

L & W Building Construction Pte Ltd v King Wah Construction Pte Ltd
[2000] SGHC 246

Case Number : Suit 433/2000/K, RA 43/2000 and 44/2000
Decision Date : 23 November 2000
Tribunal/Court : High Court
Coram : Woo Bih Li JC
Counsel Name(s) : Edwin Lee (Chong Yeo & Partners) for the appellants/defendants; Raymond Chan and Spring Tan (Chan Tan & Partners) for the respondents/plaintiffs
Parties : L & W Building Construction Pte Ltd — King Wah Construction Pte Ltd

JUDGMENT:

Grounds of Decision

1. The Defendants are the developers of a 4-storey factory with basement carpark in Jurong Port Road ('the Project'). The Plaintiffs are the main contractors.
2. The architects for the Project are WP Architects ('the Architect').
3. By a Completion Certificate dated 6 November 1998, the Architect certified that the works were completed.
4. There was some dispute about alleged outstanding defective works. By 11 January 2000, the Architect had called for tenders for rectification works and had decided to award the works to the lowest tenderer for \$342,350.
5. The Architect issued a Certificate of Payment (Final) No 16 dated 8 February 2000 certifying \$199,406.70 as being due to be paid to the Plaintiffs. In arriving at the figure of \$199,406.70, the Architect made a deduction of \$342,350 for defective works.
6. The Architect also issued a revised Certificate No 16A dated 20 March 2000. The Plaintiffs say that they did not receive Certificate No 16A nor does the Architect have any power to issue a revised final certificate.
7. Certificate No 16A was different from No 16 in that No 16A gave a break-down as to the source of payment for the \$342,350 i.e. \$209,593.04 from a retention sum and \$132,756.96 by way of deduction. This difference is not material as the balance sum certified to be due to the Plaintiffs under Certificate No 16A is also \$199,406.70.
8. As at the date of Certificate No 16, as well as the date of Certificate No 16A, the rectification works done by another contractor had not been completed or paid for. By July 2000, they were completed and paid for.
9. In any event, I will henceforth refer to Certificate No 16.
10. The Plaintiffs commenced this action to claim (a) the \$199,406.70 and (b) the \$342,350. The former was based on Certificate No 16 and the latter was based on the argument that the deduction was in breach of cl 31(1) read with cl 1(7) of the Conditions of Contract.
11. The Plaintiffs applied for summary judgment for both sums and the Defendants applied for a stay of proceedings pending arbitration pursuant to cl 37 of the Conditions of Contract.
12. Prior to the hearing before the Assistant Registrar, the Defendants paid the \$199,406.70 to the Plaintiffs. Both applications continued as regards the sum of \$342,350.
13. After hearing arguments, the Assistant Registrar granted judgment to the Plaintiffs for the sum of \$342,350 with interest

and dismissed the application for a stay of proceedings pending arbitration.

14. The Defendants appealed against both the decisions and after hearing arguments, I allowed both the appeals, set aside the decisions of the Assistant Registrar, and ordered a stay of proceedings pending arbitration.

15. The Plaintiffs are appealing against my decisions.

16. It is not in dispute that there is an arbitration provision in the Conditions of Contract which is applicable as between Plaintiffs and Defendants and that there are disputes regarding the alleged defective works. The real issue is whether the Plaintiffs are entitled to summary judgment for the \$342,350. If so, the application for a stay would consequently be dismissed. If not, a stay of proceedings would have to be granted.

The Final Certificate and the relevant clauses in the Contract Conditions

17. The Final Certificate states:

CERTIFICATE OF PAYMENT FINAL

To (Building Owner): M/s KING WAH
CONSTRUCTION PTE LTD

Cert. No: 16
Date: 08-02-2000

Name of Job:

PROPOSED ERECTION OF A 4-STOREY SINGLE USER, SINGLE OCCUPER FACTORY
WITH A BASEMENT CAR PARK ON LOT 497 (PLOT A16250) MUKIM NO. 6 AT
JURONG PORT ROAD

We hereby certify that under the terms of the Building Contract the \$199,406.70
sum of Dollar ONE HUNDRED AND NINETY NINE THOUSAND,
FOUR HUNDRED SIX AND CENTS SEVENTY ONLY is now due to
M/s L & W CONSTRUCTION PTE LTD of 36, Senoko Road,
Woodlands East Industrial Estate for work done and materials
supplied up to January 2000

Value of work executed	\$8,383,721.49
Material on site	\$ Nil
Gross Valuation	\$8,383,721.49
Less - % retention (Max. limited Nil)	\$ Nil
Nett Valuation	\$8,383,721.49
Less Payment Previously certified (Cert. Nos. 1-15)	\$7,697,772.75
Less Liquidated and Ascertained Damages	\$ 150,000.00
Less Defects	\$ 342,350.00
Amount Due (without GST)	\$ 193,598.74
Add 3% GST	\$ 5,807.96
Amount Due	\$ 199,406.70
Date of Contract	<u>June 1997</u>
Original Value of Contract	<u>\$7,500,000.00cts</u>

[Italics added.]

18. Clauses 31(10)(a) and 31(11) of the Conditions of Contract state:

'Final Certificate

31.(10)(a) Within 3 months of receipt from the Contractor of the documentation referred to in the preceding sub-clause of this Condition or of the Maintenance Certificate (whichever is the later) the Architect shall issue a Final Certificate. Such Certificate shall be supported by documents showing the Architect's final measurement and valuation of the Works in accordance with all the terms of the Contract, and after setting out and allowing for all payments or other expenditure of the Employer or any permitted deductions by him shall state any final balance due from the Employer to the Contractor or from the Contractor to the Employer, as the case may be, which shall thereupon become a debt due. Such certificate shall also take account expressly of any outstanding permitted deductions not yet made by the Employer under the terms of Contract whether by way of liquidated damages or otherwise (unless the Employer shall inform the Architect of his decision to forego or postpone his right to the same).

...

Effect of Architect's Certificates

31.(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 clause 32(8) of these Conditions), whether for payment or otherwise, until final judgment or award, as the case may be, and until such final judgment or award such decision or certificates shall (save as aforesaid and subject to sub-clause (4) of this Condition) be binding on the Employer and the Contractor in relation to any manner 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 as 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 into account 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.'

19. Although cl 31(11) refers to cl 31(4), the latter is not relevant for present purposes.

20. Clause 1(7) of the Conditions of Contract states:

'Remedy on Non-Compliance by Contractor

1. (7) If within 7 days after receipt of a written notice from the Architect

requiring the Contractor to comply with a written direction or instruction the Contractor fails to do so, the Employer may employ other contractors to do so under the supervision of the Architect and may upon the certificate of the Architect deduct the extra cost (if any) of doing so from any monies otherwise due under the contract or recover the same from the Contractor. Such certificate shall be called a "Certificate of Cost of Other Contractor's Work", and any such deduction shall be recorded by the Architect in subsequent payment certificates under clause 31 of the Conditions provided that no extra cost shall be deducted under this clause in the case of an unjustified direction or one which should have been expressed as an instruction.'

21. I will refer to a certificate under cl 1(7) as a 'Certificate of COCW'.

Submissions

22. Plaintiffs' Counsel submitted that the court should consider not only the balance amount that is stated to be due under Certificate No 16. He submitted that the amount really due to the Plaintiffs was the value of the work executed i.e. \$8,383,721.49. This was the sum which the Plaintiffs were entitled to be paid under Certificate No 16 subject to any valid deductions being made therefrom. He then proceeded to argue that the deduction of \$342,350 was not validly made.

23. I did not agree with this approach.

24. If Plaintiffs' Counsel's submission was valid, this would mean that there are two sums due to the Plaintiffs under Certificate No 16. The first is the total value of the works i.e. \$8,383,721.49 and the second is the balance due i.e. \$199,406.70.

25. There is only one sum due to the Plaintiffs under Certificate No 16 i.e. \$199,406.70. This is stated twice in Certificate No 16. Firstly, near the top it states:

'We hereby certify that under the terms of the Building Contract the sum of Dollar ONE HUNDRED AND NINETY NINE THOUSAND, FOUR HUNDRED SIX AND CENTS SEVENTY ONLY is now due to M/s L & W CONSTRUCTION PTE LTD of 36, Senoko Road, Woodlands East Industrial Estate for work done and materials supplied up to January 2000' \$199,406.70

26. Secondly, it states near the bottom:

'Amount Due \$ 199,406.70'

27. For the purpose of cl 31(11) of the Conditions of Contract, this is prima facie the sum for which full effect is to be given to by way of summary judgment.

28. To get around this, Plaintiffs' Counsel submitted that the Architect was wrong in including the cost of rectifying defective work in Certificate No 16 without a Certificate of COCW under cl 1(7) of the Conditions of Contract.

29. Plaintiffs' Counsel relied primarily on the judgment of the Court of Appeal in *Lojan Properties Pte Ltd v Tropicon Contractors Pte Ltd* [1991] 2 MLJ 70 ('*Lojan Properties*').

30. The Conditions of Contract in *Lojan Properties* are, for present purposes, similar to those in the present case before me.

31. Before coming to the judgment of the Court of Appeal in *Lojan Properties*, it would be appropriate to consider the

judgment of the High Court in that case as reported in [1989] 3 MLJ 216 as it sets out the background facts in some detail.

32. I quote from the bottom of p 217 to 218 of the report of the judgment of the High Court:

'... The architects had issued altogether 28 interim certificates serially numbered 1 to 28, since the commencement of the works up to January 1987, and the defendants had paid the first 16 interim certificates leaving the remaining 12 certificates, namely, Nos 17 to 28, unpaid. Ten of these certificates, nos 17 to 26, were issued during the period between 19 September 1984 and 27 September 1985; certificate no 27 was issued on 15 December 1986 and certificate no 28, expressed as 'pre-final certificate', was issued on 16 January 1987. The total amount due under these 12 certificates was \$1,931,294.32; but a sum of \$146,000 was paid to account, leaving the balance of \$1,785,294.32. Between June and July 1987 a series of meetings were held between the plaintiffs' and the defendants' representatives with a view to resolving the settlement of the outstanding sum owing by the defendants to the plaintiffs under the contract. Unfortunately, these were not successful, and no further payment was made. On 9 September 1987 the plaintiffs instituted these proceedings against the defendants claiming the sum of \$1,785,294.32 and interest thereon.

After the writ had been served on the defendants, they took out an application for a stay of all further proceedings under s 7 of the Arbitration Act (Cap 10) on the ground that the plaintiffs and the defendants have, by cl 37(1) of the conditions of contract, agreed to refer to arbitration the matters in respect of which the action was commenced. At or about the same time, the plaintiffs took out an application under O 14 for summary judgment against the defendants for the amount claimed. While both applications were pending, the defendants on 24 November 1987 wrote to the architects expressing doubts as to whether the latter had taken the following matters into account in issuing their certificates, namely:

(a) as regards interim payment certificates the fact that not all work included in those certificates had been carried out (see cl 31(2)(a));

(b) as regards extension of time certificates whether the contractor has on every occasion complied with the condition precedent required in cl 23(2);

and suggested that if those matters had not been taken into account the architects should take action pursuant to cl 31(4) of the conditions of contract. Prompted, no doubt, by the defendants' letter, the architects did several things. First, they wrote to the plaintiffs a letter dated 2 December 1987 as follows:

Pursuant to cl 23(3) of the conditions of contract, we hereby notify you that in respect of matters notified by you pursuant to your obligation under cl 23(2) we have decided that the contract completion date be extended by 17 days to 31 May 1984. This extension is for piling works which is the only matter in respect of which you have given a

requisite notice pursuant to cl 23(2).

The extension of time granted by us earlier contained in our letters dated 21 September 1983, 27 October 1983, 16 May 1984 and 6 March 1985 were null and void in that you had not complied with the condition precedent set out in cl 23(2).

Contemporaneously with this letter, the architects pursuant to cl 24(1) of the conditions of contract issued to the plaintiffs a delay certificate certifying that as at 31 May 1984: (i) the 'contract completion date' was 14 May 1984, (ii) the total period of extension of time was 17 days, and (iii) the consequential 'extended contract completion date' was 31 May 1984, and certifying also that the plaintiffs were in default in not having completed the works by 31 May 1984. Secondly, the architects on 15 December 1987 issued 17 revised certificates, nos 12A to 28A, intending to replace the original interim certificates bearing corresponding numbers respectively, and one further interim certificate, no 29. Immediately following the issue of these certificates, the architects on 16 December 1987 issued: (i) a certificate pursuant to cl 1(7) of the conditions of contract certifying that the plaintiffs having failed to comply with the notices from the architects dated 24 July 1985 and 14 July 1986, the defendants as the employer had engaged others to carry out the work under the architects' supervision and that the defendants might deduct the extra costs of doing this work from any moneys otherwise due under the contract or recover the same from the plaintiffs, and (ii) a certificate pursuant to cl 30(2) of the conditions of contract certifying that the plaintiffs had failed to make payment as required by cl 30(1) of the sum of \$137,493 due from them to sub-contractors and further certifying that by reason of such failure the defendants were entitled to pay the said sum to the sub-contractors and following such payment to deduct the sum from any sum certified by the architects to be due to the plaintiffs.'

33. The power of the architects there to issue further interim certificates was found in cl 31(4) of the conditions of contract.
34. The High Court found that the basis of the revision of the interim certificates was not stated in the revised certificates but in a letter from the architects to the developers.
35. Furthermore, in none of the revised interim certificates were the valuation dates given.
36. Thirdly, the revised interim certificates purported to contain an amount of liquidated damages already deducted although such damages were expressed to be 'recorded'. The High Court found that the liquidated damages could only be deducted only upon the issue of a delay certificate and no such delay certificate had been issued at the time when the original interim certificates had been issued. Accordingly, in seeking to revise the interim certificates by effectively deducting liquidated damages therein, the architects had erred.
37. As for the new interim certificate no 29, the High Court found that it was not validly issued for reasons which are not material to the case before me.
38. In the circumstances, the High Court found that the original interim certificates were valid.
39. As for the effect of cl 31(11), the High Court said (at p 220):

'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.'

40. Therefore the question there was whether the developers could set-off and counterclaim various sums against the sums due under the original interim certificates. One of the various sums which they had sought to set-off and counterclaim was the costs of rectification works.

41. In that case, the costs of rectification works could be claimed under cl 1(7) of the conditions of contract.

42. A Certificate of COCW had been issued by the architects there for the sum of \$381,791 as being the costs of rectification of defective works which the plaintiffs had allegedly failed to rectify.

43. The High Court found that this raised an arguable claim for \$381,791 which, if established, was deductible from the amount due to the plaintiffs under the original interim certificates.

44. In the result, the High Court deducted the \$381,791 (and another sum being the amount paid to sub-contractors) from the total of the amounts due under the original interim certificates to grant summary judgment to the plaintiffs for \$1,266,010.32 as follows:

'Balance of the total amount due under the 12 interim certificates, nos 17 to 28		\$1,785,294.32
Less		
(i) Costs of rectification of defective works claimed by the defendants	\$381,791	
(ii) Amount paid to nominated sub-contractors	\$137,493	
	Balance	\$1,266,010.32'

45. As regards the High Court's decision that the costs of the rectification works was arguable, the Court of Appeal reversed this decision and decided that the \$381,791 should not be deducted from the total of the amounts due under the original interim certificate.

46. In so doing the Court of Appeal concluded that the Certificate of COCW in that case was not valid as it did not meet the requirements of cl 1(7) as found by the Court of Appeal. The requirements are set out at p 73 of the report:

'The wording of this provision presents no difficulty of construction or interpretation. Its meaning is plain and straightforward. It requires firstly, a written notice from the architect requiring the contractor to comply with his written direction(s) or instruction(s); secondly, there must be a failure on the part of the contractor to comply with the architect's written notice giving the written direction(s) or instruction(s) for a period of seven days after the receipt of the architect's written notice; thirdly, and this is implicit from the wording of the provision, the employer must employ other contractors to do the work directed or instructed by the architect's supervision; and fourthly, and this too is implicit from the wording of the provision, the architect must certify that the work has been done and must also certify the 'extra cost' of doing so. Then and only then can the employer deduct the amount so certified from any moneys otherwise due to the contractor and when so deducted the architect is required to record the deduction in any subsequent payment certificates under clause 31 of the conditions of contract.'

47. In the present case before me, it was arguable whether a letter dated 11 January 2000 that was alleged to be the Certificate of COCW met the first requirement. If so, then the second requirement would also have been met. However it was clear that the third and fourth requirements had not been met at the time of the alleged Certificate of COCW as the Defendants had not, at that time, engaged other contractors and, even if they had done so, the rectification works had not yet been completed.

48. Counsel for the Defendants argued that the third and fourth requirements were orbiter because in *Lojan Properties* it was clear that the first two requirements had not been met and hence it was not necessary to go into the third and fourth requirements.

49. I did not agree. The Court of Appeal had laid down the requirements for a Certificate of COCW under a similar cl 1(7) and not all of such requirements had been met in the present case before me.

50. At p 74 to 75 of the report, the Court of Appeal also said:

'... The scheme of the contract is clear. As we have premised earlier the intention clearly expressed in the contract is to exclude the right to set-off. See the House of Lords decision in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd*, where the right of set-off was contractually excluded....'

51. In the present case before me, Plaintiffs' Counsel argued that as the requirements for a Certificate of COCW have also not been met, then likewise, the sum for the rectification works should not be deducted in Certificate No 16.

52. However, there is a material difference between the facts in *Lojan Properties* and those before me.

53. It will be recalled that in *Lojan Properties*, the total of the amounts due under the original interim certificates was the higher sum of \$1,785,294.32. Accordingly, the onus was on the developers/defendants to establish that the Certificate of COCW was valid in order to deduct the \$381,791 from the \$1,785,294.32.

54. In the present case before me, the sum due under Certificate No 16 is the lower sum of \$199,406.70. The sum of \$342,350 had already been deducted in Certificate No 16 and the Defendants did not have to rely on a Certificate of COCW to effect a deduction.

55. Accordingly, the Defendants did not have to establish the validity of the alleged Certificate of COCW.

56. Had the sum certified to be due under Certificate No 16 been \$541,756.70 (comprising \$199,406.70 and \$342,350) then the Defendants would have had to establish the validity of the alleged Certificate of COCW in order to deduct \$342,350 from \$541,756.70.

57. In so far as Plaintiffs' Counsel relied also on *James Png Construction Pte Ltd v Tsu Chin Kwan Peter* [1991] 1 MLJ 449, the facts there are different from those before me. In that case, the final certificate did certify the sum due for which the plaintiffs were claiming. The defendant there was contending that the architect had not listed all the defects which he ought to have in the final certificate and had contended that the final certificate was issued prematurely before the end of the defects liability period.

58. The High Court found that cl 30(6) of the conditions of contract in that case did not prohibit the issue of a final certificate before the end of the defects liability period but it had simply set out the latest period by which the architect was to issue his final certificate. Therefore the final certificate was held to have been valid and the defendant there could not withhold payment thereon to the plaintiffs.

59. The facts in *Kum Leng General Contractor v Hytech Builders Pte Ltd* [1996] 1 SLR 751 are also different from those before me. There the defendants who were the main contractors, had sought to deduct various sums from payments otherwise due to

the plaintiffs, who were the sub-contractors. The deductions were on the basis of liquidated damages for delay. However such a claim could only be made on the issuance of an architect's certificate which had not yet been issued at the time the deductions were made. The certificate was issued about six months after the deductions were made. In these circumstances, the court there held that the plaintiffs were not entitled to make the deductions.

60. In the present case before me, Plaintiffs' Counsel argued that the Architect was wrong to include the estimated costs of the rectification works in Certificate No 16 because under cl 31(10)(a) the Architect had first to determine the final measurement and valuation and then deduct 'all payments or other expenditure of the Employer or any permitted deductions by him' in order to arrive at the final balance due to or from the Plaintiffs.

61. According to Plaintiffs' Counsel, the costs of the rectification works did not come within the meaning of 'all payments ... of the Employer' as the Defendants had not yet paid such costs.

62. Neither, he argued, did it come within the meaning of 'other expenditure of the Employer' as the Defendants had not yet expended any sum to pay for the costs of the rectification works.

63. He further submitted that the estimated costs of the rectification works also did not come within the expression 'permitted deductions' in cl 31(11) as that expression pertained only to deductions which were supported by a valid certificate, for example, such as under cl 24(1) and (2) pertaining to a Delay Certificate and liquidated damages thereunder or under cl 1(7) pertaining to a Certificate of COCW. The authority for this proposition was again the judgment of the Court of Appeal (as well as the judgment of the High Court) in *Lojan Properties*.

64. I was of the view that it was arguable whether under cl 31(10)(a), the Architect could take into account expenditure of the Defendants (leaving aside payments and permitted deductions) only if the same had been paid for and that expenditure which the Defendants were going to incur should be ignored just because the works had not been completed yet and they had not been paid for yet.

65. It will be recalled that prior to the date of Certificate No 16 the Architect had already awarded the rectification works to another contractor for the sum of \$342,350 even though the rectification works had not been completed and paid for yet.

66. Under cl 31(10)(a), an architect has only three months from the date of receipt of documents from the Plaintiffs, submitted pursuant to cl 31(9), to issue the Final Certificate.

67. It is likely that the preparation of specifications for rectification works, the calling of tenders, the submission of tenders, the consideration of tenders and the award to the successful tenderer, and the subsequent execution of the rectification works and payment thereof would often take more than the three months mentioned in cl 31(10)(a).

68. If an architect is supposed to wait till all these steps are completed before issuing the Final Certificate, as is implicit in Plaintiffs' Counsel's submission, then he is likely to be unable to meet the deadline in cl 31(10)(a). Yet if he issues the Final Certificate within the three months, it is suggested that he must ignore the cost of the rectification works even though it has been ascertained, simply because such works have not been completed and paid for. I had my doubts as to whether that would be correct.

69. Even if the submission of Plaintiffs' Counsel mentioned in paragraph 62 above was correct, the point was that the Plaintiffs were relying on cl 31(11) to seek summary judgment.

70. It will be recalled that cl 31(11) provides that pending arbitration or a (full) hearing before the courts, 'full effect by way of Summary Judgment or Interim Award or otherwise shall, ..., be given to all ... certificates of the Architect ... whether for payment or otherwise ... and until such final judgment or award such ... certificates shall ... be binding ... 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'

71. It is a fact that the Architect allowed a deduction in Certificate No 16 for the costs of the rectification works.

72. The very purpose of cl 31(11) is to preclude, for the time being, any argument as to whether the Architect had over-certified or under-certified the sum due under the Architect's Interim Certificates or Final Certificate. As Plaintiffs' Counsel had stressed the sanctity of such certificates, he could not in the next breath urge the court to go behind Certificate No 16 and grant the Plaintiffs summary judgment for more than what was certified therein. To allow the Plaintiffs to do so would be to open the Pandora's box.

73. In the circumstances, I was of the view that the Plaintiffs were not entitled to summary judgment for the \$342,450.

Woo Bih Li

Judicial Commissioner

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