

HONG KONG / JUDGMENT

SUN KAI ENGINEERING CO. LTD. v. TILEMAN ASIA (HK) LTD.

COURT

Court of First Instance

DECIDED

6 March 2000

CASE / FILE NUMBER

HCCT56/1997

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bjbj HCCT56/1997 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE CONSTRUCTION AND ARBITRATION PROCEEDINGS NO.56
OF 1997

BETWEEN SUN KAI ENGINEERING CO. LTD Plaintiff and TILEMAN ASIA (HK) LTD Defendant

Before : Mr Recorder Kotewall SC in Court Dates of Hearing : 1, 2, 3 and 6 March 2000 Date of
Judgment : 6 March 2000

J U D G M E N T

Introduction

The plaintiff was a sub contractor engaged by the defendant on a project referred to as the Lamma Power Station, Phase III, Chimney No.3 (the Project). The defendant was a sub contractor of Nishimatsu Construction Company Limited (Nishimatsu), the main contractor of the Project. The employer was the Hong Kong Electric Company Limited. The plaintiff was responsible only for the provision of workers for the concreting operation in respect of, for our purposes, the windshield structure of the chimney to be constructed by the slipform method. The parties entered into a contract in writing by a Letter of Acceptance dated 8 June 1994. This, together with the tender submitted by the plaintiff according to the tender document dated 15 March 1994, was agreed by the parties before me to constitute the only contract between them on this project. The plaintiff s claims The plaintiff s claims are under three heads :-

- (1) the balance of the contract price in the sum of HK\$163,183.50 (the retention claim);
- (2) loss and damages in the sum of HK\$720,000.00 caused by the construction period for the windshield being extended by 20 days (the extension of time claim); and
- (3) cost of the demonstration of labour on 24 May 1994 in the sum of HK\$39,000.00 (the demonstration claim). The defences The defence to the three heads of claim, as pleaded in the amended defence, may be summarized as follows :- First, in respect of the retention claim, the defence initially said that it had already paid everything which was due. In the course of the trial, the defendant which was, with the leave of the court, represented by Mr Leung, an engineer, accepted that the sum claimed is payable, but Mr Leung made submissions as to when the balance of the contract price had to be paid. Secondly, on the extension of time claim, four points are made by the defence :-
 - (a) The defendant s programme had to conform to the main contract programme. It had therefore to be flexible and it was not bound by any commencement or completion dates.
 - (b) The contract was, to use the term adopted in the course of these proceedings, back back , meaning that it mirrored certain provisions of the defendant s contract with Nishimatsu. Since the defendant did not claim against the main contractor, the plaintiff was not entitled to claim against the defendant.
 - (c) On the terms of the contract, to which I will refer, floor slabs and roof slabs were to be cast on an as called for basis. Since both parties accept that these slabs may have to be done outside the two months construction period stated in the contract, the plaintiff s total working time under the contract cannot have been limited or defined by the two month period.
 - (d) There were no labour rates as such in the contract and all payments under the contract has to be on a measured quantities basis. Thirdly, as for the demonstration claim, the defence says that this was part of the tender process, before the award of the tender, and the plaintiff is not entitled to be paid therefor. The contract First, the terms of the Letter of Invitation of 15 March 1994 from the defendant to the plaintiff. This reads You are cordially invited to submit your tender for the works described below. Description of the works Provision of labour, tools, equipment and supervision for the placing of concrete works of the Chimney No.3 at Lamma Island Power Station. Time for completion: As refer to construction Programme on site. Expected start on site: Mid April 1994 A complete set of tender document is enclosed and your tender should include for everything necessary for the completion of the works including sufficient labour, supervision, equipment and tools, but excluding permanent materials and lifting equipment which will be provided free of charge by Tileman. The cost of transport of your labour and equipment including any travel allowances is to be included in your quotation together with any site establishment costs. You are given the opportunity to inspect the site and are deemed to have done so, in order to ensure the sufficiency of your tender. The successful tenderer will enter into a sub contract agreement with Tileman Asia (Hong Kong) Limited which will be on a back to back basis

with the Nishimatsu Construction Company Ltd. Standard Form of Sub Contract and the Hongkong Electric Co. Ltd. Conditions of Contract, which are available at our offices for your inspection. The following facilities will be provided free of charge : * Craneage * Steel stock * Workers Canteen * Site Latrines * 3 phase site electricity supply point and site water supply * Nursing facilities Please submit your tender before 12.00 noon on Tuesday 22 March 1994, for the attention of Eric Eu, 34/F Hopewell Centre. Secondly, the terms of the Letter of Acceptance of 8 June 1994 from the defendant to the plaintiff. This reads Further to your returned tender, subsequent meeting and clarification, we confirm hereby that your revised tender sum in the amount of HONG KONG DOLLARS TWO MILLION SIX HUNDRED THIRTEEN THOUSAND SIX HUNDRED SEVENTY ONLY (HK\$2,613,670.00) is accepted subject to the following terms and conditions :-

1. You will become our sub contractor for the supply of labour for concrete works to the entire satisfaction of this Company.
2. The attached Bills of Quantity will form part of this sub contract. Rates and prices contained therein, will be used for the preparation of interim payment, valuation of variations and preparation of final account.
3. The retention monies shall be 5% of the sub contract sum and the percentage of retention held shall be 10% of the interim payment and shall be released 2.5% after issuing of the practical completion certificate and the rest of it shall be released after the completion of the 12 months maintenance period under the main contract.
4. Interim Payment Applications should be submitted on 15th and 30th of each month and the liquidated and ascertained damages shall be HK\$50,000.00/day and will be charged for delay under the Main Contract or suffers other loss or damage due to default of the Sub contractor.
5. All works shall be carried out in full compliance with Tileman Construction programme.
6. No extra payment shall be made for overtime works for windshield construction and the labour content shall be 34 man/shift until the slipform rise to 31 meter high. The construction of the windshield is scheduled to be finished in 2 months working time. The floor slabs and roof slab concrete shall be cast on an as called for basis decided by Tileman.
7. All other correspondence submitted in respect of the captioned work prior to the date of this Letter of Acceptance except the tender document shall not form part of the contract.
8. The contents of this letter shall take precedence over any conflicting terms and/or conditions contained elsewhere. Please confirm your acceptance of the above by signing this letter and return the duplicate to our office. Unless and until a formal sub contract has been prepared and executed, you are reminded that this signed Letter of Acceptance and its enclosure shall constitute a binding contract between us. I note that no further formal sub contract was entered into and this Letter of Acceptance was treated as one of the operative contractual documents. The retention claim This is for \$163,183.50. The Bills of Quantities annexed to the Letter of Acceptance listed the works and the total contract sum at

\$2,613,670.00. The plaintiff's claim for the retention is simple. It says that the contract price was \$2,613,670.00; it was paid \$2,450,486.50. There is, therefore, a balance of \$163,183.50. The periods prescribed in paragraph 3 of the Letter of Acceptance have long since expired and payment should not have been withheld. The defence is that while the plaintiff is entitled to the sum claimed, the expiry of the 12 months contract maintenance period under the main contract did not expire until much later and the defendant itself did not get paid until late 1998. Mr Leung thought that the retention monies should only have been released to the plaintiff upon the expiration of the Defect Liability Period on 14 September 1998. It is not in dispute that the chimney was certified to have been substantially completed by 31 January 1996. Mr Tsang, for the plaintiff, made detailed and careful submissions on this point. His submissions can be summarized as follows. He submitted that there were different due dates for the payment of different parts of the sum of \$163,183.50. First, the limit of retention monies under paragraph 3 of the Letter of Acceptance is 5% of the contract sum, i.e. \$130,683.50. This was the actual amount of retention money deducted by the defendant from the plaintiff's interim payments. Only this sum is thus subject to the timing for payment under paragraph 3 of the Letter of Acceptance. The difference, i.e. \$32,500.00 is not retention money and represents the remaining unpaid contract sum which was payable upon completion of the plaintiff's contract works which occurred long before the certified practical completion date of the main contract. This sum of \$32,500 should therefore have been paid by the latest, together with the first part of the retention money which I consider next. I should add that I agree that this is the correct position under the contract as I read it. Secondly, as for the retention monies, Mr Tsang says that 2.5%, i.e. \$65,341.75 should have been paid after the issue of the practical completion certificate. The completion certificate was dated 13 March 1996 certifying completion on 31 January 1996. In my view, this clearly was the contractual due date for this sum under paragraph 3 of the Letter of Acceptance. Thirdly, as to the balance of the retention money, i.e. \$65,341.75, this should have been paid on the expiry of the 12 months maintenance period, which would have commenced on the day after 31 January 1996. In other words, the operative date of payment for \$65,341.75 was 31 January 1997. In my judgment, this is the correct analysis of the contractual position and the different sums ought to have been paid on the dates set out above. The extension of time claim This is for \$720,000. This is the sum the plaintiff claims as damages for breach of contract by the defendant. The plaintiff relies in particular on clauses 4, 5 and 6 of the Letter of Acceptance and the second paragraph of the Invitation Letter dated 15 March 1994. The plaintiff accepts that it was obliged to comply with the defendant's programme. No separate programme was attached to the Letter of Acceptance. I have been shown programmes of the defendant which show clearly that it was planned and envisaged that the windshield would be constructed in one continuous eight week or two month period. The crucial point, as it seems to me, turns on the construction of paragraph 6 of the Letter of Acceptance. On this point, it is to my mind clear that the contract period for the construction of the windshield was two months. Paragraph 6 does not provide for an estimate. It would be completely unmanageable for the plaintiff if it had to make all the necessary arrangements and pay for workmen only to be told, apparently at any time, that

the defendant was entitled to suspend work or call for stoppages and presumably for which the plaintiff would have no recourse or recompense. In my judgment, the effect of clause 6 is clear. The plaintiff was to carry out the works within two months of the commencement date, which turned out to be 3 June 1994, and it had two months from 3 June 1994 with which to do so. Mr Tsang submitted that a superior contractor has an implied duty not to prevent or hinder the sub contractor from carrying out sub contract works in accordance with the contract, and he relies on *Jardine Engineering Corp. Ltd & Ors v. Shimizu Corp.* [1992] 2 HKC

271. He says that the first defence, already averted to, raised by the defendant clearly has no merits. While the defendant could have opted for a different commencement date, once the work commenced, the plaintiff was entitled to carry out the work free from hindrance or prevention on the part of the defendant. Here the evidence before me is to the effect that there were various stoppages arising out of a number of factors, none of which are the responsibility of the plaintiff. These are the delay or short supply of concrete, the breakdown of the hoist and the re installation of another hoist which had been installed too close to the structure. There was no issue as such on quantum and the defence to this part of the claim is as I have earlier summarized. In the *Jardine* case, Kaplan J had to consider a number of issues including the scope of implied terms on the contract before him. Having summarized the law at pages 305 onwards, the learned judge referred to the well known dictum of Lord Blackburn in *Mackay v. Dick* (1881) 6 App Cas 251 at 263 as follows think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. I read this passage as a statement of the general law rather than, strictly speaking, an implied term based on the *Moorcock* (1889) 14 PD 64, and I accept its applicability on the facts and terms of the contract before me. At page 314 of his judgment, Kaplan J considered and accepted submissions based on the decision in *Wells v. Army & Navy Co operative Stores Ltd* [1903], *Hudson s Building Cases*, 4th Ed. at page
354. The learned judge said this As his final position Mr Lloyd submitted that, on the agreed facts, it is clear that (subject to causation and remoteness) the defendant is in breach of contract by depriving the plaintiffs (however unintentionally) of their rights to have the time within which to execute and complete the sub contract works as are set out in part III of the appendix of the sub contract. This cause of action is based on the principle enunciated in *Wells* (supra), at p 354, where Vaughan Williams LJ said: In my judgment, where you have a time clause and a penalty clause, it is always implied in such clauses that the penalties are only to apply if the builder has, as far as the building owner is concerned, and his conduct is concerned, that time accorded to him for the execution of the works which the contract contemplates he should have. If a party is given 100 days to complete a piece of work and the other party tells him to suspend work for 10 days, then he has only been given 90 days to complete the work. True it is that he will get an extension of time for 10 days and this is designed to assist the employer because without the extension of time the liquidated

damages clause would go on the doctrine of employer's prevention. The extension of time provision is very much to the benefit of the employer. However, on this factual scenario, the extension of time does not cure all the damage suffered because although it gives 10 days extension, it does not compensate the contractor for the extra 10 days cost involved. A 100 day contract becomes a 110 day contract and this, in all probability, would be a more expensive proposition. If this is correct and subject to causation and remoteness, I do not see why the plaintiffs cannot recover it as a matter of law. I should also refer to a passage from the judgment of Vaughan Williams LJ in *Wells v. Army and Navy Co operative Society* as follows I will deal with the specific clauses in a moment; but in the contract one finds the time limited within which the builder is to do the work. That means, not only that he is to do it within that time, but it means also that he is to have that time within which to do it. It seems to me that in the construction Mr Bray wished us to put upon clause 16 of this contract he was inviting us to put the construction which would really put it in the power of the directors of this company to deprive the builders altogether of the benefit of that limitation of time. In my mind, that limitation of time is clearly intended, not only as an obligation, but as a benefit to the builder. In my judgment, these passages contain useful guidance and are applicable to dispose of the first limb of the defence based on the extension of time claim. As to the second head of defence, that is the so called back back defence, the only possible effect of the provision is to incorporate certain of the terms in the standard forms of the main contract and the subcontract into the contract. It may be that some of the terms of the different contracts are similar. It is not entirely clear which were the terms incorporated, or the effect of any of them. Be that as it may, none of the terms which may be incorporated can mean that the failure of the defendant to enforce a right under its contract with Nishimatsu can deprive the plaintiff of its rights under its contract with the defendant. As to the third defence raised, whether the slabs might be cast at any time is not to my mind relevant since they do not form part of the same process for the construction of the windshield. They are separate items with different time frames as illustrated in the programmes which I have been shown. The Bills of Quantity show that the windshield was to be worked on a 24 hour basis but the slabs were not. Paragraph 6 of the Letter of Acceptance shows that the two items were considered quite separate and different as to when they have to be constructed. The fourth defence is that there were no rates in the Bills of Quantities for daily wages of labour. This cannot, in my judgment, be relevant to a claim for damages in the circumstances obtaining. In any event, it was provided in clause 9.2(2) of the Standard Form of Subcontract that The value of all authorized variations shall be ascertained by reference to the rates and prices, if any, specified in the subcontract of a like for analogous work, but if there are no such rates and prices or, if they are not applicable, then such value shall be such as is proper and reasonable in all the circumstances. The plaintiff is, of course, not claiming for works pursuant to an authorized variation; it is claiming damages for breach of contract. It must be unlikely for contracts of this nature to contain unit rates in anticipation of claims for damages for breach of contract. For completeness, I ought to set out that I find proved the following :

- (1) concreting operation was suspended on site from 13 June to 21 June 1994 on the defendant's instruction;
- (2) from end of June onwards, the progress became slow because of shortage of concrete which, as between the plaintiff and the defendant, was the responsibility of the defendant; and
- (3) the hoist for materials was not in service from 20 July to 28 July and from 19 August to 22 August 1994. Provision of the hoist is also part of the defendant's responsibility. I find that as a result of the foregoing, instead of completing the windshield in two months, it took the plaintiff from 3 June to 22 August 1994 to complete the work, in other words, the plaintiff took an extra 20 days and incurred extra costs, which it claimed, of \$720,000, calculated at \$1,000 per shift per workman with two shifts each day for a total of 20 days. Except for an item of \$1,000, I find this part of the claim substantiated. As I said earlier, quantum was not seriously in issue. The amount I find proved is \$710,000. The demonstration claim This is for an amount of \$39,000. This arose out of the defendant's instructing the plaintiff to arrange for 39 concretors to attend a concrete demonstration for the chimney No.3 on site on 24 May 1994. That, in essence, is the plaintiff's evidence of what happened and which is supported by a letter of 5 June 1994 asking for payment. The defendant proffered very little by way of evidence of the circumstances surrounding the demonstration or the events or negotiations leading up to it. There is some inadmissible hearsay and an unsigned statement by a Mr Louie Lau on whose evidence I am unable to attach much weight. Mr McCrickard had no personal knowledge of what happened either. His oral testimony was to the effect that he thought that the demonstration was so that the plaintiff could prove that it was able to supply sufficient workmen to do the job, and that the defendant only agreed the contract price after that. When pressed with the defendant's tender analysis, Mr McCrickard very fairly accepted that it would seem that by 20 April 1994, the price had already been agreed. At the prompting of Mr Leung, he later modified that conclusion by saying that the defendant must have agreed the contract price at some time between 20 April 1994 and 9 May 1994, in other words, some considerable time before the demonstration. Mr McCrickard was not able to remember if the plaintiff was told that it would be paid or would not be paid for the demonstration and Ms's evidence for the plaintiff is not inconsistent with that. I find that there was no discussion as such as to payment, but Mr McCrickard emphasized and underlined the fact that the defendant had to satisfy itself of the plaintiff's capacity because the defendant had to demonstrate to Nishimatsu that the numbers of workmen required were available. He thought that representatives of Nishimatsu would have been present on 24 May 1994 to satisfy themselves of the numbers, that is to say the 39 workmen which the plaintiff arranged to bring on to the site at the defendant's instructions. Mr Tsang submitted that a mere request from the defendant to the plaintiff in the absence of any clear expression or understanding that no reimbursement would be made to bring the 39 workers to Lamma Island would be sufficient to ground a claim based on quantum meruit. A fortiori, he says, if the request was for them to go and construct a mock up. I agree. While the evidence does not indicate that much was done when the workmen got

onto the site, I do not think that that matters overmuch. What matters is the request. Mr Tsang referred to Keating on Building Contracts, 6th Ed., 1995 at pages

86. Although the principles on quantum meruit claims are not exactly esoteric, it is probably a useful exercise to refer to some of the passages in the text. The expression quantum meruit means the amount he deserves or what the job is worth and in most instances denotes a claim for a reasonable sum. It is used to refer to various circumstances where the court awards a money payment whose amount at least is not determined by a contract.... A claim on a quantum meruit cannot arise if there is an existing contract between the parties to pay an agreed sum. But there may be a quantum meruit claim where there is:
- (d) work outside a contract. Where there is a contract for specified work but the contractor does work outside the contract at the employer's request the contractor is entitled to be paid a reasonable sum for the work outside the contract on the basis of an implied contract.... Assessment of a reasonable sum. The courts have laid down no rules limiting the way in which a reasonable sum is to be assessed. Where a quantum meruit is recoverable for work done outside a contract, it is wrong to regard the work as though it had been performed to any extent under the contract. The contractor should be paid at a fair commercial rate for the work done..... Useful evidence in any particular case may include abortive negotiations as to price, prices in a related contract, a calculation based on the net cost of labour and materials used plus a sum for overheads and profit, measurements of work done and materials supplied, and the opinion of quantity surveyors, experienced builders or other experts as to a reasonable sum. Although expert evidence is often desirable there is no rule of law that it must be given and in its absence the court normally does the best it can on the materials before it to assess a reasonable sum. In all the circumstances, I find the plaintiff's claim on a quantum meruit made out in respect of the demonstration claim and I award under this head the sum of \$39,000 on the basis of \$1,000 for each concreter on 24 May 1994. To summarize, the plaintiff succeeds :
- (a) on its demonstration claim \$39,000
- (b) on its extension of time claim \$710,000 It is entitled to interest on both these sums at the rate of 11.5% from the issue of the writ on 5 July 1996. The plaintiff has also succeeded on its claim in respect of the retention monies of \$163,183.50. As to \$97,841.75, interest will run from 31 January 1996 and as to \$65,341.75, interest will run from 31 January 1997, in respect of both parts at the rate of 11.5%. All the awards of interest at 11.5% are up till today and thereafter at the judgment rate. Unless Mr Leung is able to persuade me to the contrary, the plaintiff is to have the costs of this action. (Robert George Kotewall) Recorder of the Court of First Instance High Court Mr David Tsang, instructed by Messrs Fung, Wong, Ng & Lam, for the Plaintiff Defendant in person, represented by Mr Leo Leung Kwok Kee of Tileman Asia (HK) Limited - PAGE - "@AB & 6" Administrator Normal.dot Microsoft Word 8.0 Title _PID_GUID Microsoft Word Document MSWordDoc Word.Document.8

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