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CHAN TAN & PARTNERS
ADVOCATES AND SOLICITORS

New Civilbuild Pte Ltd v. Guobena Sdn Bhd and The Tai Ping Insurance Co Ltd, Suit No 46 of 1998

Damages suffered and loss incurred as a result of delay - Payment of progress payment claims withheld - whether call on performance bond was fraudulent or unconscionable - whether order discharging interlocutory injunction is final.

Facts

Guobena Sdn Bhd (Guobena) was the main contractor for the Tanglin Regency Project (the Project). The developers of the Project were First Tanglin Land Pte Ltd (First Tanglin). Guobena in turn sub contracted about 50% to 55% of their obligations under the main contract to New Civilbuild Pte Ltd (New Civilbuild) (the sub-contract). New Civilbuild failed to complete their works by the scheduled completion date of 21 April 1997.

As a result, Guobena demanded for payment under the performance bond (the bond) issued by The Tai Ping Insurance Ltd (Tai Ping). New Civilbuild denied liability for the delay and obtained an injunction to restrain Guobena from calling on the bond and to restrain Tai Ping from making any payment on Guobena's call. Judicial Commissioner Lee Seiu Kin (JC Lee) on Guobena's application subsequently discharged the injunction.

In this action, New Civilbuild claimed against Guobena for (1) a sum of \$2,122,743.29 being damages suffered and costs incurred as a result of the delay which, they contended, was caused by Guobena and for under certification of some items of variation works; (2) retention monies amounting to \$335,511.33 (3) outstanding progress claims (nos. 23 and 26) of \$1,478,470.62 for work already completed; (4) a declaration that Guobena's call on the bond was fraudulent and/or unconscionable and (5) repayment of the sum received by Guobena under the bond.

Guobena denied the claims and counterclaimed for expenses and payments made by them on New Civilbuild's behalf to suppliers, sub-contractors and other third parties. Guobena also counterclaimed \$3m for liquidated damages (LAD) for the delay in completion. On its part, Tai Ping counterclaimed against New Civilbuild (and Guobena) for the repayment of the sum paid out on the bond with interest and costs on an indemnity basis and also sought declaratory relief that the call on the bond was fraudulent and or unconscionable and, that Guobena should

refund to Tai Ping the judgment sum totaling \$1,694,457.10 that they received in Suit No. 57 of 1998.

Held, interlocutory judgement for part of the plaintiffs' claim and the first defendants counterclaim with the quantum to be assessed by the Registrar.

1. The claim for losses and damages arising from delay was dismissed. Based on the evidence, New Civilbuild's works were not delayed by Guobena. Most of New Civilbuild's claims for variation works were also dismissed, as they were not entitled to claim for them under the sub contract.
2. The claim for unpaid progress payments, which was not disputed by Guobena, was allowed. However, Guobena's counterclaim in respect of expenses made by them on behalf of New Civilbuild was also allowed. The sums allowed in the counterclaim is to be set off against the unpaid progress payments due to New Civilbuild.
3. The claim for retention monies was allowed. Based on a plain reading of clause 11.2 of the sub contract, as long as the Completion Certificate had been issued, New Civilbuild was entitled to the retention monies. It was not necessary that the Architect must issue a Completion Certificate to New Civilbuild before they can be entitled to payment of the retention monies.
4. The claim for a declaratory relief and repayment of monies paid to Guobena under the Bond was dismissed. Since New Civilbuild had caused the delays, Guobena was not fraudulent or unconscionable in calling on the bond. In the circumstances, the declaration sought by New Civilbuild and Tai Ping was disallowed and, subject to any right of set off, Guobena were allowed to retain the payments sum received under the bond. The earlier decision of JC Lee (in SIC no. 614 of 1998) discharging the interlocutory injunction was an interlocutory order and not a final order since it only determined the interim rights of the parties and not the substantive rights in dispute in the present action. The doctrine of issue estoppel and or res judicata therefore would not apply in this case and it was open for the court to consider whether Guobena had been fraudulent or unconscionable in calling on the bond.
5. Guobena's claim against New Civil Build for LAD was dismissed. The sub-contract incorporated the SIA form of contract. Under the SIA form of contract, a delay certificate was needed before Guobena could claim LAD. Since Guobena did not issue any delay certificate, their counterclaim against New Civilbuild for LAD is disallowed.

EDITORIAL COMMENT

This case touches on many issues commonly faced in disputes between Main Contractors and their Domestic Sub Contractors. This commentary shall however focus on three main areas in the judgement that may be of particular interest to contractors and other construction professionals. These are New Civilbuild's claims for variation works, New Civilbuild's claim for the release of retention monies and Guobena's claim for Liquidated Damages against New Civilbuild.

Variations: Quantum Meruit and Implied Promise

Often, additional works are ordered and carried out without strict regard to the terms of the contract. This may be due to urgency, parties' lack of diligence and other compelling reasons. This practice however creates a legal obstacle for the contractor, as he may not be able to recover the costs of such additional works under the sub contract in the event of a dispute.

This is what the Plaintiffs' discovered when the court disallowed their variation claims. The court held that clause 16.1 of the contract, which provided that "No variation order will be permitted unless it is subsequently sanctioned in writing by the Client. The procedures for variation orders are adequately covered in the Articles and Conditions of Contract", had to be complied with in order for the Plaintiffs to succeed. Since none of the variations claimed had been approved by the developers pursuant to clause 16.1, the Plaintiffs' claims were disallowed.

The court however opined that the clause would not apply for works done outside the scope of the sub-contract or for works done under the sub-contract but for which no remuneration was provided in the sub-contract. In such cases, a claim in quantum meruit may be possible. Alternatively, a claim for additional works could be made on the basis of an implied promise to pay. The implied promise may arise in circumstances where "where an employer desired the execution of extra works by the employee and had stood by and seen the expenditure on such works by the employee and taken the benefit thereof." However, as the Plaintiffs did not plead their claims on the alternative basis of "quantum meruit" or "implied promise" their claims were disallowed.

Two observations can be made from this decision: (1) contractual requirements for variations should be complied with. This will avoid unnecessary disputes. (2) When pursuing a claim for additional works, it is prudent to plead the claims on the alternative basis of quantum meruit and/or alternatively an implied promise to pay. Failure to do so may be detrimental, especially when the contractual procedures for variations have not been complied with.

Retention Sum and Liquidated Damages

The courts' judgement on these two issues highlights the problems that are created when the Main Contractors try to incorporate the Main Contract terms into the Sub Contract without proper modifications.

The claim for retention sum hinged on the interpretation of clause 11.2 of the sub-contract which provided, inter alia, that

"Half of the retention will be released upon issuance of the Completion Certificate by the Architect and balance upon settlement of Final Account and at the end of DLP [defects liability period] or Notice of Completion of Making Good Defects, whichever is later." The Defendants contended that based on this clause, New Civilbuild were not entitled to claim for the first half of the retention unless the Architect issued a Completion Certificate for the Sub Contract works. The court rejected this argument. The court held that the retention monies may be released upon issuance of the Completion Certificate by the Architect under the Main Contract. It was not necessary for the separate Completion Certificate to be issued for the Sub Contract works.

The decision of the court may seem inappropriate because the Architect does not have an obligation to issue a Completion Certificate for domestic sub contractors' works. Further, it may create difficulty for the sub contractor in the situation when the Architect fails or refuses to issue a Completion Certificate because of a dispute between the Main Contractor and the Employer. In such event, the sub contractor may not be able to claim for the balance of the retention monies for an indeterminate period.

The claim for LAD was raised in Guobena's counterclaim against New Civilbuild. Their claim was dismissed because the court found that sub-contract incorporated the SIA form of main contract. Under the SIA form of main contract, a delay certificate was needed before Guobena could claim LAD. Since no delay certificate was issued, their counterclaim for LAD was disallowed.

Counsel for Guobena argued that there was no provision in the sub-contract such as cl 24(1) requiring the Project Architect to give a delay certificate justifying Guobena's claim for liquidated damages. However, the court relying on the case of Tropicon Contractors Pte Ltd v Lojan Properties Pte Ltd, rejected the argument. The court reasoned that "The legal principle is clear - if the sub-contract contemplates a delay certificate and none is issued by the claimant, then no LAD can be claimed"

This suggests that if a domestic sub contract incorporates the SIA Form of Main Contract, the Architects' certificates issued under the Main Contract will effect the rights and obligations of the parties under the domestic sub contract as well. As noted above, this will cause problems as the Architect has no obligation to administer the domestic sub contract.

The court's decision will also lead to an unusual situation where, although New Civilbuild was found as a matter of fact to be largely responsible for the delays, they were found not liable for LAD since no delay certificate was issued.

In the circumstances, contractors should pay particular attention to incorporation clauses and the standard form agreements that they intend to incorporate into their contracts. The implication and effect of the incorporation of such standard form agreements should be carefully considered since as illustrated in this case, their incorporation may lead to unintended consequences.

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