

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1997] SGHC 262

Suit No 1715 of 1995

Between

Raymond Construction Pte Ltd

... Plaintiff

And

Low Yang Tong
AGF Insurance (Singapore)
Pte Ltd

... Defendant

GROUND OF DECISION

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Raymond Construction Pte Ltd v Low Yang Tong and Another

[1997] SGHC 262

Suit No 1715 of 1995
Kan Ting Chiu J
22 October 1997

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Judgment:

2 1. The Plaintiffs are building
contractors. They contracted with the First Defendant to construct the latter's
house, using the Singapore Institute of Architects (SIA) form of contract.

the construction. They led the Plaintiffs to sue the First Defendant for \$240,139.69 for outstanding payments, and the First Defendant responded with a counterclaim of \$484,040.00

being the cost of completing unfinished works and of rectification works and liquidated

damages for late completion.

4 3. The matters came on for hearing

before me. After three days' hearing, the parties agreed to separate the technical

and legal issues and to have the former referred for alternative dispute resolution, while

the latter were to be determined by the court.

5 The first question

6 4. There are three questions for my

determination. The first is -

7 Whether the 1st Defendant is

entitled to claim damages against the Plaintiffs in respect of any defective works which

were notified to the Plaintiffs and/or appeared after the expiry of the Defects Liability

Period?

8 5. The relevant provisions of the

contract are clauses 15(2), 15(3), 30(6) and 30(7). Clause 15(2) and (3) provide that

9 (2) Any defects, shrinkages or

other faults which shall appear within the Defects Liability Period stated in the appendix

to these Conditions and which are due to materials or workmanship not in accordance with

this Contract shall be specified by the Architect in a Schedule of Defects which he shall

deliver to the Contractor not later than 14 days after the expiration of the said Defects

Liability Period, and within a reasonable time after receipt of such Schedule the defects,

shrinkages and other facts therein specified shall be made good by the Contractor _____ and _____

(unless the Architect shall otherwise instruct, in which case the Contract Sum

shall be

adjusted accordingly) entirely at his own cost.

10 (3) Notwithstanding sub-clause (2)

of this Condition the Architect may whenever he considers it necessary so to do, issue

instructions requiring any defect, shrinkage or other fault which shall appear within the

Defects Liability Period named in the appendix to these Conditions and which is due to

materials or workmanship not in accordance with this Contract to be made good, and the

Contractor shall within a reasonable time after receipt of such instructions comply with

the same and (unless the Architect shall otherwise instruct, in which case the Contract

Sum shall be adjusted accordingly) entirely at his own cost. Provided that no such

instructions shall be issued after delivery of a Schedule of Defects or after 14

days from

the expiration of the said Defects Liability Period.

11 6. Clause 30(6) provides for the

issuance of a Final Certificate which under sub-rule (7) would be conclusive evidence in

any proceedings arising out of the contract that the works have been properly carried out

and completed in accordance with the terms of the contract.

12 7. The Plaintiffs contended that

clause 15 is an exemption clause which precludes the First Defendant from making any

claims against them after the expiry of the Defects Liability Period. The First Defendant

on the other hand, argued that clause 15 does not limit the Plaintiffs' liability for

defective works or defects which appear within the Defects Liability Period, and that it

does not apply to defects which appear after the Defects Liability Period, and

that the

Plaintiffs' liability continues until the time-bar sets in.

13 8. The counsel for the Plaintiffs

relied on passages in *Keating on Building Contracts* 6th Edn, pages 267-8 that

14 The contractor's liability in

damages is not removed by the existence of a defects clause except by clear words, so that

in the absence of such words the clause confers an additional right and does not operate

to exclude the contractor's liability for breach of contract. Clear words in this

context usually require the kind of architect's binding and conclusive certificate

...

15 and

16 Where there is a defects clause and

at the end of the defects liability period a binding and conclusive final certificate of

satisfaction is given by the architect then, in the absence of fraud or other special circumstances, the contractor's liability in contract for any defects which may appear thereafter comes to an end ...

17 9. *Hudson's Building and*

Engineering Contracts, 11th Edn Vol 1 also deals with this question at para 5-053 -

18 It is always a question of

construction whether the rights under the maintenance clause are intended to supplant the

right to damages at common law altogether. In the absence of express provision, the

remedies under these clauses are in addition to and not in substitution for the common law

rights, and even where the defects have appeared within the period the owner may sue for

damages rather than call on the contractor to do the work, subject, in that event, to the

possibility of the owner's damages being limited, ... to the cost to the contractor

of doing the work at that time, rather than the possibly greater cost of bringing in

another contractor either then or at a later date.

19 10. *Hancock* v *Brazier* (*Anerley*)

Ltd [1966] 1 WLR 1317 is referred to in both works. In *Hancock* building

contractors built and sold houses. Clauses 9 and 11 of the contracts for sale provide that

20 9. The vendor will prior to

completion at its own cost and charge and in a proper and workmanlike manner erect, build

and complete on the above freehold land a messuage or dwelling-house in accordance with

the plan and specification supplied to the purchaser subject only to such variations as

may be ordered by the purchaser.

21 11. If the purchaser shall discover

any structural defects in the said house and works within six months from the

date of

completion and shall notify the vendor thereof in writing the vendor shall
forthwith make

good such structural defects without expense to the purchaser.

22 11. The contractors used hardcore

for the foundation which was unsuited for the purpose. A few years after the
houses were

completed, the floors and walls cracked badly. The purchasers sued the vendors
for breach

of contract.

23 12. The action was heard by Diplock

LJ sitting as an additional judge of the High Court. One defence raised was that
clause 9

dealt with the purchasers' rights prior to completion, and that after completion,

their rights are limited to clause 11. The judge rejected this defence saying (at
page

1328)

24 Clause 11 creates rights by

providing that the defendants will make good any structural defects which are discovered

within 6 months. If that clause is to take away the rights of the plaintiffs which

normally follow at common law in the case of a breach of contract it must do so in very

clear terms if the court is going to give to it that effect. I can see no grounds whatever

in this case for giving that effect to clause 11. It does not cover the same ground as

clause 9, for it is limited to structural defects, and clause 9, as I have construed it,

requires the house to be completed with materials fit and suitable for the purpose in _____ a

proper and workmanlike manner in accordance with the plan and specification.

There _____ are,

therefore, all kinds of breaches of clause 9, as I have construed it, which would not be

covered by clause 11 at all; and I can see no reason why, because an alternative remedy is

given for a limited number of breaches of a limited kind discovered in a limited period, I

should hold that by some implication the plaintiffs have give up all rights which clause 9

expressly bestows upon them.

25 13. Diplock LJ had taken into

account the fact that clause 11 applied only to structural defects and was narrower than

clause 9, but a broader approach was taken by the Court of Appeal when the matter went up

on appeal. Lord Denning MR dealt with the question in general terms (at page 1334) -

26 I think that if a builder has done

his work badly, and defects afterwards appear, he is not to be excused from liability

except by clear words. I am of opinion that clause 11 is no defence to the builder here.

It applies only to defects which the purchaser discovers within six months, not those

which he discovers afterwards. Even with regard to those discovered within six months, it

only compels the vendor to make them good. It does not excuse him from liability in

damages. There is nothing in clause 11 to take away the right of a man to sue in respect

of structural defects which were not discoverable within six months. It does not, therefore, take away the right of the purchaser here.

27 14. The effect of a defect clause

and the decision in *Hancock* was considered in *HW Nevill (Sunblest) Ltd v William*

Press & Son Ltd (1981) 20 BLR 78. In this case, the defect clause is clause 15 of

the JCT form of contract, which is similar to clause 15 of the SIA form, though the nature

of the claim was different from the First Defendant's. The defendants undertook the

site clearance, piling, foundation and drainage works for the erection of a bakery. Parts

of the works they did were defective, but they returned to the site and remedied the

defects. The employers therefore had no claim against them for the defective works, but

they made a claim for payments they made arising out of the delays suffered by the second

set of contractors responsible for the next stage of the erection and for additional work

consequent to the defendants' defective works, as well as additional architects'

fees and losses arising from the late opening of the bakery. The issue before the court

was "Whether the plaintiff's remedies in respect of the alleged defective work

are limited to the remedies specified in clause 15 of the agreement, and whether

accordingly the plaintiff is not entitled to recover damages therefor." Judge

Newey

QC held at page 88 that

28 A clause such as Clause 15, merely

created a simply way of dealing with part of a situation created by breaches of contract,

is not to be read as depriving the injured party of his other rights.

29 My conclusions with regard to

(this) issue are, therefore, that Nevill's remedies in respect of the defective work

were not limited to the remedies specified in Clause 15 and that Nevill may claim damages

for breach of contract to include consequential loss.

30 15. Counsel for the Plaintiffs,

contended that "On a plain reading of clause 15, it says that the First Defendant

cannot claim against the Plaintiffs after the expiry of the Defects Liability

Period". This is inconsistent with the pronouncements in *Hancock* and *Nevill*

and the passages in *Keating* and *Hudson* that I have referred to, and is not

supported by any decision or commentary on clause 15 on either the JCT or SIA form of

contract. If a final certificate has been issued, that would have lent support to their

cause, but it was not issued. My answer to the first question is yes.

31 *The second question*

32 16. The second question raised by

the parties is "What is the proper method to be used to value at law the variation

work?" The parties agree that clause 11(4) of the contract is the provision to be

considered. It provides that

33 All variations required by the

Architect or subsequently sanctioned by him in writing and all work executed by the

Contractor for which provisional sums are included in the Contract Bills (other than work

for which a tender made under clause 27(g) of these Conditions has been accepted) shall be

measured and valued by the Quantity Surveyor who shall give to the Contractor
an

opportunity of being present at the time of such measurement and of taking such
notes and

measurements as the Contractor may require. The valuation of variations and of
work

executed by the Contractor for which a provisional sum is included in the
Contract Bills

(other than work for which a tender has been accepted as aforesaid) unless
otherwise

agreed shall be made in accordance with the following rules:-

34 (a) The prices in the Contract

Bills shall determine the valuation of work of similar character executed under
similar

conditions as work priced therein;

35 (b) The said prices, where work is

not of a similar character or executed under similar conditions as aforesaid, shall
be the

basis of prices for the same so far as may be reasonable, failing which a fair valuation

thereof shall be made;

36 (c) Where work cannot properly be

measured and valued the Contractor shall be allowed day work rates or the prices

prevailing when such work is carried out (unless otherwise provided in the Contract

Bills):

37 (i) at the rates, if any, inserted

by the Contractor in the Contract Bills or in the Form of Tender; or

38 (ii) when no such rates have been

inserted, at the actual prime cost to the Contractor of his material, transport and labour

for the work concerned, plus fifteen per cent, which percentage shall include for the use

of all ordinary plant, tools and scaffolding, and for supervision, overheads and profit;

39 Provided that in either case

vouchers specifying the time daily spent upon the work (and if required by the Architect

the workmen's names) and the materials employed shall be delivered for verification

to the Architect or his authorised representative not later than the end of the week

following that in which the work has been executed;

40 (d) The prices in the Contract

Bills shall determine the valuation of items omitted provided that if omissions

substantially vary the conditions under which any remaining items of work are carried out

the prices for such remaining items shall be valued under rule (b) of this sub-clause.

41 17. The parties had entered into a

lump sum contract with no Contract Bills.

42 18. The question is posed with no indication whether the variation works fell within any or all the rules. All the variation

works do not have to come under one rule, different parts of the works may come under

different rules, and one part of the works may fall under two rules.

43 19. Under Clause 11(4), all

variation works fall into two classes. Variation works which of a similar character and

executed in similar conditions to the contracted works come under the first class to which

rule (a) applies. Variation works which are not of similar character and are not executed

in similar conditions to the contracted works are within the second class and are governed

by rule (b).

44 20. Reference have to be made to

Contract Bills prices in determining the payment for both classes of variation

works.

Under rule (a) the Contract Bills prices will be applied directly. For rule (b) they may

be used as "the basis of prices" for the variation works, failing which a fair valuation of the works will be made.

45 21. When there are no Contract

Bills, difficulties arise when payment for variation works have to be assessed.
Rule (a)

cannot apply without the requisite prices. Rule (b) is similarly affected, except for the

"fair valuation" alternative.

46 22. How then are works coming

within rule (a) to be valued, and how is a fair valuation to be determined under rule (b)?

Where variation works are done at the request of the employer for which no terms of

payment are agreed or are applicable payment will be determined on a *quantum meruit*

basis. There are no set rules to follow in such an exercise. The contractors' labour

cost, material cost and administrative cost, the circumstances under which the variation

works were done (eg whether they disrupt the contractors' work under the contract and

other projects) and a reasonable margin of profit are matters to be taken into account.

The same considerations should apply in determining the "fair valuation" under rule (b) in the absence of any guidance in the contract.

47 23. Rule (c) sits uncomfortably

with rules (a) and (b) because it introduces another class of variation works,

characterised not by similarity or dissimilarity to the contracted works, but by the fact

that such variation works cannot be properly measured and valued. Under rule (c)(i) the

contract rates are to be used. Since this rule applies to work that cannot be

measured

properly, it would not be easy to arrive at a valuation on the basis of the rates.
Under

rule (c)(ii), the works are to be valued at the contractors' prime cost of material,
transport and labour with a 15% mark-up. Rule (c) cuts across rule (a) and rule
(b).

Consequently payment for the same variation works may fall under rule (a) and
rule (c), or

rule (b) and rule (c).

48 24. The difficulty over which of

two rules to apply can be resolved in this case. *Quantum meruit* payment is
implied

when there is no agreement on how payment for work done is to be quantified.
Where there

is an express agreement that payment would be at prime cost plus 15% for some
works that

formula must apply to those works and *quantum meruit* will not apply. Other
works

not covered by that formula will be paid for on a *quantum meruit* basis. This is the

answer to the second question. If there were Contract Bills in the contract, some other

solution would have to be found to overcome the difficulty.

49 *The third question*

50 26. The third question raised is

"Whether the defective works were accepted by the Architect and/or the First Defendant?"

51 27. This is not a question that can

be answered without referring to the facts. The question implies that the parties have

agreed on what "the defective works" were which may have been accepted. In fact

there is no agreement on this.

52 28. Moving on, whether or not there

is acceptance may be a question of fact which can only be determined after hearing and

evaluating evidence. The question in this form cannot be answered as a question of law.

53 29. In the First Defendant's

Reply to the Plaintiffs' Submissions, counsel has recast the question as "Does

the issuance of interim payment certificates by the Architect amount to an acceptance of

the work by the First Defendant?"

54 30. In this form, the question can

be answered. Under clause 30(2) of the SIA form of contract, interim certificates are to

state "the total value of the work properly executed ..." The Architect must

have been satisfied that the works to which the interim certificate refers have been

properly executed when he issued the certificate.

55 31. Clearly, interim certificates

are evidence that the works are properly executed. However they are not conclusive

evidence because the contract does not confer on them that status. Under clause 30(7) a

Final Certificate is conclusive evidence, and even then, it is subject to the following

exceptions -

56 (a) Fraud, dishonesty or fraudulent

concealment relating to the Works, or any part thereof, or to any matter dealt with in the

said certificate; or

57 (b) Any defect (including any

omission) in the Works, or any part thereof which reasonable inspection or examination at

any reasonable time during the carrying out of the Works or before the issue of the said

certificate would not have disclosed; or

58 (c) Any accidental inclusion or
exclusion of any work, materials goods or figure in any computation or, any
arithmetical
error in any computation.

59 32. An interim certificate is
evidence that the works referred to are properly executed and are accepted by
the

Architect as the agent of the employer. In the absence of evidence to the
contrary, an

interim certificate would be sufficient evidence to establish that the works
covered by it

have been accepted.

60 33. However, the employer is not

precluded from asserting that the works are not properly executed despite the
interim

certificate. When he takes that position, the onus is on him to produce evidence
that the

works have not been accepted, then it becomes a question of fact to be

determined on a

balance of probabilities.

61 Kan Ting Chiu

62 Judge

63 Dated: 22 October 1997

Kan Ting Chiu J

Hee Theng Fong and Doris Damaris Lee and Sharon Tay (Hee Theng
Fong & Co) for the plaintiffs
Lee Hooi Kian and Desmond Ong (Rajah & Tann) for the defendants
