IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1995] SGHC 50

Suit 751/1994

Between

Aoki Corp

… Plaintiff

And

Lippoland (Singapore) Pte Ltd

… Defendant

GROUNDS OF DECISION

Building and Construction Law — Contractors' duties — Extension of time and liquidated damages; Building and Construction Law — Contractors' duties — Extension of time and liquidated damages; Building and Construction Law — Contractors' duties — Extension of time and liquidated damages

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Aoki Corp v Lippoland (Singapore) Pte Ltd

[1995] SGHC 50

Suit 751/1994
Warren Khoo L H J
22 February 1995

1 Cur Adv Vult

2 These two appeals from decisions of the Senior Assistant Registrar involve a determination of the validity of a delay certificate issued by the architect under a building contract in the standard Singapore Institute of Architects (SIA) form.

3 The contractors sued on two interim payment certificates for sums totalling $992,413.80. The employers pleaded by way of set-off and counterclaim a sum of $1,080,581.29 for liquidated damages by reason of delay in the completion of the works.

4 The senior assistant registrar gave the contractors judgment in the sum claimed by them, but ordered a stay of the employers` counterclaim for liquidated damages pending arbitration. The employers appeal against both decisions of the senior assistant registrar.

5 **Provisions of the contract**

6 Clause 23 of the SIA conditions of contract deals with the matter of extension of time for completion of the building works. Clause 23.1 provides a list of events, acts and omissions for which extensions of time may be granted.

7 Clause 23.2 provides as follows:

> *It shall be a condition precedent to an extension of time by the architect under any provision of this contract including the present clause (unless the architect has already informed the contractor of his willingness to grant an extension of time) that the contractor shall within 28 days notify the architect in writing of any event or direction or instruction which he considers entitles him to an extension of time together with a short statement of the reasons why delay to completion will result. Upon receipt of such notification the architect shall inform the contractor in writing within one month of its receipt whether or not he considers the event or instruction or direction in principle entitles the contractor to an extension of time.*

8 Clause 23.3 provides as follows:

> *As soon as any delaying factor in respect of which an extension of time is permitted by the contract has ceased to operate and it is possible to decide the length of the period of extension beyond the contract completion date (or any previous extension thereof) in respect of such matter, the architect shall notify the contractor of his decision and estimate of the same, provided that where two or more such factors are operating concurrently the architect need not so notify the contractor until the last of such matters has ceased to operate.*

9 Clause 24.1 provides for the issue by the architect of a delay certificate in the event the contractor fails to complete the building work by the date for completion originally fixed by the contract or by the extended date for completion. So far as relevant, it reads as follows:

> *24.1 As soon as the latest date for completion of the works ... has passed, then if at the said date there are no other matters entitling the contractor to an extension of time and the works nevertheless remain incomplete, the architect shall issue a certificate setting out the contract completion date ... ; the total period of extension of time (if any); the consequential extended*

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> *contract completion date (if any); and certifying that the contractor is in default in not having completed the works by the stated completion date or extended completion date (as the case may be). Such certificate shall be issued to the employer with a copy to the contractor, and is hereinafter called a `delay certificate`.*

10 Clause 24.2 provides for the deduction of the liquidated damages from moneys due to the contractor. It reads:

> *24.2 Upon receipt of a delay certificate the employer shall be entitled to recover from the contractor liquidated damages calculated at the rate stated in the Appendix to the conditions from the date of default certified by the architect for the period during which the works shall remain incomplete, and may but shall not be bound to deduct such liquidated damages, whether in whole or in part, from any moneys due under the contract at any time up to and including the final certificate.*

11 What cll 23.2 and 23.3 require of the architect may be summarized as follows. After the contractor notifies the architect of the event direction or instruction which the contractor considers entitles him to an extension, the architect has to do two things. Within a period of one month he has to tell the contractor in writing whether or not he considers that such notified event in principle entitles him to an extension. It is not necessary for him to decide how much an extension he is prepared to give, if he is prepared to give any. Then, as soon as possible after the delay event has ceased to operate and it is possible to decide the length of the extension, he must decide the length of the extension, and inform the contractor.

12 What happened in this case is that at various dates, mostly in 1992, the contractors wrote to the architect letters in varying terms referring to possible delays. It suffices to say for present purposes that in none of these cases did the architect indicate in writing whether or not the contractors were in principle entitled to an extension as required by the second sentence of cl 23.2. In regard

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to all of the contractors` letters except one, the architect did eventually give his decision refusing extension. In the single instance where he did purport to grant an extension of 15 days, he had not at any time before that indicated whether in principle the contractors were entitled to any extension.

13 **The contentions**

14 The contractors contend that because the architect did not deal with that particular notification of the contractors within the one-month period provided, his subsequent decision in regard to the extension of time of 15 days was invalid. It follows, so they say, that the delay certificate (predicated as it was on a valid extension of time) was also invalid, and the employers cannot validly deduct liquidated damages. They say that if there were any delays in the completion of the works entitling the employers to damages, the employers could still claim in an arbitration such damages as general damages, but they cannot set up such a claim against the contractors in these summary judgment proceedings on the interim payment certificates. The contractors say that they have a good defence to the employer`s claim for damages for delay as the architect wrongfully failed to give them the extension of time to which they were entitled. The employers` claim, according to the contractors, should therefore be stayed, while summary judgment should be given for the contractors` claim on the interim payment certificates.

15 The issue I have to decide boils down simply to this. Does the fact that the architect failed to give his intimation in principle within the one-month period render his subsequent determination on the extension of time invalid for the purpose of the summary judgement proceedings?

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16 I am of the view that it does not, or in any event does not in this case. Firstly, on a plain reading of cl 23.2, the contract does not make the in-principle intimation within the one-month period a condition for the validity of the determination. It is, in my view, of some significance that while notification by the contractor of a delay event within 28 days of its occurrence is expressly made a condition precedent to an extension of time, the architect`s in-principle intimation within the one-month period is not expressed to be a condition precedent to the validity of his subsequent decision on the quantum.

17 There is good reason for making the timely notification by the contractor of a delay event a condition precedent to extension of time. This is to enable the employer or the architect to verify the claim for extension and to monitor the event and its impact on the progress of the works. In the case of the in-principle intimation by the architect, however, it must have been thought by the draftsman that there is no compelling need to make it a condition precedent. One possible reason for not doing so is that it is often not possible for the architect to come to or commit himself to a view that `in principle` the contractor is entitled to an extension without evaluating the effect of the delay event. The architect in the instant case explains the matter thus:

> *Without going into the full detailed methodology by which extension of time applications are evaluated, I wish to point out that the process of verifying and evaluating such applications require time. Further, in assessing the question of delay, one has to consider whether the alleged event relied on by the contractor falls on the critical path. Briefly, the critical path comprises the sequence of activities in a construction programme in which a delay would have the effect of prolonging the overall completion period of the project. Delay to activities falling outside the critical path may be absorbed by the `float time` allowed in the programme so that the activity will not affect the completion date. There may be further complications where there are concurrent delays or multi-event delays attributable to different factors in which case the architect has to assess the critical cause of the delay and make due allowances, if any, when evaluating the length of extension to be granted.*

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18 The in-principle intimation requirement is one peculiar to the SIA conditions of contract. Its purpose appears to be to force the architect to take a stand so as to enable the contractor to decide what he should do, in particular, whether he should bring in more men and equipment to speed up the work and sue for damages for the extra cost incurred. In a seminar on the SIA conditions of contract, then in draft, in November 1979, the draftsman, Duncan Wallace QC, in referring to this in-principle intimation requirement, is reported to have said (according to a rather imperfect and unpublished transcript):

> *The reason why we have [included this requirement] is that we think the contractor is entitled to know if there is going to be a flat-out rejection. If there is, then he is entitled to make up his own mind whether he is going to fight it, because he can fight it in several ways. One way is to bring in extra plant and write back [and say he is going to sue for damages]. The alternative is that he gives notice of arbitration and carries on … At least he should have that choice, because he will be looking at the amount of liquidated damages, working out his chances of winning in a dispute over the extension of time, and deciding whether it will pay him to catch up or whether he would rather risk it and pay the liquidated damages if he turns out to be wrong.*

19 It seems to me that the result of not elevating the giving of the in-principle intimation (within one month) to the status of a condition precedent may possibly be to confine the consequences of the failure to observe this requirement to a claim for damages, if any, resulting from any initial uncertainty due to the architect`s unjustified omission to act, rather than to destroy the validity of the architect`s eventual decision on the extension of time.

20 **The Assoland case1**

21 The contractors rely on the decision of Goh Phai Cheng JC [as he then was in , a case decided also on the SIA conditions of contract. In that case, the date for completion was 19 September 1991. On 15 October and 19 November 1991, and 27 March 1992 the contractors submitted claims for extension of

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time. The architect did not at any time give the in-principle intimation. Then, on 4 November 1992, he purported to issue a delay certificate stating that the time for completion of the works had been extended for a total of 218 days and accordingly the latest date for completion was 24 April 1992. The learned judicial commissioner referred to the provisions of cl 23. He noted the two stages involved in the processing of claims for extensions of time which I have already mentioned, ie the preliminary in-principle intimation under cl 23.2 and the final decision on the quantum of extension under cl 23.3. The learned judicial commissioner referred to certain Australian, New Zealand and English authorities to the effect that a purported exercise of a power to extend time outside the period of time fixed by the contract, or if no time is fixed, outside a reasonable time, is ineffective, with the result that time for completion becomes at large. He then held:

> *In my judgment, the architect`s failure to comply with the procedural requirements in cl 23.2 would mean that the purported exercise of the power conferred upon him by cl 23 on 4 November 1992 was invalid as it was not exercised within the period fixed by cl 23.2.*

22 I am not sure if the case is of much assistance to the question at hand. In the first place, the authorities which were relied upon for the decision were all authorities dealing with clauses which did not contain the provision for the preliminary intimation contained in cl 23.2 of the SIA conditions. Under the provisions of the contracts in those cases, the architect was required simply to decide on requests for extensions both in principle and in quantum at the same time. Thus, in , the contract provided that in the event specified:

> *... it shall be lawful for the engineer, if he shall think fit, to grant from time to time, and at any time or times, by writing under his hands such extension of time for completion of the work, and that either prospectively or retrospectively, and to assign such other time or times for completion as to him may seem reasonable.*

23 It was held that the words `either prospectively or retrospectively` did not give the engineer a right to fix a new date for completion ex post facto after the entire work had been completed. They only empowered him, if a delay occurred, to wait until the cause of the delay had ceased to operate, and then within a reasonable time after that to assign a new date for completion.

24 In , another case referred to, the contract in the then RIBA form provided that if in the opinion of the architect the works were delayed by reason of any of the events therein specified:

> *...the architect shall make a fair and reasonable extension of time for completion of the works. Upon the happening of any such event causing delay, the contractor shall immediately give notice thereof in writing to the architect, but he shall nevertheless use his best endeavours to prevent delay and shall do all that may reasonably be required to the satisfaction of the architect to proceed with the works.*

25 It was held, for reasons which I do not need to go into, that an extension of time given by the architect after the completion of the works was nevertheless valid.

26 So the cases referred to in the ***Assoland*** case1 concerned contractual provisions quite different from those under consideration. The provisions in the cases referred to in the ***Assoland*** case1 did not deal with anything like the giving of the preliminary intimation in cl 23.2 of the SIA conditions. The learned judicial commissioner appears to have extended one line of authority dealing with the time within which an extension of time should be given to the provision for the giving of the preliminary in-principle intimation under cl 23.2 of the SIA conditions. Apart from this, no authority was cited or reasons given for the view that a failure to give the preliminary intimation had the effect of nullifying the extension that was given. With respect, I think it would be giving

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this provision of the contract for the giving of a preliminary intimation an unduly far-reaching effect if one were to hold that the failure to give such intimation at all or the failure to give one within the one-month period renders any extension of time invalid, even more so if such view is taken regardless of whether the extension itself is made within the time prescribed by cl 23.3, ie as soon as the delay factor has ceased and it is possible to make a determination. In this connection, I have also to mention that in the ***Assoland*** case1 there was no finding that the extension of time was not made within the time prescribed by cl 23.3, as opposed to cl 23.2.

27 In the present case, while it is the contention of the contractors that the purported extension of 15 days was invalid because there had been no preliminary in-principle intimation that the architect would grant such an extension, it is not suggested by them that the decision on the quantum of the extension was not made within the time provided in cl 23.3, ie as soon as the delay factor had ceased and it was possible to determine the length of extension. For the reasons set out above, I do not think that the omission to give the in-principle intimation had the effect suggested by them.

28 **Alternate ground**

29 The contractors next contend that the delay certificate was invalid because it was not issued as soon as the latest date for completion had passed, as required by cl 24.1. The original date for completion was 25 November 1992. Assuming the extension of 15 days was valid, the latest date for completion was 11 December 1992. It was not until 15 March 1993 that the delay certificate was issued.

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30 The contractors say that a certificate issued after a delay of three months after the latest date for completion, ie from 11 December to 15 March, cannot be said to have been issued `as soon as the latest date for completion has passed.` Counsel relies on , where a delay of 21/2 years was held to vitiate the delay certificate.

31 I would deal with these submissions as follows. Clause 24.1 requires the architect to issue the delay certificate when the latest date for completion has passed only if there are no further matters then entitling the contractors to an extent of time. In this case, the latest date for completion was 11 December 1992. The architect has explained, and this is borne out by the correspondence, that between July 1992 and March 1993, there were disputes between the contractors and the architect concerning the contractors` entitlement to extension of time for a host of alleged causes of delay. It was not possible for him to come to a conclusion until these matters had been fully considered and resolved.

32 The ***Tropicon*** case4 turns on its own very peculiar facts. In that case, the architects had certified that the works had been completed on 1 July 1985. The employers were in default in paying interim certificates which had been issued, and on 9 September 1987 the contractors issued a writ claiming the outstanding sums under the interim certificates. They applied for summary judgment. During the progress of the summary judgment proceedings the employers on 24 November 1987 wrote to the architects purporting to inquire whether the architects had taken certain matters into account when issuing the interim certificates and whether, as regards the extensions of time which the architect had granted the contractors, they had complied with the condition precedent in cl 23.2 of the contract. The employers also suggested that if those matters had not been taken into account, the architects should take action under

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cl 31.4 of the conditions of contract (which provides for the issue of a further interim certificate correcting any error in an earlier interim certificate). In response to this, the architects wrote a letter to the contractors (so far as relevant for our present purpose) purporting to nullify extensions of time which had previously been granted, giving the reason that the contractors had in some of the instances not given the notifications of the delaying event within the 28 days required by cl 23.2. The architects at the same time purported to issue a delay certificate on the basis of the new date for completion.

33 It was held by LP Thean J [as he then was], and this was upheld by the Court of Appeal, that the delay certificate was not valid because it was not issued at the time stipulated in cl 24.1, ie as soon as the latest date for completion had passed. The learned judge also found that the purported revised extension of time was flawed because it was not made within the time provided by cl 23.3; the delaying factor had occurred more than three years before and presumably had ceased to operate long before the purported extension.

34 It is evident that the delay certificate purportedly issued by the architects in the ***Tropicon*** case4 was issued long after the date contemplated by cl 24.1. What is more, it was issued in rather unusual circumstances, suggestive of a lack of bona fide on the part of those concerned. I do not think that the case laid down any rule that a delay in the issue of the delay certificate after the date for completion or the latest extended date for completion per se renders the delay certificate invalid. All the circumstances as well as the full terms and effect of cl 24.1 must be considered.

35 In the instant case, it has not been suggested that the delay certificate was issued in anything but the regular course of duty of the architect. The only complaint made is that there was a delay of three months after the latest date for

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completion. As stated earlier, cl 24.1 does not require a delay certificate to be issued until the architect is satisfied that there are no other matters entitling the contractors to an extension of time. No complaint has been made in this respect. As stated above, the architect has given his explanation why it could not be issued earlier, and this explanation has not been disputed.

36 **Temporary finality of certificates**

37 Clause 31.11 of the SIA conditions of contract provide, so far as relevant for present purposes, that no certificate of the architect shall be final and binding, but in the absence of fraud or improper pressure or interference by either party, full effect shall be given to all certificates of the architect, whether for payment or otherwise, until final judgment or award.

38 It is provided by cl 37.3 that the arbitrator to whom any dispute is referred is not bound by any certificate, refusal of certificate, ruling or decision of the architect, but may disregard it and substitute his own decision on the basis of the evidence before and facts found by him. Clause 37.3 also provides that where the architect has not made a ruling or decision or has not given a certificate, the arbitrator has the power to deal with the matter.

39 The object of these provisions of the contract is that certificates issued in the ordinary course by the architect are to be honoured, and that any challenge in relation to them should be referred for arbitration, although, as can be seen in the ***Tropicon*** case4, where the circumstances are such that the legality or propriety of a certificate can be decided by reference to the terms of the contract and the circumstances in which it was issued, the court will not hesitate to deal with the matter even in summary judgement proceedings.

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40 In this case, there is nothing to show that the delay certificate was not issued in the ordinary course, and in accordance with the terms of the contract. It would follow that it should be honoured, just as the interim certificates should be honoured.

41 The interim certificates as well as the delay certificate might be challenged in an arbitration, and the arbitrator could then make his decisions on the subject matter of these certificates without being bound by these certificates. Equally, if the contractors are dissatisfied with the 15-day extension or with the refusal of the architect to grant extensions on the other alleged delay events, they are not precluded from reopening these matters before the arbitrator. However, in the meantime, the interim certificates and the delay certificate must be given effect in the absence of any vitiating factors.

42 I would add this. Progress payments are the lifeline of a building contractor`s business. The object of giving interim payment certificates temporary finality is to enable the contractor to be paid during the progress of the works so as to minimize cash flow problems. His entitlement to be paid is not to be resisted on the ground of any cross-claims by the employer. No such cross-claims will be allowed unless they are certified by the architect in accordance with the contract. Needless to say, the architect must exercise his function as the certifier in good faith and to the best of his uninfluenced professional judgment, even though he is usually appointed by the employer. Otherwise, the object of the provisions for temporary finality could be defeated. It would be no comfort to the contractor that he could ventilate his dissatisfaction before an arbitrator, with all the time, trouble and expense that this entails. From this point of view, the court in summary judgment proceedings on the interim certificates will always, when invited to do so, try as

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far as possible to see whether a certificate which has the effect of derogating from the contractor`s entitlement to be paid, has been properly issued.

43 **Termination of delay certificate**

44 There is, finally, a complaint by the contractors that the architect failed to issue a termination of delay certificate under cl 24.3. They say that after the issuance of the delay certificate on 15 March 1993, the architect had on 17 March 1993 issued two further instructions relating to the works which affected the progress of the works. On 23 March 1993, the contractors gave written notice to the architect of delay to the completion of the works occasioned by these instructions. The architect did not act on this notice, and also did not issue a termination of delay certificate under cl 24.3.

45 I do not think it necessary for me to go into this matter or the rather involved provisions of cl 24.3. It suffices for me to say that a refusal to issue a certificate is reviewable by the arbitrator in accordance with clause 37.3, referred to above. It is a matter for the arbitrator, not for the court in these summary proceedings.

46 **Conclusion**

47 In the circumstances, the contractors are entitled to summary judgment for the amounts certified in the interim certificates. The employers, on the other hand, are also entitled to deduct the amount of the liquidated damages consequent on the delay in the completion of the works. There is no reason why the employers` claim for the liquidated damages should be stayed. I would make orders in terms of the notices of appeal as follows. In respect of the appeal against the summary judgment, I set aside the order of the learned Senior

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Assistant Registrar, and in its place I order that the defendants have unconditional leave to defend the action. The defendants shall have the costs of this appeal and below, to be paid forthwith. In respect of the appeal against the order granting stay, I set aside the order of the learned Senior Assistant Registrar, and in its place I order that the plaintiffs` application for stay be dismissed. The defendants shall have the costs of this appeal and below, to be paid forthwith.

48 ***Defendants` a ppeals allowed.***

Warren Khoo L H J

George Tan and Monica Neo (Chan Tan & Pnrs) for the plaintiffs
Christopher Chuah and Tan Liam Beng (Drew & Napier) for the defendants

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