

HONG KONG / JUDGMENT

ALPHA BUILDING CONSTRUCTION LTD v. BEST PARTNER LTD

COURT

Court of First Instance

DECIDED

14 May 2007

CASE / FILE NUMBER

HCCT80/2006

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bjbj HCCT 80/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE CONSTRUCTION AND ARBITRATION PROCEEDINGS NO. 80 OF 2006

IN THE MATTER OF ARBITRATIONS and IN THE MATTER OF THE ARBITRATION ORDINANCE (CAP 341)

BETWEEN ALPHA BUILDING CONSTRUCTION LTD Claimant and BEST PARTNER LTD Respondent (1st ARBITRATION) AND BETWEEN STYLETEC BUILDING MATERIALS LTD Claimant and ALPHA BUILDING CONSTRUCTION LTD Respondent (2nd ARBITRATION)

Before: Hon Reyes J in Court Date of Hearing: 14 May 2007 Date of Decision: 14 May 2007

DECISION

I. INTRODUCTION Best Partner was the Employer, Alpha the Main Contractor, and Styletec a Nominated Sub-Contractor in the relevant project. Alpha has commenced proceedings against Best Partner under an arbitration agreement in the Main Contract. Styletec has commenced arbitration proceedings against Alpha under an arbitration agreement in the Sub-Contract. Pleadings have closed in the Main Contract arbitration. Mr. Daniel Lam has been appointed as arbitrator. Styletec has issued a Notice of Arbitration in the Sub-Contract arbitration. An arbitrator has yet to be appointed and there have not been any pleadings. Alpha has applied to consolidate both arbitrations. Best Partner and Styletec oppose consolidation. II. DISCUSSION I

do not think that this is a case for consolidation. I have 2 reasons for this conclusion. First, I am not satisfied that there are sufficient common questions of fact and law in the 2 arbitrations to justify consolidation. Alpha's pleaded case in the Main Contract arbitration is that substantial completion was effected as of 12 April 2005 and practical completion took place on 7 or 8 June 2005. It claims entitlement to an extension of time from 1 April until 11 June 2005. Its total claim is for over \$17 million. Alpha's claim is disputed by Best Partner which (among other things) counterclaims liquidated damages for 110 days of delay. Best Partner's total counterclaim (including for alleged defective work by Alpha) is for over \$5 million. In the Sub-Contract arbitration Styletec claims an outstanding payment of \$414,000 for Kitchen Cabinet and Appliances Installation. That amount has been paid by Best Partner to Alpha and specifically earmarked by Best Partner as being payable to Styletec. It will be noticed that, as far as pleadings in the Main Contract arbitration are concerned, Alpha's case is that there has been no delay. Nonetheless, in its affidavit evidence in support of consolidation, Alpha has suggested that, if there is delay, then such delay is attributable to Styletec. No particulars of what such period of delay might be or how Styletec caused the same have been provided to me. Alpha argues that delay and its attribution will be a common theme in both arbitrations. But it seems to me Mr. Anthony Chow (appearing for Best Partner) is right. Whether or not Styletec caused delay to the Main Contract works is irrelevant to the Main Contract arbitration. Delay is only the flip side of Alpha's claim for an extension of time. The question in the Main Contract arbitration will essentially be whether Alpha is entitled to an extension of time. If it is not entitled, there will consequently be delay for which Best Partner would be entitled to damages. That would be regardless of what or who (Alpha, Styletec or some other person) caused the delay. It is unclear on the material before me (especially in the absence of particulars of the delay allegedly caused by Styletec) that the arbitrator in the Main Contract proceedings will be concerned with who (whether Styletec or someone else) caused any delay. Indeed, even if there was delay, it does not follow that it would be attributable in whole or part to Styletec. Styletec's culpability for any delay seems to me a severable issue, which (if it is seriously alleged by Alpha) might more conveniently be dealt with in separate proceedings between Styletec and Alpha. I note that on delay there is an additional hurdle for Alpha which has been identified by Styletec. Under the Sub-Contract, Alpha is not entitled to loss or damages for delay unless the Architect has first issued a certificate stating that the Sub-Contract Works (or a section thereof) ought reasonably to have been completed within a specified period. There is no such certificate. Alpha has belatedly said that it will apply for such a certificate in the Main Contract Arbitration. But it is not apparent why such a certificate could not also be obtained in the Sub-Contract Arbitration. There are some alleged defects of which (as against Alpha) Best Partner complains in the Main Arbitration. Some of those alleged defects relate to Styletec's work. But the amount of potential damages involved in the latter alleged common defects is minimal. I therefore do not think that the common items are a sufficient factor pointing to consolidation. Let me be more specific. Some 9 common items have been rectified by Styletec at no cost to Best Partner. Best Partner will not be claiming for those items. Some 4 common items are not being pursued by Best Partner against Alpha since the cost of rectification for these has been negligible. There is a dispute as to whether some 7 items claimed by Best Partner relate to Styletec's work at all. Alpha says yes, everyone else says no. But, in

any event, the amounts involved for the repair of those items (gaps under a gas heater; a telescopic box with a loose flap and another with a missing flap; and leakage from a kitchen sink, from a water outlet pipe, from a pipe inside a kitchen cabinet and from gaps in the back plate of a gas heater) cannot be significant. A remaining claim in respect of 3 common items amounts to just under \$6,000. Mr. Shaw (appearing for Alpha) refers to the need for a declaration in the Main Contract arbitration that Best Partner's earmarking of the \$414,000 for Styletec is of no significance. I do not see at present why this issue is a common one. It seems to me only to arise in the arbitration with Styletec. The arbitrator there is perfectly able to rule to the extent necessary on the significance (if any) of Best Partner's earmarking. Second, I think that consolidation will unnecessarily prolong the Sub-Contract arbitration and increase its costs disproportionately. At present, only a relatively small amount is involved in the Sub-Contract Arbitration. Its outcome largely hinges on a construction of Alpha's obligations under the Sub-Contract. Best Partner has specifically paid Alpha for the \$414,000 of work claimed by Styletec. It is Styletec's case that Alpha is thus under a contractual obligation to pass that amount onto Styletec. Alpha disagrees. It is accordingly possible for the Sub-Contract Arbitration to proceed on documents alone as proposed by Styletec. In the circumstances, I doubt that consolidating the Sub-Contract arbitration with the more complicated (and hence lengthier) dispute between Best Partner and Alpha would be fair. It will only increase costs and delay the time taken to arrive at a relatively straightforward decision in the Sub-Contract Arbitration. III. CONCLUSION Alpha's application to consolidate is dismissed. I shall hear the parties on costs. (A.T. Reyes) Judge of the Court of First Instance High Court Mr Geoffrey Shaw, of Messrs Deacons, for the Claimant in the 1st Arbitration and the Respondent in the 2nd Arbitration Ms Eva Sit, instructed by Messrs Kao, Lee & Yip, for the Claimant in the 2nd Arbitration Mr Anthony W L Chow, instructed by Messrs O P Q R S T U V i\$`G hca.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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