

**CHUON TZU CONSTRUCTION
COMPANY SDN BHD**

... **Appellant**

AND

HIAP GUAN SDN BHD

... **Respondent**

**(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 10 of 2014)**

Before: Mortimer P, Leonard and Burrell JJ A.
28th May 2015

Mr Lim Chin Wah (M/S Ahmad Zakaria & Associates) for the Appellant
Mr Lee Yew Choh and Mrs Jephine Lim Swee Teng (M/S YC Lee and Lee) for the Respondent

Mortimer. P:

The appellant (the main contractor) was the main contractor for the Hua Ho project, a substantial commercial and residential development by an agreement dated the 12 April 2004. The respondent (the painter) was subcontracted to provide painting works for the project which included applying SKK Arkifloor EHG paint (SKK paint) to the floor of level 2 of the basement car Park. This type of paint was specified in the main contract and incorporated into the subcontract which was dated 12 April 2004 but not signed until 3 September 2004.

The painter applied SKK paint in accordance with the sub contract but rising damp caused the paint to bubble. The work was not accepted by the architect. The main contractor refused to pay for the work. The painter sued and obtained judgment from Findlay J against which the main contractor now appeals.

The Background

It is common ground that this paint is not suitable for application to a concrete floor which is subject to rising damp. The main contractor constructed the floor to level 2 of the basement car park without a damp proof membrane under the main contract. Before the floor was constructed the main contractor had been informed in an SKK brochure by the painter that concrete is highly susceptible to rising damp and the provision of a moisture waterproof barrier must be provided before the application of SKK paint. This is conceded by the main contractor's project manager Mr Chen Min Wei in his affidavit dated 7 February 2014. (See paragraphs 9 – 11). He in turn informed the architect by enclosing the SKK brochure which contains the statement:

“Water vapour barrier must be provided for the ground/basement floor slabs to prevent up rising moisture (membrane system is preferred).”

On 1 April 2005 the painter began applying the SKK paint specified in the contract to the floor at level 2. In spite of problems it was required by the main contractor to complete the painting. When it was applied it started to bubble and peel off in certain areas where moisture was rising through the floor. Attempts to remedy the situation failed and consequently the result was defective.

Findlay J heard the claim in February and September 2014 and awarded the painter \$128,039.66 together with a retention sum of \$41,623.98 with interest and costs.

The Facts

The painter was unaware that the floor concerned had no waterproof barrier until a problem arose in about February 2005. The floor was uneven and rough and needed to be made smooth before the application of the paint. Advice was sought from a Mr Wong from Singapore who was employed by the SKK company. He tested the floor for rising damp and found it to be present. He advised that the surface of the floor should be scrambled and an SK floor filler be applied to make the floor even and to protect against rising damp. However, the main contractor considered the SKK product to be too expensive and preferred to use Cem-coat a cheaper product. Mr Wong had no objection to the Cem-coat provided:

*“.....it do not crack, able to curb rising moisture and suitable for vehicle traffic movements. However in view of the site conditions we **are** much more confidence in our above-mentioned proposal using Epoxy Floor Conditioner” (SK floor filler)*

The main contractor chose to use Cem-coat even though on 8th March 2005 Unicorp wrote to it saying:

“Note: the Cem-coat coating may reduce the rising damp problem but not fully stop it. Thus any coating applied over it may delaminate if it does not allow the substrate to breathe”.

Later on 1 April 2005 after the Cem-coat coat had been applied Unicorp wrote:

“We would like to bring to your attention that the Cem-coat application was installed to provide a reasonably acceptable finish on the concrete substrate and not a damp proof layer.”

With this background no variation was made to the main contract even though the employer through Mr Law, the main contractor through its project manager and the architect were aware of Mr Wong’s advice. It appears that throughout the employer insisted on the SKK paint as he had seen a floor where it had been successfully applied in Singapore.

Findlay J’s judgment

In summary the judge held that the main contractor had no defence to the painter’s claim under the sub contract. The painter’s contractual obligation was to apply with proper skill and care the SKK paint specified in the contract. The main contractor was responsible for the construction of the floor for which the painter had no contractual duty.

The judge had the difficulty that he could not ascertain from either counsel or the pleadings any valid defence to the contractual claim. To this end he repeatedly asked counsel to explain her defence until she complained that he was bullying her. He gave her a lengthy adjournment so that the defence could be amended. When the trial resumed he found himself in the same position still unaware of a valid defence.

Counsel below put forward much the same contention as had been advanced before this court. The main basis of her contention was that the main contractor was blameless for the defective painting. She submitted that it was entirely the responsibility of the painter who was the expert in the application of this paint. It was its duty to warn the main contractor and the architect of the necessity of a waterproof membrane or the equivalent. That the main contractor was blameless as the main contract did not require the provision of waterproofing and continued to require the application of the SKK paint. The architect provided no appropriate variation of the main contract. For these reasons she said the main contractor was not liable.

The Appeal

There are 2 distinct issues in this appeal. First, was the judge wrong in finding the main contractor liable to pay for the painting under the sub contract? Secondly, did the main contractor have a fair trial? It is said that it had an unfair trial because the judge made it clear that he had already made up his mind that he was liable before hearing the evidence and that he refused to listen to the defence. These are serious allegations which we address very carefully.

Was the Judge in error?

We find ourselves in the same position as the judge. What is the defence which Mr Lim, counsel for the main contractor, contends that the judge ought to have accepted?

Although it is put in many different ways Mr Lim's primary submission is that the main contractor was not in any way responsible for the painting of the floor which was found to be defective. The reason is that it was the responsibility of the painter on the basis that the painter was the expert and 'designer' of the paintwork as a nominated subcontractor under the main contract. Further, that the defective work was carried out by the painter and throughout the architect did not vary the main contract which required SKK paint even though he was aware that it was only suitable for concrete floors with a waterproof membrane or other suitable barrier.

Discussion

In order to demonstrate the main contractor's lack of fault a number of suggestions are made concerning the fact that the main contract was not varied either to require some other paint or the provision of a membrane. The basis of this must be that it was the painter's responsibility to persuade the architect to make these variations because it was an expert and a 'nominated sub contractor'.

When asked for evidence that the painter was a nominated sub contractor Mr Lim said that it was an inference because the painter was the only supplier of SKK paint in Brunei. This we cannot accept. Clause 21 of the main contract provides for nominated sub contractors "who may be nominated or selected by the superintending officer" and there are special provisions relating those who are selected and Mr Lim can point to no evidence which supports his contention.

There is no issue that the subcontractor was contractually obliged to paint the floor of basement 2 with SKK paint. That obligation continued in spite of the fact that the main contractor and the architect knew that it was only suitable for a concrete floor with a waterproof membrane or other barrier. They knew, but the painter did not know, that the floor had no waterproof membrane. What is more it was the painter who informed the main contractor that a membrane was necessary and it did so before the main contractor constructed the floor.

When the surface of the floor was unsuitable because it was rough for the application of the paint it was discovered that water was rising through the surface. When the main contractor remedied the rough surface it chose to use Cem-coat in the knowledge that it did not provide a complete water barrier.

With that background the painter was still required under the contract to apply SKK paint. It applied the paint. There was no defect in the paint nor was the workmanship in anyway defective. The painter fulfilled its obligations under the contract with the main contractor. In turn the main contractor has to fulfil its obligation to remunerate the painter. Whether the architect was at fault as Mr Lim in his submission implies is irrelevant to this action of the main contractor was of the opinion that the architect was at fault it could have taken 3rd party proceedings. It did not do so.

Conclusion

The judge's decision was entirely correct. The main contractor has no defence to the action.

Did the judge hold a fair trial?

The main contractor contends that the trial was unfair in that the judge had made up his mind at the outset before hearing the evidence. He puts it in this way:

“The trial judge had made the wrong decision by refusing to hear the evidence of the appellant/defendant and stating in court below that there was no defence on more than one occasion before the evidence was heard.”

This allegation is supported by an affidavit by the project manager who was the main contractor's chief witness. He complains that the judge had predetermined the case against him because he repeatedly asked counsel to explain what was her defence. He did not get any satisfactory answer and counsel asked him simply to hear the evidence.

This allegation needs careful consideration. The project manager may not have understood that in order to conduct a fair trial the judge needs to be able to understand the evidence and to do this he needs to know each party's case in order to evaluate it properly. If the judge is robust in his enquiries it does not necessarily indicate that he had a closed mind. It is only fairness to the parties that a judge should express his concern and ask for counsel's assistance.

There is little doubt that in his enquiries he was robust. He notes in his judgment that counsel complained that he was bullying her and he did not pursue the matter further.

The allegation that the judge refused to hear the evidence is incorrect. The notes of evidence show that he heard the witnesses on both sides. His detailed judgment also demonstrates that he considered the detail of the evidence of the witnesses and the many documents involved.

Further, not having understood the nature of the defence he allowed an adjournment to enable the main contractor to amend its defence and basically get its house in order. The opportunity was taken. Consequently the judge started the hearing on the 10th and 11th of February and adjourned the case until the 8th and 9th of September.

It is obvious from the matters put before this court that the main contractor remains convinced that it has a defence on the basis that it had no responsibility for the defective result of the painting and that the defects were all the responsibility of the painter as an expert, nominated subcontractor and even ‘designer’ of the paintwork or possibly the Architect.

Unfortunately on the facts there is no defence to the contractual claim. Neither counsel in front of the judge nor counsel before this court has been able to demonstrate even an arguable defence.

Finally it is noteworthy that there is no evidence from counsel in the case to support the main contractor’s allegations of an unfair trial.

Having considered the matter with such care as we are able we are quite satisfied that the judge conducted a perfectly fair trial. He tried to understand the case put forward by each party, and he listened to and considered all the evidence both written and oral. If he was robust in attempting to understand a non-existent defence it indicates a concern to understand the defence and evaluate it. When counsel complained, as was proper if she felt the judge was interfering with her presentation, the judge ceased his enquiries.

Conclusion

For these reasons we are satisfied that the trial was fair and the judge’s decision was correct. This appeal is dismissed.

Order

The appeal is dismissed.

We order nisi that the appellant shall pay the costs of the appeal to be taxed if not agreed. If either party wishes to be heard on costs it should inform the registry with notice to the other side by close of business on Thursday 28 May 2015 and appear on Saturday 30 May 2015 at 9.00 am. Otherwise the order nisi will become absolute at midday Saturday 30 May 2015.

Mortimer, P.

Leonard, J.A.

Burrell, J.A