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*

GROUNDS 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

Judgment:

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.

2. Disputes arose during and after 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.

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.

The first question

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4. There are three questions for my determination. The first is -

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?

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

(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.

(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

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Schedule of Defects or after 14 days from the expiration of the said Defects Liability Period.

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.

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.

8. The counsel for the Plaintiffs relied on passages in *Keating on Building Contracts* 6th Edn, pages 267-8 that

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 ...

and

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

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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 ...

9. *Hudson's Building and Engineering Contracts*, 11th Edn Vol 1 also deals with this question at para 5-053 -

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.

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

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.

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

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thereof in writing the vendor shall forthwith make good such structural defects without expense to the purchaser.

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.

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)

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.

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

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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) -

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.

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

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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.

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.

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.

The second question

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

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

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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:-

(a) The prices in the Contract Bills shall determine the valuation of work of similar character executed under similar conditions as work priced therein;

(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;

(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):

(i) at the rates, if any, inserted by the Contractor in the Contract Bills or in the Form of Tender; or

(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;

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

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representative not later than the end of the week following that in which the work has been executed;

(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.

17. The parties had entered into a lump sum contract with no Contract Bills.

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.

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).

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.

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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.

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.

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).

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

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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.

The third question

26. The third question raised is "Whether the defective works were accepted by the Architect and/or the First Defendant?"

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.

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.

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?"

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.

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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 -

(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

(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

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

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.

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.

Kan Ting Chiu

Judge

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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

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