

Fire-Stop Marketing Services Pte Ltd v Mae Engineering Ltd
[2004] SGHC 116

Case Number : Suit 287/2003

Decision Date : 31 May 2004

Tribunal/Court : High Court

Coram : Lai Kew Chai J

Counsel Name(s) : John Chung (Kelvin Chia Partnership) for plaintiff; Karam S Parmar and Dawn Chew (Tan Kok Quan Partnership) for defendant

Parties : Fire-Stop Marketing Services Pte Ltd — Mae Engineering Ltd

Building and Construction Law – Building and construction contracts – Construction of terms of contract for the installation of fire rated board claddings – Whether payment to be based on cladded or uncladded works.

31 May 2004

Judgment reserved.

Lai Kew Chai J:

1 The plaintiff is a supplier and installer of fire rated board claddings and the defendant was an air conditioning, mechanical and ventilation ("ACMV") sub-contractor for the project known as The Esplanade, Theatres On The Bay, in Singapore.

2 According to the opening statement of the defendant:

The Sub-Contract price was for a lump sum of S\$400,000.00 to clad 5000m² of ACMV ductwork. In respect of ACMV ductwork required to be fire cladded beyond the 5000m² (ie variations) the agreed rates were S\$80 per m² and S\$165 per m² for 2-hour fire-rated cladding and 4-hour fire-rated cladding respectively, of ACMV ductwork that is cladded.

3 A single issue was agreed on by the parties, namely, whether on the true and proper construction of the sub-contract document and having regard to all the documents, affidavits and evidence before the court, payment to the plaintiff should be based on the area of the cladded ACMV duct or the area of the uncladded ACMV duct. Accordingly, the basis of measurement is left to the court for decision.

4 The following important items relating to the work done and materials supplied and what is payable depending on the court's findings, were agreed to between the parties. First, it was agreed that the value of the cladded ACMV, for materials supplied and work done, was \$1,028,576.22 (excluding 3% goods and services tax ("GST")). Second, the value of the cladded ACMV duct area was agreed at \$529,610.00 (excluding 3% GST).

5 The financial consequences depending on the court's findings were also agreed on. If the court decides that payment should be based on the area of the cladded ACMV duct, the total amount payable by the defendant to the plaintiff shall be \$310,305.61 (excluding 3% GST). On the other hand, if the court rules that payment should be based on the area of the uncladded ACMV duct, the total amount payable by the plaintiff to the defendant shall be \$168,664.29 (excluding 3% GST).

6 Parties had also agreed on the following matters. Without any admission of liability, the plaintiff agreed that the defendant is entitled to deduct \$5,697.35 under the counterclaim. The defendant further agreed to withdraw its claims for indemnities without prejudice to its rights to raise them in future. The questions of interest and costs are left to the court for decision.

The facts

7 Pursuant to an agreement in writing made between the plaintiff and the defendant on 10 March 2000 ("the sub-contract"), the defendant employed the plaintiff "to supply deliver and install two-hour fire rated board cladding to 5000m² of ACMV ductwork with 'Cape' Monolux 40 Board System in the project for an agreed lump sum price of \$400,000.00" on the terms and conditions set out in the sub-contract. The sub-contract provides for progress payments to be made to the plaintiff pursuant to the defendant's certification. The sub-contract, however, is silent as to the mode of measurement of work done by the plaintiff.

Terms of the sub-contract

8 The first paragraph of the sub-contract written by the defendant on the defendant's stationery [1] provides:

Further to your confirmation ref FS/06/6848/99 dated 30/6/99 agreed Lump Sum price of S\$400,000.00 (SINDLRS Four Hundred Thousand Only) we hereby confirm the award for the provision of Supply, Delivery, Installation, Warranty & Endorsement of 2 Hours Fire Rated Board Cladding to 5000M2 of ACMV Ductwork with 'Cape' Monolux 40 Board System subject to the following terms and conditions. The price quoted is in Singapore dollars and not subject to any currency fluctuation or fluctuations of any sort or kind whatsoever.

9 Clause 1.1 of the sub-contract provides:

This Sub-Contract Agreement is for the provision of Supply, Delivery, Installation, Warranty & Endorsement of 2 Hours Fire Rated Board Cladding to 5000M2 of ACMV Ductwork with 'Cape' Monolux 40 Board System in accordance with the specifications and drawings.

The scope of works is as described in the specifications and drawings of the Main Contract relating to the System. The terms and conditions for the works shall as a minimum reflect all the requirements of the Main Contract in respect of the works to be carried out under this Sub-Contract.

If the contract is as stated remeasurable then final payment shall be subject to final measurements which will be based on the as built drawings.

10 It is common ground that the area of the ductwork or cladding was unknown at the time of the award of the sub-contract. The plaintiff was not given any drawings upon which to base its quotation. The defendant put up the figure of 5,000m² of ACMV duct. As the quantity was not known, the "5000m²" was merely an estimate of the work to be done.

11 In my view, what was agreed was the rate at which the plaintiff would be paid. It was agreed at \$80 per square metre for the work done and materials supplied. This was quoted on 30 June 1999. As the area of the ductwork was only an estimate, the words "agreed lump sum price of \$400,000.00" did not have any significance in meaning.

12 The scope of the sub-contract works was also clear. The plaintiff was required to and it agreed to supply and install two-hour fire rated claddings comprising the rockwool insulation and the calcium silicate board known as "Cape" Monolux 40 Board to the ACMV ducts.

13 As work progressed from May 2000 to May 2002, the plaintiff was in fact paid for the work done by reference to the agreed rate of \$80 per square metre and not by reference to an agreed lump sum price. In fact, the plaintiff was paid by way of progress payments, up to progress payment No 14, the sum of \$687,779.80, which far exceeded the so-called "lump" sum of \$400,000.00.

14 Whenever a particular section of the ACMV ductwork was to be cladded by the plaintiff, the defendant's employees issued the plaintiff with a works order, accompanied by a sketch or sketches identifying the ductwork to be cladded. After the work was completed, the representatives of both plaintiff and defendant would verify and measure the area of the completed cladding work. The area of cladding measured would be recorded on the plaintiff's delivery order.

15 The defendant's representatives would sign on the plaintiff's delivery orders, on which were stamped these words:

I/We [name] hereby acknowledge that the above quantities/measurements are certified correct as per measurement conducted on site.

The defendant also put on its usual stamp which confirmed delivery of quantity but "quality and performance" were subject to the approvals of the consultant or owner.

16 Based on the measured quantities, the plaintiff calculated its claims for work done. It applied the unit rate of \$42.50 per square metre (being the agreed rate of \$80.00 less the rate of \$37.50 for materials which had already been claimed and paid) and submitted its claims. The defendant made payments up to Claim No 14. The defendant only raised issues about the quantities from Claim Nos 15 to 17. The disputes in the amounts were agreed during this trial. We are no longer concerned with them but with the basis of measurement.

17 It is also noteworthy that the cladding had to be wrapped around not only the duct itself but around the supports and hangers as well so that the entire ductwork would be capable of withstanding any fire for the specified period of time. In some instances, according to the plaintiff's witness, Mr Joel Chia, there were also obstructions around the ducts like pipes and services. Where two ducts were closely located, the fireproof cladding had to be clad round both ducts, in which case much more fireproof cladding materials had to be used.

18 In addition, it was explained to the court that the thickness of the cladding materials alone was 19mm. This consequently meant that the overall thickness of the cladded duct was larger than the uncladded duct size. It would therefore not make commercial sense to quote based on the uncladded area of the duct.

19 According to the defendant, the total area cladded by the plaintiff is only 6,617.204m², based on the as-built drawings. The total value of the work done and materials supplied was 6,617.20 x \$80 per square metre = \$529,376.32. The defendant therefore asserts that it had overpaid the plaintiff by \$158,403.48.

20 I turn to the construction of the material provisions of the sub-contract. The defendant relies on the ordinary meaning of the words: "agreed lump sum of S\$400,000.00 for the provision of ... Fire Rated Board Cladding to 5,000m² of ACMV Ductwork with "Cape" Monolux 40 Board". It submitted that

the wording adopted by the defendant was similar to that used in all three of the plaintiff's quotations.

21 The defendant further submitted that this was the commercial purpose and industry practice. The contract rates and/or price, which were based on the area of the ACMV ductwork, according to evidence led by the defendant, are to ensure certainty of the price. This practice will also ensure that the risk of poor workmanship is borne by the supplier in control of the installations.

22 In response, the plaintiff submitted that the express words of the sub-contract quoted above are ambiguous. It is not clear whether the words "5000m² of ACMV ductwork" refer to the cladded ACMV or the uncladded ACMV duct. The plaintiff contended that the phrase can refer to either the cladded ACMV or the uncladded ACMV.

Conclusion

23 In my view, the term "5000m²" is meaningless since the quantity of the uncladded duct area has never been known. On the evidence, it is even too late to measure the amount of cladding, as most of it has been covered or is not accessible without a disproportionate breaking-up of the premises. The term was merely a description of the nature of work and it was not meant to define the quantity of work, for which there would be re-measurement as work progressed. The unit rates worked out seemed within commercial range. I do not think that any supplier and installer of such cladding would quote a lump sum for a contract over which the quantity is not known.

24 There will therefore be judgment for the plaintiff with costs. Interest on the sum payable shall be at 6% from the date of the writ. I will hear submissions on the rate of the GST, if applicable. The counterclaim is dismissed with costs.

Plaintiff's claim allowed with costs. Defendant's counterclaim dismissed with costs.

[1]Agreed bundle p 20

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