Hiap Hong & Co Pte Ltd v Hong Huat Development Co (Pte) Ltd
[2001] SGCA 17

Case Number : CA 104/2000

Decision Date : 16 March 2001

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ

Counsel Name(s) : Wu Chang-Sheng and Tay Mui Leng Sharon (Donaldson & Burkinshaw) for the appellants; Teh Kee Wee Lawrence (Rodyk & Davidson) for the respondents

Parties : Hiap Hong & Co Pte Ltd — Hong Huat Development Co (Pte) Ltd

Contract – Implied contracts – Whether term should be implied to make employers liable to contractors for defaults of architects in performance of certification duties

Professions – Architects – Building contract – Singapore Institute of Architects standard conditions – Nature of certification duties of architects – Duties of employers/owners in terms of certification duties of architects

(delivering the judgment of the court): This is the second appeal, involving the same matter and parties, which has come before this court. The first appeal, which is reported in [2000] 2 SLR 609, concerned the question of leave to appeal against a decision of an arbitrator under a Singapore Institute of Architects (`SIA`) building contract. Pursuant to the leave granted by us in the first appeal, the question of law, which in our view warranted the grant of leave to appeal to the High Court, was formulated to be the following:

> *What is the nature or extent of the term to be implied as regards the duties of (Hong Huat Development Co Pte Ltd) as employers in relation to the certifying functions of the architect under the SIA Conditions?*

This question came before Woo Bih Li JC who ruled against the contentions of the appellant herein (`Hiap Hong`). The present is Hiap Hong`s appeal against that ruling.

Background

In brief, the dispute arose out of an SIA contract (`the contract`) between Hiap Hong, the main contractors, and Hong Huat Development Co (Pte) Ltd (`Hong Huat`) the owners of the development. Hong Huat are the respondents herein. After the completion of the contract, Hiap Hong alleged that the architect engaged by Hong Huat had failed to discharge his certifying duties as laid down in the contract and that Hong Huat, as the employers of the architect, were thereby liable to Hiap Hong for the architect`s defaults. Specifically, the alleged defaults of the architect are the following:

(a) The architect had breached cl 30(1) by issuing the Interim Certificates of Payment (`ICP`) late and, in turn, Hong Huat was in breach of the same clause by making late payments. This had caused Hiap Hong to lose in all $397,788.88 in interest.

(b) The architect had breached cl 30(2) by issuing several ICPs which allowed greater amounts of retention money to be deducted than allowed for by cl 30(3). Thus, Hong Huat had withheld more than it was entitled to and this resulted in losses to Hiap Hong to the amount of $1,799.70.

(c) The architect had breached cl 30(4)(b) by failing to issue a certificate for one moiety of the total amounts retained by Hong Huat on the issuance of the Certificate of Practical Completion and cl 30(4)(c) by failing to issue a certificate for the residue of the amounts retained by Hong Huat. This had resulted in losses to Hiap Hong amounting to $26,351.40.

(d) The architect had breached cl 30(6) by failing to issue the Final Certificate before the expiration of three months from the end of the defects liability period. This had caused Hiap Hong to suffer a loss of $176,210.50.

These, and some other claims, were referred to arbitration in accordance with the contract. In this appeal, only these four claims are in issue. Hiap Hong contended that Hong Huat were liable for the defaults of the architect on the basis that there was an implied term in the contract which required Hong Huat to ensure that the architect would duly discharge his duties under the contract, and as the architect had failed to do so, Hong Huat were therefore in breach of this implied term.

The arbitrator found in favour of Hiap Hong on all these claims and gave his award accordingly. In respect of the alleged breach under cl 30(1), he held Hong Huat were liable because:

> *where an architect`s engagement involves a standard form of building contract with a procedure for the issuing of Certificates of payment, there is an implied term between the Employer and the architect (sic - contractor) that the architect will exercise his certification functions according to the terms of the contract; and he would do all things necessary to enable the contractor to carry out the works, and the Employer is thus liable for any breach of this duty on the part of the architect. Where the contract provides that an architect has power to certify as to such matters as interim payments, he must be neutral in that he must act fairly and impartially as between the Employer and the contractor. It has generally been accepted that until recent years ... the purpose of certification procedure in building contracts has been to provide an administrative machinery for payments; and the contract itself sets out the substantive entitlement of the contractor.*

He also held that similarly for cl 30(2), (3), (4) and (6), there was an implied term that Hong Huat would, as the employers, ensure the proper discharge by the architect of his duties under those clauses.

Decision below

In the court below, counsel for Hiap Hong argued that in relation to the certifying function of an architect under such an SIA contract, there were, in fact, two separate and distinct duties. The first was the act of issuing the certificate (duty (a)) and the second was the act of evaluating the amount due to the contractor under the contract (duty (b)). Hiap Hong contended that in relation to duty (a), the owner would be impliedly liable, irrespective of knowledge, if the architect had breached that duty. However, in respect of duty (b), to render the owner liable, the latter must know that the architect was in breach of his duty.

The judge below, having reviewed the two cases relied upon by Hiap Hong, namely, **Frederick Leyland & Co v Panamena Europea Navigacion Cia** [1943] 76 Lloyd LR 113 and **Perini Corp v Commonwealth of Australia** [1969] 2 NSWR 530(Unreported) , came to the conclusion that these two cases did not draw a distinction between the two types of duty. He said:

In my view such a distinction is untenable. Where the architect acts as a certifier he must act independently. No distinction can or should be drawn between the question whether he has wrongly delayed issuing a certificate and the question whether he has certified the wrong amount. Both pertains to his certifying function.

Following from this, the judge below gave the following answers to the specific question on which leave was granted to Hong Huat to appeal to the High Court:

(a) Hong Huat have an implied duty not to interfere with the discharge of the architect`s duty.

(b) Hong Huat have an implied duty to do all things reasonably necessary to enable the architect to discharge his duty properly. However, such an implied duty does not require Hong Huat to order or tell the architect what to do.

(c) Consequently, even if the architect had failed to issue various certificates on time, or over-certified the retention sums, Hong Huat are not liable for the architect`s default, if any, even if Hong Huat were aware of such defaults. Should I be incorrect on this point, and Hong Huat are liable provided they are aware of such defaults, it is for Hiap Hong to plead and prove such awareness which they did not do.

(d) Therefore, Hong Huat are not liable for interest if Hiap Hong received various sums of moneys late by reason of the architect`s default.

The appeal

Before us, much the same arguments were made. Counsel for Hiap Hong submitted that there was an implied term obliging Hong Huat, as the employers, to ensure that the architect issued the interim certificates according to the time frames specified in the contract. They contended for such an implied term on the following main grounds:

(i) the necessity for co-operation under the contract;

(ii) the common law doctrine of implied terms as encapsulated in the locus classicus **The Moorcock** [1889] 14 PD 64;

(iii) the mandatory term used in the relevant clauses.

It is not disputed that under the contract there was a need for co-operation between the parties. It is trite law that in appropriate circumstances, terms may be implied into a contract to implement the presumed intention of the parties. The real question here is, what is the proper term to be implied in the contexts of cl 30(1), (2), (3), (4)(b), (c), and (6) of the contract.

Hiap Hong`s contentions

The basis for Hiap Hong`s claim under cl 30(1) of the contract is that the architect was required to issue interim certificates monthly. This, the architect had failed to do. As the architect was employed by and was the agent of Hong Huat, the latter should be responsible for the default of the former.

Hong Huat knew that the contract provided for monthly interim certificates. Hong Huat also knew that the architect did not comply with that and yet did nothing to ask the architect to perform his duties. Under the contract, duty (a) is distinct from duty (b) (as described in [para]7 above). While in respect of duty (b) Hong Huat could not interfere with the architect`s discharge of that duty, Hong Huat should have ensured that the architect complied with duty (a). A similar reasoning applies with respect to the architect`s defaults under cl 30(4)(b), (c), and (6).

With respect to the default under cl 30(2) and (3), Hiap Hong contend that cl 30(3) sets the limit as to the amount which could be deducted for the retention fund. Here, the architect deducted more than what was permitted as retention sum under the contract. Hong Huat, as employers, should have ensured that the architect would properly discharge his duties.

Counsel for Hiap Hong submitted that the architect was engaged by Hong Huat to be in charge of and administer the construction project on their behalf in accordance with the contract and as the architect would take his instructions from, and was contractually answerable only to Hong Huat, the latter should ensure that the architect would properly perform his duties. The language of the relevant clauses are in clear mandatory terms: the architect is required to issue those relevant certificates at the specified times and is only allowed to deduct for the retention fund up to a specified limit. Thus, there should be an implied term that Hong Huat would ensure that the architect would duly discharge his duties of certification within the specified time frames and would not deduct for the retention fund anything more than what was permitted. Counsel contended that on such an implied term, it does not matter whether the owner is aware that his architect is in dereliction of his duties, otherwise the purposes and intent of the implied term, which is to give business efficacy to the contract, will be defeated.

Consideration of the authorities

It is settled law that an architect under a building contract is not an arbitrator. But he has a dual function. In the words of Lord Reid in **Sutcliffe v Thackrah** [1974] AC 727[1974] 1 All ER 859: `In many matters he is bound to act on his client`s instructions, whether he agrees with them or not; but in many other matters requiring professional skill, he must form and act on his own opinion.`

It is equally settled law that an owner and a contractor would have made their contract on the understanding that in all matters where the architect has to apply his professional skill and judgment, the architect will act in a fair and unbaised manner in applying the terms of the contract. Such matters will include the issue of certificates for payments and the grant of extension of time. While an architect under such a contract is the employer`s agent, in the exercise of his functions requiring skill and judgment, he must act fairly and professionally and neither party should seek to unfairly or unduly influence him in the discharge of those functions.

It is long recognised and accepted that the principle of implied term propounded in ***The Moorcock*** (supra), which is based on giving efficacy to a contract (epitomized by the hallowed phrase, `business efficacy`), may be a convenient means of repairing an obvious oversight. But that principle can be easily over-stretched. It may be a desperate expedient in a tenuous case. In **Shirlaw v Southern Foundries (1926)** [1939] 2 KB 206 at 227, where MacKinnon LJ enunciated the `officious bystander` test, he gave a warning against the temptation to invoke indiscriminately the statement of Bowen LJ in ***The Moorcock*** (supra). The `officious bystander` test is that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common, `Oh, of course!`.

The authorities do not clearly indicate whether the two tests, `business efficacy` and `officious bystander`, are the same or distinct and separate tests. In **Ashmore v Corporation of Lloyd`s (No 2)** [1992] 2 Lloyd`s Rep 620, Gatehouse J said that they are `distinct tests with the result that a term may sometimes be implied on the basis of one but not the other.` We think the following statement in ***Chitty on Contracts*** (28th Ed) Vol 1, [para]13-004 is probably a correct summary of the position:

> *In many cases, however, one or other of the parties will seek to imply a term from the wording of a particular contract and the facts and circumstances surrounding it. The court will be prepared to imply a term if there arises from the language of the contract itself, and the circumstances under which it is entered into, an inference that the parties must have intended the stipulation in question. An implication of this nature may be made in two situations: first, where it is necessary to give business efficacy to the contract, and, secondly, where the term implied represents the obvious, but unexpressed, intention of the parties. These two criteria often overlap and, in many cases, have been applied cumulatively, although it is submitted that they are, in fact, alternative grounds. Both, however, depend on the presumed intention of the parties.*

Be that as it may, in considering the question of implied terms, it must be borne in mind that the touchstone is necessity and not merely reasonableness. In the words of Scrutton LJ in **Re Comptoir Commercial Anversois and Power, Son & Co`s Arbitration** [1920] 1 KB 868 at 899-900:

> *The Court ... ought not to imply a term merely because it would be a reasonable term to include if the parties had thought about the matter, or because one party, if he had thought about the matter, would not have made the contract unless the term was included; it must be such a necessary term that both parties must have intended that it should be a term of the contract, and have only not expressed it because its necessity was so obvious that it was taken for granted.*

Of course, a term to be implied must always be equitable and reasonable. The court will imply a term if from the language of the contract and the surrounding circumstances an inference should be made that the parties must have intended the stipulation in question.

We shall now turn to examine the two cases relied upon by Hiap Hong. In ***Panamena*** (supra) the dispute concerned repairs carried out on a vessel. There, under the contract, the shipowners` surveyor (one T), was to inspect and exercise reasonable supervision of the repairs. Under cl 7 of the contract,

> *The owners shall pay for the repairs ... Payment shall be effected as required by the repairers on the basis of cash against expenditure during the progress of the work and the ascertained balance on the completion of the repairs and every such payment shall be effected promptly by the owners after the issue of a certificate by the owners` surveyor that the work has been satisfactorily carried out and on receipt of a certificate of the amount due issued by the Costs Investigation Branch of the Ministry of War Transport and certifying that same has been checked and found correct ... Such last mentioned certificates shall be accepted by the parties hereto as final and conclusive ...*

A certificate was issued by the Costs Investigation Branch (`CIB`) certifying the expenditure by the repairers. However, T refused to certify that the work had been satisfactorily carried out because he thought the cost was, in his opinion, excessive. The shipowners contended that without the certificate from T the repairers had no right to receive payment. It is important to note that T was actually the President and surveyor of the shipowner company. The Court of Appeal found that under cl 7 the surveyor`s certificate should only be confined to the question of quality and not the question of amount, which latter question was for the CIB to decide. But T took the position that he was entitled to consider both questions.

Scott LJ, in delivering the leading judgment of the Court of Appeal, noted that first the contract did not provide for arbitration to review the action or inaction of T. Second, in exercising the function of issuing the certificate, T should act with scrupulous independence of both parties. Third, the shipowners supported the stand taken by T and the shipowners were, in the words of Scott LJ, `in effect telling (T) that that was the right course for him to take and urging him to stick to his decision.` He held that in so acting, the shipowners had infringed their implied duty under the contract. The following was Scott LJ`s explanation why such a duty should be implied (at p 124):

> *The repairers were entitled to rely on the surveyor doing what the contract said he was to do, that is, keeping to matters of quality only. It seems to me plain that if the shipowners* ***had known that*** *he was departing from his proper function under the contract, it would have been their duty to stop him and tell him what the function was for which the contract provided, just as much so as if he had had in his possession a draft of the contract which gave him a wider field than was given by the executed contract, and the owners had realised that he was going wrong because his draft was an incorrect version of the real contract. It obviously was not the contractual duty of the repairers to bring him to book. It is equally obvious that they would count on his carrying out his proper function. In those circumstances I think the Court ought to imply an undertaking by the owners that* ***in the event of its becoming known to them*** *that their surveyor was departing from the function which both parties had agreed, i.e., was to perform, they would call him to book, and tell him what his real function was. [Emphasis is added.]*

It would be seen that the implied term was premised on knowledge on the part of the owners of the breach by the certifier. We would point out that in ***Panamena*** (supra) not only was there no arbitration clause pursuant to which the contractor could obtain speedy redress, there was clear evidence that the shipowners had full knowledge of what T was doing, and was in fact egging him on, as the following passage in the judgment of Scott LJ (at p 126) demonstrates:

> *I also accept the judges` conclusions on the whole of the evidence, both oral and contained in the letters, that Dr Telfer was acting not as an impartial expert, but in the interests of the defendants, in order to get for them a compromise on the amount of the plaintiffs` claim; and* ***that the defendants were encouraging him, and indeed influencing him, to persevere in those endeavours****. [Emphasis is added.]*

Next is the case of ***Perini*** (supra). There the plaintiff contracted with the Commonwealth of Australia to build the Redfern Mail Exchange. Under cl 35 of the contract the Director of Works, a Commonwealth official, was given the function to extend time for completion of the work as he should think adequate upon sufficient cause being shown. Macfarlan J of the New South Wales Supreme Court, while recognising the special position of the Director of Works, and that he was entitled to

consider departmental policy, felt that the Director would be wrong if he were to consider himself as being controlled by it and that in making his decision he must consider the rights and interests of the parties and arrive at a decision from the volition of his own mind. Macfarlan J also held that two terms, one a negative and the other a positive, should be implied in relation to the discharge by the Director of the duties as a certifier. The negative term is that the Commonwealth was bound not to interfere with the proper performance of the Director`s duties as a certifier. The positive term was that the Commonwealth was bound to insure that the Director did his duty. The rationale for implying the negative term was put as follows ((1969) 12 BLR 82 at 107):

> *I have already held that the duty of the Director when acting as Certifier was to act independently and in the exercise of his own volition according to the exigencies of a particular application. In my opinion it is not possible to assume that the parties to this agreement could have contemplated that he would act in manners other than those upon which they have agreed and expressed in cl 35 and that it is a consequence of this assumption that they shall have impliedly bound themselves one to the other that they would not do anything that would prevent him from a proper discharge of the mandate which contractually they have granted to him. It is not necessary for any purpose of this case to decide whether the plaintiff is so bound but I am of the opinion that the defendant is, and that the obligation of the defendant in this respect is more clearly seen because it was the employer of the Director who in his turn was bound to act as the defendant should direct.*

In relation to the positive term to be implied, Marfarlan J justified it on this basis ((1969) 12 BLR 82 at 111):

> *... **I will assume that the certifier, with the knowledge of both parties to the agreement, acted in breach of his obligation**. Could the Commonwealth in those circumstances say: `I will not do anything to insure that he carries out these duties`? In my opinion an application of the test stated in **The Moorcock** [1889] 14 PD 64; would require the answer that the Commonwealth was contractually bound to order him to carry out his duties. In my opinion the plaintiff and the defendant, being the parties bound by his agreement, are bound to do all co-operative acts necessary to bring about the contractual result. In the case of the defendant this is an obligation to require the Director to act in accordance with his mandate **if the defendant is aware that he is proposing to act beyond it**. [Emphasis is added.]*

Again, it will be noted that in relation to the positive implied term, knowledge by the owner that the certifier was going to act contrary to the contract, or was acting contrary to the term, was essential.

In this regard, a third case must also be referred to and this is **Lubenham Fidelities and Investment Co v South Pembrokeshire District Council** [1986] 33 BLR 39. There, the contract followed the JCT Standard Form and the dispute concerned interim certificates issued by the architects (Wigley Fox Partnership) where certain deductions were made, including liquidated damages. At the trial it was common ground that the deductions were wrongly made. The contractors protested against the deductions and withdrew their workforce and stopped work. The architects stood their ground. The trial judge accepted that the partner at the architectural firm made an honest mistake. The defendant employer, South Pembrokeshire District Council (`SPDC`), then sought counsel`s advice who said that the deductions for liquidated damages ought not to have been made.

The contract provided for arbitration. On 1 July 1977 the contractors gave notice of their intention to determine their employment under cl 26. This was followed on 17 July 1977 with a notice of determination. In the meantime on 15 July 1977, SPDC gave notice of determination under cl 25. Various claims were made in the action, including claims for damages against the architects for negligence. The official referee decided that the notice of determination of SPDC was valid but not that of the contractors.

One of the issues raised in ***Lubenham*** (supra) was whether SPDC were in breach in refusing to pay more (namely, without the deductions) than what was certified by the architects. Counsel for the contractors argued that as in ***Panamena*** (supra), where the repairers were held entitled to recover the full amount due to them notwithstanding the absence of one of the required certificates, here too the contractors should be entitled to full payment, without the deductions made by the architects.

May LJ, who delivered the judgment of the Court of Appeal said that in ***Panamena*** (supra), the term implied was that if the shipowners were aware that their surveyor was departing from his proper function under the contract, it was the duty of the shipowners to stop him and tell him what his function was thereunder. In ***Panamena*** there was, in fact, hindrance to the surveyor doing his duty. But in ***Lubenham*** (supra), SPDC never `hindered the architect from giving an interim certificate which properly complied with clause 30(1) and (2) of the building contract.` Unlike the position in ***Panamena*** , SPDC never suggested or requested the architect to make the deductions. The only problem was that the architect exercised his independent judgment wrongly. The Court of Appeal also held that in the light of the presence of a wide arbitration clause, there was no need or scope for the implication of any further term into the contract. A simple remedy was available to the contractors to go for arbitration and to have the interim certificates corrected.

Our analysis

The present appeal raises an issue which is quite unlike that in ***Panamena*** (supra), where the question was one relating to the entitlement to payment in the absence of the required certificate. It is also unlike that in ***Lubenham*** (supra), which concerned improper deductions in the interim certificates issued and whether the contractor was still entitled to full payment notwithstanding the wrong deductions made in the certificates. Here, the claim is for damages (on account of the loss of use of moneys) due to the delay on the part of the architect in issuing the interim and final certificates.

We would reiterate that in a building contract of this nature, it is clearly within the contemplation of the parties that they must co-operate to achieve the objects therein. Thus, the following statement as to implied term pronounced by Devlin J in **Mona Oil Equipment & Supply Co v Rhodesia Rlys** [1949] 2 All ER 1014 at 1018 is too well established to be disputed:

> *The formulation of the implied term in cases of this class depends, in my judgment, on the necessity for co-operation. Without co-operation the contract would lack business efficacy ... I think it can properly be implied ... that the defendants should instruct [T&C] to act as otherwise the relevant clause would be unworkable.*

It is also clear that for certain acts of the architect under the contract, the owners would be liable for the architect`s default. In ***Sutcliffe v Thackrah*** (supra) the dual functions of the architect were alluded to ([para]15 above). Similarly, in **London Borough of Merton v Stanley Hugh Leach** [1985]

32 BLR 51 where the disputes concerned delay in completion and claims for loss and expenses and where the contractor contended that the delay was almost wholly due to want of diligence and care and lack of co-operation on the part of Merton`s architect, Vinelott J drew a distinction between the duties of the architect as agent of the owner and where he exercises discretionary power. This was what he said (at p 78):

> *It is to my mind clear that under the standard conditions the architect acts as the servant or agent of the building owner in supplying the contractor with the necessary drawings, instructions, levels and the like and in supervising the progress of the work and in ensuring that it is properly carried out. He will of course normally though not invariably have been responsible for the design of the work. There are very few occasions when a building owner himself is required to act directly without the intervention of the architect. They are conveniently summarised in the interim award in the answer to Preliminary Issue No. 10. To the extent that the architect performs these duties the building owner contracts with the contractor that the architect will perform them with reasonable diligence and with reasonable skill and care. The contract also confers on the architect discretionary powers which he must exercise with due regard to the interests of the contractor and the building owner.* ***The building owner does not undertake that the architect will exercise his discretionary powers reasonably; he undertakes that although the architect may be engaged or employed by him he will leave him free to exercise his discretions fairly and without improper interference by him****. [Emphasis is added.]*

This dual nature of the duties of the architect was also highlighted by Diplock J in **Nolox v Swinton & Pendlebury Borough Council** [1958] 5 BLR 34 at 47 where the contract left a choice of working methods to the engineer:

> *His decision as to whether one method or another is satisfactory to him must, of course, be an honest one, but it does not seem to me that the Corporation warrants competency or skill, or warrant that his decision shall be reasonable.*

But, as rightly pointed out by the judge below, there is no authority which supports the dichotomy of the certifying function sought to be drawn by Hiap Hong, namely, the issue per se of the certificate on the one hand and the assessment as to the value to be given in each certificate on the other. The cases which we have referred to have only distinguished between duties which the architect is to perform as an agent of the employer under the contract and the duties upon which the architect is to exercise independent professional judgment and the latter includes the certifying function. The cases do not seek to further distinguish between the act of issuing certificates and the exercise of skill and judgment in determining the values to be stated therein. We do not see how the two aspects relating to certification can really be divorced. They are two sides of the same coin. The argument of Hiap Hong would appear to suggest that so long as the architect issues a certificate of `nil` value, that would meet their contention. If this is the extent of the failure, where then is the loss?

It is vitally important to bear in mind the nature of the duties of the architect when he is exercising the function of a certifier. As stated before, it is settled law that he is to act fairly and independently. He is not subject to the directions or instructions of either party although he must listen to both parties before he arrives at his own decision. Thus, in exercising the function of certification the architect cannot be the agent of the owners. The nature of that function is wholly inconsistent with the architect being an agent of the owner. In ***Emden`s Construction Law*** Issue

56/June 1999 at p II 275 the authors stated `When issuing certificates the architect or other certifier is not acting as the employer`s agent but must form and act on his own opinion.` In 4(2) ***Halsbury`s Laws of England*** (4th Ed Reissue) the learned authors stated that the architect`s `duties as certifier are different from his duties as agent or arbitrator although sometimes it is not easy to distinguish them.`

It is true that the architect is employed by the owner and to that extent the latter has control over him. But such control must necessarily be confined to matters in which the architect acts as the owner`s agent and not in relation to matters where the architect is accorded a special role under the contract and where he is expected to exercise independent judgment. In [para ]6.228 of ***Hudson`s*** the authors, after referring to matters on which the owner exercises control over the architect, go on to state that `the owner of necessity ceases to be entitled to control (the architect`s) activities in relation to the matter he is called upon to decide, whether as certifier or arbitrator.`

A refusal by a certifier to issue a certificate, or the withholding by the certifier of a certificate, can fall under one of two categories: (i) because nothing is due on the merits; or (ii) due to failure by the certifier to give any consideration to the matters upon which such issue will depend. Obviously for the first category of refusal or withholding, there could be no implied undertaking by the owner that his architect would certify. Even for the second category it is also doubted that there is such an implied undertaking. In **Neale v Richardson** [1938] 1 All ER 753 at 756-757 Slesser LJ said:

> *I cannot see why in principle the defendant should not be entitled to stand upon her contract and say that she has undertaken to pay when, and only when, the architect gives his final certificate ... To say that a person, by relying upon his legal rights has taken advantage of somebody else`s failure of duty, in a case* ***where there is no suggestion that he has prompted, or even acknowledged, that breach of duty****, seems to me to be contrary to principle, and if [* ***Kellett v New Mills Urban District Council*** *(Unreported)] is to be taken to provide more than another example of collusion, respectfully, I find myself unable to follow it. [Emphasis is added.]*

In this regard we note that the author of ***Hudson`s Building & Engineering Contracts*** (11th Ed) has stated that (at p 826):

> *... there is now little doubt that unreasonable refusal or prolonged delay by an A/E in giving his attention to a matter requiring his decision, satisfaction or a certificate must, as a matter of business efficacy, enable the absence of the certificate or lack of satisfaction to be disregarded, the correct basis for this being that a contractual obligation to obtain a certificate can only be construed as subject to an implied term that the A/E will be willing or able to do his part, and, indeed, an implied undertaking to the contractor on the part of the owner to the same effect.*

The authority which the author of ***Hudson`s*** has relied upon to make that proposition is ***Panamena*** (supra). But as mentioned above, in ***Panamena*** the certifier had misinterpreted the contract and furthermore his stand was very much supported and encouraged by the owner. One could almost say that there was collusion there.

In the present case, it is not alleged that Hong Huat had instigated or encouraged the architect not to issue any certificate. It is not Hiap Hong`s case that Hong Huat had in any way caused the

architect to delay the issue of any certificate. The case presented to the arbitrator, and as decided by him, was that there was an implied term that Hong Huat were liable for the failure of the architect to issue an interim certificate at the prescribed time irrespective of the reasons for their failure and irrespective of whether Hong Huat knew of the cause of the delay.

We are of the opinion that there is no justification for such a wide-ranging term to be implied, bearing in mind the independent nature of the certification function of the architect postulated under a building contract. It is not the duty of an owner/employer to oversee the architect in the discharge of that function. In fact, he should not be doing that as it could undermine the independent nature of that function.

Perhaps, it might be helpful if we revert to basics and apply the `officious bystander` test or the `business efficacy` test. What would the parties` response be if an officious bystander were to query them as to what would happen if the architect fails to issue the interim or other certificates within the time frames set out in the contract. We do not see any obvious answer. Indeed, we think that in all likelihood the parties would seek further clarifications before attempting any answer and we seriously doubt that the parties` response, after clarifications, will be the same.

Turning to the other test of `business efficacy`, we do not see how it could reasonably be said that business efficacy would demand that the owner direct the architect to get on with his job as set out in the contract, bearing in mind that in the exercise of the certification function, he should not be subject to the control of either party. If at all any direction could be made to the architect in this regard, it should come jointly from the owners and the contractors.

In any event, there is a very compelling reason why the terms sought to be implied by Hiap Hong ought not be made. Clause 34 contains a very wide provision for arbitration. It specifically mentions that the withholding by the architect of any certificate is a matter on which reference to arbitration may be made. Clause 34(2) expressly allows reference to arbitration during the progress of the work where the dispute relates to, inter alia, whether or not a certificate has been improperly withheld, or whether a certificate is withheld not in accordance with those conditions. In view of this, we do not see the need for any implied term on the ground of business efficacy as the parties, by the contract, have already provided for how such a dispute or problem is to be resolved. There is, therefore, no room for the term contended for by Hiap Hong to be implied. The machinery in the arbitration clause clearly recognises the independent nature of the certification process and only the arbitrator, upon a reference, can direct the architect in relation thereto. This was a recourse which was open to Hiap Hong but they had failed to avail themselves of it. In fact, to imply the term contended for by Hiap Hong would be inconsistent with what is provided for in the arbitration clause.

In our judgment, the decision in ***Panamena*** (supra) should be viewed with circumspection. First, the certifier there was the chief executive of the owner. Secondly, there was no provision for arbitration or any procedure to expeditiously review the decision of the surveyor. Thirdly, there appeared to be collusion between the owner and the certifier. Thus, the decision there should be looked at with these considerations in mind and, with respect, on those facts, we think the decision was well justified. Quite clearly, if a certifier wrongly, with the knowledge or connivance of the owner, refuses to issue a certificate, the contractor should, if there is an arbitration clause like the one in the present case, invoke that clause straightaway or, if there is no such clause, come to court to ask for the appropriate reliefs.

In ***Perini*** (supra), the certifier was the Director of Works, an official of the defendant, the Commonwealth of Australia. In [para]21-22 we have referred to the negative and positive terms which Macfarlan J implied into the contract. But the dispute there concerned the question whether

the extension of time applied for by the contractor should be granted and whether the certifier had in coming to his decision exercised an independent mind. It seems to us that it was because the Director of Works was an employee of the Commonwealth that the positive term was implied that the Commonwealth should ensure that the Director did his duty as certifier. We should add that while in ***Perini*** there was an arbitration clause for the resolution of all disputes arising out of the contract, the parties, however, agreed to waive it to allow the action to proceed.

This should suffice to dispose of the appeal. If, contrary to our views, and for the sake of argument, it is still permissible to imply a term into the contract, then to render the owners liable there must be clear knowledge on their part that the architect is in default of his certification duties. This is what was laid down in ***Panamena*** (supra) and ***Perini*** (supra). As indicated before, the non-issue of a certificate could mean either that in the view of the architect nothing is due or that the architect is dilatory. Counsel for Hiap Hong conceded in the court below that there is an industry practice that before an interim certificate is issued, the contractor would make a progress claim. Thus, the fact that there is delay in the issue of a certificate does not indicate to the owners the cause of it; nor should the owners be imputed with the knowledge of it.

In this connection, we would add that while the pleaded case of Hiap Hong before the arbitrator did not allude to any knowledge on the part of Hong Huat, neither did Hong Huat raise it as a pre-condition before there could be any liability on their part. The parties simply proceeded on the basis that if Hiap Hong should succeed in showing that the positive term should be implied, then damages for late interim certification should commence nine days after each claim submission. It would appear that by the course taken by the parties before the arbitrator, the question of knowledge was not an issue.

Judgment

In the result, we would affirm the answers given by Woo JC set out in [para]9 above. Accordingly, we dismiss the appeal with costs and the usual consequential orders.

Outcome:

Appeal dismissed.