

Construction Law Focus

CHAN TAN & PARTNERS

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NO.1 COLOMBO COURT #09-26/27 SINGAPORE 179742

Legislation - Act No. 22 of 1992 amending Limitation Act (Cap. 163)

In this case, the main contractor appointed the sub-contractor by 2 sub-contracts to supply and install air-conditioning and ventilation systems and to supply and install lift services for the project. Certain payments were certified by the Architect. Notwithstanding such certification, the sub-contractor failed to receive payment and sued for payment under the certificates. An application for summary judgment was made and the main contractor put forward, inter-alia, the argument that they are not liable to pay the sub-contractor as they had not received from the employer the sums included in the said payment certificates by virtue of cl 27(a)(vii) of the main contract. This clause reads as follows:

'That payment in respect of any work, materials, or goods comprised in the sub-contract shall be made within 14 days after the receipt by the contractor from the employer of the amounts stated in any architect's certificate under cl 30 of these conditions which includes an amount due to the nominated sub-contractor under the sub-contract.'

The court rejected the argument on the ground that the provisions of cl 27(a)(vii) were not expressly stated in the sub-contracts and doubted whether it could be said that the clause was incorporated into and formed part of the sub-contract. The terms of the sub-contract only require the sub-contractor to observe and confirm with all the provisions of the main contract so far as they were related to and applicable to the sub-contract works and "were not repugnant to or inconsistent with the express provisions of the sub-contract."

EDITORIAL COMMENT

This local case dealt with the situation where the main contractor alleged that he need not pay his sub-contractor because he had not yet receive payment from the employer. Quite often in such situations, the main contractor is usually able to point to what is

known as a "pay when receive clause" to support his argument. Essentially, when such a clause is present in a sub-contract, the main contract is entitled to deny payment to the sub-contractor on the ground that he had not himself received payment from the employer. In this case, no such clause was expressly provided in the sub-contract. The main contractor, however, referred to a clause in the main contract that appears to have this effect. Unfortunately for the main contractor, this clause did not also appear in the sub-contract; it was also not clearly and expressly incorporated by reference into the sub-contract. The main contract was reduced to relying on the general clause that requires the sub-contractor to "observe and confirm" the provisions of the main contract.

It may be possible to draw the following lessons from this decision:

- (a) Any terms or conditions that are considered important should be expressly set out in the contract and the party that will eventually seek to enforce it should not rely on general clauses to incorporate such terms or conditions from another contract of document.
- (b) Such "pay when receives" clauses potentially have far reaching consequences and careful attention should be given by both main contractors and sub-contractors to its implications.

Liability of Expert Witnesses for Negligence

Palmer & Anor v Durnford Ford (a firm) and Anor
9-CLD-08-08

It was accepted by the court in this action as "settled law" that witnesses in either civil or criminal procedures enjoyed immunity from any form of civil action in respect of evidence given in the course of those proceedings. The immunity also applies to the preparation of proofs of evidence which are to be given in court. However, the court also concludes that there is no good reason why an expert should

not be liable for the advice he gave to his client as to the merits of his claim.

EDITORIAL COMMENT

This decision seems to be correct as a matter of principle. It, however, means that expert witnesses should take care to delineate the scope of their duties. If he is not engaged to render advice on the merits of the client's claim, his terms of engagement should clearly say so. Experts should also take care in situations where they expressed an overly optimistic view to a client that may induce him to commence action ; the expert may find himself giving a contrary view at the hearing when confronted with adverse evidence from the opposite side.

Exclusion of court's discretion on "equitable set off by the terms of the contract

Quadrant Visual Communications Ltd & Ors v Hutchinson Telephone (UK) Ltd & Anor 9-CLD-07-31

The court in this case had to consider the following provision in an application for summary judgment for payment of sums due under the contract as well as for specific performance:

" .. free from equity, cross-claim, set-off or other deduction whatsoever."

It was argued that this provision precluded the court from investigating whether or not there was a valid defence based on the ground of equitable set-off. It was held that once the court was asked for the equitable remedy of specific performance, its discretion cannot be fettered by the terms of the contract. The words "any equity" exclude the concept of "clean hands." The court was therefore not bound by the terms of the contract.

EDITORIAL COMMENT

This decision appears to be confined to the situation where an equitable relief like specific performance is being sought. It should not be applicable where, say, the plaintiff is seeking merely to recover payment of money wrongly withheld. In such cases, the court, it is submitted, should give full effect to any provision in the contract excluding the right to make a cross-claim or to put forward a set-off. It is significant to note that SIA 88 by clause 31(11) has such a clause that essentially gives "temporary finality" to certificates of payment, presumably, free from set-offs or cross-claims. If this decision can be taken to mean that the courts are not bound to give effect to

clauses that expressly or by implication exclude set-offs or cross-claims in all situations, it may mean that a clause like clause 31(11) faces the possibility that the court may not give it its intended effect. It is, however, our view that this decision does not have this effect and it is confined to the situations where the plaintiff seeks equitable reliefs.