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Soil condition – non-disclosure and misrepresentation – taking back work from the contractor.

***Fu Hai Construction Pte Ltd v Econ Corporation Ltd* (Suit no. 1070 of 2001, unreported judgment dated 31.08.2002)**

Misrepresentation is not an issue that crops up often in construction disputes, but arguments sometimes do arise over what someone may have orally promised another. On other occasions, the issue turns on the significance of written statements that are not intended by one party or the other to be part of the contract that was eventually formed.

Disputes relating to soil conditions and statements made by a party or its consultants have ended up in court elsewhere (see for example, *Morrison-Knudsen International Co Inc v Commonwealth* [1972] 13 BLR 114). Until *Fu Hai Construction Pte Ltd v Econ Corporation Ltd* (Suit no. 1070 of 2001, unreported judgment dated 31.08.2002), no case in Singapore has provided any guidance how such disputes are to be resolved.

In this case, the defendants engaged the plaintiffs as sub-contractors for certain works. The defendants had terminated the plaintiffs' sub-contract and in response, the plaintiffs contended that the termination was wrongful. The plaintiffs alleged that the defendants had made and breached certain representations and sought a rescission of the sub-contract under section 2 of the Misrepresentation Act (Cap 390).

One of the representations alleged to have been made concerned soil condition. The plaintiffs contended that the defendants knew that the soil excavated comprised of rubbish but failed to disclose this to them. The court found that the "the defendants must have known or ought to have known, the nature of the material they excavated" and rightly rejected the somewhat disingenuous argument by the defendants that their geotechnic division did not know beforehand of the rubbish although it installed over 300 bored piles at the site.

One of the points to be considered was whether non-disclosure can amount to misrepresentation. The court first acknowledged the principle that non-disclosure per se would not usually amount to a misrepresentation and accepted the point that "a construction contract is not within the class of contracts of the utmost good faith." The court, however, noted that a representative of the plaintiffs had actually inquired from the defendants "whether there were any adverse factors that he should know about and was assured that there were none." The court proceeded to hold that in such circumstances, the defendants' non-disclosure of the soil condition amounted to a misrepresentation with the following words:

> "Tacit acceptance in another's self-deception does not itself amount to a misrepresentation, provided that it has not previously been caused by a positive misrepresentation. An exception to the general rule that there is no duty to disclose is where the failure to disclose some fact distorts a positive representation."

The judgment also dealt extensively with the conduct of the defendants when they whittled down the subcontract value or scope of works to exclude the major works of bored piling, temporary works/instrumentation and soldier piles. The court in this case made some adverse comments on the unilateral selection of specialist sub-contractors for the plaintiffs by the defendants, the fact that the plaintiffs was made to co-ordinate works payment of the usual attendance fee and the failure to give proper and adequate information concerning the other sub-contractors.

EDITORIAL COMMENTS

These days, it is a common experience that soil investigation is often not carried out with the detailed attention, care and rigour that it deserves. There appears to be a tendency for risks associated with ground conditions to be allocated by contract rather than reduced by getting better information. Since it is clear that non-disclosure may in certain circumstances amount to misrepresentation, consultants or contractors who prepare contract seeking to allocate risks for adverse ground conditions should be careful in making statements even if they did not intend such statements to become terms of the contract.

Concerning the taking back of work, it seems reasonably well established that a main contractor or employer has no right to take back work from a sub-contractor or main contractor or giving it to someone else unless the contract empowers him to do so. Taking back work without any express power under the contract would probably amount to repudiatory conduct (*Felton v Wharrie* (1906) HBC (4th ed.), Vol 2, p. 398, CA (UK); *E R Dyer Ltd v Simon Build/Peter Lind Partnership* (1982) 23 BLR 23). The statements of the learned judge on this subject appears to be made *obiter*, since nothing of substance in the decision turns on the comments, but it gives an idea how such an action will be perceived by the court if the issue is litigated.