The Management Corporation Strata Title Plan No 1933 v Comtech Corporation Pte Ltd and Another
[2000] SGHC 207

Case Number : Suit 119/2000

Decision Date : 11 October 2000

Tribunal/Court : High Court

Coram : Chan Seng Onn JC

Counsel Name(s) : Anthony Lee and Lynette Chew (Bih Li and Lee) for the plaintiffs; Seetow Soo Ling (Patrick Wee & Partners) for the 1st defendants; Goh Phai Cheng and Cheah Kok Lim (Ang & Partners) for the 2nd defendants

Parties : The Management Corporation Strata Title Plan No 1933 — Comtech Corporation Pte Ltd; Liang Huat Aluminium Limited

JUDGMENT:

Gounds of Judgment

Background facts

1. The plaintiffs are a body corporate constituted under the Land Titles (Strata) Act (Cap.158) to manage and maintain the common property of the strata title development known as Dormer Park ('the condominium').

2. The condominium was developed and built by Hong Leong Holdings Ltd ('the developer'). The 1st defendants were the main contractors engaged by the developer to construct the condominium. The 2nd defendants were the nominated subcontractors for the design, supply and installation of aluminium windows and glazing works ('works').

3. The 1st and 2nd defendants jointly and severally executed a Deed of Indemnity dated 27 October 1997 ('deed') for the works in favour of the developer for a period of 10 years commencing from 13 April 1995, the date of issue of the completion certificate. The deed was subsequently assigned to the plaintiffs under a deed of assignment dated 30 August 1999.

Defects

4. The plaintiffs alleged that the works were defective for the following reasons:

> (a) parts of the window frames in the condominium had faded and/or discoloured due to the defective powder coating; and
>
> (b) the window handles were faulty as they broke easily.

5. The plaintiffs' solicitors wrote to the 1st and 2nd defendants on 21 February 2000 giving them notice of the defects. They stated that legal action would be taken immediately if these defects were not rectified within 14 days. The present action was instituted on 5 April 2000 when the defendants failed to rectify the defects.

6. At the commencement of the trial, I was informed that the 1st defendants had gone into liquidation. The plaintiffs thus decided to proceed solely against the 2nd defendants.

7. After hearing evidence on the disputed defects and the causes associated with them, I found that (a) both the window

handles and the powder coating of the window frames were indeed defective, and (b) the 2nd defendants were liable for these defects under the deed. In my opinion, the defects were not caused by any act or omission of the plaintiffs, their servants or agents. Neither were they the result of fair wear and tear.

8. The 2nd defendants counterclaimed for rescission of the deed on the basis that it was given by mistake. They contended that the deed was invalid and of no effect. At the trial, this issue was not seriously canvassed. In my judgment, the 2nd defendants' counterclaim had no merit and I accordingly dismissed it.

9. I would not go into the reasons for dismissing the counterclaim and my finding on the defects since the 2nd defendants did not appeal. The plaintiffs however appealed against the dismissal of their claim. I now give my reasons.

Deed of Indemnity

10. Central to my decision was the construction of the deed, the relevant parts of which are as follows:

> WHEREAS:
>
> ….
>
> 3. The Contractor [1st defendants] and the Sub-Contractor [2nd defendants] have agreed to jointly and severally indemnify the Employer [Hong Leong Holdings Ltd] in the manner hereinafter appearing, against any defects in the design workmanship, quality of materials, uneven fading, peeling, discolouration, watertightness or deterioration in the works to the Premises.
>
> THE CONTRACTOR AND THE SUB-CONTRACTOR HEREBY JOINTLY AND SEVERALLY AGREE WITH THE EMPLOYER AS FOLLOWS:-
>
> 1. The statements and representations in the Recital hereinabove stated are true and accurate in all respects and this Indemnity shall have full force and effect notwithstanding any limitation or termination of the Contractor's liability and/or responsibility under the Contract.
>
> 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.
>
> 4. Should the Contractor or **the Sub-Contractor** fail to perform their obligations under Clause 2 and 3 above within a reasonable period, the Employer shall 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 all legal costs on a Solicitor and Client basis** incurred by the Employer in enforcing this Clause.

….

7. The obligations of the Contractor and Sub-Contractor under this Indemnity are joint and several and the Employer shall be entitled to enforce the Indemnity against either the Contractor or the Sub-Contractor or both; any failure by either the Contractor or the Sub-Contractor to perform such obligations not excuse or discharge the other from performing the same.

This Indemnity shall be valid for the period of ten (10) years calculated from the issue of the Completion Certificate of the Premises under the terms of the Contract. (Insertion of '**' and all manner of emphasis are mine.)

Missing words

11. Plaintiffs' counsel pointed out that the words "and the sub-contractor" ('the missing words') were inadvertently left out of clause 2 at the location marked with a double asterisk. The 2nd defendants prepared the deed based on the standard form provided by WT Partnership, the Quantity Surveyors and Construction Cost Consultants. Present in that standard form were the missing words, from which an inference could be drawn that they were inadvertently omitted. There was no evidence that the 2nd defendants had intentionally left out the missing words when they copied the clauses exactly from the standard form. I also found other glaring grammatical errors in clauses 4 and 7 where the words "be" and "shall" respectively were omitted but were present in the standard form. They were probably the result of clerical errors.

12. The construction of the deed clearly calls for the missing words to be read in. Otherwise the words *'to either of them'* will be otiose in the following part of clause 2:

"the Contractor (**) shall forthwith upon notice given to either of them".

13. Clause 3 states that if the remedial works undertaken by either '*the Contractor or the Sub-Contractor prove ineffective*' [and I think it must be referring to the remedial works done under clause 2], the contractor and subcontractor shall effect additional works as directed by the employer. It is within the contemplation of clause 3 that the remedial works in clause 2 can alternatively be performed by the subcontractor. If clause 2 were to be construed as **not** placing any obligation to repair on the subcontractor at all, then the words "*or the Sub-Contractor*" in the first two lines of clause 3 would be meaningless. This again supports the contention that those missing words should have been there.

14. Being a joint and several indemnity, it is not surprising that the deed places the same obligations on both the contractor and subcontractor throughout. Consequently, it made sense to place the same obligation on the subcontractor to perform the remedial work upon notice given to him in clause 2.

15. However much I would like to construe the deed strictly, I found that the deed must be read such that those missing words are present. In my opinion, it was a clerical error made in copying from the standard form.

16. In any event, this was not material to the decision. On the facts, the plaintiffs had notified both the contractor (i.e. 1st defendants) and the subcontractor (i.e. 2nd defendants) of the defects. Neither of them did any remedial work. Being jointly and severally liable, the 2nd defendants would also be liable if the 1st defendants failed to carry out the repairs. Under clause 4, the 2nd defendants would have to indemnify the present assignees of the deed for the cost of making good the said defects,

whether or not those missing words were read into the deed.

Was the deed an indemnity or a warranty

17. Plaintiffs' counsel submitted that although the deed was titled "Indemnity for Aluminium and Glazing Works" and the word "indemnify" was used at recital 3, nevertheless in substance it was a warranty and not an indemnity. He contended that it was highly unusual in the deed to indemnify the plaintiffs against defects. Counsel urged me to treat it as a warranty.

18. I found it difficult to construe the deed as a warranty when the deed itself had made it so explicit that it was an indemnity. The words "indemnity" and "indemnify" were used no less than 11 times in the 3 page deed. In contrast, the word "warranty" never appeared.

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.

20. I therefore concluded that on a true construction, it was a Deed of Indemnity and not a Deed of Warranty.

Separate and Distinct Obligations

21. Plaintiffs' counsel submitted that clauses 2, 3 and 4 were separate and distinct. There was no basis to suppose that 'and' was to be added at the end of clauses 2 and 3 when they end with a full stop. Thus the clauses must be read disjunctively and not conjunctively. Accordingly, any failure or refusal of the 1st or 2nd defendants to perform their obligations to remedy the defects under clause 2 of the deed immediately gave rise to a cause of action and a claim for damages against the two defendants.

22. The plaintiffs' claim here was based entirely on a breach of the express terms of the deed. The breach stemmed from the 1st and 2nd defendants refusal to take any steps to rectify or replace the discoloured window frames and window latches within the 14 days stipulated by the plaintiffs in their notice to them dated 21 February 2000. It was not disputed that both defendants were served notice of the defects in accordance with clause 2 of the deed.

23. In the course of the trial, the plaintiffs clarified that they were not relying on any breach of clause 4 of the deed, which they said gave them an additional right against the defendants but did not take away their remedies for breach of either clause 2 or 3.

24. Since the plaintiffs had not done any remedial works themselves, they accepted that they could not claim any reimbursement under clause 4 simply because no costs and expenses for remedial works were incurred as yet. However, they maintained that they could still claim damages (to be subsequently assessed) for breach of clause 2 of the deed at this moment without resorting to clause 4.

25. It was argued that if the remedy for clauses 2 and 3 were to be limited to clause 4, then it was tantamount to having an exemption clause restricting the liability of the defendants. As the deed had to be construed strictly and since there were no clear words taking away the rights of the plaintiffs, it was submitted that the said clauses of the deed were not to be construed as being restricted in this manner.

Construction of the terms of the Deed of Indemnity

26. Defendants' counsel argued that until the plaintiffs had paid for remedial works, the issue of reimbursement under clause 4 did not arise. The nature of the indemnity under the deed is an indemnity against payment.

27. I substantially agreed with the submissions of counsel for the 2nd defendants that clauses 2, 3 and 4 have to be read together. These three clauses are interrelated and are interdependent.

28. When defects arise, the plaintiffs cannot simply sue for damages under the deed. First the plaintiffs (as the assignees of the employer) must give notice to either the contractor or subcontractor who will then have to remedy the defects forthwith as provided for in clause 2. The manner of rectification is left to the contractor or subcontractor as the case may be. If the rectification proves ineffective, then the contractor and subcontractor will have no alternative but to effect additional works in the manner as directed by the plaintiffs under clause 3. But at least, they still have the opportunity to carry out the remedial works although they now have to comply with the directions and instructions of the plaintiffs. This appears logical to me because the contractor and subcontractor have been unsuccessful earlier with their own methods. 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.

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.

33. A few more scenarios to test the operation of clauses 2, 3 and 4 will make it reasonably obvious that the clauses operate together. If the subcontractor were to carry out some repairs under clause 2, which prove ineffective, can the plaintiffs immediately sue for damages? If indeed each is a separate and distinct clause breach of which gives rise to damages, then the plaintiffs will be able to sue for damages immediately without clause 3 coming into play. I do not think that is a fair construction of the deed. I hold the view that the contractor or subcontractor must still be given the chance to remedy the defects again under clause 3, although this time they have to follow the plaintiffs' instructions on the manner of rectification. It is only after the contractor or subcontractor has exhausted all avenues available that they become liable to indemnify the plaintiffs in the manner provided under clause 4.

34. Similarly, if one stretches the argument of plaintiffs' counsel, it will appear that recital 3 and clause 1 read together permits the plaintiffs to sue for damages the moment defects arise regardless whether the contractor and subcontractor have been given the chance to remedy the defects at their own expense first. I think that is a wrong construction of the terms of the deed.

35. The fact that reimbursement of legal costs on a 'Solicitor and Client' basis is provided for only in clause 4 suggests that the

sole remedy for breach of clauses 2 and 3 resides in clause 4. At the trial, I asked plaintiffs' counsel what sort of legal costs would the plaintiffs be entitled to for a successful claim based on a breach of clause 2 alone. He submitted that it would only be 'party and party' costs. To my mind, that seems incongruous having regard to the entire scheme of the deed of indemnity. It must be contemplated that there shall be full indemnity from the contractor or subcontractor with regard to all the legal costs of enforcement on a 'Solicitor and Client' basis, which I shall interpret as an indemnity basis. Since this is provided for only under clause 4, which explicitly refers to the contractor's or subcontractor's failure to perform under clauses 2 and 3, I arrive at the inescapable conclusion that clauses 2, 3 and 4 work together as a whole, and not independently as contended by plaintiffs' counsel.

Orders made

36. Accordingly, I dismissed the plaintiffs' claim because no cause of action has arisen as yet. Their claim is premature.

37. During the course of the proceedings, I was informed that the plaintiffs did not have sufficient funds and hence, could not pay for the remedial works and thereafter claim reimbursement under clause 4. On the other hand, the managing director of the 2nd defendants offered to do the remedial work. Under the circumstances, it is in the interest of both parties that I make clear that my decision is without prejudice to the 2nd defendants remedying the defects under clause 2 if they so wish, failing which the plaintiffs may rely on clause 3 and perhaps even clause 4 eventually, whereupon the 2nd defendants will be liable to fully indemnify the plaintiffs for all the costs of the remedial works (including legal costs if any), which costs will of course have to be properly and reasonably incurred.

38. As the defendants' counterclaim was dismissed and the plaintiffs had succeeded on the other substantial issues in relation to the cause of the defects and whether the defects were covered by the deed, I decided to award the defendants only 60% of their costs to be taxed if not agreed.

Chan Seng Onn

Judicial Commissioner

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