

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1992] SGHC 320

Suit No 1913 of 1987

Between

K M Oli Mohamed (Pte) Ltd

... Plaintiff

And

Joseph S L Goh

... Defendant

GROUND OF DECISION

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K M Oli Mohamed (Pte) Ltd v Joseph S L Goh

[1992] SGHC 320

Suit No 1913 of 1987
Punch Coomaraswamy J
21 December 1992

1 JUDGMENT:

2 The plaintiffs are a family-run business dealing in jewellery. The defendant is an architect. In September 1984, the plaintiffs met with the defendant and engaged the defendant's services in the construction of a 4-storey apartment consisting of 8 units.

3 On 30 September 1984, the terms of engagement (hereinafter referred to as "the agreement") were drawn up. Para 2 of the agreement defined the defendant's scope of work as being engaged:-

4 ...to prepare sketch plans, necessary plans for submission to the Government Authorities for approval, prepare specification, detailed drawings, calling of tenders and periodical supervision.

5 Para (f) provided:- Should the project be suspended or terminated at any stage, settlement of fees will be in accordance with the Singapore Institute of Architect's mode of payment i.e. 1/3 at planning approval and 1/3 at building approval at tender stage, ...

6 By a letter dated 16 January 1987, the plaintiffs' solicitors wrote a letter (headed "without prejudice") to the defendant terminating the defendant's services. The plaintiffs issued a writ on 10 July 1987 claiming damages of \$42,904.55 for breach of contract and warranty. The defendant counterclaimed the balance of his fees of \$87,415.15. At the trial the plaintiffs withdrew their claim for damages and chose to start the hearing by calling evidence to defend the counterclaim. I dismissed the plaintiffs' claim with costs for the defendant. There being no objection from the defendant (to the proposed sequence of calling evidence), I permitted the plaintiffs to call evidence in defence of the defendant's counterclaim before the defendant called evidence to prove his counterclaim.

7 The defendant's counterclaim was for \$87,415.15. The actual fees were \$112,415.58 but of this \$25,000 had been paid by the plaintiffs leaving a balance of \$87,415.15. In defence, the plaintiffs alleged that the defendant was not entitled to his fees at all for the following reasons:- (a) The defendant was in breach of his duty as an architect in failing to comply with the plaintiffs' instructions to apply for the housing developer's Licence on behalf of the plaintiffs; (b) The defendant was in breach of his duty for failing to keep within the budgeted estimate of \$942,000; and (c) The defendant was in breach of his duties for failing to design plans and/or obtain approval for plans designed to fit the alleged specifications and desires as intimated by the plaintiffs to the defendant.

8 Even if the defendant was entitled to his fees, the bill of \$87,415.58 is alleged to be manifestly excessive. A figure of \$46,355.64 is said to be more appropriate.

9 The agreement between the parties was silent as to whose duty it was to obtain a housing developer's licence. In a letter dated 22 May 1985, the Ministry of National Development wrote to the plaintiffs advising the latter to apply for a housing developer's licence before building works commenced on the project. Rahmat Ullah s/o Oli Mohamed, a director of the plaintiffs, states under cross-examination that a copy of this letter was sent to the defendant, but with no covering letter.

10 Under further cross-examination however, he states that there was a "covering" letter dated 7 March 1986 sent together with the letter dated 22 May 1985, a difference of 10 months between the two letters. I can only surmise that it is highly unlikely that the letter of 7 March 1986 was the covering letter as the time period was too great and that a copy of the letter of 22 May 1985 was not sent to the defendant. I believe the defendant when he said that he did not receive the letter of 22 May 1985 or a copy of it. This is consistent with the defendant's reminder to the plaintiffs in a letter dated 25 March 1986 to submit the application for the licence before the building works commenced.

11 As the agreement was silent on whose duty it was to apply for the licence and there were no express instructions given to the defendant, I conclude that it was not an express term of the contract that the defendant was to apply for the licence. I do not accept the plaintiffs' submission on this point that they were laymen and relied totally on the defendant's advice. Being businessmen, they should know that construction of a building involves not only architects, but also numerous other professionals such as quantity surveyors, lawyers and engineers. It would be unreasonable to imply that the architect would have to bear the total responsibility for all action. As stated in para 2 of the agreement the scope of the defendant's work was clearly defined as to "prepare sketch plans, necessary plans for submission to the Government Authorities for

approval, prepare specification, detailed drawings, calling of tenders and periodical supervision." Application for a housing developer's licence does not come within these words.

12 For those reasons, I am not prepared to imply any term that the defendant had a duty to apply for the housing developer's licence.

13 The plaintiffs alleged that the budgeted estimate was \$942,000 for the cost of construction. This figure was arrived at as a result of an estimation done by professional consultants, BEC Consultants ("BEC"). In fact, the plaintiffs originally wanted a figure of \$800,000 because that was the amount the bank was willing to lend. The defendant engaged the services of Peter Tong Associates for another estimation and in a letter dated 16 September 1986, Peter Tong Associates arrived at a total cost of \$1,604,170. I must add however, that the estimation included additional items not included in BEC's estimation. Items like air-conditioning (\$140,000), swimming pool (\$130,000) and ceramic stand balustrade (\$35,000) were not considered in BEC's original estimate. While it is true that there was a substantial increase in certain common items like piling (from \$45,000 to \$108,170) and lifts (\$50,000 to \$100,000), the difference may be explained by the difference in quality of materials used and facilities.

14 It is relevant to point out that in a letter dated 25 September 1984 submitted to the Deputy Director, Development & Building Control Division ("DBCD"), (before BEC's estimate of \$942,000), under item IV, "Construction", the estimated cost of construction was given as \$1.4 million. This letter was signed by the plaintiffs. The plaintiffs submitted that the figure was put there simply for "statistical purposes" and was put in subsequent applications for "consistency". On the evidence, I conclude that there was no term of the contract that the defendant was to keep within the budgeted estimate

of \$942,000. Furthermore, both BEC and Peter Tong Associates are not the servants or agents of the defendant. The plaintiffs' witnesses cannot remember whether BEC were paid for their work or whether there was a bill. I conclude that they must have done so as BEC were independent contractors. Therefore any negligent estimation would found a cause of action against BEC and/or Peter Tong Associates. As I have explained, the difference in figures in the two estimates is understandable and I find that both BEC's and Peter Tong Associates' figures as fair and reasonable.

15 By reason of the letter dated 25 September 1984 to the DBCD where the construction cost was estimated at \$1.4 million, I conclude that there were actually two estimates which the defendant had given. One was that of \$800,000, the other \$1.4 million; the larger sum to take into account additional work (like a swimming pool) or superior materials in the construction which the plaintiffs may require. BEC's figure of \$942,00.00 and Peter Tong Associates' figure of \$1,604,170 were close enough to both estimates respectively.

16 The lowest tender turned out to be \$1,750,000 from Hai Feng Construction Co and this tender sum was based on additional items like a swimming pool which Peter Tong Associates had factored into their estimates. The discrepancy between the defendant's initial estimate of \$1,400,000 and \$1,750,000 cannot be said to be extreme.

17 The plaintiffs cited some old English authorities to show that where there was a discrepancy between the estimate and the lowest tender, there was no entitlement to fees.

18 In *Money Penny v Hartland* (1826) 2 C & P 378; 172 ER 171, Best CJ said:-

19 A man should not estimate a work at a price which he would not contract for it; for if he does, he deceives his employer ... If a surveyor delivers an estimate greatly below the sum at which work can be done, and thereby induces a private person to undertake what he would not otherwise do, then I think he is not entitled to recover. In *Nelson v Spooner* (1861) 2 F & F 613; 175 ER 1209,

20 Cockburn CJ asked the jury these questions:- (a) whether it was an express condition that the works shown on the revised plan should be capable of being executed for the estimated sums? If not, then (b) whether there is an implied condition in such cases that the work shall be capable of being done for a sum reasonably near to the estimated sum? If so then, (c) whether the plaintiffs' estimate was so reasonably sufficient that the defendant ought to have employed him.

21 Applying the criteria of Cockburn CJ to this case, I find that there were two such express sums - one for \$800,000 and one for \$1.4 million depending on whether the plaintiffs wanted the additional items and the materials upgrade. I hold that the difference between the lowest tender amount of \$1,750,000 and \$1.4 million to be reasonably near to the estimated sum and there was no "deceit" practised by the defendant. If the plaintiffs wanted to achieve the \$942,000 budget they should have instructed the defendant to remove certain items or to use cheaper materials. If an employer can substantially achieve his desired object despite reductions in the work to be done, he should give the architect the opportunity of altering his plans so as to effect the reductions: *Building Contracts* by D Keating (4th Edition).

22 The plaintiffs also cited the case of *Nye Saunders and Partners v Alan E Bristow* (1987) 37 BLR 93 where the original estimate of 238,000 was altered 18 months later to 440,000 largely as a result of inflation due to the 1973/74 oil

crisis. Stephen Brown LJ held that this was a massive increase in costs and that the architect failed in his duty in not warning the defendant/client of the likely impact of inflation. The plaintiffs' architects were in breach of their duty to the defendant.

23 The case however is merely authority for the principle that the defendant in that case assumed that the original of 238,000 included inflation. It did not. The moral of the story is that the architect must be very clear in what his estimate costs include. The defendant before me in this case has discharged that obligation. He has shown the plaintiffs the difference between the two costs of \$942,000 and \$1.4 million and accounted the difference.

24 I also find that there was no breach of the defendant's duty as an architect as the plans were constantly submitted to the plaintiffs for approval and they were in fact approved. When the DBCD stated they would only allow three storeys instead of four, the defendant made amendments to the plans which were approved by the plaintiffs. The defendant eventually appealed successfully to the DBCD on the basis of the amended plans. All the plans submitted by the defendant to the plaintiffs had a signature or thumbprint on behalf of the plaintiffs. In fact, since the defendant's termination, the plaintiffs continued to use his plans for the construction of the apartment which stands today. Therefore, there was no breach of duty on the defendant's part in designing the building.

25 The only question which now stands is the quantum of the defendant's fees. By a letter dated 17 March 1987 the defendant delivered to the plaintiffs a bill of costs amounting to \$112,415.58. \$25,000 already having been paid, the amount outstanding was \$87,415.58. The bill was as follows:-

26 PROPOSED 1 BLOCK OF 4-STOREY FLATS (7 UNITS) ON LOT
80-43 MUKIM 25, TANJONG KATONG, SINGAPORE

(a) Professional Fees for the main contract of 2/3 x 8% x \$1,591,605.99 (based on lowest tender submitted on 22/11/86 and other subsequent tenders - see annex A).	\$84,885.65
(b) Professional fees for model 8% x \$2,300	\$ 184.00
(c) Professional fees for soil investigation 8% x \$2,500	\$ 200.00
(d) Professional fees for piling 8% x \$82,0741.11	\$ 6,565.93
(e) Taking client's instructions, consultations with Government departments and then design and preparing plans for official submission of swimming pool. 4% x \$130,000	\$ 5,200.00
(f) Taking client's instructions, consultations with Government departments, then prepare amendment plans and obtained approval of building authorities	\$10,000.00
(g) Lithography charges for main contract tender	\$ 3,500.00
(h) Printing charges outstanding	\$ 310.00
(i) Perspective drawing	\$ 1,500.00
(j) Straits Times advertisement for Clerk-of-Works \$ 70.00 \$112,415.58 Less amount paid up to date \$ 25,000.00 Total professional fees due and payable	\$ 87,415.58
Annex A (Breakdown of Building Cost)	
(1) Lowest main contract tender dated 22.11.86	\$1,820,727.99

(2) Less prime costs and provisional sums \$ 903,500.00	\$ 917,227.99
(3) Lowest electrical tender dated 12.1.87	\$ 99,400.00
(4) Lowest plumbing & sanitary tender dated 18.12.86	\$ 134,546.00
(5) Lowest air-conditioning tender dated 12.1.87	\$ 79,283.00
(6) Lowest lift tender dated 22.12.86	\$ 92,000.00
(7) Lowest security system tender dated 12.1.87	\$ 15,649.00
(8) Soil treatment	\$ 3,500.00
(9) Mail box	\$ 2,000.00
(10) Acrylic canopy	\$ 3,000.00
(11) Bin centre	\$ 5,000.00
(12) Culvert	\$ 30,000.00
(13) Swimming pool	NIL
(14) Service connection	\$ 10,000.00
(15) Builder's work in connection with M&E work	\$ 50,000.00
(16) Contingency	\$ 150,000.00
	\$1,591,605.99

27 The basis for calculating the defendant's fees can be found in the agreement. At para 2 the professional fees agreed were to be 8% of the total cost of all executed works or orders.

28 As provided by para (f), in the event of the project being suspended or terminated at any stage, settlement of fees would be in accordance with the Singapore Institute of Architect's mode of payment ie, 1/3 at planning approval and 1/3 at building approval at tender stage.

29 The plaintiffs raised two points. Firstly, the conditions of Appointment and Scale of Professional Charges 1985 were not applicable as it came into effect in 1985. Secondly, the provision of 1/3 payment at planning approval and

1/3 at building approval at tender stage was inconsistent with para 6.3 of these conditions. Para 6.3 reads:-

30 ... if the services of the Architect are terminated, the Client shall pay to the Architect the full fee for each stage completed and in respect of the stage not completed, the Architect shall be entitled to charge 2/3 of the fee for the incomplete stage.

31 It is not disputed that at that time of signing the agreement on 30 July 1984, the Singapore Institute of Architects ("SIA") Conditions were not in force. The parties would not have been able to determine the mode of payment at that point of time. However, when the mode of payment did become determinable in 1987, the conditions were already in force. It was clearly the intentions of the parties at the time the agreement of 30 July 1984 was intended to have legal effect. If the conditions did not come into force when it was time to decide the mode of payment, the courts would arrive at "a reasonable fee" and the contract would not be void for uncertainty.

32 The law is concisely and accurately stated in Halsbury's Laws (4th Edition) Vol 4 in para 1357 thus:-

33 Where an express agreement has been made as to the amount of the remuneration to be paid to an architect or engineer, he must be paid accordingly. Where, however, no agreement has been made, the architect or engineer is entitled to reasonable remuneration. The amount of such reasonable remuneration is a question of fact.

34 An illustration of this approach in a different context was in *Foley v Classique Coaches Ltd* < 1934 > 2 KB 1. In that case, the plaintiff owned a

petrol-filling station and adjoining land. He sold the land to the defendants on condition that they should enter into an agreement to buy petrol for the purposes of their motor coach business exclusively from him. The agreement was duly executed, but the defendants broke it, and argued that it was incomplete because it provided that the petrol was to be bought "at a price agreed by the parties from time to time". The Court of Appeal rejected this argument and held that, in default of agreement, a reasonable price must be paid.

35 Since the conditions were in force when it was time to determine the mode of payment in 1987, I hold that they will be used as the basis of calculation. Para 6.3 appears to be at odds with the specific provision of 1/3 at planning approval and 1/3 at building approval at tender stage. I resort to para 6.9 to resolve the apparent conflict which provides:-

36 The provisions or conditions hereof shall not preclude the Architect and his client from agreeing to fees in excess of the above scale or other mode of payment of his fees.

37 In this case, para 6.9 will prevail over para 6.3 since the agreement had provided for a specific mode of payment and that will prevail. I now turn to the specific items on the defendant's bill.

38 The plaintiffs challenged virtually every item on the bill of costs. I will deal with this item by item.

39 As item (a), professional fees for the main contract of $\frac{2}{3} \times 8\% \times \$1,591,605.99$, the plaintiffs claimed that the figure should be \$1,214,709.30 instead on adjustment of the figures in annex A.

40 Item (1) of annex A gave the lowest main contract tender as \$1,820,727.99, the tenderer being Hai Feng Construction Co. That was the original amount tendered but this was subsequently adjusted to \$1,750,000 in a letter dated 9 December 1986 to the plaintiffs from Hai Feng Construction Co. Therefore, I find that the correct figure should be \$1,750,000.

41 Item (2) of annex A gave the figure for prime costs and provisional sums as \$903,500. The plaintiffs submitted that the figure should be \$919,355 to include the sum for profit and attendance as well. The defendant under cross-examination admitted that the 1.5% for profit and attendance respectively was for the main contractor and was a rough figure as much as the prime costs sums were. Therefore, there was no reason for the 1.5% for profit and attendance respectively to be left out in the calculations of the prime costs figures as they would be a rough estimate of the costs themselves. On that basis, I accept the plaintiffs' inclusion of these profit and attendance figures which would increase the figure for deduction to \$919,355. Also, I would accordingly factor this 1.5% for profit and attendance respectively into the actual tenders received in items (3) to (7).

42 Items (3) to (7) are the actual tenders received to replace item (2) which was a rough estimate. Essentially, items (3) to (7) were the actual tenders received while items (8) to (16) were estimated costs of work designed by the defendant approved by the plaintiffs. For items (3) to (7), the plaintiffs were asking for a deduction from each tender the item known as "contingency sum". This contingency sum was one of the defendant's own inclusion into the tender figures and was not one submitted by the tenderers. The defendant submitted that the sum was for additional work not originally provided. The defendant relied on clause 6.7(b) of the SIA conditions which reads:-

43 For work not contracted, the lowest bona fide tender received by the Architect.

44 This sub-section does not justify the inclusion of his own estimate of additional work that might never have taken place. Therefore, I accept the plaintiffs' submission that all contingency sums would be left out in the calculations of the tender sums. The plaintiffs also disputed the addition of prime costs sum for light fittings and said that it should not be included in the cost of assessment. However, I accept the defendant's evidence that the plaintiffs wanted the light fittings and told this to Peter Tong Associates. Conceptually, I would put this as a separate item together with items (8) to (16) as an estimated cost and not under the figure for tender of electrical installation. The amount of \$30,000 would remain untouched.

45 The plaintiffs submitted that items (8) to (16) should be omitted as they had not been tendered. However, I refer to clause 6.7(c) under the SIA conditions (which as I held earlier are applicable to the agreement) which provides that in calculating the total construction cost of the work:-

46 For work where tenders have not been received, latest estimates of costs prepared by the Architect submitted and accepted by the client as the operative budget or the appointed Quantity Surveyor's project budget.

47 The figures in items (8) to (16) were given by the quantity surveyors, Peter Tong Associates. I regard them as accurate. The only item I would leave out would be the contingency amount of \$150,000 for the same reasons outlined above.

48 After the above adjustments, I now set out the amended annex A:-

ANNEX A	
(1) Lowest main contract tender (Hai Feng Construction Co)	\$1,750,000.00
(2) Less prime costs and provisional sums	\$ 919,355.00
(3) Lowest electrical tender (less contingency sum of \$20,000)	\$ 79,400.00
Add: Profit & attendance each at 1.5%	\$2,382.00
(4) Lowest plumbing & sanitary tender (less contingency sum of \$5,000)	\$ 129,546.00
Add: Profit & attendance each at 1.5%	\$ 3,886.38
(5) Lowest air conditioning tender (less contingency sum of \$10,000)	\$ 69,283.00
Add: Profit & attendance each at 1.5%	\$ 2,078.49
(6) Lowest lift tender (less contingency sum of \$10,000)	\$ 82,000.00
Add: Profit & attendance each at 1.5%	\$ 2,460.00
(7) Lowest security system tender (less contingency sum of \$3,000)	\$ 12,649.00
Add: Profit & attendance each at 1.5%	\$ 379.47
(8) Soil treatment	\$ 3,500.00
(9) Mail box	\$ 2,000.00
(10) Acrylic canopy	\$ 3,000.00
(11) Bin centre	\$ 5,000.00
(12) Culvert	\$ 30,000.00
(13) Swimming pool	NIL
(14) Service connection	\$ 10,000.00
(15) Builder's work in connection with M&E's work	\$ 50,000.00
(16) Contingency	DISALLOWED
Total allowed:	\$ 1,318,209.30

49 Using the total building cost of \$1,318,209.30 and multiplying it by 2/3 and for 8% by 0.08 I arrive at a figure of \$70,304.50. This would be the figure for the professional fees.

50 As for item (b), the professional fees for the model, the model itself was not built by the defendant but by other independent contractors who were paid directly by the plaintiffs. Moreover clause 5.3.7 of the SIA conditions provides:- All professional fees set out herein exclude disbursements incurred by the Architect and the cost of extra copies of all drawings, documents and models required by the Client.

51 The defendant would thus not be entitled to charge professional fees for the model. He would only be entitled to a reimbursement but since in this case the independent contractor was paid directly by the plaintiffs, the issue of reimbursement does not arise.

52 As for items (c) and (d), the defendant would be entitled to recover this as he is not excluded by any clause under the SIA conditions.

53 While it is true that the plaintiffs did not ultimately want a swimming pool, it is not disputed that the defendant undertook work and prepared the plans on it. His figure of \$130,000 was derived as an estimate of the quantity surveyors, Peter Tong Associates. His figure of 4% was a rough estimate of the amount of work done on it on a quantum merit basis. Since the maximum he could have claimed was 8%, I hold 4% to be a reasonable figure.

54 Item (f) refers to the amendment of plans to meet the approval of the building authorities. The amendments were approved by the plaintiffs and I

allow that claim. As for items (g), (h), (i) and (j), I allow the claims as they are necessary disbursements incurred.

55 Therefore, the final bill of costs would look like this:-

(a) Professional fees for the main contract of 2/3 x 8% x \$1,318,209.30	\$ 70,304.50
(c) Professional fees for soil investigation	\$ 200.00
(d) Professional fees for piling	\$ 6,565.93
(e) Taking client's instructions, consultations with Government departments and then design and preparing plans for official submission of swimming pool	\$ 5,200.00
(f) Taking client's instructions, consultations with Government departments, then prepare amendment plans and obtained approval of building authorities	\$ 10,000.00
(g) Lithography charges for main contract tender	\$ 3,500.00
(h) Printing charges outstanding	\$ 310.00
(i) Perspective drawing	\$ 1,500.00
(j) Straits Times advertisement for Clerk-of-Works	\$ 70.00
Total	\$ 97,650.43
Less amount paid up to date	\$ 25,000.00
Total professional fees due and payable	\$ 72,650.43

56 Accordingly, I award \$72,650.43 to the defendant on his counterclaim. The sum will carry interest at 6% per annum from the date of the counterclaim. The plaintiffs failed on liability. On quantum, the defendant has been awarded almost 85% of his counterclaim. I see no reason to deprive him of any part of the costs of his counterclaim. He will therefore have these costs.

Punch Coomaraswamy J

Lim Pin (Donaldson & Burkinshaw) for the plaintiffs
George Tan Keok Heng (Chan Tan & Partners) for the defendant
