

Construction Law Focus

CHAN TAN & PARTNERS

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

Construction subcontract - alleged right to set off claim against the subcontractor - architect's interim certificate - entitlement of subcontractor to summary judgment on certified amount - whether a stay of proceedings for reference to arbitration on the application of the main contractor should be allowed

Arum Building Services (Pte) Ltd v Greatearth Construction Pte Ltd [1994] 3 SLR 330, High Court, Singapore.

In the recent Singapore case of *Arum Building Services (Pte) Ltd v Greatearth Construction Pte Ltd*, the Court examined a sub-contractor's right to certified progress payments and the main contractor's right to make set-offs against the certified sums under the SIA standard form of contracts. In that case, the nominated sub-contractors (plaintiffs) claimed against the main contractors, firstly, for \$225,392.60 being the total amount certified by payment by the architect in four interim certificates, and secondly, for \$507,609.33 for accelerated work carried out by them. The main contractors (defendants) refused to make payment under the certificates on the ground that they had two claims against the plaintiffs in the sum of \$368,129.70 which they purported to set off against the certified amount. The architect in issuing the certificates did not take the defendants' claims into account as he regarded the claims as "purely domestic". The plaintiffs, relying on clauses 30(1) of the SIA Main Contract and clauses 13.1 and 13.2 of the SIA Sub-Contract, applied for summary judgment for the certified amount and the defendants, relying on clause 14.1 of the SIA Sub-Contract, applied for a stay of the action pending arbitration. The court referred to the decisions of the court and the court of appeal in *Tropicon Contractors Pte Ltd v Lojan Properties Pte Ltd*¹ and noted that the position established in the *Tropicon's case* in the context of a dispute between an employer and a main contractor could not apply directly to a dispute between the

contractor and a sub-contractor because the sub-contractor was not a party to the main contract and clause 31(11) could not come to its assistance. Referring to clause 13.2 of the SIA Sub-Contract, the Court noted that that clause was very different in structure from clause 31(11) SIA Main Contract but found them to be so substantively similar that "they must be read to confer the same degree of finality and enforceability to certificates issued under clause 30(1) between main contractors and sub-contractors as between employers and main contractors. Such construction of clause 13.2 is also in keeping with clause 2 of the sub-contract which says that, whenever possible, the provisions of the sub-contract should be construed consistently with those of the main contract."

Clause 13.2 of the SIA Sub-Contract reads as follows:

"In so far as the architect may decide the amounts due to the sub-contractor and any matter of defence, set-off or counterclaim as between the parties to this sub-contract for the purpose of determining the amounts to be certified for payment by him in the main contract pursuant to cl. 30(1) of the main contract conditions, or any matters of extension of time and delay under cl 11(2) of this sub-contract, such decisions and certificates shall be binding until final judgment or award in any dispute between the parties to this sub-contract."

Based on those reasoning, the court in *Arum's case* held that the "four amounts certified by the architect in favour of the plaintiffs were payable since the architect did not take the defendants' claims into account when issuing his certificates. There was no basis for any legitimate dispute that needed to be referred for arbitration." As regards the plaintiffs' claim for \$597,609.33 for accelerated work carried out, there was no certification by the architect for payment and accordingly, the court ruled that they did not come within clause 13.2 of the SIA Sub-Contract. The claim for accelerated work should be referred to arbitration.

EDITORIAL COMMENT

This case, being the first reported decision on the Conditions of Subcontract issued by the Singapore Institute of Architects, is important for the light it sheds on some of the issues that regularly occur with this

¹ [1989] 3 MLJ 216; On appeal, *Lojan Properties v Tropicon Contractors* [1991] 2 MLJ 70.

standard form. First, this decision put an end to whatever doubts anyone may have as to whether the treatment of set-offs and cross-claims under the Subcontract is different from that of the Main Contract. Although there are some differences in the structure between clause 31(11) of the Main Contract and clause 13.2 of the Subcontract, the court was prepared to find that the provisions of the Subcontract confer "the same degree of finality and enforceability to certificates issued under clause 30.1 between the main contractor and subcontractor as between the employer and main contractor." This means that the main contractor would have to pursue his cross-claims separately in arbitration. He will not be allowed to make deductions from the interim payments. It does not appear also to matter whether a certificate of non-payment was issued or not or whether the architect did not take into account cross-claims that are "purely domestic" in nature. The certification of non-payment therefore does not appear to have any effect on the integrity or "temporary finality" of the interim certificates.

New Publications - Institute for Research in Construction, National Research Council Canada

We have received by electronic mail a list of technical papers published by the Institute for Research in Construction, National Research Council Canada. Anyone interested in getting a copy of any of the following papers can contact Ms Cynthia Howard of the Institute on the internet at howard@irc.lan.nrc.ca

Archer, J.W, "Pourquoi le bois de construction doit-il être sec?" Quebec Habitation 11(6), 1994 pp. 1-2. (Inserted inside Quebec Habitation) (Also available in English: The importance of dry lumber) (NRIC-38560F) (IRC-P- 3959F)

Archer, J.W. "Dry framing lumber makes big difference in performance" Home Builder 7(6),1994 pp. 19.(NRIC-387411) (IRC-P-4022))

Baskaran, B.A., " Stathopoulos, T. "Prediction of wind effects on buildings using computational methods : Review or the state of the art" Canadian Journal of Civil Engineering 21, 1994 pp. 805-822. (NRIC-38715) (IRC-P-3996)

Lam, Y.M.P.; Rainer, J.H. "Analysis and measurement of dynamic properties of an existing hangar structure" 3rd International Kerensky Conference on Global Trends in Structural Engineering (Singapore, Japan, 1994) pp. 295-301, 1994 (NRIC-38725) (IRC-P-4006)

Ramachandra, V.S; Lowery, M.S. "Effects of phosphonate-based compound on the hydration of cement and cement components" Fourth International Conference on Superplasticizers and other Chemical

Admixtures in Concrete (Montreal, Que., Canada, 1994) pp. 131-151, 1994(American Concrete Institute Publication SP (148) (NRIC-37039) (IRC-P-3585)

Walt, G.L.; Felio, G. "Canada's urban infrastructure: Challenges and opportunities: Policy Options 15(10), 1994 pp. 19-23 (NRIC-38721) (IRC-P-4002)

Lie, T.T.; Kodur, V.K.R." Fire resistance of FRP-reinforced concrete structural members" CSA Technical Committee on the Design of FRP Structural Components and Reinforcing Materials for Buildings (Toronto, Ontario, Canada, 1994) pp. 1-2,

Proulx, G. " Lessons learned from evacuation drills in apartment buildings " NFPA 1994 Fall Meeting, Education Section (Toronto, Ontario, Canada, 1994) pp.1, (IRC-ORAL-95)

Proulx, G ; Fahy, R.F. "The study of occupant behaviour during the World Trade Centre evacuation" NFPA 1994 Fall Meeting Speakers Session (Toronto, Ontario, Canada, 1994) pp.1-11, (IRC-ORAL-94)

Richardson, J.K. " Canada's fire research for the 21st century" NFPA 1994 Fall Meeting (Toronto, Ontario, Canada, 1994) pp.1-13, (IRC-ORAL-96)

Yung, D. " The development of a tool to support the introduction of performance based codes in Canada" National Fire Protection Association 1994 Fall Meeting (Toronto, Ontario, Canada, 1994) pp. 1-25, (IRC-ORAL-93)

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