IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1994] SGHC 166

Suit 1381/1993

Between

Aurum Building Services (Pte) Ltd

… Plaintiff

And

Greatearth Construction Pte Ltd

… Defendant

GROUNDS OF DECISION

Arbitration — Stay of court proceedings — Grounds; Building and Construction Law — Set-off and abatement

Version No 1: 29 Oct 2026 (23:45 hrs)

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Aurum Building Services (Pte) Ltd v Greatearth Construction Pte Ltd

[1994] SGHC 166

Suit 1381/1993
Kan Ting Chiu J
18 June 1994

1 [Please note that this case has not been edited in accordance with current Singapore Law Reports house style.]

2 Kan Ting Chiu J:

3 1 This case called for an examination of a sub-contractor's right to certified progress payments and the main contractor's right to make set-offs against the certified sums under the Singapore Institute of Architects' forms of main contract and sub-contract.

4 2 The plaintiffs were the nominated sub-contractor for sanitary and plumbing works for the Leonie Gardens Condominium. The defendants were the main contractor for the project. The plaintiffs' claim against the defendants fell mainly under two heads, firstly for $225,392.60 being the total amount certified by payment by the project architect in four interim certificates, and, secondly, for $597,609.33 for accelerated work carried out by them. The parties agreed that the architect had certified $225,392.60 for payment. This was stated in the affidavits filed by them and confirmed by their counsel in the course of

argument, although the four certificates exhibited by the plaintiffs were actually issued by the quantity surveyors.

5 3 The defendants refused to make payment under the certificates on the ground that they have two claims against the plaintiffs in the sum of $368,129.70 which they purported to set off against the certified amount.

6 4 Against this background, the plaintiffs took out this action against the defendants and applied for summary judgment for the certified amount and the defendants responded by applying to stay the action pending arbitration.

7 5 At this point it is useful to refer to the contractual provisions the parties relied on in support of their applications. The plaintiffs relied on cl 30(1)(a) and (b) of the main contract, which provide that:

8 (a) Interim certificates of the architect in favour of the contractor under cl 31 of these conditions shall state separately the amounts in each certificate due to each individual nominated sub-contractor or supplier (or to designated sub-contractors or suppliers whose work or materials or goods are the subject of a PC item) as the value of their work, goods or materials carried out or delivered at the relevant date under that clause, which amounts shall be paid by the contractor to such nominated or designated sub-contractors or suppliers, less retention moneys or any set-off or counterclaim to which the contractor may be entitled, within 14 days of receipt by the contractor from the employer of the amounts so due under the certificate of the architect.

9 (b) In issuing such an interim certificate the architect, after receiving representations and enquiring into the matter, may (but shall not be obliged to) take into account in any such valuation any dispute, claim, set-off, defence or

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counterclaim as between the contractor of the one part and the designated or nominated sub-contractor or supplier of the other part arising out of their sub-contract. If so, the certificate shall separately state any sum so deducted or taken into account or allowed (or, if it be the case, disallowed) by the architect when giving his certificate, in which event the contractor and designated or nominated sub-contractor or supplier shall be bound by such deduction or taking into account or allowance or disallowance until final judgement or award in any dispute between them and, if relevant, the employer and contractor shall likewise be bound in any dispute between them, as the case may be. Provided that in issuing such certificates the architect shall disregard and not take account of any sum arising out of any disputes, claims, set-offs, defences or counterclaims as between the sub-contractor or supplier and the contractor unless any such sum shall be in principle recoverable by the contractor from the employer or by the employer from the contractor under or by virtue of any provision of this contract, and so require to be certified or taken into account as between the contractor and the employer under cl 31 of these conditions …

10 and cll 13.1 and 13.2 of the sub-contract, which read:

11 13.1 The sub-contractor will (unless the schedule hereto provides to the contrary) be paid within 14 days after payment or deemed payment of the main contractor by the employer following certification by the architect of the amounts paid or deemed to be paid to the main contractor and accordingly due to the sub-contractor in all respects in accordance with cll 30(1) and (2) and 31 of the main contract conditions.

12 13.2 In so far as the architect may decide the amounts due to the sub-contractor and any matter of defence, set-off or counterclaim as between the

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parties to this sub-contract for the purposes of determining the amounts to be certified for payment by him in the main contract pursuant to cl 30(1) of the main contract conditions, or any matters of extension of time and delay under cl 11(2) of this sub-contract, such decisions and certificates shall be binding until final judgment or award in any dispute between the parties to this sub-contract.

13 6 The defendants based their application for a stay on cl 14.1 of the sub-contract, which says that:

14 Any dispute between the parties hereto as to any matter arising under or out of or in connection with this sub-contract or under or out of or in connection with the sub-contract works or as to any certificate decision direction or instruction of the architect, shall be referred to the arbitration … .

15 7 If the defendants have a claim against the plaintiffs, there is nothing in the main contract or the sub-contract that would prevent them from prosecuting it. The question to be determined in these proceedings is whether they can set off their claim against the certified payments before the claim is proved.

16 8 Clause 30(1)(b) of the main contract states clearly that the architect "may (but shall not be obliged to)" take into account any dispute, claim, set-off, defence or counterclaim of the contractor when issuing an interim certificate under cl 30(1)(a). If he takes it into account, the certificate he issues shall state any sum deducted, taken into account, allowed or disallowed. However, the architect's discretion is not unfettered. He is not allowed to take into account any claim by the contractor unless it "shall also be in principle recoverable by the contractor from the employer or by the employer for the contractor under or

by virtue of any provision of this contract". The architect's power is explained in the "Guidance Notes on Singapore Institute of architects Articles and Conditions of Building Contract and Conditions of Sub-Contract", in para 8, where it says:

17 In his certificates for payment to the main contractor, the architect is also empowered to take account of matters of claim and cross-claim between main contractor and sub-contract in carefully defined cases (cl 30(1)), wherever these will affect the amount to be certified under the main contract. In this area, again, the architect's certificates will carry 'temporary finality' not only as between the employer and main contractor, but also, if the new short form of standard sub-contract is used, as between the main contractor and sub-contractor, until final judgment or award in any dispute between them. The only exception to this will be in the case of 'purely private' quarrels between the main contractor and sub-contractor, not affecting the sums to be certified under the main contract, as to which the architect is not given powers of certification (as he also is not in cases where the sub-contract is determined or abandoned for any reason — see cl 30(1)).

18 9 In this case, the architect did not take the defendants' claims into account because he regarded the claims as "purely domestic". The defendants' position in this issue was stated by their project manager Victor Goh, who deposed in his affidavit filed on 21 July 1993 that:

19 8 I am advised and verily believe that in such situations when the dispute is of a 'domestic' nature, cl 30(3) of the main contract does provide the proper mechanism for the architect to consider, *inter alia*, the defendants' claim for set-off against the plaintiffs.

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20 9 I am advised and verily believe that the proper procedure under cl 30(3) of the main contract is for the architect to consider the defendants' claim for set-off before issuing the certificate under cl 30(3). However, the architect did not do so in this instance. The defendants have written to the architect stating that the certificate issued under cl 30(3) of the main contract is invalid.

21 10 The deponent had read more into cl 30(3) then is justified because the provision, which reads:

22 Should the contractor fail to make payment to any designated or nominated sub-contractor or supplier as required by sub-cll (1) and (2) of this condition, the architect after considering any claim for defence or set-off by the contractor with which he has not dealt under sub-cl (1)(b) hereof, *may* issue a separate certificate of the amount due but not paid to the sub-contractor (hereinafter called a 'certificate of nonpayment'). In arriving at the amount to be so certified, the architect shall either, to the extent that he considers any such defence or set-off of the contractor justified or unjustified, deal with the matter in a further interim certificate under cl 31(4) of the conditions and under sub-cl (1)(b) of this condition before certifying under this sub-clause, or, if the matter is not appropriate for interim certification but the architect considers that a *prima facie* case exists justifying non-payment, shall to that extent give credit to the contractor for the same before arriving at the amount (if any) to be certified in the certificate of non-payment [emphasis added]

23 does not oblige the architect to issue a certificate of non-payment whenever there is a failure to make payment. If an architect issues a certificate of non-payment for a sum lower than the amounts certified in interim certificates issued earlier, the contractor is required only to pay the lower sum.

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In this case, the plaintiffs were claiming under interim certificates issued under cl 30(1)(a), and not under any certificate of non-payment. The architect's certificate of non-payment that was issued did not reduce the sums that were certified in the interim certificates, probably because of his finding that the defendants' claims were private or domestic.

24 11 When the two applications were argued before the assistant registrar he granted the defendants' application to stay the proceedings and made no order on the plaintiffs' application for summary judgment. The matters came before me on the plaintiffs' appeal against the assistant registrar's orders.

25 12 Before me, counsel for the defendants referred on the decision of the House of Lords in *Gilbert Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* in support of his contention that a party to a contract is entitled to defend a claim or dispute liability on the basis of his right of set-off unless the contract expressly stipulates that this right of set-off is excluded or ousted. I have no difficulty with this proposition, except that I think that the right of set-off may be excluded by necessary implication as well as express provision. Whether that right is excluded in any given contract is a matter that is to be decided on the terms of that contract.

26 13 The right of set-off under the SIA form of main contract was considered by LP Thean J (as he then was) in *Tropicon Contractors Pte Ltd v Lojan Properties Pte Ltd*, and in the appeal therefrom by the Court of Appeal in *Lojan Properties Pte Ltd v Tropicon Contractors Pte Ltd*.

27 14 The dispute in that case was between the employer and the main contractor. The employer sought to set-off its claim against sums certified in

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interim certificates to be payable to the contractor. LP Thean J dealt with the issue by referring to cl 31(1) and (11) of the contract relating to the employer's obligation to pay the main contractor. These two provisions read:

28 (1) On the dates or at the stages for issuing interim certificates named in the Appendix hereto, the architect shall (subject to the provision of adequate vouchers and information by the contractor) issue interim certificates for payment to the contractor, who shall be entitled to payment of any sum stated therein as due to the contractor within the period for honouring certificates stated in the Appendix following receipt of the certificate or a copy of the certificate by the employer.

29 …

30 (11) No certificate of the architect under this contract shall be final and binding in any dispute between the employer and the contractor, whether before an arbitrator or in the courts, save only that, in the absence of fraud or improper pressure or interference by either party, full effect by way of summary judgment or interim award or otherwise shall, in the absence of express provision, be given to all decisions and certificates of the architect (other than a cost of termination certificate or termination delay certificate under cl 32(8) of these conditions), whether for payment or otherwise, until final judgement or award, as the case may be, and until such final judgement or award, such decision or certificates shall (save as aforesaid and subject to sub-cl (4) of this condition) be binding on the employer and the *Aurum Building Services (Pte) Ltd v Greatearth Construction Pte Ltd* (Kan Ting Chiu J) [1994] 3 SLR contractor in relation to any matter which, under the terms of the contract, the architect has as a fact taken into account or allowed or disallowed, or any disputed matter

upon which, under the terms of the contract, he has a fact ruled, in his certificates or otherwise. The architect shall in all matters certify strictly in accordance with the terms of the contract. In any case of doubt the architect shall, at the request of either party, state in writing within 28 days whether he has as a fact taken account of or allowed or disallowed or ruled upon any matter in his certificates, if so identifying any certificate and indicating the amount (if any) taken into account or allowed or disallowed or the nature of any ruling made by him, as the case may be.

31 15 LP Thean J concluded that:

32 In so far as interim certificates of payment are concerned, it seems to me that the intention of this clause (cl 31(11)) is tolerably clear. It is intended that the contractor be paid the amounts expressed to be payable in the interim certificates, and if no payment is made by the employer, it is intended to enable the contractor in the absence of fraud, improper pressure or interference in the absence of express provisions, to obtain quick summary judgment for the amounts certified as due. In so far as any sum claimed by the employer is concerned, only the amounts expressly deductible under the contract may be set off against the amount due under the interim certificate. I therefore come to the conclusion that subject to any deduction or set-off as provided expressly in the contract, the amounts certified in the interim certificates are due and payable to the plaintiffs.

33 Although that cl 31(11) does not specifically mention set-offs, the reference to amounts expressly deductible under the contract is correct and consistent with that clause because the clause applies to all certificates issued

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by the architect, including certificates issued under cl 30, in which set-offs may be taken into account.

34 16 Karthigesu J (as he then was), in delivering the judgment of the Court of Appeal, affirmed that part of LP Thean J's judgment and said:

35 The conditions of contract, as its very name suggests, is a revised version of the former "Singapore Institute of Architects Conditions of Contract" and differs in many essential respects from it and from the RIBA and JCT forms of contract on which the former 'Singapore Institute of Architects Conditions of Contract' was modelled. The unique features of the conditions of contract are that the contractor is assured of regular periodic payments during the period the contract works are in progress based on a retrospective revaluation of all work carried out under the contract (see cl 31(1) and (2)) and, subject to the exceptions mentioned in cl 31(11), the contractor is put in a position to enforce payment if payment is not made on the due date by action in the courts. On the other hand, the employer's rights are equally protected in that he is entitled legitimately to deduct his legitimate claims against the contractor during the progress of the works provided that the claims themselves and the amounts due are certified by the architect. See cll 31(11) and 1(7) for defective works, cl 24(2) for liquidated damages and cl 30(4) for payment to nominated sub-contractors. Further, the arbitration clause (cl 37) envisages that the courts and not an arbitrator may be seized of a dispute thus negativing a stay in the event an action is brought in the courts to recover payment under an interim certificate of payment. Both the courts and the arbitrator are given power to order repayment of moneys overpaid by either party to the other whether the overpayment was under a mistake of fact or law (see cl 37(7)). The financial machinery under the conditions of contract is regulated by the certificates of the

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architect, the effectiveness of which, until determined otherwise by a court or an arbitrator, is preserved by cl 37(3)(g). Most important of all, the conditions of contract read as a whole, and cll 31(11), 1(7), 24(2) and 30(4), make it particularly clear that the common law defences of set-off or counterclaim are no longer available to the employer in a claim for payment of an interim certificate of payment.

36 17 The position established in these two decisions in the context of a dispute between an employer and a main contractor cannot apply directly to a dispute between the contractor and a sub-contractor because the sub-contractor is not a party to the main contract and cl 31(11) cannot come to its assistance. This is reflected in cl 14.2 of the sub-contract, which provides that:

37 … the provisions as to the binding effect until final judgment or award of the architect's certificates under that contract contained in cl 31(11) of the main contract conditions shall not, whereas cll 13(2) and (3) of the sub-contract shall apply to the effect of architect's certificates and decisions under this sub-contract.

38 18 The question then is whether cll 13.2 and 13.3 of the sub-contract provides for a similar or a different treatment of set-offs as between contractor and sub-contractor. Clause 13.3 has no bearing on the issue. Clause 13.2 provides that:

39 In so far as the architect may decide the amounts due to the sub-contractor and any matter of defence, set-off or counterclaim as between the parties to this sub-contract for the purpose of determining the amounts to be certified for payment by him in the main contract pursuant to cl 30(1) of the

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main contract conditions, or any matters of extension of time and delay under cl 11(2) of this sub-contract, such decisions and certificates shall be binding until final judgment or award in any dispute between the parties to this sub-contract.

40 19 Like cl 31(11), this provision refers to the amounts certified by the architect under cl 30(1) of the main contract and specifies that the certificates shall be binding on the parties in the sub-contract. The wording of this clause is stricter than cl 31(11) as it does not refer to any exception for fraud, improper pressure or interference, though it can be argued that a certificate tainted by fraud, improper pressure or interference is not valid or binding.

41 20 Though clll 31(11) and 13.2 are very different in structure, I found that substantively they are so similar that they must be read to confer the same degree of finality and enforceability to certificates issued under cl 30.1 between main contractor and sub-contractor as between employer and main contractor. Such a construction of cl 13.2 is also in keeping with cl 2 of the sub-contract which says that, whenever possible, the provisions of the sub-contract should be construed consistently with those of the main contract.

42 21 I therefore found, on a proper reading of cl 30.1 of the main contract and cl 13 of the sub-contract, that the four amounts certified by the architect in favour of the plaintiffs are payable since the architect did not take the defendants' claims into account when issuing his certificates. There was no basis for any legitimate dispute that needed to be referred for arbitration. In this situation, the defendants must pay the certified amounts first and pursue their claims against the plaintiffs separately. I entered judgment for the plaintiffs in the sum of $225,392.60 with interest at 6% pa on each sum certified from the

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day after the due date for payment of each sum to the date of judgment. I also ordered that the defendants pay the plaintiffs costs for the application for summary judgment before the assistant registrar and in the appeal.

43 22 Having come to that conclusion, it followed that the defendants' application to stay the proceedings must fail in respect of the claim for the certified payments. The application stands on a different footing in respect to the plaintiffs' claim for $597,609.33 for the accelerated work carried out. This sum is not certified by the architect for payment, and does not come within cl 13.2. The defendants have denied liability to pay the amount claimed and have raised a set-off. This claim should be referred for arbitration under cl 14.2. In the circumstances, I varied the assistant registrar's order for stay to limit it to the claim in respect of the accelerated work and fixed the costs of the application before the assistant registrar at $2,000, to be paid to the defendants. As the plaintiffs succeeded in the appeal against the stay of the claim for the certified amounts, I awarded the plaintiffs half the costs of the appeal.

44 Order accordingly.

45 Reported by Liu Hern Kuan

Kan Ting Chiu J

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Aurum Building Services (Pte) Ltd v Greatearth Construction Pte Ltd [1994] SGHC 166

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