

HONG KONG / JUDGMENT

SUN PAK SHING AND ANOTHER v. ACTION DESIGN CO LTD

COURT

Court of First Instance

DECIDED

6 March 2007

CASE / FILE NUMBER

HCCT74/2004

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J U D G M E N T

AUTONUMOUT The plaintiffs were flooring sub-contractors in seven residential developments. In broad terms the defendant provided the materials for wooden flooring in many thousands of residential units, the plaintiffs provided the skilled and casual labour required to lay the floors. The seven projects may be referred to as (1) Maywood Court (Maywood), (2) Deerhill Bay (Deerhill), (3) Tierra Verde Phase), (4) Tierra Verde Phase II (), (5) P5, (6) P6 and (7) Laguna Verde Phase 4A (Laguna). No issues have arisen in relation to the 5th and 6th projects, hence they are referred to merely as P5 and P6. In relation to all the others there are numerous disputes in which the plaintiffs claim they have been underpaid on the contract sum and also either not paid or underpaid for variations. The defendant on the other hand, whilst agreeing shortfalls on the contract sum, claims it is entitled to make many deductions for contra charges and liquidated damages. AUTONUMOUT On TV II and Laguna, the defendant counterclaims liquidated damages of \$5,610,000. No questions were asked of the plaintiffs in relation to this issue. No oral evidence was given by the defence witnesses. No expert evidence was called. There was no evidence to suggest that the plaintiff took longer to complete their work than they should have. There was no evidence to suggest that they could have started their work any earlier than they did. There was no evidence that any delay there may have been to the main contract was attributable to any particular one of over a dozen sub-contractors. The plaintiffs evidence was that they did start work at the earliest opportunity and did finish within the period of time as expected under the contract. Counsel for the defendant, Ms Janine Cheung, made no submissions in support of this part of the counterclaim. AUTONUMOUT The claim for liquidated damages against the plaintiffs is unsustainable because of a total lack of evidence and I dismiss it at the outset. I can only imagine that it was not abandoned for tactical reasons connected with other arbitration cases yet

to be heard. AUTONUMOUT Ignoring the liquidated damages claim, a summary of the claims and counterclaim is as follows :

- (a) Underpayment by the defendant on each contract Maywood \$217,473 Deerhill \$80,559
\$202,120 \$1,834,854 \$10,032 \$97,176 Laguna \$5,099,989

\$7,542,203 All these sums are agreed.

- (b) Variations. The amounts claimed by the plaintiffs and agreed by the defendant are as follows
Plaintiffs claim Defendant admits Maywood \$954,055 \$95,028 Deerhill \$412,703 \$220,068
\$193,217 \$58,067 \$12,970 \$12,970 Laguna \$573,760

\$2,146,705 \$386,133 Thus far therefore the plaintiffs claim [(a)+(b)] \$9,688,908 and the defendant admits \$7,928,336. The counterclaim is in relation to contra charges as follows : Plaintiffs admit Defendant claims Maywood \$13,615 \$172,011 Deerhill \$0 \$2,977,812 TV II \$20,000 \$2,719,387 Laguna G8 \$906,569 \$906,569 Laguna G9 \$1,432,446 \$1,439,781 Laguna G10 \$0 \$38,614 _____
\$2,372,630 \$8,254,174 Thus the plaintiffs concede a deduction of \$2,372,630 and the defendant counterclaims \$8,254,174. AUTONUMOUT The net position is therefore that the plaintiffs claim \$7,316,278 whereas the defendant submits it is liable to pay no more than it has already done so and counterclaims \$325,838 from the plaintiffs. The work actually performed by the plaintiffs was completed on schedule, substantially without complaint, free of any proven defects and done approximately six to seven years ago. AUTONUMOUT The plaintiffs claim depended exclusively on the evidence of Mr Sun Pak Shing, the 1st plaintiff. Mr Man Wai, the 2nd plaintiff was his partner on four of the projects but his job was minor in the context of this case. Mr Sun is a man of little formal education, who has over 30 years experience in the flooring business. He had a detailed knowledge of these contracts and had signed witness statements totalling over 300 pages. His evidence was given in a straightforward manner. He had a good recollection of the events in question and in most respects it was safe to rely on his evidence. Neither side produced reports or evidence from quantum experts even though much of the dispute concerned the valuation of and liability for work done. Initially, I thought this might create difficulties. Ultimately however, it did not do so. The evidence from the witnesses and the documents was sufficient. Mr Sun had all the information at his fingertips. For the defendant company the main witness was their contract manager, Ms Sandy Mak. She had never been on site but was responsible for all the contractual matters including payments. She was somewhat inflexible in her approach to payments to sub-contractors. For example she would refuse a payment if the plans which were attached to the application were not initialled or signed. In a number of instances such applications remained unpaid seven years later. The defendant's second witness was Mr Yu Man Lok, the company director. He had little first hand knowledge of the dispute and his recollection of events and attention to detail compared unfavourably with that of Mr Sun. AUTONUMOUT A Scott Schedule of all the issues and the competing valuations had been

prepared. I shall refer to the numbering in that schedule when I deal with each issue.
AUTONUMOUT The many issues fall into three categories. I now turn to each of them.

- (1) Variations AUTONUMOUT The plaintiffs claim extra payment in four of the projects :
- (i) Maywood Court (A2) AUTONUMOUT In this and other projects problems arose because of flooding. The cause of the flooding was not clear but I reject Mr s theory, based on second hand hearsay, that it may have been due, in part, to the plaintiffs workers taking showers on site. AUTONUMOUT In the Maywood and Deerhill projects there was no provision in the contract which purported to make the plaintiffs liable for damage subsequently caused by third parties (in later contracts there was and this is an issue which I address later). AUTONUMOUT In Maywood, there is no dispute that the plaintiffs did considerable rectification work on units where the floors were damaged by flooding. There is no dispute either that the defendant is liable to pay for this as a valid variation. The work involved stripping out the damaged floor, disposal of the damaged materials and relaying a new floor. AUTONUMOUT The defendant has paid only \$970,029 but contends that \$1,065,057 is the proper amount. There is no dispute that this latter figure accurately represents the contract rate for the laying of new floors. There is no dispute either that it does not include the cost of ripping out the damaged floor and disposing of that material. There is finally no dispute that the defendant is liable to pay some extra for the ripping out and disposal of damaged flooring. The issue is how much. AUTONUMOUT s evidence was that Mr Yu promised he would pay a higher rate, unspecified at the time the work was actually done because of the urgency of the work. When Mr Sun submitted his payment application he said it represented, approximately, an extra 40% on top of the contract rate. Mr Yu denies there was such a promises made. AUTONUMOUT Since the conclusion of the hearing on 13 February 2007 I have sought written submissions from both parties to explain the figures in the Scott Schedule under this item (A2). The problem arises because :
 - (i) The Scott Schedule states that the figure which the defendant says represents the contract rate for the extra work is \$1,065,057. (ii) The plaintiffs case is that they should be paid 40% on top of that figure (the defendant submits an extra 10% would be appropriate). (iii) However, in the Scott Schedule the plaintiffs claim \$1,924,084 which is approximately 80% more than the contract rate. Whereas 40% on top of \$1,065,057 is only \$1,491,079. AUTONUMOUT Inspite of two written requests from the court the plaintiffs solicitors have not explained why the figure they claim is 80%, not 40%, more than \$1,065,057. AUTONUMOUT proceed therefore on the basis that the plaintiffs maximum claim is 40% on top of the contract rate of \$1,065,057. AUTONUMOUT am satisfied that at the time the work was done Mr Yu assured Mr Sun that, in effect, he would be reasonably paid. I doubt whether exact figures were discussed. The defence submits that it should be either valued on the basis of casual labour or, if on a percentage basis, at an extra 10%. It seems to me that the task of ripping out damaged floors, disposing of the waste and getting ready to start laying all over again represents more than 10% of the additional work. I consider 30% to be reasonable which produces a figure of an extra \$319,517 due to the plaintiffs. (ii) Deerhill

Bay (B2) AUTONUMOUT Exactly the same thing happened at Deerhill Bay. On that occasion Mr Sun said he claimed an extra 50% because the development was more spread out. It was not all high rise. I consider the defendant's assessment of an 8% increase to be unrealistic. I regard 30% again as fair. Thus, an extra \$147,338 is due to the plaintiffs. (iii) Variation B3 at Deerhill is agreed at \$36,530 (iv) Variation C2 at TV I is agreed at \$42,075

- (v) Variation C3 at TV AUTONUMOUT This extra work was again for rectification of flooded units. The defence deny any liability for this item. Ms Mak said the application lacked sufficient documentation. Mr Sun said he re-submitted this application three times after the first application had gone missing. The evidence demonstrated a sufficiency of supporting documents accompanied at least the later application. I have no doubt that the work was requested and done. The plaintiffs are entitled to \$135,150 as claimed. (vi) Variation C4 at TV I is agreed of \$15,992 (vii) All variations at P5 are agreed. The agreed shortfall due to the plaintiffs is \$12,970 (viii) Variation G2 at Laguna was proved. \$88,830 is due (ix) Variation G3 at Laguna was proved. \$67,838 is due
- (x) Variation G4 at Laguna was proved. \$30,000 is due (xi) Variation G5 at Laguna AUTONUMOUT The plaintiffs claim is based on their contention that the first batch of wooden strips, supplied from the defendant's factory, were defective in that the widths were not always exactly the same. Thus, when laid, gaps appeared. Mr Sun claims that he notified the defendant of this problem and was instructed to, nevertheless, lay the different widths and fill in the gaps with grouting. The defendant submits that grouting work was done but that it was necessary not because of defective materials, but in order to rectify poor workmanship. AUTONUMOUT am satisfied that if the strips were all the same width no gaps would have appeared. Mr Sun produced photographs illustrating the differences in widths. I accept Mr's version of events. This was a valid variation, properly carried out. \$199,260 is due to the plaintiffs. (xii) Variation G6 at Laguna AUTONUMOUT The issue here is similar to G5 above. In this instance the defect in the wooden strips was an occasional block spot on the wood. For the same reason I allow it. \$67,754 is due to the plaintiffs. (xiii) Variation G7 at Laguna AUTONUMOUT It is a mystery why this variation has never been paid. No evidence has been adduced to challenge it. It relates to the cost of finishing off flooring when two units were converted into one. \$120,078 is due to the plaintiffs. AUTONUMOUT In support of G5, G6 and G7 the plaintiffs further rely on a defendant's document confirming that, in each respect, the works were 98% completed AUTONUMOUT The total sum due to the plaintiffs arising from their variations claims is as follows : A2 \$319,517 B2 \$147,338 B3 \$36,530 C2 \$42,075 C3 \$135,150 C4 \$15,992 P5 \$12,970 G2 \$88,830 G3 \$67,838 G4 \$30,000 G5 \$199,260 G6 \$67,754 G7 \$120,078

\$1,283,332

- (2) Counterclaim for defect rectification AUTONUMOUT The defendant has counterclaimed rectification fees at three of the projects, Deerhill, TV II and Laguna.

- (i) TV II and Laguna AUTONUMOUT A preliminary issue of contractual construction arises, which is relevant to these issues and later issues under (3) below (rubbish collection). AUTONUMOUT After the Deerhill project a change was made to the contractual terms. The consequence was that in all contracts, apart from Maywood and Deerhill, the contracts contained two terms which were in conflict with each other. AUTONUMOUT Taking the TV II contract for illustrative purposes clause 11 stated
- (11) Contractor must guarantee the quality of all finished works and the protection before submitting (to the owner), include plastic sheet or board protection and to be responsible for the dismantling and removal of the protection materials. If loss or damage is found during the working period and guarantee period (irrespective whether the damage was caused by third party or man-made etc.), the contractor is responsible for the repair or replacement free of charge, until the work is accepted by the architect and the owner. It (the contractor) having been notified and no action has been taken, this company has the right to send staff for the repair and replacement. All extra expenses are to be deducted from the guarantee fund of the contractor. If the guarantee fund is insufficient to pay (for the expenses), this company has the right to demand payment from the contractor. The contractor is not allowed to object. AUTONUMOUT However, each contract also incorporated the terms of the plaintiffs written quotation as part of the contract terms. This included the following Note 2 : When the project has been finished, (I) will not be responsible for the events (such as) flooding, damages and alteration. AUTONUMOUT Taken together the following facts, as I find them to be, persuade me that no liability for rectification costs falls on the plaintiffs for damage caused by third parties arising out of clause :
- (i) The plaintiffs quotation reflected the intention of both parties at the time it was signed. There is evidence of written alterations on it, signed by Ms Sandy Mak, indicating that the whole document was read, considered and agreed. (ii) At the time of the signing of the contract, (about a week later) the new clause 11 was not brought to the attention of Mr Sun who was told that, in effect, the contract was in similar terms to the Maywood contract. (iii) The contra charge of \$1,548,779 under the TV II project was made over two years after the plaintiffs had completed their work. Mr Sun was genuinely surprised and immediately objected. He said, and I accept, that the suggestion that he could be liable for all damage caused after he had left the site had never been the intention of the parties. To make himself so liable would have made no commercial sense. (iv) In any event the procedures laid down in clause 11 were not complied with. In July 2000 the plaintiffs, at the defendant s request, left the site with the work still incomplete. Soon afterwards the plaintiffs were requested to commence work at Laguna. When the final account was signed in March 2002, the defendant had made no notification of defects and had made no deductions in the account. The deduction was not claimed until November 2002.

- (v) The work to which the \$1,548,779 related was the sum claimed by the main contractor, Baldwin , against the defendant. The defendant has merely passed it on to the plaintiffs. In part or in whole it must relate to work that the plaintiffs would have continued to perform had they not been requested to leave the site in July 2000. AUTONUMOUT For all the above reasons, item D5 in the Scott Schedule (defective fee of \$1,548,779 claimed by the main contractor) must fail. AUTONUMOUT For items D3(a)
- (j) the same applies. All these items (which range in value from \$1,600 to \$233,600) relate to rectification work done after the plaintiffs left the site. Much of it is for flood repair work, a small amount is for repairs to scratched flooring and one item (for \$141,600) is for the relaying of flooring which had originally been laid on uneven concrete. AUTONUMOUT With the exception of the last item, there is no evidence to suggest that any of the work was necessary because of the fault of the plaintiffs. The defendant cannot rely on clause 11. AUTONUMOUT As for the item for \$141,600, it is true that the 1st plaintiff knew that he was laying the wooden strips on uneven concrete. However, I accept that he notified the defendant of this fact in advance of the floors being laid and that he only laid them because the defendant required him to do so as a matter of urgency. AUTONUMOUT The rectification work under this heading at Laguna relates to two small items at G10(a) and
- (c) in the Scott Schedule. In neither case can the defendant claim against the plaintiffs for costs incurred after they had left the site for work done which was not caused by them. G10(a) was for laying a different colour plastic covering (the plaintiffs had laid what was available at the time) and G10(c) was for completing flooring done two years after the plaintiffs left the site.
- (ii) Deerhill Bay AUTONUMOUT The contract for the Deerhill Bay project did not include any equivalent of clause 11 in TV II. The issue of liability for damage done by third parties does therefore not arise. AUTONUMOUT Item B5 in the Scott Schedule is a counterclaim by the defendant for \$2,509,402. The high watermark of this claim was the production of deduction notice in that sum dated three years after the plaintiffs had left the site. It related to work done on the instructions of the main contractor, Paul Y , by another contractor Montaco after the plaintiffs had left the site. AUTONUMOUT The plaintiffs had left the site in July 1999 at the defendant s request (as I so find in reliance on Mr s evidence to that effect). The plaintiffs were re engaged at TV I, TV II, P5, P6 and Laguna in the two years that followed. The defendant did not engage any new sub contractor to carry on where the plaintiffs had left off. It fell to Paul Y to engage Montaco. The rectification work done by Montaco could have been done by the plaintiffs had they been allowed to remain on site. AUTONUMOUT Moreover there was no satisfactory evidence as to what Montaco actually did. The deduction notice did not specify the works and Mr Yu was not able to assist. Any suggestion that it included rectification of defective work by the plaintiffs is unsustainable. More likely it was a continuation of the repairs to the flood damage which beset many of these projects.
- (3) BALANCE OF CONTRA CHARGE ITEMS

- (i) Rubbish collection AUTONUMOUT Item B4 at Deerhill is a counterclaim for \$80,000 and D4 at TV II is a counterclaim for \$107,106. Both are for the cost of waste disposal which it was alleged should have been done, but was not done, by the plaintiffs. AUTONUMOUT I dismiss item B4. Like many issues hitherto, it is a question of fact. Mr s evidence that he employed 10 casual workers whose work included the taking of rubbish outside to a collection point was not contradicted. There was no evidence of any complaints, at the time, that rubbish was not being cleared away. The contra charge was first made three years after the plaintiffs had completed their work. No invoice was produced to show that the sum claimed was paid to any other sub contractor. AUTONUMOUT Item D4 is allowed. The issue is slightly different from B4. The 1st plaintiff admits he deposited the waste material at various points inside the building. The contract provided for disposal at rubbish collection points outside the building. The 1st plaintiff relies on the same argument as under category
- (2) above, namely, that the terms of his quotation contained a provision (in conflict with another term in the contract) entitling him to leave the rubbish where he did. AUTONUMOUT In this instance, I think the term relied on by the defendant should prevail. It is a simple term requiring specific conduct. It is not a term (as in (2)) which renders the plaintiff liable for unknown, future conduct by others over which he had no control. AUTONUMOUT My findings in relation to the construction of the contract under headings
- (2) and
- (3) herein are not inconsistent if one weighs in the balance the nature of the conflicting terms. Under (2) the contract term provided for future uncertain events which did not reflect the intentions of the parties at the material time whereas under
- (3) the contractual term provided for specific conduct by the plaintiffs which was reasonable and which did reflect the intentions of the parties. (ii) Omission
- (a) Maywood Court (Scott Schedule item A3) AUTONUMOUT It is admitted that the plaintiffs omitted certain works at Maywood. They did not carry out works converting 32 units into larger joint units. The agreed cost of this omission was \$149,169. AUTONUMOUT However, the 1st plaintiff claims that he and Mr Yu orally agreed that he could off set against this sum certain delivery charges amounting to \$135,960 for transporting materials to flooded units on an urgent basis. AUTONUMOUT Yu denies the agreement. Ms Mak refused to pay the invoice because it lacked documentation. Mr Yu had little knowledge or recollection of the events. Mr Sun, on the other hand, was clear that an agreement had been made. He would not have done the work without prior approval and agreement. AUTONUMOUT However, I accept the argument from the defence that the amount claimed is double what it should be. The charges are for downloading the materials to the ground floor and then uploading them to the flooded units. The cost of uploading would be covered by the variation charges for that particular variation. AUTONUMOUT The amount of the counterclaim is therefore :
\$149,169 (\$135,960

2) = \$81,189

- (b) Laguna (Item G9 in the Scott Schedule) AUTONUMOUT The defendant claims \$1,439,781 for works not done at Laguna. At the outset of the trial, the plaintiffs were able to agree the quantum in six out of the seven items. Mr Sun would not accept one item valued at \$7,335. He had a clear recollection that he had performed this work before he received instructions to omit certain works. In other words the instructions not to do it came too late. AUTONUMOUT I accept Mr Sun's evidence. It provides an example of his good memory and his sense of justice. Even though it was a very small amount he knew that he had done the work. He knew also that he had not done the other six items and was prepared to accept the defendant's valuations and not waste time pushing for his own, slightly lower, figures. AUTONUMOUT This contra charge is \$1,432,446. (iii) 15% administration charges AUTONUMOUT On several of the contra charges the defendant has levied a 15% administration charge. A contractual provision for 15% only appears in the Laguna contract. I have not allowed the defendant's claim for rectification at Laguna therefore it does not arise. AUTONUMOUT disallow it in the earlier contracts because there is no provision for it. In any event, on the items I have allowed it would only come to \$12,239. SUMMARY OF COUNTERCLAIM AUTONUMOUT The counterclaim is dismissed save for : A3 \$81,189 \$405 (agreed) \$20,000 (agreed) \$107,106 \$906,569 (agreed) \$1,432,446 (agreed but for \$7,335)

\$2,547,715 AUTONUMOUT To conclude, the claim is substantially allowed and the disputed part of the counterclaim, but for one or two relatively small items, is dismissed. AUTONUMOUT The shortfalls of contract payment plus variations minus the counterclaim in figures is : \$7,542,203 + \$1,283,332 \$2,547,715 = \$6,277,820. Interest AUTONUMOUT The rate of interest will be prime 1%. AUTONUMOUT As for the period of interest the plaintiffs seek a complicated order by which different sums should commence attracting interest at different dates. AUTONUMOUT My order will be more simple. The writ was not filed until October

2003. I will not use this date because it took the plaintiffs a little time to be granted legal aid. Otherwise the writ would have been served earlier. AUTONUMOUT will use the date of the final application for payment on the last contract, namely, 4 April 2002. A high percentage of the judgment sum is represented by the shortfall in payment on the Laguna contract, namely, \$5,099,989 out of a final judgment sum of \$6,277,820. A fair and simple approach to interest is therefore to order one rate and one period of time. AUTONUMOUT There will be judgment for the plaintiffs in the sum of \$6,277,820 plus interest at prime 1% from 4 April 2002. I see no reason to make a costs order other than one which reflects the true outcome of the proceedings, namely, a costs order nisi in the plaintiffs favour to be taxed if not agreed in accordance with Legal Aid Regulations. (M.P. Burrell) Judge of the Court of First Instance High Court Mr James Lee, instructed by Messrs Kevin Ng & Co., for the Plaintiffs Ms Janine Cheung, instructed by Messrs Huen & Partners, for the Defendant PAGE - 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 H I J K L M N O P Q R S T U V (#p# (#p# (#p# (#p# &`#\$ &`#\$ z^5 v 7Bo4B vZ i t(Mt vZ i z^5 7Bo4 6K2* & 6" ABC.dot setup

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