Management Corporation Strata Title Plan No 1933 v Liang Huat Aluminium Ltd [2001] SGCA 41

Case Number : CA 125/2000

Decision Date : 25 May 2001

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Lai Kew Chai J; L P Thean JA

Counsel Name(s) : Lee Hwee Kiam Anthony and Chew Mei Lin Lynette (Bih Li & Lee) for the appellants; Goh Phai Cheng SC and Cheah Kok Lim (Ang & Partners) for the respondents

Parties : Management Corporation Strata Title Plan No 1933 — Liang Huat Aluminium Ltd

Contract – Contractual terms – Construction of deed – Principles of construction – Facts relevant to construction of deed – Whether deed in nature of indemnity or warranty

Credit and Security – Guarantees and indemnities – Contracts of indemnity – When cause of action arises – Whether breach of obligations under indemnity gives rise to action for damages at law

JUDGMENT:

Cur Adv Vult

Introduction

1. This appeal arose from a claim by the appellant, The Management Corporation Strata Title Plan No. 1933 (the MC), which is the management corporation constituted under the Land Titles (Strata) Act (Cap 158, 1999 ed) for the condominium known as Domer Park (the Condominium), against the respondents, Liang Huat Aluminium Ltd (Liang Huat) for damages for breach of contract under a deed made on 27 October 1997. The High Court dismissed the claim on the ground that the claim by the MC under the deed is one for an indemnity and such claim has not arisen, and that the MC is not entitled to claim damages for breach of contract. Against the decision, this appeal is now brought.

Background

2. The material facts that gave rise to the appeal are briefly these. The Condominium was developed and built by Hong Leong Holdings Ltd (Hong Leong). The main contractor engaged by Hong Leong to construct and complete the Condominium was Comtech Corporation Pte Ltd (Comtech). Comtech in turn engaged Liang Huat as the sub-contractor for the design, supply and installation of aluminium windows and glazing works (collectively called the Works) to be carried out in the Condominium. In respect of the Works, Comtech and Liang Huat executed a deed called INDEMNITY FOR ALUMINUM & GLAZING WORKS dated 27 October 1997 (the Deed) in favour of Hong Leong. We shall refer to the relevant terms of this Deed in detail in a moment.

3. After the completion of the Works, defects appeared and these were drawn to the attention of Liang Huat. On 20 March 1999, their representatives visited the site and inspected the defects complained of. However, Liang Huat refused to accept responsibility for such defects, and no rectification or remedial works were carried out by them. There was a further inspection of the Works on 11 May 1999, and after that inspection Liang Huat agreed to submit proposals to resolve the problem, but no proposal was submitted.

Legal proceedings

4. On 30 August 1999, Hong Leong by a deed of assignment assigned to the MC, inter alia, all their interests, rights and benefits under the Deed. On 15 September 1999, the solicitors for the MC wrote to Liang Huat demanding that they rectify the defects complained of, but no rectification at all was carried out. Some five months later, on 21 February 2000, a formal notice was given by the solicitors again requiring Liang Huat to rectify the defects, and a copy of this notice was sent to Comtech. Liang Huat continued to default in rectifying the defective works, and in consequence legal proceedings were brought against Comtech and Liang Huat claiming damages for breach of contract. Before the trial took place, Comtech went into liquidation, and the proceedings were then continued only against Liang Huat.

5. The trial judge found (a) that both the window handles and the powder coating of the window frames in the Condominium were defective; (b) that Liang Huat were liable to make good these defects under the Deed; and (c) that the defects were not caused by any act or omission of the MC, their servants or agents. Nor were they the result of any fair wear and tear. Turning to the terms of the Deed, the judge held that in substance the deed was in the nature of an indemnity and that was consistent with the title of the Deed. On that basis, he held that, as Liang Huat had failed to make good the defects, the MC was entitled under cl 4 of the Deed to proceed with rectifying and making good such defects and claim reimbursement for the costs and expenses incurred from Comtech and Liang Huat. However, the MC itself had not proceeded with rectifying and making good the defects and expended any monies therefor. On that ground, he held that the claim for reimbursement had not arisen. He further held that, on the construction of the terms of the Deed, the MC is not entitled to claim damages for breach of contract. Accordingly, he dismissed the MCs claim.

The appeal

6. The appeal essentially turns on the construction of the relevant provisions of the Deed. In approaching this issue, it is necessary to consider the following matters. First, the Deed bears the caption INDEMNITY FOR ALUMINIUM & GLAZING WORKS. This is only a title or a label. In our opinion, not too much importance should be attached to the title or label of the instrument. In construing the Deed, we should look at the substance thereof rather than the title or label. The textbook, *Interpretation of Contracts* (2nd edn) by Ken Lewison, QC at 8.07 states:

> The nature of the relationship between the parties is to be determined by the substance of the obligations into which they have entered; and if their contract is described by a label inconsistent with that substance, or if the parties incorrectly state what they believe to be the effect in law of their contract, the label or the statement will be rejected.

7. The second matter, which should be considered, is that the Deed by paragraph 3 states:

> 3. The Contractor [Comtech] and the Supplier [Liang Huat] have agreed to jointly and severally indemnify the Employer in the manner hereinafter appearing, against any failure of any defects in the workmanship, quality of materials or deterioration in the works to be applied to the Premiums.

This paragraph is relied heavily by Liang Huat in support of their contention that, on the true construction of the Deed, it is an indemnity. We have two observations on this point. First, a recital in an instrument can only assist in the construction of the substantive terms thereof; it cannot override or control the operation of the substantive terms, where such terms are clear and unambiguous. In *Walsh v Trevanion and Anor* (1850) 15 QB 733, 751, Patteson J laid down the following rule of construction on the recital in relation to the operative part of a deed:

> [W]hen the words in the operative part of a deed of conveyance are clear and unambiguous, they cannot be controlled by the recitals or other parts of the

> deed. On the other hand, when those words are of doubtful meaning, the recitals and other parts of the deed may be used as a test to discover the intention of the parties, and to fix the true meaning of those words.

Further, the relationship of a recital in a deed to its operative part was explained by Lord Esher MR in *Ex parte Dawes, re Moon* (1886) 17 QBD 275, 286 as follows:

> Now there are three rules to the construction of such an instrument. If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and operative part are clear, but they are inconsistent with each other, the operative part is to be preferred.

Secondly, the manner or the extent of the indemnity as recited in paragraph 3 of the Deed is expressed to be in the manner provided in the operative provisions of the Deed. It is therefore the operative provisions of the Deed to which we should have regard.

8. The third matter to bear in mind is that the court should place itself in thought in the same factual matrix as that in which the parties were at the time Deed was executed: per Lord Wilberforce in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as H E Hansen-Tangen)* [1976] 1 WLR 989, 997. In an earlier passage of his speech in that case, Lord Wilberforce said at pp 995-996:

> No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as "the surrounding circumstances" but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
>
> ..
>
> It is often said that, in order to be admissible in aid of construction, these extrinsic facts must be within the knowledge of both parties to the contract, but this requirement should not be stated in too narrow a sense. When one speaks of the intention of the parties to the contract, one is speaking objectively the parties cannot themselves give direct evidence of what their intention was and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties.

9. In this case, the background facts were that Hong Leong engaged Comtech as the main contractor to construct the Condominium, and Liang Huat were engaged by Comtech as the sub-contractor to carry out the design, supply and installation of the aluminium windows and glazing works in the Condominium. In connection with such works, Hong Leong required certain undertakings from Comtech and Liang Huat as to the making good of any defects in the Works and required Liang Huat to be joined as a party to these undertakings. The parties negotiated and eventually the Deed was prepared and agreed to by the parties and was executed by Comtech and Liang Huat in favour of Hong Leong. Substantially those were the background facts that could be relied upon in the construction of the Deed.

10. Liang Huat, however, go further. They refer to the discussions and the warranty dated 22 September 1997 submitted by Comtech and Liang Huat to Hong Leong which was rejected by Hong Leong, and also to the terms of such warranty. These matters are relied by Liang Huat to support their contention that the Deed is intended to be an indemnity. In our opinion, all these matters are inadmissible in construing the Deed. These matters may be the objective facts in the sense that they had actually happened and were not disputed, but they were evidence of the subjective intentions of the parties prior to the execution of the Deed. They were matters raised or discussed in the negotiation leading to the formation of the Deed: the negotiation took the form of a submission of a warranty by Comtech and Liang Huat and the rejection thereof by Hong Leong. In *Prenn v Simmonds* [1971] 3 All E R 237, 241, Lord Wilberforce said:

> In my opinion, then, evidence of negotiations, or of the parties intentions, and a fortiori of Dr Simmondss intentions, ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the genesis and objectively the aim of the transaction.

More recently, we have the decision of this Court in *Pacific Century Regional Development Ltd v Canadian Imperial Investment Pte Ltd* (6 April 2001) (as yet unreported), in which it was held that the evidence of what was understood to be the mutual understanding in the negotiation of the contract in question was inadmissible in construing the contract. The Court there approved the following passage from Vol. 1 of *Chitty on Contracts*, (28th edn) at 12-117:

> On the other hand, although evidence of the facts about which the parties were negotiating is admissible to explain what meaning was intended, *the court is not entitled to look at what the parties to the contract said or did whilst the matter was in negotiation nor are drafts or preliminary agreements admissible in aid of its interpretation*, except where it is sought to rectify the document or to show that the parties negotiated on an agreed basis that the words used bore a particular meaning. Evidence will also not be admitted to show what were the parties subjective intentions with respect to the words used. "The general rule seems to be that all facts are admissible which tend to show the sense which the words bear with reference to the surrounding circumstances of and concerning which the words were used, but that such facts as only tend to show that the writer intended to use words bearing a particular sense are to be rejected. [Emphasis is ours]

The Deed

11. We now turn to the relevant provisions of the Deed, namely cll 2, 3 and 4, which are as follows:

> 2. In the event of any deterioration or defects (as shall be determined by the Employer) in the workmanship, quality of materials, installation, watertightness or deterioration appearing in the Works, the Contractor shall forthwith upon notice given to either of them and within such time as the Employer may direct, effect remedial works to the defective area or areas and shall make good to the absolute satisfaction of the Employer all damages to surface finishes including but not limited to plaster, panelling, tiling and other similar works, mechanical, electrical or other installations or other property arising directly or indirectly out of the said defects.
>
> 3. In the event that remedial works undertaken by the Contractor or the Sub-

> Contractor prove ineffective as determined by the Employer whose decision shall be final and conclusive, or are not to the satisfaction of the Employer, the Contractor and the Sub-Contractor shall effect such additional works in such a manner and within such time as the Employer may direct and shall carry out all test, as directed by the Employer until all the defects have been remedied to the absolute satisfaction of the Employer.
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> 4. Should the Contractor or the Sub-Contractor fail to perform their obligations under Clause 2 and 3 above within the time directed by the Employer or in the absence of such direction, within a reasonable period, the Employer shall entitled to remedy the said defects and the Contractor and the Sun-Contractor shall forthwith on demand reimburse the Employer all costs and expenses incurred by the Employer for making good the said defects including all legal costs on a Solicitor and Client basis incurred by the Employer in enforcing this Clause.

12. In construing these clauses, the judge below appeared to take the view that, because the Deed is in the nature of an indemnity, in the event of Comtech or Liang Huat failing to perform their obligations under cll 2 and 3, the MCs right against Comtech and Liang Huat is confined to only claiming a reimbursement under cl 4 for the costs and expenses incurred by the MC in making good the defects. He said at 19 of his grounds of judgement:

> 19. On examination of the terms of the deed, I found that the substance of the deed was also in the nature of an indemnity, which was entirely consistent with the title given. Under clause 4, should the contractor or the subcontractor fail to perform their obligations under clauses 2 and 3, the employer shall be entitled to claim reimbursement from the contractor and subcontractor of all its costs and expenses for making good the defects, including the legal costs for enforcing clause 4 on a Solicitor and Client basis.

He therefore arrived at the conclusion that, until the MC has remedied the defective works and paid for the costs and expenses in so doing, the claim of reimbursement under cl 4 does not arise.

13. The basis for this conclusion is that the judge appeared to take the view, and that was the contention advanced by Liang Huat which was accepted by him, that the nature of the indemnity under the Deed is an indemnity against payment, and hence until the MC has made the payment, the cause of action under the Deed does not accrue. Such a proposition is much too broad, and this is certainly not the position in equity. In equity, a contract of indemnity can be specifically enforced by the one indemnified, as soon as the liability covered by the indemnity has arisen. The indemnified need not have to pay out first before he seeks relief. The authorities in support are in abundance. In *Johnston v Salvage Association* (1887) 19 QBD 458, 460-461, Lindley LJ said:

> In equity a contract to indemnify can be specifically enforced before there has been any such breach of the contract as would sustain an action at law. In equity the plaintiff need not pay and perhaps ruin himself before seeking relief. He is entitled to be relieved from liability.

In *British Union and National Insurance Company v Rawson* [1916] 2 Ch 476, 481-482, Pickford LJ said:

> It has been stated in several cases that at common law an indemnity is confined to protecting the indemnified against actual loss and not against liability, for example, *In re Perkins* [1898] 2 Ch, 182, though this was doubted by Scrutton J in *In re Law Guarantee Trust and Accident Society* [1914] 2 Ch 617 on the authority of *Ashdown v Ingamells* 5 Ex D 280. However this may be, the

> indemnity is not so confined in equity (see *Lacey v Hill* L R 18 Eq 182 and the two cases above mentioned), and in equity the indemnified may call upon the indemnifier to pay the debt either to him or to the principal creditor before having paid himself, and if paid to him the indemnifier has no concern with what he does with the money.

The position was summarised by Lord Brandon of Oakbrook in *Firma C-Trade S.A. v Newcastle P & I Association* [1991] 2 AC 1, 28 as follows:

> There is no doubt that before the passing of the Supreme Court of Judicature Acts 1873 and 1875, there was a difference between the remedies available to enforce an ordinary contract of indemnity (by which I mean a contract of indemnity not containing any express "pay to be paid" provision) at law on the one hand and in equity on the other. At law the party to be indemnified had to discharge the liability himself first and then sue the indemnifier for damages for breach of contract. In equity an ordinary contract of indemnity could be directed to be specifically performed by ordering that the indemnifier should pay the amount concerned directly to the third party to whom the liability was owed or in some cases to the party to be indemnified. *Johnston v Salvage Association* (1887) 19 QBD 458, 460, *per* Lindley LJ; *British Union and National Insurance Co v Rawson* [1916] 2 Ch 476, 481-482, *per* Pickford LJ. There is further no doubt that since the passing of the Supreme Court of Judicature Acts 1873 and 1875 the equitable remedy has prevailed over the remedy at law.

14. In the case of an express indemnity such as that in the present case, the question when a cause of action arises depends on the relevant terms of the indemnity and the construction of such terms. In *Telfair Shipping Corporation v Intersea Carriers S A* [1985] 1 WLR 553, Neill J succinctly summarised the position as follows:

> In such a case [i.e. the case of an express indemnity] the extent of the indemnity and the time at which the cause of action arises will depend on the construction of the contract. If the indemnity is an indemnity against liability, as it was held to be in *Bosma v Larsen* [1966] 1 Lloyds Rep 22, the cause of action will come into existence when A incurs a liability to B. It may be that in certain circumstances a liability may be incurred for this purpose when the liability is still merely contingent: see *Forster v Outred & Co* [1982] 1 WLR 86. If, however, the indemnity is a general indemnity, as the relevant clause was held to be in *R & H Green & Silley Weir Ltd v British Railways Board (Note)* [1985] 1 WLR 570, then time will not begin to run against A for the purpose of pursuing his indemnity against C until As liability to B has been established and ascertained: .

15. Turning to the case at hand, the judge below, having considered very briefly the obligations of Comtech and Liang Huat under cll 2 and 3 of the Deed, went on to construe cl 4 thus:

> 28. ..... Clause 4 stipulates clearly what is to happen if the contractor or subcontractor fails to perform any of their obligations under clauses 2 and 3. The plaintiffs shall be entitled thereafter to remedy the defects and subsequently claim reimbursement (plus all legal costs of enforcement) from them.
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> 29. Clause 4 is thus the machinery by which the indemnity under the deed is to operate for any breach of clause 2 or 3. The plaintiffs should not be allowed to circumvent the deed of indemnity by suing for damages for breach of clause 2 or

3 *per se* as if the deed were a warranty.

30. In this deed, the contractor and subcontractor had volunteered to subject themselves only to an indemnity and no more, provided that they are allowed the right to do the remedial works themselves first. The entire mechanism or the mode of indemnity is very clear. Only if they for some reason are unable to remedy the defects or they fail to do so, then the plaintiffs have the right to claim an indemnity for the costs of rectification, which can either be done by the plaintiffs themselves or by another third party contractor. This was the manner agreed to by the contractor and subcontractor by which their risks under the indemnity were to be distributed or allocated.

31. Unlike a claim for damages which can be at large, the amount payable under the indemnity has been explicitly limited to the costs of making good the defects plus legal costs on an indemnity basis.

32. Since the plaintiffs have not expended any monies to remedy the defects, they cannot claim any reimbursement under the deed of indemnity as yet. The plaintiffs claim under the indemnity is thus entirely premature and their action has not yet accrued against the 1st or 2nd defendants.

16. With respect, we have difficulty in accepting this construction and the effect of cl 4 of the Deed. Even if the Deed is in the nature of an indemnity, it does not necessarily follow that, in the event of a breach of cll 2 or 3 on the part of Comtech or Liang Huat, the MCs right against them is confined only to a claim for reimbursement under cl 4. In our opinion, on a proper construction of cll 2, 3 and 4, such a conclusion is not warranted.

17. We consider first cll 2 and 3 of the Deed. These clauses impose obligations on Comtech and Liang Huat with reference to making good any defects in the Works. Under cl 2, in the event of any deterioration or defects in the workmanship, quality or materials, installation, watertightness or deterioration appearing in the Works, they are obliged, upon notice being given to either of them, to effect the remedial works to the defective area or areas and make good all damage to the surface finishes to the absolute satisfaction of the MC. Clause 3 imposes a further obligation on the part of Comtech and Liang Huat. It obliges Comtech and Liang Huat to carry out additional remedial works, if the initial remedial works undertaken by them prove to be ineffective and not to the satisfaction of the MC, and this obligation remains, until all the defects are remedied to the absolute satisfaction of the MC. Two significant features should be noted in both these clauses. First, both the clauses are couched in mandatory or obligatory language requiring Comtech and Liang Huat to carry out and do certain acts and things in certain events. They are clearly in the nature of an agreement or undertaking, and a breach of either of these clauses gives rise to an action for damages at law. Secondly, neither of the clauses uses the term indemnify or indemnity or words to that effect in relation to their obligations to the MC.

18. Turning to the facts, the judge below found that there were defects in the Works, which neither Comtech nor Liang Huat had rectified and made good. Therefore, they were, and still are, in breach of cl 2 of the Deed. The MCs claim was based entirely on their breach of cl 2. Now, construing cll 2 and 3 alone, such breach of obligation on their part gave rise to an action for damages at law. There is no doubt that the MC has a right at common law to sue them, and in particular, in this case, Liang Huat, for damages for breach of contract. If this is correct, as we think it is, then the question is: how would this position be affected by the presence of cl 4? The answer must turn on what precisely cl 4 provides.

19. We now turn to cl 4. It should be noted first that cl 4 does not impose any obligation on Comtech or Liang Huat. Neither does it impose any obligation on the MC. Second, all that the clause does is to give to the MC a certain right, in the event that either Comtech or Liang Huat should fail to perform their obligations under cll 2 and 3. That right entitles the MC to step in to remedy the defects and thereafter to be reimbursed by Comtech and/or Liang Huat in respect of all costs and expenses incurred in remedying such defects. At the risk of repetition, we advert again to the material wording of this clause:

> Should the Contractor or the Sub-Contractor fail to perform their obligations under Clause [sic] 2 and 3 above within the time ... the Employer shall [sic] *entitled* to remedy the said defects and the Contractor and the Sub-Contractor shall forthwith on demand reimburse the Employer all costs and expenses incurred by the Employer for making good the said defects including .
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> [Emphasis is ours]

Now, that being the provision of cl 4 and construing cll 2, 3 and 4 together, the crucial question is: has cl 4, by its express terms or by necessary implication, taken away the right, which the MC has at law, namely the right of action for damages for breach of contract? The answer is clearly a resounding No. There is nothing in cl 4, expressly or impliedly, which suggests that such a right of the MC has been taken away.

20. In *P & M Kaye Ltd v Hosier & Dickinson Ltd* [1972] 1 WLR 146, 166, Lord Diplock in discussing the question of a building owner recovering consequential loss or damage arising from the contractors breach of contract in respect of defects in workmanship or materials, said at pp 165 166:

> At common law a party to a contract is entitled to recover from the other party consequential damage of this kind resulting from that other partys breach of the contract, unless by the terms of the contract itself he has agreed that such damage shall not be recoverable. In the absence of express words in the contract a court should hesitate to hold that a party had surrendered any of his common law rights to damages for its breach, though it is not impossible for this to be a *necessary* implication from other provisions of the contract.

His Lordship then continued:

> I can read no such *necessary* implication into condition 15 or any other condition of the R.I.B.A. contract. the contractor is under an obligation to remedy the defects in accordance with the architects instructions. If he does not do so, the employer can recover as damages the cost of remedying the defects, even though this cost is greater than the diminution in value of the works as a result of the unremedied defects.
>
> But there are no express words in condition 15 which deal with consequential damage at all, notwithstanding that the condition is dealing with breaches of contract, viz., "materials or workmanship not in accordance with this contract," discovered in circumstances in which it could be foreseen they would be likely to cause some consequential damage beyond that which is capable of mitigation by remedying the defects. I can see nothing in the provisions of condition 15 to which I have referred to give rise to any *necessary* implication that the employer was surrendering his right at common law to recover damages for any consequential loss sustained by him as a result of latent defects discovered during the defects liability period.

21. We find the case of *Pearce And High Ltd v John P Baxter and Anor* [1999] BLR 101 of some assistance. There, the plaintiff was a building contractor, and carried out some construction works for the defendants at their home. The works were carried out and the architects certificate of practical completion was issued. The defendants, however, refused to pay the amount due, and the plaintiff commenced legal proceedings in the County Court to recover the amount due. The defendants resisted the claim and in turn counterclaimed damages for defects and omissions in the works. With regard to the defects, cl 2.5 of the building contract provided as follows:

> Any defects, excessive shrinkages or other faults which appear within six months of the date of practical completion and are due to materials or workmanship not in accordance with the Contract or frost occurring before practical completion shall be made good by the Contractor entirely at his own cost unless the Architect shall otherwise instruct.
>
> The Architect shall certify the date when in his opinion the contractors obligations under this clause 2.5 have been discharged.

The recorder of the County Court, who heard the case, held, inter alia, that compliance with cl 2.5 was a condition precedent to the recovery of damages for breach of contract in respect of the defects claimed by the defendants. He said at p 9 of his judgment:

> if a building owner does not notify defects within the defect liability period then the contractor having been denied the opportunity of returning to the building, cannot thereafter be sued in respect of patent defects which are not notified to him.

The defendants appealed and the Court of Appeal, among other things, allowed the appeal on this point and held that cl 2.5 did not take away the defendants right to sue for damages for breach of contract at common law. Evans LJ, who delivered the main judgment of the court with the other two members of the court concurring with what he said, considered the effect of cl 2.5 thus, at p 104:

> The Recorder proceeded from his finding that notice should be given, to hold that if no notice is given during the period then the employer loses all right to recover damages for the defects which have become apparent. This view, if it is correct, gives the clause a particular potency. The existence of the defect means that there was a breach of contract by the contractors. That clearly is the effect of the opening words. That breach gave the employers, subject to the contract terms, a right to recover damages, but they would have no right to require the contractors to rectify the defect, apart from the theoretical and speculative possibility that in certain circumstances the court might order specific performance of the contractors obligation which had been broken. Clause 2.5 gives the employers an express right to require the contractor to return, as well as to the contractor himself the right to return and repair the defect himself, if he is willing to do so. *There are no words of exclusion, yet the effect of the clause, if the judgment is correct, is that the employers right to damages in respect of the cost of repairs is lost for all time. It is unnecessary to cite authority for the proposition that such a right cannot be excluded except by clear, express words or by a clear and strong implication from the express words used.*
>
> Mr Gibson submits for the contractors that if clause 2.5 does not have this effect, then it adds nothing to the parties existing rights. I cannot agree. It gives both parties the express rights referred to above, both of which are likely to be a great practical value to the party concerned, *without impinging on the employers common law right to recover damages for the contractors previous breach*.
>
> [Emphasis is ours]

22. We find further support in the following passage in Vol. 1 of *Hudsons Building and Engineering Contracts* (11th edn) at 5-053:

> It is always a question of construction whether the rights under the maintenance clause are intended to supplant the right to damages at common law altogether. In the absence of express provision, the remedies under these clauses are in addition to and not in substitution for the common law rights, and even where the defects have appeared within the period the owner may sue for damages rather than call on the contractor to do the work, subject, in that event, to the possibility of the owners damages being limited, if he has acted unreasonably in the light of the discussion in the preceding paragraphs, to the cost to the contractor of doing the work at that time, rather than the possibly greater cost of bringing in another contractor either then or at a later date.

23. In our judgment, the MC has a right of action against Liang Huat for damages for breach of contact and this right has not been taken away by cl 4 of the Deed. We therefore allow the appeal with costs here and below, set aside the judgment below. We enter interlocutory judgment in favour of the MC with damages to be assessed and award interest on the damages so assessed at the rate of 6% per annum from the date of the writ to the date of final judgment. The deposit in court as security for costs, with interest, if any, is to be refunded to the MC or its solicitors.

L P Thean
Judge of Appeal

Chao Hick Tin
Judge of Appeal