

# CONSTRUCTION LAW FOCUS

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**CHANTAN LLC**

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## Suit No. 1201 of 2002

### STEEL INDUSTRIES PRIVATE LIMITED v DEENN ENGINEERING PTE LTD

*Effect of withdrawal of Certificate of Payment of Main Contractor under clause 31 (2), validity of Certificate of Payment of Main Contractor; interim payment certificate issued 5 years after completion, non compliance of form of interim payment certificate and Revision Certificate, effect of waiver; whether Architect may issue Certificates after commencement of arbitration proceedings.*

**Decision of Prakash J** dated 6 August 2003 (unreported)

#### Facts:

1. The Defendants were the Main Contractors for the redevelopment of the Fort Canning Country Club Project. The Plaintiffs were their Nominated Sub Contractors for the supply and installation of kitchen equipment. The Main Contract incorporated the SIA Conditions of Contract (4<sup>th</sup> Edition) while the Sub Contract incorporated the SIA Condition of Sub Contract. The main contract works were certified as completed on 10 January 1997. Although Defendants submitted their final claim of \$7,696,389.00 on 28 July 1997, the Architect failed to certify the final amount due. The Defendants' final claim included the Plaintiffs' final claim of \$350,226.00 for the kitchen works.
2. The Defendants commenced arbitration proceedings against the Employers in June 1998 claiming for the sum \$7,696,389.00 which sum included the Plaintiffs' final claim of \$350,226.00. In the course of the arbitration proceedings, on 5 April 2002, the Employers were placed under Judicial Management by the High Court.
3. On 9 April 2002, the Architect issued an Interim Payment Certificate No. 19 stating that the sum of \$355,479.39 was due to the Plaintiffs. No payment was made by the Employers under this Interim Payment Certificate. On 24 June 2002, the Architect issued a Certificate of Payment of Main Contractor under clause 30 (20) (a) of the Main Contract Conditions for the sum of \$830,226.00 in respect of the Plaintiffs' Sub Contract Works. The effect of this wherein he certified that the Defendants were deemed to have received payment of this sum from the Employers in respect of the Plaintiffs works.
4. The Plaintiffs contended that the sum of \$355,479.39 due under the Interim Certificate No. 19 became payable 14 days after the issue of the Certificate of Payment of Main Contractor i.e. by 8 July 2003. Since they did not receive payment they commenced the above action against the Defendants on 12 October 2002 and applied for Summary Judgement for the sum of \$355,479.39
5. On 30 October 2002, the Architect wrote to the Plaintiffs stating that as the Certificate of Payment of Main Contractor was issued on his understanding that under clause 30 (2) of

the Main Contract Conditions, it only entitled the Plaintiffs to payment in direct proportion to the payment eventually received by the Defendants as Main Contractor when the Main Contract was finalised. He gave notice that if the Plaintiffs abused his intention by utilising this Certificate to prematurely force a disproportionate payment from the Defendants, he would withdraw this Certificate. The Plaintiffs ignored his notice and on 30 January 2003, the Architect withdrew and cancelled his Certificate of Payment of Main Contractor.

#### Defendants' Contentions

6. The Defendants contended that since the Certificate of Payment of Main Contractor had been withdrawn there was no longer any basis for the Plaintiffs' claim. Alternatively, they contended that this Certificate was invalid since a pre condition for its issue was that there must be a valid Interim Payment Certificate. They further contended that Interim Payment Certificate No. 19 was invalid as it did not state the valuation of the Plaintiffs' sub contract works and the date of such valuation. This was in breach of clause 31 (2). Further, in breach of clause 31 (1), this Certificate was issued almost five years after the works were completed. They also argued that the Architect had failed to consider that the reason for the non-payment by the Employers had nothing to do with their default when he issued the Certificate of Payment of Main Contractor. Accordingly, the Defendants applied for a stay of proceedings to refer the dispute to arbitration pursuant to clause 14.1 of the Sub Contract Conditions.

#### Plaintiffs' Contentions

7. The Plaintiffs contended that the Architect could not withdraw the Certificate of Payment of Main Contractor after it had been issued and that both this Certificate and the Interim Payment Certificate No. 19 had temporary finality and should be given effect. Alternatively, Interim Payment Certificate No. 19 was not invalid for non compliance with clause 31 (1) as it was in fact a Revision Certificate under clause 31 (4) and could be issued at any time after the completion of the works.

#### **HELD:**

1. The Court accepted the principle that the Architect could withdraw a certificate or issue a corrective certificate if the earlier certificate had been issued in error. However the Architect could not as in the present case, withdraw his Certificate of Payment of Main Contractor simply because of his opinion as to how this Certificate should be used by the Plaintiffs. Further, what the Architect intended to mean when he issued this Certificate was irrelevant and he could not withdraw it simply because the Plaintiffs took a different view of the Certificate from him.
2. The Court held that the Certificate of Payment of Main Contractor was invalid in that a condition precedent for its

- issue was the requirement of an existing valid Interim Certificate. It held (following the decision in *China Construction (South Pacific) Development Co Pte Ltd v Leisure Park Pte Ltd* [2000] 1 SLR 622) that although the format of Interim Payment Certificate No. 19 did not comply with the requirements of the SIA Conditions, the conduct of the Defendants in accepting the format of the previous three interim certificates was evidence that they had waived the strict compliance with the SIA Conditions by the Architect in the issue of the interim payment certificates.
3. Interim Payment Certificate No. 19 was not issued during the progress of the works, but was issued five years after the completion of the works. As such it could not be regarded as a valid interim certificate under clause 31 (1) following the decision in *Tropicon Contractors Pte Ltd v Lojan Properties Pte Ltd*.
  4. On the Plaintiffs' arguments that Interim Certificate No 19 should be considered as a Revision Certificate issued pursuant to clause 31 (4) and may be issued at any time whether or before the completion of the works, the Court held that in order for an interim Certificate to qualify as Revision Certificate under clause 31 (4) it had to :
    - a. identify the previous certificate which it seeks to correct;
    - b. state the reasons for its correction; and
    - c. set out details of what is being corrected.

Further, it should be in accordance with the model of the revision certificate set out in the SIA Guidance Notes and the SIA Specimen Forms and Certificates for use in conjunction with the Main Contract.
  5. The Plaintiffs could not rely upon the waiver argument to overcome the deficiencies in Interim Certificate No. 19 since none of the previous three Interim Certificates were Revision Certificates. As such, there was no history of the Defendants having waived strict compliance with the format of any Revision Certificates.
  6. As regards the Certificate of Payment of Main Contractor, the Court held that basis for its issue was that monies certified as due to the Plaintiffs had been deducted by the Employers due to something that was not the fault of the Plaintiffs. However this was not the case since the Employers had been placed under Judicial Management since 5 April 2002 and the non payment of the Interim Certificate No.19 was not the result of the Defendants' default. Further, it was clear from the Architect's letters that he did not consider the reasons which led to the Employers not making full payment of the sum of \$830,226 in the Certificate of Payment of Main Contractor, and in particular whether it was the fault of the Plaintiffs which caused the Employers not to pay the amount due in Interim Certificate No. 19.
  7. The Court held that if the Architect had in fact applied his mind to the problem, he would not have been able to certify that the only reason for non payment was the Defendants' default since by the time payment became due, the Employers were already under Judicial Management and not able to make payment to any creditor.
  8. The Court held that as there was an on going arbitration between the Employers and the Defendants which included the issue of whether the delay in the completion of the works was caused by the Plaintiffs in executing their sub contract works, the Architect should not have proceeded to issue the Certificate of Payment of Main Contractor. This was because if the arbitrator finds that the delay was due to the default of the Plaintiffs, there would be no basis for the Certificate of Payment of Main Contractor to be issued.
  9. Further, under clause 37 (3) (i) of the Main Contract, once arbitration proceedings had commenced, the only Certificate which the Architect could issue was the Revision Certificate under clause 31 (4). No other Certificates including the Certificate of Payment of Main Contractor may be issued. The jurisdiction to decide on who was responsible for the delay had been conferred on the Arbitrator before the Architect took it upon himself to look into the same point. There could not be two arbiters of fact. As such the Certificate of Payment of Main Contractor was invalid.

## EDITORIAL COMMENTS

The above case decides for the first time, the issue of whether a Certificate under the SIA Conditions may be withdrawn and if so on what basis. In the above case the Court was of the view that in principle a Certificate could be withdrawn if it was issued in error but not because of the Architect's opinion on how the Certificate may be used by the beneficiary or what he intended when he issued the Certificate.

The case also discusses the purpose and operation of the Certificate of Payment of Main Contractor under clause 30 (2) of the SIA Conditions of Contract and the circumstance in which it may held to be invalid. (Readers should note that the current SIA Conditions of Contract 6<sup>th</sup> Edition does not contain the equivalent clause 30 (2) under the 4<sup>th</sup> edition. )

The Court confirmed that if the Architect failed to properly consider whether the sole reason for the Employer's deduction of monies due to nominated sub contractor was not due to the Main Contractor's default, then its issue was wrong.

It also confirmed that a condition precedent for its issue is that there must first be a valid interim certificate otherwise the Certificate of Payment Of Main Contractor issued thereunder is invalid.

The case also shows that the Revision Certificate under clause 31(4) must comply with the requirements of clause 31(4) and that it should follow the model under the SIA Specimen Forms to avoid the risk of it being held as invalid.

Further, if there were ongoing arbitration proceedings between the Employer and the Main Contractor on similar issues which the Architect had to decide in his certification, then he should not issue the Certificate. Once arbitration proceedings have commenced, the jurisdiction to decide the issue would vest with the Arbitrator. This is further supported by clause 37 (3) of the Main Contract.