

Construction Law Focus

CHAN TAN & PARTNERS

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

SIA standard form contract - interim certificates - summary judgment and right of set-off - delay certificate issued - whether architect's grant of extension of time valid - effect of implied undertaking

Assoland Construction Pte Ltd v Malayan Credit Properties Pte Ltd [1993] 3 SLR 470.

The plaintiffs were Building Contractors who agreed to construct and complete a 12-storey building at Ardmore Park for the owners, the defendants. The agreement was in the current standard form SIA contract. The architect had issued 2 interim certificates of payment, 23R and 24R for various sums. No payments were made under these interim certificates.

The parties together with the architect then met on 16 October 1992 with a view to resolve the settlement of the outstanding sums. It was agreed, inter alia, that the 2 interim certificates would be withdrawn and a new interim certificate 23A would be issued for the sum of \$480,020 payment of which would be released 2 weeks from the date of issue. The plaintiffs also wrote a letter to the defendants agreeing not to claim interest for the sum in certificate 23A on condition that the total sum was received before 30 October 1992. However, this was not done, and it was only on the 4 of November that the plaintiffs received a cheque for \$280,000 as payment for 23A. On the same date, the Architect issued a "delay certificate" under clause 24(1) of the contract.

The plaintiffs then applied for summary judgment for the sum of \$200,020 being the alleged balance of the total of \$480,020 due under the 2 interim certificates (plus interest and costs), and the assistant registrar ordered that the defendants be given unconditional leave to defend and that proceedings be stayed pending arbitration.

The plaintiffs appealed against the assistant registrar's decision. The Court on the hearing of the appeal held that the plaintiffs were entitled to judgment in the sum of \$200,200 with interest and the defendants' application for a stay of proceedings

for reference to arbitration was refused.

In giving its reasons for its decision, the Court, inter alia, accepted the decision in *Lojan Properties Pte Ltd v Tripicon Contractors Pte Ltd* [1991] 2 MLJ 70; [1989] 3 MLJ 216 that clause 31(11) of the contract enables the contractor to obtain quick summary judgment for the amounts certified as due in the interim certificates; the employer is entitled to set off against the interim certificates only the amounts that are expressly deductible.

The Court accordingly ruled that the defendants' right to deduct liquidated damages arose only after the issue of the delay certificate on 4 November 1992. However, the Court held that defendants are not entitled to deduct liquidated damages notwithstanding the issue of a delay certificate. This was because the defendants had agreed to pay the total sum of \$480,020 due to the plaintiffs in consideration of the plaintiffs agreeing to waive the contractual interest due to them for the late payment of the sum then owed by the defendants. Therefore, there was an implied undertaking by the defendants that they would not invoke their right under cl.24(2) in respect of the sum of \$480,020 that was then due to the plaintiffs.

Aside from the implied undertaking, the Court also observed that under cl 23, the grant of extension of time was conditional upon the plaintiffs notifying the architect within 28 days of the occurrence of a particular event which the plaintiffs were relying upon as the basis for an extension of time. The Court noted that upon receipt of such notification from the Contractor, the Architect had to within 1 month of the receipt, inform the Contractor in writing whether such event, direction of instruction in principle entitles the Contractor to an extension. The Court held that the Architect had failed to comply with this procedural requirement in cl. 23(1) in relation to the request for extension of time made by the plaintiffs for variations or additional works ordered by the architect. The Court concluded that this would mean that the purported exercise of the Architect's power under cl 23(2) on the 4 November 1992 was invalid as it was not exercised within the period fixed by cl 23(2). There was therefore no date from which liquidated damages could be computed and no liquidated damages are therefore recoverable.

On the stay of proceedings, the Court read the arbitration clause (cl 37) with cl 31(11) of the contract and found that this envisages that the Court and not an arbitrator may be seized of a dispute over payment under an interim certificate thus negating a stay of proceedings in the event of an action brought to recover payment under the interim certificate.

EDITORIAL COMMENT

This decision, apart from its implications, would have been important just by being the first decision after *Lojan Properties Pte Ltd v Tripicon Contractors Pte Ltd*, op. cit. on the current standard SIA standard form contract. It is, however, also significant for the conclusions it drew regarding the non-compliance by the architect of certain procedures set out in the contract relating to extension on time.

First, this case unequivocally endorses the "temporary finality" effect of interim certificates first accepted by LP Thean J in *Lojan Properties Pte Ltd v Tripicon Contractors Pte Ltd*, op. cit. The contractor can therefore expect to be paid on interim certificates issued without having sums payable thereunder being subjected to deductions by the employer claiming a general right of set-off. The employer must show that the sums he seeks to deduct are expressly deductible under some other provision of the contract.

Second, the decision renders it mandatory for the architect, on receipt of the contractor's notification under cl 23(2), to inform the contractor in writing within 1 month of his decision whether or not he considers the event or instruction or direction entitles the contractor to an extension of time. A failure to do so by the architect would, apparently, render time at large. This would have the effect of preventing the employer from recovering liquidated damages. There appears to be nothing, however, in our view, to prevent the employer from claiming general damages at the hearing of the arbitration provided he is able to prove his losses. A claim for general damages, not being a claim for an amount that is "expressly deductible" cannot be a ground that can be raised as a set-off to defeat the contractor's application for summary judgment based on interim certificates.

Third, it appears that even if, at the first instance, the employer is entitled to deduct, such a right may be waived, by the employer's implied undertaking not to invoke his rights, if there is an agreement arrived at between the parties relating to the payment of monies due under the interim certificates.

We are not certain whether the Court's findings on the effect of the last sentence of clause 23(2) was intended by the draftman of the contract. Whatever that intention might have been, this decision clearly makes it incumbent on the architect to be vigilant in his duties. On a narrow examination of the decision, this decision stands for the proposition that the architect must give his in principle decision within the time specified in cl 23(2) on the contractor's notification concerning extension of time. Looking at it from a wider perspective, one may be entitled to infer that the Court will require the architect to comply strictly with all procedural requirements relating to extension of time before liquidated damages can be imposed.

We also note that references have been made by the Court to a number decisions elsewhere like the U.K decision of *MacMahon Construction Pte Ltd v Crestwood Estates* (1971) WAR 162 and the New Zealand cases of *Anderson v Tuapeka County Council* (1901) 19 NZLR 1 and *Fernbrook Trading Co Ltd v Taggart* [1979] 1 NZLR 556 in arriving at its decision even though these cases dealt with contracts with clauses dissimilar to the SIA Contract.