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CHAN TAN & PARTNERS
ADVOCATES AND SOLICITORS

SIA standard form contract – non-payment of interim certificates of payment – notice of termination – whether notice of termination invalid under clause 33(1)(b) - contractor did not allow 14 days to elapse

***SA Shee & Co (Pte) Ltd v Kaki Bukit Industrial Park Pte Ltd* [2000] 2 SLR 12**

Certificates of payment were the subject of a dispute in *SA Shee & Co (Pte) Ltd v Kaki Bukit Industrial Park Pte Ltd* [2000] 2 SLR 12 before the Court of Appeal. In this case, the developer of a factory at Kaki Bukit Road 3 failed to make payments under five interim certificates issued by the project architect to the main contractor. The contract incorporated the Singapore Institute of Architects Conditions of Building Contract (the "SIA Conditions"). The total amount outstanding under the five certificates was $5,469,137.04.

The developer denied liability on a several of grounds. A number of these grounds are unique to this case and therefore have no relevance to the interpretation of the SIA Conditions. What is of interest is the attempt by the contractor to terminate the contract.

The contractor had sent a letter to the employer giving them notice under clause 33(1)(b) of the SIA Conditions on the ground that the employer had defaulted in making progress payments as certified by the architect. Two days later, without waiting for the 14-day grace period laid down in clause 33(1)(b) to expire, the contractor gave the employer the notice of termination of the contract. The employer contended that the attempted termination was wrongful on the basis that the notice of termination was invalid as the contractor did not allow 14 days to elapse following the first notice of 11 February 1999.

The court then had to deal with the question whether the employer was entitled to withhold payment under the interim certificates by relying on clauses 32(10) and 32(8)(a) on the ground that the contractor had repudiated the contract by wrongfully terminating the contract under clause 33(1)(b).

The court agreed with the employer that he was entitled to do so. Although the court accepted the proposition that clause 31(11) enabled summary judgment to be obtained on the basis of an interim certificate, it felt that this was subject to the exception "in the absence of express provision."

The court considered, first, that clause 32(8)(a) appeared to be "one such express provision." Second, it was of the view that when the contract came to an end, "the rationale for giving temporary finality to an interim certificate could no longer hold good." The contractor would do no further work and there would no longer be a need to minimise "cash flow problems." The court also rejected the contractor's argument that the words "any sums previously certified if not already paid" in clause 32(8)(a) should mean only sums which were already certified but not yet due from the employer and not sums which had already fallen due because the period for honouring the interim certificates had expired. The court felt that this would in effect mean that that the employer can only withhold payment on only one interim certificate at any one time, which was an interpretation that it found to be contrary to the clear language of the provision.

EDITORIAL COMMENT

It is often difficult for anyone, without some background knowledge, to understand any decision relating to the SIA Conditions. The starting point is to appreciate that a claim under an interim certificate in this standard form contract is different from claims based on similar certificates elsewhere. An important characteristic of the SIA is that such interim certificates of payment carry "temporary finality." At the risk of over simplification, the concept of "temporary finality" is basically to confer on an interim certificate a sort of a temporary protection against set-offs or cross-claims that are commonly raised against claims based on interim certificates, in applications for summary judgment. Set-offs or cross-claims can only be considered if they are certified or are stated to be "expressly deductible" under the contract. Since the concept of "temporary finality" is a creature of artifice that does not exist in general law outside the contract, it is inevitable that there will be complications. On the whole, the courts have been able to devise workable solutions to difficult problems presented by the provisions since *Tropicon Contractors Pte Ltd v Lojan Properties Pte Ltd* [1989] SLR 610 which was the first decision on the SIA Conditions, in its current form.

In many previous decisions on clause 31(11), the courts usually had to deal with a set-off or cross-claim that they often throw out as it was unsupported by any architect's certificate. The absence or the invalidity of such a certificate would have forestalled the attempt to deduct amounts from the certificate of payment that carried "temporary finality." In this instance, the "express provisions" in the form of clauses 32(10) and 32(8)(a), relied upon to justify the withholding of payment, did not require any certification by the architect. It was enough for the provisions to be "set in motion," as the court had observed.

Readers should appreciate that the provisions relied upon by the employer to withhold payment, were in fact originally set in motion by the contractor himself in his abortive termination. The contractor would probably have been better off, payment-wise, not to attempt termination, but to proceed only on an application for summary judgment based on the certificates of payment. Any termination notice should therefore be carefully prepared and issued to avoid the consequences exemplified by this case.

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**

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