BETWEEN

Hiap Guan Sdn. Bhd. **Plaintiff**

AND

Chuon Tzu Construction Sdn. Bhd. **Defendant**

(High Court of Brunei Darussalam)
(Civil Suit No.61 of 2008)

No point of law, evidence or practice involved –not reportable.

Before Commissioner James Findlay in Court.
Dates of hearing: 10 and11 February, 8 and 9 September, 2014.
Date of handing down Judgment: 15th September, 2014.

Mr YC Lee and Ms Jelphine Lim (M/S YC Lee and Lee) for the Plaintiffs.
Ms Rokiah Swed and Mr Paul Fernandez (M/S Abas Serudin & Partners) for the Defendant.

J U D G M E N T

Findlay, J.C.:

Background

The defendant was the main contractor for a substantial building project in Brunei. The defendant subcontracted some of the work to the plaintiff. Although the subcontract says it was made on 12 April 2004, it was signed only on 3 September 2004. The only part of this work with which this litigation is concerned is the painting of some concrete floor surfaces by the plaintiff. The subcontract referred to this paint as SKK Arkifloor EHG.

The plaintiffs claim is for the payment of the balance due under the subcontract. The defendant defends this claim on the basis that the plaintiff did not perform its obligations under the subcontract and it makes a counterclaim on the same basis.

The Mandatory Requirement

The most important aspect of this case is the mandatory requirement specified by the paint manufacturer for the product SKK Arkifloor EHG to work properly. So, I will deal with here.

Before the sub contract was entered into, on 7 June 2003, the plaintiff wrote to the defendant giving the plaintiff's method statement. This statement said this, amongst other things – "water vapour barrier must be provided for the ground/basement floor slabs to prevent up rising moisture (membrane system is preferred)."

On 9 June 2003, the defendant wrote a letter to Arki-Konsept, the architect on the project, with which it enclosed the plaintiff's method statement, including the comment about the water barrier, so there can be no doubt that the defendant knew that the plaintiff's product required this water barrier.

In the joint bundle of documents, there is also a brochure about Arkifloor EHG which points out "concrete is highly susceptible to uprising moisture which can decrease the effectiveness of any coating system. Installation of a waterproofing membrane is mandatory to prevent glitches in the dynamics of any coating system."

As will appear later, Ms Swed argues that this information is not part of the contract and should be excluded. There is no merit in this submission.

Was This Advice Followed?

The Defendant says that no waterproof membrane was installed. Other attempts to waterproof were applied, but not the mandatory requirement.

The defendant's project manager Mr Chen Min Wei, says that the main contract did not require a damp proof membrane for the ground floor. The specifications seem to say that one was required, but Mr Chen says that this requirement referred only to the first and top floor; the basement did not require waterproofing, only an additive. I do not understand why the membrane should be required for the upper floors and not the basement. Common sense says that rising damp would be a bigger problem on lower floors than upper ones. Then he says that the architect excluded this item from the defendant's contract for all floors. There must be some doubt about this because the only omission drawn to my attention was one of 17 June 2004 when the architect instructed "to omit bituseal 1000 waterproofing membrane system at supermarket floor area, store, lobby & common area and laid only to service counters sunken area, bakery preparation, sunken floor area male and female staff toilets male and female public toilets disabled toilet diaper changing room." This is my reading of this, although my copy is difficult to read.

In any event, in my view, none of this matters. The point is that the defendant knew that the plaintiff's product SKK Arkifloor EHG required a waterproof membrane and if this was not to be installed, the defendant should not have contracted with the plaintiff to use that product.

What is the Defendant's Defence?

It is difficult to understand just what defence the defendant advances to deal with this situation.

The defendant knew that the SKK Arkifloor EHG product required a waterproof membrane to work properly. The defendant specified this product in the subcontract, but knew that no waterproof membrane was to be installed. However, it says, the defendant is not to blame for the failure of the product; the plaintiff is to blame. This, I have to confess, I do not understand.

Early in the hearing resumed hearing on 8 September 2014, I tried to obtain from Ms Swed the basis for the defendant's case. I asked her several times to tell me just what the defendant's case was about the advice to install a waterproof membrane. Did the defendant not read this advice? Did the defendant not understand it? Did the defendant think it was not important? Did the defendant ignore it? Ms Swed did not give a satisfactory explanation, saying, as I understood her, that I should hear the evidence. I told Ms Swed that I should know the defendant's case before hearing the evidence. I gave up this pursuit when Ms Swed said she thought I was bullying her.

I am still not sure what the defendant's case is. As far as I can ascertain, from Mr Chen's evidence about the plaintiff not "highlighting" the advice, that the defendant's case is that it knew about the advice, but it did not realise its importance because the plaintiff did not emphasise it.

Who Was Responsible for not Following this Advice?

The defendant was responsible for the concrete slab and so must have known that there was no waterproofing membrane barrier in the concrete. So, in spite of the warnings so clearly given to it, it contracted with the plaintiff for the application of Arkifloor EHG coating. In the event, the warnings were well given because, due to the absence of the waterproofing membrane, the plaintiffs Arkifloor EHG failed.

All this is clear, although the defendant is somewhat coy about admitting that it was aware of the warnings. In these circumstances, it is very difficult to see that the defendant's complaint about the plaintiff's work can be justified.

The Situation In February 2014

This situation arose when I first heard the matter on the 10th and 11th of February 2014.

At that time, I asked Ms Swed how the plaintiff could be liable when the defendant was told that a waterproof barrier was required and none was installed. Ms Swed admitted that the plaintiff did tell the defendant this, but asked the matter to be adjourned so she could consider the problem. Frankly, I do not understand how this situation could have come as a surprise to the defendant. On 11 February, Ms Swed sought to amend the defendant's case radically. Not surprisingly, Mr Lee objected to this as being too late in the day. However, after argument, I granted an adjournment in order for the defendant to put its case in order, but ordered the wasted costs to be paid by the defendant immediately and that, if in the event the plaintiff was successful, the defendant would pay interest on the debt at the bank rate.

The Rise of the Problem

Even before the plaintiff started to apply its paint, problems arose. These problems were not related to the plaintiff's work, not of any direct concern of the plaintiff and not its responsibility, but they delayed the commencement of its work.

Some floors were uneven and the client was not happy with this. Mr Chen suggests that Mr Francis Wong, the agent for the plaintiff's product, should have suggested remedies for the uneven floor. This is nonsense. Neither the plaintiff nor Mr Wong had any responsibility for the uneven floor; that was the defendant's fault. However, in fact, Mr Wong did suggest using one of his firm's other products, but the defendant instead decided to use another product in spite of the fact that the defendant knew that this product would not fully stop rising dampness. It appears from the evidence that the defendant did not accept Mr Wong's advice to use his product because of the cost.

On 9 March 2005, Mr Wong told the defendant that there was "rising moisture due to inadequate moisture proof system".

As I have said, whatever advice Mr Wong gave was gratuitous; he had no responsibility to solving the defendant's problems.

The plaintiff was told to proceed with his painting, but, as predicted by the manufacturer, it did not work. There was "bubbling" due to the rising damp.

Responsibility for the Problem

So, the defendant, although knowing there was a serious problem with rising moisture, told the plaintiff to proceed, with the result foreshadowed by the warnings given to the defendant. The defendant took what Mr Lee referred to as a "calculated gamble".

So, how does the defendant now seek to avoid responsibility for the failure of the plaintiff's coating?

Defendant's Attempts to Avoid Responsibility

In the first place, the defendant, through Mr Chen, seeks to avoid responsibility by claiming that "nobody highlighted the mandatory requirement of waterproofing membrane" and the plaintiff "did not highlight to our attention to this warning in the said catalogue. Neither did the plaintiff at any material time before we concreted and after we concreted the worksite warned us of this warning. As a specialist plaintiff must be aware about the DPM and the raising damp problem."

This is so much nonsense. The defendant was told in the clearest possible terms that a waterproof membrane was required. I do not know why the defendant decided to instruct the plaintiff to proceed with the plaintiff's product and work knowing about the danger of failure. I do not know what else the defendant expected plaintiff to do. The situation here is that the plaintiff was not dealing with a lay client, towards whom one might expect the plaintiff to extend a special degree

of protection. The defendant is in the construction business and is clearly a company of some experience and substance otherwise it would not have been awarded this major contract. I do not believe that the plaintiff was required to do any more than it did in warning the defendant that a water barrier was required.

However, there is more that does damage to the defendant's case.

In a document dated 17 June 2004, the architect wrote to the defendant with an instruction. As I have said, the instruction was in relation to basement level I that the defendant was "to omit bituseal 1000 waterproofing membrane system at supermarket floor area, store, lobby & common area and laid only to service counters sunken area, bakery preparation, sunken floor area male and female staff toilets male and female public toilets disabled toilet diaper changing room."

This instruction to the defendant makes it clear that the defendant knew that the membrane was required, but was to be omitted in the areas mentioned.

In a letter of the same date, the defendant wrote to the architect saying amongst other things "we wish to record the following subject which been discussed and confirmed at our site meeting this afternoon –

1) to carry out mock up sample for waterproofing Bituseal 1000 to toilet area with screeding and plastering to wall up to 300mm high to assess the work ability of the waterproofing systems"

On some date in August 2004 (the precise date is obscured on my copy), the quantity surveyor for the project wrote to the defendant and said this "we write to confirm that the waterproofing to internal areas shall be Brush bond Cementitious waterproofing from "Fosroc" and accordingly screed thickness shall remain as per contract documents as the decision for the changing waterproofing specification rested upon the thickness of the screen being inadequate for the use of membranous system."

Not only are Mr Chen's feeble protests about the plaintiff not making the warning about the waterproof membrane clearer complete nonsense, it seems to me to be a blatant attempt to muddy the waters. The clear implication of what Mr Chen says is that the defendant did not have a waterproof membrane in mind when the subcontract was awarded and the plaintiff should have drawn the defendant's attention to this need. But the lie is given to this by the letters and instruction I have mentioned above in which the waterproof membrane was mentioned specifically and must have been in the defendant's mind.

I should say that nowhere in the defence does the defendant say that it was instructed to omit the membrane in certain areas or at all. On the contrary, it alleges, strangely, that it was the plaintiff which should have ensured that the membrane was installed.

Aspects of the Defence

The defendant's defence has varied over time; the final version of five is dated 11 March 2014. These changes in the defence give the clear impression of the defendant trying desperately to find a defence, where one does not exist.

A new defence in this last plea is extraordinary. It alleges that the plaintiff was obliged to undertake all the defendant's obligations to the client including "ensuring that water vapour barrier (membrane system) was installed." So, by some imaginative, if perverted, reasoning, and in spite of the fact that the plaintiff had nothing whatsoever to do with preparing the concrete slab in which the water barrier should have been placed, it is the plaintiff who is to blame for the fact that there was no water barrier and not the defendant. If this were not a serious matter, this allegation would be laughable. One can read the contract documents until one is blue in the face, but in no way can it be read in those documents or find it implied that somehow it was the plaintiff who failed to ensure that the water barrier was in the concrete when it was clearly the obligation of the defendant to lay the concrete slab and, if it wished to do so, to place a water barrier in that slab. It chose not to do so and there is no way at all that it can blame the plaintiff for this failure.

The defendant pleads "In summary, the painting works supplied by and executed by the plaintiff failed to meet the requirements of the specification and was defective and the works were rejected by the client and the architect. Hence the plaintiff is not entitled to claim any payment under the subcontract works which had to be scrapped as abortive and were rejected by the client and the architect."

Firstly, the defendant does not say how it alleges the painting works by the plaintiff failed to meet the requirements of the specification. They did not fail this, of course. The specification required the use of the plaintiff's product and no one in evidence has suggested that it was the way the plaintiff worked that caused the problem. The plaintiff's painting works were not defective. It was the failure of the defendant to ensure there was a water barrier that caused the failure. It is true that the work was rejected by the client and the architect, but this was because the defendant's failure had caused the problem.

Further, the defendant alleges that the plaintiff, as a specialist, failed to supply and employ a product which would not peel off and failed to advise the defendant to carry out such works on the surface of the structure to ensure that the paint would not peel off. The fact of the matter is of course that, if the defendant had done as it was told to, that is to ensure there was a water barrier, the plaintiff's paint would not have peeled off.

The defence goes on to say that the plaintiff failed to carry out its contractual obligations or was negligent in the performance of the works and in breach of the agreement. The particulars are :

Again, the allegation there was a failure by the plaintiff to advise or enquire from the defendant by making sure that water vapour barrier was installed, saying, ludicrously, that the plaintiff you ought to know that a water barrier was mandatory. Of course, it knew this and that was what it told the defendant, who decided to ignore this advice.

Defendant then makes allegations about things that happened in January 2005.

Firstly, it alleges that the plaintiff made certain representations at this time, including that all the defendants had to do to the floor was to make it even and smooth. This is a completely new allegation and should be treated with suspicion. In any event, I do not see how these representations bolster the defendant's complaint about the plaintiff's work. In any event, I do not accept that Mr Chen was a trustworthy witness. He hesitated a great deal in giving his answers, giving me the impression that he was thinking about what he should say, rather than the truth. On one occasion, at least, he failed to answer a question at all.

These allegations are said to be particulars of the plaintiff's breach or negligence. It is difficult to see how these alleged misrepresentations could be a breach or negligence.

The defendant alleges that the plaintiff should have discussed the moisture problem with the engineer and architect. The defendant knew of the moisture problem. It was the defendant who should have discussed the problem with the engineer and architect. The problem arose because the defendant failed to follow the mandatory requirement of the paint manufacturer. This is another example of the defendant seeking vainly to pass its responsibilities onto the plaintiff.

The defendant makes several other allegations about the rising moisture, although this problem was of the plaintiff's making. I say again that the defendant knew of this problem and it was its responsibility to sort it out, not the plaintiff.

It is so that, when the problem was discovered, the plaintiff did make suggestions to solve it, but the plaintiff had no obligation to do so. It was the defendant's problem, not the plaintiff's.

It is also so that, under the subcontract, the plaintiff was obliged to "remedy any defects in the Works", but this must be taken to mean defects for which the plaintiff was responsible. It would be quite wrong to expect the plaintiff to remedy defects in the work for which the defendant was responsible.

The defendant makes allegations, essentially, complaining that the plaintiff did not sort out the rising moisture problem. It was not the plaintiff's obligation to sort out a problem that was caused by the defendant's wrongdoing. It is impudent for the defendant to seek to put responsibility for sorting out the defendant's mistake on the shoulders of the plaintiff. It was the defendant's problem and for the defendant to sort out. The defendant seems to be of the view that this problem having arisen because of the defendant's failure, it was for the plaintiff to find a solution. This is simply not so. The plaintiff did offer advice, seeking to help, but it did not thereby take on the duty of solving the problem of the defendant's making.

If there repetitions in this judgment, as I think there are, this is because the defendant puts essentially the same defence is several different ways.

The Defendant's Written Submissions

In her closing written submissions, Ms Swed correctly identifies, as the first issue, the question of whose duty was it to ensure the waterproof membrane was installed before the plaintiff applied its paint.

Ms Swed then goes on to cite extensively provisions of the contract and the subcontract, none of which have any relevance to this issue.

Ms Swed submits that the documents that made it clear that the waterproof membrane was mandatory were not part of the contract and must be excluded. This is an extraordinary submission. No one has suggested that the documents were part of the contract. Its purpose is to establish that the parties knew that waterproof membrane was essential to avoid failure of the paint.

The submission goes on to say that the plaintiff knew that no waterproof membrane had been installed, but "kept quiet". Whether or not the plaintiff knew that no waterproof membrane had been installed is, in my view, in doubt and anyway not relevant. It was the plaintiff's responsibility only to apply the paint. The defendant had been told what was necessary to ensure that the paint did not fail and then it was a matter for the defendant to do what it thought fit in the light of this knowledge. If, in spite of the advice given, the defendant decided to avoid installing the waterproof membrane, then that was its responsibility and had to bear the consequences of the failure.

Mrs Swed repeats the allegation that the plaintiff had some duty to "highlight" the mandatory requirement for the waterproof membrane. I have already said that the defendant was told in clear terms what was required and the plaintiff had no duty beyond conveying this to the defendant. It was then a matter for the defendant to decide what to do in the light of this knowledge. The plaintiff had no responsibility to ensure that the defendant followed the advice given.

The written submission goes on to identify as another issue the question of whose duty it was to handle the rising moisture problem. I have to say that nothing in the written submission goes anywhere near placing a duty on the plaintiff to sort out the moisture problem. It is as clear as day that this problem was squarely on the shoulders of the defendant and had nothing whatsoever to do with the plaintiff.

As I have already said the plaintiff, through Mr Francis Wong, did try to be helpful and did in fact make a suggestion which might well have solved the problem. However, I cannot see any way in which it can be said that, by seeking to be helpful, the plaintiff was assuming responsibility for the moisture problem.

The suggestion by Mr Wong is contained in an email by him that is contained in the joint bundle of documents. Mr Wong did not give evidence and Ms Swed submits that the email is hearsay. This submission reveals a basic misunderstanding of the hearsay rule. The email by Mr Wong establishes what he said. In the absence of oral evidence from Mr Wong, it cannot of course be

used to establish the truth of what he said, but the value of the document is in what he said, not the truth of what he said.

The written submission suggests that I should draw some inference from the fact that Mr Wong did not give evidence, but I am quite at a loss to understand what that inference should be. There can be no doubt that Mr Wong did make this suggestion and that is all the email establishes.

Ms Swed then mentions the issue of what caused the paint to fail. This, of course, is not an issue. It is common cause that the paint failed because of the rising moisture. The submission makes the broad allegation that the work by the plaintiff failed to meet the requirements of the specification and was defective and the work was rejected by the client and the architect. The submission does not seek to expand on this baseless allegation.

The "Pay When Paid" Provision

Ms Swed identifies the last issue as the matter of the common "pay when paid" provision.

Correctly, the defendant pleads that the subcontract provided that the plaintiff would only get paid when the defendant received payment from the client and the client has not paid. Of course, the only way in which the client would pay the defendant for the plaintiff's work is if the defendant included the amount due to the plaintiff in its claim to the client. The defendant did not do so, saying that the architect would not allow it.

There is provision in the main contract for disputes between the defendant and the client to be settled by the architect. The defendant did not submit the non-payment by the client for the plaintiff's work to the architect because it knew that non-payment by the client was justified and this was because that work had been abortive because of the defendant's negligence.

The defendant says that the plaintiff was already paid directly by the client when the plaintiff was engaged directly to redo some painting works. This, of course, is a separate matter and nothing whatsoever to do with the obligations between the parties or this litigation. I do not know why the defendant even mentions this. This allegation does not help the defendant, but it does show, as far as the client was concerned, the plaintiff's work in other respects was satisfactory.

The defendant alleges that it has made all reasonable endeavours to arrange meetings with the architect and the client to resolve the non-payment. Finally, at a meeting on 28 August 2007, payment was refused by the client. This is not surprising, because the work for which the plaintiff claims was abortive due to the failure of the defendant, so there was no reason why the client should pay.

The plaintiff also bases its claim on the negligence of the defendant. It is quite clear that the defendant's negligent failure to ensure that there was a proper waterproof membrane in the concrete was the cause of the failure of the plaintiff's work and, if the plaintiff cannot recover its claim contractually, it is entitled to recover the claim from the defendant based on its negligence.

In any event, the defendant cannot rely on the "pay when paid" provision because, by doing so, it relies on its own wrongdoing. The only reason why the client did not pay for the plaintiff's work is because the work was abortive and it was abortive because the defendant did not perform its obligation of following the mandatory requirement.

The Defendant's Counterclaim

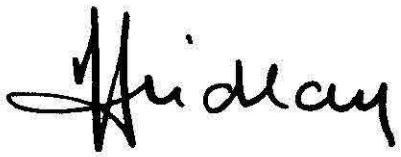
In the defendant's counterclaim, it says it has lost . . ., but does not say what it has lost, but makes a claim for the cost of scrabbling to remove the first application of the plaintiff's coating. This is again not an allegation that has any substance. That cost was a direct result of the defendant's failure to install a waterproof membrane and cannot be recovered from the plaintiff.

Conclusion

In the event, the plaintiff's claim must succeed and I give judgment in its favour in the sum of $128,039.66 with interest thereon at the rate of 8% per annum from the 4 April 2006 to the date of payment and in the sum of $41,623.98 with interest at the rate of 8% per annum from 21 November 2006 to date of payment.

The defendant's counterclaim is dismissed.

As to costs, I have considered some special order as to costs. The defendant's case was so completely without merit that such an order might have been justified. This should have been a very simple, straightforward case, but it has been bedevilled and confused by baseless, sometimes ludicrous, allegations by the defendant. However, I believe the special order as to interest sufficiently shows the court's displeasure and my order is simply that the defendant pay the costs of the claim and the counterclaim to be taxed if not agreed.



Judicial Commissioner