letter. I was told by Koo and Yiu there was such a letter. They were not sure from which payment it was now to come.

- Relationship I was getting into with plaintiffs was that 2nd defendants were drawing postdated cheque in favour of them. By so doing I was not holding 2nd defendants personally liable to plaintiffs. It was out of the money due to 1st defendants. The condition for the cashing of the cheque was completion of building by end of May 1966. Once that fulfilled 1st defendants would have money from which the \$70,000.00 could be deducted. Once building finished 2nd defendant was bound to honour the cheque. At least on this one occasion 2nd defendant was entering into a direct engagement with plaintiffs subject to four conditions as set out in the letter. By the terms of the second building mortgage 1st defendants should have completed the building—but no time was specified in second building mortgage. We would have been justified in not paying the cheque under paragraph 7 since the building was not completed by Defag. If second building mortgage had subsisted 1st defendants would have been entitled to \$1.2m. in six months. 1st defendants did not complete the building however. I now say yes and no. Yes because if building had been completed by end of May 1966 then there would have been money due to 1st defendants under second building mortgage and this cheque would have been cashable and payable.

I read paragraph 1 as meaning if there is money owing to 1st defendants at the material time—although the second building mortgage merely secured the current account which has the result of retaining the 25%.

- All the second building mortgage means is that 2nd defendants were offering security to 1st defendants for the \$1.2m. Paragraph 2 contains another condition—prior payment to Pioneer. Had there then been no money left (which was not the fact) cheque would not have been payable.

Condition 3—in paragraph 3.

Condition 4—in paragraph 4.

We were not taking liability over from Defag. Doing this only to facilitate things. It is not quite the case that we were assuming 1st defendants liabilities subject to conditions.

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180. 1st defendants to my solicitors of 14.1.68 confirmed by plaintiffs could be further concession by plaintiffs to 1st defendants. I take no part in persuading plaintiffs to make these concessions. At the time I was trying to help.

The \$230,000.00 included an additional \$100,000.00 over and above the amount of the postponement. Koo said he consulted me about this \$100,000.00 before he wrote to solicitors on 14.1.66. He did not. Do not remember if my solicitors consulted me about that letter of 14.1.66. Koo did not consult me at all about the \$100,000.00. I first became aware of the particulars now set out in letter 180, at the hearing. At that time (January 10 1966) I was not aware of any further postponements of scheduled payments to plaintiffs, i.e., I did not pay much attention.

I first became aware of the additional \$100,000.00 being introduced into the deductions at the last hearing before the late Creedon J. It was only then I knew of its introduction. Even now I do not know its purpose. Koo and Yiu say it represented an adjustment according to weight of value of Plaintiffs' work. I understand that now from you.

182 signed by me for 2nd defendant on 1st defendants' notepaper. It is in my writing. I think figure is 48. This guarantee was signed at Mr. Yeung's office. He was the financier of 1st defendants at that time. There 20 was a certificate already issued—the 7th but the money had not yet been paid out by Henry Fok Estates. Then at that time work stopped on site and, if I remember correctly, the money in respect of this 7th certificate was held by Henry Fok at Koo's request and Yeung, new financier for 1st defendants, said he would come in and finance but had to be sure we would get the money on 7th certificate. He asked me to guarantee it. I took no risk and did so. No risk because once 7th certificate issued, financier was bound to pay the money due under it. If you say so, 2nd defendant was undertaking personal liability.

184 my letter to Koo (of 1st defendants) 1.2.66. I wrote it at Yeung's 30 request and all these arrangements were proposed by Mr. Yeung—how to postpone payment and so on. But 1st defendant was not really to enter into a contract with Mr. Yeung once he obtained all these concessions. When I say "We assisted you to obtain these concessions" by Plaintiffs had been persuaded to make concessions by Mr. Yeung. In that letter I did not put it very well. In so far as letter speaks of deferred payments and our assisting 1st defendants obtain deferments from plaintiffs it was not exactly true.

At 12.54 p.m.—Adjourned.

At 2.30 p.m.—Court resumed.

Cheng Yuen Choi on former affirmation:—

40

Witness: May I clarify regarding \$100,000.00 put to me as adjustment of weight between plaintiff and 1st defendants?

Court: Yes.

I am still in the dark as to whether this sum represents the sum of \$100,000.00 mentioned in the letter of 20.1.65 which was kept away from me. (Exhibit E)

Still do not understand how the adjustment was made right from the very beginning, i.e. at time of signing the Chinese contract.

Cross-examination continued:

10 My evidence is that in January 1966 I was not even aware that there was included in the arrangements \$100,000.00 which had not previously been incorporated in these arrangements. I say neither Koo nor Yiu mentioned to me in January 1966 that there was an additional sum of \$100,000.00 over and above the \$70,000.00 the subject of my post-dated cheque. My knowledge at 13.1.66 was that a sum of \$70,000.00 over and above the original arrangements was payable to plaintiffs. I was told by Mr. Koo about time of completion of foundations that Yiu of plaintiffs was pressing for more money and he mentioned this \$70,000.00 as the balance of the whole contract. Koo did not tell me Yiu was pressing for \$100,000.00 plus \$70,000.00—only \$70,000.00. Koo told me this but not in connection with his endeavour to obtain \$250,000.00 from Henry Fok Estates. It was not at the time that two of us were writing 20 to Henry Fok. I met Koo on the site and casually he told me Yiu pressing for the \$70,000.00. I did not take much notice.

It was between plaintiffs and 1st defendants. When we were pressing financier for \$250,000.00. I do not recall Mr. Koo mentioning the \$70,000.00. At that time Koo was not frank with me. Was not frank later—never was unless he wanted me do something for him. At this casual conversation at site he was volunteering intimation without any desire to get anything from me.

30 Document 186. My letter of 11.2.66 to plaintiffs. That letter was written in reply to plaintiffs' letter at 183 enclosing copy of 180. At that late date I did have a copy of 180—four days after it was written. In acknowledging 183 I specifically pointed out that \$70,000.00 was the estimated balance. That was what Koo told me.

Having got a copy of 180 containing provision for \$100,000.00 over and above the previous scheduled deductions, I still say that when in my letter 186 I spoke of \$70,000.00 as being the balance, this was the balance after taking into account the additional \$100,000.00. Because I did not pay attention to the figure; that was arranged between plaintiffs and 1st defendants.

40 Letter 251 ("C") of 15.5.66 to me from various sub-contractors, requesting 2nd defendant to hold on to 27th and 29th payments until dispute between 1st defendants and these sub-contractors settled. I complied and held back the 27th and 29th payments. I think there were already certificates for these payments. Sub-contractors were reaching crisis in their relations with 1st defendants. The agreement at 269 between 1st and 2nd defendants is **not** the solution adopted to that crisis, i.e., to notionally discharge the second building mortgage and provide for payment of the \$1.2m. by instalments of \$80,000.00.

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At 260 is a further letter from various sub-contractors to our solicitors, confirmed by Koo whereby it was agreed that future payments after the payments to plaintiffs and Pioneer should be paid to a new account of 1st defendants on behalf of these sub-contractors and suppliers.

In between 251 and 260, the relations between 2nd defendant and 1st defendants had reached a crisis because 1st defeneants gave notice to us to terminate the contract—compromised by addendum to principal contract providing for extended completion date to 20.9.66. 1st defendants were to submit a new works schedule to the architects. (Paragraph 5, page 127). Do not dispute that Exhibit “F” is that works schedule. I myself did not see revised works schedule at about time it was submitted. Afterwards I only saw the copy posted at the site. I was frequent visitor from time to time at the site—more frequently towards end than at the beginning. My vital concern was how the work was progressing—at all times and particularly so after the compromise of 1st defendants’ notice of termination. By looking at schedule at site I would have knowledge of completion dates of various items in the schedule. R.C.C. work would have been completed under that schedule by 12.7.66. I was knowledgeable about the various charges of the work and amended dates for them. 10

1st defendants should have been working to terms of this schedule. I was interested in how work was progressing but I had no control and therefore did not have much interest in the schedule. I made no comparison of work progress with schedule. Architect said no contract could be carried out strictly in accordance with a schedule. 20

Even though there was a schedule on site I did not know R.C.C. work ought to be completed by 12th July. According to my recollection the whole R.C.C. works were never completed by 1st defendants. A small part was completed afterwards by a substitute contract. I do not mean the roof top water storage. Water tanks, their covers, walls on ground floor and railings on the baloonies. It represents a small part. Architects on 4.7.66 certified completion of the reinforced structure up to roof level. As far as that certificate is concerned it entitled the contractor to payment on completion to roof level. 30

Certificate 194 in D is addressed to 2nd defendant and dated 5.7.66. We would have received it on or after 5.7.66. These certificates sometimes came to me. Sometimes Koo collected them I sent them to financier with a copy to Johnson, Stokes & Master. Mostly the case at very beginning certificates were mailed to me by architects. Afterwards Koo went there and I would not know if certificate had been used or not and could not tell sub-contractors whether or not. 1st defendants would try to keep issue of certificates from me so that I could not tell the sub-contractors. So in some instances it might be a long time before I was aware of the issuance of a certificate. As a frequent visitor to site it was very difficult to tell at which stage a certificate had been issued. No difficulty however in seeing R.C.C. structure completed to roof level. 40

My letter 265 19.7.66 to plaintiffs notifying them the postdated cheque would not be paid under condition 3 of my letter of 13.1.66—for completion by May 1966.

1st defendants having given notice which was compromised by an extension of time to September 1966, I think I was justified in putting up condition 3 as reason for stopping cheque—because I had not got the money from Koo at that time. My position was financier was not keeping his word to me to pay on issue of certificate. That had nothing to do with 1st defendants. It was my arrangement with the financier. I still say I was justified in putting forward condition 3 to stop payment of cheque. Circumstances under which I issued the postdated cheque justified that.

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- 10 269 of 19.7.66. Agreement was the idea of the sub-contractors and Koo and proposed to me. Background very complicated. Some people wanted to control the school. I did not take the initiative in this Agreement. Result was second building mortgage was discharged without any actual payment having been made; instead of paying the 1.2m. in a lump sum that was to be paid by instalments of \$80,000.00 p.m.; these instalments were to be paid to the sub-contractors and material suppliers until such time as they were paid off; any balance to Mr. Koo; but as regards plaintiffs there was no change in the existing arrangements.

- 20 As regards Pioneer, 1st defendants' obligation was to be paid off by the \$80,000.00 instalments. Pioneer was given first priority. Amount which 1st defendants owed Pioneer on 26.7.65 was approaching \$250,000.00. Out of this \$40,000.00 p.m. was to go to Pioneer until liability discharged, and balance to go to the Group B suppliers and sub-contractors and creditors of Koo. Payments of instalment were to begin only one month after Occupation Permit. Before Occupation Permit issued, Principal contract was terminated so that schedule of payments at 275 never came into operation—not even for Pioneer. I did pay off Pioneer but not under 275—according to an arrangement I made with Pioneer.

Litton: Is this still on credit?

Swaine: Nearly at end.

- 30 **Court:** Continue.

- 40 No further certificates were issued to 2nd defendant after 188, in "D". Under guarantee of 13.2.65 (Exhibit "0") I had guaranteed to Pioneer certain payments to something less than \$300,000.00, i.e. within the limit of \$300,000.00. My payments to Pioneer did not come out of the interim pay-payments which were then payable to 1st defendants. Guarantee in favour of Pioneer put 2nd defendant in direct relationship with Pioneer but is expressed to be in deduction of the amount secured by the second building mortgage. As far as Koo and I were concerned whatever monies were paid to Pioneer could be deducted from other monies due from 2nd defendant to 1st defendants. I would still pay Pioneer even if there were no certificates. I did pay Pioneer part without certificates as advised by my solicitors.

Two months or so after my letter of 9.2.65 I gave a copy to solicitors. Do not remember if I told my architects of this provisional arrangement with plaintiffs or gave them a copy of the letter.

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287 plaintiffs to 2nd defendant and our reply at 290, paragraph 2. When I wrote that I was not in a position to confirm the outstanding figures. The amount of steel which had been incorporated into the building was no concern of ours. Not sure if I received an enclosure with 287.

Deny I wanted to have the weight of steel checked to ascertain if plaintiffs' figures were correct. I was always aware of a dispute between Yiu and Koo regarding quantity of steel. It was no concern of mine and I had no power or authority to concern myself with Mr. Yiu's figures. I did know Yiu's figures were based on amount of steel he had put into the building—according to him. I first noticed that position between plaintiffs and 1st defendants was that this job would be paid for according to the weight of steel, some little time before there was a clash at the site between Yiu and Koo in May or June 1966. Before the clash Koo had told me he did not agree the amount of money Yiu claimed and had to check the amount of steel put in the building. He said Yiu was always pressing him for more money. Koo volunteered this intimation to me. He was not seeking to get anything out of me at that time. No motive. Until Koo told me I did not know job was to be paid for according to the weight of steel. I never paid much attention to the Chinese contract. 10

292, solicitor's letter to Architects of 10.10.66. I consulted my solicitors after I got plaintiff's letter of 27.9 at 287. We had discussion—not very much both before and after 10.10.66 about plaintiffs' application for payment. Long before 10.10.66 my solicitors had had a copy of my letter of 9.2.65. (152). 20

293. Same day. Hastings to my solicitors received by them on 11.10.66 in which plaintiffs ask for payment from 2nd defendant and Hastings enclose copy of letter of 9/2.

296. Johnson, Stokes & Master to Hastings.

My solicitors should have known of the letter 152 (9/2/65) before Hastings sent them a copy because before that letter went out there was a conversation between Bryson of Johnson, Stokes & Master over telephone. I said to him I had already told Yiu we were not liable as I had already said in my letter of 10.9.66 (290). I said on top of that we were not liable because of the condition in last paragraph of letter of 9.2.65. I did tell Mr. Bryson on telephone what I had written in my letter of 10/9. In my mind the point in my letter of 10/9 was the more important point. Point about lateness is also important now, before the court. 30

20/10. 297. Hastings in reply to Johnson, Stokes & Master.

20/10. 298.

I had received copy of 297 from my solicitors. Do not remember if I received it before my solicitor's reply at 298. Before 26th I did discuss 1st defendants' certificate with my solicitors. Certificate was peculiar—dated 10.8.66. "L" which was before the termination of contract with 1st defendants. Before our discussion of this certificate my solicitors had sent me a copy of 296. 40

When discussion that certificate with my solicitors I already knew the terms of my solicitor's reply to Hastings at 296. I think so. It did not occur to me to say to my solicitors that Hastings had sent a letter of demand and had then sent a certificate, my solicitor's reply of 18/10 did not put my full case, i.e., complete denial of liability irrespective of question of delay. I thought that was clear.

At 4.25 p.m. Adjourned to 10.00 a.m.

17th October, 1968.

At 10.03 a.m.—Court resumed.

10 Litton: I ask for the two letters referred to in cross-examination to be exhibited.

Hastings to Johnson, Stokes & Master 18.9.64.

Reply 23.9.64.

20 Swaine: I have a reservation. Hastings were acting for 1st defendants at the time and not for plaintiffs. They are two letters which may be—I don't know—fragments of an entire correspondence not before the court. The correspondence in cross-examination served their immediate purpose in that I did not continue to cross-examine on clause 36 of building contract nor will I refer in closing speech to 2nd defendant's having paid the deposit to plaintiffs when under Clause 36 it should have been retained until completion of the work.

Litton: Does not wish to reply.

Court reads and admits the two letters. (Exhibits "P" and "Q").

No re-examination.

case for second defendants.

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Original Jurisdiction.
Action No. 2212 of 1966.

Between YEE SANG METAL SUPPLIES COMPANY. . . . Plaintiff
and
DEFAG CONSTRUCTION COMPANY. 1st Defendants
TAK MING COMPANY LIMITED 2nd Defendant

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10

The plaintiff firm has already obtained judgment against the first defendant firm in the full amount of its claim. That judgment remaining wholly unsatisfied; the present proceedings are between the plaintiff firm and the second defendant company. Such a trial began in March last before the late Creedon, J. and was adjourned. During the adjournment the profession and the parties to these proceedings suffered the untimely loss of Creedon, J., and the hearing before me was de novo.

Two issues arise for determination. The first concerns the liability or otherwise of the second defendant company to pay to the plaintiffs any sum over and above the figure of \$884,000.00 which it is common ground has already been paid to them. The second issue, which will arise only if such a liability on the part of the second defendant company is established, relates to the quantum so payable. I am informed that the assessment of quantum will involve detailed calculations from scale plans of the amount of steelwork which has gone into an existing 16-storey building, and that the cost of such a survey by quantity surveyors will alone amount to \$16,000.00. 20

With a view to a considerable saving of costs in the event of the plaintiffs being unsuccessful on the issue of liability, counsel on both sides asked me to determine the issue of liability before evidence was adduced on that of quantum. As the application was first put to me, I understood that I was being asked to deal first with liability and then to proceed to the question of quantum. On my issuing a caveat to the effect that if that procedure were adopted the parties must not expect to lodge an appeal with the Full Court on the single issue of liability before that of quantum was embarked upon—if indeed they would have any right so to do—it became apparent that counsel were not yet agreed upon the manner in which the issue of quantum (should it ever become a live issue) should be determined and that there was a possibility of this issue going either to arbitration, before a judge with technical assessor or possibly going before the Registrar. 30

In support of their joint application counsel relied upon Order 33, Rule 4(2) which provides, inter alia, that in an action begun by writ one or more issues may be ordered to be tried before the others. I was referred also to the case of **Smith & Co. v. Hargrove & Co.** ⁽¹⁾, where it was held that where liability and also the amount of damages are disputed in an action, and the question as to the amount of damages is one of such detail or nature that it would probably be referred to some other tribunal than a jury, it is a proper exercise of discretion to order the question of liability to be tried and the question of damages to be postponed until afterwards. Reference was also made to the cases of **Polskie Towarzystwo Handlu Zagranicznego Dla Elektrotechniki "Elecktrim" Spolka Z Ogranizcona Olpowiadziolnoscia v. Electric Furnace Co., Ltd.** ⁽²⁾ and **Gold v. Patman & Fotheringham, Ltd.** ⁽³⁾.

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It appeared to me that in the present case there existed a clear line of demarcation between the issue of liability and that of quantum and that the evidence required to sustain each of these issues was readily separable. Accordingly, applying the principles contained in the cases to which I have referred and having regard to the fact that the application was a joint application and to the possibility of a considerable saving in costs, I exercised my discretion to try the issue of liability before that of quantum and this decision is concerned only with liability.

The second defendant company is the registered owner of the property registered in the Land Office as Section A of Kowloon Inland Lot No. 1571. By a written contract dated 27th October 1964 (which I shall refer to as the Principal Contract) the second defendant company contracted with the first defendant firm for the erection by the latter of a 16-storey building on that site. By a further written contract, dated 20th January 1965, which was in the Chinese language (and which I shall refer to as the Chinese Contract) the plaintiff firm contracted with the first defendant firm to carry out the steelwork on the proposed building.

The work on the site had a chequered history and at different times during the construction of the now completed building the second defendant gave notice of termination of the Principal Contract to the first defendants and vice versa. The differences arising out of these first two notices of termination were however resolved and I will record only that as a result the second of them the completion date for the building was agreed to be set back to 20th September, 1966. Eventually the second defendant again gave notice of termination of the Principal Contract to the first defendants and this notice became effective on 3rd September, 1966, before the completion of the building. No other principal contractor was appointed in place of the first defendant firm.

The case was opened before me at considerable length. I will endeavour to epitomise, within a relatively short compass the almost one hundred pages of single-spaced typed transcript of the opening addresses.

In essence, the issue of liability depends upon the arrangements for payment made between the plaintiffs as sub-contractor of the first defendants, the first defendants as principal contractor and the second defendant as site-

(1) 16 Q.B.D. (2) 1956 (2) A11 E.R. 306 (3) 1958 (2) A11 E.R. 497

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owner. To arrive at an understanding of those arrangements it is necessary to refer to certain of the documents, comprising more than 300 pages, which were put before the court as four agreed bundles bearing the letters A, B, C & D respectively. I have considered all these documents and would observe that had greater selectivity been exercised upon them, the parties to this litigation would have had their judgment before now.

The Principal Contract, which comprises Bundle B, is a lump-sum contract for the erection of the building at a price of \$4,692,000.00 and it contains a schedule of payments (page 41 et seq.) totalling, oddly, only \$4,500,000.00. Under Clause 27 of the Contract, provision is made for the issue of interim payment certificates by the architect to the scheme; thereafter the principal contractor, the first defendants firm, was to be entitled to payment on presentation of such certificates to the site-owner, the second defendant, within the periods of time specified in the Appendix. Under Clause 36, a sum of \$100,000.00 was to be deposited by the first defendants with the second defendants as security. Clause 21 contained provision for the second defendant to determine the contract if the first defendants should fail "to proceed with the works with reasonable diligence and in accordance with the programme and time schedule".

A feature of the Schedule of payments was that the first defendants firm was to receive no payment, pending the construction of R.C.C. pile caps to the value of about \$700,000.00. Although the first defendants payments were then spread over 41 instalments, only the 1st to the 17th inclusive were the instalments referable to the R.C.C. structure for which the plaintiffs later became sub-contractor.

It is apparent from the figures at page 43 of the Principal Contract that the cost of the necessary steel bars for the work which, in the event, the plaintiff undertook to do, would amount to \$1,306,180.00.

The Chinese Contract is contained in Bundle C (pages 141 to 143). This contract provides for \$100,000.00 to be paid to the plaintiff firm on completion of the fixing work in respect of the foundation rods and foundation beams, for 10 separate payments of \$50,000.00 each on completion of the reinforcement fixing work to the floor slab of each floor from the mezzanine floor to the 9th floor inclusive and for a further 10 separate payments of \$45,000.00 each "from the 10th floor to the slab of the roof". The Contract further provided that all these payments were to be made direct to the plaintiffs by Messrs. Johnson, Stokes, & Master, solicitors for the second defendant.

A further Clause headed "Method of Weight Calculation" provided that the weight of the steel used should be calculated according to the scale-plans of the building, and the price for each 100 cattles of mild steel round bars was to be \$48.00 whilst that for the same weight of high tensile steel round bars was to be \$55.00. It would thus appear, and indeed it was the evidence of the plaintiffs and the first defendant's representative that they did not contemplate that the figure of \$1,050,000.00, the total of the instalment payments contained in the Chinese Contract, represented the ultimate sum payable to the plaintiffs but rather that on completion of the work there was to be a final adjustment of accounts on the basis of the weight of steel used, calculated

in accordance with the scale-plans of the building.

It was intended that the last twenty of the twenty-one payments specified in the Chinese Contract should coincide with and be effected from the first twenty payments due to the first defendant firm under the Schedule to the Principal Contract, it being stated in the Chinese Contract that "Each payment is to be made in accordance with Party A's payment dates". It is to be observed however that under the Principal Contract the R.C.C. work would be complete at the time of the 17th payment; the 18th, 19th and 20th payments under that Contract relating to brickwork with which the plaintiff was not concerned.

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A letter (Exhibit E) of the same date as the Chinese Contract, from the first defendants to the plaintiffs, reads as follows:—

"DEFAG CONSTRUCTION FACTORY
11, Argyle Street, Kowloon.
Ka Doo Mansions 9th floor A,

20th January 1965

For the perusal of Yee Sang Metal Materials Company.

This is to inform (you) that the signing of contract No. 65/01 for the iron-binding work at the site of new Ming Tak Middle School tendered to your esteemed company by this factory was temporarily provided for. The amount of wages and the method of payment contained therein shall be calculated according to the total amount of iron (used). A separate contract in the English (language) to be made shall prevail.

As to the BSS. 785 round steel (rods), apart from the price for work done and materials supplied at \$48.00 Hong Kong currency per picul as fixed in the contract, I shall personally be responsible to pay an extra \$2.00 Hong Kong currency per picul and pay for in full according to the weight of iron-binding work done. If the property owner promises to lend the sum of \$250,000.00 to this factory upon the completion of the foundation work at the site, this factory will certainly pay to your esteemed company the sum of \$100,000.00 Hong Kong currency.

(Chopped)
DEFAG CONSTRUCTION COMPANY
(*Sd.*) **L. S. Koo**
Manager."

This letter contemplates a separate and authoritative version of the Chinese Contract in the English language but no such version was ever executed. The letter also again refers to payment according to the amount of "iron" used, and contemplates that in addition to the tentative prices in the Chinese Contract, there should be a further payment to the plaintiff firm of \$100,000.00 if the second defendant should promise to "lend" the first defendants \$250,000.00

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upon completion of the foundation works—a loan (or advance) which did not materialise. This \$100,000.00 is not the same \$100,000.00 at that appearing in the Chinese Contract as the first payment to be made to the plaintiff firm.

This additional \$100,000.00 was not the only proposed variation and addition to the prices contemplated in the Chinese Contract, for by a letter of the 8th February 1965 (Document 150 in Bundle C) the first defendant firm irrevocably authorised Messrs. Johnson, Stokes & Master, solicitors, (then action for the second defendant company on whose behalf they were receiving periodical payments from the financiers to the scheme against architect's certificates) to pay to the plaintiffs not only the 10 payments of \$50,000.00 each and the 10 payments of \$45,000.00 each contemplated by the Chinese agreement, but also to pay to them, from the 21st payment due under the Schedule to the Principal Contract, the further sum of \$70,000.00. That 21st payment under the Principal Contract was to be in respect of steel windows and, like the 18th to the 20th, was not referable to any work done or to be done by the plaintiffs. 10

Another variation arose when, by a letter of 14th January 1966 the plaintiffs and the first defendants jointly informed the second defendant that the Chinese Contract between the plaintiffs and the first defendants had been varied in that the plaintiffs were thereafter to receive only \$40,000.00 under each of the 7th to 10th payments thereunder and only \$36,000.00 under each of the 11th to 20th payments whereas they were to receive \$230,000.00 at the time of the 41st and last payment due, under the Principal Contract on the issue of the Occupation Permit. In the result the total amount due to be paid to the plaintiffs under the Chinese Contract as varied, ignoring any final adjustments to be made on the basis of the weight of steel used, was \$1,220,000.00. Of this sum \$884,000.00 has been received by the plaintiffs. 20

In early February, 1965, there was a meeting at the Mandarin Hotel between Mr. Yu, managing partner of the plaintiff firm and Mr. Cheng, managing director of the second defendant company. The meeting was arranged by Mr. Koo, the proprietor of the first defendant firm, but there is a conflict of evidence as to whether Mr. Koo himself was present at the meeting. Following this meeting, the plaintiffs wrote to the second defendant on the 5th of February (148 in Bundle C) in the following terms:— 30

“Yee Sang Metal Supplies Co.
Hong Kong.

Room 625 Man Yee Building,
60-68 Des Voeux Road, C.
Hong Kong.
Tel. 22598
23814
35981 40

Dear Sir,

A contract in which our Company contracted for carrying out the work for Defag Construction Company was signed on the 20th

10 January 1965, for all the reinforcement fixing work, including labour and materials, at the site situate at the new Tak Ming Middle School, Kowloon. All high tensile steel (bars) and mild steel round bars for the said project are to be supplied and fixed by our Company according to the plans. In order to protect our interests in (carrying out) the reinforcement work against your repossession of the site for tenders to be called from other building contractors in the event of Defag Construction Company's abandonment (of the construction work) during the course of construction at the said site, we request you, the owner, to give a written guarantee to the effect that, in the case of (the construction work) having to be let out on contract to another building contractor because of Defag Construction Company's abandonment during the course (of the construction), the Agreement for the reinforcement work entered into between our Company and Defag Construction Company shall remain effective. As for the money for labour and materials for the reinforcement work, you, the owner, are requested to be responsible for the payment (of the same) to our Company on the due dates out of the amount of the construction costs (allotted) to the contractor. Please excuse our bluntness in this matter.

20

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To Mr. Cheng Yun Choi.

(Chopped) (words indecipherable)
(Signed) Yu Tak Yee.

Dated 5th Feb., 1965."

The second defendant company replied to this letter by a letter of the 9th February, 1965, (152 in Bundle C) as follows:—

" TAK MING COMPANY, LIMITED, H.K.

No.1 Arran St.
Kowloon
Tel. 800256
800063

30

Hong Kong 9th February, 1965.

Messrs. Yee Sang Metal Supplies Co.,
Room 625, Man Yee Building,
60-68, Des Voeux Road, Central,
Hong Kong.

Dear Sirs,

Tak Ming Middle School at
K. I. L. 1571, S.A., 76, Sai Yee Street, Kowloon.

40

We acknowledge receipt of your letter of 5th February, 1965,

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and we wish to confirm to you as follows:—

1) In case of the breach of contract No.574 dated 20th October, 1964 from the part of Messrs. Defag Construction Co., we may by mutual agreement between your goodselves and ourselves continue the contract signed on 20th January, 1965 by your goodselves with Defag Construction Co. even though the said contractor should be forced out of the above site.

2) In case of the failure to reach a mutual agreement between us, we shall pay you for the works done on the captioned site against our architect, Mr. Eric Cumine's certificates in accordance with the Building contract No.574 prepared and signed in the said architect's office. **10**

The above confirmation is subject to your fulfilment of the terms of your contract with Defag Construction Co. mentioned in your letter of 5th February, 1965 addressed to us and also subject to your carrying out works properly and expeditiously in accordance with the Schedule of works submitted to the aforesaid architect and to us by the contractor, Messrs. Defag Donstruction Co.

Yours truly,
Tak Ming Co., Ltd. H.K. **20**
(*Sd.*) Illegible
Director.”.

It is the contention of the plaintiffs that the phrase “We shall pay you for the work done against our architect's certificates in accordance with the building contract 574” confers an obligation upon the second defendant to pay to the plaintiffs the outstanding amounts certified by the architect as relating to work done by the plaintiffs. The plaintiffs, their counsel argues, should not have to wait for their money because the architect has not issued his certificate in respect of work which has nothing to do with them. It is the fact that no architect's certificates were issue in respect of the 20th, 21st and 41st payments scheduled under the Principal Contract and relating respectively to brickwork, window-frames and the issue of the Occupation Permit although in fact, as is common ground, the building has been completed and the Occupation Permit issued. The second defendant, however, argues that the obligation to pay, if any, is to pay upon the certificates of the architect, some of which were never issued, although as already noted, the unissued certificates related to work which had nothing to do with the plaintiffs who had agreed in the Chinese Contract, as varied, to a schedule of payments tied to the Schedule in the Principal Contract in such a manner that the later instalments due to them were only payable upon the completion of work which **40** could not be completed until after all their R.C.C. work was finished. In fact, all the R.C.C. work had been completed by the 5th of July, 1966, the date of the 17th architedct's certificate.

Side by side with these private arrangements between the plaintiffs and the second defendant, other arrangements were being made through solicitors. I have already referred to the letter of the 8th February, 1965

(150 in Bundle C) from the principal contractor to Messrs. Johnson, Stokes & Master, "irrevocably" authorizing payment by these solicitors to the plaintiffs of, inter alia, 10 sums of \$50,000.00 each and 10 of \$45,000.00 each and I have related how, despite its description, this authority was amended by the plaintiffs and first defendants by letter of 14th January 1966.

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It is apparent that the arrangement for payments to the plaintiffs through Messrs. Johnson, Stokes & Master on the authority of the first defendants, the principal contractors, contemplated the continued employment of the first defendants in that capacity whereas the undertaking contained in
10 the second defendant company's letter of 9th February 1965 to the plaintiffs was directed to the situation which would arise should the first defendants cease to be employed by the second as principal contractors. In fact that latter eventuality occurred when the second defendant company served a second notice of termination of the Principal Contract upon the first defendants which became effective upon 3rd September 1966.

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The plaintiffs rest their case upon the construction of the arrangement reached directly between the second defendant company and the plaintiffs and embodied in the two letters of the 5th and 9th February 1965 set out above. Paragraphs 7 to 12 of the Further Amended Statement of Claim, which
20 purported to rest the plaintiffs' claim on other and alternative grounds including the arrangement for payment through Messrs. Johnson, Stokes & Master, have been abandoned by counsel for the plaintiffs.

I have said that the plaintiffs' case rests upon the construction of the two letters of 5th and 9th February 1965 and this was pleaded in the Further Amended Statement of Claim. At one stage Mr. Litton, counsel for the second defendant, elicited from the plaintiffs' managing partner, under cross-examination, the statement that what he was really suing on was an oral promise given by Mr. Cheng of the second defendant company at the Mandarin Hotel. Despite objection by Mr. Litton I permitted re-examination on this matter
30 whereupon the witness said that he was relying on a paragraph 2 of the letter of 9th February 1965 from the second defendant company and upon paragraph 13 of his Further Amended Statement of Claim and that he understood paragraph 2 of the letter to mean that if the first defendants discontinued their work under the Principal Contract then payment for all work done on the site by the plaintiffs would become the responsibility of the second defendant company. I would add that re-examination on this point was in any event hardly necessary, for even in its absence I could have attached only minimal weight to the answer of a layman as to the legal foundation of his case. He employs lawyers to put his case upon its feet and his counsel pleaded the letter of 9th February 1965
40 of set purpose. I could not have allowed that purpose to be set to naught and the plaintiffs' whole case distorted because of the isolated answer of a layman on a technical matter. It is my duty to decide the case in the light of the whole of the evidence and the evidence includes this very important letter and that whether or not the plaintiff firm's representative appears to appreciate its importance. Indeed in his opening speech for the second defendant company Mr. Litton himself very aptly said that I might well place more reliance upon the exchange of letters than on anything said in evidence in court.

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It is the submission of counsel for the second defendant company that under the Principal Contract one of the obligations of the first defendants was to supply the material for and execute the steel reinforcement fixing work and that the subsequent sub-contract for that work contained in the Chinese Contract could not result in any privity of contract between the second defendant as site-owner and the plaintiff firm as sub-contractors. In support of this argument counsel quoted from Hudson's Building & Engineering Contracts where it is stated ⁽⁴⁾ that it cannot be over-emphasised that no privity of contract between the employer and the sub-contractor can arise out of a sub-contract concluded between the main contractor and the sub-contractor. Counsel further supported this argument by reference to a South African case, **Concrete Construction, Ltd. v. Keidan & Co. Ltd.** ⁽⁵⁾ in which the contract between the owners and the principal contractors contained a clause for the nomination of suppliers which was for all practical purposes identical with that in the Royal Institute of British Architects' standard form and in which reinforcement steel was billed as a P.C. item which is explained as an item to be supplied by a nominated sub-contractor. In that case at an interview at which were present a representative of the employer, the architect, the main contractor and the supplier, the latter was asked by the architect to reduce his prices but refused to do so. The supplier stated that he would require a deposit of £3,000 and complained about the main contractor being a slow payer, but was re-assured by the employer's representative who said that a substantial loan had been arranged and that the supplier would be paid monthly on the certificates issued to the main contractor by the architect. Subsequently, the architect wrote to the supplier stating that he accepted the tender on behalf of his clients, the employers, and that on acceptance of "this order" by the suppliers, a sum of \$3,000 would be payable to them by the main contractors.

The supplier replied stating "Our acceptance of your order is hereby confirmed". On the same day the main contractor wrote to the employer authorizing him to pay the £3,000 and debit the main contractor's account.

It was held by the South African Court of Appeal that in view of the language of the main contract, the architect was, for all practicable purposes, constituted the agent of the principal contractor for placing orders with nominated suppliers, and that the inference on the facts, in spite of the correspondence, was that the contract had been made between the principal contractor and the supplier and not with the employers.

Applying the facts of that case to the present case, Mr. Litton argued that the suggestion in paragraph 13 of the Statement of Claim that in the event of the ouster of the first defendant firm from the site and a failure to reach an agreement between the plaintiffs and the second defendant company for the continuance of the Chinese Contract as between themselves, the second defendant would pay the plaintiffs for the work done on the second defendant's property, did not accurately summarize the exchange of correspondence. The plaintiffs' letter of the 5th February 1965 to the second defendant company, having posed the hypothesis that the first defendant firm was ousted from the site, went on "As for the money for the labour and materials for the reinforcement work, you, the owner, are requested to be responsible for the payment

(4) 9th Edition P. 579.

(5) 1955 (4) S.A.L.R. 315.

(of the same) to our company on the due dates out of the amount of the construction costs (allotted) to the contractor.”.

10 Counsel argued that the phrase “Out of the amount of the construction costs (allotted) to the contractor” could only refer to the principal contractor, the first defendant firm, and to appreciate what was involved in that request a proper understanding of the engagement under the main contract was of paramount importance. When the request really envisaged was a situation in which the first defendant firm was ousted from the site at a time when it had completed the work due to be paid for under, say, the 9th scheduled payment, but had not received such payment. On the assumption that the plaintiffs had been paid the money due to them out of the first eight scheduled payments, when eventually an architect’s certificate was issued in respect of the 9th scheduled payment an appropriate sum was to be deducted therefrom and paid to the plaintiffs, and this, counsel urged, was all the above-quoted sentence asked for. The certificates issued under the Principal Contract were certificates issued in favour of the principal contractor and nobody else, the whole scheme of the Principal Contract being that there were only two parties to that contract, the owner and the contractor.

20 It is counsel’s contention that when in answer to the letter of the 5th of February, the second defendant company by its letter of the 9th February, 1965, (152 in Bundle C) wrote:—

“In case of the failure to reach a mutual agreement between us, we shall pay you for the works done on the captioned site against our architect, Mr. Eric Cumine’s certificates in accordance with the Building contract No.574 prepared and signed in the said architect’s office.”,

30 this was not an undertaking to pay for any and all work done by the plaintiffs on the second defendant company’s property as pleaded in paragraph 13 of the Statement of Claim; rather was it an undertaking to pay for works done on the site against the architect’s certificates under the Principal Contract. These certificates did not certify the work of the plaintiffs or any other subcontractor but that of the principal contractor, the first defendant firm, no matter by whom the work had actually been performed. The second defendant’s position in the present case was actually stronger than that of the site-owners in the South African case, for in the latter case the site-owners, through their architect, took a direct part in the negotiations leading to the conclusion of the sub-contract, whereas in the present case the responsible officials of the second defendant company and the plaintiff firm had never even met until a few days before this exchange of correspondence, that is, at a time long after the plaintiff firm had undertaken a binding obligation towards the principal contractor, the first defendant firm, in regard to the steelwork. Under the Principal Contract the first defendant firm had no right to be paid any money except after the issue of an architect’s certificate. Such certificate was a condition precedent to payment under the building contract and all the second defendant company undertook by its letter of the 9th February, 1965, was that in the event of the first defendants being ousted, the second defendant company would make deductions from monies due to the first defendant firm under any outstanding certificate and pay those deductions direct to the plaintiff

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firm. It was inherently improbable that the construction of the letter pleaded in paragraph 13 of the Statement of Claim could be correct because the Principal Contract was a lump-sum contract, so that the site-owners had no particular interest in the individual costing of the various items, e.g. steelwork, whereas the Chinese Contract envisaged a final adjustment of payments to the plaintiffs on the basis of the amount of steel used in the building. There was no reason why the second defendant company should assume an unascertained liability in respect of the steelwork.

Mr. Swaine, for the plaintiff, countered these arguments by saying that whilst no doubt the principles which have been held to preclude privity of contract between an owner and a sub-contractor are valid in general, there, was no reason in law or logic why a building owner should not, if he so chose contract direct with a sub-contractor. This in fact was what had happened at the Mandarin Hotel and in the letters of the 5th and 9th of February, 1965, which followed that meeting and there was privity of contract between the second defendant company and the plaintiff firm; in January 1965, the second defendant company had every reason to concern itself with the affairs of the first defendants, the principal contractor, since no progress was being made on the site and the site-owners were already paying interest to their financiers on an initial sum of \$250,000.00, although that sum had not yet been advanced and was not due to be advanced until further progress was made on the site. Whilst Mr. Cheng of the second defendant company would have the court believe that relations between the second defendant firm and the plaintiffs were no concern of his, there was before the court incontrovertible evidence that he had been concerning himself with the affairs of sub-contractors and had gone so far as to enter into a direct written contract with the sub-contractor for concrete, guaranteeing the first defendant firm's liability to that sub-contractor (Pioneer Co., Ltd.) to a limit of \$300,000.00, a guarantee which was subsequently enforced after the dismissal of the first defendant firm from the Principal Contract. By February, 1965, the second defendant company was in an unenviable position in regard to its proposed building and directly involved itself with the plaintiffs in much the same way as it had done with Pioneer Co., Ltd., with the difference that the latter company had had the sense to obtain a formal written guarantee whereas the relationship between the second defendant company and the plaintiff firm depended upon the construction of letters written between laymen. Mr. Koo of the first defendant firm had given Mr. Cheng of the second defendant company a copy of the Chinese Contract, the reason for that being, according to Mr. Koo, that Mr. Cheng had expressed interest and a wish to see it, whereas Mr. Cheng's version was that he had to see the sub-contract before he could comply with Mr. Koo's request to release to the plaintiffs the \$100,000.00 which had been deposited by the first defendant firm as security with the second defendant company; the latter explanation was unconvincing, because M. Cheng had said in evidence, as his counsel had said in opening, that it did not matter to the second defendant to whom they paid the monies due under the building contract so long as they had the first defendant firm's authorization for such payments.

According to the evidence of Mr. Yu of the plaintiff firm, counsel continued, he had obtained, at the meeting at the Mandarin Hotel, a promise from Mr. Cheng that the Chinese Contract would remain effective should the first defendant firm be ousted from the site, and obtained the further

assurance that whilst the latter firm remained the principal contractor there would be paid direct to the plaintiff firm appropriate amounts out of the scheduled payments; when Mr. Yu wrote his letter of the 5th of February, 1965 (148 in Bundle C), he asked the second defendant firm for a written guarantee that the Chinese Contract would remain effective in the event of the ouster of the first defendant firm and, what is of more importance to the present case, went on to request that the second defendant company should be responsible for payment to the plaintiffs of construction costs out of monies allotted to the first defendant firm; in evidence, Mr. Yu said that this embodied

10 his request at the Mandarin Hotel that as long as the first defendant firm remained the principal contractor, the second defendant company would continue payment to the plaintiffs out of the scheduled payments and, counsel argued, if that evidence is accepted, there is no room for the construction of paragraph 2 of the reply of the 9th of February, 1965, (152 in Bundle C), which counsel for the second defendant urged.

On the other hand, Mr. Cheng's version of the request as to payment contained in the plaintiffs' letter of the 5th of February, (148 in Bundle C) was that it embodied Mr. Yu's request that should the first defendant firm be ousted and the Chinese Contract not continued, or not be deemed to continue

20 between the plaintiffs and the second defendant company, then the latter would assume responsibility for payment to the plaintiffs out of the scheduled payments contemplated by the Principal Contract. Such a construction, counsel urged, went contrary to the plain and ordinary meaning of the last portion of the letter read in the context of the whole document, the main purpose of which was to seek an assurance that in the event of the ouster of the first defendant firm from the site, the sub-contract would specifically remain effective; the last portion of the letter was merely a request that in that, the only contemplated event, the second defendant company would be responsible for payment for labour and materials for the R.C.C. work out of the amounts

30 due to any principal contractor.

The second defendant company's reply to this letter on the 9th of February, 1965, provided for the contingency that there being no mutual agreement for the continuation of the sub-contract after any expulsion of the 1st defendant firm from the site, the owner should pay the plaintiff sub-contractors for the work they had done and obtain architect's certificates in respect thereof.

In support of this construction, the evidence of Mr. Yu of the plaintiff firm as to the meeting at the Mandarin Hotel was that he asked Mr. Cheng of the second defendant company to hold himself responsible for payment

40 to the plaintiffs for the work done by them under the Chinese Contract with the first defendant firm and also that if the building work should be transferred to another contractor, the Chinese Contract entered into between the plaintiffs and the first defendant firm should remain effective. His letter of the 5th of February, Mr. Yu said, contained two requests, the first being for a written guarantee that if the building work was transferred to another principal contractor, the Chinese Contract should remain effective, and the second being that in the event of the first defendant firm remaining as principal contractor, then from the amounts due and payable by the second defendant to the first defendants, the sums due to the plaintiffs for their work should be deducted

50 and paid to the plaintiffs.

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According to Mr. Yu, Mr. Cheng agreed positively at the Mandarin Hotel to the continuation of the Chinese Contract should the first defendant firm cease to be the principal contractor, and in saying, in his letter of the 9th February, 1965, that in such an eventuality "we may by mutual agreement between your goodselves and ourselves continue the contract signed on the 20th of January, 1965, by your goodselves with Defag Construction Co.", Mr. Cheng was going back on his oral agreement at the Mandarin Hotel. His principal object at the Mandarin Hotel, according to Mr. Yu, was to ask Mr. Cheng to undertake to pay the plaintiffs all the money for work done by the plaintiffs on behalf of the first defendants in the event of the Principal Contract being discontinued. 10

There is a conflict of evidence as to whether Mr. Koo of the first defendant firm was or was not present at this meeting at the Mandarin Hotel. I find it unnecessary to resolve this conflict because Mr. Koo's evidence as to what is alleged to have transpired at the meeting is of no particular assistance and the main protagonists upon this issue are Mr. Yu of the plaintiff firm and Mr. Cheng of the second defendant company.

Mr. Cheng (who claimed that Mr. Koo was not present at the meeting) said that Mr. Yu's first request to him was that the second defendant should pay the plaintiffs direct instead of through the first defendant firm and that Mr. Yu went on to discuss the position which would arise should the first defendant firm be ousted from the site and requested that in that event Mr. Cheng should consider continuing the Chinese Contract as between the second defendant company and the plaintiffs. According to Mr. Cheng, he replied that he could not adopt any contract between the plaintiffs and the first defendant firm but that should the latter cease to be the principal contractors he might consider a new approach to the plaintiffs, his idea being that, in such circumstances, he would study the Chinese Contract and if he found it acceptable, continue upon that basis with the plaintiffs, whereas if that contract was not acceptable, new terms might be negotiated with the plaintiffs. 20 30

The witness, after first agreeing that at the Mandarin Hotel meeting, and indeed as early as the 20th of January, 1965, when Mr. Koo had given him a copy of the Chinese Contract, he appreciated that this contract amounted to a method whereby the plaintiffs were financing the first defendant firm, subsequently retracted this answer and claimed that he did not appreciate this until approximately six months later. Mr. Cheng further said that in the event of failure to agree upon the continuation of the Chinese Contract, he agreed that the second defendant company would pay the plaintiffs for the work done by them but only from monies which they had availed to pay the first defendant firm and subject to authorization by Mr. Koo of that firm; that he made no firm promise that in the event of the first defendant firm being expelled from the site, he would continue the Chinese Contract with the plaintiffs but he did ask Mr. Yu to write to him on this topic. When Mr. Yu wrote his letter of the 5th of February, he was asking for a written guarantee that in the event of such expulsion, the Chinese Contract should continue—and this was a request which had already been refused at the meeting at the Mandarin Hotel. Mr. Cheng was unable to agree that the only other matter (apart from a guarantee of the continuation of the Chinese Contract) which Mr. Yu had raised with him, was that if the first defendants remained as principal 40

contractors, then the second defendant would pay the plaintiffs out of the allotted construction costs. That request as to payment also contemplated a situation in which the first defendants had ceased to be the principal contractors.

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The second paragraph of his letter of the 9th of February, 1965, Mr. Cheng said, meant no more than that if, on the termination of the first defendant firm's contract, work had been performed by them which was not yet the subject of an architect's certificate, then the plaintiffs would be paid in accordance with the work they had done when the architect's certificate was available and in accordance with the scheduled payments to be made to the first defendants. The witness was at first unambiguous that he was not promising to pay for the work done in accordance with the schedule of payments in the Chinese Contract.

It was noticeable that in regard to the interpretation of this paragraph of his letter of the 9th February, 1965, Mr. Cheng shifted his ground more than once. Thus having at first said that he was not promising to pay for the work done in accordance with the schedule of payments in the Chinese Contract which "did not concern the second defendant", he subsequently said that what he had in mind was that he might have to pay to the plaintiffs the monies specified in the schedule to the Chinese Contract, subject to Mr. Koo's authorization. This latter statement accords ill with his earlier one and also with his evidence that at that date he had not familiarized himself with the contents of the Chinese Contract. Moreover this plea of ignorance is in itself in contradiction of the witness's earlier evidence that, having a copy of the Chinese Contract in his possession, he knew what payments to the plaintiffs were envisaged through the solicitors. At another stage the witness said that what he intended to convey was that the second defendant would pay the amounts which Mr. Koo of the first defendant firm authorized. This was apparently said despite the fact that the situation envisaged was one in which Mr. Koo would have dropped out of the picture and of course any such authorization must have been tied to the terms of the Chinese Contract. The paragraph in dispute makes no reference to the Chinese Contract or to authorization by Mr. Koo but promises payment for works done on the site against architect's certificates issued in accordance with the Principal Contract. Again, having first agreed that by this paragraph he was promising the plaintiffs no more and no less than the payments promised by the second defendant's letter to Messrs. Johnson, Stokes & Master of the previous day, he amended this answer in reply to a question as to what, in that event was the purpose of this paragraph, by saying that it was intended also to allay Mr. Yu's fears that in the event of the ouster of the second defendant company from the site, and despite the irrevocable authority given by that firm to the solicitors to pay certain sums to the plaintiffs, those sums might in fact be paid to the first defendants from whom the plaintiffs might have difficulty in extracting their money. This was as far as the witness could go in asserting any difference between the promise contained in his letter and the irrevocable authority granted by the first defendants to Messrs. Johnson, Stokes & Master for payments to the plaintiffs. The witness added that he did not regard the arrangement contained in paragraph 2 of his letter very seriously, considering it to be almost the same as that made through the solicitors.

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Those conflicting interpretations must be considered in the light of the respective positions of the parties in early February, 1965.

The dominating cause, permeating the whole background of the situation in which the parties to this triangle found themselves, was the financial embarrassment of the first defendant firm as principal contractor. That firm had undertaken an onerous obligation in agreeing to perform \$700,000.00 worth of work on pile caps before receiving any payment and the position was quickly reached in which little or no work was going on at the site so that Mr. Cheng had constantly to prod Mr. Koo about this. It was the first defendant firm's financial difficulties which caused it to sub-contract the steelwork to the plaintiffs on a basis of payment which amounted to a measure of subsidy by the plaintiffs to the first defendants throughout the duration of the construction of the building. Side by side with the first defendant firm's financial difficulties, the second defendant company was also under some strain in regard to its finances for completion of the building. It had the benefit of a building mortgage and a further charge from the financiers, Henry Fok Estates Ltd., but despite these arrangements found it necessary to enter into an agreement with the first defendant firm whereby 20% of the cost of the building might remain on mortgage. It was Mr. Yu's evidence, and I find as a fact, that at the meeting at the Mandarin Hotel his was not a one-sided approach and that Mr. Cheng was very anxious that the plaintiffs should not withdraw but should continue with the steelwork since the substitution of another subcontractor might eliminate the measure of finance which was being provided by the plaintiffs to the first defendant firm, the principal contractors. Mr. Cheng, indeed, had every reason to meet Mr. Yu's requests so far as possible and did so by his letter of the 9th of February, 1965. 10

It is no doubt true, as counsel for the second defendant company urges, that no privity of contract between an employer and a subcontractor arises out of a sub-contract concluded between the main contractor and the subcontractor. Privity of contract so arising however, is not the basis of the plaintiffs' claim and for that reason the case of **Concrete Construction, Ltd. v. Keidan & Co., Ltd.**⁽⁵⁾ is largely irrelevant in the context of this case. To establish privity of contract with the second defendant company the plaintiffs rely, not upon their Chinese Contract with the first defendant firm, but upon the second defendant company's letter of the 9th of February, 1965, addressed to them and in particular upon the second paragraph thereof. I would say at once that in my view that paragraph amounts to the establishment of a direct contractual relationship between the second defendant and the plaintiffs and whilst the cases are not on all fours with the facts of the present case, I have derived some support for this view from **Dixon v. Hatfield**⁽⁶⁾, **Andrews v. Smith**⁽⁷⁾ and **Smith v. Rudhall**⁽⁸⁾ all of which involved a finding of a direct contractual relationship between an owner (or his representative) and a subsidiary supplier. In essence however I rely upon the ordinary and natural meaning of the paragraph. 30

There is some authority for the suggestion that as consideration the plaintiffs could, if necessary, rely upon their implied promise to perform, for the benefit of the second defendant, their existing obligations to the first

⁽⁵⁾ 1955 (4) S.A.L.R. 315.

⁽⁷⁾ (1835) 2 C., M. & R. 627.

⁽⁶⁾ (1825) 2 Bing. 439.

⁽⁸⁾ (1862) 3 F. & F. 143.

defendants, in the event of the first defendants ceasing to be the principal contractors (see **Bret v. J. S. & Wife**⁽⁹⁾, **Bagge v. Slade**⁽¹⁰⁾, **Westbie v. Cookaine**⁽¹¹⁾, and **Moore v. Brey**⁽¹²⁾). Such reliance is however unnecessary, since the plaintiffs can plead actual performance, they having completed all the steel work within the time specified in the revised schedule of works (see **Shadwell v. Shadwell**⁽¹³⁾, **Scotson v. Pagg**⁽¹⁴⁾, and **Chichester and wife v. Cobb**⁽¹⁵⁾). This revised schedule (Exhibit F) came into existence as the result of an addendum to the Principal Contract (see p.127 of bundle "B") under which the first defendant firm withdrew its notice of termination of the Principal Contract and agreed to complete the building within 100 days of the execution of the addendum, that is, by 20th September 1966. Under the revised work schedule the new date for completion of the R.C.C. work was 12th July, 1966 and its completion was in fact certified by the architect one week earlier than that date, that is, almost two months before the eventual final dismissal of the first defendant firm from the Principal Contract.

10

Interesting as is the ex post facto construction of the disputed paragraph by the laymen concerned with it, its meaning in the last resort is a matter for the court. The paragraph must be construed in the context of the whole of the letter embodying it and there would appear to be no reason for denying to the words of the disputed passage their ordinary and natural meaning, to which I now turn.

20

When the Principal Contract was terminated and the first defendant firm ousted from the site, the Chinese Contract, in so far as it remained unperformed, became incapable of performance in that no further architect's certificates would be issued to the first defendant firm so as to support the schedule of payments in the Principal Contract—and the payments under the Chinese Contract were dependent upon payments being made to the first defendant firm under the Principal Contract.

30

At the date of the first defendants' ouster however, all the R.C.C. work had been completed and had been certified by the architect as having been completed by or on behalf of the principal contractor who had been paid 75% of the price thereof.

40

Applying these facts to the paragraph the construction of which is so hotly disputed, the undertaking was to pay the plaintiffs for "the works done on the captioned site" and this can only refer to work done by the plaintiff firm. The work which had been so done was the whole of the steelwork. Payment, it is to be noted, was to be "against our architect, Mr. Eric Cumine's certificates in accordance with the building contract". Such certificates had been issued in accordance with the Principal Contract in respect of the whole of the steelwork. It seems to me that if, as Mr. Litton argues, the undertaking was to pay for work which had been completed at the date of ouster of the

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(9) (1600) Cro. Eliz. 755, pl. 20.

(11) (1631) 1 Vin. Abr. 312, pl. 36.

(13) (1860) 9 C.B. (N.S.) 159.

(15) (1866) 14 L.T. 433.

(10) (1616) 3 Bulst., 162.

(12) (1633) 1 Vin. Abr. 310.

(14) (1861) 6 H. & N. 295.

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continued.

first defendants but which had not yet been certified by the architect under the Principal Contract, then a fortiori the undertaking embraced work which had not only been completed but had also been so certified. Moreover the undertaking was not to pay a proportion of the cost of the work done or to pay in accordance with the payments laid down in the Chinese Contract between the plaintiffs and the first defendants, but simply "to pay for". In other words, in the events which happened, the undertaking was to pay for all the steelwork covered by architect's certificates Nos 1 to 17, that is, for the whole steelwork in the building with the minor exception of a cover to a water-tank which, the plaintiffs say, they have been unable to install because the second defendant would not permit them access to the roof for that purpose. 10

This appears to me to be the plain and ordinary meaning of the paragraph in dispute and it is immaterial that no architect's certificates 20, 21 and 41 were ever issued. These were intended to relate to work other than steel work and the agreement which the plaintiffs made to accept deferred payment of part of the money due to him for steelwork and for such deferred payments to be tied to the issue of architect's certificates for the completion of later work with which he was not concerned, was an agreement not with the second defendant company but with the first defendant firm. So far as the second defendant company is concerned its undertaking was to pay for work done on the site by the plaintiffs against architect's certificates. That work having been done and the relevant certificates having been issued, the liability of the second defendant company is complete. Its obligations is to pay to the plaintiffs any balance found to be due to them in respect of the work done on the site by the plaintiffs and the yardsticks to be used in the calculation of such a balance, if any, are the prices for mild steel bars and high tensile steel bars specified in the Chinese Contract the contents of which were available to Mr. Cheng at the time he wrote his letter of the 9th February 1965. 20

Moreover, I am satisfied that despite Mr. Cheng's present evasiveness, that construction accords with his intentions at the time he wrote the letter. There is evidence that he was concerning himself actively with the affairs of sub-contractors because he distrusted the ability of the first defendants to bring the Principal Contract to a successful conclusion. Thus by a letter of 6th July, 1965, (document 164 in C) addressed to the first defendants, after referring to an approach which the second defendant had made to the financiers for the accommodation of the first defendants, he continued "we are now even trying very hard to obtain other sources of financial aid in order to help you out of this difficult situation apart from the supports we have given to you regarding metal supplier and concrete supplier." It is the fact that the second defendant had given an actual guarantee limited to \$300,000.00 to the concrete supplier and the general tenor of this letter underscores the extent to which the second defendants were prepared to go in order that the construction work could proceed. Again in a letter of the 23rd July, 1965, to the architect the second defendants said "we were aware of the contractor's unsound financial position, therefore, we have gone so far as to give our guarantee to the metal supplier and concrete supplier for credit facilities entrusted to the contractor." From these words it would appear that however Mr. Cheng now construes his letter of the 9th of February, 1965, in the middle of that year, he was under no illusions as to what he had promised the plaintiffs. His further letter of 1st February 1966 (Document 184 in C) is a flat contradiction of his evidence 40 50

that he took no part in persuading the plaintiffs to accept deferred payments.

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10 It is significant also that when by their letter of the 7th September, 1966 (document 287 in C), the plaintiffs sought payment from the second defendants of the amounts due to the plaintiffs from the first defendants at the date of the termination of the Principal Contrat, the reply from the second defendants (document 290 in C) was to the effect that they were not "at present" in a position to make proposals for payment or to confirm "the outstanding figures", whereas the reason for refusal to pay which was embodied in Messrs. Johnson, Stokes & Master's letter of the 18th of October (document 296 in C) to Messrs. Hastings & Co., solicitors, was that the plaintiffs had failed to comply with the conditions set out in the final paragraph of the second defendant's letter to the plaintiffs of the 9th of February, 1965. The suggestion of the 9th of February, 1965. The suggestion at that time was not that the second defendant Company was under no obligation of any kind to pay but that the plaintiffs were in default in the expeditious completion of the work and had not, in fact, completed in accordance with the schedule of works. That argument falls to the ground when it is appreciated that the schedule of works was amended to provide for completion of the R.C.C. work by the 12th July, 1966, whereas the architect's certificate, No.17, certifying the completion of all R.C.C. work was dated the 5th of July, 1966.

20 It was the case that at the date of execution of the Chinese Contract the first defendant firm was indebted to the plaintiff firm in the sum of \$167,000.00. Some attempt was made by counsel for the second defendant company to suggest that the revision of the figures of the Chinese Contract from \$1,050,000.00 to \$1,220,000.00 by the addition of the two figures of \$70,000.00 and \$100,000.00 respectively was a subterfuge whereby the plaintiffs were to receive their \$167,000.00 at the expense of the second defendants. The suggestion is speculative in the extreme and it does not bear scrutiny in the light of the fact that the Chinese Contract specifically provided for payment on the basis of the weight of steel incorporated into the building as assessed by reference to the scale plans. It was also the evidence of both Mr. Yu and Mr. Koo that each appreciated upon the signing of the Chinese Contract that \$1,050,000.00 was an inadequate figure inserted for convenience because it could be made totally with payments due to the first defendant firm under the Principal Contract. It will be recalled that Exhibit E, the letter providing for an additional payment to the plaintiffs of \$100,000.00 should the financiers agree to an advance of \$250,000.00 upon the completion of the foundation works, came into existence simultaneously with the Chinese Contract. I do not consider that even if the suggestion of the invention of an underhand method of paying the \$167,000.00 had any substance, it would be material, except as to credit, upon this issue of liability and I am not at the moment concerned with quantum. In any event, I find the suggestion to be wholly without foundation.

30 Another contention on behalf of the second defendant company was that if it was to be held liable to the plaintiffs under their present claim, the result would be that the second defendant company was being made to pay twice on the architect's 17th certificate relating to the completion of the R.C.C. work. Were that contention valid, I think the answer to it would

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continued.

be that if a person binds himself to pay twice for particular work, there is no reason why he should not be held to his undertaking. In fact, however, the suggestion of double payment goes much too far, since, for examine, under the Principal Contract foundation work valued at \$700,000.00 was not to be paid for upon its completion but the payments were to be spread over 41 instalments culminating with the issue of the Occupation Permit; the whole scheme of payments was such that the first defendant firm was financing the work throughout and to a not inconsiderable extent; further, the schedule of payments provided only for payment by the second defendant to the first of 75% of the amount shown in each architect's certificate and the remaining 25% was not to be payable until, at the earliest, the completion of the building. There is no evidence before me that this remaining 25% has ever been paid so that the suggestion that the second defendant company would be paying twice for the R.C.C. work is by no means established. In any event, this judgment is concerned only with liability, and the issue of quantum will be decided by reference to the amount of steel incorporated into the building. There is thus no possibility of the plaintiffs being paid more than once for their work and even if it should transpire that the second defendant has put itself in a position where it has to pay, between two different parties, something in excess of 100% of the value of the R.C.C. work, the plaintiffs are not to be held responsible for that situation.

10

20

Finally, the plaintiffs' claim includes a fixed sum of \$3,000 in respect of transportation charges incurred at the commencement of the reinforcement work. This item was said by Mr. Yu of the plaintiff firm to have been incurred because "they" had left no room at the site to bend the metal in the manner necessary with the result that the metal rods had to be removed elsewhere for this processing and thereafter re-transported to the site. There was no elaboration of the term "they" but it would appear that it was the responsibility of the first defendants, the principal contractors, to ensure conditions at the site suitable for the various sub-contractors to carry out their work and the failure of the first defendants to establish such conditions for the bending of metal rods has not been shown to be in any way attributable to the second defendant whom I find to be free from any liability under this head of damage.

30

The second defendant company is however liable to the plaintiff firm for the balance, if any, of the price of work done on the site by the plaintiff firm in excess of the sum of \$884,000.00 already received by the plaintiffs. The amount of any such balance is a matter for future determination and, at counsel's request, there will be liberty to either side to apply for directions regarding the manner of such determination. Costs to the plaintiff firm.

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*Original
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No. 7

Judgment
Dated
15th
February
1969

IN THE SUPREME COURT OF HONG KONG

Original Jurisdiction.

Action No. 2212 of 1966.

Between YEE SANG METAL SUPPLIES COMPANY. . . . Plaintiffs

and

DEFAG CONSTRUCTION COMPANY... 1st Defendants

TAK MING COMPANY LIMITED 2nd Defendant

10

L. S.
(Sgd.) S. H. MAYO
Assistant Registrar.
15th February 1969

BEFORE THE HONOURABLE MR. JUSTICE PICKERING IN COURT

J U D G M E N T

Dated and entered the 15th day of February 1969.

20

This Action having been tried before the Honourable Mr. Justice Pickering without a jury, at the Supreme Court of Justice, Hong Kong, and the said Mr. Justice Pickering having on the 3rd day of January 1969 ordered that judgment as hereinafter provided be entered for the plaintiffs IT IS ADJUDGED that the second defendant do pay the plaintiffs such sum as would be awarded to the Plaintiffs for the balance of the price of work done on the site by the plaintiffs in excess of the sum of \$884,000.00 and costs of action to be taxed.

S. H. MAYO
Assistant Registrar.

*In the
Supreme
Court of
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NOTICE OF APPEAL

*Appellate
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IN THE SUPREME COURT OF HONG KONG

Appellate Jurisdiction

No. 8
Notice of
Appeal
16th
January
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Civil Appeal No. 2 of 1969
(On Appeal from Original Jurisdiction Action
No. 2212 of 1966)

Between TAK MING COMPANY LIMITEDAppellant
and (2nd Defendant)

YEE SANG METAL SUPPLIES COMPANY. Respondent **10**
(Plaintiffs)

NOTICE OF APPEAL

TAKE NOTICE that Full Court will be moved as soon as Counsel can be heard on behalf of the abovenamed 2nd Defendant Tak Ming Company Limited on appeal from the judgment herein of the Honourable Mr. Justice Pickering given on the trial of the action on the 3rd day of January 1969, whereby it was adjudged or ordered that the 2nd Defendant Company is liable to the Plaintiff firm for the balance, if any, of the price of work done on the site of Section A of Kowloon Inland Lot No.1571 by the Plaintiff firm in excess of the sum of \$884,000 already received by the Plaintiff, and costs to be taxed, for an order that the said judgment may be set aside or reversed or rescinded, and that Judgment may be entered in the above-mentioned action for the 2nd Defendant in the said action and costs of the said action. **20**

AND FURTHER TAKE NOTICE that the grounds of this appeal are that the learned Judge's finding was arrived at against the weight of evidence.

AND for an Order that the Plaintiff pay to the 2nd Defendant the costs of this appeal to be taxed.

AND FURTHER TAKE NOTICE that the above-named 2nd Defendant proposes to apply to set down this appeal in the appeal list. **30**

Dated this 16th day of January 1969.

(Sgd.) **Johnson, Stokes & Master**

Solicitors for the 2nd Defendant.

To the abovenamed Plaintiff and to
Messrs. Hasting & Company, Solicitors for the Plaintiff.

FURTHER GROUNDS OF APPEAL

IN THE SUPREME COURT OF HONG KONG

Appellate Jurisdiction

Civil Appeal No.2 of 1969

(On Appeal from Original Jurisdiction Action

No. 2212 of 1966)

*In the
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*Appellate
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*No. 9
Further
Grounds
of
Appeal*

Between TAK MING COMPANY LIMITEDAppellant

and (2nd Defendant)

10 YEE SANG METAL SUPPLIES COMPANY Respondents
(Plaintiffs)

FURTHER GROUNDS OF APPEAL

TAKE NOTICE that the Appellant herein shall at the hearing rely upon the following ADDITIONAL GROUNDS OF APPEAL:

1. That the learned Judge erred in law in holding that by an exchange of letters between the Respondents (the Plaintiffs) and the Appellant (the 2nd Defendant) dated respectively 5th and 9th February 1965 the Appellant undertook the contractual burden of Defag Construction Company to pay the Respondents for work done and material supplied under a subcontract dated 20th January 1965 entered into between the Respondents and the said
20 Defag Construction Company.

2. That the learned Judge failed to give sufficient weight to the fact that the Appellant's letter dated 9th February 1965 was in reply to the specific requests set out in the Respondents' letter dated 5th February 1965.

3. That the learned Judge mistook and/or failed to give effect to the legal relationship between the Principals (Appellants) General Contractors (Defag Construction Company) and Sub-contractors (Respondents).

4. That the learned Judge failed to give a proper construction to the contract between the Appellants and the said Defag Construction Company dated 27th October 1964 which was a lump sum contract.

30 (Sd.) Samuel Soo & Co.
Solicitors for the Appellant.

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Supreme
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JUDGMENTS OF THE FULL COURT

*Appellate
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IN THE SUPREME COURT OF HONG KONG

Appellate Jurisdiction

Civil Appeal No.2 of 1969

(On Appeal from Original Jurisdiction Action

No. 2212 of 1966)

Between TAK MING COMPANY LIMITEDAppellant
and

YEE SANG METAL SUPPLIES COMPANY. Respondent **10**

JUDGMENTS OF THE FULL COURT

Coram: Blair-Kerr & Williams, JJ.

J U D G M E N T

Williams, J. Defag Construction Company (hereinafter called the principal contractor) agreed to construct a 16 storey building for the appellant, Tak Ming Company (hereinafter called the owner). The contract made on 27th October 1964 was for a fixed price of \$4,692,000.

On 20th January 1965 the principal contractor negotiated a sub-contract with the respondent herein whereby the latter agreed to do all the reinforced concrete work and to supply the necessary steel bars. In the original **20** proceedings the sub-contract was referred to as the Chinese contract.

The owner was to pay the principal contractor in 41 instalments against architect's certificates issued at agreed stages as work progressed. To ease the initial financial burden upon the owner no payment became due under the principal contract until foundation work and the construction pile caps to the value of \$700,000 was completed. That \$700,000 was then to be spread over the 41 payments. Payment to the principal contractor for the R.C.C. work was to be completed, less certain retention money amounting to 25%, by the time the 17th certificate had been issued.

Under the sub-contract the respondent received \$100,000 on com- **30** pletion of certain steel work in the foundations; thereafter he was to get 10 payments of \$50,000 and 10 of \$45,000. Those 29 payments were tied to the first 20 payments due to the principal contractor under the principal contract. Therefore although the respondent would complete the R.C.C. work by the time the 17th certificate was issued, he would not be paid in full until the issue of the 20th certificate. That arrangement obliged the respondent to wait until the principal contractor performed stages 18, 19 and 20 before the respondent would receive his last payments under the sub-contract. There was to be a final adjustment of the sub-contract price according to the weight of steel rods supplied by the respondent. During the course of construction **40**

the above rates of payment to the respondent were slowed down and reduced by agreement.

The judgment indicates that the respondent received \$884,000 and that \$1,220,000 payable under the sub-contract was not a fixed sum, but would be adjusted according to the weight of steel supplied by the respondent for the R.C.C. work.

10 Shortly after he undertook the sub-contract the respondent met the owner at the Mandarin Hotel. Soon after that meeting the respondent wrote to the owner on 5th February 1965 asking for certain assurances in connection with the continuation of and payment for his work under the sub-contract in the event of the principal contractor being unable to complete. On 9th February 1965 the owner replied in terms which the respondent appeared to accept as safe-guarding his interests.

When the building was near completion the owner terminated the principal contract as from 3rd September 1966. On 5th July 1966 the respondent had completed his sub-contract, except for a fragment which the owner would not allow him to do, but because of the delayed method of payment he had not been paid in full.

20 Relying upon the exchange of letters of 5th February 1965 and 9th February 1965 between himself and the owner, the respondent successfully sued the owner for the balance due to him for the work done etc. under the sub-contract.

The all important letters are as follows:—

5th February 1965 from the respondent to the owner:

“ Yee Sang Metal Supplies Co.
Hong Kong.

Room 625 Man Yee Building,
60-68 Des Voeux Road, C.
Hong Kong.
Tel. 22598
23814
35981

30

Dear Sir,

40 A contract in which our Company contracted for carrying out the work for Defag Construction Company was signed on the 20th January, 1965, for all the reinforcement fixing work, including labour and materials, at the site situate at the new Tak Ming Middle School, Kowloon. All high tensile steel (bars) and mild steel round bars for the said project are to be supplied and fixed by our Company according to the plans. In order to protect our interests in (carrying out) the reinforcement work against your repossession of the site for tenders to be called from other building contractors in the event of Defag Construction Company's abandonment (of the construction

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work) during the course of construction at the said site, we request you, the owner, to give a written guarantee to the effect that, in the case of (the construction work) having to be let out on contract to another building contractor because of Defag Construction Company's abandonment during the course (of the construction), the Agreement for the reinforcement work entered into between our Company and Defag Construction Company shall remain effective. As for the money for labour and materials for the reinforcement work, you, the owner, are requested to be responsible for the payment (of the same) to our Company on the due dates out of the amount of the construction 10 costs (allotted) to the contractor. Please excuse our bluntness in this matter.

To Mr. Cheng Yun Choi

(Chopped) (words in indecipherable)

(Signed) Yu Tak Yee

Dated 5th Feb., 1965."

The owner's reply of 9th February 1965 was:—

" TAK MING COMPANY, LIMITED, H.K.

No.1 Arran St.
Kowloon 20
Tel. 800256
800063

Hong Kong 9th February, 1965.

Messrs. Yee Sang Metal Supplies Co.,
Room 625, Man Yee Building,
60-68, Des Voeux Road, Central,
Hong Kong.

Dear Sirs,

**Tak Ming Middle School at
K.I.L. 1571, S.A., 76, Sai Yee Street, Kowloon.** 30

We acknowledge receipt of your letter of 5th February, 1965, and we wish to confirm to you as follows:—

1) In case of the breach of contract No.574 dated 27th October, 1964 from the part of Messrs. Defag Construction Co., we may by mutual agreement between your goodselves and ourselves continue the contract signed on 20th January, 1965 by your goodselves with Defag Construction Co. even though the said contractor should be forced out of the above site.

2) In case of the failure to reach a mutual agreement between us, we shall pay you for the works done on the captioned 40

site against our architect, Mr. Eric Cumine's certificates in accordance with the Building contract No.574 prepared and signed in the said architect's office.

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The above confirmation is subject to your fulfilment of the terms of your contract with Defag Construction Co. mentioned in your letter of 5th February, 1965 addressed to us and also subject to your carrying out works properly and expeditiously in accordance with the Schedule of works submitted to the aforesaid architect and to us by the contractor, Messrs. Defag Construction Co.

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10

Yours truly,

Tak Ming Co., Ltd. H.K.
(*Sd.*) Illegible
Director."

The respondent successfully contended that the owner's letter promised that should the principal contractor be ousted, and the respondent not permitted to complete his sub-contract, then the owner would pay him for the work already completed, as certified by architect's certificates.

20 Before the principal contract was terminated by the owner in September 1966, the architect had issued the 17th certificates relating to the completion of the R.C.C. work. The respondent claims that that fulfills the conditions contained in the owner's letter of 9th February 1966 and entitles him to payment by the owner of the balance due under the sub-contract.

No architect's certificates had been issued to cover the 20th, 21st and 41st instalments payable under the principal contract. A re-arrangement of payments under the sub-contract had slowed down payments under the sub-contract, but had provided that the respondent would receive \$320,000 on issue of the 41st certificate which would occur after the occupation permit had been received. The building was completed and the occupation permit issued not long after the principal contractor was ousted from the site.

30 In the court below the owner contended that his letter of 9th February 1965 merely promised payment, for work completed under the sub-contract, from monies allocated to the principal contractor against issued architect's certificates. He submitted that at the time the principal contractor was ousted there were unissued certificates relating to work which the principal contractor had not completed. Therefore it was not possible to release any more money to the principal contractor's credit until he finished the building, but that now impossible because the principal contract was at an end. Since the respondent's final payments were to have been made out of the principal contractor's final instalments it was not possible to pay him, although he had
40 completed the R.C.C. work.

The judgment says that the owner's promise to pay the respondent for the work he had done under the sub-contract, in the event of the principal contractor being dismissed, could only refer to work done by the respondent. He referred to para. 2 of the owner's letter which says that payment to the

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respondent would be against the architect's certificates issued under the principal contract, and said that the certificates so issued covered the whole of the R.C.C. work under the sub-contract.

The judge found that the owner's letter promised that if the principal contract was terminated, and if the owner did not permit the respondent to continue with the R.C.C. work, then the owner would pay the respondent for the R.C.C. work already completed under the sub-contract, provided it was embraced by certificates already issued under the principal contract. On that interpretation he gave judgment for the respondent.

The first ground of appeal complains that the judge erred in law 10
in finding that the exchange of letters resulted in the owner undertaking the principal contractor's obligations to the respondent under the sub-contract. The letters show quite clearly that there was no such wholesale taking over by the owner from the principal contractor. It is clear that the judgment contains no such finding. If the owner was taking over the principal contractor's responsibilities the latter would surely have been a party to his release from such obligations. There is nothing to suggest that he was. The judge found that the owner had promised that if he ousted the principal contractor from the site, he would in that event pay the respondent for work he had already done. Mr. Litton, for the owner, argued before us that it was not logical to 20
interpret his letter as saying that whatever is owed under the sub-contract is to be paid by the owner, because it would mean that the owner had stepped into the shoes of the principal contractor. The judge in my opinion merely said that the owner promised that if anything was owed to the respondent he would pay it, on conditions contained in that letter. I see no point in pursuing that ground of appeal any further.

The second ground complains that the judge failed to give sufficient weight to the fact that the owner's reply was in answer to specific requests made by the respondent's letter of 5th February 1965. In that connection it is worth 30
noting that the judge refers very frequently to requests and replies between pages 42 and 50 of the record. At p.43 he considered the argument of Mr. Litton that the respondent's letter of 5th February 1965, simply requested that if the owner ousted the principal contractor, and if money had already been allocated to the principal contractor following the issue of a certificate, then the owner should pay the respondent from such monies. Mr. Litton's argument, quoted at 0.46 of the record, is that the owner's reply of 9th February 1965 was simply his agreement to that request. If that is the correct approach then I feel that the exchange of letters was unnecessary and superfluous because an arrangement of that nature was already being negotiated. It came into 40
existence by way of a letter dated 8th February 1965 from the principal contractor to the owner's solicitors authorising them to pay the respondent's instalments from monies credited to the principal contractor under the principal contract. As the judge commented at 0.40 of the record, that arrangement contemplated that the principal contractor would remain on the site until the building was completed. However, the letters of 5th February 1965 and 9th February 1965 contemplated the principal contractor being ousted from the site and raised the question of the respondent being paid for the work he had done in the event of such an ouster. The judge very carefully considered the evidence of the respondent and the owner as to what they meant in their

respective letters. There is no point in my going into that portion of the judgment in detail; the counsel for the appellant (owner) and respondent covered it very exhaustively. It is sufficient to say that the judge remarked at p.50.

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“Those conflicting interpretations must be considered in the light of the respective position of the parties in early February 1965.”

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Mr. Litton submitted that the judge should have construed the two letters in the light of the surrounding circumstances existing at the time. It is clear from the above quoted passage that the judge at least purported to
10 be doing that very thing.

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In that connection the judge had said, at p.50 of the record:—

“The dominating cause permeating the whole of the background of the situation in which the parties to this triangle found themselves was the financial embarrassment of the first defendant as principal contractor.”

He considered evidence as to the financial strain on the owner who was trying to finance the entire project. He found as a fact that at the time the letters were exchanged the owner was anxious that the respondent should not withdraw
20 from the R.C.C. contract, but should continue because the respondent was in some measure financing the sub-contract which eased the financial strain on the owner as well as the principal contractor.

Mr. Litton argued on the appeal that the evidence of financial stress, relied upon by the judge in construing the parties' intention at the time the said letters were exchanged, was not apparent in February 1965. He said that it was not until July 1965 that the owner had cause to concern himself with sub-contracts because of financial difficulties. However, in cross-examination the owner said that by January 1965 it was apparent that the principal contractor was in serious financial difficulty; that on 21st January 1965 all
30 work on the site had ceased and that the delay was costing the owner money. The principal contractor did not have the money to continue with the next phase of the construction under the principal contract which was the R.C.C. work. It was for that reason that he sub-contracted it to the respondent. It would seem that, contrary to Mr. Litton's argument, the owner had reason to be anxious over the lack of progress in building and over the mounting costs including accumulating interest on money he had borrowed. It was in those circumstances that the respondent, who was as concerned with the principal contractor's ability to pay as was the owner with his ability to perform the contract, wrote to the owner on 5th February 1965 and received the reply of
40 9th February 1965.

There was in my opinion ample evidence to support the judge's finding of fact that the owner was very anxious that respondent should continue with the sub-contract.

In my view the second ground of appeal is not made out.

*In the
Supreme
Court of
Hong Kong.*

*Appellate
Jurisdiction*

No. 10
Judgments
of the
Full Court
2nd June
1969
continued.

In the third ground of appeal the owner alleges that the judge failed to give effect to the legal relationship between the owner, the principal contractor and the sub-contractor. A vague statement of that nature covers such a speculative field that one wonders what particular aspects of those relationship the judge had overlooked. One should not be left wondering and the grounds should be more specific. Does it mean that certain rights were not assignable, or that obligations imposed under one contract could not be assumed in another, or that privity of contract can never exist between the sub-contractor in a building contract and the person for whom it is being constructed? The respondent never suggested that privity of contract existed between the owner and he on the basis of the sub-contract. The respondent alleged a separate contract between the owner and he to which the principal contractor was not a party. That agreement differed from the sub-contract which contemplated performance in full of the principal contract; it was a separate arrangement which contemplated a failure on the part of the principal contractor to fulfill his obligation. 10

Mr. Litton, in the course of the appeal posed the question as to what the owner was going to get out of this agreement with the sub-contractor. He pointed out that the owner was unlikely to accept liabilities which he had not contracted for. One can only reply that if there was an agreement established by the exchange of letters then he was in fact undertaking such liabilities as it contained. One benefit the owner was getting out of it was the assurance that the R.C.C. work would be done by the respondent and the necessary steel supplied by him at a time when the financial climate was non too satisfactory. The judge at p.52 referred to authorities, which I will not again quote, to support the proposition that the consideration moving to the owner from the respondent was the latter's implied promise to perform, for the benefit of the owner the obligations which the respondent owed to the principal contractor. He went on to state that such reliance on an implied promise of that nature was not necessary in that the respondent was in a position to plead actual performance. Mr. Litton did not criticise or reject those references as fallacious. There is no reason to suppose that the judge failed to bear in mind or give effect to the legal relationships. In fact in quoting his judgment earlier I referred to:— 30

“.....the situation in which the parties to this triangle found themselves,.....”.

The fourth and last ground of appeal, i.e. in the additional grounds of appeal, is also vague. It states that the judge failed to give a proper construction to the contract between the owner and the principal contractor of 27th October 1964 which was for a lump sum. The ground of appeal should have been followed by words such as “.....in that.....” and then setting out what important construction had been omitted. The judge was fully conscious that the principal contract was for a lump sum and he mentioned the exact figure. 40

Mr. Litton argued during the appeal that the owner having fixed a price, would be unlikely to increase his expenditure by taking upon himself the liability to pay the respondent an unspecified sum under the sub-contract.

The owner was not, as the judge pointed out, assuming the principal contractor's liabilities to pay the respondent under the sub-contract. He was merely promising to pay the respondent for R.C.C. work he had done if the principal contract was halted. The indeterminate feature was the weight of steel used. However the owner was only paying the principal contractor for 75% of each instalment of the work certified by the architect. The remaining 25% was to be retained until after issue of the occupation permit. Any liability of the principal contractor assumed by the owner would be considerably offset if not completely covered by the 25% retention money.

*In the
Supreme
Court of
Hong Kong.*

*Appellate
Jurisdiction*

*No. 10
Judgments
of the
Full Court
2nd June
1969*

continued.

- 10 Mr. Litton put forward the theory that since the contract was awarded by tender, the principal contractor could have greatly overcharged for the earlier stages so as to quickly get hold of a major portion of the contract money and he could have offset those high prices by greatly undercharging for the final stages. Such an arrangement would make it most hazardous financially for the owner to determine the contract at a late stage in the programme because he would have to pay proper prices for the undercharged stages to a new builder. There is no evidence that such was the position. In fact the evidence points to works reducing the owner's rate of payment in the early stages, apart from the unduly high retention of 25% of each instalment as opposed to the
- 20 customary 15%.

The owner argued that under the principal contract no payment could be made without an architect's certificate, no matter who had done the work, be it the principal contractor or the sub-contractor.

- It is true that once the principal contractor was ousted from the site the principal contract was terminated. Its existence could only be referred to in order to explain or prove what should have been done according to its terms and what should have been paid under it prior to its cesser. The rights of the respondent against the principal contractor at that date are decided under the sub-contract. In this case the respondent successfully pleaded in the
- 30 court below that he was not relying on the sub-contract to try and determine the liability of the owner, but upon a separate agreement with the owner contained in the letters of 5th and 9th February 1965.

- If the principal contractor had been allowed to complete the building he would have received the agreed price. From those payments the respondent's instalments would have been paid by the owner's solicitors on the authority given to them by the principal contractor. Had the principal contractor been ousted when the R.C.C. work was only half completed the owner would have had to decide whether to let the respondent complete it, with or without another principal contractor. If he had permitted the respondent
- 40 to complete the remaining half of the R.C.C. work he would still have had to pay him for it. If he dismissed the respondent he would have to pay someone else to complete it. In any event, in those circumstances, he would have to pay for the whole of the R.C.C. work, whether or not there was a principal contractor on the site to whom architect's certificates could be issued. The one way in which the owner might feel legally justified in not paying for all the R.C.C. work, would be to oust the principal contractor after the R.C.C. work had been done and before the building was constructed, and then argue that there was no principal contractor to whom an architect could issue his certificate.

*In the
Supreme
Court of
Hong Kong.*

*Appellate
Jurisdiction*

No. 10
Judgments
of the
Full Court
2nd June
1969
continued

It find it difficult to perceive th moral justification for attempting to seize upon such a state of affairs as a reason for refusing to pay the respondent.

There is no substance in the fourth ground of appeal.

The original ground of appeal was that the judge's findings were against the weight of the evidence. The judge considered all the evidence very carefully and anxiously considered its implications and the weight to be attached to it. The construction he placed upon the two letters followed a searching scrutiny of them, and of the other documentary evidence in the light of the contracts between the principal contractor and the owner, and the respondent, and with full regard to all the surrounding circumstances. **10**

There could be no justification for disturbing his findings.

(J. T. Williams)

Acting Puisne Judge.

Blair-Kerr, J: I agree. In this appeal I do not think that it is necessary for me to recapitulate the facts and analyse the arguments of counsel. Mr. Litton has said everything which could possibly have been said in support of the appeal. But, as my Brother has said, the learned judge in the court below considered the evidence very carefully indeed; and I see no reason why this Court should interfere with the construction which he put upon the two all-important letters of 5th and 9th February, 1965, and the conclusion to **20** which he arrived in the light of all the circumstances disclosed in the evidence.

The appeal is accordingly dismissed.

(W. A. Blair-Kerr)

President

90A

No. 10A

IN THE SUPREME COURT OF HONG KONG

Appellate Jurisdiction
Civil Appeal No.2 of 1969
(On Appeal from Original Jurisdiction Action
No. 2212 of 1966)

*In the
Supreme
Court of
Hong Kong*

*Appellate
Jurisdiction*

Between TAK MING COMPANY LIMITED Appellant
(2nd Defendant)

and

10 YEE SANG METAL SUPPLIES COMPANY . . . Respondent
(Plaintiff)

No. 10A
Order of
the Full
Court
dismissing
the appeal
2nd June
1969

**BEFORE THE HONOURABLE MR. JUSTICE BLAIR-KERR
AND THE HONOURABLE MR. JUSTICE WILLIAMS IN
FULL COURT**

O R D E R

Upon reading the notice of motion, dated the 16th day of January, 1969, on behalf of the Appellant (2nd Defendant) by way of appeal from the judgment of the Honourable Mr. Justice Pickering given at the trial of this action on the 3rd day of January, 1969, whereby it was adjudged that the Appellant (2nd Defendant) do pay the Respondent (Plaintiff) such sum as would be awarded to the Respondent (Plaintiff) for the balance of the price of work done on the site by the Respondent (Plaintiff) in excess of the sum of \$884,000.00 and the costs of the action to be taxed.

And upon reading the Further Grounds of Appeal filed herein on behalf of the Appellant (2nd Defendant) on the 28th day of April 1969.

And upon reading the said Judgment.

And upon hearing Mr. Henry Litton Counsel on behalf of the Appellant (2nd Defendant) and Mr. John J. Swaine Counsel on behalf of the Respondent (Plaintiff).

*In the
Supreme
Court of
Hong Kong*

*Original
Jurisdiction*

No. 10A
Order of
the Full
Court
dismissing
the appeal
2nd June
1969

continued

IT IS ORDERED that the said judgment of the Honourable Mr. Justice Pickering, dated 3rd day of January 1969, be affirmed, and that this appeal be dismissed with costs to be paid by Appellant (2nd Defendant) to the Respondent (Plaintiff) and that such costs be taxed by a Taxing Master.

Dated the 2nd day of June 1969.

(*Sgd.*) **S. H. MAYO**
Assistant Registrar.

No. 11

ORDER OF THE FULL COURT GRANTING LEAVE TO APPEAL

*In the
Supreme
Court of
Hong Kong.*

IN THE SUPREME COURT OF HONG KONG

*Appellate
Jurisdiction*

Appellate Jurisdiction
Civil Appeal No.2 of 1969
(On Appeal from Original Jurisdiction Action
No. 2212 of 1966)

No. 11
Order of
the Full
Court
Granting
Leave to
Appeal
20th June
1969

Between TAK MING COMPANY LIMITEDAppellant
and

10 YEE SANG METAL SUPPLIES COMPANY. Respondent

BEFORE THE FULL COURT (THE HONOURABLE MR. JUSTICE BLAIR-
KERR AND THE HONOURABLE MR. JUSTICE WILLIAMS IN COURT)

ORDER

Dated the 20th day of June, 1969.

20 UPON hearing Counsel for the Appellant and Counsel for the
Respondent and upon reading the Notice of Motion of the Appellant filed
herein on the 11th day of June, 1969 by consent IT IS ORDERED that
leave be granted to the abovenamed Appellant to appeal to Her Majesty the
Queen in Her Privy Council against the Judgment of This Honourable Court
pronounced by the Full Court on the 2nd day of June 1969 conditional upon
the Appellant within two month from the date hereof producing a bank guarantee
or other good and sufficient security in the sum of \$15,000.00 to the satisfaction
of the Registrar of the Court for the due prosecution of the Appeal, and the
payment of all such costs as may become payable to the Respondent in the
event of the Appellant's not obtaining an order granting him final leave to appal,
or of the Appeal being dismissed for non-prosecution, or of Her Meajsty in
Council ordering the Appellant to pay the Respondant's costs of the Appeal
AND IT IS ORDERED that the Appellant prepare and despatch to the
Registrar of the Privy Council the record of the Appeal within a period of
30 three months from the date hereof or within such further time as the court
may allow AND IT IS FURTHER ORDERED that the Appellant be at
liberty to apply for a stay of execution after the quantity surveyor has completed
his assessment of the damages and that the costs of today be paid by the
Appellant in any event.

(Sgd.) S. H. MAYO
Assistant Registrar.

*In the
Supreme
Court of
Hong Kong*

IN THE SUPREME COURT OF HONG KONG

*Appellate
Jurisdiction*

Appellate Jurisdiction

Civil Appeal No.2 of 1969

(On Appeal from Original Jurisdiction Action

No. 2212 of 1966)

No. 12
Order of
the Full
Court
extending
time for the
despatch
of the
Record of
Appeal to
the Privy
Council
28th
August
1969

Between TAK MING COMPANY LIMITED Appellant

and

YEE SANG METAL SUPPLIES COMPANY . . . Respondent

**BEFORE THE HONOURABLE MR. JUSTICE BRIGGS AND
THE HONOURABLE MR. JUSTICE MCMULLIN IN FULL COURT 10**

O R D E R

Upon the application of the Appellant by Notice of Motion dated the 18th day of August, 1969 and upon hearing Counsel for the Appellant and Counsel for the Respondent and upon reading the affidavit of Samuel Soo filed herein on the 21st day of August, 1969 and the affirmation of Yu Tak Yee filed herein on the 23rd day of August, 1969, IT IS ORDERED that:—

- (i) The time for the dispatch of the record of appeal to the Registrar of the Privy Council by the Appellant be extended for a further period of 30 days from the date of this Order;
- (ii) There be no stay of execution or suspension of proceedings on the Judgment of this Court pronounced by the Full Court on the 2nd day of June, 1969 and on the proceedings under the Award made by Mr. D. A. Bailey on the 30th day of July, 1969; 20
- (iii) The Respondent is to furnish security to the satisfaction of the Registrar before execution and in accordance with Rule 5 of the Order in Council Regulating Appeals from the Supreme Court or Court of Appeal for Hong Kong to Her Majesty in Council; and
- (iv) Costs of this application be to the Respondent.

Dated the 29th day of August, 1969.

(Sgd.) S. H. MAYO 30

Assistant Registrar.

91B

No. 13

IN THE SUPREME COURT OF HONG KONG

Appellate Jurisdiction
Civil Appeal No.2 of 1969
(On Appeal from Original Jurisdiction Action
No. 2212 of 1966)

Between TAK MING COMPANY LIMITED Appellant

and

YEE SANG METAL SUPPLIES COMPANY . . . Respondent

*In the
Supreme
Court of
Hong Kong*

*Appellate
Jurisdiction*

No. 13
Order of
the Full
Court
correcting
Order of
the Full
Court
dated 28th
August
1969

2nd
October
1969

**10 BEFORE THE FULL COURT (THE HONOURABLE MR. JUSTICE
PICKERING AND THE HONOURABLE MR. JUSTICE MORLEY-JOHN)
IN COURT**

ORDER

Upon hearing Counsel for the Appellant and for he Respondent and upon reading the Affirmation of Samuel Soo filed herein on the 29th day of September, 1969.

20 IT IS ORDERED that paragraph (i) of the Order herein made by the Full Court comprising the Honourable Mr. Justice Briggs and the Honourable Mr. Justice McMullin dated the 29th August, 1969 be corrected so as to read as follows: "The time for the dispatch of the Record of Appeal to the Registrar of the Privy Council by the Appellant be extended for 30 days, i.e., until 20th of October, 1969." and that the costs of this application be costs in the cause.

Dated the 2nd day of October, 1969.

(Sgd.) **S. H. MAYO**

Assistant Registrar.

EXHIBITS

Exhibits

Plaintiff's Exhibits

A
Second Building Mortgage for Certain sums not exceeding in the aggregate \$1,200,000 and interest 16th November 1964

Plaintiff's Exhibit A—Second Building Mortgage of Section A of Kowloon Inland Lot No. 1571 to secure certain sums not exceeding in the aggregate the sum of \$1,200,000.00 and interest dated 16th November, 1964.

I certify that the sum of \$2,400.00 has been paid in respect of Stamp Duty.
(C. R. No. 5636) (Sgd.).....
Asst. Collector

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17, Nov. 1964

THIS INDENTURE made the Sixteenth day of November, One thousand nine hundred and sixty four BETWEEN THE TAK MING COMPANY LIMITED whose registered office is situate at No.76, Sai Yee Street Kowloon in the Colony of Hong Kong (which Company and its successors and assigns are where not inapplicable hereinafter included under the designation "the Mortgagor") of the first part KOO LING SUN, trading as DEFAG CONSTRUCTION COMPANY of No. 116 Argyle Street Ninth Floor "A" Kowloon aforesaid (hereinafter called "the Contractors") of the second part and KOO LING SUN of No. 116 Argyle Street Ninth Floor "A" Kowloon aforesaid, Merchant (who and whose executors administrators and assigns are where not inapplicable hereinafter included under the designation "the Mortgagee") of the third part WHEREAS by a Building Agreement made between the Mortgagor of the one part and the Contractors of the other part the Contractors have agreed with the Mortgagor to build and completely finish fit for occupation certain shop and school buildings to be erected on the piece or parcel of ground more particularly described in the Schedule hereto in accordance with the plans and specifications prepared by Eric Cumming and approved by the Director of Public Works referred to in the Building Mortgage mentioned in the First Schedule hereto for a total consideration of \$4,500,000.00 to be paid or fall due in accordance with the stages set forth in the Second Schedule hereto AND WHEREAS it was agreed upon the treaty for the said building agreement that the Mortgagees (the Mortgagees being for all purposes in connection with this Indenture and the said Building Agreement deemed to be identical with the Contractors as the Contractors do by joining in and executing these presents acknowledge and admit) would permit part of the moneys to become payable pursuant to the said Building Agreement not exceeding a total extent of \$1,200,000.00 to remain outstanding on an account current between the Mortgagor and the Mortgagees in connection with the said Building works and that such account should be repayable in manner hereinafter appearing and until so repaid should be secured by a Second Building Mortgage drawn in favour of the Mortgagees in the manner hereinafter appearing such Building Mortgage to rank after the Building Mortgage and Further Change mentioned in the First Schedule hereto which said Building Mortgage and Further Charge are to secure an immediate advance of \$3,200,000.00 already advanced and further advances totalling \$3,300,000.00 details of which are as set out in the Third Schedule hereto NOW THIS

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INDENTURE WITNESSETH that in pursuance of the said agreement and in consideration of the Mortgagees granting to the Mortgagor permission to it to become and remain indebted to the Mortgagees on an account or accounts current and continuing to grant such facilities in manner hereinafter appearing the Mortgagor hereby covenants with the Mortgagees that the Mortgagor will on the expiry of six months from the date of the issue by the Building Authority of the Final Occupation Permit in respect of the said buildings to be erected on the premises described in the Schedule hereto (hereinafter where not inapplicable called "the date of repayment") pay unto

10 the Mortgagees all such sum or sums as may be owing by the Mortgagor to the Mortgagees on such account or accounts on the date of repayment (such sum or sums or any part or parts whereof remaining owing are hereinafter where not inapplicable called "the principal") and will pay interest at the rate of 1.5 per cent per month on the principal from the date of the expiry of one month from the date of the said Occupation Permit until repayment AND FURTHER that if the principal shall remain unpaid after the date of repayment the Mortgagor will so long as the principal shall remain unpaid pay to the Mortgagees interest on the principal at the rate aforesaid by equal monthly payments without deduction AND IT IS HEREBY AGREED AND

20 DECLARED that if the principal shall remain unpaid with the consent of the Mortgagees after the date of repayment it shall not be competent for the Mortgagor at any time thereafter to pay off or for the Mortgagees to call in the principal until the party so paying off or calling in the principal shall have given to the party respectively receiving or paying the principal at least one calendar month's previous notice in writing of such intention to pay off or call in the principal AND THIS INDENTURE FURTHER WITNESSETH that for the consideration aforesaid the Mortgagor doth hereby assign unto the Mortgagees ALL THOSE premises more particularly described in the SCHEDULE HERETO And all rights rights of way (if any) privileges

30 easements and appurtenances thereto belonging or in anywise appertaining And all the estate right title interest property claim and demand whatsoever of the Mortgagor therein and thereto TO HOLD the said premises hereinbefore assigned or expressed or intended so to be with their and every of their appurtenances unto the Mortgagees for the residue of the term of years as set out in the said Schedule and for all other the estate term and interest of the Mortgagor therein Subject to the said **Indenture of Building Mortgage** and the said Further Charge and to the payment of the principal sum and all other sums and interest thereon as described in the said Schedule But subject nevertheless to the proviso for redemption hereinafter contained PROVIDED

40 ALWAYS that if the Mortgagor shall on the date of repayment pay to the Mortgagee the principal and shall pay interest for the same at the rate aforesaid from the date hereinbefore mentioned until repayment without any deduction as aforesaid AND also all such sums of money as the Mortgagees may expend in respect of the non-payment of the Crown rent and other moneys reserved by or the proportion thereof payable in respect of the said premises hereby assigned or non-performance of the covenants terms and conditions contained in the said Crown Lease referred to in the said Schedule or in payment of the police lighting water and other rates if any assessed or to be assessed on the said premises or in insuring any part of the said premises from loss or damage

50 by fire together with interest for the same at the rate aforesaid from the time at which such expenditures were respectively made then the Mortgagees shall at any time after such payment shall have been so made upon the request

Exhibits

Plaintiff's Exhibits

A

Second Building Mortgage for Certain sums not exceeding in the aggregate \$1,200,000 and interest 16th November ~~1969~~ 1964
continued.

Exhibits
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Plaintiff's
Exhibits
 ———
 A
 Second
 Building
 Mortgage
 for Certain
 sums not
 exceeding
 in the
 aggregate
 \$1,200,000
 and interest
 16th
 November
~~1969~~ 1964
continued.

and at the cost of the Mortgagor reassign the said premises hereby assigned unto the Mortgagor or as the Mortgagor shall direct. PROVIDED ALWAYS and it is hereby declared that if default shall be made in payment as aforesaid of the principal or the interest for the same or any part thereof respectively at the time hereinbefore appointed for payment thereof respectively or in payment of any moneys for the time being due on the security of these presents or there shall be any breach of any of the covenants or obligations of the Mortgagor herein contained it shall be lawful for the Mortgagees at any time or times thereafter without any consent on the part of the Mortgagor or of any other person to enter into and upon and take possession of the said premises hereinbefore expressed to be hereby assigned or for the time being subject to the present security and the same thenceforth to hold possess and enjoy and to receive the rents and profits thereof without any lawful interruption or disturbance by the Mortgagor or any other person and/or to let or lease the same for any term and upon such conditions as the Mortgagees shall think fit and to appoint any person or persons at such remuneration as the Mortgagees shall think proper to collect the rents and profits of the premises on behalf of the Mortgagees AND the Mortgagor doth hereby further covenant with the Mortgagees that the Mortgagor will at all times during the continuance of this security keep the said premises hereby assigned or expressed or intended so to be and every part thereof in a good stage of repair and in good and proper sanitary condition as required by the Hong Kong Government AND also insure all buildings now or hereafter to be erected on the said premises particularly during the course of construction thereof against loss or damage by fire in their full insurable values in some local insurance company or such other insurance company or office or offices as the Mortgagees shall first approve of in writing and will punctually pay all premia or sums of money necessary for such purpose and will at any time on demand made for that purpose on the Mortgagor or left on the said premises endorse over to produce to or lease with the Mortgagees the Policy or Policies of such insurance and the receipts for every such payment and the Mortgagees shall at all times have a lien on the same and the monies thereby assured AND ALSO that if default shall be made in keeping the said premises so insured it shall be lawful for the Mortgagees to insure and keep insured all or any of the said premises to the full insurable value thereof AND THAT the Mortgagor will on demand repay to the Mortgagees all monies expended by the Mortgagees for that purpose with interest thereon at the rate aforesaid from the time of the same respectively having been advanced or paid and that until such repayment the same shall be a charge upon the said premises AND it is hereby declared that the Mortgagees may at any time or times hereafter without any further consent on the part of the Mortgagor or of any other person and whether in possession or not sell the said premises hereinbefore expressed to be hereby assigned or for the time being subject to the present security or any part or parts thereof either subject to the said Indenture of Building Mortgage or freed and discharged therefrom (as may be thought fit) and either together or in parcels and either by public auction or private contract or partly by public auction and partly by private contract with power upon any such sale to make any stipulation as to title or evidence or commencement of title or otherwise which the Mortgagees shall deem proper AND ALSO with power to buy in or rescind or vary any contract for sale and to resell without being responsible for any loss occasioned thereby AND for the purposes aforesaid to enter into such contracts stipulations and agreements and to execute and do all such assurances and

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- things as may be deemed expedient or necessary PROVIDED ALWAYS and it is hereby agreed and declared that the Mortgagees shall not exercise the power of sale hereinbefore contained until the Mortgagees shall have previously given at least one calendar month's notice in writing to the Mortgagor to pay off the moneys for the time being owing on the security of these presents or left a notice in writing to that effect at or upon some part of the premises hereinbefore expressed to be hereby assigned and default shall have been made in payment of such moneys or some part thereof at the expiration of such notice (but so that such notice shall in no case expire before the date of repayment)
- 10** or unless or until the whole or any part of some monthly payment of interest whether before or after the date of repayment shall be in arrear for thirty days or until default shall be made in payment of the Crown rent and other moneys reserved by or the proportion thereof payable in respect of the said premises hereby assigned or in performance of any of the covenants and conditions contained in the said Crown Lease or in performance of any of the covenants or obligations of the Mortgagor herein contained or until default shall be made by the Mortgagor in payment of the moneys for the time being owing on the security of these presents after notice given by the Mortgagor to the Mortgagees of their intention to pay off such moneys
- 20** PROVIDED ALWAYS and it is hereby agreed and declared that upon any letting leasing or sale purporting to be made in pursuance of the aforesaid powers in that behalf the tenant or purchaser shall not be bound to see or enquire whether any default has been made in payment of any principal money or interest intended to be hereby secured at the time hereinbefore appointed for payment thereof or whether any money remains owing on the security of these presents or as to the propriety or regularity of such letting leasing or sale nor in the case of any sale whether any notice has been given in writing to the Mortgagor in accordance with the provisions lastly hereinbefore contained AND notwithstanding any impropriety or irregularity whatsoever in such
- 30** letting leasing or sale the same shall as far as regards the safety and protection of the tenant or purchaser be deemed to be within the aforesaid powers in that behalf and be valid and effectual accordingly AND the remedy of the Mortgagor in respect of any breach of the clauses or provisions hereinbefore contained with respect to the letting leasing or sale of the premises shall be in damages only AND it is hereby declared that the receipt of the Mortgagees for the rents of the premises let or for the purchase money of the premises sold or of any part thereof shall effectually discharge the tenant or purchaser therefrom and from being concerned to see to the application or being answerable for any loss non-application or mis-application thereof AND it is hereby agreed and
- 40** declared that the moneys which shall arise from any such letting leasing or sale shall be held upon trust in the first place to defray all expenses incurred by the Mortgagees in or about such letting leasing or sale or otherwise in relation thereto and in paying any rates assessed on the said premises and in preserving the said premises from forfeiture by paying the Crown rent and other moneys reserved by or the proportion thereof payable in respect of the said premises hereby assigned and performing the covenants and conditions contained in the said Crown Lease and in effecting or keeping up any policy or policies of insurance on the said against any loss or damage by fire together with interest for the same payments after the rate aforesaid from the respective
- 50** dates thereof and in the next place in case any sale shall have been made freed and discharged from the said Indenture of Mortgage then the proceeds of sale shall be applied in satisfaction of all moneys (if any) which shall be owing therein

Exhibits

Plaintiff's Exhibits

A

Second Building Mortgage for Certain sums not exceeding in the aggregate \$1,200,000 and interest 16th November ~~1965~~ 1964
continued.

Exhibits
 —
Plaintiff's
Exhibits
 —
 A
 Second
 Building
 Mortgage
 for Certain
 sums not
 exceeding
 in the
 aggregate
 \$1,200,000
 and interest
 16th
 November
~~1964~~ 1964
continued.

and in the next place to apply such moneys arising from any letting leasing or sale in or towards satisfaction of the principal and interest for the time being owing on the security of these presents. AND THIRDLY to pay over the surplus (if any) unto the Mortgagor or other person entitled thereto AND it is hereby also agreed and declared that the aforesaid powers of letting leasing and sale may be exercised by any person or persons who for the time being shall be entitled to receive and give a discharge for the monies owing on the security of these presents. AND further that the Mortgagees shall not be answerable for any involuntary losses which may happen in the exercise of the aforesaid powers and trusts or any of them AND the Mortgagor so far as relates to the said premises hereby assigned but not further or otherwise do hereby further covenant with the Mortgagees that the said Crown Lease is now good valid and subsisting and in nowise void or voidable and that the rent and other moneys reserved by and the covenants and conditions contained in the said Crown Lease to be performed by the Mortgagor have been duly paid and performed up to the date hereof AND further that the Mortgagor shall and will from time to time during the continuance of this mortgage security pay the Crown rent and other moneys and perform the said covenants and conditions by and in the said Crown Lease reserved and contained and will pay the rates taxes and assessments payable and assessed on the said premises and will at all times keep the Mortgagees indemnified against all actions suits expenses and claims which may be incurred or sustained on account of the non-payment of the said Crown rent other moneys rates taxes and assessments or the breach of the said covenants and conditions or any of them AND ALSO that if default shall be made in paying the Crown rent and other moneys reserved by the said Crown Lease and the rates taxes and assessments payable and assessed on the said premises or default shall be made in the performance of the said covenants and conditions contained in the said Crown Lease it shall be lawful for the Mortgagees to pay such Crown rent other moneys rates taxes and assessments and perform such covenants and conditions AND THAT the Mortgagor will on demand repay to the Mortgagees all moneys expended by the Mortgagees for that purpose with interest thereon at the rate aforesaid from the time of the same respectively having been advanced or paid and that until such repayment the same shall be a charge upon the said premises hereby expressed to be assigned AND ALSO that the Mortgagor has good right to assign the premises hereinbefore expressed to be hereby assigned unto the Mortgagees in manner aforesaid free from all incumbrances AND further that the Mortgagor and every person having or lawfully or equitably claiming any estate right title and interest in or to the said premises or any of them will at all times at the cost until foreclosure or sale of the Mortgagor and afterwards of the person or persons requiring the same execute and do all such lawful assurances and things for the further and more perfectly assuring all or any of the same premises unto the Mortgagees as by the Mortgagees shall be reasonably required AND the Mortgagor doth hereby further covenant with the Mortgagees that the Mortgagor shall and will fully and completely finish in a workmanlike manner as expeditiously as possible in accordance with the said plans and specifications drawn by Eric Cumine and approved as aforesaid the messuages or tenements erections constructions and buildings intended to be erected on the said premises hereby assigned or expressed so to be as soon as possible and in any event before the 28th day of September 1965 AND that in case default in this respect shall be made by the Mortgagor (default in completing the said works and buildings attributable

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solely to the said Defag Construction Company shall not be deemed the default of the Mortgagor) it shall be lawful for the Mortgagees forthwith to enter into the said premises and to complete the same messuages or tenements erections constructions and buildings AND THAT in that case the Mortgagor shall and will on demand pay unto the Mortgagees all sums of money which the Mortgagees shall expend thereon with interest thereon after the rate aforesaid calculated as aforesaid from the time or respective times of paying and advancing the same AND THAT the said premises hereby assigned or intended so to be shall then stand charged with and shall not be redeemed or redeemable until

10 full payment shall be made of all moneys which shall be so expended in completing the said messuages or tenements erections constructions and buildings as aforesaid (and such money shall be deemed to be included in all references to the principal hereby secured) together with interest thereon as aforesaid as well as of the moneys advanced or to be advanced hereunder and the interest thereon AND the Mortgagees do hereby covenant with the Mortgagor that if so long as the Mortgagor shall pay all interest payable hereunder at the time hereby appointed for payment thereof and shall perform and observe all other the obligations on their part contained herein the Mortgagees will allow or permit or continue to allow or permit the Mortgagor from time to

20 time to become and remain endebted to the Mortgagees on an account or accounts current between the Mortgagor and the Mortgagees to the extent of one quarter of the sums which would otherwise be due and payable to the Contractors upon completion of the various stages set forth in the Second Schedule hereto until the sum owing on the security of these presents shall reach the sum of \$1,200,000.00 and no more to the intent that such one quarter part of the sums specified in the Second Schedule shall at all times remain outstanding and not payable until the date of repayment hereinbefore mentioned (subject always to the provisoes hereinafter contained) AND IT IS HEREBY FURTHER AGREED AND DECLARED that notwithstanding anything

30 to the contrary herein contained the Mortgagor shall in addition to leaving out standing such one quarter part of the sums specified in the said Second Schedule as aforesaid be entitled by notice in writing to similarly postpone payment until the date of repayment of any further sum not exceeding in the whole the sum of \$75,000.00 which would otherwise fall due and payable to the Contractors upon completion of any of the stages set forth in the Second Schedule hereto PROVIDED ALWAYS that if the Mortgagor shall have made default in paying any sums which shall have fallen due to the Contractors under the said Building Agreement and in respect of which the Certificate of the architect shall have been issued (save the proportion thereof permitted

40 by these presents to remain outstanding) and shall have continued in such default for seven days after notice in writing from the Contractors to the Mortgagor or in case the Mortgagor shall become subject to the Bankruptcy Laws or Ordinances for the time being in force or make any arrangement or composition with its creditor or shall have any part of their estates taken in execution or in case any covenant or obligation herein expressed or implied by the Mortgagor and on its part to be observed and performed shall not have been performed and observed then in any such case the obligation of the Mortgagees to make or continue such advances as aforesaid shall cease PROVIDED ALSO and it is hereby further agreed that this security shall

50 extend to all such sums which may be advanced by the Mortgagees to or for the Mortgagor although the obligation to make or continue such advances may have ceased PROVIDED NEVERTHELESS AND IT IS HEREBY

Exhibits

Plaintiff's Exhibits

A
Second Building Mortgage for Certain sums not exceeding in the aggregate \$1,200,000 and interest 16th November ~~1969~~ 1964
continued.

Exhibits
 —
Plaintiff's Exhibits
 —
 A
 Second Building Mortgage for Certain sums not exceeding in the aggregate \$1,200,000 and interest 16th November ~~1964~~ 1964
continued.

AGREED AND DECLARED that notwithstanding anything to the contrary hereinbefore contained it shall be competent for the Mortgagor to pay off the principal at any time before the date of repayment but after the issue of the said Occupation Permit upon the Mortgagor paying to the Mortgagees the Principal and all interest due on the principal if any calculated up to the date of actual repayment IN WITNESS whereof the said parties to these presents have caused their respective Common Seals to be hereunto affixed the day and year first above written.

THE FIRST SCHEDULE ABOVE REFERRED TO

ALL THAT piece or parcel of ground situate lying and being at **10** Kowloon in the Colony of Hong Kong and known and registered in the Land Office as SECTION A OF KOWLOON INLAND LOT No. 1571 TOGETHER with the messuages or tenements erections and buildings now or hereafter to be erected thereon HELD from the Crown for all the residue now to come and unexpired of the term of 75 years from the 14th day of March 1923 with a right of renewal for one further term of 75 years created by an Indenture of Crown Lease of the whole of Kowloon Inland Lot No.1571 dated the 2nd day of February 1931 and made between His late Majesty King George V of the one part and The Ho Mun Tin Land Investment Company Limited of the other part Subject to a Building Mortgage to secure an advance and **20** further advances to a total extent of \$5,000,000.00 dated the 18th day of January 1964 Memorial No.427089 and a Further Charge to secure further advances to the further extent of \$1,500,000.00 dated the 30th day of October 1964 and registered in the Land Office by Memorial No. 464924.

THE SECOND SCHEDULE ABOVE REFERRED TO

1st Payment	Upon production of the certificate of Eric Cumine the architects that R.C.C. structure up to mezz. floor has been completed	\$170,000.00	
2nd Payment	Upon production of the certificate of Eric Cumine the architects that R.C.C. structure up to First Floor has been completed	\$170,000.00	30
3rd Payment	Upon production of the certificate of Eric Cumine the architects that R.C.C. structure up to Second Floor has been completed	\$170,000.00	
4th Payment	Upon production of the certificate of Eric Cumine the architects that R.C.C. structure up to Third Floor has been completed	\$170,000.00	
5th Payment	Upon production of the certificate of Eric Cumine the architects that R.C.C. structure up to Fourth Floor has been completed	\$170,000.00	40
6th Payment	Upon production of the certificate of Eric Cumine the architects that R.C.C. structure up to Fifth Floor has been completed	\$150,000.00	

	7th Payment	Upon production of the certificate of Eric Cumine the architects that R.C.C. structure up to Sixth Floor has been completed	\$150,000.00	<i>Exhibits</i> <hr/> <i>Plaintiff's Exhibits</i> <hr/>
	8th Payment	Upon production of the certificate of Eric Cumine the architects that R.C.C. structure up to Seventh Floor has been completed	\$150,000.00	A Second Building Mortgage for Certain sums not exceeding in the aggregate \$1,200,000 and interest 16th November 1969 1964 <i>continued.</i>
	9th Payment	Upon production of the certificate of Eric Cumine the architects that R.C.C. structure up to Eighth Floor has been completed	\$150,000.00	
10	10th Payment	Upon production of the certificate of Eric Cumine the architects that R.C.C. structure up to Ninth Floor has been completed	\$150,000.00	
	11th Payment	Upon production of the certificate of Eric Cumine the architects that R.C.C. structure up to Tenth Floor has been completed	\$150,000.00	
	12th Payment	Upon production of the certificate of Eric Cumine the architects that R.C.C. structure up to Eleventh Floor has been completed	\$150,000.00	
20	13th Payment	Upon production of the certificate of Eric Cumine the architects that R.C.C. structure up to Twelfth Floor has been completed	\$150,000.00	
	14th Payment	Upon production of the certificate of Eric Cumine the architects that R.C.C. structure up to Thirteenth Floor has been completed	\$150,000.00	
	15th Payment	Upon production of the certificate of Eric Cumine the architects that R.C.C. structure up to Fourteenth Floor has been completed	\$150,000.00	
30	16th Payment	Upon production of the certificate of Eric Cumine the architects that R.C.C. structure up to Fifteenth Floor has been completed	\$142,500.00	
	17th Payment	Upon production of the certificate of Eric Cumine the architects that R.C.C. structure up to the Roof has been completed	\$130,000.00	
	18th Payment	Upon production of the certificate of the said Architect that the Brick work has been completed from 1st to 6th floors	\$50,000.00	
	19th Payment	Upon production of the certificate of the said Architect that the Brick work has been completed from 7th to 11th floors	\$50,000.00	

<i>Exhibits</i>	20th Payment	Upon production of the certificate of the said Architect that the Brick work has been completed from 12th to top floors	\$50,000.00	
<i>Plaintiff's Exhibits</i>				
A	21st Payment	Upon production of the certificate of the said Architect that the Steel windows have been fixed from 2nd to 8th floors	\$70,000.00	
Second Building Mortgage for Certain sums not exceeding in the aggregate \$1,200,000 and interest 16th November 1963 1964 <i>continued.</i>	22nd Payment	Upon production of the certificate of the said Architect that the Steel windows have been fixed from 9th to top floors	\$70,000.00	
	23rd Payment	Upon production of the certificate of the said Architect that the Internal wall plaster has been half completed	\$60,000.00	10
	24th Payment	Upon production of the certificate of the said Architect that the Internal wall plaster has been all completed	\$60,000.00	
	25th Payment	Upon production of the certificate of the said Architect that the External wall plaster has been half completed	\$50,000.00	
	26th Payment	Upon production of the certificate of the said Architect that the External wall plaster has been all completed	\$50,000.00	20
	27th Payment	Upon production of the certificate of the said Architect that the mosaic tiles & glazed tile has reached the site	\$70,000.00	
	28th Payment	Upon production of the certificate of the said Architect that the completion of floor tiles and wall tiles has taken place	\$40,000.00	
	29th Payment	Upon production of the certificate of the said Architect that all wooden doors have reached the site	\$100,000.00	30
	30th Payment	Upon production of the certificate of the said Architect that all wooden doors have been fixed	\$40,000.00	
	31st Payment	Upon production of the certificate of the said Architect that half completion of floor rendering and stair rendering	\$60,000.00	
	32nd Payment	Upon production of the certificate of the said Architect that all floor rendering and stair rendering complete	\$50,000.00	
	33rd Payment	Upon production of the certificate of the said		

	Architect that all metal works have reached the site	\$40,000.00	<i>Exhibits</i>
34th Payment	Upon production of the certificate of the said Architect that all metal works required has fixed	\$30,000.00	<i>Plaintiff's Exhibits</i>
35th Payment	Upon production of the certificate of the said Architect that all glass required has reached the site	\$30,000.00	A Second Building Mortgage for Certain sums not exceeding in the aggregate \$1,200,000 and interest
10 36th Payment	Upon production of the certificate of the said Architect that sanitary fittings have reached the site	\$70,000.00	16th November 1964 1964
37th Payment	Upon production of the certificate of the said Architect that all sanitary fittings fixed	\$30,000.00	<i>continued.</i>
38th Payment	Upon production of the certificate of the said Architect that the Roofing works and cement tiles laid	\$40,000.00	
39th Payment	Upon production of the certificate of the said Architect that the painting works completed	\$50,000.00	
20 40th Payment	Upon application by the said Architect for Occupation Permit.	\$50,000.00	
41st Payment	Upon issue of the Final Occupation Permit	\$667,500.00	
	Total:	<u>\$4,500,000.00</u>	

THE THIRD SCHEDULE ABOVE REFERRED TO

	Time for advance calculated from date of Further Charge	Advances under Building Mortgage	Advances under Further Charge	TOTAL
	Within 3 months	HK\$ 85,000.00	HK\$ 50,000.00	HK\$135,000.00
	Within 4 months	HK\$195,000.00	HK\$100,000.00	HK\$295,000.00
	Within 5 months	HK\$235,000.00	HK\$100,000.00	HK\$335,000.00
30	Within 6 months	HK\$205,000.00	HK\$100,000.00	HK\$305,000.00
	Within 7 months	HK\$255,000.00	HK\$100,000.00	HK\$355,000.00
	Within 8 months	HK\$235,000.00	HK\$120,000.00	HK\$355,000.00
	Within 9 months	HK\$280,000.00	HK\$120,000.00	HK\$400,000.00
	Within 10 months	HK\$240,000.00	HK\$120,000.00	HK\$360,000.00
	Within 11 months	HK\$ 70,000.00	HK\$190,000.00	HK\$260,000.00

Exhibits Within 12 months HK\$500,000.00 HK\$500,000.00

Plaintiff's Exhibits HK\$1,800,000.00 HK\$1,500,000.00 HK\$3,300,000.00

A
Second
Building
Mortgage
for Certain
sums not
exceeding
in the
aggregate
\$1,200,000
and interest
16th
November
~~1964~~ 1964
continued.

Chopped with the Chop of the Contractors
and SIGNED by Koo Ling Sun)
DEFAG CONSTRUCTION CO.
(Sgd.) **L. S. Koo**
Manager
for and on behalf of the Contractors
in the presence of:—)

(Sgd.) (Illegible)
Solicitor,
Hong Kong.

10

Sealed with the Common Seal of the Mortgagors and
SIGNED by Bo Hing Chan, Permanent Directors) (Sgd.) **Bo Hing Chan**
and Charles Chum Yuan Cheng director and) (Sgd.) **Charles Chum**
Secretary hereof in the presence of:—) **Yuan Cheng**

(Sgd.) (Illegible)
Solicitor,
Hong Kong.

SIGNED SEALED AND DELIVERED by the)
Mortgagees in the presence of:—) (Sgd.) **L. S. Koo** 20

(Sgd.) (Illegible)
Solicitor,
Hong Kong.

INTERPRETED to the Mortgagor by:—

Interpreter to Messrs. Johnson, Stokes & Master,
Solicitors, &c., Hong Kong.

INTERPRETED to the Contractors and the)
Mortgagees by:—)

(Sgd.) (Illegible)
Interpreter to Messrs. Hastings & Co.,
Solicitors, &c., Hong Kong.

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Plaintiff's Exhibit B—Articles of Agreement dated 27th October 1964.*Exhibits*

ARTICLES OF AGREEMENT made the 27th day of October 1964 between Messrs. Tak Ming Company Limited of No.1, Arran Street, Kowloon, Hong Kong (hereinafter called "The Employer") of the one part and Mr. L. S. Koo carrying on business in Hong Kong as Defag Construction Co., of No.116, Argyle Street, 9th Floor A, Kowloon, Hong Kong (hereinafter called "the Contractor") of the other part.

*Plaintiff's Exhibits***B**

Articles of Agreement dated 27th October 1964

Whereas the Employer is desirous of the construction and maintenance of a building comprising Shops and a School including ancillary works thereto. **10** (hereinafter called "the Works") at Lot No. K.I.L. 1571 S.A. fronting Nelson Street, Kowloon, Hong Kong and has caused Drawings and Specification showing and describing the work to be done to be prepared by or under the direction of the Architect And Whereas the said Drawings numbered A1 to A12; A13A; A13-A19; A1DA19D; AD1-AD39; D1-D6; ST1-ST73 inclusive (hereinafter referred to as "the Contract Drawings"), and the said Specification have been signed by or on behalf of the parties hereto: And Whereas the Contractor has made an estimate of the sum which he will require for carrying out the said work:

Now it is hereby agreed as follows:

- 20** 1. For the consideration hereinafter mentioned the Contractor will upon and subject to the Conditions annexed hereto execute and complete the Works shown upon the Contract Drawings and described by or referred to in the said Specification and Conditions.
2. The Employer will pay to the Contractor the sum of Hong Kong Dollars Four Million Six hundred and Ninety Two Thousand Only. (\$4,692,000.00) (hereinafter referred to as "the Contract Sum") or such other sum as shall become payable hereunder at the times and in the manner specified in the said Conditions.
- 30** 3. The term "the Contractor" in the said Conditions shall mean the person or persons contracting for the works specified including his or their executors and administrators.
4. The term "the Architect" in the said Conditions shall mean Mr. Eric Cumine, F.R.I.B.A. of 14 Embassy Court, Hysan Avenue, Hong Kong, or in the event of his being temporarily unable to act due to absence or illness, one of the authorised architects employed by him in his practice as an architect. In the event of Mr. Cumine's death or of his ceasing to be the Architect for the purpose of this Contract, such other person as shall be nominated for that purpose by the Employer, not being a person to whom the Contractor shall object for reasons considered to be sufficient **40** by the Arbitrator mentioned in the said Conditions. Provided always that no person subsequently appointed to be Architect under this Contract shall be entitled to disregard or overrule any decision or approval or direction given or expressed by the Architect for the time being.
5. The term "the Surveyor" in the said Conditions shall mean the person

Exhibits
Plaintiff's
Exhibits

from time to time nominated for that purpose by the Employer or the Architect on his behalf.

As witness our hands the day and year first above written.

B
Articles of
Agreement
dated 27th
October
1964
continued.

Signed by the said
(*Sgd.*) (illegible)

Signed by the said
DEFAG CONTRUCTION CO.

(*Sgd.*) **L. S. Koo**
Mauager

Employer

Contractor

in the presence of:—

in the presence of:—

Name (*Sgd.*) (illegible)

Name (*Sgd.*) (illegible)

10

Witness

Witness

Address: 1 Arran St.,
Kowloon.

Address: 14 Embassy Court,
Hong Kong.

Occupation: Prefect of Studies

Occupation: Quantity Surveyor



Plaintiff's Exhibit B—Appendix to Contract Documents for the construction and maintenance of Tak Ming Middle School.

Exhibits
Plaintiff's
Exhibits

B
Appendix
to Contract
Documents
for the construction
and maintenance of
Tak Ming
Middle
School.

A P P E N D I X

Clause.

	Period of Final Measurement (if none other stated is 3 months from the practical completion of the Works).	10	Six months
10	Defects Liability Period (if none other stated is 6 months from the practical completion of the Works).	13 and 27(f)
	Date for Possession.	17	1st November, 1964.
	Date for Completion. (See Clause 43) Bonus.	17
	Rate of Bonus.	43	at the rate of \$3,000.00 per day.
	Rate of Agreed Damages.	43	at the rate of \$3,000.00 per day.
	Period of Interim Certificates.	27(a)	As per Schedule attached.
	Period of Honouring of Certificates.	27(a)	Five days.
20	Percentage of Certified Value Retained.	27(c)	Twenty Five per cent.
	Limit of Retention Fund.	27(c)	Twenty Five per cent.
	* Deposit by Contractor.	36.	\$100,000.00.
		37.	\$- -
	* Delete as necessary.		
	Signed by the said		Signed by the said
			DEFAG CONSTRUCTION CO.
	(Sgd.) (illegible)		(Sgd.) L. S. Koo

Exhibits

In the presence of:—

In the presence of:—

*Plaintiff's Exhibits*Name: (*Sgd.*) (Illegible)Name: (*Sgd.*) (Illegible)

B

Address: 1 Arran St.,

Address: 14 Embassy Court,

Appendix
to Contract
Documents
for the construction
and maintenance of
Tak Ming
Middle
School.
continued.

Kowloon.

Hong Kong.

Occupation: Prefect of Studies

Occupation: Quantity Surveyor

**Terms of Payment for Construction
of Tak Ming Middle School**

Construction of R.C.C. pile caps about HK\$700,000.00 no payment is required.

1st Payment	Upon completion of R.C.C. structure up to Mezz. floor level.	\$170,000.00 10
2nd Payment	Upon completion of R.C.C. structure up to 1st floor level.	170,000.00
3rd Payment	Upon completion of R.C.C. structure up to 2nd floor level.	170,000.00
4th Payment	Upon completion of R.C.C. structure up to 3rd floor level.	170,000.00
5th Payment	Upon completion of R.C.C. structure up to 4th floor level.	170,000.00
6th Payment	Upon completion of R.C.C. structure up to 5th floor level.	150,000.00 20
7th Payment	Upon completion of R.C.C. structure up to 6th floor level.	150,000.00
8th Payment	Upon completion of R.C.C. structure up to 7th floor level.	150,000.00
9th Payment	Upon completion of R.C.C. structure up to 8th floor level.	150,000.00
10th Payment	Upon completion of R.C.C. structure up to 9th floor level.	150,000.00
11th Payment	Upon completion of R.C.C. structure up to 10th floor level.	150,000.00 30
12th Payment	Upon completion of R.C.C. structure up to 11th floor level.	150,000.00
13th Payment	Upon completion of R.C.C. structure up to 12th floor level.	150,000.00

14th Payment	Upon completion of R.C.C. structure up to 13th floor level.	150,000.00	<i>Exhibits</i> —
15th Payment	Upon completion of R.C.C. structure up to 14th floor level.	150,000.00	
16th Payment	Upon completion of R.C.C. structure up to 15th floor level.	142,500.00	B
17th Payment	Upon completion of R.C.C. structure up to roof level.	130,000.00	Appendix to Contract Documents for the construction and maintenance of Tak Ming Middle School.
18th Payment	Brick work complete from 1st to 6th floor.	50,000.00	<i>continued.</i>
10 19th Payment	Brick work complete from 7th to 11th floor	50,000.00	
20th Payment	Brick work complete from 12 to top floor.	50,000.00	
21st Payment	Steel window fixed from 2nd to 8th floor.	70,000.00	
22nd Payment	Steel windows fixed from 9 to top floor.	70,000.00	
23rd Payment	Internal wall plaster half complete	60,000.00	
24th Payment	Internal wall plaster all complete	60,000.00	
25th Payment	External wall plaster half complete	50,000.00	
26th Payment	External wall plaster all complete	50,000.00	
27th Payment	Upon mosaic tiles and glazed tile reach the site.	70,000.00	
28th Payment	Upon completion of floor tiles and wall tiles.	40,000.00	
20 29th Payment	Upon all wooden doors reach the site.	100,000.00	
30th Payment	All wooden doors fixed.	40,000.00	
31st Payment	Half completion of floor rendering and stair rendering.	60,000.00	
32nd Payment	All floor rendering and stair rendering completed	50,000.00	
33rd Payment	All metal work reach the site.	40,000.00	
34th Payment	All metal works fixed.	30,000.00	
35th Payment	All glass reach the site.	30,000.00	
36th Payment	Sanitary fittings reach the site.	70,000.00	
37th Payment	All sanitary fittings fixed.	30,000.00	

<i>Exhibits</i>	38th Payment	Roofing works and cement tiles laid.	40,000.00
<i>Plaintiff's Exhibits</i>	39th Payment	Painting works completed.	50,000.00
B	40th Payment	Apply for occupation permit.	50,000.00
Appendix to Contract Documents for the construction and maintenance of Tak Ming Middle School. <i>continued.</i>	41st Payment	Occupation permit issued.	667,500.00
		Total:	<u>HK\$4,500,000.00</u>

Payment to be made 75% from the above mentioned each time and the balance of 25% to be paid within 30 days from the date of occupation permit is issued.

DEFAG CONSTRUCTION CO.

(Sgd.) L. S. Koo 10
 Manager



Plaintiff's Exhibit B—Addendum to Contract No.574 dated 27th October 1964.

Exhibits

Plaintiff's Exhibits

ADDENDUM TO CONTRACT NO. 574 dated the 27th October 1964, made between Messrs. Tak Ming Company Limited of No. 1 Arran Street, Kowloon, Hong Kong (hereinafter called "The Employers") of the one part of Mr. L. S. Koo trading as Defag Construction Company of No. 116 Argyle Street, 9th Floor A Kowloon (hereinafter called "The Contractor") of the other part for the construction and maintenance of a building comprising Shops and a School including ancillary works thereto at Lot No. K.I.L. 1571 S.A. fronting Nelson Street, Kowloon, Hong Kong.

B
Addendum
to Contract
No. 574
dated
27th
October
1964

NOW IT IS HEREBY AGREED AS FOLLOWS:—

1. That the Contractor hereby waives his rights under Clause 22 of the aforesaid Contract to determine the said Contract and agrees to resume work on the construction of the said building, forthwith.
2. The Employers will honour the outstanding Certificates issued by the Architect for the Contract, namely, Mr. Eric Cumine, F.R.I.B.A. subject to clarification being received by the Employer or his Solicitors as to the position of Wong Tai & Company and subject also to the usual payments being made to Yee Sang Metal Supplies Company and Pioneer Concrete (Hong Kong) Limited in manner already agreed.
3. The Employers will within 7 days from the date of receiving future Architect's Certificates, properly issued by the said Architect pay to the Contractor all such sums as are shown to be due and owing to the Contractor.
4. The Contractor will complete the outstanding work under the aforesaid Contract in two stages, namely:—

Stage 1.

The Contractor will within fifty days of the signing of this Addendum so complete the first to eighth floors (inclusive) and also the transformer room on the ground floor of the said building exclusive of the transformer and electrical installations so as to enable the Architect as soon as the transformer and electrical equipment have been installed to apply on the Employers' behalf to the Building Authority for a Temporary Occupation Permit in respect of the first to eighth floors inclusive.

Stage 2.

The Contractor will so complete the remainder of the building works under the aforesaid contract within one hundred days of the signing of this Addendum as to enable the said Architect to apply forthwith on the Employers behalf to the Building Authority for a Temporary Occupation Permit in respect of the whole of the building.

Exhibits
—
Plaintiff's
Exhibits

B

Addendum
to Contract
No. 574
dated
27th
October
1964
continued

- 5. The Contractor will submit a Work Schedule to the Architect within three (3) days of the signing of this Addendum and will carry out the work expeditiously in accordance therewith.
- 6. In the event of the Contractor failing to complete the Contract within 100 days of the date hereof then the Contractor hereby agrees to pay to the Employers as liquidated damages the sum of \$540,000.00 together with an additional \$3,000.00 for each day that the Contract remains uncompleted. The aforesaid sum of \$540,000.00 represents the liquidated damages payable by the Contractor to the Employers under the aforesaid Building Contract as at the 16th May 1966.
- 7. Save in so far as the aforesaid contract dated the 27th October 1964 is hereby varied all the other terms and conditions of the aforesaid contract shall remain unaltered and the Employers and the Contractor hereby expressly agree to be bound thereby.

10

Dated the 12th day of June, 1966.

(Sgd.) **L. S. Koo**

(Sgd.) **(Illegible)**

Contractor

Employers

Witness (Sgd.) **(Illegible)**

Witness (Sgd.) **(Illegible)**

Address Lee Gardens, Hysan Court
Hong Kong

Address Lee Gardens
Hong Kong

20



Plaintiff's Exhibit C—Bundle of agreed Correspondence, Letters from Yee Sang Metal Supplies Co. to Tak Ming Company, Limited; Letters from Tak Ming Company, Limited to Yee Sang Metal Supplies, etc.

Exhibits
—
Plaintiff's
Exhibits

(C O P Y)

Hong Kong 24th October, 1964.

Messrs. Defag Construction Co.,
116, Argyle Street,
9th Floor, A,
KOWLOON.

C
Bundle of
agreed
Corres-
pondence,
Letters etc.

10 Dear Sirs,

Re: Section A of K.I.L. No. 1571.

With reference to our previous discussions we would hereby confirm that in further consideration of our entering into the Building Contract with you under which you will erect our proposed new buildings on the above property you will (in addition to the sums to be advanced or to remain outstanding under the Second Building Mortgage) advance to us when required by us sums totalling \$500,000.00 by way of unsecured loans for the purchase of the lifts, electrical installations, other equipment and apparatus for the new buildings and any extra work ordered in or about the new buildings

20 payment for which extra work should under the Building Agreement be made on the issue of the said occupation permit. In addition to the said advance if you complete the new buildings within the time limited by the Building Agreement but only in that event we shall become liable to pay you a bonus of \$60,000.00. You shall advance the said sum of \$60,000.00 to us in addition to the sum of \$500,000.00. The said sum of \$500,000 and \$60,000 or any part thereof not advanced by way of your obtaining credit for us or permitting us to remain indebted to you as the case may be for the purchase of such lifts, electrical installations, equipment and apparatus as aforesaid and such extra work and bonus as aforesaid such credits to be co-extensive with the period

30 of and on terms no more disadvantageous than the loan as hereinafter mentioned including the option hereinafter mentioned. The loan or outstanding credits aforesaid shall be repaid or redeemed on the expiration of one month from the date of the issue of the final occupation permit in respect of the said new buildings or at our option may remain outstanding thereafter for no more than 6 calendar months but in this event

(a) We shall reduce such loan or outstanding credits by payment of instalments of \$100,000 per calendar month, the first of such instalments to be paid at the expiry of two months from the date of the final occupation permit in respect of the said new buildings and

40

(b) We shall pay interest on the said loan or credits or such part or parts thereof from time to time outstanding from the expiry of the said one month period at the rate of 1.5 per cent per calendar month payable at the end of the month in question to which such payment of interest relates.

Exhibits
 Plaintiff's
Exhibits
 C
 Bundle of
 agreed
 Corres-
 pondence
 Letters etc.
continued.

If we should fall down in paying any instalment or interest as aforesaid then the whole loan or the balance thereof remaining unpaid and the balance of any such credits shall fall immediately due and payable and you may require us thereafter to charge the same upon the above premises and to execute a mortgage to secure repayment of the same at the same time as the sums secured by the above-mentioned Second Building Mortgage.

We should be obliged if you would kindly confirm the above agreement by countersigning the carbon copy of this letter.

Agreed and confirmed
 the above by:-
 DEFAG CONSTRUCTION CO.,

(Sgd.) L. S. Koo
 Manager

Yours faithfully,

TAK MING CO., LTD.

(Sgd.) (Illegible)
 Director

10

(C O P Y)

20th January 1965.

Messrs. Tak Ming Co., Ltd.
 1, Arran Street,
 Kowloon.

Dear Sirs,

20

**Re: Tak Ming Middle School
 at K.I.L. 1571, S.A.**

We are pleased to inform you that an agreement was made between Messrs. Yee Sang Metal Supplies Co. of Room 625, Man Yee Building, Hong Kong and ourselves to do the metal works, we shall be grateful, if you will kindly release our deposit of HK\$100,000.00 to the said Yee Sang Metal Supplies Co. in stead to us upon completion of the foundation works.

Please consider our request as irrevocable and your payment to the said firm as good as to ourselves without any claim or whatsoever from our part in the future.

30

We should be obliged, if you would confirm the above to Messrs. Yee Sang Metal Supplies Co. at your earliest convenience.

Yours sincerely,
 DEFAG CONSTRUCTION CO.
 (Sgd.) L. S. Koo
 Manager

(TRANSLATION)

Room 62 Man Yee Building,
60-68 Des Voeux Road, C.
Hong Kong.
Tel. 22598

YEE SANG METAL SUPPLIES CO.

CONTRACT FOR REINFORCEMENT WORK*Exhibits**Plaintiff's
Exhibits*

C

Bundle of
agreed
Corres-
pondence,
Letters etc.

No. 65/01

The makers of the Contracts:

- 10** Contract Assignor: Defag Construction Company (hereinafter referred to as 'Party A')
- Contractor: Yee Sang Metal Supplies Company (hereinafter referred to as 'Party B')

It is hereby agreed by both parties to enter into the following terms:

SITE: Party B contracts from Party A (to carry out) all reinforcement work, including (the supply of) material and labour, at the site situate at new Tak Ming Middle School, K.I.L. 1571 S.A. Kowloon.

- 20** **WORK:** To be completed according to the sizes and standards specified in the iron (structural) plans prepared by Eric Cumine, Architects and approved by the Public Works Department subject to the final approval and satisfaction of the architects and of the Public Works Department.

MATERIALS: In accordance with the plans, only BSS 785 and "Decon-40" high tensile new steel bars are to be used; used iron bars or welded iron bars shall not be used.

METHOD OF WEIGHT CALCULATION: The weight shall be calculated according to the scales of the plans.

PRICE: For each 100 "sze" catties of materials, including labour, Party A shall pay HK\$48.00 for BSS 785 mild steel round bars (and) HK\$55.00 for "Dacon-40" high tensile steel round bars.

- 30** **METHOD OF PAYMENT:** HK\$100,000.00 shall be paid forthwith on completion of the fixing work in respect of the foundation blocks and foundation beams.

HK\$50,000.00 shall be paid forthwith on completion of the reinforcement fixing work to the floor slab of each floor from the mezzanine floor to the 9th floor, entailing a total of 10 separate payments.

From the 10th floor to the slab of the roof, 10 separate payments of HK\$45,000.00 each shall be made. (Each payment is to be made in accordance with Party 'A's payment dates).

Exhibits
 Plaintiff's
 Exhibits

All money for materials and labour shall be fully paid up within 20 days after the completion of the reinforcement fixing work of stairways and water tanks, i.e., (within 20 days) after the completion of all reinforcement fixing work.

C
 Bundle of
 agreed
 Corres-
 pondence,
 Letters etc.
continued.

All the above payments other than that for the foundations which is to be paid by Party A, are to be paid direct by Messrs. Johnson, Stokes & Master, Solicitors.

ADDITIONAL CLAUSE: Time limit for reinforcement fixing work: the columns for each (floor) to be completed within 2 days; the floor slab of the mezzanine floor to be completed within 4 days; each floor slab of the 1st and 2nd floors to be completed within 3 days; each floor slab of the 3rd floor to the roof to be completed within 2 days. Only rainless days are to be counted. Time spent on moving the steel (bars) to the upper floors is not to be included. **10**

In the event of any night work being involved, Party A shall reimburse (Party B for) half of the wages (paid) at the rate of HK\$20.00 per work-day.

Party A shall compensate (Party B) for any losses in the event of alterations to the plans.

TERMS AND CONDITIONS:

1. All workers employed by Party B shall follow the directoins given by Party A's Work supervisors. If Party A discovers that workers employed by Party B are unsuitable, Party A may, at any time, order Party B to dismiss (the said workers), and to employ new workers, the employment of the new workers shall be dealt with by Party B. **20**

2. When Party A makes payment to Party B at the due times, Party B shall supply the materials at the appropriate time, and workers employed by Party B shall not stop working without any reasonable cause, nor leave the job or be intentionally negligent. In the event of any such occurrence; Party B shall take immediate steps to adjust matteis; otherwise Party A has the right to claim compensation for all losses suffered therefrom.

3. When each stage of work has been completed by Party B, Party A must make prompt payment to Party B. If Party A fails to make the payment punctually, Party B shall have the right to stop the work and also have the right to claim compensation from Party A for materials and labour and all other losses (suffered). **30**

4. Party A shall be responsible for the labour insurance of the workers, but Party B's workers shall work with great care in order to avoid unpleasant events.

5. Party A shall supply Party B's workers with space for them to carry on the bending of the steel (bars).

6. This Agreement is made in duplicate and shall take effect from the date on which it is signed by both parties. **40**

Witness (Blank)

Party A: Contract Assignor (Chopped) Defag Construction Co.

(Signed) **L. S. Koo**

Manager

Party B: Contractor:

(Chopped) Yee Sang Metal Supplies Co.

(Signed) **Yu Tak Yee**

Manager

Exhibits

Plaintiff's Exhibits

C

Bundle of
agreed
Corres-
pondence,
Letters etc.
continued.

Made on the 20th day of January, 1965.

立合約人 出判人：大發營造廠（以下簡稱甲方）
 承判人：義生五金材料公司（以下簡稱乙方） 茲經雙方同意訂立下列各項

地 盤：乙方承判甲方位於九龍 K.I.L.1571.S.A. 新德明中學校地盤內全部元鐵紮鐵工程連工包料

工 程：根據 ERIC CUMINE 則師所繪及工務局批准之鐵則其長短度數悉照圖則之標準做妥
 以交准則師及工務局驗妥為準

用 料：依照圖則全部用 B.S.S. 785 及 "DAICON-40" 高拉力新元鐵枝不能用舊鐵或以火連駁之元
 鐵。

重量計算：依照圖則比例尺寸計算重量。

價 格：連工包料甲方願支付每壹佰司斤工料銀港幣 肆拾捌元正，（B.S.S. 785 元鐵）
 伍拾伍元正，（"DAICON-40" 高拉力元鐵）

糧款 支付：紮妥地脚花籃地脚陣即支付港幣壹拾萬元正。

由擱樓起至拾樓共分拾次每次紮妥樓面壹層支付港幣伍萬元正。
 由拾壹樓起至天台面共分拾次每次支付港幣肆萬伍仟元正。（每次根據甲方出糧時間
 支付）

紮妥扶梯，水缸，等即全部鋼筋紮妥，完工後式拾天內全部工薪銀付清。

上列糧款除地脚糧款由甲方支付外，其餘俱由贊臣史篤士及孖士打律師行直接支付。

附 則：紮鉄期間每層柱以不超過兩天內紮妥，擱樓樓面限肆天紮妥，式機及叁樓樓面每層限
 叁天紮妥，肆樓至天台樓面每層限兩天紮妥，俱晴天計，起鉄上樓時間不在內。
 如開夜工由甲方補償一半工資照工數計，訂定每工港幣貳拾元算。
 如有修改圖則概由甲方補償損失。

條 件：（一）乙方所用工友應服從甲方工程管理人監督指導如甲方發覺乙方所用之工人有不適合之處甲方得隨時着令
 乙方停止僱用另招新人工作而僱用新人由乙方處理。

（二）甲方依期出糧與乙方時乙方必須依約供給進行而乙方之工友不得無故停工及故意或有意歇息等情事倘有
 上述情事發生乙方須速進行改善否則甲方有權向乙方要求賠償一切損失。

（三）乙方每完成一期工程時甲方必須依期將糧款支付與乙方如甲方不依期將糧款支付與乙方時乙方有權停工
 且乙方有權向甲方要求賠償鐵料人工及其他一切損失。

（四）勞工保險由甲方負責但乙方工友亦宜小心工作免生不愉快事情。

（五）甲方應供給場地俾乙方開工屈鐵之用。

（六）本合約壹式兩份自雙方簽訂之日起發生効力。

出判人（甲方）

簽署

DEFAG CONSTRUCTION CO.

L. S. Koo

Manager

YEE SANG METAL SUPPLIES CO.

承判人（乙方） 余德義 簽署

壹九六五年一月式拾日訂立

見証人

Manager

(C O P Y)

*Exhibits**Plaintiff's
Exhibits*

Hong Kong 20th January, 1965.

C
Bundle of
agreed
Corres-
pondence,
Letters etc.
continued.

Messrs. Yee Sang Metal Supplies Co.,
Room 625, Man Yee Building,
Des Voeux Road, Central,
Hong Kong.

Dear Sirs,

**Re: Tak Ming Middle School at
K.I.L. 1571, S.A. 76, Sai Yee Street, Kowloon.**

At the request of our contractor, Messrs. Defag Construction Co. 10 of 116, Argyle Street, 9th Floor A, Kowloon, we wish to confirm to you that the deposit of HK\$100,000.00 made to us by the said contractor in accordance with the building contract No.574 signed before the architect, Mr. Eric Cumine between the said contractor and ourselves will be released to your goodselves upon the completion of the whole foundation works certified by the architect.

Yours sincerely,

TAK MING CO. LTD. H.K.

(Sgd.) (Illegible)
Director.

(C O P Y)

20

CY/sl

Hong Kong 21st January, 1965.

Henry Y. T. Fok, Esq.,
Henry Fok Estates Ltd.,
Room 1806,
Hang Sang Bank Building,
Des Voeux Road, Central,
Hong Kong.

ENCLOSURE NO. 1

Dear Sir,

**Re: Mortgage and further charge of K.I.L. 1571,
S.A. at 76, Sai Yee Street, Kowloon.**

30

In view of the financial difficulties encountered by our contractor, Messrs. Defag Construction Co. and of the complete stop of works on the site, we wish to solicit hereby your assistance and kind approval on the revision of the schedule of advances fixed in the further charge as follows:

Time for payment	Rate 1.2%	Rate 1.5%	Total
On completion of foundation works	\$250,000.00		\$250,000.00
Within 3 months	\$ 85,000.00	\$ 50,000.00	\$135,000.00

Within 4 months	\$195,000.00	\$100,000.00	\$295,000.00	<i>Exhibits</i>
Within 5 months	\$235,000.00	\$100,000.00	\$335,000.00	<i>Plaintiff's Exhibits</i>
Within 6 months	\$205,000.00	\$100,000.00	\$305,000.00	
Within 7 months	\$255,000.00	\$100,000.00	\$355,000.00	C
Within 8 months	\$235,000.00	\$120,000.00	\$355,000.00	Bundle of
Within 9 months	\$280,000.00	\$120,000.00	\$400,000.00	agreed
Within 10 months	\$ 60,000.00	\$300,000.00	\$360,000.00	Corres-
				pondence,
				Letters etc.
				<i>continued.</i>
	(\$240,000.00)	(\$120,000.00)		
Within 11 months		\$260,000.00	\$260,000.00	
10	(\$ 70,000.00)	(\$190,000.00)		
		\$250,000.00	\$250,000.00	
	<u>\$1,800,000.00</u>	<u>\$1,500,000.00</u>	<u>\$3,300,000.00</u>	

Under the present circumstances, the said contractor is unable to obtain the necessary finance to commence the foundation works unless they will be paid an advance of \$250,000.00 on completion of the footings. As a matter of fact, the whole foundation works cost over HK\$700,000.00 in the building contract and the advance of HK\$250,000.00 will probably still hold quite some retention money from the contractor, a fortiori, it will help us to overcome the deadlock of the present situation. Since it has always been your aim to help us to complete the proposed school building, in the meantime we have already paid the interest on the sums although they are not yet advanced according to the original mortgage deed, we deeply believe that you will probably see your way to assist us once again in granting our request.

Thanking you in anticipation for your kind assistance,

Yours very sincerely,

TAK MING CO., LTD. H.K.

(Sgd.) (Illegible) Director

c.c. Mr. Lai On.
CY/sl.

逕啓者 敝公司 承判大發營造廠建築九龍新德明中學校地盤全部紫鉄工程，連工包料，已於一九六五年壹月貳拾日簽訂合約，該地盤內所有高拉力鉄及元鉄料概由 敝公司 負責供應及依照圖則紮安，茲恐大發營造廠在該地盤建築期內中途放棄而為 貴業主將地盤收回另招別商承建時 敝公司 之紫鉄工程權益得到保障起見，敢請 貴業主修具保證書，保證將來如因大發營造廠中途放棄而由別商承建時，敝公司 與大發營造廠簽訂之紫鉄工程合約仍屬有效，至於紫鉄工料銀亦由 貴業主負責依期在承建商工程費項內撥出支付與 敝公司 收，冒昧之處，統祈賜諒，此致

鄭潤才先生台鑒

余德義 啟

一九六五年貳月伍日

(TRANSLATION)
Yee Sang Metal Supplies Co.
Hong Kong

Room 625 Man Yee Building,
60-68 Des Voeux Road, C.
HONG KONG
Tel. 22598
23914
35961

Exhibits
—
Plaintiff's
Exhibits
—
C
Bundle of
agreed
Corres-
pondence
Letters etc.
continued.

10 Dear Sir,

A contract in which our Company contracted for carrying out the work for Defag Construction Company was signed on the 20th January 1965, for all the reinforcement fixing work, including labour and materials, at the site situate at the new Tak Ming Middle School, Kowloon. All high tensile steel (bars) and mild steel round bars for the said project are to be supplied and fixed by our Company according to the plans. In order to protect our interests in (carrying out) the reinforcement work against your repossession of the site for tenders to be called from other building contractors in the event of Defag Construction Company's abandonment (of the construction work) **20** during the course of construction at the said site, we request you, the owner, to give a written guarantee to the effect that, in the case of (the construction work) having to be let out on contract to another building contractor because of Defag Construction Company's abandonment during the course (of the construction), the Agreement for the reinforcement work entered into between our Company and Defag Construction Company shall remain effective. As for the money for labour and materials for the reinforcement work, you, the owner, are requested to be responsible for the payment (of the same) to our Company on the due dates out of the amount of the construction costs (allotted) to the contractor. Please excuse our bluntness in this matter.

30 To Mr. Cheng Yun Choi.

(Chopped) (words indecipherable)

Dated 5th Feb., 1965.

(Signed) Yu Tak Yee

(C O P Y)

*Exhibits**Plaintiff's
Exhibits*

8th February, 1965.

C
Bundle of
agreed
Corres-
pondence,
Letters etc.
*continued.*Messrs. Johnson Stokes & Master,
Hong Kong & Shanghai Bank Building,
Hong Kong.

Dear Sirs,

Re: **Building Contract No. 574 for the construction &
Maintenance of the Tak Ming Middle School at
Lot No. K.I.L. 1571, S.A.****Architect: Mr. Eric Cumine.**With reference to the interim payments due to us under the captioned
contract against certificate for payment signed by the architect, we hereby
irrevocably authorize you to pay for our account as follows:—

10

Payee: Messrs. Yee Sang Metal Supplies Co., Room 625,
Man Yee Building, Hong Kong.Amount: Ten Payments of \$50,000.00 each to be deducted from
interim payments Nos. 1-10 and ten payments of
\$45,000.00 each from interim payments Nos. 11-20
and one payment of \$70,000.00 from interim payment
No. 21, altogether 21 payments to the total amount
of \$1,020,000.00.

20

Receipts: The official receipts of Messrs. Yee Sang Metal Supplies
Co. for the aforesaid payments received from you,
shall be accepted by us as part of the payments from
interim payments No. 1-20 and full payment from
interim payment No. 21.We shall be grateful, if you will kindly confirm the above by writing
to Messrs. Yee Sang Metal Supplies Co. at your earliest convenience.

Yours faithfully,

DEFAG CONSTRUCTION CO.

(Sgd.) **L. S. Koo**
Manager

30

c.c. Messrs. Tak Ming Co., Ltd.,

(C O P Y)

BSM/T13/62
 Messrs. Yee Sang Metal Supplies Co.,
 Man Yee Building, Room 625,
 Hong Kong.

8th February, 1965.

Exhibits
 ———
Plaintiff's
Exhibits
 ———

C
 Bundle of
 agreed
 Corres-
 pondence,
 Letters etc.
continued.

Dear Sirs,

**Re: Building Contract No. 574 for the construction &
 Maintenance of the Tak Ming Middle School
 at Lot No. K.I.L. 1571, S.A.**

10 We have received from Defag Construction Co. a letter a photostat copy of which is enclosed herewith. We have also received confirmation that the mortgagees Henry Fok Estates Ltd. will be paying all moneys to be advanced under the Building Mortgage totalling \$3,300,000.00 on the above property to us and we shall then be under obligation to distribute the same to the contractors Defag Construction Co. against architect's certificates. We hereby confirm that out of the moneys received by us from Messrs. Henry Fok Estates Ltd. we will pay to you from the interim payments mentioned in the enclosed letter the sums in question.

20 The enclosed letter gives the impression however that the interim payments are at present due to Defag Construction Co. This is in fact not the position as Defag Construction Co. will not be entitled to anything until the building work gets under way and architect's certificates come in.

Please confirm that you will be proceeding to finance Messrs. Defag Construction Co. in the light of the above and we shall make arrangements accordingly.

Yours faithfully,
 (Sgd.) J. S. & M.

(C O P Y)

Encl.
 30 c.c. Messrs. Defag Construction Co.
 c.c. Messrs. Tak Ming Co. Ltd.

Hong Kong 9th February, 1965.

Messrs. Yee Sang Metal Supplies Co.,
 Room 625, Man Yee Building,
 60-68, Des Voeux Road, Central,
 Hong Kong.

Dear Sirs,

40 **Re: Tak Ming Middle School at
 K.I.L. 1571, S.A., 76, Sai Yee Street, Kowloon.**

We acknowledge receipt of your letter of 5th February, 1965 and we wish to confirm to you as follows:

Exhibits
 Plaintiff's
Exhibits

C
 Bundle of
 agreed
 Corres-
 pondence,
 Letters etc.
continued.

1) In case of the breach of contract No. 574 dated 27th October, 1964 from the part of Messrs. Defag Construction Co., we may by mutual agreement between your goodselves and ourselves continue the contract signed on 20th January, 1965 by your goodselves with Defag Construction Co. even though the said contractor should be forced out of the above site.

2) In case of the failure to reach a mutual agreement between us we shall pay you for the works done on the captioned site against our architect, Mr. Eric Cumine's certificates in accordance with the Building contract No. 574 prepared and signed in the said architect's office.

The above confirmation is subject to your fulfilment of the terms of your contract with Defag Construction Co. mentioned your letter of 5th February, 1965 addressed to us and also subject to your carrying out works properly and expeditiously in accordance with the schedule of works submitted to the aforesaid architect and to us by the contractor, Messrs. Defag Construction Co. **10**

Yours truly,
 TAK MING CO., LTD. H.K.

(Sgd.) (Illegible)
 Director

(C O P Y)

9th February, 1965. **20**

Messrs. Tak Ming Co., Ltd.
 1, Arran Street,
 Kowloon.

Dear Sirs,

Re: Second building Mortgage of Section A of Kowloon Inland Lot No. 1571, S.A. and Building Contract No. 574 for the Construction & Maintenance of the Tak Ming Middle School at the above lot. **30**

We thank you for your support regarding the finance advanced to us by Messrs. Yee Sang Metal Supplies Co. of Man Yee Building, Hong Kong.

We hereby irrevocably authorize you to pay for our account to the said Yee Sang Metal Supplies Co. under your letter of confirmation dated 9th February, 1965 (a carbon copy of which is handed to me personally) and their official receipts for your payments shall be accepted by us and deductible from any money due to us by you in accordance with the captioned second building mortgage and building contract.

Yours faithfully,
 DEFAG CONSTRUCTION CO. **40**

(Sgd.) L. S. Koo

(C O P Y)

Hong Kong, 10th February, 1965

Exhibits

Plaintiff's Exhibits

Messrs. Johnson, Stokes & Master,
Solicitors &c.

C
Bundle of
agreed
Corres-
pondence,
Letters etc.
continued.

Dear Sirs,

Re: Building Contract No. 574 for the construction &
Maintenance of the Tak Ming Middle School
at Lot No. K.I.L. No. 1571 S.A.

Your letter dated the 8th instant addressed to our clients, Messrs.
10 Yee Sang Metal Supplies Co., has been handed to us with instruction to
confirm that our clients are prepared to finance Messrs. Defag Construction
Co. on the terms set out therein and to request you to make arrangements
in accordance therewith without delay.

For reference purposes, we are also instructed to request you to
supply to us on our clients' behalf a photostatic copy of the above Contract,
for which we undertake to pay your charges.

Yours faithfully,

(C O P Y)

(Sgd.) HASTINGS & CO.

16th February, 1965

20 Messrs. Johnson, Stokes & Master,
Solicitors &c.

Dear Sirs,

Re: Building Contract No. 574 for the construction
& Maintenance of the Tak Ming Middle School
at Lot No. K.I.L. No. 1571 S.A.

Your letter dated the 8th instant addressed to our clients, Messrs.
Yee Sang Metal Supplies Co., has been handed to us with instructions to
confirm that our clients are prepared to finance Messrs. Defag Contstcriton Co.
on the terms set out therein and to request you to make arrangements in
30 accordance therewith without delay.

Yours faithfully,

(Sgd.) HASTINGS & CO.

(C O P Y)

*Exhibits**Plaintiff's
Exhibits*

Your Ref: BPC: JW

18th February, 1965.

C
Bundle of
agreed
Corres-
pondence,
Letters etc.
*continued*Messrs. Hastings & Co.
Marina House, 1st Floor,
15-19 Queen's Road, Central,
Hong Kong.

Dear Sirs,

Re: Building Contract No. 574 for the construction
& Maintenance of the Tak Ming Middle School
at Lot No. K.I.L. No. 1571 S.A.**10**

We acknowledge receipt of your letter of the 16th instant and note that your clients will be proceeding to finance Messrs. Defag Construction Co., on the terms set out in our letter of the 8th instant.

We would accordingly hereby confirm that we will follow the instructions contained in our letter of the 8th instant, which we shall henceforth consider fully operative.

Yours faithfully,

(Sgd.) Johnson Stokes & Master

(C O P Y)

Hong Kong 23rd April, 1965.

Messrs. Johnson Stokes & Master,
Solicitors, Hong Kong.

Attention: B. S. McElney, Esq.

Dear Sirs,

We act for M^r. L. S. Koo trading as Defag Construction Co. who have arranged with Messrs. David Yip Trading Co. and Kai Cheong Loong for the supply to our client of building materials in the construction of the building for The Tak Ming Company Limited on credit and to pay the price therefor out of the balance of moneys (after deducting payments due and payable to your clients Pioneer Concrete (Hong Kong) Limited and Yee Seng Metal Suppliers) payable by Tak Ming Co. Ltd. under and by virtue of the Building Contract dated 27th day of October 1964.

We understand that by an agreement dated 13th day of February 1965 made between our client of the 1st part, The Tak Ming Co. Ltd. of the 2nd part and Pioneer Concrete (Hong Kong) Ltd. of the 3rd part, our client agreed inter alia that he shall not make any further arrangements with any other suppliers which shall necessitate any of the moneys to be advanced by Messrs. Henry Fok Estate Limited to pass through your hands to be disbursed to such other suppliers direct save and except the arrangements come to with Yae Seng Metal Supplies and that our client has in accordance with the said agreement given you an irrevocable instruction to pay the moneys due to Pioneer Concrete (Hong Kong) Ltd. and Yae Seng Metal Suppliers.

We are therefore instructed to enquire from you as Solicitors for the said Pioneer Concrete (Hong Kong) Ltd. and Tak Ming Co. Ltd. whether or not your client will object to your sending us on behalf of our client the balance of each payment payable by the Tak Ming Co. Ltd. under the said Building Contract after deductions by you of the moneys payable to Pioneer Concrete (Hong Kong) Ltd. and Yae Seng Metal Suppliers (if any) per Schedule attached hereto. Upon receipt of confirmation from you that your clients have no objection our client proposes to give us instructions to apply to you for the balance of payments when the same fall due.

Yours faithfully,

(Sgd.) D'Almada Remedios & Co.

LJAR: STL: cl:

Encl.

c.c. Messrs. Tak Ming Co. Ltd.
Messrs. Pioneer Concrete (H.K.) Ltd.

Exhibits

Plaintiff's Exhibits

C

Bundle of agreed Correspondence, Letters etc.
continued

(C O P Y)

Exhibits
 Plaintiff's
 Exhibits
 C
 Bundle of
 agreed
 Corres-
 pondence,
 Letters etc.
continued.

	Payable to Defag	Deducted for payment to Yee Seng	Deducted for payment to Pioneer	Balance to be sent to D'Almad Remedios & Co. on behalf of Defag.
1st Payment	HK\$127,500	HK\$50,000	HK\$35,000	HK\$42,500
2nd Payment	HK\$127,500	HK\$50,000	HK\$35,000	HK\$42,500
3rd Payment	HK\$127,500	HK\$50,000	HK\$35,000	HK\$42,500
4th Payment	HK\$127,500	HK\$50,000	HK\$35,000	HK\$42,500
5th Payment	HK\$127,500	HK\$50,000	HK\$35,000	HK\$42,500 10
6th Payment	HK\$112,500	HK\$50,000	HK\$30,000	HK\$32,500
7th Payment	HK\$112,500	HK\$50,000	HK\$30,000	HK\$32,500
8th Payment	HK\$112,500	HK\$50,000	HK\$30,000	HK\$32,500
9th Payment	HK\$112,500	HK\$50,000	HK\$30,000	HK\$32,500
10th Payment	HK\$112,500	HK\$50,000	HK\$30,000	HK\$32,500
11th Payment	HK\$112,500	HK\$45,000	HK\$30,000	HK\$37,500
12th Payment	HK\$112,500	HK\$45,000	HK\$30,000	HK\$37,500
13th Payment	HK\$112,500	HK\$45,000	HK\$30,000	HK\$37,500
14th Payment	HK\$112,500	HK\$45,000	HK\$30,000	HK\$37,500
15th Payment	HK\$112,500	HK\$45,000	HK\$30,000	HK\$37,500 20
16th Payment	HK\$106,875	HK\$45,000	HK\$30,000	HK\$31,875
17th Payment	HK\$ 97,500	HK\$45,000	HK\$30,000	HK\$22,500
18th Payment	HK\$ 37,500	HK\$45,000	HK\$ —	—
19th Payment	HK\$ 37,500	HK\$45,000	HK\$ —	—
20th Payment	HK\$ 37,500	HK\$45,000	HK\$ —	—
18th-20th Payment	—22,500	—	—	—
21st Payment	HK\$ 52,500	—	HK\$ —	HK\$52,500
22nd Payment	HK\$ 52,500	—	HK\$10,000	HK\$42,500
23rd Payment	HK\$ 45,000	—	HK\$10,000	HK\$35,000
24th Payment	HK\$ 45,000	—	HK\$10,000	HK\$35,000 30
25th Payment	HK\$ 37,500	—	HK\$10,000	HK\$27,500
26th Payment	HK\$ 37,500	—	HK\$10,000	HK\$27,500
27th Payment	HK\$ 52,500	—	HK\$10,000	HK\$42,500
28th Payment	HK\$ 30,000	—	HK\$10,000	HK\$20,000
29th Payment	HK\$ 75,000	—	—	HK\$75,000
30th Payment	HK\$ 30,000	—	—	HK\$50,000
31st Payment	HK\$ 45,000	—	—	HK\$45,000
32nd Payment	HK\$ 37,000	—	—	HK\$37,500
33rd Payment	HK\$ 30,000	—	—	HK\$30,000
34th Payment	HK\$ 22,500	—	—	HK\$22,500 40
35th Payment	HK\$ 22,500	—	—	HK\$22,500
36th Payment	HK\$ 52,500	—	—	HK\$52,500
37th Payment	HK\$ 22,500	—	—	HK\$22,500
38th Payment	HK\$ 30,000	—	—	HK\$30,000
39th Payment	HK\$ 37,500	—	—	HK\$37,500
40th Payment	HK\$ 37,500	—	—	HK\$37,500
41st Payment	HK\$500,000	—	—	HK\$500,000

(C O P Y)

11th May, 1965.

Messrs. Tak Ming Company, Limited,
1, Arran Street,
Kowloon.

Attention: C. Y. Cheng, Esq.

Dear Sir,

I, YU Tak Yee of Yee Sang Metal Supplies Co. at Rm. 625, Man Yee Building, Hong Kong, acknowledge receipt of a post-dated cheque (No. 10 057699) for HK\$100,000.00 of 10th June, 1965 being the refund of the deposit in accordance with your letter addressed to us on 20th January, 1965.

I hereby agree that the above-mentioned cheque shall only be cashed subject to the completion of foundation works by Messrs. Defag Construction Co. before 10th June, 1965, otherwise, you may stop payment without any objection from our part. If early completion, this cheque shall be changeable for an early dated cheque upon our request.

Witnessed by:

(Sgd.) **L. S. Koo**

Yours sincerely,

(Sgd.) Yu Tak Yee

(C O P Y)

20

BY REGISTERED POST

21st June, 1965.

Mr. Henry Y. T. Fok,
The Manager,
Henry Fok Estates Ltd.,
7th Floor,
Hang Sang Bank Building,
Des Voeux Road, Central,
Hong Kong.

Dear Sir,

30

Re: **Construction of Tak Ming Middle School
at K.I.L. 1571, S.A.,**

We have the honour to inform you that we have duly completed the foundation works of the captioned job. A letter certifying this effect issued by Eric Cumine's office was handed over to your Mr. Lai On on last Thursday, 17th June, 1965.

We beg to state that we were really in a very difficult position to start the works on the above site owing to the harsh conditions imposed on us especially after banking crisis. A letter of Messrs. Tak Ming Co. Ltd. dated 21st January, 1965 was written on our request for your kind consideration. 40 Latter, your Mr. Lai On encouraged and told us that you have given your sympathetic consent to advance H.K.\$250,000.00 upon our completion of

*Exhibits**Plaintiff's
Exhibits*

C

Bundle of
agreed
Corres-
pondence,
Letters etc.
continued.

Exhibits
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Plaintiff's
Exhibits
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foundation works, and this was also confirmed by your Mr. Lai On to Mr. Cheng of Tak Ming Co. Ltd., we have since then tried our utmost to complete the foundation works in expecting to obtain your exceptional kind advancement of HK\$250,000.00 as promised.

C
 Bundle of
 agreed
 Corres-
 pondence,
 Letters etc.
continued.

Will you please appreciate, Sir, that we are now deeply involved and engaged with our subcontractors, material suppliers, all of them are expecting to collect the payments that we have promised based on your kind consent through your Mr. Lai On to assist us. We are now proceeding works expeditiously in order to provide a few stories of the building to Tak Ming Co. Ltd. for their temporary occupation at the beginning of the coming scholastic year. 10

To be frank with you, Sir, we are now financially very tight, any delay of your kind advancement of HK\$250,000.00 will result in a series of drastic consequences on the site.

In view of the above, we beg you to save us out of this desperate situation and to kindly advance us the most needed money as soon as possible.

Yours very truly,

DEFAG CONSTRUCTION CO.

(Sgd.) **L. S. Koo**
Manager

c.c. Messrs. Tak Ming Co. Ltd.,
 Mr. Lai On, Messrs. Henry Fok Estates Ltd., 20

(C O P Y)

Hong Kong 24th June, 1965.

BY REGISTERED POST

Mr. Henry Y. T. Fok,
 Henry Fok Estates Ltd.,
 7th Floor,
 Hang Sang Bank Building,
 Des Voeux Road, Central,
 Hong Kong.

ENCLOSURE No. 5

30

Dear Sir,

We have received a carbon copy of Messrs. Defag Construction Co. addressed to you on 22nd June, 1965 and we wish to solicit your kind consideration on the following facts:

As far I understand that the contractor has done his best to complete the foundation works which cost over \$700,000.00 without any advancement. What he begged to have your advancement of \$250,000.00 at present is for the construction of upper structures. Materials on the site and the works ahead

are estimated to be over \$200,000.00. It would appear to be safe to advance \$250,000.00 in order to let the contractor to continue the works under the present circumstances because a certain sum of about \$700,000.00 is always retained as security. Moreover, the probable profit of \$400,000.00—\$500,000.00 from the part of contractor, it will make sense that the contractor will be able to complete the building with your future advancements altogether not more than \$3,300,000.00.

Exhibits
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Plaintiff's Exhibits
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C
Bundle of
agreed
Corres-
pondence,
Letters etc.
continued

10 We would like to reiterate that according to the original mortgage, we were entitled to be advanced \$250,000.00 from you to the contractor, interests were charged and paid for quite some time. Interests withinut actual advancements being paid by us to you are well over \$250,000.00. So, it shall not affect your capital itself or returns of yours capital at all, even you should have advanced the \$250,000.00.

Your prompt advancement of \$250,000.00 will certainly save the disasters that shall be resulted from the discontinuance of works on the site, such as bankruptcies of the contractor and his sub-contractors etc., and the unpredictable consequences derived to our schools.

On account of the aforesaid facts, we should be most obliged, if you would favourably consider this advancement at your earliest convenience.

20

Yours sincerely,
TAK MING CO., LTD. H.K.

(Sgd.) (Illegible)
Director

(C O P Y)

Hong Kong 6th July, 1965.

BY MESSENGER

Messrs. Defag Construction Co.,
116, Argyle Street,
9th Floor, (Flat A),

30 Kowloon.

ENCLOSURE No. 6

Dear Sirs,

Re: Building Contract No. 574 for the Construction
& Maintenance of the Tak Ming Middle School
at Lot No. K.I.L. 1571, S.A.

I, the undersigned, was on the site this morning and noticed very few workers (say about 10 persons) doing slow motion act there. We wish to draw your kind attention to the following:

40 The main conditions of payments were discussed between your Mr. L. S. Koo and Mr. Lai On of Henry Fok Estates Ltd. then proposed them to us for agreement. You knew beforehand what were the requirements

Exhibits
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Plaintiff's
Exhibits
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 C
 Bundle of
 agreed
 Corres-
 pondence,
 Letters etc.
continued.

of Messrs. Henry Fok Estates Ltd. to provide the further charge of HK\$1,500,000.00 to us, you accepted the conditions of payments despite of our warning that any delay of works shall result in a lot of damages to us. This was also urged you by Mr. Lai On from very beginning to expedite the works once the contract was signed.

We do appreciate your financial difficulties, hence on your request we wrote to Messrs. Henry Fok Estates Ltd. on 21st January, 1965 and on 24th June, 1965 to give all our sympathies to you. We are now even trying very hard to obtain other sources of financial aid in order to help you out of this difficult situation apart from the supports we have given to you regarding metal supplier and concrete supplier. All we hope is your carrying on works properly. 10

We have to point out that the delay of your works in accordance with the time schedule submitted to our architect and to ourselves by you on 15th February, 1965 has already caused us a lot of damages. If you continue your slow motion act on the site, you will certainly aggravate the situation. We shall feel reluctant, but no choice, to ask our architect to serve you notice according to clause 21(2) of conditions of contract No. 574 between us.

Please be cooperative and let us try together to get out of this mess.

Yours sincerely,
 TAK MING CO., LTD. H.K. 20
 (Sgd.) (Illegible)
 Director

(C O P Y)

6th July, 1965.
 Our Ref. 574/SK/CL.
 Yr. Ref.

Messrs. Tak Ming Co., Ltd.,
 1, Arran Street,
 Canton Road,
 Kowloon.

30

Dear Sirs,

Re: Construction of Tak Ming School,
 on K.I.L. 1571, S.A.

I refer to the letter dated 21st June, 1965 from Messrs. Defag Construction Co., to Messrs. Henry Fok Estates Ltd. in connection with the payment of \$250,000.00 for constructional work carried out on the above project. You have, I see, a copy of this letter and I shall be grateful if you will contact Messrs. Henry Fok Estates Ltd. to ascertain what the present position is in relation to this payment. You will appreciate that in this particular contract our correspondence in this connection can only be addressed 40 to you by this firm.

Yours faithfully,
 (Sgd.) T. A. Roberts.
 (T. A. Roberts)
 for Eric Cumine

(C O P Y)

Hong Kong 9th July, 1965.

Eric Cumine, Esq.,
 Authorized Architect,
 14, Embassy Court,
 Hysan Avenue,
 Hong Kong.

Attention: T. A. Roberts, Esq.,

Dear Sir,

ENCLOSURE No. 8

Exhibits

*Plaintiff's
 Exhibits*

C
 Bundle of
 agreed
 Corres-
 pondence,
 Letters etc.
continued.

10

Your ref: 574/SK/CL.

Re: Building Contract No. 574 for the
 Construction & Maintenance of the
 Tak Ming Middle School at Lot No.
 K.I.L. 1571, S.A.,

With reference to your letter of 6th July, 1965, we wish to inform you that we have in fact written to Messrs. Henry Fok Estates Ltd. upon receiving copy of letter dated 21st June, 1965 from Messrs. Defag Construction Co., and enclosed photostat copy of our letter on 24th June, 1965 is self-explanatory.

20

Unfortunately, Messrs. Henry Fok Estates Ltd. failed to carry out their verbal promise and they insisted on that the payments should be made in compliance with the building contract. We are not trying to help the contractor to find some financial aid, but it will be very difficult to get any assistance, if the contractor continues his quasi-stop of works on the site.

Therefore, we have sent a letter of 6th July, 1965 to the contractor (a photostat copy is herewith attached) in order to force the contractor, hopefully his sub-contractors, to be cooperative with us to get works moving on. By the time we shall be able to have thing fixed more easily with one properous financier in view.

30

We hope that the aforesaying may make the present situation clear to you and we thank you for your kind concern at this matter.

Yours sincerely,

TAK MING CO., LTD. H.K.

(Sgd.) (Illegible)
 Director

CY/sl

(C O P Y)

*Exhibits**Plaintiff's
Exhibits*15th July, 1965.
Our Ref. 574/SK

C
Bundle of
agreed
Corres-
pondence,
Letters etc.
continued.

Messrs. Defag Construction Co.,
116, Argyle Street,
9th floor, Flat A.,
Kowloon.

Dear Sirs,

ENCLOSURE No. 9

Re: Tak Ming Middle School
K.I.L. 1571 S.A.

10

Recent site visit reveals that there is no workmen on site, and there is no progress on the project.

You are requested to give adequate explanation for the delay within seven days to this office.

This letter will serve to inform you that unless you proceed with the works with reasonable diligence and show evidence that it is your intention to complete the works under the contract and to time, I shall advise my clients to terminate their contract with you under the Conditions of Contract, Clause 21.

Yours faithfully,
(Sgd.) (Illegible)
(Jacob Wong)

20

for Eric Cumine

CC. Client
JW/ml

(C O P Y)

20th July, 1965.

Eric Cumine Esq.,
Authorised Architect,
No. 14, Embassy Court,
Hysan Avenue, Hong Kong.

30

Attention Mr. Stanley Kwok
Mr. Jacob Wong.

Dear Sir,

Re: Building Contract No. 574 for the construction
and Maintenance of the Tak Ming Middle School
at Lot No. 1571 S.A.

With reference to your letter of 15th July, 1965 for the above captioned Contract, in reply we beg to state that we were really in a very difficult position to complete the piling caps on the above site, owing to the harsh condition imposed on us especially after banking crisis.

40

The Owner has so far failed to provide us the payment of HK\$250,000.00

upon completion of the R.C.C. pile caps as verbal agreed by Mr. Lai On of Messrs. Henry Fok Estates Ltd. and Mr. Chang the Principal of Tak Ming College.

Exhibits
—
Plaintiff's
Exhibits
—

In the event of the Owner instructing another Contractor to take over the work on the above site on the excuse of our work having slowed down which is directly the result of lack of operating fund caused by the above, we shall be obliged if you will kindly dissuade the Owner from doing so in the interests of justice.

C
Bundle of
agreed
Corres-
pondence,
Letters etc.
continued.

10

Yours faithfully,
DEFAG CONSTRUCTION CO.

(Sgd.) L. S. Koo
Manager

(C O P Y)

22nd July, 1965.
Our Ref: 574/SK/CL

Messrs. Tak Ming Co. Ltd.,
1, Arran Street,
Canton Road,
Kowloon.

20 For Att: Mr. Chales C. Y. Cheng, LL.D.

Dear Sir,

Re: Tak Ming Middle School
K.I.L. 1571 S.A. Sai Yee Street

I forward herewith a photostat copy of letter dated 20th July 1965 from Messrs. Defag Construction Co. which is self-explanatory.

Please let me have your early instructions.

Yours faithfully,
(Sgd.) Jacob Wong
(Jacob Wong)
for Eric Cumine

30 JW/kl

(C O P Y)

*Exhibits**Plaintiff's
Exhibits*

Hong Kong 23rd July, 1965.

C

BY REGISTERED POST

Bundle of
agreed
Corres-
pondence,
Letters etc.
*continued.*Eric Cumine, Esq.,
Authorised Architect,
14, Embassy Court,
Hysan Avenue,
Hong Kong.

Attention: Jacob Wong, Esq.,

Dear Sir,

10

Re: Building Contract No. 574,
Tak Ming Middle School,
K.I.L. 1571, S.A.,

We thank you for your letter of 22nd July, 1965 and enclosure therewith.

We wish to inform you that the contractor was originally introduced to us by Mr. Lai On of Henry Fok Estates Ltd. and only at the contractor's request saying that he had already arranged with Mr. Lai On of Henry Fok Estates Ltd. to have this exceptional advancement of HK\$250,000.00, we wrote to Messrs. Henry Fok Estates Ltd. for consideration on the advancement. As 20 far as the undersigned is concerned, I have never committed myself to the contractor about this advancement.

We were aware of the contractor's unsound financial position, therefore, we have gone so far to give our guarantee to the metal supplier and concrete supplier for credit facilities entrusted to the contractor. Since Messrs. Henry Fok Estates Ltd. refused to make this exceptional advancement and the contractor was not in a position to carry on works as it should be, we shall have no alternative but to terminate the contractor's contract on receiving your advice according to clause 21 under the conditions of contract.

Please kindly advise us at your earliest convenience.

30

Yours sincerely,
TAK MING CO., LTD. H.K.

(Sgd.) (Illegible)
Director

CY/sl

(C O P Y)

3rd August, 1965.
Our Ref. 574/SK/GC*Exhibits*
—
Plaintiff's
Exhibits
—**REGISTERED**C
Bundle of
agreed
Corres-
pondence,
Letters etc.
*continued.*Mr. L. S. Koo,
Messrs. Defag Construction Co.,
No. 116, Argyle Street, 9th Floor A,
Kowloon,
Hong Kong.

Dear Sir,

10 Re: NOTICE OF DETERMINATION OF CONTRACT
No. 574 dated 27th October, 1964.

Further to my 574/SK of the 15th July, 1965 as no further work has proceeded on the Contract Works and your letter of the 20th July, 1965 is not considered to be a contractual excuse for non performance I hereby give you formal notice, on behalf of the Employer, that due to your inability to proceed with the Contract Works the Contract entered into between you and Messrs. Tak Ming Company Limited dated the 27th October, 1964 will be determined under Conditions of Contract Clause 21(a) as from the 10th August, 1965 **unless you give a written guarantee to proceed with and complete the**

20 Works in accordance with the Conditions of Contract on or before that date. Should no such guarantee be received you will be instructed on the Contract Procedure to be adopted.

Yours faithfully,
(*Sgd.*) (Illegible)
(Stanley Kwok)
for Eric Cuminecc. Tak Ming Co., Ltd.
RFT/cl.

(C O P Y)

Hong Kong 4th August, 1965.

30 Eric Cumine, Esq.,
Authorised Architect,
14, Embassy Court,
Hysan Avenue,
Hong Kong.

Attention: Stanley Kwok, Esq.,

Dear Sir,

40 Re: Building Contract No. 574,
Tak Ming Middle School,
K.I.L. 1571, S.A.,

With reference to our letter addressed to you on 23rd July, 1965, we wish that you will kindly advise us as soon as possible the result of your notice served on 15th July, 1965 by registered post to the contractor concerned, Messrs. Defag Construction Co.,

Please appreciate that the delay of works from the contractor has caused us a lot of damages already, it will probably take sometime to apply to

Exhibits
 Plaintiff's
Exhibits
 C
 Bundle of
 agreed
 Corres-
 pondence,
 Letters etc.
continued

the court for injunction order and your immediate advice will certainly save us from the increase of damages.

In the meantime, we shall be grateful, if you will kindly instruct your staff to make a survey of the cost on the works done by the contractor, so that we eventually may submit it to the court for assessment against our claim.

Your prompt attention in this matter will be greatly appreciated.

Yours sincerely,
 TAK MING CO., LTD. H.K.
 (Sgd.) (Illegible) 10
 Director

CY/sl

(C O P Y)

DOUBLE REGISTERED

10th August, 1965.
 Our Ref. 574/SK/GC

Mr. L. S. Koo,
 Messrs. Defag Construction Co.,
 No. 116, Argyle Street, 9th Floor, A.,
 Kowloon,
 Hong Kong.

20

Dear Sir,

Re: DETERMINATION OF CONTRACT No. 574
 between yourself and Tak Ming Co.,
 Ltd., H.K. dated 27th October, 1964.

Further to my even reference of the 3rd August, 1964 and since you have neither replied thereto or re-commenced work on the Site please **TAKE NOTICE** that the above Contract is hereby terminated with effect from **12 NOON ON THE TENTH DAY OF AGUUST, 1965** under Conditions of Contract, Clause 21 (a) (1) and (2).

This notice is given you without prejudice to any of the Employer's 30 rights and remedies contained under the Conditions of Contract.

You are hereby instructed to:—

- (i) Return to this office forthwith the whole of the Approved Drawings as listed in my 574/SK/GC of the 26.10.64., signed for by you on 23.10.64.
- (ii) Hand over the Site and everything contained therein or thereon (except the Drawings listed above) to the Employer's Watchman (or Watchmen) who are expected to be on Site on the 11th/12th August, 1964. **NOTHING MUST BE TAKEN OFF THE SITE**, without the prior approval of this office. You may however keep a watchman 40 on Site at your expense until the valuation referred to in the following paragraph is made.

An appointment will be made with you to carry out a mutual measurement of works executed and materials on Site and a valuation of such made. Should you fail to make or keep an appointment the valuation will be carried out and you will have to accept the measurements taken in your absence.

Exhibits
Plaintiff's Exhibits

Please acknowledge receipt of this letter of determination.

CC./Tak Ming Co., Ltd. H.K.

Yours faithfully,
(Sgd.) (Illegible)
(R. F. Trimble)
for Eric Cumine

C
Bundle of
agreed
Corres-
pondence,
Letters etc.
continued

RFT/cl.

10

(C O P Y)

AN AGREEMENT made the 11th day of August One thousand nine hundred sixty five between Tak Ming Company Limited (德明有限公司) of No. 76, Sai Yee Street, Kowloon of one part, (hereinafter called The Owner) and Defag Construction Co. (大發營造廠) of No. 116, Argyle Street, Ninth Floor "A", Kowloon (hereinafter called The Contractor) of the other part, at the contractor's request, an extension of date for completion, say at the end of October, 1965 as stipulated in the building contract (No. 574) prepared by Eric Cumine's Office, will be made up to the 15th day of May, 1966. This extension of six months and a half of time shall be considered as the delay from the contractor's part, liquidate damage of \$3,000.00 per day was imposed in the aforesaid building contract. The owner hereby agrees to give this extension as requested till the 15th day of May, 1966 and further agrees to make a concession to deduct the liquidate damage by a half of \$3,000.00 per day, i.e. \$1,500.00 each day on conditions that the contractor shall resume works within THREE DAYS from this date hereof and carry out works expeditiously and properly and strictly in accordance with the working schedule re-submitted by the Contractor to the owner and to the architect, a copy of the said schedule is herewith attached. Failure to comply with any one of the required conditions, this agreed extension shall automatically become null and void, this agreement shall not affect the notice of termination of contract served by Eric Cumine on 3rd August, 1965, and the liquidate damage shall resume to be \$3,000.00 per day as originally stipulated. This extension for date of completion a reed by the owner shall be subject to the approval of Her Majesty's Hong Kong Government and also to the permission of Messrs. Henry Fok Estates Ltd.

20

30

Signed in the presence of

Witnesses

40

Signed in the presence of

Witnesses

TAK MING CO., LTD. H.K.

(Sgd.) (Illegible)

.....
Director

(Sgd.) (Illegible)

(Sgd.) (Illegible)

DEFAG CONSTRUCTION CO.

(Sgd.) L. S. KOO

.....
Manager

(Sgd.) (Illegible)

(Sgd.) (Illegible)

WORKING SCHEDULE FOR CONSTRUCTION OF NEW TAK MING COLLEGE

NELSON STREET, KOWLOON.

MONTH DATE	AUGUST			SEPTEMBER			OCTOBER			NOVEMBER			DECEMBER ¹⁹⁶⁵			JANUARY			FEBRUARY			MARCH			APRIL			MAY ¹⁹⁶⁶	
	10	20	30	10	20	30	10	20	30	10	20	30	10	20	30	10	20	30	10	20	30	10	20	30	10	20	30	7	15
R.C.C. WITH FORM WORK FROM MEZZ. FL. TO WATER TANK		Mezz Fl		1st Fl	2nd Fl	3rd Fl	4th Fl	5th Fl		6th Fl	7th Fl	8th Fl	9th Fl	10th Fl	11th Fl	12th Fl	13th Fl	14th Fl	15th Fl		Roof	Water Tank							
BRICK LAYER																													
STEEL WINDOWS & DOORS																													
INTERNAL LIME PLASTER																													
PLUMBING & DRAINAGE																													
WALL TILER																													
PAVING GRANDLITHIC, MOSAIC ETC., FL. FIN.,																													
METAL WORKER																													
ROOFER INCLUDING CEMENT TILE																													
CARPENTER & JOINER																													
EXTERNAL CEMENT PLASTER																													
GLAZIER																													
PAINTING																													
CLEAN SITE																													

DEFAG CONSTRUCTION CO.

(Sgd.) *L. J. Hoo.*

Manager

(C O P Y)

18th August, 1965.

Messrs. Johnson, Stokes & Master,
Solicitors & Notaries,
Hong Kong.

*Exhibits**Plaintiff's
Exhibits*

C
Bundle of
agreed
Corres-
pondence,
Letters etc.
continued.

Dear Sirs,

Re: Building Contract No. 574 for the
Construction and maintenance of
the Tak Ming Middle School at Lot
No. K.I.L. No. 1571 S.A.

10

We are informed by our clients, Defag Construction Company that you will abide by the irrevocable arrangement under the above contract to arrange for all monies payable by your clients to them in connection with the above contract, after deducting the agreed payments to Yee Sang Metal Supplies Co. and Pioneer Engineering Co. to be paid by cheques to our order for the credit of their current account with us (a/c No. Y2489) and to be forwarded such cheque by you direct to us.

Please confirm your irrevocable arrangement of the above contract by signing and returning the duplicate of this letter to us at your early convenience.

20

Yours faithfully,
NANYANG COMMERCIAL BANK, LTD.

(Sgd.) (Illegible)

(C O P Y)

RKB/T3/65

23rd August, 1965.

Nanyang Commercial Bank, Limited,
Yaumati Branch,
20, Jordan Road,
Kowloon.

30 Dear Sirs,

Re: Building Contract No. 574 made
between Tak Ming Co. Ltd. and
Defag Construction Co.

We thank you for your letter of the 18th instant and would confirm the arrangement whereby all the monies payable to Defag Construction Co. by our clients in connection with the above contract, after deduction of the agreed payments to Yee Sang Metal Supplies Co. and Pioneer Engineering Co., will be paid direct to you for the credit of the account of Defag Construction Co. (Being account No. Y2489).

40

Yours faithfully,
(Sgd.) Johnson, Stokes & Master

9th September, 1965.

(C O P Y)

*Exhibits**Plaintiff's
Exhibits*C
Bundle of
agreed
Corres-
pondence,
Letters etc.
*continued.*Messrs. Johnson, Stokes & Master,
Hongkong & Shanghai Bank Building,
Queen's Road, Central,
Hong Kong.

Attention: R. K. Bryson, Est.,

Dear Sirs,

Re: Building Contract No. 514 for the
construction & maintenance of the
Tak Ming Middle School at Lot
No. K.I.L. 1571, S.A.

10

With reference to our letter of 8th February, 1965, we would like to inform you the amendment of our payments to Messrs. Yee Sang Metal Supplies Co. as follows:

18th—20th payments shall be \$37,500 each in stead of \$45,000 each.

21st payment shall be \$52,500 in stead of \$70,000.

The above amendment is due to the insufficiency of money to be collected through you, therefore, we are now agreed with Messrs. Yee Sang Metal Supplies Co. to postpone our payments for the difference as below: 20

22nd—25th payments shall be \$10,000 each.

In order to expedite this matter, Messrs. Yee Sang Metal Supplies Co. and ourselves jointly inform the aforesaid amendments to you by this letter.

Thanking you in advance for your kind attention.

Confirmed the
above by:

Yours faithfully,

YEE SANG METAL SUPPLIES CO.

DEFAG CONSTRUCTION CO

(Sgd.) 余德義

(Sgd.) L. S. Koo

(C O P Y)

Hong Kong 13th January, 1966.

Messrs. Yee Sang Metal Supplies Co.,
Room 625, Man Yee Building,
60-68, Des Voeux Road, Central,
Hong Kong.

Dear Sirs,

Re: Tak Ming Middle School at
K.I.L. 1571, S.A., 76, Sai Yee Street, Kowloon.

Exhibits
—
Plaintiff's
Exhibits
—
C
Bundle of
agreed
Corres-
pondence,
Letters etc.
continued.

10 At your request and in view of promoting an agreement between Messrs. Defag Construction Co. and your goodselves, we draw a post-dated cheque of \$70,000 (No. 071548) on 15th July, 1966 under the following circumstances and conditions:

1) The sum of \$70,000 will originally be due to you by Messrs. Defag Construction Co. from 21st payment thereafter out of our 41 payments to the said contractor according to your joint letter dated 9th September, 1965 to Messrs. Johnson, Stokes & Master. Now you are agreed that this sum will be deferred and payable by us to you in accordance with the 2nd building Mortgage in Defag's favour.

20 2) Messrs. Defag and your goodselves both are agreed to the fact that this sum of \$70,000 shall only be payable to you after clearance of debt due by Messrs. Defag to Messrs. Pioneer (H.K.) Concrete Ltd. under the aforesaid 2nd building mortgage, you will have, however, priority before any money to be paid to Defag under the 2nd building mortgage.

3) Our this post-dated cheque shall only become payable and be cashed subject to that the captioned building will be completed on or before the end of May, 1966 and final occupation permit will be issued by B.O. Office by the time.

30 4) This sum paid by us to you shall be deductible from any of our money due to Defag.

Your acceptance of our this post-dated cheque shall be considered as your confirmation of the above arrangements.

Acknowledged receipt by:

YEE SANG METAL SUPPLIES CO.

(Sgd.) 余德義

Yours sincerely,
TAK MING CO. LTD. H.K.
(Sgd.) (Illegible)
Director

Known and confirmed the above by:

DEFAG CONSTRUCTION CO.

40 (Sgd.) L. S. Koo
Manager

(C O P Y)

14th January, 1966.

Exhibits

Plaintiff's Exhibits

C

Bundle of agreed Correspondence, Letters etc. *continued.*

Messrs. Johnson, Stokes & Master,
Hongkong & Shanghai Bank Building,
Queen's Road, Central,
Hong Kong.

Attention: R. K. Bryson, Esq.

Dear Sirs,

Re: Building Contract No. 574 for the construction & maintenance of the Tak Ming Middle School at Lot No. K.I.L. 1571, S.A.

10

With reference to our letters of 8th February, and of 9th September, 1965, we would like to inform you the amendments of our payments to Messrs. Yee Sang Metal Supplies Co. as follows:

7th—10th payments—\$40,000 each.
11th—20th payments—\$36,000 each.
41st ———payments—\$230,000.

The above amendments are the agreement given by Messrs. Yee Sang Metal Supplies Co. to Mr. Young's proposal. As to expedite this matter, 20 Messrs. Yee Sang Metal Supplies Co. and ourselves jointly inform the aforesaid amendments to you by this letter.

Confirmed the above by:

YEE SANG METAL SUPPLIES CO.

Yours faithfully,
DEFAG CONSTRUCTION CO.

(Sgd.) L. S. Koo
Manager

(Sgd.) 余德義
Manager

	出 粮 金 額	義生公司應收	派安公司應收	大發公司委託 南洋銀行宏泰 公司代收
1st Period	HK\$127,500	HK\$50,000	HK\$35,000	HK\$42,500
2nd Period	HK\$127,500	HK\$50,000	HK\$35,000	HK\$42,500
3rd Period	HK\$127,500	HK\$50,000	HK\$35,000	HK\$42,500
4th Period	HK\$127,500	HK\$50,000	HK\$35,000	HK\$42,500
5th Period	HK\$127,500	HK\$50,000	HK\$35,000	HK\$42,500
6th Period	HK\$112,500	HK\$50,000	HK\$24,000	HK\$38,500
7th Period	HK\$112,500	HK\$40,000	HK\$24,000	HK\$48,500
8th Period	HK\$112,500	HK\$40,000	HK\$24,000	HK\$48,500
9th Period	HK\$112,500	HK\$40,000	HK\$24,000	HK\$48,500
10th Period	HK\$112,500	HK\$40,000	HK\$24,000	HK\$48,500
11th Period	HK\$112,500	HK\$36,000	HK\$24,000	HK\$52,500
12th Period	HK\$112,500	HK\$36,000	HK\$24,000	HK\$52,500
13th Period	HK\$112,500	HK\$36,000	HK\$24,000	HK\$52,500
14th Period	HK\$112,500	HK\$36,000	HK\$24,000	HK\$52,500

40

	15th Period	HK\$112,500	HK\$36,000	HK\$24,000	HK\$52,500	<i>Exhibits</i>
	16th Period	HK\$106,875	HK\$36,000	HK\$24,000	HK\$46,875	—
	17th Period	HK\$ 97,500	HK\$36,000	HK\$24,000	HK\$37,500	<i>Plaintiff's Exhibits</i>
	18th Period	HK\$ 37,500	HK\$36,000	—	HK\$1,500	—
	19th Period	HK\$ 37,500	HK\$36,000	—	HK\$1,500	C
	20th Period	HK\$ 37,500	HK\$36,000	—	HK\$ 1,500	Bundle of
	21st Period	HK\$ 52,500	—	—	HK\$52,500	agreed
	22nd Period	HK\$ 52,500	—	HK\$10,000	HK\$42,500	Corres-
	23rd Period	HK\$ 45,000	—	HK\$10,000	HK\$35,000	pondence,
10	24th Period	HK\$ 45,000	—	HK\$10,000	HK\$35,000	Letters etc.
	25th Period	HK\$ 37,500	—	HK\$10,000	HK\$27,500	<i>continued.</i>
	26th Period	HK\$ 37,500	—	HK\$10,000	HK\$27,500	
	27th Period	HK\$ 52,500	—	HK\$10,000	HK\$42,500	
	28th Period	HK\$ 30,000	—	HK\$10,000	HK\$20,000	
	29th Period	HK\$ 75,000	—	—	HK\$75,000	
	30th Period	HK\$ 30,000	—	—	HK\$30,000	
	31st Period	HK\$ 45,000	—	—	HK\$45,000	
	32nd Period	HK\$ 37,500	—	—	HK\$37,500	
	33rd Period	HK\$ 30,000	—	—	HK\$30,000	
20	34th Period	HK\$ 22,500	—	—	HK\$22,500	
	35th Period	HK\$ 22,500	—	—	HK\$22,500	
	36th Period	HK\$ 52,500	—	—	HK\$52,500	
	37th Period	HK\$ 22,500	—	—	HK\$22,500	
	38th Period	HK\$ 30,000	—	—	HK\$30,000	
	39th Period	HK\$ 37,500	—	—	HK\$37,500	
	30th Period	HK\$ 37,500	—	—	HK\$37,500	
	41st Period	HK\$425,625	HK\$230,000	HK\$142,000	(HK\$53,625)	

30 We, The Tak Ming Co. Ltd. hereby guarantee payment to Nanyang Commercial Bank Ltd. A/C No. Y2489 of the sum due to Defag in respect of the 7th payment under the Building Contract between us and the said Defag namely the sum of \$48,500.00.

The above guarantee is conditioned that Defag Construction Co. immediately resumes and expedites works on our site.

TAK MING CO. LTD.

(Sgd.) (Illegible)

Director,

14/1/66.

(C O P Y)

*Exhibits**Plaintiff's
Exhibits*

YEE SANG METAL SUPPLIES CO. HONG KONG

18th January, 1966.

C
Bundle of
agreed
Corres-
pondence,
Letters etc.
*continued*Tak Ming Company, Ltd., H.K.
No.1, Arran Street,
Kowloon.
Dear Sirs,Re: Tak Ming Middle School
76, Sai Yee Street, Kowloon.
K.I.L. 1571, S.A.

10

We enclose herewith a copy of the letter dated 14th instant which was written by Defag Construction Co. and addressed to Johnson, Stokes & Master.

Kindly note its contents and acknowledge receipt at your earliest convenience.

Faithfully yours,

Encl.

(C O P Y)

Hong Kong 1st February, 1966.

BY REGISTERED POST

20

Mr. L. S. Koo,
Defag Construction Co.,
116, Argyle Street,
9th Floor "A",
Kowloon.

Dear Sir,

Re: Building Contract No.574,
Prepared at Mr. Eric Cumine's office

The undersigned has been on our site, K.I.L. 1571, S.A. and found that the progress of works after your arrangement with Mr. Young, the designated financier, has been far from to our satisfaction. 30

Although we had in fact assisted you to obtain the deferred payments agreement respectively from Messrs. Pioneer Concrete (H.K.) Ltd. and from Messrs. Yee Sang Metal Supplies Co., based on Mr. Young's proposal for quite some time, we are informed that you still have no intention whatsoever to conclude your definite agreement with Mr. Young and his partner.

Please be reminded that you should carry out works expeditiously and properly and strictly in accordance with the working schedule re-submitted by yourself to the architect and to ourselves, a copy of which was attached to the agreement of extension signed between yourself and ourselves on 11th August, 1965. We would like to point out that a lot of works as described 40

in the said working schedule have not yet been commenced or carried out as they should be.

So you are now seriously warned that any failure to comply with the above mentioned extension agreement shall nullify, inter alia, the agreed extension, and the said agreement shall not affect the notice of termination of contract served by Mr. Eric Cumine to you on 3rd August, 1965, in other words, it is not necessary to serve you again notice under clause 21 of conditions of contract signed between us on 27th October, 1964.

10 Unless you shall conclude a definite agreement with Mr. Young and his partner within THREE DAYS from the date hereof and also shall expedite works forthwith, you shall take full consequences as aforesaid among other things.

Please do understand that we have done our utmost to help you out in order to complete the building as soon as possible only based on your good will, certainly not otherwise.

Yours truly,
TAK MING CO., LTD. H.K.
(Sgd.) (Illegible)
Director

20 c.c. Eric Cumine, Esq.
CY/fkw

(C O P Y)

Hong Kong 11th February, 1966.

BY REGISTERED POST

Messrs. Yee Sang Metal Supplies Co.,
Room 625, Man Yee Building,
60-68, Des Voeux Road, Central,
Hong Kong.

Dear Sirs,

30 Re: Tak Ming Middle School at
K.I.L. 1571, S.A., 76, Sai Yee Street, Kowloon.

We acknowledge receipt of your letter of 18th ultimo and enclosure therewith.

We wish to reiterate that you are agreed, in principle, to the payment of \$70,000 (as we understand, this sum is the estimated balance) be deferred and paid by us to you in stead by us to Defag Construction Co. in accordance with the terms and conditions of our 2nd building mortgage in Defag's favour.

40 However, we have drawn a post-dated cheque at your request under the circumstances and subject to the conditions as mentioned in our letter to you on 13th January, 1966.

Exhibits

Plaintiff's Exhibits

C
Bundle of
agreed
Corres-
pondence,
Letters etc.
continued

Exhibits
Plaintiff's
Exhibits

C
Bundle of
agreed
Corres-
pondence,
Letters etc.
continued.

So please be co-operative and urge Defag Construction Co. to expedite the works as quickly as possible.

CY/fkw

Yours sincerely,

TAK MING CO., LTD. H.K.
(Sgd.) (Illegible)
Director

(C O P Y)

21st Feb., 1966.

Messrs. Johnson Stokes & Master,
Solicitors,
Hong Kong.

10

Dear Sir,

Re: Tak Ming Middle School
Section A. of K.I.L. 1571

From date of this writing our account No.2489 of Nanyang Commercial Bank (Yamati Branch) has been terminated.

We shall be much obliged if you will kindly have our payment from 8th to 41th for the above mentioned direct to our Financer Messrs. Wang Tai & Co's account No. 4025 of Nanyang Commercial Bank (Hong Kong Office) 20

For your future information our Financer's address is:

Room 42, Chung Hing Building,
36-44 Nathan Road,
Kowloon.

Thank you in advance,

Yours faithfully,
DEFAG CONSTRUCTION CO.

(Sgd.) L. S. Koo
Manager

(C O P Y)

12th March, 1966.

Messrs. Johnson, Stokes & Master,
Solicitors & Notaries,
Hong Kong & Shanghai Bank Building,
Hong Kong.

Attention: R. K. Bryson, Esq.

Dear Sir,

Exhibits
—
Plaintiff's
Exhibits
—
C
Bundle of
agreed
Corres-
pondence,
Letters etc.
continued.

10 With reference to our letter to you of about fortnight ago regarding the date for completion of our building situate at K.I.L. 1571, S.A. we are prepared to grant to Defag, we have the honour to ask you to prepare a necessary document for it.

20 We are prepared in principle to grant an extension for the date of completion of our building till the end of May, 1966 only on condition that Defag shall apply and obtain a temporary occupation permit up to 8th floor (inclusive) for our building on or before 15th May, 1966. Moreover, we are also prepared to waive the penalties for delay, if Defag will complete the building on or before 31st May, 1966 and will obtain the temporary occupation permit for us as above mentioned. In case of failure to comply with either one or both above conditions, this extension shall automatically become null and void and the penalties for delay shall resume in full counting back from the date for completion in the original building contract No. 574 signed at Eric Cumine's office.

The above extension shall be granted subject to that Messrs. Wang Tai & Co. shall enter the agreement prepared at your office to finance Defag without any delay.

Thanking you in anticipation,

Yours sincerely,
TAK MING CO., LTD.
(Sgd.) (Illegible)
Director,

30 cc. Messrs' Wang Tai & Co.

(C O P Y)

Tak Ming Co., Ltd.
1, Arran Street,
Kowloon.

15th March, 1966

Defag Construction Company,
116, Argyle Street,
Kowloon.

40 Attention: Mr. L. S. Koo

(C O P Y)

*Exhibits**Plaintiff's
Exhibits*

Dear Sirs,

Re: Tak Ming Middle School

C

Bundle of
agreed
Corres-
pondence,
Letters etc.
continued.

Further to the Agreement in writing dated the 11th August 1965, made between Tak Ming Company Limited of the one part and yourselves of the other part, and your subsequent request for an extension of the date for completion of the premises now being erected on Section A of Kowloon Inland No.1571, we, Tak Ming Company Limited hereby agree to waive all claims for liquidated damages and/or penalties payable by you under the Agreements dated the 27th October 1964 and the 11th August 1965 in respect of late completion of the premises on condition that:—

- (1) the aforesaid premises are completed by you or on before the 31st May 1966 and, either
- (2) you do supply Tak Ming Company Limited with a temporary Occupation Permit in respect of the ground to eighth floor (inclusive) on or before the 15th May 1966, or
- (3) verbal consent is given by the Building Ordinance Office (and confirmed by the Architect Mr. Eric Cumine) on or before the 15th May 1966 to Tak Ming Company Limited to occupy the aforesaid premises (ground to eighth floor inclusive) pending the issuing of a temporary Occupation Permit.

In the event, however, of your failing to comply with (1) above and also in the event of your failing to comply with either (2) or (3) above, then in each and either event liquidated damages and/or penalties for late completion shall be paid by you as from the 31st October 1965 in accordance with the Building Agreement dated the 27th October 1964, notwithstanding the waiver contained herein and also in the Agreement dated the 11th August 1965.

Yours faithfully,

confirmed by
DEFAG CONSTRUCTION CO.

(Sgd.) (Illegible)
TAK MING CO. LTD.

30

(Sgd.) L. S. Koo
Manager

17th March, 1966.

(C O P Y)

19th April, 1966.

Mr. Stanley Kwok,
Messrs. Eric Cumine,
Authorised Architect,
Hong Kong.

*Exhibits**Plaintiff's
Exhibits*

C
Bundle of
agreed
Corres-
pondence,
Letters etc.
continued.

Dear Sir,

Re: Building Contract No.574 for the Construction
and maintenance of the Tak Ming Middle School
at Lot No. 1571 Section A, Kowloon.

10

Further to our letter to you of the 14th April, 1966 concerning the delay in payments for the above job, we would draw your attention to the fact that although your certificates for the 13th, 18th and 36th payments were issued on the 29th March and 1st April respectively, we have only just received the payments concerned, thereby a delay of over 15 days. As you will appreciate, such delay has caused us considerable embarrassment in meeting our commitments towards the sub-contractors and shops as scheduled, resulting in a delay in the progress of the building work.

20 We shall accordingly be much obliged if you will kindly impress upon the owner the necessity for punctuality in making agreed payments to us and we wish to place it on record that we shall not be responsible for any delay in completing the above contract resulting from the above.

Thanking you for your kind attention to this matter.

Yours faithfully,
DEFAG CONSTRUCTION CO.

(Sgd.) L. S. Koo
Manager

(C O P Y)

19th April 1966.
Our Ref: 574/SK/GC.

30

Messrs. Tak Ming Co., Ltd.
1, Arran Street,
Kowloon.

Dear Sirs,

Re: Tak Ming Middle School

A letter has been received from the Contractors enclosing a copy of your letter to them of the 15th March 1966.

40 In their letter they complain that they have not always had their payment certificates honoured within the five (5) day laid down in the contract. They state also that this non-compliance with the contract Conditions (coupled with the high retention of 25% now amounting to \$1,205,000.00) is causing them considerable financial embarrassment.

Exhibits
 ———
Plaintiff's
Exhibits
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C
 Bundle of
 agreed
 Corres-
 pondence,
 Letters etc.
continued.

As your Architect I must point out that the late honouring of certificates constitutes a breach of contract (under Clause 22) and, as such may have a compensating effect should liquidated damages be imposed and subsequently challenged.

Would you please therefore arrange to have payment certificate cheques sent to the Contractors within 5 days of your receipt thereof.

c.c. Defag Constn. Co.
 RFT/bw

Yours faithfully,
 (Sgd.) R. F. Trimble
 (R. F. Trimble)
 for Eric Cumine.

10

(C O P Y)

RKB/T3/65
 22nd April 1966.

Messrs. Hon & Co.,
 1001 King's Theatre Building,
 32, Queen's Road, Central,
 Hong Kong.

Dear Sir,

Re: Henry Fok Estates Limited,
 K.I.L. No.1571 Section A.

20

We thank you for your letter of the 16th instant, enclosing your cheque for the sum of \$202,500.00 in respect of schedule payments Nos.13, 18 and 36, for which we are obliged.

We would point out that we are still waiting to receive a remittance in respect of schedule payment No.27, in respect of which a copy of the Architect's Certificate was sent to you on the 7th instant.

In addition, we are of course still waiting to receive schedule payment No.14 pursuant to the Architect's Certificate sent to you on the 14th instant.

This constant delay on the part of your client in making payments against the Architect's Certificates is placing our client in an extremely embarrassing position. We enclose herewith copy of a letter from the Architect Eric Cumine dated the 19th instant addressed to our client, and should be obliged if you would kindly draw your client's attention to the copy letter enclosed herewith. **30**

A further Architect's Certificate has been received in respect of schedule payment No.15, and accordingly we enclose herewith copy of the Architect's Certificate dated the 19th instant for your client's attention.

May we now please have a remittance in respect of the schedule payments Nos. 27, 14 and 15 referred to above.

Encl.

Yours faithfully, **40**
 (Sgd.) Johnson, Stokes & Master

(C O P Y)

22nd April, 1966.

Mr. Stanley Kwok,
Messrs. Eric Cumine,
Authorised Architect,
Hong Kong.

Dear Sir,

Re: Building Contract No. 574 for the construction
and maintenance of the Tak Ming Middle School
at Lot No.1571 Section A, Kowloon.

10

With reference to your Certificate No.574/GC/15 issued on 5th April, 1966 for the 27th payment of the above mentioned Contract, we regret to inform you that the payment still not received until this date.

We shall be much obliged if you will kindly impress upon the Owner in making the said payment to us as soon as possible, otherwise we shall not hold the responsible for any resulting it might be happen for such delay of payment.

Your kind attention to this matter will be much appreciated.

20

Yours faithfully,
DEFAG CONSTRUCTION CO.

(Sgd.) L. S. Koo
Manager

(C O P Y)

23rd April, 1966.
Our Ref. 574/SK/GC

Messrs. Defag Construction Co.,
116, Argyle Street, 9th Floor A,
Kowloon.

Dear Sirs,

30

Re: Tak Ming Middle School

Reference your letter of the 19th instant the Employers have already been written to on the subject of delays in payment of interim certificates. Their attention was drawn to Clause 22 of the Conditions of Contract. You should also read the Clause and take what action you deem fit.

Yours faithfully,
(Sgd.) R. S. Trimble
(R. S. Trimble)
for Eric Cumine

RFT/cl.

*Exhibits**Plaintiff's Exhibits*

C
Bundle of
agreed
Corres-
pondence,
Letters etc.
continued.

(C O P Y)

25th April, 1966.

*Exhibits**Plaintiff's
Exhibits*C
Bundle of
agreed
Corres-
pondence,
Letters etc.
*continued*Messrs. Hon & Co.,
1001, King's Theatre Building,
32, Queen's Road, Central,
Hong Kong.

Dear Sirs,

Re: Henry Fok Estates Limited
K.I.L. No.1571 Section A

We thank you for your letter of the 22nd instant, enclosing your 10 cheque for the sum of \$112,500 in respect of schedule payment No.14 for which we are obliged.

We cannot accept what you say as to schedule payment No.27 since your clients have undertaken to pay "75% of the amount due in connection with the Building works". Obviously this must include the cost of materials supplied.

We would point out that the Building Contract entered into by our clients with Defag Construction Co. containing details of all the schedule payments was, in fact, approved by your clients prior to the signing of such agreement. Accordingly your clients knew full well what was expected of 20 them when they entered into the Building Mortgage with our clients.

Will you please now let us have your clients' remittance in respect of schedule payment No.27 without any further delay.

Yours faithfully,

cc: Tak Ming Co., Ltd.

(Sgd.) Johnson, Stokes & Master

(C O P Y)

RKB/T3/65

30th April, 1966.

Messrs. Hon & Co.,
1001, King's Theatre Building,
32, Queen's Road, Central,
Hong Kong.

30

Dear Sirs,

Re: Henry Fok Estates Limited-
K.I.L. No.1571 Section A

We confirm our letter of the 22nd instant, and shall be pleased to receive schedule payment No.15 without further delay. It would appear that in spite of all our requests, no effort is being made by your clients to expedite payments.

With further reference to our letter of the 25th instant, we understand that your clients have indicated to our clients this morning that they have no 40

intention of making any schedule payments in respect of materials delivered to the site. According to the Building Contract entered into by our clients with the Contractor, the number of schedule payments due in respect of materials delivered to the site is five, and the amount involved is \$310,000.00. Accordingly the attitude being adopted by your clients is causing our clients grave concern.

10 Quite apart from the interpretation of the Mortgage and further charge, on the interpretation of which these sums are clearly due, Mr. Lai On of Henry Fok Estates Ltd. actually drew up in conjunction with Mr. Koo of Defag Construction Company, the Contrators, the schedule of payment annexed to the Building Contract subsequently entered into by our clients with the Contractors. We understand that in addition to discussing the schedule payments with Mr. Koo, Mr. Lai On and Mr. Koo also discussed the proposed schedule payments with our client Mr. C. Y. Cheng of Tak Ming Company Ltd. prior to the Building Contract being signed.

20 Our clients are, and have for sometime been, paying interest at the full rate on the \$1,800,000.00 due to be advanced to our clients under the Building mortgage and also on the \$1,500,000.00 due to be advanced to our clients under the Further Charge notwithstanding the fact that to date a total of approximately only \$1,600,000.00 has been advanced by your clients. The interest payable by our clients is working out at \$82,500.00 a month and if, due to the delay in making payment on the part of your clients, and also the refusal on the part of your clients to pay those schedule payments relating to materials supplied, the new school premises are not completed by the end of May 1966, then the repercussions will be very serious so far as our clients are concerned. For your information, our clients have to vacate their present premises at the end of May 1966 and our clients will suffer very heavy financial loss if they are unable to move into the new school premises at the beginning of June 1966.

30 We cannot see how your clients can possibly justify their refusal to pay the schedule payments relating to materials supplied to the site and, accordingly we should be obliged if you would kindly point out to your clients the serious consequences which might result from such refusal.

Yours faithfully,

(C O P Y) (Sgd.) Johnson, Stokes & Master

RKB/T3/65

4th May, 1966.

Messrs. Hon & Co.,
1001, King's Theatre Building,
32, Queen's Road, Central,
Hong Kong.

40 Dear Sirs,

Re: Henry Fok Estates Limited-
K.I.L. No.1571 Section A

We should be obliged if you would kindly bring to the attention of

Exhibits
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Plaintiff's
Exhibits
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agreed
Corres-
pondence,
Letters etc.
continued

Exhibits
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Plaintiff's
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 C
 Bundle of
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 pondence,
 Letters etc.
continued.

your clients, Henry Fok Estates Ltd. the fact that we have still not received any remittance in respect of the following schedule payments:—

- 1) Schedule Payments Nos. 23 & 25, in respect of which the Architect's Certificate was forwarded to you on the 27th April 1966.
- 2) Schedule Payment No.19, in respect of which the Architect's Certificate was sent to you on the 29th April 1966.

In addition to the above there is still outstanding schedule payment No.27; and in respect of which we wrote to you at some length on the 30th ultimo. **10**

We have been instructed by our clients to draw to the attention of your clients the fact that work on our clients' site has slowed very considerably, as a result of the delay on the part of your clients in paying out the various schedule payments. It seems inevitable that the building now in the course of erection will not be completed by the end of this month, largely, we would emphasize, on account of the dilatory manner in which your clients have been making the schedule payments.

Yours faithfully,

(Sgd.) Johnson, Stokes & Master

c.c. Tak Ming Company, Ltd.

20

(C O P Y)

Hong Kong 5th May, 1966.

Messrs. Johnson, Stokes & Master,
 Solicitors, Hong Kong.

Dear Sirs,

Re: Henry Fok Estate Limited
 K.I.L. No. 1571 Section A.

We thank you for your letter of the 30th April and 4th May, 1966 the contents of which have been conveyed to our client.

We may point out that the various schedule of payments you referred to were actually payments agreed to between the Mortgagor and the Contractor for which our client is not obliged to observe. However, our client has made a few payments according to the said schedule for the Mortgagor's convenience. **30**

We may point out again that our client is not obliged to make payment in accordance with the Building Contract schedule but only in accordance with the schedule of payments in the Building Mortgage and Further Charge.

Yours faithfully,
 (Sgd.) HON & CO.

PH/ct

(CHOP) Johnson Stokes & Master
 Solicitors &c.,
 Hong Kong
 6th May 1966

40

(C O P Y)

RKB/T3/65

14th May, 1966.

Exhibits

Plaintiff's Exhibits

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Bundle of
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Corres-
pondence,
Letters etc.
continued

Messrs. Hon & Co.,
Rm. 1001 King's Theatre Building,
32, Queen's Road, Central,
Hong Kong.

Dear Sirs,

Re: Henry Fok Estates Limited
Section A of K.I.L. No.1571

10 We thank you for your letters of the 6th & 10th instant, enclosing your cheques for the sums of \$82,500.00 and \$106,875.00 for which we are obliged.

We would also take this opportunity to acknowledge receipt of your letter of the 5th instant, and in view of what you say therein, we shall be pleased to learn whether your client would be prepared to attend a conference to take place either at your office or this office at which, our client, the contractor, and all the other interested parties would attend in an effort to come to some satisfactory conclusion as to how the building under construction at the above site could be completed with the minimum of delay.

20 Kingly let us hear from you as to the above at your earliest possible convenience.

Yours faithfully,
(Sgd.) HASTINGS & CO.

Exhibits
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C
 Bundle of
 agreed
 Correspondence,
 Letters etc.
continued.

德明有限公司鄭潤才先生

逕啟者 鄙人等係洗衣街 1571 號地段德明中學地盤各部門判頭及材料商，現因該承建商與 鄙人等發生財務糾紛，鄙人等為保障血本起見，用特函請 台端協助，暫將第二十七及第二十九期工程費寄存於贊臣史篤士律師及廖亞利孖打律師事務所，待 鄙人等與該承建商一切問題解決後，再行書面通知動用方法 將來如因該款發生任何法律問題 鄙人等願負責全部責任

右致

各判頭及材料商

義生五金材料公司 余德義
 大 昌 何 蘇
 瑞 成 木 行 關 光
 木 作 裝 修 金 木 慶 等
 木 作 裝 修 陳 春 記
 泥 水 周 紹 欽

公曆一九六六年五月拾五日

(TRANSLATION)

Exhibits
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Plaintiff's
Exhibits
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Dear Sir,

We are the sub-contractors and material suppliers in respect of the building of Tak Ming Middle School on the site at Lot No.1571 Sai Yee Street. As there is now a dispute over financial matters between the contractor and us, we are now writing this letter to ask you to help us to protect our financial interests by leaving the 27th and 29th payments for work with Messrs. Johnson, Stokes & Master, and Leo D'amada Solicitor's firm to hold back until we give further notice in writing after the dispute between us and the contractor is settled. We are willing to take full responsibility for any legal consequences which may ensue in future on account of the said payments (being withheld).

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 Bundle of
 agreed
 Corres-
 pondence,
 Letters etc.
continued

To: Mr. Cheng Yun Choi
 Tak Ming Company, Ltd. (H.K.)

(From) The sub-contractors and material suppliers
 (Signed) Yue Tak Yee of Yee Sang Metal Supplies Co.
 (Signed) Ho So of Tai Cheong
 (Signed) Kam Mok Hing, Carpentry Sub-contractor
 (Signed) Chan Chun Kee, Joinery Sub-contractor
 (Signed) Chow Shiu Yam, Cement and Plastering Sub-contractor
 (Signed) Kwan Kwong of Shui Shing Timber Suppliers

Dated the 15th May, 1966.

I hereby certify that the foregoing
 is a true translation of the Chinese
 text. 935-A

(Sgd.) (Illegible)

COURT TRANSLATOR

22nd March 1968

(C O P Y)

*Exhibits**Plaintiff's
Exhibits*

17th May 1966.

C
Bundle of
agreed
Corres-
pondence,
Letters etc.
*continued.*Messrs. Tak Ming Co. Ltd.,
No.1 Arran St.,
Kowloon.

Dear Sirs,

Re: Contract No.574 dated 27th Oct.
1964—Tak Ming Middle School

We have been consulted by our clients Messrs. Defag Construction Co. in connection with the above contract entered into between yourself as **10** employer of one part and our clients as contractor of the other part whereby our clients undertake the construction of the building of the above school at a total cost of \$4,500,000.00 on such terms and conditions as therein mentioned.

We are instructed that you have failed to make the 27th payment of \$52,500.00 (\$70,000.00 less 25%) demanded by our clients in their letter of 22nd April 1966 which said payment was against the arrival at site of Mosaic and Glazed tiles as per schedule of payment 27 of the said Contract and a certificate to that effect has been issued by the Architect Eric Cumine on 5th April 1966. Despite repeated demands, you have still failed to pay the same up to the time of writing. Our clients consider that your said act has constituted **20** a breach of the said contract. In view of your said breach, our clients exercises his discretion under clause 22 of the said contract to determine forthwith the employment under the said contract. Our clients will exercise such right as they may be entitled to under the said clause 22 and take such further steps accordingly.

Our clients reserve their right to hold you liable for all loss and damage sustained therefrom by reason of your said breach.

Yours faithfully,
(Sgd.) Gunston & Smart

c.c. Messrs. Eric Cumine, Architect.

30

(C O P Y)

23rd May 1966.
Our Ref: 574/SK/GCMessrs. Tak Ming Co., Ltd. H.K.
1, Arran Street,
Hong Kong.

Dear Sirs,

Re: Contract No. 574
Tak Ming Middle School

Following your Mr. Chang's conference with the undersigned on Friday afternoon the 20th May 1966 Mr. L. S. Koo of Defag Construction Co. was interviewed the following morning.

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Plaintiff's
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2. As I pointed out to you final occupation would be obtained quicker if you could persuade Defag Construction Co. to withdraw their determination letter and complete the works themselves than accept the determination and complete the works with another firm of Contractors.
3. There is no need to reiterate my reasons. Messrs. Defag Construction Co. have verbally agreed to withdraw their determination letter provided that mutual agreement can be reached on an Addendum to the Conditions of Contract.
4. I went fully into this question with Mr. Koo and a "draft" of the suggested Addendum is attached.
5. You will note that the 50 days for Stage 1 and the 90 days for full completion discussed between Mr. Chang and Mr. Koo and Mr. Fok of Henry Fok Estates Ltd. have been adjusted to 90 days and 120 days respectively. This had to be done because the electrical installation to the Building—which does not form part of the Contract—must be completed to the satisfaction of the Authorities before even a Temporary Occupation Permit can be obtained.
6. This involves the construction of a Transformer Room, the provision and installation of the Transformer and the electrical wiring light and power installations. Additionally the Sanitary Plumbing installation will have to be sufficiently far advanced to allow Stage I (the School) to be operative, all external finishes will have to be so completed that the hoardings, etc., can be removed and the Fire Protection Installation will have to be completed. It is considered that the 90 and 120 days agreed upon are not too great and that the Contractors will have to work efficiently to meet the dates.
7. It will be noted that no mention is made in the Addendum to the Lifts Installations. This has been left out deliberately since the Lifts Installations are the subject of a separate contract outside this office control.
8. No mention has been made either to your Mortgage commitments with Henry Fok Estates Ltd, and Messrs. Defag Construction Co. since they also are not part of the building contract.
9. It is suggested that the draft Addendum be discussed between all parties concerned and their respective solicitors and agreement reached and as soon as possible. Whether the Contract and suggested Addendum should now be legally tied to the Mortgages agreements, as was not the case before, is for your Solicitors to decide.
10. Money will have to be found immediately for the Electrical Installation and if so instructed this office will obtain tenders.
11. A Lift Contract will have to be formulated and Lifts installed before a Permanent Occupation Permit can be obtained.

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Bundle of
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pondence,
Letters etc.
continued.

Exhibits
 Plaintiff's
Exhibits

11. Copies of this letter and the Addendum have been sent (to save time) as indicated.

Yours faithfully,
 (Sgd.) R. F. Trimble
 (R. F. Trimble)
 for Eric Cumine.

C
 Bundle of
 agreed
 Corres-
 pondence,
 Letters etc.
continued

c.c. Johnson, Stokes & Master,
 Defag Constn. Co.
 Gunston & Smart,
 Henry Fok Estates Ltd.
 RFT/bw.

10

(C O P Y)

D R A F T

ADDENDUM TO CONTRACT NO. 574 dated the 27th October 1964 made between Messrs. Tak Ming Company Limited of No.1 Arran Street, Kowloon, Hong Kong (hereinafter called "The Employers") of the one part and Mr. L. S. Koo carrying on business in Hong Kong as Defag Construction Company at No.116, Argyle Street, 9th Floor A, Kowloon (hereinafter called "the Contractors") of the other part for the construction and maintenance of a building comprising Shops and a School including ancillary works thereto at Lot No.K.I.L. 1571 S.A. fronting Nelson Street, Kowloon, Hong Kong. 20

NOW IT IS HEREBY AGREED AS FOLLOWS:—

1. That the Contractors will withdraw their letter dated the 17th May 1966 addressed to the Employers determining the Contract provided that the remaining clauses of this Addendum insofar as they relate to action required by the Employers are complied with and undertake to complete the whole of the outstanding works under the Contract as laid down in Clauses 4 and 5 herein.
2. The Employers will immediately honour the outstanding payment certificates issued by the Architect for the Contract Mr. Eric Cumine, F.R.I.B.A. 30
3. The Employers will honour and within five days of the date thereof all future payment certificates properly issued by the said Architect under the terms of the Contract and this Addendum thereto.
4. The Contractors will complete the outstanding works under the Contract in two stages viz. **Stage 1.** The First to Eight Floors (1st to 8th) inclusive within ninety (90) days of the signing of this Addendum to such a stage of completion that will enable the said Architect to apply on the Employers behalf to the Building Authority for a Temporary Occupation Permit. **Stage 2.** The remainder of the building works under the Contract within one hundred and twenty (120) days of the signing of this Addendum to such a state of completion that will enable the said Architect to apply on the Employers behalf to the Building Authority for a Temporary Occupation Permit. 40

- 5. That the Contractors will provide and instal the complete electrical installation to the Building in accordance with the said Architect's Drawing and Specification contemporaneously with Stages 1 and 2 of Clause 4 hereof and at a price to be agreed with the said Architect on behalf of the Employers.
- 6. That the Bonus and Agreed Damages Clauses in the Contract and any subsequent amendments thereto shall be null and void.
- 7. That one third of the forty first payment as laid down in the Contract Terms of Payment shall be payable on the issue of a Temporary Occupation Permit for Stage 1 by the Building Authority, that one third of the said payment shall be payable on the issue of a Temporary Occupation Permit for Stage 2 and the balance shall be payable on the issue of the Permanent Occupation Permit for the whole Building by the Building Authority.

Exhibits
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Plaintiff's Exhibits
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 Bundle of agreed Correspondence, Letters etc.
continued.

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.....
Contractors

.....
Employers

(C O P Y)

RKB/T3/65

4th June, 1966.

Eric Cumine,
 Authorized Architect,
 20 14, Embassy Court,
 Hysan Avenue,
 Hong Kong.

Attention: Mr. R. F. Trimble

Dear Sir,

Re: K.I.L. No.1571 Section A-
Tak Ming Middle School

We would acknowledge receipt of the copy of your letter to Tak Ming Company Ltd. dated the 23rd ultimo together with the draft Addendum enclosed therewith, for which we are obliged.

30 We understand that various discussions have taken place between our clients, Tak Ming Company Ltd. and Defag Construction Company, and as a result we are instructed to send you an Addendum which we have drawn up, and should be obliged if you would kindly see whether Mr. Koo of Defag Construction Company is prepared to sign same.

You will note that we have provided for payment of Architect's Certificates within 7 days from the date of receipt of same. We think Hnery Fok Estates Limited are now prepared to pay out against Architect's Certificate within 5 days, and accordingly it seems desirable for our clients to be allowed a further 2 days in which to make payment.

*Exhibits**Plaintiff's
Exhibits*

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Bundle of
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pondence,
Letters etc.
continued

With regard to Clause 7 of your draft Addendum we have omitted this clause from the Addendum herewith in view of the fact that any earlier payment of the 41st payment or a part thereof by our clients would only be possible if Henry Fok Estates Ltd. are prepared to agree to make such payment to our clients at an earlier date. We understand that Henry Fok Estates Limited may well be prepared to make such payment at an earlier date, but until such time as definite agreement is reached on this point with Henry Fok Estates Ltd., then we feel that this clause must be omitted from the Addendum.

We are sending an extra copy of the Addendum herewith for retention by Defag Construction Company. **10**

If you have any queries in connection with this matter, then do not hesitate to communicate with us.

Yours faithfully,
(Sgd.) Johnson Stokes & Master.

(C O P Y)

RKB/T3/65

7th June, 1966.

Eric Cumine,
Authorised Architect,
14, Embassy Court,
Hysan Avenue,
Hong Kong.

20

Attention: Mr. R. F. Trimble

Dear Sirs,

Re: K.I.L. No.1571 Section A-
Tak Ming Middle School

Further to our conversation with your Mr. R. F. Trimble on his telephoning yesterday, we have had another discussion with our client Mr. C. Y. Cheng who states that provided Mr. Koo completes all the work in respect of Stage 1, as mentioned in the draft Addendum, our client will be responsible **30** for any re-painting etc. which is required after the installation of the electrical equipment.

Quite frankly our client has told us that their only desire is to obtain a Temporary Occupation Permit in respect of the first to eighth floors inclusive, regardless of the state of the inside of the building.

We have taken the opportunity of re-drawing the Addendum and now enclose a fresh Addendum for the attention of Mr. Koo. You will note that in view of what you said about the original clause 6 in our draft Addendum sent with our letter of the 4th instant, we have now re-worded this clause and inserted a figure of \$540,000.00 by way of liquidated damages which sum we **40** understand is acceptable to Mr. Koo.

If Mr. Koo is prepared to accept the Addendum as drawn, then we see no reason why Mr. Koo and Tak Ming Company Ltd. should not sign the Addendum enclosed herewith.

If you have any comments to make on the enclosed Addendum, then we shall be pleased to hear from you.

Yours faithfully,

(Sgd.) Johnson, Stokes & Master

Encl.

Exhibits
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Plaintiff's
Exhibits

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Bundle of
agreed
Corres-
pondence,
Letters etc.
continued

(C O P Y)

13th June, 1966.

10 Messrs. Johnson, Stokes and Master,
Hongkong & Shanghai Bank Building,
Mongkok Branch,
Kowloon.

Attention: R. K. Bryson, Esq.

Dear Sirs,

K.I.L. 1571, S.A.

20 With reference to our letter of 15th May, 1966 addressed to Messrs. Tak Ming Co., Ltd. in which we have asked your goodselves to hold stake of the amount due to Messrs. Defag Construction Co. in respect of the payments Nos. 27 and 29 until the settlement of the dispute between Messrs. Defag Construction Co. and the undersigned Sub-contractors and Material Suppliers.

We now wish to inform you that the settlement was made as follows:-

1). A Committee of THREE (3) representative members was elected and duly formed to take care of everything on the site, a photostatic copy of the Committee's resolution is herewith attached for your perusal.

2). All future payments less payments made direct to Pioneer Concrete (H.K.) Ltd. and Yee Sang Metal Supplies Co. will be paid direct to the following new current account in the name of:—

30 DEFAG CONSTRUCTION COMPANY
Site of Tak Ming Middle School
Sub-contractors & Suppliers Account

with The Shanghai Commercial Bank, Ltd. Head Office and the said account shall only be used for the collection of payments from the Owner and payments to the Sub-Contractors and Material Suppliers in respect of the works and materials to be carried out and delivered to site of Tak Ming Middle School on K.I.L. 1571, S.A., Kowloon.

Exhibits
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Thanking you in anticipation and looking forward to receiving your kind approval at your earliest convenience.

Yours faithfully,

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 Bundle of
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 Corres-
 pondence,
 Letters etc.
continued

S. Y. Chow

C. L. Lee

Kwan Kwong

(Sgd.) S. Y. Chow (Sgd.) C. L. Lee (Sgd.) Kwan Kwong

Confirmed by:—

Ho So

Chan Chun Kee

Kam Mok Hing

(Sgd.) L. S. Koo

(Sgd.) Ho So (Sgd.) Chan Chun Kee (Sgd.) Kam Mok Hing

(C O P Y)

10

22nd June, 1966.

Messrs. Johnson Stokes & Master,
 Hong Kong & Shanghai Bank Bldg.,
 Hong Kong.

Attention: R. K. Bryson Esq.,

Dear Sirs,

Re: Defag Construction Co.'s
 Building Contract No. 574

With reference to the letter of Defag Construction Co., dated 14th Jan., 1966 to you, for the amendments of payment to us, we hereby irrevocably **20** authorize you to pay the 17th, 19th and 20th payments for our account as follows:—

Payee: Account number 3660 of Nanyang Commercial Bank, Ltd., Hong Kong.

Amount: The 17th, 19th & 20th payments of foresaid contract of HK\$36,000 each total HK\$108,000.

Receipt: The receipt of Nanyang Commercial, Bank Ltd., for the foresaid payments receive from you, shall be accepted by us.

We shall be grateful, if you will make arrangements accordingly.

Yours faithfully,

30

(Sgd.) Yu Tak Yee

c.c. Nanyang Commercial Bank, Ltd.,

(C O P Y)

22nd June, 1966.

Messrs. Johnson Stokes & Master,
Hong Kong & Shanghai Bank Bldg.,
Hong Kong.

Attention: R. K. Bryson Esq.,

Dear Sirs,

Re: Defag Construction Co.'s
Building Contract No. 574

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Bundle of
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Corres-
pondence,
Letters etc.
continued.

10 With reference to the letter of Defag Construction Co., dated 14th Jan., 1966 to you, for the amendments of payment to us, we hereby irrevocably authorize you to pay the 41st payments for our account as follows:—

Payee: Wang On Trading Co., Room 309, The Chartered Bank Building Hong Kong.

Amount: The 41st payment of foresaid contract of HK\$230,000.00

Receipt: The financial receipt of Wang On Trading Co., for the foresaid payments received from you, shall be accepted by us.

20 We shall be grateful, if you will kindly confirm the above by writing to Wang On Trading Co., at your earliest convenience.

Yours faithfully,

YEE SANG METAL SUPPLIES CO.

(Sgd.) Yu Tak Yee

(C O P Y)

RBK/T3/65

27th June, 1966.

Wang On Trading Company,
Room 309, The Chartered Bank Building,
Hong Kong.

Dear Sirs,

30 Re: Building Contract No.574

We have received instructions from Yee Sang Metal Supplies Co., Hong Kong, to remit to you in due course the sum of \$230,000.00.

We cannot estimate at the moment when this money will come to hand, but as soon as same is received by us we shall at once forward to you our cheque for the above sum.

Yours faithfully,
(Sgd.) Johnson, Stokes & Master

(C O P Y)

*Exhibits**Plaintiff's
Exhibits*

RKB/T3/65.

9th July, 1966.

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Bundle of
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pondence,
Letters etc.
*continued.*Yee Sang Metal Supplies Co.,
Room 625, Man Yee Building,
Des Voeux Road, C.,
Hong Kong.

Dear Sirs,

Re: Building Contract No.574-
K.I.L. No.1571 Section A
Tak Ming Middle School

10

We write to inform you that we have today paid into your account, being No.3660 at the Nanyang Commercial Bank Ltd., Hong Kong, the sum of \$36,000 being the amount due to you under schedule payment No.17.

Yours faithfully,

(Sgd.) Johnson Stokes and Master

(C O P Y)

Hong Kong 9th July, 1966.

BY REGISTERED POST

20

Messrs. Yee Sang Metal Supplies Co.,
Room 625, Man Yee Building,
60-68, Des Voeux Road, Central,
Hong Kong.

Dear Sirs,

Tak Ming Middle School at
K.I.L.1571, S.A., 76, Sai Yee Street, Kowloon.

With reference to our letters of 13th January, 1966 and of 11th February, 1966, we wish to inform you that the post-dated cheque (No.071548) on the 15th July, 1966 shall not become payable and be cashed under the condition 3 mentioned in our letter of 13th January, 1966 since the building 30 concerned has not be completed on or before the end of May, 1966 and no final occupation permit has been issued yet.

However, the sum of \$70,000 shall still be payable by us to you in accordance with the terms and conditions of the 2nd Bulding Mortgage in Defag's favour.

Yours faithfully,
TAK MING CO., LTD. H.K.

(Sgd.) (Illegible)

Director

(C O P Y)

12th July, 1966.

Tak Ming Company, Ltd., H.K.
No.68-78, Sai Yee Street,
Kowloon.

Dear Sirs,

Re: Tak Ming Middle School at
K.I.L. 1571, S.A., 76,
Sai Yee Street, Kowloon.

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Plaintiff's
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pondence,
Letters etc.
continued.

10 We thank you for your letter of 9th July, 1966.

Since the Date of completion for the erection of the above building has been agreed between Defag Construction Co. and your goodselves to be deferred to 22nd September, 1966, please confirm that you are agreeable to the post-dated cheque for \$70,000.00 issued by you in our favour becoming payable on 22nd October, 1966.

Yours faithfully,

(Sgd.) Yu Tak Yee

(C O P Y)

Hong Kong 16th July, 1966.

20 Messrs. Yee Sang Metal Supplies Co.,
60-68, Des Voeux Road, Central,
Hong Kong.

Dear Sirs,

Tak Ming Middle School at
K.I.L.1571, S.A., 76, Sai Yee Street, Kowloon.

We thank you for your letter of 12th July, 1966, we would like to reiterate that our cheque (No. 071548) dated 15th July, 1966 shall no more become payable and be cashed as mentioned in our letter of 9th July, 1966 addressed to you by registered post.

30 However, you will be paid by us to you in accordance with the same terms & conditions of the 2nd building mortgage in Defag's favour, i.e., the payment will be made within one month after the issue of final occupation permit, or alternatively within 6 months from the date thereof, the interest at 1.5% per month will be charged.

Yours truly,
TAK MING CO., LTD. H.K.

(Sgd.) (Illegible)
Director

CY/chu

(C O P Y)

*Exhibits**Plaintiff's Exhibits*

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Hong Kong
\$3.00
Stamp Duty Paid
23 VII 6600450
Hong Kong
\$3.00
Stamp Duty Paid
23 VII 66

Stamped on 23/7/66

THIS AGREEMENT is made the Nineteen day of July One thousand nine hundred and sixty-six BETWEEN KOO LING SUN trading as DEFAG CONSTRUCTION COMPANY of No.116 Argyle Street, 9th floor Flat A, Kowloon in the Colony of Hong Kong (hereinafter called "The Contractor") of the one part and TAK MING COMPANY LIMITED whose registered office is situate at 76 Sai Yee Street, Kowloon aforesaid (hereinafter called "The Owner") of the other part. 10

W H E R E A S

1. The Contractor has by an Agreement in writing dated the 27th day of October 1964 agreed to build for the Owner a 17-storey building on the property of Owner known and registered in the Land Office as Section A of Kowloon Inland Lot No. 1571 for the price of \$4,500,000.00 on the terms set forth in the said agreement.
2. By a Second Building Mortgage dated the 16th November 1964 and made between the parties hereto the Owner agreed with the Contractor that the Onwer would on the expiry of six months from the date of the issue by the Building Authority of the Final Occupation Permit in respect of the aforesaid building pay unto the Contractor all such sum or sums as may be owing by the Owner to the Contractor on an account current between the Owner and the Contractor not exceeding a total extent of \$1,200,000.00. 20
3. The Contractor has requested the Owner to pay such sum or sums as may be due to the Contractor under the account currant by way of monthly instalments of \$80,000.00 per month, the first payment to be made one month after the issuing of the Temporary Occupation Permit in respect of the whole of the said building and the Owner has agreed to make payment in the manner following upon the terms and conditions herein contained. 30
NOW IT IS HEREBY AGREED by and between the parties hereto as follows:—

- 1) The Owner will pay such sum or sums as may be owing by the Owner to the Contractor on the account current by way of monthly instalments of \$80,000.00 per month commencing one calendar month after the issuing by the Building Authority of a Temporary Occupation Permit in respect of the whole of the said building.
- 2) In addition to the aforesaid monthly instalments of \$80,000.00 the Owner will at the expiration of one calendar month from the issuing of the Final Occupation Permit commence to pay through Messrs. Johnson, Stokes & Master the interest due to the Contractor under the aforesaid Building Mortgage. 40

3) Payment of each monthly instalment of \$80,000.00 and also of the interest referred to above shall be made through Messrs. Johnson, Stokes & Master and the Contractor hereby expressly authorizes the Owner through Messrs. Johnson, Stokes & Master to deduct from such instalments and the interest such monthly sums as may be due and owing to Pioneer Concrete (Hong Kong) Ltd., Yee Sang Metal Supplies Company, all material suppliers and each and every sub-contractor employed by the Contractor on the site at Section A Kowloon Inland Lot No. 1571 in accordance with the Schedule to be prepared by the Contractor and duly counter-signed by Pioneer Concrete (Hong Kong) Ltd., Yee Sang Metal Supplies Company, all material suppliers and each and every of the sub-contractors employed on the aforesaid site which said Schedule shall be supplied to Messrs. Johnson Stokes & Master within ten (10) days from the date hereof.

Exhibits
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Plaintiff's
Exhibits
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 C
 Bundle of
 agreed
 Correspondence,
 Letters etc.
continued.

4) All payments made by the Owner through Messrs. Johnson, Stokes & Master pursuant to clause 3) above shall be deemed to be payments made for and on behalf of the Contractor and shall go in reduction of the amount due and owing by the Owner to the Contractor under the said account current and the receipts of Pioneer Concrete (Hong Kong) Limited, Yee Sang Metal Supplies Company, the material suppliers, and of the sub-contractors counter-signing the Schedule referred to in clause 3) above shall bind the Contractor and his assigns.

5) The Contractor has immediately prior to the signing of this Agreement executed a Certificate of Satisfaction of the aforementioned Second Mortgage dated the 16th November 1964, and thenceforth the Contractor shall not be entitled to any security whatever in respect of the moneys owing to the Contractor pursuant to the said Building Contract, but it is hereby declared and agreed that no moneys were paid upon execution of the said Certificate of Satisfaction and the amount owing by the Owner to the Contractor on the date of the said Certificate of Satisfaction is unaffected thereby.

6) Nothing herein contained shall affect or alter the terms and the validity of the said Building Contract and the Addendum to the Building Contract which said Addendum is dated the 12th June, 1966, save and except as expressly amended above.

AS WITNESS the hands of the parties hereto the day and year first above written.

40 SIGNED by the Contractor in the presence of :- R. K. Bryson
 Solicitor
 Hong Kong) (Sgd.) L. S. Koo.

SIGNED by C. Y. Cheng on behalf of the Owner in the presence of: R. K. Bryson) (Sgd.) C. Y. Cheng

Exhibits
—
Plaintiff's
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C
Bundle of
agreed
Corres-
pondence,
Letters etc.
continued.

We Tak Ming Middle School of 76, Sai Yee Street, Kowloon in the Colony of Hong Kong hereby guarantee to you payment of the amounts due from Tak Ming Company Ltd. under the above Agreement.

Dated the 19th day of July, 1966.

C. Y. Cheng

(*Sgd.*) Principal.

To: DEFAG CONSTRUCTION COMPANY
116, Argyle Street, 9th Floor,
Flat A, Kowloon

逕啟者 敝公司承建之九龍洗衣街一五七一號地段德明中學
 建築工程，根據一九六六年六月八日及六月十日三方安
 協簽訂之合約（業主，建築商及表內B字之判頭及材料
 商）決無異議各該判頭及材料商之尾數須於該工程全部
 完工第二次臨時入伙紙發出後壹個月，在大發營造廠名
 下應得之建築費尾數壹佰式拾萬元中按月支付捌萬元，
 由德明中學担保及德明有限公司付款，每月由孖士打律
 師樓直接轉發給派安公司肆萬元，其他肆萬元由各該判
 頭及材料商分配根據新表格（七月廿五日送交之表格）
 直接付與上開人等并請發出與每單位單獨書面證明由律
 師樓（孖士打）轉與各判頭及材料商用特備函奉告懇請
 照辦為感

德明有限公司
 鄭潤才先生台照

Manager

L. J. Ho

DEFAG CONSTRUCTION CO.

一九六六年七月廿五日

Exhibits

(TRANSLATION)

*Plaintiff's
Exhibits*

Dear Sir,

C
Bundle of
agreed
Corres-
pondence,
Letters etc.
continued.

With reference to our construction work for Tak Ming Middle School at Lot No. 1571, Sai Yee Street, Kowloon, we shall observe (the terms and conditions) stipulated in the agreements entered into on 8th June, 1966 and 10th June, (1966) by the three parties (the owner, the contractor and the sub-contractors and material suppliers listed in the schedule under "B") without any objection. The balance due to all the said sub-contractors and material suppliers shall be paid by monthly instalments of \$80,000 each. (The first payment) is to be made after the entire completion of the said construction work and one month after the issue of the 2nd Temporary Occupation Permit. The monthly instalments of HK\$80,000 each are to be made out of the balance of construction cost of \$1,200,000 due to Defag Construction Company. Tak Ming Middle School shall guarantee the payment which is to be made by Tak Ming Co., Ltd. Each month \$40,000 is to be paid direct to Pioneer Co., Ltd. through Johnson, Stokes & Master, the other \$40,000 is to be paid direct to the sub-contractors and material suppliers in accordance with the New Schedule submitted on 25th July. Furthermore, you are requested to issue separate certificates to each one (of them), which are to be forwarded to the various sub-contractors and material suppliers through Messrs. Johnson, Stokes & Master, Solicitors.

To: Mr. Cheng Yun Choi
Tak Ming Co., Ltd.

(Chopped in English) Defag Construction Co.

(Signed in English) L. S. Koo
Manager

Dated 25th July, 1966.

List of Balance Due To Sub-contractors and Material Suppliers
For The Construction Of New Tak Ming Middle School K.I.L. 1571
Section A, Kowloon.

25th July, 1966.

Name	Address	Remark
(A) Pioneer Concrete (H.K.) Ltd.	\$257,705.10(approx.) \$220,000.— to \$240,000.— (about)	Kung Sheung Building, \$40,000 - each 8th floor, 18, Fenwick month until all Street, Hong Kong. paid.

(B) HK\$40,000.00 each month to be shared as follows:—

				<i>Exhibits</i>
	1.Kam Mok Hing	47,500.00	On Ning Building No. 1 ground floor, Fok Loy Villege, Tsun Wan N/T	HK\$4,500.— each month until all paid.
	2.Chow Shui Yam	132,000.00	5, Hok Ling Street, 3rd floor, Tokawan Kowloon.	HK\$12,900.—each month until all paid.
	3.General Engineering Co., Limited.	63,200.00	Rm. 328, Caroline Mansion 4, Yun Ping Rd., 3rd fl., Hong Kong.	HK\$6,150.— each month until all paid.
10	4.Chan Chun Kee	13,500.00	Rm. 5, Johnston Mansion 11th floor, Johnston Rd., Hong Kong.	HK\$1,300.— each month until all paid.
	5.Ah Tong Bamboo Rigger.	41,000.00	365, Shaukiwan Road, 1st floor, Hongkong.	HK\$3,950.— each month until all paid.
	6.Tin Woo Manufacturing Co.	5,000.00	11, Fung Yee Street, 4th floor, Kowloon.	HK\$500.— each month until all paid.
20	7.Lee Chuck	21,000.00	154, Wong Tau Hom R/E Block "H" 1st floor.	HK\$2,050.— each month until all paid.
	8.Cheung Cheong Kee Engine Metal Factory	32,000.00	45-D, Ma Tau Wei Road Hung Hom, Kowloon.	HK\$3,120.— each month until all paid.
	9.Hop Kee Glass	19,000.00	476, King's Road, gr. floor, Hong Kong.	HK\$1,850.— each month until all paid.
30	10.Tai Chong Construction Supply Co.	15,000.00	5, Yeung Chong Street, ground floor, Kowloon.	HK\$1,450.— each month until all paid.

Exhibits

Plaintiff's Exhibits

C

Bundle of agreed Correspondence, Letters etc.
continued.

Exhibits
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Plaintiff's
Exhibits
 ———

C
 Bundle of
 agreed
 Corres-
 pondence,
 Letters etc.
continued

11.	Shui Shing Timber Co.	12,200.00	5, Da Kou Ling Road, Kowloon City.	HK\$1,200.— each month until all paid.
12.	Luen Fat Metal Works Factory	7,418.00	22, Foo Kwai Street, Taikoktsui, Kowloon.	HK\$730.— each month until all paid.
13.	Man Cheong Metal Works.	3,160.00	Lot No. 1146, No. 12B Shun Ning Road, Kowloon.	HK\$300.— each month until all paid.

(C) 1.	The First Enterprises Corporation Ltd.,	6,000.00	303-304, Yu To Sang Building, Hongkong.		10
2.	Yee Sang Metal Supplies Co.	29,442.00	625, Man Yee Building, 6th floor Hongkong.	for cement supply	
3.	Yee Sang Metal Supplies Co.	16,000.00	625, Man Yee Building, 6th floor Hongkong.	Steel bars.	
4.	Dah Fong Company Mr. Sun Ho Sung.	42,000.00	612, China Building, Hong Kong.		20

Note:

- Owing to the survey of quantity of steel bars supplied by Yee Sang Metal Supplies Co. the actual amount due to the said Co. will be informed later.
- The balance of construction cost of HK\$1,200,000.00 except paid to the sub-contractors and material suppliers shown above to be directed to Defag Construction Company.

DEFAG CONSTRUCTION CO. **30**

(Sgd.) L. S. Koo
 Manager

(C O P Y)

RKB/T3/65

4th August, 1966.

Yee Sang Metal Supplies Company,
625, Man Yee Building,
Hong Kong.

Exhibits
—
Plaintiff's
Exhibits

C
Bundle of
agreed
Corres-
pondence,
Letters etc.
continued.

Dear Sirs,

Re: Defag Construction Company

10 We have been instructed by Defag Construction Company of 116, Argyle Street, 9th floor, Kowloon, to write to you to obtain your confirmation of the sum which will be due and owing to you, in respect of steel bars supplied, from Defag Construction Co. upon completion of the building now being erected at Section A of Kowloon Inland Lot No.1571.

According to a new schedule which has been prepared by Defag Construction Co., the amount which will be due and owing to you upon completion of the building will be approximately HK\$16,000.00 the exact figure to be ascertained after a calculation has been made as to the exact number of steel bars supplied by you.

20 Defag Construction Co. have instructed us to obtain your confirmation of the figure of approximately HK\$16,000 and also to obtain your confirmation of the proposal whereby this sum will be paid to you by way of monthly instalments of HK\$7,000 the first payment to be made eight calendar months after the expiration of one calendar month from the issuing of the Temporary Occupation Permit in respect of the whole of the building on the above site.

Defag Construction Co. has instructed us to pay to you direct the aforesaid monthly instalments of \$7,000 out of the monthly instalments of HK\$80,000.00 due to be paid by Tak Ming Company Ltd. to Defag Construction Company Pursuant to an Agreement dated the 19th July, 1966.

30 If you agree the above approximate sum of HK\$16,000 and are prepared to accept the proposal of Defag Construction Company that this sum should be paid to you by way of the aforesaid monthly instalments of HK\$7,000 then kindly sign the duplicate letter herewith and return same to us at your earliest possible convenience.

In the event that a final calculation as to the number of steel bars shows that the amount due and owing to yourselves is more or less than \$16,000 then the number of monthly instalments will be increased or decreased proportionately.

Yours faithfully,

(Sgd.) Johnson, Stokes & Master

Encl. duplicate of same to be returned.

40 We confirm the approximate figure of HK\$16,000.00 above and agree to accept repayment by monthly instalments of HK\$7,000.00 on the lines indicated above.

Dated the 1966. (Signature)

(C O P Y)

Exhibits

Plaintiff's Exhibits

RKB/T3/65

4th August, 1966.

C
Bundle of
agreed
Corres-
pondence,
Letters etc.
continued.

Yee Sang Metal Supplies Company,
625, Man Yee Building,
Hong Kong.

Dear Sirs,

Re: Defag Construction Company

We have been instructed by Defag Construction Company of 116, Argyle Street, 9th floor, Kowloon, to write to you to obtain your confirmation **10** of the sum which will be due and owing to you in respect of cement supplied from Defag Construction Co. upon completion of the building now being erected at Section A of Kowloon Inland Lot No.1571.

According to a new schedule which has been prepared by Defag Construction Co., the amount which will be due and owing to you upon completion of the building will be HK\$29,442.00.

Defag Construction Co. have instructed us to obtain your confirmation of the figure of HK\$29,442 and also to obtain your confirmation of the proposal whereby this sum will be paid to you by way of monthly instalments of HK\$12,000 the first payment to be made eight calendar months after the expiration of **20** one calendar month from the issuing of the Temporary Occupation Permit in respect of the whole of the building on the above site.

Defag Construction Co. has instructed us to pay to you direct the aforesaid monthly instalments of \$12,000 out of monthly instalments of HK\$80,000.00 due to be paid by Tak Ming Company Ltd. to Defag Construction Company pursuant to an Agreement dated the 19th July, 1966.

If you agree the above sum of HK\$29,442 and are prepared to accept the proposal of Defag Construction Company that this sum should be paid to you by way of the aforesaid monthly instalment of HK\$12,000 then kindly sign the duplicate letter herewith and return same to us at your earliest **30** possible convenience.

Yours faithfully,

(Sgd.) Johnson, Stokes & Master

Encl. duplicate of same to be returned.

We confirm the figure of HK\$29,442.00 above and agree to accept repayment by monthly instalments of HK\$12,000.00 on the lines indicated above.

Dated the 1966. (Signature)

(C O P Y)

4th August 1966.
Our Ref. 574/SK/GC*Exhibits**Plaintiff's
Exhibits*C
Bundle of
agreed
Corres-
pondence,
Letters etc.
*continued.*M/s. Defag Constn. Co.,
116 Argyle Street, 9th Floor, A,
Kowloon.

Dear Sirs,

Tak Ming Middle School

10 Receipt is acknowledged of your request of the 30th July for an extension in the Time for Completion of 15 days due to inclement weather between 12th June and 31st July 1966.

The Contract Completion Time is extended as under:—

13th, 14th, 15th & 16th June	—	Severe	Rain	Storm	
13th, 14th and 15th July	—	„	„	„	Typhoon Signal No.7
17th July	—	„	„	„	„ No.7

Total Extension 8 days

The claims for 17th to 30th June, 23rd, 25th and 26th July are rejected.

Yours faithfully,

(Sgd.) R. F. Trimble

(R. F. Trimble)
for Eric Cumine

20

cc. Client
Johnson, Stokes and Master.
RFT/lt

(C O P Y)

4th August, 1966.

30 Mr. Chang,
M/s. Tak Ming Co. (H.K.) Ltd.,
76, Sai Yee Street,
Kowloon.

Dear Sir,

Re: Construction of New Tak Ming
Middle School, K.I.L. 1571
Section A.

With reference to our list submitted on 25th July, 1966 for the balance due to our sub-contractors and material suppliers we wish to inform you that the Item "C" to be paid to them after the amount we due to Messrs. Poiner Concrete (H.K.) Ltd. all cleared and share as follows:—

40 Item "C" From the 8th Installement HK\$40,000.00 each month to be shared in percentage.

180

<i>Exhibits</i>	1.	The First Enterprises Corporation Ltd.	\$ 6,000.00	
<i>Plaintiff's Exhibits</i>	2.	Yee Sang Metal Supplying Co.	\$29,442.00	
<i>C</i>	3.	Yee Sang Metal Supplies Co.	\$16,000.00	the actual amount due to the said Co. will be inform later.
<i>Bundle of agreed Correspondence, Letters etc. continued.</i>	4.	Dah Fong Company Mr. Sun Ho Sung	\$42,000.00	

When the above amount all cleared the balance to be directed to Defag 10 Construction Company.

Thanking you in advance,

Yours faithfully,
DEFAG CONSTRUCTION CO.

(Sgd.) L. S. Koo
Manager

(C O P Y)

15th August 1966.
Our Ref. 574/SK/GC

M/s. Defag Constn. Co.,
116, Argyle Street,
9th Floor, A.,
Kowloon.

20

Dear Sirs,

Tak Ming Middle School

This letter is sent to you to withdraw my even referenced letter of the 4th instant extending the Time for Completion by 8 days.

In granting the extension originally the fact that inclement weather delays had been precluded from the Contract originally had been over looked.

No extension of time can therefore be granted contractually although 30 a claim of two(2) days for the 12th and 13th June when all people in the Colony were advised to stay at home by the Government might be favourably received by my Client.

Your completion date for Stage 1, in accordance with the Addendum Agreement was the 31st July. Allowing the two days mentioned above the work should have been completed by 2nd August. You are, therefore, as of this date, 13 days late.

Will you please inform me when the Transformer Room will be completed.

Yours faithfully,

(Sgd.) R. F. Trimble
(R. F. Trimble)
for Eric Cumine

cc. Client
M/s. Johnson, Stokes & Master.
EFT/lt

Exhibits
—
Plaintiff's
Exhibits
—
C
Bundle of
agreed
Corres-
pondence,
Letters etc.
continued.

10

(C O P Y)

REGISTERED

3rd September 1966.
Our Ref: 574/SK/GC.

Mr. L. S. Koo,
Messrs. Defag Construction Co.,
116, Argyle Street, 9th Floor A,
Kowloon.

Dear Sir,

20

Contract No. 574
Tak Ming Middle School

This letter is written to confirm our verbal arrangement made this morning in that you will accept the Determination of the Contract by the Employer with effect of today's date and forego the 7 days prior notice required under the Conditions of Contract.

I hereby therefore give you formal notice, on behalf of the Employer, that your Contract is Determined by the Employer as of the 3rd September 1966 under Conditions of Contract, Clause 21(a) Default (2).

30 The Contract Works will be completed by the Employer or another Contractor under Conditions of Contract, Clause 21(c) (i) and (ii). You are **not** therefore to remove off the Site any temporary buildings, plant, machinery, appliances, goods and materials thereon and are required not to interfere in any way with the further progress of the works by whomsoever such work is being executed.

The Determination of your Contract does not prejudice any other rights or remedies of the Employer contained in the Conditions of Contract.

Yours faithfully,

(Sgd.) Stanley T. Kwok
(Stanley T. Kwok)
for Eric Cumine.

cc. Tak Ming Co. Ltd.
Johnson, Stokes & Master
40 (Mongkok Branch)
RFT/bw.

(C O P Y)

7th September, 1966.

*Exhibits**Plaintiff's
Exhibits*

C

Bundle of
agreed
Corres-
pondence,
Letters etc.
*continued.*Tak Ming Company, Limited, H.K.
No.1 Arran Street,
Kowloon.

Dear Sirs,

Re: Construction of Tak Ming Middle School at
K.I.L. No.1571, S.A., 76, Sai Yee Street, Kln.

As we understand that you have taken over the above site from Messrs. Defag Construction Co. owing to their breach of the building contract No. 574 dated 27th October, 1964 made between you and them, in accordance with our previous understanding as confirmed by your letters to us of the 9th February, 1965 and 16th July, 1966, we are taking the liberty of sending you herewith an up-to-date statement of outstanding accounts due and payable by the said Defag Construction Co. to us in respect of building materials supplied by us to the above site for your kind attention, showing an outstanding amount of \$367,645.75. **10**

We shall be obliged if you will kindly confirm that you are prepared to take over the above liabilities from Defag Construction Co. in accordance with the said understanding, in which case please also confirm your proposals for payment and the correctness of our figures at your earliest convenience. **20**

Yours faithfully,

(Sgd.) Yu Tak Yee

(C O P Y)

Hong Kong 7th September, 1966.

TO SUB-CONTRACTORS & OTHERS:

Notice is hereby given that we, The Tak Ming Company Limited determined the building contract between ourselves and Defag Construction Company for cause on the 3rd day of September 1966 which termination was accepted by Defag Construction Co. Accordingly your right to remain on our site at No.76, Sai Yee Street was thereby determined and you are hereby requested to forthwith vacate the premises. Needless to say Defag Construction Company's indebtedness to you is no concern of ours and does not entitle you to stay on the site. If you are prepared to work for the new contractor when appointed and he is prepared to employ you this will be up to you and him. Should you fail to vacate the premises forthwith, suitable steps will be taken to force your eviction. **30**

TAK MING CO. LTD. H.K.

(Sgd.) (Illegible)
Director

茲通告如后：
 德明有限公司與大發營造廠間之合約已於一九六六年九月三日為某種緣故而終止，而大發營造廠對該項終止亦已接受，因此各位有關人士在洗衣街七十六號之停留權亦同時終止，現請各位即刻離開，無庸說大發營造廠對各位之債務絕對與本公司無關，故不能以此為藉口而停留。
 倘各位願意與新建建築商工作，而新建建築商亦願意僱用各位，此乃汝等雙方之事。
 如各位不即刻離開則本公司將採取步驟請各位離開。

通告

Exhibits
 —
Plaintiff's Exhibits
 —
 C
 Bundle of agreed Correspondence, Letters etc.
continued

(C O P Y)

8th September 1966.

Tak Ming Company Limited, H.K.
 No.1 Arran Street,
 Kowloon.

Dear Sirs,

Re: Construction of Tak Ming Middle School at
 K.I.L. No. 1571 S.A., 76 Sai Yee Street, Kowloon.

Further to our letter to you of yesterday's date, we would refer to **10** our Chinese letter to you and Defag Construction Company dated 5th July 1966 relative to your agreement to guarantee payment of the sum of \$29,442.05 in respect of cement and metalware supplied to the said Defag Construction Company at your request, we would place it on record that you have so far not supplied us with your written guarantee as previously agreed, and in view of Messrs. Defag Construction Company having been relieved of their position as your principal contractors, we shall be glad to know at the same time how you propose to pay the said sum of \$29,442.05 to us in accordance with the guarantee undertaken by you at your earliest convenience.

Yours faithfully,
 YEE SANG METAL SUPPLIES CO.

(Sgd) Yu Tak Yee

Exhibits

(C O P Y)

*Plaintiff's
Exhibits*

Hong Kong 10th September, 1966.

C BY REGISTERED POST

Bundle of
agreed
Corres-
pondence,
Letters etc.
*continued*Messrs. Yee Sang Metal Supplies Co.,
Room 625, Man Yee Building,
60-68, Des Voeux Road, C.,
Hong Kong.

Dear Sirs,

RE: Tak Ming Middle School Building

We acknowledge receipt of your letters dated 7th and 8th September, 1966 respectively. **10**

As far as our letter of 9th February, 1965 is concerned, you have collected in fact payments against our architect, Mr. Eric Cumine's certificates and we really are not at present in a position to make proposal for payment or to confirm the outstanding figures which we do not think we have any authority to do them.

We should point out that we have never received your chinese letter of 5th July, 1966 as mentioned in your letter of 8th September, 1966 and we repudiate what you said about our guarantee for payment of \$29,442.05 which is no concern of ours at all. **20**

Please be kindly informed that we are not going to reply your future groundless letters, if there were any, under the present circumstances.

Yours faithfully,

TAK MING CO., LTD. H.K.

CY/fkw

(Sgd.) (Illegible)
Director

(C O P Y)

6th October, 1966.

Yu Tak Yee Esq.,
Managing Director,
Yee Sang Metal Supplies Co.,
625 Man Yee Building,
Des Voeux Road Central,
Hong Kong. **30**

Dear Sir,

Tak Ming College—Sai Yee Street Kowloon

We understand that differences have arisen between the Main

Contractor and yourself as to the correct quantity of steel reinforcement for the above project.

We are willing to act as Arbitrator between the parties in settling the dispute, provided that both parties agree in writing to our appointment. The work will involve detail measurements of the steel reinforcement in accordance with the Contract Drawings. The fee will be HK\$16,000.00 to be divided equally between the parties and paid on completion of our measurement.

- 10** If both parties cannot agree to our appointment we are willing to accept an appointment in writing by either party to certify the quantity of steel reinforcement and either party may use these figures in subsequent legal action. The fee for this service will be HK\$16,000.00 and paid on completion of our measurement.

We await your further instructions and please do not hesitate to ask for any clarification of this letter.

Yours faithfully,

(Sgd.) P. C. Russell, Bailey
P. C. Russell, Bailey,
Lavett & Partners.

20

(C O P Y)

RKB/T3/65

10th October, 1966.

Eric Cumine, Architect,
Lee Gardens, Embassy Court,
Hysan Avenue,
Hong Kong.

Attention: Mr. R. F. Trimble

Dear Sirs,

Re: K.I.L. No.1571 Section A-
Tak Ming Middle School

30

As you are no doubt aware, Yee Sang Metal Supplies Company have approached our clients Tak Ming Company Limited with a view to our clients paying to Yee Sang Metal Supplies Company direct such sum as is due and owing to Yee Sang Metal Supplies Company from Defag Construction Company, the original contractor.

We are not quite clear whether under the original Building Contract, our clients can validly make payment direct to Yee Sang Metal Supplies Company who are one of the sub-contractors. Accordingly we are writing to you to enquire whether you consider our clients can validly make payment direct to Yee Sang Metal Supplies Company and whether you consider that before

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Letters etc.
continued.

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 Bundle of
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 Corres-
 pondence,
 Letters etc.
continued.

such payment is made written authorisation should be given by Defag Construction Company to our clients, Tak Ming Company Limited to make such payment direct.

Yours faithfully,

(C O P Y)

Hong Kong 10th October, 1966.

Messrs. Johnson, Stokes & Master,
 Solicitors &c.

Attention: Mr. Bryson

10

Dear Sirs,

Re: Construction of Tak Ming Middle School at
 K.I.L. No.1571, S.A., 76, Sai Yee Street, Kowloon.

We have been consulted by our clients, Yee Sang Metal Supplies Co., with reference to work done and materials supplied by them for the above site, of which your clients, Tak Ming Company, Limited, H.K., are the registered owner, in pursuance of a Building Contract No. 574 made between your clients of the one part and Defag Construction Co. of the other part and dated the 27th October, 1964.

By a letter dated the 9th February 1965 addressed by your clients to our clients, a copy of which is enclosed herewith for your ready reference, your clients agreed to pay our clients for the works done by our clients on the said site on terms as specified therein, in the event of a breach of the said Contract No.574 on the part of the said Defag Construction Co. 20

We are instructed that your clients have since terminated their said Contract with the said Defag Construction Company on the ground of a breach thereof by the latter, and in view of the fact that both our clients have been unable to come to an agreement to continue with the said Contract, we are accordingly instructed to call upon your clients, through your goodselves, to pay to our clients, or to us on their behalf, the sum of \$367,645.75 being outstanding balance due and payable to our clients in respect of work done and materials supplied at the above site, particulars of which have already been rendered to your clients, in accordance with the terms of the agreement and undertaking contained in your clients' said letter to our clients of the 9th February 1965, subject to our clients obtaining the certificates of both the architect, Eric Cumine Esq. and the said Defag Construction Co. as required therein. 30

We shall be obliged if you will kindly take your clients' instructions on the above and let us hear from you within the next seven days as to whether

your clients are prepared to meet their above undertaking, failing which our clients will take such further steps against your clients in the matter as they may be advised without further notice.

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Exhibits

Yours faithfully,

(Sgd.) HASTINGS & CO.

(C O P Y)

Hong Kong 9th February, 1965.

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 Bundle of
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 pondence,
 Letters etc.
continued.

Messrs. Yee Sang Metal Supplies Co.,
 Room 625, Man Yee Building,
 10 60-68, Des Voeux Road, Central,
 Hong Kong.

Dear Sirs,

Tak Ming Middle School at
 K.I.L.1571, S.A., 76, Sai Yee Street, Kowloon.

We acknowledge receipt of your letter of 5th February, 1965 and we wish to confirm to you as follows:

1) In case of the breach of contract No.574 dated 27th October, 1964 from the part of Messrs. Defag Construction Co., we may by mutual agreement between your goodselves and ourselves continue the contract signed on 20th January, 1965 by your goodselves with Defag Construction Co. even though the said contractor should be forced out of the above site.

2) In case of the failure to reach a mutual agreement between us, we shall pay you for the works done on the captioned site against our architect, Mr. Eric Cumine's certificates in accordance with the Building contract No. 574 prepared and signed in the said architect's office.

The above confirmation is subject to your fulfillment of the terms of your contract with Defag Construction Co. mentioned your letter of 5th February, 1965 addressed to us and also subject to your carrying out works properly and expeditiously in accordance with the schedule of works submitted to the aforesaid architect and to us by the contractor, Messrs. Defag Construction Co.

Yours truly,
 TAK MING CO., LTD. H.K.

(Sgd.) (Illegible)
 Director

CY/sl

*Exhibits**Plaintiff's
Exhibits*

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Bundle of
agreed
Corres-
pondence,
Letters etc.
continued.

(C O P Y)

11th October, 1966.
Our Ref. 574
Yr. Ref. K/RKB/T3/65Messrs. Johnson Stokes & Master,
Hong Kong & Shanghai Bank Building,
Mongkok,
Kowloon.

Dear Sirs,

Tak Ming Middle School

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In reply to your letter of the 10th instant the contractual position is that Defag Construction Co. are solely responsible for meeting all accounts of their sub-contractors and material suppliers.

Since there are no Nominated Sub-contractors or Nominated Suppliers the Client has no legal responsibility to anyone except Defag Construction Co.

Should the Client pay any such accounts written authorisation must first be obtained from Defag Construction Co. and they should countersign all receipts as if they had in fact been paid themselves by the Client.

Yours faithfully,
(Sgd.) R. F. Trimble
(R. F. Trimble)
for Eric Cumine Associates.

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(C O P Y)

18th October, 1966.

Messrs. Hastings & Co.,
Marina House, 1st floor,
Queen's Road C.,
Hong Kong.

Dear Sirs,

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Re: Construction of Tak Ming Middle School at
K.I.L. No.1571 S.A., 76, Sai Yee St.,
Kowloon.

We thank you for your letter of the 10th instant, for which we are obliged.

Our clients Tak Ming Company Limited, Hong Kong, have instructed us to inform you that your clients, Yee Sang Metal Supplies Company failed to comply with the conditions set out in the final paragraph of the letter from our clients to your clients dated the 9th February, 1965, and accordingly our

clients do not consider themselves bound in any way to make any payment to your clients.

Yours faithfully,
(Sgd.) Johnson, Stokes & Master

(C O P Y)

Hong Kong 20th October, 1966.

Messrs, Johnson, Stokes & Master,
Solicitors &c.

Dear Sirs,

10 Re: Construction of Tak Ming Middle School at
K.I.L. No.1571 S.A., 76, Sai Yee Street, Kowloon.

We are in receipt of your letter of the 16th instant, upon which we have taken our clients further instructions.

With regard to the last paragraph of your said letter under reply, we would point out that as stated in our latter to you of the 10th instant, the payment by your clients to our clients of the sum of \$367,645.75 referred to therein will be subject to the certification of both the architect and Defag Construction Co., being obtained that our clients have duly complied with the conditions set out in the final paragraph of the letter from your clients to ours dated the 9th February, 1965. In this connection, we are instructed to place it on record that your clients, after terminating their contract with Defag Construction Co., have purposely refused to allow our clients to complete a small amount of iron-binding work to be carried out to the roof top water storage of the above premises involving a value of about \$600.00 only for both labour and material, and that our clients are ready and willing to do the same upon being notified by your clients.

Our clients have since obtained the certificate of Defag Construction Company to the above effect, a photostatic copy of which we enclose herewith for your ready reference, and will supply you with the architect's certificate in due course.

Yours faithfully,
(Sgd.) HASTINGS & CO.

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pondence,
Letters etc.
continued.

(C O P Y)

*Exhibits**Plaintiff's
Exhibits*RKB/T3/65
PFG/y-55/Jw/66

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Bundle of
agreed
Corres-
pondence,
Letters etc.
*continued*Messrs. Hastings & Co.,
Marina House, 1st floor,
Hong Kong.

26th October, 1966.

Dear Sirs,

Re: Yee Sang Metal Supplies Company

We thank you for your letter of the 20th instant with enclosure, for **10** which we are obliged.

Our clients inform us that they do not consider themselves bound to make any payment under their letter to your clients dated the 9th February 1965, by virtue of the fact that your clients failed to comply with the final paragraph of the above mentioned letter, in that they failed to carry out the work properly and expeditiously in accordance with the Schedule of Works submitted to Mr. Eric Cumine and to Tak Ming Company Ltd.

Yours faithfully,

cc. Tak Ming Company Ltd.

(Sgd.) Johnson, Stokes & Master

(C O P Y)

20Your Ref. K/RKB/T3/65
Our Ref. PFG/y-55/Jw/66

Hong Kong 31st October, 1966.

Messrs. Johnson, Stokes & Master,
Solicitors &c.

Dear Sirs,

Re: Construction of Tak Ming School at
K.I.L. No. 1571 S.A. 76, Sai Yee Street, Kowloon.

We are in receipt of your letter of the 26th ultimo, upon which we have now had the opportunity of taking our clients' further instructions. **30**

Our clients categorically deny that they failed to carry out their part of the work properly and expeditiously as alleged. Whilst it is true that frequent disputes arose between your clients and Defag Construction Co., your clients' then principal contractors, which resulted in delays in the progress of the overall building works on the site, our clients cannot see why they should in any way be held liable therefor as their part of the work was entirely contingent

upon the progress of the principal building works. Further, we are instructed that the said delays on the part of the said Defag Construction Co. (whatever their cause) were clearly accepted by both your clients and the architect, Eric Cumine Esq., as evidenced by the fact that the latter issued certificates for full payment of all building works at the site up to the stage where our clients part was fully performed. Indeed, as your clients must well remember, it was your clients who persistently beseeched our clients to support the said Defag Construction Co. at a time when the latter was already considerably behind in their work and in a precarious financial state, and it was on your clients' undertaking to pay our clients for their work done and materials supplied as contained in your clients' letter to ours dated the 9th February 1965 that our clients agreed to do so. It is, therefore, clear that our clients' work must naturally be dissociated with that of Defag Construction Co.

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 Letters etc.
continued.

In the above circumstances, we are instructed that unless the sum of \$367,645.75 is paid to us on our clients' behalf within the next seven days, our instructions are to commence legal proceedings against your clients in the matter without further notice, in which event please inform us whether you have instructions to accept service on behalf of your clients.

Yours faithfully,

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(Sgd.) HASTINGS & CO.

(C O P Y)

Your Ref.: K/RKB/T3/65
 Our Ref.: PFG/y-55/Jw/66

Hong Kong 2nd December, 1966.

Messrs. Johnson, Stokes & Master,
 Solicitors &c.
 Kowloon Office,
 Hongkong & Shanghai Bank Building, (6th floor).
 664 Nathan Road,

30 Mongkok, Kowloon.

Dear Sirs,

Re: O. J. Action No. 2212 of 1966

With reference to your letter of the 29th ultimo, we are instructed that particulars of the work done and materials supplied were supplied to your clients under cover of our clients' letter to yours dated the 7th September 1966. However, for your convenience, we enclose a further copy of the same.

Yours faithfully,

(Sgd.) HASTINGS & CO.

Encl.

大發營造廠 台照

德明有限公司 下列 九龍洗衣街德明中學地盤 年 月 日

日期	摘要	重量	單價	金額	備考
	地脚至天台樓面及水缸	等全部鐵料	如下		
11/2/1965-5/9/1966	高拉力鉄	14,029.75	担	55 00	771,636 25
— — —	普通元鉄	9,540.19	,,	50 00	477,009 50
	初業地脚鉄料運費	3,000.00	担	1 00	3,000 00
	合計				1,251,645 75
	10/6/65 大發營造廠來	\$ 100,000.00			
第1期甘	洛則樓糧單日期 13/9/65 付款日期 21/9/65 來,,	50,	000,00		
2, ,,	— — — 12/10/65 — — — 23/10/65 ,, ,,	50,	000,00		
3, ,,	— — — 25/10/65 — — — 5/11/65 ,, ,,	50,	000,00		
4, ,,	— — — 9/11/65 — — — 23/11/65 ,, ,,	50,	000,00		
5, ,,	— — — 29/11/65 — — — 10/12/65 ,, ,,	50,	000,00		
6, ,,	— — — 13/12/65 — — — 2/ 1/66 ,, ,,	50,	000,00		
7, ,,	— — — 4/ 1/66 — — — 19/ 1/66 ,, ,,	40,	000,00		
8, ,,	— — — 5/ 2/66 — — — 18/ 2/66 ,, ,,	40,	000,00		
9, ,,	— — — 15/ 2/66 — — — 25/ 2/66 ,, ,,	40,	000,00	884,000	00
10, ,,	— — — 28/ 2/66 — — — 12/ 3/66 ,, ,,	40,	000,00		
11, ,,	— — — 11/ 3/66 — — — 24/ 3/66 ,, ,,	36,	000,00		
12, ,,	— — — 21/ 3/66 — — — 4/ 4/60 ,, ,,	36,	000,00		
13, ,,	— — — 29/ 3/66 — — — 19/ 4/66 ,, ,,	36,	000,00		
13, ,,	— — — 1/ 4/66 — — — 19/ 4/66 ,, ,,	36,	000,00		
14, ,,	— — — 12/ 4/66 — — — 25/ 4/66 ,, ,,	36,	000,00		
15, ,,	— — — 13/ 4/66 — — — 3/ 5/66 ,, ,,	36,	00,000		
16, ,,	— — — 3/ 5/66 — — — 12/ 5/66 ,, ,,	36,	00,000		
19, ,,	— — — — — 30/ 6/66 ,, ,,	36,	00,000		
17, ,,	— — — — — 9/ 7/66 ,, ,,	36,	00,000		
合計港幣	佰 拾 萬 仟 佰 拾 元 角 分正			Total H.K.\$	367,645 75

附註：甘洛則樓糧單由第1—19期之款共計\$ 784,000.00全部由贊臣史篤士及孖士

打律師樓付來。

上列鉄料重量乃根據20/1/1965合約內(重量計算辦法)依照工務局批准圖則規定比例尺寸計算重量。

(TRANSLATION)

YEE SANG METAL SUPPLIES CO.

HONG KONG

Room 625, Man Yee Building

60-68 Des Voeux Road, C.

Hong Kong

Tel. 222598, 223814

STATEMENT OF ACCOUNT FOR REINFORCEMENT WORK

To Messrs. Defag Construction Company.

Tak Ming & Co., Ltd.

The following site at Tak Ming Middle School, Sai Yee Street, Kowloon.

Date (Blank)

No. of Period (Blank)

No. (Blank)

Date	Particulars	Weight	Unit Price	Amount	Remarks
	Materials (required) from the foundation to the flooring of the roof and water tanks etc. are as follows:				
11/2/1965-5/9/1966	High tensile steel (bars)	14,029.75 Piculs	55.00	771,636.25	
„ „	Ordinary round steel (bars)	9,540.19 „	50.00	477,009.50	
	Transportation charges for the material at the beginning of reinforcement work at the foundation	3,000.00 Piculs	1.00	3,000.00	
Total				1,251,645.75	(It is stipulated in the Contract that spaces within the site will be provided for steel-bending work. At the beginning of the work, there were no spaces at foundation Fl, therefore transportation charges are added.
10/6/65	Received from Defag Construction Company		\$100,000.00		
1st (Payment)	Date of Eric Cumine Architects' vouchers of payment	13/9/65	Payment received on	21/9/65	„ 50,000.00
2nd	„	12/10/65	„	23/10/65	„ 50,000.00
3rd	„	25/10/65	„	5/11/65	„ 50,000.00
4th	„	9/11/65	„	23/11/65	„ 50,000.00
5th	„	29/11/65	„	16/12/65	„ 50,000.00
6th	„	13/12/65	„	2/1/66	„ 50,000.00
7th	„	4/1/66	„	19/1/66	„ 40,000.00
8th	„	5/2/66	„	18/2/66	„ 40,000.00
9th	„	15/2/66	„	25/2/66	„ 40,000.00
10th	„	28/2/66	„	12/3/66	„ 40,000.00
11th	„	11/3/66	„	24/3/66	„ 36,000.00
12th	„	21/3/66	„	4/4/66	„ 36,000.00
13th	„	29/3/66	„	19/4/66	„ 36,000.00
18th	„	1/4/66	„	19/4/66	„ 36,000.00
14th	„	12/4/66	„	25/4/66	„ 36,000.00
15th	„	19/4/66	„	3/5/66	„ 36,000.00
16th	„	3/5/66	„	12/5/66	„ 36,000.00
19th	„	„	„	30/6/66	„ 36,000.00
17th	„	„	„	9/7/66	„ 36,000.00
				884,000.00	
Total HK\$				367,645.75	The following is the amount due after deducting the payments received:

NOTES: All Messrs. Eric Cumine, Architects' vouchers of payments for the 1st to 19th payments, a total of \$784,000.00, were made through Messrs. Johnson, Stokes & Master, Solicitors.

Pursuant to the contract of 20/1/65 (method of weight calculation), the above weights of materials are calculated according to the scales of the plans approved by the Public Works Department.

(Chopped) Yee Sang Metal Supplies Co.

I certify that the foregoing is a true translation of the Chinese document marked "3194C"

(Sgd.) Chan Sin Cheung
Court Translator