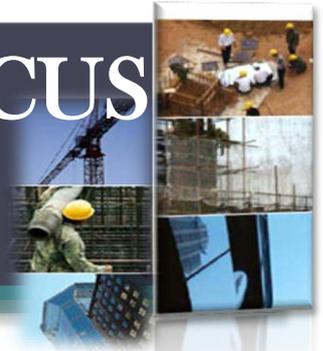


CONSTRUCTION LAW FOCUS

CHAN NEO LLP

(a limited liability partnership)

Advocates & Solicitors • Notaries Public • Commissioners for Oaths



Zac. T Engineering Pte Ltd v GTMS Construction Pte Ltd [2011] SGHC 62 [Quentin Loh J] (22 March 2011)

Whether non-payment for another project a ground for stopping works – effect of a variation claim not being made in accordance with contract procedure – claim for completed work done and backcharges

GTMS Construction Pte Ltd (the defendant) (“GTMS”) engaged Zac. T Engineering Pte Ltd (the plaintiff) (“Zac”) as the sub-contractor for GTMS’s projects at Punggol and Clementi under two separate sub-contracts dated 17 August 2007 and 3 January 2008 respectively. Works under the Punggol project was completed on or about 30 May 2008 without any sign-off on the final accounts. On 12 December 2008, Zac stopped works under the Clementi project on the ground of GTMS’s alleged failure to make payment for works carried out under both the Clementi and Punggol projects. GTMS denied Zac’s allegations and contended that Zac was in repudiatory breach of the Clementi sub-contract in failing to provide sufficient labour and to proceed with the works with due diligence, and by its abandonment of the site on 12 December 2008 and refusal to resume work despite notice to do so, which GTMS accepted on 6 January 2009.

In the court action, Zac claimed \$433,275.22 and \$471,639.40 for work done (including variations) under both the Punggol and Clementi projects respectively. GTMS disputed Zac’s claims. In particular, it challenged Zac’s variations claims on the ground that it was a condition precedent under the contract for certain procedure to be followed before Zac was entitled to make a claim for a variation. This was, however, not complied with by Zac. GTMS also counterclaimed against Zac for loss, damage and expense it had allegedly suffered as a result of Zac’s repudiation of the Clementi sub-contract and backcharges for materials, tools etc that it had provided on Zac’s behalf.

Held: After offsetting the judgment sums in respect of the parties’ respective claims and counterclaims, Zac was to pay GTMS \$73,182.20 (inclusive of GST).

1. Zac had wrongfully suspended and abandoned the works in repudiation of the Clementi sub-contract on 12 December 2008, which GTMS accepted on 6 January 2009. The objective evidence showed that Zac was in delay in respect of the Clementi project in failing to complete the works by the contract completion date of 6 October 2008, and it had not pleaded, as is often seen in construction disputes, that there were changes in the scope of works or abortive works caused by changes that caused a delay to its progress, or that it had been delayed in sequencing of its works by GTMS’s works.
2. Zac had also failed to prove that it had been underpaid. On the contrary, the evidence showed that Zac’s claims for work done was an over exaggeration and had failed to take into account GTMS’s backcharges. Even if it were proven that Zac had been underpaid, the underpayment was not a valid reason in law for Zac to suspend works on the Clementi project. Accordingly, Zac was liable to GTMS for GTMS’s cost in completing Zac’s works under the Clementi project.
3. Zac was not entitled to reject GTMS’s backcharges on the ground that there were no material requisition forms duly signed by Zac. There was no contractual requirement or consistent practice that Zac was required to raise or sign such a form before GTMS delivered any material, tools or consumables to Zac or before GTMS could raise a backcharge. Moreover, this was not pleaded by Zac in its pleadings.

4. While Zac pleaded that the backcharges were manifestly excessive and were penalties which were not enforceable in law, they were not taken up either in evidence or final submissions. There were also no authorities submitted to support Zac's contention that backcharges could be penalties and unenforceable.
5. Other than its progress claims which were unsupported by any documents, Zac failed to produce any evidence or documents to support its claim. Accordingly and based on GTMS's evidence generally, Zac was entitled to judgment only for \$339,623.30 (inclusive of GST) in respect of its claim for work done under the Clementi project.
6. Other than those accepted and admitted by GTMS, Zac was not entitled to judgment on its variations claims as it has failed to follow the variation procedure under the sub-contract, which was condition precedent to Zac's entitlement to make a claim for a variation. There was no evidence to show that this requirement had been waived.

EDITORIAL COMMENT

Under or non-payment. This case reiterates the general position at law that under or non-payment is generally not a valid reason in law for the contractor's stoppage or suspension of works, and *a fortiori*, there is no general right to suspend works if the under or non-payment is for a different project. For the contractor to legally stop or suspend works under the contract for under or non-payment, the contract must expressly empower him to do so. Thus, before a contractor decides to stop or suspend works for under or non-payment, he is advised to review the contract to confirm that he is indeed empowered to do so under the contract.

Variations. This case also illustrates, once again, the risk of not complying with the procedure for making a claim for variations which is expressed as a condition precedent to the contractor's entitlement to make a claim for variations under the contract, and confirms that such a requirement may be waived by the parties. However, on the facts, the Court

found that the case of waiver had not been proven, and more importantly, it had not been pleaded. It is worth noting that it is an important rule of pleadings that the parties are bound by their pleadings and they cannot rely on a ground or raise a defence which has not been pleaded, and this is so notwithstanding that such a ground or defence may subsequently be found to be supported by the evidence adduced at the trial.

Scott Schedule and proper documentation.

Indeed, this case is also a good illustration of how an ill-prepared case can adversely affect the outcome of a case and the parties' claim, particularly more so in a construction case. As noted by the Court, the parties did not provide any breakdown of their claims or a Scott Schedule to show the component items of their claims or their costing, or what was agreed and what was not. Neither was there any attempt to show where the differences in quantum lay. All these would (as noted by the Court) take up an unnecessary amount of court time and unjustifiably run up the legal costs. In fact and given the manner in which the case was conducted, the Court refused to award costs to Zac in respect of its claim under the Punggol project even though it had succeeded in the claim. The Court also noted that the evidence presented by both sides was woefully lacking – witnesses with primary knowledge had not been called, cross-examination was incomplete, a lot of the disputed areas were not properly covered and a lot of the documentation was left much to be desired. All these, as is apparent from the decision, affected and reduced the quantum recoverable by the parties in respect of their respective claims. It is therefore important for the parties to keep proper record and documentation of their claims and to have conducted a thorough investigation and review of their case before going for trial to ensure that their case is properly pleaded and substantiated.

Readers with any questions or comments on the contents of this article are welcome to write to us at CHAN NEO LLP, 133 Cecil Street, Keck Seng Tower, #16-01, Singapore 069535, or send us an email to our internet address at admin@channeo.sg. Contact: Ms. Monica Neo, Tel: 62231218.