

CHANG CHAN TECK

... **Appellant**

AND

WLW DEVELOPER & TRADING CO SDN BHD

... **Respondent**

**(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 4 of 2012)**

Before: Mortimer P, Davies and Leonard JJ A.
22nd November, 2012.

Building contract-breach by delay-interpretation of standard terms-liquidated or general damages- inconsistency of terms-performance in one of two alternative ways-contract in writing or partly oral- term of written document excluding oral term

Ms Linda Lee Lian Khing (M/S CCW and Partnership) for Appellant
Mr Lee Yew Choh (M/S YC Lee and Lee) for the Respondent

Cases cited in the Judgment:

Lim Ting Guan and another v Goodlink Enterprises [2004] 1 JCBD 200
Bhai Panna Singh v Bhai Arjun Singh 1929 AIR 179
Kerala and others v United Shippers and Dredgers Ltd 1982 AIR Kerala 281

Davies, J.A.:

1. The Appeal

1. This is an appeal by the first defendant, (*“the Employer”*) against a judgment for the plaintiff (*“the Contractor”*) for \$97,787.96 and costs arising out of a building contract dated 26 May 1999 between those parties. Teo Tsair Ter, the second defendant in the action is the appellant’s brother and was the superintending officer appointed under clause 4 of the contract. He is no longer a party to the appeal.
2. At the outset the judge decided two important questions against the respondent. The first was that the contract was a lump sum contract not one for work done in accordance with a bill of quantities. And the second was that

practical completion of the contract was not until water supply was connected to the property; ie on 16 April 2001. There is no cross appeal.

(a) *the first basis of appeal*

3. At the outset the judge also dismissed the appellant's claim for liquidated damages of \$95,700 (319 days at \$300), and the appellant's alternative claim for general damages, for the respondent's alleged delay in completing the work. The dismissal of the alternative claim for general damages is the first basis of the appeal. The appellant does not appeal from the dismissal of the claim for liquidated damages.
4. The judge decided that both of these claims failed for three reasons. The first of these was that Teo as superintending officer under the contract did not decide the respondent's second or third applications for extensions of time as required under the contract; and consequently that there was no time fixed for completion of the work under the contract. The second was that Teo as superintending officer failed to certify in writing that in his opinion the works ought reasonably to have been completed by the time so fixed as required by clause 29 of the contract. And the third was that there was no evidence that the appellant suffered any loss or damage in consequence of the alleged delay.

(b) *the second basis of appeal*

5. The second basis of the appeal involves three disputed items the subject of claims by the respondent which the appellant submits were wrongly decided in favour of the respondent. These may be identified by reference to a report by Mr Low Ah Hai, a quantity surveyor called by the appellant, as items 1h, 19C2 and 19C7.

2. The claim for general damages for delay.

6. The appellant does not appeal against the rejection of his claim for liquidated damages because of the application of clause 29 of the contract to the facts of this case. That clause is in the following terms:

“ If the Contractor fails to complete the Works by the date in the Appendix or within any extended time under Clause 30 hereof and the Supervising Officer certifies in writing that in his opinion the same ought reasonably so to have been completed the Contractor shall pay or allow the Employer a sum calculated and at the rate stated in the Appendix as liquidated and ascertained damages for the period during which the said Works shall so remain or have remained incomplete and the Superintending Officer may deduct such damages from any moneys due to the Contractor.”

7. Two facts are relevant to that application. The first is that the date in the Appendix was superseded by at least one extension granted by the second appellant as supervising officer pursuant to clause 30 of the contract. And the second is that at no time did the supervising officer make any certification in writing pursuant to that clause. It is because no such certification was made that the appellant accepts that he has no entitlement to liquidated damages.
8. However we think that the same reasoning applies equally to the appellant's claim for general damages for breach of this contract. We would construe clause 29 as providing that certification by the supervising officer under clause 29 that the works ought reasonably to have been completed before the date specified in that clause is a precondition of breach of the contract. There can be no breach of contract for delay unless the supervising officer certifies that the works ought reasonably to have been completed before that date.
9. The purpose of that part of the clause providing for a method of calculation of such damages under the contract is, at best, to provide a genuine pre-estimate of those damages (as it asserts) or, at worst, a penalty provision; but it is, in either case, no more than an attempt to pre-fix the amount of damages instead of, at common law, having to prove specifically the amount of damage or loss. However its effect is not that stated in the clause but that stated in section 75 of the Contracts Act, Cap 106.
10. That section provides:

“When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulations by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.”
11. The effect of this provision and its equivalent elsewhere, which, as this Court noted in *Lim Ting Guan and another v Goodlink Enterprises [2004] 1 JCB 200* at 215, is not easy to construe, is, as Lord Atkin said of the identical provision of the Contracts Act 1872, India:

“The effect of S.74, Contracts Act of 1872, is to disentitle the plaintiffs to recover simpliciter the sum [fixed by the contract] whether penalty or liquidated damages. The plaintiffs must prove the damages they have suffered.”

Bhai Panna Singh v Bhai Arjun Singh 1929 AIR 179
12. Thus the effect of clause 29, in consequence of section 75, is that, once breach has been established by certification under that clause, the appellant

has a right to general damages with this advantage; that proof of the actual extent of damage is unnecessary if some damage has been proved. See *State of Kerala and others v United Shippers and Dredgers Ltd 1982 AIR Kerala 281* at 286, *Lim Ting Guan* above. This can be seen at the above reference to *State of Kerala*, where Bhat J, speaking for the Court, said:

“The phrase referred to above [“whether or not actual damage or loss is proved to have been caused thereby”] finding a place in Section 74 only means that, unlike in England, a party faced with breach of contract in India is not compelled to prove the extent of the loss or damage suffered by him in fact or actually. He need not prove in an exact manner the extent of the real loss or damage suffered by him.....

.....

Section 74enables him to claim compensation in spite of his failure to prove the actual extent of the loss or damage provided of course he establishes the basic requirement for award of “compensation”, viz., the fact that he has suffered some loss or damage. The proof of this basic requirement is not dispensed with by Section 74 of the Act.”

13. In summary, recovery of damages for breach of this contract, whether in reliance on pre-fixing of damages calculated at the rate stated in the Appendix or assessed at common law, was dependent on prior breach which required certification in writing by the supervising officer. And as there was none, damages are not recoverable on either basis.
14. This disposes of the first basis of appeal. However because we heard full argument on the question whether any loss or damage was proved, we propose to say why we think that, even if breach had been proved, the appellant failed to prove any loss or damage.
15. At trial, losses were claimed on two bases. The first was that, had the work been completed within time, the buildings would have earned rent. However the appellant does not pursue this claim because Teo said that the first appellant did not intend to let the premises and there was no evidence to the contrary.
16. The second consisted of payments which were incurred in housing workers and storing goods who and which, it was claimed, would have been housed and stored in the buildings the subject of the work. This was rejected by the learned judge on the following basis. First, payments said to have been made to house workers and store goods of the appellant, were made, not by appellant, but by Teo Trading Co, a partnership said by Teo to have been of the appellant and three of his brothers and the workers and goods were those of Teo Trading Co, not of the appellant. Secondly, the extent of the appellant's interest in the partnership was not disclosed. And thirdly it was

not disclosed what arrangement there was, if any, for repayment by the first appellant to the partnership.

17. Before this Court it was contended by the appellant that the learned judge ought to have inferred that, because the appellant was a partner in the partnership, he suffered some loss and the most probable inference ought to have been that he suffered a loss equivalent to one quarter of the sum paid by the partnership. The difficulty in this argument is that the burden of proving the existence, nature and extent of his loss, if any, was on the appellant and the facts relevant to that were peculiarly within the knowledge of the appellant. In the absence of any evidence of these the learned judge was, in those circumstances, right to conclude that the appellant failed to prove any loss.
 18. In any event there was no evidence from the appellant that it was his intention that the people or goods in question were intended to be housed or stored in these buildings had they been completed in time. Teo purported to give this evidence by himself expressing that intention and deposing that he was authorised to give evidence on behalf of the appellant. The learned judge rejected that evidence as proving the appellant's intention.
 19. In contending that the learned judge was wrong in rejecting that evidence as proof of the appellant's intention, the appellant relied on Chapter XII of the Evidence Act which permits the admission of hearsay evidence in certain circumstances. However the provisions of this Chapter would not have permitted the admission of this evidence of Teo. In the first place they apply only to statements made out of court by others, in this case by the appellant to Teo to the effect that that was his intention: section 169(2)(a). There was no such statement here; Teo merely claimed to know the mind of the appellant. Secondly no notice to adduce this evidence was given: section 170. And thirdly there was no evidence or argument that it was unreasonable or impractical for the appellant to give evidence: section 172(2) (a).
 20. For all of these reasons we are of the view that even if it had been open to the appellant to claim damages for breach of this contract at common law, no loss in consequence of any such breach was proved. The claim for general damages for delay would have failed, in any event, for lack of proof of loss.
- 3. The second basis of appeal; the three disputed items**
21. The appellant had paid the respondent \$582,000 under 15 progress claims. The respondent claimed a further \$294,009.08 reduced at trial. The judge allowed \$97,787.96 of these.
 22. There are, as we indicated earlier, three claims of the respondent which remain disputed on appeal. They may be identified, as they were at trial, as items 1h, 19C2 and 19C7 in the report of Mr Low Ah Hai, a quantity

surveyor engaged by the appellant some ten years after completion of the works to measure the quantity of work completed.

4. Item 1h; electrical installation for the main house

23. The learned judge allowed \$1,789 by way of omission. The appellant submits that he should have allowed the sum of \$3,622.
24. The total sum in the contract for electrical installation for the main house was \$19,560. The respondent claimed that the value of work done was \$17,771, measured by the respondent in 2000 in accordance with the schedule of rates in the contract (see clause 13(a)(1v)), and, at the least, not disputed when claimed in January 2001. The difference between \$19,560 and \$17,771 is \$1,789 the amount claimed by the respondent and allowed by the judge as the amount of the omission. The appellant claims that the value of the work done was \$15,938 as measured by Low in October 2010. The difference between \$19,560 and \$15,938 is \$3,622, the amount claimed as the omission by the appellant. It is no doubt arguable that the learned judge would have been entitled to accept the respondent's measurement forwarded to the appellant on 15 January, 2001 and, at least, not disputed before Low's report ten years later in preference to that of Mr Low. However the judge did not so conclude and we are not prepared to say that he should have so concluded.
25. However the respondent contended, and the learned judge accepted, that this omission of \$1,789 was accepted by Teo. The learned judge said that the handwritten note on the respondent's claim of 15 January, 2001 was that of Teo and that it suggested that it was agreed that \$1,789 should be omitted. Before this Court the appellant submits that there was no evidence that the note was made by Teo and, in any event, that it did not signify acceptance.
26. In the absence of evidence to the contrary, the learned judge inferred, from Teo's usual practice of endorsing his acceptance or refusal on the respondent's claims for payment and that this appeared to be such an endorsement, that this was Teo's note. Were it not for the way in which this case was conducted we would have concluded that the judge was entitled to so infer. However the burden of proving that this endorsement was an admission by Teo of the respondent's claim was on the respondent. Not only did the respondent not plead this; he did not even raise it before his final address, by which time it was too late for the appellant to rebut it. In particular he did not put to Teo in cross-examination that this was his endorsement.
27. In those circumstances, we think that the learned judge was wrong to draw the inference which he did and there was no other evidence that this was an admission by the appellant. There seems to be no other reason for rejecting Mr Low's final measurement which, in other matters, the learned judge accepted. We therefore think that the judge erred in rejecting Mr Low's

evidence in this respect and that, consequently, he should have allowed an omission of \$3,622. For that reason the appeal with respect to this item must succeed. The judgment must therefore be reduced by \$1833 (\$3622 - \$1,789).

5. Items 19C2 and 19C7; construction of the multi-purpose hall

28. Both of these concern opposing contentions before this Court as to two matters. The first of these was the effect of two sets of drawings forming part of the contract. These may be identified as, respectively, drawings HS1 to HS5 at pages 88 to 92 of the defendant's bundle of documents and drawings at pages 35 to 43 of the defendant's bundle of documents. Mr Lau, the respondent's project manager, said that these showed two alternative and so irreconcilable methods of construction, the first a construction by means of steel frame, the latter by concrete. And he said that it was the first method which was adopted and accepted by the appellant. His evidence in this respect was accepted by the learned judge. However the appellant contends that the two sets of drawings should be read together with the consequence that all items in both sets of drawings should have been completed by the respondent.
29. Mr Lau, after giving the evidence to which we have referred, turned to items 19C2 and 19C7 in Mr Low's report, explaining, in each case, what was required under the agreed method of construction. He was not cross-examined on any of this evidence; nor was his evidence contradicted.
30. We were asked in effect, to overrule the learned judge' acceptance of this evidence by looking at these two sets of drawings to see and hold that, as the appellant submits, they can and should have been read together in order to determine what items were included in the works required to be constructed. We decline that invitation. In the absence of Mr Lau's evidence the drawings are by no means clear and, as we have said, Mr Lau's evidence was uncontested and uncontradicted. The judge was right, in our view in accepting that there were alternative methods of construction provided in the drawings and that the value of the omissions in each of items 19C2 and 19C7 must be of only those items referred to in drawings HS1 to HS5 relating to the multi-purpose building. We turn later to what they were.
31. The second matter on which there were opposing contentions was as to the effect of Mr. Wong's evidence that, before the written contract document was executed, Teo instructed the respondent not to include the mezzanine floor in the work to be constructed. He said, in effect, that it was in consequence of this that the schedule of rates did not include work to construct the mezzanine floor notwithstanding that some of that work was included in drawings HS1 to HS5. The judge appears to have accepted this evidence and that, in consequence, items required only for the mezzanine floor should not be included in omissions to which the appellant was entitled because he did not include in those omissions some items relating to the mezzanine floor notwithstanding that they were included in drawings HS1 to HS5.

32. We do not think that the learned judge was entitled to find, in effect, that the above conversation between the respondent and Teo was part of the contract between the parties because it would make that contract one partly oral and partly written and this was prohibited by clause 3 of the written contract document. That clause defines “*contract*” as meaning

“the documents forming the tender and acceptance thereof together with the documents referred to therein including and condition annexed hereto, the Specification, Drawings and Schedule of Rates and all these documents taken together shall be deemed to form one contract and shall be complimentary to one another.”

Leaving aside any questions about the way in which this is expressed, we think that its intention is to exclude oral evidence purporting to add to or vary its terms.

5. Item 19C2; no reinforced fascia and concrete beam

33. The respondent claimed and the judge allowed \$5823.81 for this. This was the cost of the metal fascia board [App roa vol 10, p 397] and the steel frame construction did not require the construction of any concrete beams. The appellant submits that there should instead be an omission of \$13,752.00, the cost of that concrete work. If the judge was correct in accepting the evidence of Mr Lau that the contract was for a steel frame building in accordance with drawings HS1 to HS5, as we have held, the appeal in this respect must fail.

6. Item 19C7; no mezzanine floor

34. The respondent failed to construct a mezzanine floor in the multi-purpose hall to the extent required by drawings HS1 to HS5. The appellant originally claimed that an omission of \$80,842.00, the amount fixed by Mr Low for this item, should have been allowed. This was later amended to \$70,566, which is the total of items 7 to 11 in the list of items in Mr Low’s report relating to item 19C7. The judge allowed an omission of \$10,276, the total of items 1 to 6 in that list. This, according to Mr Lau and accepted by the judge, represents a calculation of the total of the items in the schedule of rates attributable to a steel frame building for a mezzanine floor.
35. Whether or not that is correct, \$10,276 does not represent the total of the work required by drawings HS1 to HS5 as Miss Lee, for the appellant, has pointed out. Those drawings also refer to items 7, 8 and 10 in that list; the Kapur Bukit joist, the T&G flooring and one of apparently two staircases. The only costing of these items was that of Mr Low which we adopt. These were, respectively, \$4,836, \$16,800 and \$2,580. In our opinion, therefore, the appellant was entitled to an omission of \$34,492 (\$10,276 plus these

amounts) in respect of item 19C7. The judgment should therefore be reduced by the sum of \$24,216 (\$4,836+\$16,800+\$2,580).

7. Generally

36. As can be seen from our analysis of the evidence, the learned judge was right in pointing to confusion in the drawings, and relying on inherent probabilities where the evidence was unclear. However we think that these inherent probabilities, in the light of the contractual provisions, lead to a different conclusion from that reached by the judge only in respect of items 1h and 19C7.

Orders

1. Appeal allowed
2. Set aside the judgment below.
3. In lieu, judgment for the respondent for \$71,738.96 with interest at the rate of 6.5% per annum from 16 November 2001 to 29 February 2012 and thereafter at the rate of 6% to the date of payment.

Mortimer, P.

Davies, J.A.

Leonard, J.A.