

HONG KONG / JUDGMENT

KIN SHING ENGINEERING (H.K.) CO., LTD. v. VINSON ENGINEERING LTD.

COURT

Court of Appeal

DECIDED

2 May 2007

CASE / FILE NUMBER

CACV224/2006

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bjbj cacv 224/2006 in the high court of the hong kong special administrative region court of appeal civil appeal no. 224 of 2006 (on appeal from HCCT NO. 108 of 2003) BETWEEN KIN SHING ENGINEERING (H.K.) CO., LTD. Plaintiff VINSON ENGINEERING LTD. Defendant Before: Hon Rogers VP, Le Pichon JA and Sakhrani J in Court Date of Hearing: 2 May 2007 Date of Judgment: 2 May 2007 J U D G M E N T Hon Rogers VP: This is an appeal from a judgment of Reyes J given on 25 May 2006. By the judgment, the judge gave judgment in favour of the Plaintiff who was a subcontractor, against the Defendant who was his intermediate employer, for the sum of \$1,258,840.80, with interest. The matter before the judge was a claim under a building contract and there were a large number of items. In order for the matter to come before the court, there were expert witnesses on both sides and the experts produced a joint report and then supplementary reports for items which were not agreed. On this appeal, Mr Maurice Chan, who has appeared on behalf of the Defendant, has said everything that he possibly could in favour of allowing the appeal. He has challenged a number of issues. The first matter which Mr Chan has challenged is as to whether the Plaintiff's expert was justified in his calculation of the variation in respect of the conduits. The tender for the contract required that there should be concealed conduits. In the course of carrying out the work, the judge accepted that that was changed, for a number of the different conduits, to what are called open conduits. Surprisingly, an open conduit, or a non-concealed conduit, is more expensive to construct than a concealed one. Be that as it may, the question then comes as to how many concealed conduits were constructed and how many other conduits were constructed. What the expert did was to take the number of conduits which had originally been in the contract and deduct from that number the number of concealed conduits and then deduce that the remaining conduits were all open conduits or non-concealed conduits, and then calculate the extra amount. On behalf of the Defendant, Mr Chan says that that is not a legitimate way to have calculated it and he should have calculated it by, presumably, examining the number of open conduits and counting them up. When one looks at the chart which is in the bundles - it is Appendix H-1 which is headed Outstanding Information Issue and it is in the supplementary report by the Plaintiff's expert and is to be found at page 934 of bundle C1 in the court bundle - one sees how many conduits one is actually talking about. In

my view, what the expert did was a perfectly legitimate way of carrying on but it was open to challenge if the Defendant wished to challenge the Plaintiff's expert on it, but he did not. Of course, it has now been explained that perhaps one of the reasons why there was no challenge was that the Defendant was represented by a director and was not represented by counsel and solicitors. That was a counsel of imprudence, in my view, and I presume that proper leave was given for the director to appear on behalf of the company. That should be a very exceptional circumstance and in cases such as this where one has detailed information, it is very important that the court is given all the assistance it can be given. Unfortunately, it is no use for counsel to be then instructed in the Court of Appeal and say this, that or the other point was not taken. The fact is, it appears to me, that the Plaintiff's expert proceeded on a reasonable basis; there was no challenge as to that and the judge cannot be faulted in proceeding on the basis of the Plaintiff's expert who he clearly preferred, to say the least, over and above the evidence of the Defendant's expert. The next ground of complaint on this appeal was that, under clause 3.2 of the contract, it was provided that: Apart from the works listed in the quotation, if there are additional variation works, such works can only be commenced after the Work Instruction is signed and acknowledged by our Company's Project Management Department. If this item of additional or variation work is urgent, such works can be commenced after our Company's consent, but the quotation should be submitted immediately to the Project Management Department so as to facilitate recording and assessment. The contractor must duly follow this procedure. If the quotation is not submitted for approval within one week of the additional variation works, then our Company has the right to disclaim the responsibility for paying the costs of the additional or variation works. The judge considered the evidence as to what had actually happened on the ground. Having considered what discussions there had been between the parties, how many of the Plaintiff's own employees or representatives were at the site, the difficulty in the communication and as to whether there had been a telephone conversation between Mr Lee and Mr Tang the judge came to the conclusion, in paragraph 35 of his judgment, that the Defendant had waived strict compliance with General Condition 3.2 of its contract with Kin Shing. Mr Chan, on behalf of the Defendant, has sought to argue that although the judge said that the Defendant had waived strict compliance with Condition 3.2, the necessary documents should have been provided within a reasonable time and that they were only provided about six weeks before the trial took place. The difficulty with that argument is that once the judge has decided that the Defendant had waived compliance with a particular condition, that is that. It is not for the court to rewrite the contract and substitute words contained in the contract, for example, within one week to within a reasonable time. Secondly, it has to be pointed out that if the documents were indeed provided six weeks before the trial, the Defendant clearly had them. Given the circumstances of the case and if a plethora of documents were rendered too late for the Defendant to be able to deal with them adequately for trial, the proper course that the Defendant should have taken was to ask for an adjournment, and that did not happen. The final point that is taken is under what was referred to as Schedule 2.1 of the joint report of the experts, and that is items which are valued by the Plaintiff's experts but are stated as outstanding information by the Defendant's expert. The point which is taken, under the items which are listed as 3, 11, 14, 15 and 31, is that the items did not constitute variations for which the Plaintiff was entitled to charge but

were items of ordinary work which were included, or should have been included, within the terms of the original tender, and that the Plaintiff was not entitled to charge for overtime work in respect of them, or additional work. Mr Chan, on behalf of the Defendant, said that this point was taken in the witness statement on behalf of the Defendant s director. That may be, but he has also admitted that there was no cross-examination of either the Plaintiff s director, Mr Lee, or his expert. As Mr Chan, who appeared on behalf of the Plaintiff, has pointed out, Mr Lee has explained in his witness statement the various reasons as to why he averred that the Plaintiff was indeed entitled to charge for additional work which was carried out and that would have included overtime work in respect of the various matters. These are all matters for the trial judge. The trial judge was perfectly entitled to accept Mr s evidence on behalf of the Plaintiff. In view of the fact that there was no cross-examination as to that, there is no ground, in my view, on which this Court can now delve into the question as to whether the items in Schedule 2.1 should not have been included. Finally, Mr Chan, on behalf of the Defendant, has said that in view of the fact that these items were not raised at trial, there should be a retrial in respect of them. I regret that I do not see that that would be the right course at all. Unfortunately, the Defendant has chosen to be represented by a director in the trial below, but by solicitors and counsel in this Court. He might have been better advised to have done it in reverse if finances were such that he could not finance both. But that is not a ground now for allowing a retrial on matters which, at the best, are purely speculative. In my view, this appeal falls to be dismissed. Hon Le Pichon JA: I agree. Hon Sakhrani J: I also agree. (Anthony Rogers) Vice-President (Doreen Le Pichon) Justice of Appeal (Arjan H Sakhrani) Judge of the Court of First Instance Mr P K Chan, instructed by Messrs Peter Lau & Co., for the Plaintiff/Respondent Mr Maurice J Chan, instructed by Messrs Ho & Ip, for the Defendant/Appellant PAGE - A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk 2QX[2QX[2QX[2QX[H; < jFen & 6" ABC-Final (fair)1.dot setup Microsoft Word 9.0 Judiciary Title Source Erica Microsoft Word Document MSWordDoc Word.Document.8

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