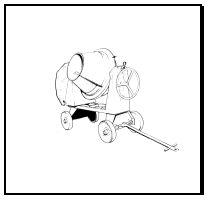
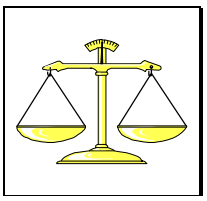


CONSTRUCTION LAW FOCUS



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No. 1 of 1998 January-April 1998

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Damages for defective works and defect liability period - proper method to be used to value variations - acceptance of defective works by architect or employer

The recent decision of the High Court in *Raymond Construction Pte Ltd v Low Yang Tong & Anor* (yet unreported) in suit no. 1715 of 1995, coram: Kan Ting Chiu J (22 October 1997) answers a few important questions that arise often in construction disputes. The Plaintiffs in this case were employed by the 1st Defendant to construct his house. The SIA standard form contract was used. In the course of construction, disputes arose and the Plaintiff then started this action to claim for outstanding payments due under the contract amounting to $240,139.69. The 1st Defendant in turn counter-claimed for liquidated damages and the costs of completing unfinished works and of rectification works amounting to $484,040.00. After three days' hearing at the trial, the parties agreed to separate the technical and legal issues and to have the former referred for alternative dispute resolution, while the latter be determined by the court.

There are three questions for the court's determination:

(1) Whether the 1st Defendant is entitled to claim damages against the Plaintiffs in respect of any defective works which were notified to the Plaintiffs and/or appeared after the expiry of the Defects Liability Period;
(2) What is the proper method to be used to value at law the variation work; and
(3) Whether the defective works were accepted by the Architect and/or the 1st Defendant.

On the first question, clause 15(2) of the contract provides that any defects, shrinkages or other faults which appear within the Defects Liability Period, and which are due to materials or workmanship not in accordance with the Contract, will have to be made good by the Contractor at his own expense, if the Architect specifies them in a Schedule of Defects and delivers the same to the Contractor within 14 days after the expiration of the Defects Liability Period. Clause 15(3) further provides that the Architect may, whenever necessary before the delivery of a Schedule of Defects or within 14 days after the expiration of the Defects Liability Period, issue instructions requiring any such defect, shrinkage or other fault to be made good. Clause 30(6) provides for the issuance of a Final Certificate, which under clause 30(7) would be conclusive evidence that the works have been properly carried out and completed in accordance with the terms of the contact.

The Plaintiffs' contention that clause 15 precludes the 1st Defendant from making any claims against them after the expiry of the Defects Liability Period was rejected by Kan, J, who answered the first question in the affirmative. The Court found the Plaintiffs' contention inconsistent with the pronouncements in *Hancock v Brazier (Anerley) Ltd* [1966] 1 WLR 1317 and *HW Nevill (Sunblest) Ltd v Williams Press & Son Ltd* (1981) 20 BLR 78.

The Plaintiffs' contention was also found to be inconsistent with the relevant passages in Keating on Building Contracts, 6th Edn and Hudson's Building and Engineering Contracts, 11th Edn, Vol 1.

On the second question, the parties agreed that clause 11(4) was the relevant provision here. This provides, inter alia, that all variations required by the Architect or subsequently sanctioned by him in writing were to be measured and valued by the Quantity Surveyor in accordance with specified rules, unless otherwise agreed. Most of the rules specified in clause 11(14) make reference to the prices provided in the Contract Bills. However, the parties had entered into a lump sum contract with no Contract Bills. Thus, there was uncertainty as to whether the variation works fell within any or all the rules. Kan, J noted that all the variation works need not necessarily come under one rule, and part of the works may fall under two rules. Kan, J, on his construction of the rules specified in clause 11(14), classified all variation works into two classes, with a third class cutting across the former two:-

(a) Variation works which are of a similar character and

executed in similar conditions to the contracted works;
(b) Variation works which are not of similar character and are not executed in similar conditions to the contracted works; and
(c) Variation works which cannot be properly measured and valued.

For classes (a) and (b), the corresponding rules (a) and (b) require reference to be made to Contract Bill prices. Under rule (a), the Contract Bill prices will be applied directly. For rule (b), they may be used as "the basis of prices", failing which a fair valuation of the works will be made. Since there were no Contract Bills in the present case, difficulties arise as to how works coming within rule (a) are to be valued, and how a fair valuation is to be determined under rule (b). Kan, J held that where variation works are done at the request of the employer for which no terms of payment are agreed or are applicable, payment will be on a quantum meruit basis. Kan, J set out certain considerations (viz., contractors' labour cost, material cost, administrative cost, the circumstances under which the variation works were done, and a reasonable margin of profit) that have to be taken into account in this exercise, and which also apply in determining the "fair valuation" under rule (b).

As to the difficulty of which of two rules to apply where rule (c) overlaps with either rule (a) or rule (b), Kan, J held that quantum meruit payment is implied when there is no agreement on how payment for work done is to be quantified. Where there is an express agreement that quantification of certain works is governed by a formula, quantum meruit will not apply. Other works not covered by that formula will be paid on a quantum meruit basis. However, the learned judge noted that if there were Contract Bills in the contract, some other solution would have to be found to deal with the difficulty.

On the third question, the Court noted that the question implies that the parties have agreed on what "the defective works" were which may have been accepted, but in fact, there was no agreement on this. This was therefore not a question of law, but one of fact. The learned judge took the question to be "Does the issuance of interim payment certificates by the Architect amount to an acceptance of the work by the 1st Defendant?" Kan, J held that it was clear under clause 30(2) that interim certificates are evidence, though not conclusive, that the works referred to are properly executed and are accepted by the Architect as the agent of the employer. However, the employer may nevertheless assert that the works are not properly executed despite the interim certificate, and the Court may so hold if the employer is able to produce evidence that the works have not been accepted sufficient to discharge his burden of proof on a balance of probabilities.

and

EDITORIAL COMMENT

The standard form contract used in this casewas not the current SIA standard form contract. The one in use was the previous SIA form which was based on the JCT-RIBA model, which incidentally, is still in use in Malaysia as the current PAM form. Our Malaysian readers may therefore find this decision instructive.

On defects, there are usually provisions in most standard form building contracts that require the rectification of defects by the contractor. The requirement to make good defects is also usually stated to be for a certain period after completion. This period is often described as the "defect liability" or "maintenance" period. English authorities have long held that the contractor's liability in damages for defects is not removed by the existence of a defect liability clause in the absence of clear words: *Hancock v Brazier* [1966] 2 All ER 901; *Robins v Goddard* [1905] 1 KB 294; *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689. In the absence of such clear words, it appears the defect liability clause confers an additional right on the employer. The expiry of the defect liability does not suspend or extinguish the rights of the employer at common law to general damages for defective work. The result is that generally, subject to provisions to the contrary in the construction contract, a contractor's liability in damages will continue until it is statute-barred. This present decision therefore appears to reinforce in Singapore, this line of decisions.

As for variations, It seems that clause 11(4) does not envisage the situation where a contractor enters into a building contract with an employer, without providing contract bills (or bills of quantities) in the contract. However, in the present case, we have a lump sum contract with no Contract Bills. Kan J was of the view that, in the circumstances, the correct method of valuation of the variation work was on a quantum meruit basis (i.e. a reasonable sum). Kan, J's view is not without support:

"Payment for extra work contemplated by the contract will usually be at or with reference to the contract rates. If there are no relevant rates, it will be a reasonable sum."(Keating, 6th Edn, p 101)

Finally, what it is interesting is the court's finding that interim certificates are to be regarded as some evidence (though not conclusive) that the works referred to therein are properly executed and are accepted by the Architect. The implication of this is that architects and, possibly, quantity surveyors should henceforth not treat the evaluation of contractor's interim claims as a mere valuation or measurement exercise. Considerations should also be made as to whether the works they cover have been properly executed .