IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1993] SGHC 147

Suit 1417/1987

Between

L & M Airconditioning & Refrigeration (Pte) Ltd

… *Plaintiff*

And

SA Shee & Co (Pte) Ltd

… *Defendant*

GROUNDS OF DECISION

Building and Construction Law — Damages — Damages for defects; Building and Construction Law — Damages — Damages for defects; Building and Construction Law — Damages — Damages for defects; Civil Procedure — Costs

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L & M Airconditioning & Refrigeration (Pte) Ltd v SA Shee & Co (Pte) Ltd

[1993] SGHC 147

Suit 1417/1987
L P Thean J
30 June 1993

1 This was a dispute arising out of an air-conditioning sub-contract made between the plaintiffs as the sub-contractors and the defendants as the main contractors. The plaintiffs claimed the sum of $126,693.14 being the balance due under the sub-contract and the defendants counterclaimed various sums totalling $153,514.20 as damages for breach of the sub-contract.

2 The circumstances which gave rise to the dispute were briefly as follows. The defendants were the main contractors in the construction of a block of apartments called Fontana Heights (`the building`) at Mount Sinai Rise. The developers or building owners were International Greenland Enterprises Pte Ltd. The plaintiffs were nominated sub-contractors for the supply and installation of the entire air-conditioning system and equipment to the building. Under the main contract, the date of completion was 19 January 1984 and the date of expiry of the defect liability period was one year from the date of issue of the temporary occupation licence by the competent authority. Under the sub-contract, the date of completion was the same as that of the main contract but the defect liability period was expressed to be one year from the date of practical

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completion, which was different from that provided in the main contract. The completion of the building was delayed and the date of practical completion was 29 May 1985. The architect in charge of the project granted an extension of time to 28 February 1985, and by reason of this there was a delay of 90 days and liquidated damages in the sum of $540,000 at $6,000 per day were imposed and the amount was deducted from the sums payable to the defendants under the main contract.

3 The case of the plaintiffs was that the total amount due under the sub-contract was $1,708,996.54 of which the total amount paid was $1,582,303.40 leaving a balance of $126,693.14 due and payable. The defence was by way of a counterclaim, and the defendants counterclaimed damages for breach of contract, namely, that (i) the plaintiffs had failed or refused to make good various defects in the works carried out and materials supplied by them, and (ii) that there had been delay by the plaintiffs in completing their works and they thereby contributed to the delay in completing the building. These were the two major heads of the counterclaim. In addition, the defendants also claimed various minor sums due from the plaintiffs. At the conclusion of the hearing, I gave judgment to the plaintiffs in the sum of $126,693.14 but in exercise of my discretion I declined to award any interest on that sum. On the defendants` counterclaim, I found that the defendants had established liabilities on the part of the plaintiffs in respect of the two major heads of claim but had not been able to quantify their loss or damage. Accordingly, in respect of each head of the counterclaim, I awarded nominal damages in the sum of $200. I dismissed the defendants` counterclaim of the various minor sums, as there was no satisfactory or sufficient evidence in support.

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4 On the question of costs, after hearing arguments I ordered the defendants to pay to the plaintiffs the costs of the action relating to the claim. But I directed that so far as attendance in court was concerned, only the costs of one day of hearing should be allowed and that no costs should be allowed for preparing and perusing or any work done in respect of all bundles of documents prepared by the plaintiffs or defendants including Agreed Bundles, I, II, III, IV and AMM 1-415 and the Bundle of Affidavits. In addition, I directed that no costs should be allowed for any of the authorities contained in the plaintiffs` bundle of authorities or referred to in the submission made on behalf of the plaintiffs. On the counterclaim I made no order as to costs.

5 I now give my reasons. On the evidence there was no dispute that the amount of $126,693.14 was due to the plaintiffs. The total amount of the sub-contract was $1,708,996.54 of which $1,582,303.40 was paid and the balance due was $126,693.14. The amount had been certified by the mechanical and electrical engineering company in charge of the works, Dactt Engineers Pte Ltd (`Dactt Engineers`) and was admitted by Chwee Meng Chong, the managing director of the defendant company. The plaintiffs therefore were entitled to judgment for this amount.

6 I now turn to the counterclaim of the defendants. There were two major heads of claim made by them, namely: (i) claim for loss or damage arising from the failure of the plaintiffs to make good and rectify the defects outstanding as at the date of expiry of the defect liability period under the sub-contract, and (ii) claim for loss or damage arising from the delay by the plaintiffs in completing their works which had contributed to the delay in completing the main contract work. With regard to (i), there was ample evidence, some of which was documented, that as at the date of expiry of the defect liability period there were

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outstanding numerous defects which the plaintiffs had failed or refused to make good and rectify. The evidence adduced by the defendants showed that the works carried out by the plaintiffs had been quite unsatisfactory and that there had been a series of complaints, almost continuously, from Dactt Engineers, and there had been further complaints from the architect and the owners; the plaintiffs did not appear to me to have rectified satisfactorily the defects at various material times. As at 28 May 1986, there was a long list of outstanding defects which had not been rectified: see pp 546-549 of AB II (Vol 2). On the evidence, I found that the defendants had established liability on the part of the plaintiffs.

7 As for the second major head of claim, there was also evidence which showed that the plaintiffs had been guilty of delay. For example, there were delays on their part in having various pieces of equipment and materials delivered to the site on time, and the evidence of the architect was that there was delay on the part of the plaintiffs. In fact, the evidence of the architect was that the plaintiffs had not really completed their works as at the date of practical completion. Evidence was adduced from other witnesses which showed clearly that there had been delays on the part of the plaintiffs. I therefore found that the defendants had also established liability on the part of the plaintiffs in respect of this head of claim.

8 I should add that I find it unnecessary here to give a detailed account of my examination of the evidence adduced at the trial which spanned over 10 days. Suffice it here to say that I had examined in detail the evidence adduced and was fully satisfied that liabilities under these two heads of claims had been established. The plaintiffs have not challenged these findings (as appeared from their notice of appeal). I did not accept substantially the evidence of Ng Cheng

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Thiam who at the material time was the managing director of the plaintiff company and who was in charge of the air-conditioning works. He maintained that the plaintiffs had rectified all the defects and that throughout there had been no delay on the part of the plaintiffs in carrying out the sub-contract works. The evidence to the contrary was overwhelming, some of which was amply supported by letters from Dactt Engineers. I accepted the evidence of Hue Kook Yen, a director of Dactt Engineers, Chan Cheng Kwee, the managing director of Dactt Engineers and a professional engineer, Liang Hawkin, the architect, Sim Chee Kwung, the property manager of the building owners at the time, and Looi Sun Meng, the foreman of the defendants in charge of the construction of the building. Counsel for the plaintiffs submitted that the evidence of Hue Kook Yen (`Hue`) on the lists of defects must be treated with suspicion on the ground that he was not (and is not) a qualified engineer. I rejected this submission. Hue had had training in the field of electrical and mechanical engineering and had had 15 years of experience. He is a very experienced technician and at all material times worked under the supervision of Chan Cheng Kwee who is a qualified engineer. On the evidence I did not find what he said on the defects of the air-conditioning works erroneous or untenable, and there was no evidence to the contrary. As I have said, I accepted his evidence.

9 I turn to the question of quantum. There was clear evidence of outstanding defects as at the date of expiry of the defect liability period. In addition, there were other defects which arose after the expiry of the period. The building owner had engaged other contractors to make good all the defects. The total amount incurred was $142,414.20 which they deducted from the moneys payable to the defendants under the main contract. However, included in the amount were costs and expenses for carrying out various items of works for which the plaintiffs were not liable under the sub-contract. No evidence was

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adduced to show to my satisfaction how the amount could and should properly be apportioned in respect of the defects for which the plaintiffs were liable and the basis of such apportionment. On the evidence it was not possible for me to assess and determine the actual costs or to make a proper estimate thereof for making good these defects. I therefore awarded only nominal damages.

10 Similarly, in respect of the plaintiffs` liability for the delay, the defendants adduced no evidence to show the proper basis for apportioning the liquidated damages attributable to the delay on the part of the plaintiffs. Damage the defendants had suffered by reason of the plaintiffs` delay, but the question was what part of the liquidated damages should be borne by the plaintiffs. Chwee Meng Chong, the managing director of the defendant company, testified that the defendants had paid to the building owner liquidated damages in the sum of $548,000, calculated at the rate of $6,000 per day for 90 days - this was not disputed. He apportioned to the plaintiffs the sum of $48,000 as liquidated damages for eight days and this apportionment was based on the proportion by which the sub-contract value bore to the whole of the main contract value. That was not a rational apportionment and was unsupported by any authority. I rejected it. Having rejected it, I found that there was no basis on which I could properly apportion the amount and it would be too arbitrary for me to take a random sum and say that that was the amount for which the plaintiffs were liable under this head of the claim. I had no alternative but to award only nominal damages.

11 This case is quite different from those cases where damage has not been suffered and nominal damages are awarded as a token. ***McGregor on Damages*** (15th Ed) para 399 at p 250 states:

> *Nominal damages may also be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given. This is only a subsidiary situation, but it is important to distinguish it from the usual case of nominal damages awarded where there is a technical liability but no loss. In the present case the problem is simply one of proof, one not of absence of loss but of absence of evidence of the amount of loss.*

12 I find this passage extremely apposite here.

13 In giving judgment to the plaintiffs in the sum of $126,693.14, I refused to award interest on that sum. Interest is normally awarded on the ground that the plaintiffs had been withheld of the money which ought to have been paid to them. Here, the defendants had good grounds for withholding the sum or a substantial part of it; they had a good and also a substantive counterclaim against the plaintiffs. Unfortunately, they had not adduced cogent evidence on the proper quantification of the amounts. Secondly, the plaintiffs themselves had contributed to such withholding of the money in refusing to accept, in the face of clear documentary evidence, of which they ought to have been aware, at least a part of the counterclaim.

14 On the question of costs on the counterclaim, the plaintiffs asked that such costs be awarded to them as only nominal damages were awarded to the defendants. I was aware of the following cases: ***Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd*** , and ***Alltrans Express Ltd v CVA Holdings Ltd.*** , In fact, I brought these cases to the attention of counsel when they appeared and argued the question of costs. But I found that these two cases were clearly distinguishable.

15 In the first case, the plaintiffs claimed Â£2,028 being the full purchase price for the goods sold to them on the ground that they were valueless. At the

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trial, evidence was given that the defect in the goods could be removed easily at the cost of Â£52 and the plaintiffs were permitted to amend the statement of claim to cover damage under this head. The plaintiffs failed on their main claim but the judge held that there was in law a breach of contract and gave judgment for the plaintiffs in the sum of Â£52 on the amendment to their statement of claim. The judge held that the plaintiffs had not established anything which was of the least value to them and they ought not to be regarded as successful plaintiffs. In the circumstances, costs were awarded against them.

16 In the second case, the plaintiffs claimed the sum of Â£82,500 as damages for breach of contract relating to the sale of shares in a company. The defence was that the loss had been calculated on the wrong basis. The judge hearing the case came to the conclusion that the plaintiffs were not entitled to Â£82,500 and ordered that damages be assessed. The assessment of damages went before an official referee who, after a hearing lasting for 15 days, made the finding that the plaintiffs had failed to prove that they had suffered any loss and awarded to them nominal damages. The official referee allowed the costs of the hearing to the plaintiffs and on appeal his decision was reversed. The Court of Appeal held that as the plaintiffs had succeeded in obtaining only nominal damages they could not be regarded as successful plaintiffs.

17 The question as to costs on the counterclaim has to be decided on the special facts of this case. In the first place, this was not a case where the plaintiff had suffered no loss or damage and nominal damages were awarded on that basis. In this case, the defendants (the claimants) had suffered loss or damage. There was evidence before me, which I had accepted, that there were considerable defects as of the date of the expiry of the defect liability period which the plaintiffs had failed or refused to rectify. The building owners had to

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engage other contractors to rectify the defects and the costs of such rectifications were borne and paid for by the defendants. It had also been established that the plaintiffs had been guilty of delay in performing the sub-contract and liquidated damages had been paid by the defendants. Nonetheless, the defendants had not succeeded in quantifying the amounts attributable to the plaintiffs` liabilities. Secondly, the plaintiffs were extremely combative and disputed every point relating to the defects for which, purely on the documentary evidence before me, they were clearly responsible. The stand they took was quite unreasonable, and this ought to be taken into account on the question of costs: ***Pettey v Parsons*** , at p 664.

18 Finally, I turn to the special directions as to the costs awarded to the plaintiffs. The solicitors for the plaintiffs prepared voluminous bundles of documents, which were as follows:

> (i) one bundle expressed to be Agreed Bundle I consisting of 154 pages,
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> (ii) one bundle expressed to be Agreed Bundle II (Volume 1) (AB I Vol 1) consisting of 349 pages,
>
> (iii) one bundle expressed to be Agreed Bundle II (Volume 2) (AB II Vol 2) consisting of 356 pages,
>
> (iv) one bundle expressed to be Agreed Bundle III (AB III) which was the sub-contract consisting of 81 pages,
>
> (v) one bundle expressed to be Agreed Bundle IV (AB IV) which was the main contract consisting of 353 pages,
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> (vi) one bundle of affidavits used in the O 14 application consisting of 353 pages, and
>
> (vii) one bundle of copies of minutes of meetings consisting of 415 pages (AMM).

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19 Of all these documents, only a few pages in AB I, namely, the certificate by Dactt Engineers and accounts of the progress payments made and the balance outstanding, and a few pages of the sub-contract containing the material provisions thereof were relevant to the claim of the plaintiffs. The other documents, if at all relevant, were relevant to the counterclaim in respect of which I made no order as to costs. The defendants` bundles of documents were only relevant to the counterclaim. At any rate, the bulk of the documents in AB I, AB II, AB III, AB IV and AMM were not relevant or material and were not referred to or relied upon. Less than half of each of these bundles were really material in relation to the counterclaim. The huge bundle of affidavits was totally irrelevant and their contents were inadmissible in evidence. This was a blatant case of a party not giving sufficient care and attention to the preparation and compilation of relevant documents for the trial. What the plaintiffs did was to gather indiscriminately all the documents which had some connection with the case, however remote it might be, make copies of them and compile them into bundles and bundles. I deprecate such practice. I do not see why the defendants should bear any part of the costs for the preparation of such bundles of documents or any work done in connection with them.

20 Similarly, I disallowed the plaintiffs` costs of compiling the huge bundle of authorities which they produced in court. Their claim was simple and straightforward and was one of fact; it was not really disputed. It certainly did not require any detailed or extensive research on the law to be carried out and no authorities were needed in support. Such compilation only helps to inflate the costs of litigation. The plaintiffs themselves must bear these costs.

21 Order accordingly.

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L P Thean J

Raja Singham with Phillip Lam (Drew & Napier) for the plaintiffs
G Murugaiyan with Gopal Perumal (G Murugaiyan) for the defendants

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