

CONSTRUCTION LAW FOCUS

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Joint Liability of Contractor and Design Consultant for Defects in works – principle and effect of joint judgement – circumstances in which joint liability will be imposed-effect of apportionment of liability inter se by the Courts-impact of decision on allocation of risks

Lee Sian Teck Chartered Architects v Chuang Uming (Pte) Ltd and Setron Limited

Facts:

Lee Sian Teck Chartered Architects (“the Architects”) were engaged as the project architects for the project known as Haw Par Technocentre by the owners Setron Limited (“the Employers”). Chuang Uming (Pte) Ltd were appointed as the Main Contractors (“the Contractors”) for the project. Construction work began in November 1990 and the project was completed in March 1992.

Two months after the project was completed, some of the ceramic tiles covering the facade of the building began to pop out or “de-bond”, falling to the ground. No repair works was carried out as the Contractors and Architects blamed each other for the damage. Eventually, the Employers engaged other contractors to remove and replace the defective tiling entirely.

Meanwhile the Architects issued interim certificates for the work done. These were subsequently revised by them to take into account the defective works.

The Contractors commenced proceedings against the Employers, claiming the amount due under Certificate No. C18. The Employers contended that they were not obliged to make payments on the defective facade and instead counterclaimed damages for breach of contract and/or

negligence. In turn, the Contractors blamed the Architects for the defects in the facade. As a result, the Architects were joined as a third party to the action by the Employers.

Held:

Trial judge’s findings

The trial judge dismissed the Contractors’ claim and allowed the Employers’ claim for damages against both the Contractors and the Architects. He held that they were jointly liable for the defective tiling of the facade, but liability was apportioned as 20% to the Contractors and 80% to the Architects. Both parties were also allowed recourse to each other for contribution. Damages for joint liability were set at \$1,979,526.18.

On appeal

The Contractors and the Architects each filed separate appeals on the issues of joint liability, apportionment of liability, and the quantum of damages awarded. The Court of Appeal dismissed the Contractors’ appeal and allowed the Architects’ appeal in part, revising the apportionment of liability from the decision of the lower court to a 50-50 basis.

It held that defective design of the tiling and defective workmanship were both responsible for the tile de-bonding. There was substantial overlap in the effects on the tiling defects, making it difficult to determine the primary cause. As such, the Contractors and the Architects were held equally to blame, and liability apportioned at 50% each.

For the same reason that the damage formed indivisible parts of the entire damage, joint liability was appropriate. Separate liability in separate judgements could only be given if the damages caused could be identified and isolated as each party’s own negligent act or breach. On the facts, as both the Architects’ design and the Contractors’ workmanship were flawed a joint judgement was inevitable.

EDITORIAL COMMENT

Allocation of Risks:

The case is of some significance to the construction industry as its impact will be felt in the manner of allocation of risks between Contractors and Design Consultants. Although the Court of Appeal dealt with various other issues, this editorial will be restricted to the issue of joint liability of the Contractor and the Design Consultant.

In the above case, the Court of Appeal, by affirming the decision of the Trial Judge, has firmly established the principle

of joint liability on the part of the Contractor and the Design Consultant to the Employer for defects in the works arising from both their default. As such, it held that a joint judgement should be entered against both, instead of separate judgements entered against each.

Effect of Joint judgements in law:

Where separate judgements are entered against each of the parties, the Employer can enforce the judgement against that

particular party only. If that party fails to satisfy the judgement, the Employer cannot look towards the other party to satisfy the same.

On the other hand, in the case of a joint judgement, both parties are jointly and severally liable to the Employer for the full sum under it. The Employer can choose to enforce the joint judgement against either party for the full judgement sum, regardless of any apportionment of liability between the parties by the Court. Should one party satisfy the joint judgement in full, he would be entitled to seek contribution from the other to the extent of the other's share of liability under the joint judgement.

Concept of “indivisible parts of the damage”:

The Court of Appeal held that the Architect and the Contractor may be held jointly liable in circumstances where both were responsible for the damage and such damage could not “in reality be easily identified or isolated but constitutes indivisible parts of the entire damage”.

See the judgment of Thean JA:

“In cases, such as this, where the damage or injury was occasioned by more than one party, the question whether there should be a joint judgement or separate judgements depends essentially on the facts and in particular on the damage caused. Where the damage caused can be so identified and isolated as to be attributable to the negligent act or the breach of contract of each party, then a separate judgement in respect of that damage can be entered against each of the parties. Where, however, the damage caused by the parties cannot be so identified and isolated, and in reality forms indivisible parts of the entire damage, we do not see how separate judgements can be entered against them separately. Reverting to the facts in this case, clearly both the defective workmanship and the defective design contributed to the debonding of the tiles. We are in agreement with the learned judge that the breaches of the Contractors and the Architects ‘indisputably overlap and interweave’ and both contributed to the same damage.”

Apportionment of liability between the parties:

Further, in a joint judgement, the apportionment of liability by the Court between the Architect and the Contractor inter se would not affect their liability to the Employer to satisfy the joint judgement in full.

As held by Thean JA,

“ In such a case, a joint judgement is the natural result as there is no reason, in principle, to limit the Owner to recovering only part of the loss from one party and the remaining part from the other. The apportionment of the liability between the Contractors and the Architects in percentage terms is not a logical corollary of the separate breaches of contract, but a device to ensure that justice is done as between the Contractors and the Architects inter se.”

As such, even though the Court had deliberately apportioned liability between the Contractor and the Architect in percentage terms, their liability towards the Employer was not affected in any way.

With all due respect to the Court of Appeal, although the stated rationale for the apportionment of liability between the parties by the Court was intended to ensure an equitable distribution of liability between the defaulting parties, this is of little or no comfort to the party seeking contribution from the other as in the case of one party failing to satisfy his share of liability under the joint judgement, it is unlikely that he would be able to provide any contribution to the other party.

Practical Consequences of Decision:

Under the joint judgement, the Employer can look towards either party to satisfy the joint judgement in full. The Employer would obviously choose to enforce the judgement sum against that party which appears to be in a financial position to satisfy the judgement or where that party cannot afford the commencement of execution proceedings against it because of the potential damage to its reputation or because of its effect on its financial or contractual commitments. Further, should the Employer proceed against both parties under the joint judgement and one is unable to satisfy his share of liability, the Employer would invariably look towards the other to satisfy that defaulting party's share of liability.

In this sense, by virtue of his liability under the joint judgement, the Contractor is effectively liable for deficiencies or defects in the design by the Architect which had contributed to the damage. Similarly, under a joint judgement, the Architect is effectively liable to the Employer for the Contractor's default in his works where this had contributed to the damage.

Although in the above case, the Court held, on the facts, that both the Architects and the Contractors were each 50 % liable for the damage, the actual quantum of liability between the parties inter se is irrelevant under a joint judgement in so far as their liability towards the Employer is concerned. Accordingly, even if the Architect was found only to be 5% liable and the Contractor 95%, the Architect would nevertheless be liable to Employer for 100% of the judgement sum. Similarly, the Contractor would be liable under the joint judgement for the full judgement sum even though the damage may have been caused primarily by defective design.

The key consideration for the Court in imposing joint liability is whether the damage or defects as caused by both are “indivisible and cannot be readily identified or isolated”. If this criteria is satisfied, a joint judgement can be entered against both.

The impact of this decision is to expose both the Contractor and the Design Consultant to risks which were clearly not contemplated by either prior to this decision.

The amount of damage, which may be claimed by the Employer in having to rectify the defect and the consequential losses arising from the defect (including, for instance, loss of rental or financing charges) may be considerable. As such, both the Architect and the Contractor in light of this decision have to consider carefully the shift in the sharing of risks from that traditionally assumed by each of them to include this additional liability under a joint judgement for defects in the works.