

CONSTRUCTION LAW FOCUS

CHAN TAN & PARTNERS - ADVOCATES AND SOLICITORS • ISSUE No. 1 of 1999 • JAN-APR 1999

SG Industrial Pte Ltd vs Eros Electrical Engineering & Construction Pte Ltd, Suit no. 1187 of 1992 unreported.

- ***Termination of sub-contract***
- ***Main contractor claimed damages arising from termination***
- ***Counterclaim by sub-contractor for damages for loss of profit***

The Plaintiffs were the main contractors for a HDB project known as Bukit Panjang N5C5 Neighbourhood Centre (“the Project”). By a sub-contract contained in the Plaintiffs’ letter of award dated 21 November 1995 and the Defendants’ letter of acceptance dated 13 December 1995, the Defendants were engaged as the Plaintiffs’ sub-contractors for sanitary, mechanical and electrical part of the Project for a lump sum of \$1,830,000.00. The sub-contract did not provide for any commencement or completion dates for the sub-contract works. Instead, clause 5.0 of the sub-contract merely referred to the dates as provided for in the main contract. It stated “the contract commencement and completion dates for this project are 6 October 1995 and 5 January 1998 respectively”. Work programmes, which were exchanged at or about the date of the sub-contract, showed when the sub-contract works were to begin and complete. Clause 13 of the sub-contract provided that the Defendants should complete the sub-contract works within the main contractors’ programme of work. It also provided that the Plaintiffs were entitled to alter the programme and the Defendants should adhere to the construction schedule to be issued from time to time as the Plaintiffs deem fit. There were also terms in the sub-contract requiring the Defendants to comply with all reasonable orders and instructions which the Plaintiffs might give from time to time in connection with the performance of the sub-contract works. It required the Defendants to submit for approval detailed shop drawings, samples and catalogues prior to the execution of the works. By clause 11, the Defendants were required to make progress payment claims on a monthly basis, such claims to be submitted five days before the end of the month. Clause 33 provided that the Plaintiffs might terminate the sub-contract if the Defendants should make the following defaults: “(a) if without reasonable cause it wholly suspends the sub-contract works before completion; (b) if it fails to proceed regularly and diligently

with the sub-contract works; (c) if it refuses or persistently neglects to work according to the main contractor’s instructions.”

Because of variations ordered by HDB and other reasons, there were delays in the Plaintiffs’ earthworks and substructural works. The Defendants’ works, which were dependant on the progress of the Plaintiffs’ works, were also delayed. There were revisions to the main contractor’s master programme issued at the time of tender. The first revision was made in late May 1996 and the second revision was made in January 1997. The effect of these revisions was a reduction of the time available for the Defendants to carry out their sub-contract works. Instructions were also issued to the Defendants to start work wherever the site was available. This led to quarrels about the sequence of work and other difficulties. The Plaintiffs were also unhappy with the Defendants’ slowness in complying with these instructions. The Plaintiffs also pressed the Defendants to make submissions of samples, catalogues specifications etc of the M&E equipment and components. Some of these instructions had first been given in the later part of 1996. The Defendants, on the other hand, were discontented with the Plaintiffs’ delay in certification and payment of the Defendants’ progress claims. There were also complaints of under-certification by the Plaintiffs. The parties also disputed over the Defendant’s entitlement for additional payment for the underground rainwater downpipe, which the Defendants was outside their original scope of sub-contract work.

On 4 June 1997, the Plaintiffs wrote to the Defendants saying that they were disappointed with the Defendants’ lack of response to the numerous reminders regarding outstanding works and submissions. The Plaintiffs’ letter set out a list of some five outstanding submissions items and some five items of outstanding work. It required the Defendants to make good their shortcomings within three days. On 9 June 1997, the Defendants replied that the delays had been caused by the Plaintiffs’ delays in their works and that, in any case, the outstanding works and submissions were not critical. The Defendants also complained, again, about the Plaintiffs’ defaults in the matter of certification and payment of the Defendants’ progress claims. On 10 June 1997, the Plaintiffs, through their solicitors, served a notice of termination of the sub-contract purportedly under clause 33(b) and (c) of the sub-contract. The Plaintiffs’ complaints fall under three broad headings: failure to comply with instructions to proceed with works; failure to comply with instructions to make

submissions; and failure to proceed regularly and diligently by reference to the construction programmes.

In the action, the Plaintiffs claimed damages arising from termination of the sub-contract, in the form of additional cost it had to incur to have the M&E works completed. The Plaintiffs also claimed damages for allegedly defective work done by the Defendants. The Defendants, on the other hand, contended that the purported termination of the sub-contract was wrongful and counterclaimed for damages for loss of profit. Their counterclaims also included, inter alia, claims for balance of the value of work done and damages arising from the Plaintiffs' late and/or under-certification of the progress claims, in the form of financing charges.

The Court held that the Plaintiffs' termination was wrongful and that the Plaintiffs were in breach of their payment obligations to the Defendants. Judgment was accordingly entered in favour of the Defendants for, inter alia, damages arising from the Plaintiffs' wrongful termination and compensation to the Defendants arising from the Plaintiffs' breach of their payment obligations.

In finding that the Plaintiffs' termination of the sub-contract was wrongful, the Court has made the following comments:

- (1) On the question of whether the Defendants had failed to proceed the sub-contract works regularly and diligently, the court has the following to say:
 - (a) The Defendants not only had the duty to complete the contract works but they also had the right to the amount of time allocated to them by the contract to do so. The purported shortening of the completion date itself is an infringement of this right. The court were of the view that there was nothing in the terms of the sub-contract that could be fairly construed as taking away this basic right of the Defendants.
 - (b) Although clause 13 of the sub-contract might seem to give the Plaintiffs the liberty to issue whatever construction programme they deemed fit, even to the extent of curtailing the contract period originally agreed, the Plaintiffs did not contend this. Neither did the Plaintiffs contend that the revised programme amounted to a variation of the contract in respect of the completion date, or created any estoppel.
 - (c) It is not fair and reasonable for the Plaintiffs to rely on the second revised master programme as a yardstick to measure the Defendants' progress in accordance with the contract. Failure on the part of the Defendants to progress was not necessarily a breach of their obligation to proceed regularly and diligently.
- (2) On the question of whether the Defendants had failed to comply with instructions to proceed with the works,

the Court noted that the Defendants contracted as an independent contractor to do and complete the M&E works within a specified period of time and held that "Within this general time-limit and the general timings and sequences of the construction programmes, Eros had the right to plan and carry out their works in the order it thought best. As an independent contractor, Eros also had the right to decide the manner in which any item of work was to be carried out." The Court was of the view that clause 20 of the sub-contract does not give the Plaintiffs the right to disturb the basic right of the Defendants to plan and carry out their works with same degree of orderliness, and due allowance had to be made for the practicalities of the progress of other trades on site. In finding that there were some doubts over the reasonableness of the Plaintiffs' purported exercise of their power to give instructions, the Court held that the Defendants' failure or delay in carrying out the Plaintiffs' instructions could not amount to breaches of the contract, let alone repudiatory breaches. On the question of whether the Defendants had failed to comply with instructions to make submissions, the Court held that such failure per se, without relation to the sequence of work, could not give rise to a breach of the contract.

EDITORIAL COMMENT

This case is a typical of the situation where the main contractor seeks to terminate his sub-contract based on an express term in the sub-contract. Often, when the main contractor seeks to terminate the sub-contract based on delays, a number of difficulties are encountered. First, it is often not easy to convince the court that the delay was wholly or partially attributed to the default of the sub-contractor when the main contractor or other sub-contractors can be shown to be responsible for or have contributed to the delays (see for example, *L & M Airconditioning & Refrigeration (Pte) Ltd v SA Shee & Co (Pte) Ltd* [1993] 3 SLR 482). Second, the relevant sub-contract provisions on which reliance was made to terminate are often poorly drafted. This case decided that the main contractor do not have any carte blanche right to give the sub-contractor instructions to proceed in a sequence which the sub-contractor could not accept.

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
