

Building contract - delay in completion of building works by sub-contractor causing delay to main contractor - main contractor purporting to exercise right of set-off against progress payments due to sub-contractor - construction of contract - whether main contractor has a right of set-off at law or under sub-contract

Kum Leng General Contractor v Hytech Builders Pte Ltd [1996] 1 SLR 751, High Court, Singapore

In the recent Singapore case of *Kum Leng General Contractor v Hytech Builders Pte Ltd*, the Court examined the main contractor's right of set-off under the terms of a building contract. In that case, the plaintiffs were sub-contractors in a building project in which the defendants were the main contractors. The defendants alleged that the employers had deducted, from moneys due to the defendants, the sum of \$680,000.00 as liquidated damages for delay in the completion of the main contract works. The defendants further alleged that the delay in completing the contract works was due to the plaintiffs' delay in completing the sub-contract work and that they had a right both in common law and by clause 14 of the sub-contract to set-off from the amounts payable to the plaintiffs that part of the claim attributable to delay by the plaintiffs. Clause 14 of the sub-contract reads as follows:

"The [defendants] shall *notwithstanding anything in this sub-contract* be entitled to deduct from or set-off against any money due from him to the [plaintiffs] (including any retention money) any sum or sums which the [plaintiffs] *is liable* to pay to the [defendants] under this sub-contract." [Emphasis added]

Consequently, the defendants withheld a total sum of \$224,560.16 from the amounts due to the plaintiffs.

The plaintiffs commenced proceedings for the refund of the sum of \$224,560.16, and applied for summary judgment. The plaintiffs conceded that if the defendants' claim for damages is bona fide, the defendants would, at common law, have a right to set-off but submitted that that right can be excluded by contract. They argued that in this case, the defendants' common law right to set-off was so excluded. They submitted that, by the terms of the sub-contract, the

only deductions that the defendants were permitted to make were in respect of retention money, sums previously paid out and such other liquidated sum in respect of which the plaintiffs' liability has been agreed or established. The plaintiffs' case was that the deductions impugned in this case did not fall within any of these categories.

On appeal against the assistant registrar's order dismissing the plaintiffs' application for summary judgment, the High Court reversed the assistant registrar's order and entered judgment in favour of the plaintiffs. The court., in adopting the position taken in *Aurum Building Services (Pte) Ltd v Greatearth Construction Pte Ltd* [1994] 3 SLR 330, held that it would suffice if there was in the contract clear words that excluded the right to set-off either expressly or by necessary implication. After a detailed consideration of the contract documents, the court was of the view that the defendants had, by clause 9(a) of the sub-contract, varied their common law right of set-off. The relevant portion of Clause 9(a) reads as follows:

"Provided that the [defendants] shall not be entitled to claim any loss or damage under this clause unless the architect shall have issued to the contractor (with a duplicate copy to the [plaintiffs]) *a certificate in writing stating that in his opinion the sub-contract works or the relevant section thereof ought reasonably to have been completed within the specified period or within any extended period or periods* as the case may be." [Emphasis added].

By clause 9(a), the plaintiffs were obliged to 'allow' and consequently, the defendants would, subject to the proviso stated therein, be entitled to deduct the amount of loss or damages suffered or incurred by the defendants by the plaintiffs' failure to complete the sub-contract on time, from sums due to the plaintiffs under the interim certificates. The proviso to the defendants' entitlement to deductions was that the architect must have issued to the plaintiffs a certificate in writing stating that in his opinion the sub-contract works ought reasonably to have been completed within the specified period or within any extended period for completion. On the facts of this case, the architect issued a certificate to the defendants in respect of the alleged delays by the plaintiffs only on 1 April 1995 - about six months after the defendants had made the deductions. The court rejected the defendants' argument that the key issue was not whether the

certificate was issued before the deductions but whether at the time of the summary judgment hearing such a certificate existed. It held that an architect's certificate conforming to the requirements of the proviso to clause 9(a) was a condition precedent to the defendants' entitlement to deductions. The court held that by clause 9(a), the defendants had varied their common right of set-off in that that right can be exercised only upon the issue of the stipulated certificate from the architect. The court disagreed with the defendants that clause 14 of the sub-contract has the effect of overriding the specific requirements of clause 9(a). To give clause 14 such an effect would be to render the proviso to clause 9(a) meaningless. The court is of the view that the words 'liable to pay to the contractor under this sub-contract' in clause 14, in the context of clause 9(a), refers to the liability arising consequent upon the issue of the architect's certificate. Once such an architect's certificate is issued, the sub-contractor is, under clause 9(a), required to pay to the contractor the contractor's claim for his damages arising from late completion even though the sub-contractor disputes the contractor's claim. This is so regardless of whether that claim is for liquidated or unliquidated amount. Where the architect issues such a certificate, the sub-contractor is required to pay or allow the claim first - disputes can come later. In this case, as no such architect's certificate existed at the time the deductions were made, the defendants were accordingly not entitled to make the deductions that they did.

Based on those reasoning, the court decided that since at the time of the deductions there was no architect's certificate as required by clause 9, the defendants were precluded from exercising their right of set-off. That being so, the defendants were obliged by clause 12(b) of the sub-contract to make full payment on the interim certificates within 28 days of receipt of those certificates from the architect. Accordingly, the court entered judgment for the sums claimed in favour of the plaintiffs. The court also considered that it was not appropriate in this case to grant the defendants' application for stay of judgment pending the result of the arbitration proceedings between the parties at which the defendants' claim for damages would be determined. The parties had, in the sub-contract, determined the circumstances in which the contractor can have the right to set-off whatever claim to damages he may have against the sub-contractor. A prerequisite for the deductions made in this case was an architect's certificate under clause 9(a). The contractor made the deductions without such a certificate. To grant a stay would be to enable the contractor to effectively get the benefit of such a set-off in spite of non-compliance with the terms of clause 9(a) of the sub-contract.

EDITORIAL COMMENT

This case confirms the position that the parties to a contract may by agreement limit or exclude their rights to set-off. This right may be so excluded by clear express words in the contract or by necessary implication. Where the parties agree in their contract to limit or exclude their rights to set-off, the court will construe that provisions strictly and effect will be given to them.

Limitations of the right to set-off are not unusual in standard form contracts in Singapore. Both the SIA Main and Subcontract confer "temporary finality" on interim certificates issued by the Architect. As a general rule, deductions cannot be made from payments due on interim certificates issued thereunder unless they are supported by appropriate certificates issued by the Architect. Such a position was established by the well known decision of *Tropicon Contractors Pte Ltd v Lojan Properties Pte Ltd* [1989] 3 MLJ 216 (on appeal, *Lojan Properties v Tropicon Contractors* [1991] 2 MLJ 70) that was subsequently affirmed in *Assoland Construction Pte Ltd v Malayan Credit Properties Pte Ltd* [1993] 3 SLR 470 and *Aoki Corporation v Lippoland (Singapore) Pte Ltd* [1995] 2 SLR 609. This present case is the first time such an approach has been adopted for a specially drafted contract.

The requirement for an architect's certificate under clause 9(a) of the contract in the present case is not an unfamiliar one. A similar provision exist in the previous SIA contract and the current JCT contract (clause 24). *A Bell & Son (Paddington) Ltd v CBF Residential Care and Housing Association* (1989) 46 BLR 102 is a U.K. decision that was made along similar lines to the present one.

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