

Construction Law Focus

CHAN TAN & PARTNERS

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

Construction contract - Defective works - Negligence of Architect - Duties of Architect in Certifying and Supervision.

Sim & Associates (sued as a firm) v Alfred Tan [1994] 3 SLR 169, Court of Appeal, Singapore.

In this case, the owner claimed against his architects for inter alia, breaches of their duties by certifying payment for defective works. The judge in the lower court decided in favour of the owner based on the architects' breach of their duties to supervise and to ensure that the main contractor make good the defects. He awarded to the owner the costs of rectifications and order a refund of the architects' fees. The owner never pleaded in his claim that architects failed in their duties to supervise nor was evidence led at trial to show that how the architects failed to carry out reasonable supervision.

On appeal, the Court of Appeal decided that there was insufficient evidence of the architects' failure in their duties to supervise. The Court of Appeal made certain observations on the general law that are instructive. The Court of Appeal found that it is the duty of an architect to give reasonable supervision so as to enable him to certify that works had been executed according to contract. The duties imposed on an architect are that of an ordinary skilled architect, and the architect is not negligent merely because some defects or insufficiencies escaped his attention, or even when such defects may be detected upon reasonable inspection. An architect is not expected to be on the site all the time, though in order to fulfil his duties, he must be there periodically to ensure that works had been carried out properly, and depending on the importance of the matter, he must exercise his judgment whether minute inspection should be carried out. Mere error of judgment is not negligence. The architect can absolve himself from blame if he acted in accordance with general and approved practice, or if there is no accepted practice, he will not be negligent if he acted in accordance to practice accepted by one responsible body of architects, even if another body considered the practice wrong. The issue to be addressed is therefore whether the architects had breached the standard of reasonable supervision required of a

reasonably skilled architect.

There were essentially four heads of defective works in relation to marble works, electrical works, aluminium works, and water seepage and stains. Under all the heads, there was no evidence to show that the architects were negligent in carrying out reasonable supervision, or that the defects were attributable to such negligence. Mere existence of defects does not equate to lack of supervision. Further, the Court of Appeal was not satisfied that the evidence showed and established the alleged defects as was alleged in the first place. In any event, defects with respect to the works were noted by the architects and a list was given to the contractors with instructions to rectify, but the reason why the defects were not attended to was attributable to disagreements between the owners and the contractors with respect to inter alia, interim payment and final accounts. There was no breach on the architects' part and even if there was, on facts, the Court was of the view that no damage was in fact suffered by the owner, for the costs of rectification do not exceed the balance of the sum due to the contractors which the owners should pay if the contract had not gone awry. The Court of Appeal therefore held that the owner failed to establish the architects' negligence and ordered that owners pay to the architects the balance of his fees as counterclaimed by the architects.

EDITORIAL COMMENT

There is no absolute liability on the part of the architect with reference to any loss resulting from his acts. To establish a case against an architect, one must show that the architect failed to exercise a reasonable standard of care, and evidence must be produced in support of the particular lack of care in the circumstances.

Ordinarily, the starting point of an architect's duties to the owners is the contract upon which he is engaged. The Contract is relevant in considering the scope of the Architect's duty in tort. Other duties, other than that of reasonable care and skills may be implied. Besides possible civil liabilities, architects should, of course, be mindful of their responsibilities as the Qualified Person under the Building Control Act and the regulations thereunder.

Construction contract - Leave to Appeal from Arbitrator's award - Nema Guidelines - Question of whether Arbitrator's decision not to award interest constitutes strong *prima facie* case that Arbitrator is wrong

Ahong Construction (s) Pte Ltd v United Boulevard Pte Ltd [1994] 2 S L R 735

The case involves construction of a residential complex. Completion of the complex took place 13 months after the Completion Date prescribed by the contract. The matter was referred to arbitration, where the arbitrator held that there should be extension of time of 13 months. Accordingly, the award was given that the liquidated damages which the owner deducted from the money due to contractors must be refunded and that the costs and expenses for the prolongation of the contract period must be paid to the contractors. However, the arbitrator refused to award interest on such sums, even after the question of interest was remitted to him on appeal by the contractors. The arbitrator, on remission states that his reasons are that the contractors could have finished the work earlier, and by not telling the owner and architect that the work could not be completed within 90 days from the completion date, which is the maximum extension period prescribed by the contract, the contractors were partly to blame. The contractors applied for leave to appeal against the arbitrator's supplementary award disallowing interest.

The Court states that as a matter of law, an appeal from arbitration must be only on question of law (see Arbitration Act ss 28(2), (3) and (4)) and the applicant's case must satisfy the Nema guidelines :

- (1) where the question of law is a "one-off" point, leave will be granted if the arbitrator is clearly wrong on perusal of the award, without the aid of arguments.
- (2) where the question of law is not a "one-off" point, eg. where it involves the construction of a standard term contract, leave to appeal should not be granted unless there is a strong *prima facie* case that the arbitrator was wrong.

The court held that applying the Nema guidelines, the matter was not a "one-off" case, and there was strong *prima facie* case that the arbitrator was wrong not to award interest. The arbitrator's reasons for not awarding interest needs justification and explanation.

If the contractors were entitled to extension of time, it follows that they were competent and efficient in discharging the contract and should be entitled to interests on the sum awarded to them. It would be contradictory for the arbitrator to say on one hand that the contractors were right, that they deserved an extension of time, and on the other hand to say that they should have been more efficient and things could have been completed earlier. Further the matter relating to 90 days maximum extension period was never canvassed at the hearing. Lai Kew Chai J made the following observations:

"The decision no to award interest, for the reasons given, may well call for some clear judicial guidelines on the principles governing the power and discretion whether or not to award interest."

EDITORIAL COMMENT

This decision is useful in showing us how a Singapore court applies the decision in *The Nema* [1981] 2 All ER 1030 which interpreted U.K provisions similar to the local Arbitration Act. The question of interest has always been viewed as discretionary. It has always been peripheral to the substance of the dispute before the arbitrator. It is not uncommon to find arbitrators in Singapore refusing to grant interest or costs to the successful claimant.

For the current SIA standard form contract, the Singapore Court of Appeal had in *Lojan Properties Pte Ltd v Tropicon Contractors Pte Ltd* [1991] 2 MLJ 70 expressed the view that cl 37(6) of that contract dealing with the arbitrator or court's power to award interest "at full commercial rates" is "no more than a restatement of what the law is "and that this power is discretionary; the court will only consider whether the court or arbitrator has exercised his discretion and whether he exercised it correctly. This present case illustrates that where appropriate, the court is even prepared to grant leave to appeal if it feels that the arbitrator had not exercised his discretion properly.

Readers with any questions or comments on the contents of this issue are welcomed to write to us or send us an e-mail to our internet address at chantan@singnet.com.sg