

CONSTRUCTION LAW FOCUS

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ADVOCATES AND SOLICITORS

Hiap Hong & Company Pte Ltd v Hong Huat Development Co (Pte) Ltd Civil Appeal No 104 of 2000

Construction Law - Certification duties of Architects in building contracts - Duties of Employers/Owners vis-à-vis certification duties of Architects

Background Facts:

A dispute arose out of a building contract based on the SIA Conditions of Contract (1979) Edition between Hiap Hong & Company Pte Ltd (“the Main Contractors”) and Hong Huat Development Co (Pte) Ltd (“the Owners”). After the completion of the Works, the Main Contractors alleged that the Architect engaged by the Owners had failed to discharge his duties under the main contract and that the Owners, as Employers of the Architect were liable for the Architect’s defaults on the basis of an implied term.

The alleged breaches of contract included the following:

- (a) Clause 30(1): The late issue of the Interim Certificates of Payment (ICP) by the Architect and the late payment by the Owners. This caused the Main Contractors to lose \$ 397,788.88 in interest.
- (b) Clause 30(4)(b): The failure to issue a Certificate of Practical Completion for the release of the retention monies. This resulted in a loss of \$26,351.40 by the Main Contractors.
- (c) Clause 30(6): The failure to issue the Final Certificate before the expiry of 3 months from the end of the defects liability period. This resulted in a loss of \$176,210.50 to the Main Contractors.

The Main Contractors contended that there was a separate and distinct duty between issuing the certificate and evaluating the correct amount and that, the Owners were impliedly liable irrespective of knowledge of the breach of the first duty. With regards to the second duty, subjective knowledge was required of the Owners before they could be held liable.

The High Court held that:

- (a) That there was no distinction as to the two types of duties in the issue of the ICP by the Architect.
- (b) That the Owners were under an implied duty to ensure that the Architect discharged his duty as reasonably

necessary. However this did not include instructions to the Architect.

- (c) If the Architect had failed to issue various payment certificates, the Owners were not responsible for the Architect’s defaults notwithstanding that they were aware of such defaults. The onus was on the Main Contractors to plead and prove that the Owners were aware.
- (d) The Owners were not liable for the interest which the Main Contractors would have received had the Architect issued the various ICPs on time.

The Main Contractor appealed against the High Court’s decision to the Court of Appeal.

Issue on Appeal:

What is the nature and extent of the term to be implied as regards the duty of the Owners as employers in relation to the certifying functions of the Architect under the SIA Conditions of Contract?

The Court of Appeal held that:

- (1) **The general rule of implied terms:** The principle of implied terms is to give business efficacy to the contract when repairing an obvious oversight (The Moorcock). Another approach is the ‘officious bystander’ test (Shirlaw v Southern Foundries). The court will imply a term if the language of the contract itself and the circumstances under which it is entered into give rise to the inference that the parties must have intended the term in question.
- (2) **Function of an Architect:** An Architect under a building contract is not an arbitrator. However he has a dual function (see: Sutcliffe v Thackrah). He is bound to act on his client’s instructions whether he agrees with them or not. In other matters requiring professional skill and judgement such as the issue of certificates for payment and the grant of extension of time, he must form and act on his own opinion.
- (3) **Understanding between parties:** The Main Contractors and the Owners contracted on the understanding that in matters where the Architect has to exercise his professional skill and judgement, he will do so in a fair and unbiased manner in applying the terms of the Contract.
- (4) **Extent of the term to be implied:** In the exercise of the function of a certifier, the Architect is not an agent of the Owners. Where the Architect refuses to issue or fails to issue a certificate for no valid reason or fails to give due consideration to the consequences which non-certification would lead, there could be no implied

undertaking by the Owners that they would be liable for the Architect's default.

The Owners are under no duty to oversee or instruct the Architect in his certifying function and he should not do so as this could undermine the independent nature of such a function. There is no justification for an implied undertaking by the Owners since the role of certification by the Architect is independent. Using the tests adopted for implied terms, the term contended by the Main Contractors cannot be implied.

The Court of Appeal held that the cases of *Sutcliffe v Thackrah*, *London Borough of Merton v Stanley Hugh Leach Ltd* and *Nolox Ltd v Swinton & Pendley Borough Council* only distinguished between the duties of the Architect - in situations where he acted as an agent for the Owner or as an independent professional. They do not distinguish further the act of issuing a payment certificate and the exercise of professional skill and judgement in determining the value to be stated in the certificate.

EDITORIAL COMMENT

Although the decision of the Court of Appeal was made in relation to the SIA Conditions of Contract 1979 Ed., the principle that the Owner is not liable for the late issue of the progress payment certificate and the final certificate of the payment by the Architect would apply to a contract based on the SIA Conditions of Contract 6th Ed. as well since the provisions in both editions, on this aspect although not identical, are similar. Accordingly, the Contractor would no longer have any recourse against the Owner for loss of interest in the event that the payment certificates are not issued in time, in accordance with the provisions in the Contract.

The Court of Appeal held that there was no distinction between the act of issuing the payment certificate and the exercise of skill and judgement in determining the value to be stated on the certificate. The Court felt that they were two sides of the same coin.

With all due respect, there is a fundamental distinction between the two. In the case of issuing payment certificates, the Contract expressly provides the time limits within which the payment certificates (either interim or final) should be issued. This term is known to all the parties including the Owner from the commencement of the Contract.

In our view, there is no exercise of any skill or judgement by the Architect in determining when the various payment certificate should be issued as the time frame is provided in the Contract itself. This is different from his duty in certifying the amount payable in the payment certificate, since this involves skill and judgement in assessing his entitlement to the claim and the value of the claim.

Further, although this point does not appear to be canvassed before the High Court and the Court of Appeal, it is surely pertinent that any delay in the issuance of the payment certificates would result in a monetary advantage (in terms of interest on monies retained) that only the Owner and not the Architect would enjoy. Accordingly, to leave the Architect exposed to possible claims by the Contractor for late certification seems inequitable and imposes a heavy burden on the Architect when it is clear that it is only the Owner who would enjoy a monetary benefit from any late certification.

In view of the above decision by the Court of Appeal, which represents the law as it now stands, and bearing in mind the possibility of Contractor's claims, the Architect must ensure that payment certificates are issued in time in accordance with the Contract provisions. If there is a reason why he is unable to issue the payment certificates in time (because of a lack of information from the Contractors or otherwise) he should notify the Contractor in writing of the reason(s) for his inability to do so. Alternatively, if he is able to do so, he should make his own assessment on the value of the Contractor's claim and issue the payment certificate accordingly.

It is doubtful if an Architect when faced with claims by the Contractor for late certification, (as this is now a possibility) can escape liability by contending that he is awaiting the Project Quantity Surveyor's evaluation of the Contractor's claim before issuing the payment certificate. He may of course seek a contribution and/or indemnity from the Quantity Surveyor when faced with such claims, but this is of limited comfort to him.