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Shia Kian Eng (trading as Forest Contractors) v Nakano Singapore (Pte) Ltd (Suit 600245/2000, HC, unreported judgment by Justice Judith Prakash dated 3 April 2001)

Facts

1. The series of disputes involved in this action arose out of the construction of the development known as Woodsvale Executive Condominium at the junction of Woodlands Avenue 7 and Woodlands Drive 72. The development consists of a total of 13 high-rise apartment blocks.

2. The developer, Woodsvale Land Pte Ltd ("the Developer") appointed the defendants, Nakano Singapore (Pte) Ltd ("Nakano"), as their main contractor under a design and build contract. Nakano in turn appointed a number of sub-contractors to carry out different aspects of the works, including the plaintiff, Mr Shia Kian Eng, who carries on construction work under the trade name Forest Contractors ("Forest").

3. There were a number of disputes between the parties. Forest had sued for non-payment, under-payment and damages whereas Nakano had counter-sued for damages claiming that it was repudiation on the part of Forest that caused it to terminate Forest's works before they were completed and, as a consequence, incurred additional expenses to procure the completion of the works. In addition, Nakano claimed that part of Forest's works were defective and wanted reimbursement of the rectification expenses.

4. In the statement of claim, Forest asked for $2,794,744.61 in payment for the work it had done (both pursuant to the original contracts and pursuant to variation orders) up to the date of termination by Nakano. This amount was reduced to $2,041,632.63 as a result of discussions both before and during the course of the trial. In addition to this amount, Forest claimed damages for wrongful repudiation and interest on late payment of its invoices. Nakano contended that Forest's claims were inflated and incorrect and, in any event, it was entitled to set off against Forest's claim, its own counterclaim amounting to $2,770,935.44.

Judgment of the High Court

5. In respect of Forest's claim, the court found that it was entitled to recover $1,670,177.96 as the balance due in respect of the works performed by it and the sum of $7,264.24 as damages for wrongful termination. As against this, the court found that Nakano was entitled to its counterclaim for the sum of $734,450 in respect of the costs of rectifying the defective plaster works. This must be set-off against the amount of Forest's claim. Forest was therefore entitled to $942,992.20. Therefore, judgment was ordered in favour of Forest in the sum of $942,992.20 together with interest thereon at the rate of 6% per annum from the filing of the writ.

6. The Defendants appealed against the decision of the High Court and this appeal was dismissed by the Court of Appeal.

Issues

7. Out of the numerous issues to be determined in this action, two key issues arose for consideration:

(1) the question whether certain drawings, specifications and product brochures mentioned in the purchase orders but, not given to Forest prior to the commencement of the work (and some not given even at the time of issue of purchase orders) formed part of the contractual documents; and

(2) the argument brought up by Forest that the effect of the word "nil" entered against the heading "liquidated damages" on Nakano's purchase order would mean that Nakano was not even able to claim general damages for delay.

8. On the first issue, the court found that on the evidence:

(1) it was unclear that there was any active negotiation by the parties on the form of the terms and conditions or that they had started work on the assumption that these terms and conditions would eventually be agreed and made applicable to the parties' relationship;

(2) no copies of the standard purchase orders and conditions of sub-contract were furnished to Forest;

(3) Nakano was obviously familiar with the practice of the construction industry of having a letter of intent with a provision indicating that a formal contract would follow. Yet, Nakano did not issue such a letter of intent. Although the court accepted that Forest was likely to expect a written acceptance of its quotations, "it would not have been expected to be inundated with contractual documents when it had not been given any such documents prior to commencing work."; and

(4) As for some other documents, while the purchase orders mentioned these documents as being annexed to them, not all these documents were in fact so annexed.

9. On the second issue, the other findings of the court made it unnecessary for the court to decide on this point. However, the learned judge commented, obiter, that it would be "difficult to accept the proposition that simply because it was agreed that there should be no liquidated damages clause, no damages at all could be claimed" if the party was responsible for the delay causing loss to the other party.

Editorial Comments

1. On the first issue, the importance of the court's decision is that there are no special and distinct propositions of law dealing with the retrospective application of a contract to previous transactions. The outcome will turn on the facts and the circumstances based on ordinary contractual principles and the evidence. Therefore, the approach of the court in this case in its assessment of the facts and the dealings of the parties provides a useful guide to how such an argument might be dealt with in the future.

2. The approach of the court was, if documents are not furnished by one party to another party either prior to or at the time of entry into the contract, then in the absence of a "clear indication by that other party that he would accept documents subsequently given as a part of the contract", it would be difficult to convince the court that those documents were incorporated as part of the contract.

3. On the second issue, it is pertinent to point out that there has not been a local case that decided on the effect of a "nil" entry in the liquidated damages clause. In the English case of Temloc Ltd v Erill Properties Ltd (1987) 39 BLR 30, the court held that there ought to be no damages payable for delayed completion. The alternative claim for damages at large was also rejected. However, Temloc's case does not provide a firm ruling on contracts where a "dash' or "N/A" is made in the Appendix or where the space is left blank.

4. The key differences in these two cases ought to be highlighted. In the present case, the court was construing "one-off" provisions in sub-contracts that were partly in writing and partly oral. On the other hand, the court in the English case had to deal with an entry against a widely known provision in a standard form contract, being the JCT form, where pricing practices and procedures should be reasonably established and contractual and time-related risks could be evaluated with some degree of predictability. Another significant difference between these two cases is that in the English case, there was no dispute over the contract documents or contract provisions whereas in the present case, what was agreed and the nature and the terms of the agreement was very much in doubt.

5. Bearing in mind that the court's comments were obiter and therefore, not binding, the court's comments cannot be taken to be law in this country as to the effect of a "nil" entry in the liquidated damages clause. However, the parties to any construction contract in the local construction industry ought to be particularly careful where it is provided for in the conditions of contract that liquidated damages apply and in the appendix to the conditions of contract, a "nil" entry is stated in the liquidated damages clause.