Steel Industries Pte Ltd v Deenn Engineering Pte Ltd
[2003] SGHC 167

Case Number : Suit 1201/2002, RA 26/2003

Decision Date : 06 August 2003

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Thio Ying Ying with Cheong Aik Hock (Kelvin Chia Partnership) for the Plaintiffs; Raymond Chan (Chantan LLC) for the Defendants

Parties : Steel Industries Pte Ltd — Deenn Engineering Pte Ltd

Building and Construction Law – Terms – Certificates and approvals – Architect issuing interim certificate five years after completion of works – Whether waiver of strict compliance covering such circumstances

Building and Construction Law – Terms – Certificates and approvals – Validity of certificate of payment – Architect's power to issue and withdraw certificate of payment

Introduction

1 Some years ago, Fort Canning Country Club Investment Ltd ('the employers') undertook the redevelopment of an existing building to provide premises for the Fort Canning Country Club ('the project'). They appointed Deenn Engineering Pte Ltd, the defendants in this action, as the main contractors for the project. The architect of the project was a firm called International Project Consultants.

2 In March 1996, Steel Industries Pte Ltd, the plaintiffs herein, became nominated sub-contractors with responsibility of carrying out the supply, installation, testing and commissioning of kitchen equipment in the project. The sub-contract between the plaintiffs and the defendants incorporated the Singapore Institute of Architects standard form of Conditions of Sub-Contract ('the SIA Conditions of Sub-Contract').

3 The project was duly commenced and completed. The main contract works were certified by the architect as being completed on 10 January 1997 whilst the plaintiffs' sub-contract works were certified as completed on 9 May 1998.

4 In October 2002, the plaintiffs started this action for the sum of $376,302.70 which they asserted was the balance due to them under the architect's Interim Certificate no. 19. The defendants entered appearance and applied to stay proceedings on the basis that the sub-contract contained an arbitration clause. Shortly thereafter, the plaintiffs filed an application for summary judgment.

5 The plaintiffs' and the defendants' applications were heard together in January this year. On 22 January, the plaintiffs' application was dismissed but the defendants' application was allowed and the action was stayed pending arbitration. The plaintiffs appealed. I dismissed their appeal and they now wish to take the matter further.

Further facts

6 By the sub-contract, the parties agreed, among other things, to the following terms and conditions:

(1) the nominated sub-contract sum was to be $713,913.90 (excluding GST) and this was subject to final certification by the architect and to adjustments made in relation to the defendants' right to set off or deduction;

(2) the plaintiffs were to apply for payment by the defendants on a monthly basis and they would be paid within 14 days after the defendants themselves had been paid or had been deemed to be paid by the employers following certification by the architect in accordance with cl 30(1) and (2) and 31 of the Main Contract Conditions (cl 13.1 of the SIA Conditions of Sub-Contract);

(3) any dispute arising between the parties was to be referred to arbitration.

7 The terms of cl 13 of the SIA Conditions of Sub-Contract played a pivotal role in the case and must therefore be set out in full:

> 13.1 The Sub-Contractor will (unless the Schedule hereto provides to the contrary) be paid within 14 days after payment or deemed payment of the Main Contractor by the Employer following certification by the Architect of the amounts paid or deemed to be paid to the Main Contractor and accordingly due to the Sub-Contractor in all respects in accordance with clauses 30(1) and (2) and 31 of the Main Contract Conditions.
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> 13.2 In so far as the Architect may decide the amounts due to the Sub-Contractor and any matter of defence, set-off or counterclaim as between the parties to this Sub-Contract for the purpose of determining the amounts to be certified for payment by him in the Main Contract pursuant to clause 30(1) of the Main Contract Conditions, or any matters of extension of time and delay under clause 11(2) of this Sub-Contract, such decisions and certificates shall be binding until final judgment or award in any dispute between the parties to this Sub-Contract.
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> 13.3 In the event of any dispute as to whether or not the Contractor has received payment in accordance with the sub-clause (1) hereof, the Architect, upon the request of the Contractor or the Sub-Contractor and after satisfying himself as to the facts, shall certify whether and if so in what amounts and when the Contract has received payment from the Employer in respect of the Sub-Contract Works, or is deemed to have received such payment pursuant to clause 30(2) of the Main Contract Conditions. Such Certification shall be known as a "Certificate of Payment of Main Contractor" and shall be binding as between the Contractor and Sub-Contractor until final judgment or award of any dispute under this Sub-Contract. For the avoidance of doubt, such Certificate shall not itself deal with any matters of set-off or counterclaim as between the Main Contractor and Sub-Contractor, which shall be decided (if at all) in the Interim Certificates for payment under the Main Contract in accordance with the provisions of clause 30(1) of the provisions of the Main Contract.

The purport of this clause therefore was that the plaintiffs did not have an independent claim against the defendants for payment for work done. Instead, they were only entitled to receive money from the defendants after the defendants had themselves been paid in respect of that work by the employers or after the defendants had been deemed to have received the money. The situations in which payment could be deemed to have been made were set out in cl 30(2) of the Main Contract Conditions.

8 According to the plaintiffs' statement of claim, in the course of the works and thereafter, the architect issued six interim certificates which contained certifications as to amounts due to the plaintiffs. These were as follows:

Date	Interim Cert No.	Amount (w/o GST)	Amount (w/GST)
13.12.1996	14	S$361,504.30	S$372,349.43
29.01.1997	15	S$ 52,800.00	S$ 54,384.00
25.04.1997	16	S$ 47,847.85	S$ 49,283.29
28.07.1997	17	S$ 0.00	S$ 0.00
24.12.1997	18	S$ 0.00	S$ 0.00
10.04.2002	19	S$355,479.39	S$366,143.77
	Total =	S$817,631.54	S$842,160.49

It would be noted that the 19th Certificate was only issued in April 2002, some four and a half years after the 18th Certificate. Prior to the issue of the 19th certificate, the total amount certified was $476,016.72 (with GST) and, according to the plaintiffs, the defendants had paid them $465,857.79 leaving only some $11,000 outstanding. It should be noted here that the defendants' own calculations showed that they had paid the plaintiffs only $452,289.11 (inclusive of GST), being the amount that had been paid to them by the employers for the plaintiffs although Interim Certificate no. 17 had certified an amount of $462,152.15 (without GST) as being due to the plaintiffs.

9 In the meantime, the defendants had been at odds with the employers and the architect. The main contract works had been certified by the architect to be completed on 10 January 1997. The defendants had then submitted their final claim of $7,696,389 on 28 July 1997. This final claim included the plaintiffs' final claim of $350,226 for the kitchen works. Up to June 1998, however, the architect failed to issue the Final Payment Certificate certifying the final amount due to the defendants and the employers failed to make any payment to them. In June 1998, the defendants commenced arbitration proceedings against the employers claiming the sum of $769,389. The employers disputed the defendants' claim and made a counterclaim for liquidated damages. In the course of those proceedings, on 5 April 2002, the employers were placed under judicial management. As at the date of the hearing, the arbitration proceedings had not been concluded.

10 When the 19th Interim Certificate was issued, the unpaid amount increased to $376,302.70. As at 10 April 2002, however, that amount was not yet claimable by the plaintiffs as, under cl 13.1, the defendants had to make payment to them as sub-contractor within 14 days of receiving payment from the employers or within 14 days of having been deemed to have received such payment. That situation changed when on 24 June 2002 the architect issued his Certificate of Payment of Main Contractor pursuant to cl 30(2) of the Main Contract Conditions ('Certificate of Payment') wherein he certified that the defendants were deemed to have been paid by the employers the sum of $830,226 (excluding GST) in respect of the plaintiffs' works. The plaintiffs stated that this meant that the full balance outstanding became payable within 14 days thereafter ie by 8 July 2002. Since they did not receive payment on or after 8 July 2002, the action was started on 12 October 2002.

11 On 30 October 2002, the architect wrote to the plaintiffs stating that the Certificate of Payment had been issued upon his explicit understanding that under cl 30(2) of the Main Contract, it only entitled the sub-contractor to payment in direct proportion to the payment eventually received by the main contractor when the Main Contract was finalised. He gave the plaintiffs notice that if

they abused his intention by utilising his certificate to prematurely force a disproportionate payment from the defendants, he would withdraw the Certificate of Payment.

12 On 30 January 2003, the architect by a letter to the plaintiffs, withdrew and cancelled his Certificate of Payment. According to the letter, the basis of the withdrawal was that the plaintiffs had utilised the Certificate of Payment to claim full payment of their sub-contract dues. This withdrawal was significant as, if valid, it removed the basis on which the plaintiffs could claim that payment was due from the defendants.

The arguments

13 The plaintiffs' application for summary judgment was based on the Interim Certificate no. 19 and on the Certificate of Payment. They pointed out that both Certificates had temporary finality under the SIA Conditions of Sub-Contract as they were to be 'binding until final judgment or award in any dispute' between the parties to the sub-contract. They also contended that when a plaintiff contractor makes an application for summary judgment based on the architect's certificates, it is for the party challenging the validity of the certificate to show that the architect's power had not been properly exercised in respect of the certificate. This contention was based on the decision in *China Construction (South Pacific) Development Co Pte Ltd v Leisure Park (Singapore) Pte Ltd* [2000] 1 SLR 622.

14 The defendants did not accept that the plaintiffs were entitled to payment. Their first argument was that since the Certificate of Payment had been withdrawn, it could no longer serve as a basis for the plaintiffs' claim. Their second argument was that even if that Certificate of Payment had not been withdrawn and cancelled, it was invalid. They argued that these matters were matters in dispute between them and the plaintiffs and therefore had to be referred to arbitration under cl 14.1 of the sub-contract. Thus the plaintiffs were not entitled to summary judgment.

15 According to his letter, the basis on which the architect withdrew the Certificate of Payment was that he had previously informed the plaintiffs and their solicitors that it was issued to confirm that the plaintiffs would receive payment from the defendants only in direct proportion to the fraction of the main contract value eventually received by the defendants in their arbitration with the employers and not to enable the plaintiffs to claim for payment in the meantime. The defendants pointed out that there was nothing in the SIA Conditions of Sub-Contract which prohibited the architect from withdrawing or cancelling a Certificate of Payment and that an architect's ability to do this had been expressly recognised by the following passage in *Hudson's Building and Engineering Contracts* (11th Ed) at para 6-171:

> … it is difficult to see why, in principle a certifier should not be able to issue a corrective certificate where he becomes aware of an error in an earlier certificate, a fortiori if there is a doubt or objection taken to the validity of the earlier certificate on the grounds of form or timing for example. But unless the effect of the earlier certificate has been to alter a party's position irreparably (for example as a result of the necessary certifications prior to termination) or the contract has expressly or impliedly imposed restrictions on the timing of the certificate, there seems no good reason why even substantive errors should not be corrected.

16 I accepted the principle that an architect is entitled to withdraw a certificate or issue a corrective certificate if the earlier certificate had been issued in error. I could not see, however, that an architect would be entitled to withdraw a certificate simply because he does not approve of the use which the beneficiary of the certificate wishes to make of it. If the Certificate of Payment had been validly issued, then the plaintiffs were entitled to use it to found their action against the

defendants. The architect's opinion as to how that Certificate should be used and what he intended it to mean was irrelevant and he could not, in my opinion, withdraw it simply because the plaintiffs took a different view.

17 I therefore had to consider whether the Certificate of Payment was invalid.

18 The defendants put forward several arguments as to why the Certificate of Payment was invalid. The first was that a precondition for it to be issued was that there must be a valid Interim Payment Certificate in favour of the plaintiffs under cl 30(1)(a) stating the amount due to the plaintiffs under the sub-contract. The defendants asserted that Interim Certificate no. 19 was not valid and therefore this precondition had not been fulfilled. The defendants' objections to Certificate no. 19 were as follows:

(1) it did not state that the sum of $355,479.39 was due to the plaintiffs as nominated sub-contractors as required by cl 30(1)(a) of the Main Contract Conditions (what the Certificate stated was that the amount due to the 'Contractor' ie the defendants, was $355,479.39);

(2) there was no sum certified separately as being due to the plaintiffs as the defendants' nominated sub-contractors and this was a breach of cl 30(1)(a);

(3) in breach of cl 31(2), the Interim Certificate did not state the valuation of the plaintiffs' sub-contract works and the date of such valuation;

(4) there was no valuation at all of the plaintiffs' works nor any reference to any other document showing the valuation of the works and the sum of $355,479.39 was derived by calculating the balance amount payable to the defendants by the employers and did not relate specifically to the plaintiffs' works; and

(5) Interim Certificate no. 19 was issued almost five years after the works were completed and almost five years after the defendants' submission of their final claims to the employers whereas under cl 31(1) of the SIA Conditions of Sub-Contract, the Interim Certificates were to be issued monthly.

19 As regards the first four objections to Certificate no. 19 which were basically objections to the form of the Certificate, the plaintiffs' response was that the requirement that the architect comply strictly with the format prescribed by the SIA Conditions of Sub-Contract had been waived. The plaintiffs relied on the *China Construction* case in which it was found that it is appropriate to take into account the conduct of the parties and of the architect in the matter of certifications and payment. In that case, Khoo J, had held that as the architect therein had habitually departed from the strict terms of the SIA Conditions of Contract in issuing his certificates and yet the defendants there had paid on the same without objection, they had to be taken to have waived the strict requirements of the contract.

20 The plaintiffs argued that in this case too, the architect had habitually departed from the strict contractual requirements. First, he had not issued his Interim Certificates at the correct intervals in that the 15th Interim Certificate was issued nine days late, the 16th Interim Certificate was issued more than two months late and the 17th Interim Certificate was issued two and a half months late. Secondly, the architect did not state, as required, in any of his Interim Certificates the sums due to each individual nominated sub-contractor or supplier. Instead, he referred to valuation certificates issued by KPK Quantity Surveyors in his cover letters. It was KPK's valuation that contained a breakdown of the sum due to each nominated sub-contractor or supplier and this

valuation had been sent to the employers and the defendants under separate letters. As regards Certificate no. 19, the architect stated in his letter of 11 April 2002, that the amount due was in respect of the plaintiffs' works and that it was based on the employers' written acceptance of the plaintiffs' kitchen installation. Further, by Interim Certificate no. 16, the architect effected the first release of one half of the retention monies under Clause 31(7) of the Main Contract Conditions but had not made reference to this release in the Certificate itself. It was only KPK's valuation that showed that the architect had certified a release of the first half of the retention monies.

21 There was merit in the plaintiffs' arguments that the architect had been habitually non-compliant with the contractual terms and that the defendants had accepted this compliance by nevertheless making payment to the plaintiffs on receipt of the architect's Interim Certificates. I agreed that they had waived strict compliance with the conditions and could not complain about the failure of the architect to specify the names of the sub-contractor and the valuation of the works done in the Interim Certificate itself as long as these details were made plain by accompanying documentation or documentation that had been previously sent to the defendants. In this case, the letter issued by the architect in April 2002 made it clear that it was the plaintiffs who were to be paid the amount due under the Certificate.

22 The defendants' fifth objection to the Interim Certificate was, however, in a different category. The defendants might have waived short delays in the issue of Interim Certificates while the works were underway but such waiver could not be taken as agreeing to pay under a certificate that was issued years, not days or even months, after it should have been. Further this certificate was not issued during the process of the work but five years after completion of the works. It was hard to regard it as an Interim Certificate. In *Tropicon Contractors Pte Ltd v Lojan Properties Pte Ltd* [1989] 3 MLJ 216 an interim certificate issued two years after completion of works which did not show any date at which valuation of the works was carried out was held to be invalid and of no effect. In this case too I considered that Interim Certificate no. 19 could not be valid as an Interim Certificate under cl 30(1)(a).

23 The plaintiffs, anticipating such an outcome, argued in the alternative that Interim Certificate no. 19 should be considered a corrective certificate issued pursuant to cl 31(4). That clause gives the architect power to issue a further Interim Certificate 'at any time whether before or after completion, correcting any error in an earlier Interim Certificate … or dealing with any matter of which he was aware, or which should have been dealt with, at the time of an earlier Interim Certificate, or revising any decision or opinion on which that Certificate was based'.

24 The defendants submitted that in order for an Interim Certificate to qualify as a Revision Certificate under cl 31(4) it had to:

(1) identify the previous Certificate which it sought to correct;

(2) state the reasons for the correction; and

(3) set out the details of what was being corrected.

This submission was based on the model of a revision certificate under cl 31(4) in the SIA Guidance Notes and the SIA Specimen Forms and Certificates for use in conjunction with the Main Contract. The Interim Certificate no. 19 did not contain any of the three items specified above. Neither it nor the covering letter of 11 April 2002 identified the previous certificate that was sought to be corrected, set out the reasons for the correction nor gave the details of what was being corrected. The Certificate did not even state that it was a Revision or Corrective Certificate issued under cl

31(4).

25 The plaintiffs could not deny that these various particulars were not contained in Interim Certificate no. 19. They sought to rely on the waiver argument to overcome the deficiencies in its format. In my view, the waiver argument was applicable to make irrelevant the deficiencies in Interim Certificate no. 19 when it was considered as a normal Interim Certificate since previous Interim Certificates had similar deficiencies. The waiver argument did not apply, however, to Interim Certificate no. 19 if it was to be considered as a Revision Interim Certificate pursuant to cl 31(4) since none of the previous Interim Certificates were Revision Certificates. There was no history of the defendants having waived strict compliance with the format of Revision Certificates. In my opinion, if an Interim Certificate is issued to revise the contents of a previous Interim Certificate, it must say so expressly and must have the other requirements set out in cl 31(4) so that there can be no doubt about its effect or its place in the sequence of Interim Certificates issued in the course of the contract works.

26 Accordingly, upon reflection, I agree with the defendants' submission that Interim Certificate no. 19 was not a valid Interim Certificate.

27 At the time of the argument, however, I was more concerned with the defendants' other objections to the validity of the Certificate of Payment. These were that:

(1) it had been issued on the wrong basis; and

(2) the architect had no power to issue it as he was out of office.

28 In order to understand the argument relating to the basis on which the Certificate was issued, it was necessary to examine cl 30(2). It reads:

> 30.(2) For the purpose of sub-clause (1)(a) of this Condition, the Contractor shall be deemed to have received payment from the Employer of some or all of the amounts certified as due to any such Designated or Nominated Sub-Contractor or Supplier as follows:-
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> (a) If the sole reason for non-receipt from the Employer of some or all of the amounts certified by the Architect in favour of a Designated or Nominated Sub-Contract or Supplier is a defence, set-off, counterclaim or deduction by the Employer against the Contractor not related to any default by that Designated or Nominated Sub-Contractor or Supplier, the amounts shall to that extent be treated as having been paid to the Contractor.
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> (b) In a case where the Contractor has without any default on his part only been able to recover from the Employer some but not all of the sums properly due to him under or by virtue of the Contract, the same proportion of the total of all sums so recovered by the Contractor as the total amounts due in favour of Designated or Nominated Sub-Contractors or Suppliers at that time bears to the total sums due at that time in respect of their own and the Contractor's own work shall be rateably allocated to such Designated or Nominated Sub-Contractors or Suppliers in proportion to the respective certified amounts and shall be deemed to have been paid to the Contractor in respect of each of the said amounts. …

Thus, under cl 30(2)(a), a main contractor is, vis-à-vis a nominated sub-contractor, deemed to have received payment of the amount due to that nominated sub-contractor from the employer if the sole reason that actual payment has not been made is that the employer has a defence to the main contractor's claim or a counterclaim against the main contractor and such defence or counterclaim is

unrelated to any default on the part of the nominated sub-contractor. The point of this clause is that if for some reason relating to the work done on the project but totally unconnected with the sub-contract works in question, the employer refuses to pay the main contractor, the nominated sub-contractor should not be deprived of the monies properly due to him.

29 The defendants submitted that the basis for the issue of the Certificate of Payment was that monies certified as due to the plaintiffs as nominated sub-contractors had been deducted by the employers due to something that was no fault of the plaintiffs. They said this was not actually the case here because:

(1) on the assumption that Interim Certificate no. 19 was validly issued, after the issue of this Certificate on 10 April 2002, no payment was made by the employers pursuant to it. This was because the employers were facing grave financial difficulties and had been under judicial management since 5 April 2002. As such, the non-payment of the Interim Certificate no. 19 did not result from a default of the defendants that entitled the employers to deduct monies from the amount certified due under the Interim Certificate; and

(2) it was clear from the architect's letters that he did not consider the reasons which led to the employers not making full payment of the sum of $830,226 certified in the Certificate of Payment. He certainly did not consider whether it was the fault of the defendants or the plaintiffs which caused the employers not to pay the amount due under Interim Certificate no. 19.

30 The above arguments had merit. There was no evidence that the architect had, prior to issuing the Certificate of Payment, applied his mind to ascertaining whether the reason for non-payment of Interim Certificate no. 19 by the defendants fell within cl 30(2)(a). Such evidence as there was, that is, the letters that the architect himself wrote, indicated that he had issued the Certificate because he thought that it would help the plaintiffs obtain from the defendants the proper proportion of any payment actually received by the defendants from the employers when the disputes between the defendants and the employers were resolved. Secondly, if he had applied his mind to the problem, he would probably not have been able to certify that the only reason for non-payment was the defendants' default since by the time payment became due the employers were under judicial management and not in a position to make payment to any one creditor.

31 It appeared to me when I heard the application that it was not possible to say that the sole reason for non-payment of Interim Certificate no. 19 was the defendants' default. There was the very real possibility that non-payment was due to the parlous financial situation of the employers. The plaintiffs had entered into a 'pay when paid' contract with the defendants and therefore had to share with the defendants the risk of the employers' insolvency. If such insolvency was the cause or one of the causes for non-payment by the employers, it would not be right to force the defendants to pay the plaintiffs out of their own pockets.

32 There was also the fact that there was an on-going arbitration between the employers and the defendants wherein the defendants had claimed all outstanding monies including those for the sub-contract works and the employers had refused to pay them on the basis that they had a counterclaim for liquidated damages of $1,144,000 as a result of the late completion of the works. The works included the plaintiffs' kitchen works. The original completion date for the kitchen works was 4 September 1996 but the plaintiffs only completed those works by early February 1997. The defendants completed their other works on 10 January 1997. One of the issues in the arbitration was whether the late completion of the works was caused by the employers' design consultant's instructions to vary the architectural works for kitchen or whether it was caused by delay of the plaintiffs themselves in executing those kitchen works. If, in the arbitration, it was found that the

delay was due in whole or in part to the default of the plaintiffs then there would be no basis for Certificate of Payment to be issued.

33 Thirdly, there was the question of whether the architect had the power to issue a Certificate of Payment once arbitration proceedings between the employers and the defendants had commenced. The defendants submitted that he did not because cl 37(3)(i) of the Main Contract provided that once arbitration proceedings had commenced, the architect may only issue Revision Interim Certificates under cl 31(4). By implication, this means that no other Certificates may be issued after that point. This is logical because the issue of such a Certificate would mean that the architect had determined that, notwithstanding the arbitration was on-going and included an issue as to the liability of the plaintiffs for the delay in completion, the plaintiffs were not responsible at all for the delay in completion and had not contributed to the employers' claim for liquidated damages. That could not be right as the jurisdiction to decide the point had been conferred on the arbitrator before the architect took it upon himself to look into the same point. There could not be two arbiters of fact. This position was supported by the authority of *Engineering Construction v Attorney General* [1994] 1 SLR 687 which decided that the Superintending Officer under the PWD Form of Contract (a position equivalent to that of the architect under the Main Contract Conditions) had no power to make a determination as to whether an extension of time should be granted after an arbitrator had been appointed to decide on the issue of the party responsible for the delay in the completion of the works.

Conclusion

34 For the reasons given above, I was satisfied that the Certificate of Payment was not valid. Having considered the matter further, I am also satisfied that Interim Certificate no. 19 was not valid. Accordingly, there was no basis on which summary judgment could be given to the plaintiffs. There were valid disputes between them and the defendants and these had to be decided by arbitration in accordance with cl 14.1 of the sub-contract.