

Soil-Build (Pte) Ltd v Sin Yam Huat Investment Holding Pte Ltd
[2000] SGHC 253

Case Number : Suit 406/2000/G consolidated with S600180/2000, RA 63/2000
Decision Date : 28 November 2000
Tribunal/Court : High Court
Coram : Lee Seiu Kin JC
Counsel Name(s) : Ho Chien Mien & Prakash Pillai (Allen & Gledhill) for the plaintiffs; Leong Why Kong (Salem Ibrahim & Partners) for the defendants
Parties : Soil-Build (Pte) Ltd — Sin Yam Huat Investment Holding Pte Ltd

JUDGMENT:

Grounds of Decision

1 The Defendants are the owners and developers of a 7-storey flatted warehouse at Kallang Pudding Road ("the Project"). The Plaintiffs are the main contractors for the project.

2 In this action the Plaintiffs claim for monies due under an Architect's certificate along with certain ancillary reliefs. In SIC 513/2000 the Plaintiffs applied for summary judgment. The learned Assistant Registrar did not allow the application and granted the Defendants unconditional leave to defend the action. The Plaintiffs appealed before me and on 11 October 2000, after hearing counsel for the parties, I allowed the appeal and made the following orders:

- (i) Judgment for the Plaintiffs in the sum of \$368,205.34 plus interest;
- (ii) Such judgment to be stayed pending determination of any counterclaim to be filed by the Defendants in respect of defective works. For the avoidance of doubt, the Defendants are not precluded from counterclaiming in respect of other matters save that the stay shall not operate in relation to those matters;
- (iii) No order as to costs here and below.

3 The Defendants have appealed against the first order giving judgment against them in the sum of \$368,205.34 plus interest and I now give my grounds of decision.

4 On 24 June 1996 the parties entered into a contract ("the Contract") in respect of the Project which incorporated the Singapore Institute of Architects Conditions of Building Contract for lump sum contracts ("the SIA Conditions"). The contract sum was \$12.7 million and the contract period was 15 months from 19 July 1996. The Contract provided for nominated sub-contractors to be appointed for certain specialised works and one of them was Diethelm Industries Pte Ltd ("Diethelm"). They were appointed on 24 September 1996 to supply and install the aluminium cladding for the Project.

5 On 26 January 1998, the Architect issued, pursuant to clause 24(4) of the Contract, a Completion Certificate which stated that the Project was completed on 24 January 1998. Attached to the Completion Certificate was a schedule ("the Schedule") entitled "Minor Outstanding Works" which, under the terms of the Contract, the Plaintiffs were to carry out before the Defendants would release the retention monies. The certificate also stated that the 15-month Maintenance Period under the contract would commence from the completion date and end on 24 March 1999.

6 The dispute between the parties hinged on whether the Plaintiffs had satisfactorily completed the "Minor Outstanding Works" set out in the Schedule. In particular, the Defendants had numerous complaints about the aluminium cladding installed by Diethelm. The Plaintiffs claimed that this was because Diethelm were not co-operative in attending to the Defendants' complaints in respect of the cladding. Although there were some other defective works outstanding, the Defendants had

themselves said in their letter to the Plaintiffs on 8 April 1999 that Diethelm's aluminium cladding work was the major complaint they had.

7 The Contract required the Plaintiffs to procure an on-demand performance bond for 10% of the contract sum amounting to \$1.27 million. On 8 April 1999 the Defendants called on the bond. However payment was not made pursuant to this call because the parties agreed, at a meeting on 23 April, to settle the matter by appointing an independent third party to identify the defects still outstanding. The Plaintiffs would then be given a reasonable period to rectify those defects to the satisfaction of that third party. It took another 2 months to resolve the details of this agreement but eventually the parties agreed on and appointed Mr Chin Cheong of Building Appraisal Pte Ltd ("BAPL"). The terms of this appointment are set out in the Plaintiffs' letter of 18 June 1999 to him, which provides as follows:

"PROPOSED ERECTION OF A ONE BLOCK OF 7-STOREY FLATTED WAREHOUSE DEVELOPMENT ON LOT 3633 MK 24 AT KALLANG PUDDING ROAD FOR M/S SIN YAM HUAT REALTY PTE LTD

1 We refer to the above project.

2 Various disagreement[s] have arisen between the respective parties on the work required to rectify alleged defects related to the above project.

3 As such, the parties [i.e. the owner of the building, M/s Sin Yam Huat Realty Pte Ltd ("Sin Yam Huat") and the main contractor M/s Soil Build Pte Ltd ("Soil Build")] have agreed to appoint an independent third party to identify and draw up a list of defects for which rectification works are required and to make a final assessment as to the costs of carrying out such work. You are hereby appointed jointly by Sin Yam Huat and Soil Build to act as the said third party expert.

4 The scope of your work would include the following:

- a Review drawings, specifications and reports prepared by consultants.
- b Carry out a comprehensive site inspection of the alleged defects.
- c Work with the parties to prepare a list of defects.
- d Provide an opinion in respect of the "defects" or "making good" works or make recommendations, if necessary.
- e Prepare four (4) copies of a report (including colour photographs) encompassing the above.

5 In addition, you will be expected to draw up a reasonable time frame for completion of the rectification works. At the end of the stipulated time frame, you are to certify that the rectification works have been satisfactorily completed. If there are still outstanding or defective works at the end of the period stipulated for rectification, you are also to assess the cost of rectifying these defects. As third party expert, your decision/judgement in respect of the alleged defects will be final, conclusive and binding on the parties (without further recourse to court or arbitration proceedings).

6 Although you are jointly appointed [by] Sin Yam Huat and Soil Build, please note that Soil Build undertakes to pay your costs in respect of this matter.

7 Please confirm as soon as possible whether you will be accepting the appointment as third party."

8 From this letter it can be seen that the parties had agreed for BAPL to act as a sort of an arbitrator to:

- (a) decide what constituted the defects;
- (b) set a reasonable period for the Plaintiffs to rectify those defects;
- (c) at the end of this period, determine whether the defects have been rectified;
- (d) in respect of the defects not satisfactorily rectified, assess the cost of rectifying them.

BAPL's decision on these matters was to be final and binding on the parties in relation to the dispute between them under the Contract. Although it was not expressly stated in the correspondence between the parties, it was a necessary consequence of this agreement that the Defendants would be entitled to deduct from the retention monies the total sum that BAPL assessed was the cost of rectifying the defects not satisfactorily completed after the time given to the Plaintiffs to carry out such works. It was also a necessary corollary that thereafter the Defendants would have no further claim against the Plaintiffs in respect of the Contract or at least in respect of those defects. I shall refer to this as "the Settlement Agreement".

9 BAPL accepted the appointment and produced a report in August 1999. The report contains a list of defects and stated that 4 weeks was a reasonable period to complete the rectification works. Based on this report the Plaintiffs undertook certain rectification works and informed BAPL of the alleged completion of works prior to 11 November, on which date BAPL inspected the building. In their letter of 11 November, the Plaintiffs requested BAPL to certify the completion of the rectification works, or assess the cost of the defects not rectified to their satisfaction in accordance with the terms of the Settlement Agreement.

10 However the Defendants' solicitors, M/s Salem Ibrahim & Partners ("SIP") wrote to BAPL on 15 November to say that they did not "*deem*" the 11 November inspection to be a "*comprehensive one, satisfactory for the purpose of [BAPL] certifying all incomplete rectification works*". They requested BAPL to conduct urgently a "*comprehensive inspection*". BAPL replied on 17 November and, among other matters, confessed to some confusion as regards the scope of their appointment. On 19 November the Plaintiffs' solicitors, M/s Allen & Gledhill ("A&G") wrote to SIP and enclosed for the latter's consideration a draft letter to BAPL to clarify the scope of work. A&G did not receive any immediate response to this letter and on 7 December they sent the following letter to BAPL (with a copy forwarded to SIP):

"PROPOSED 7-STOREY WAREHOUSE AT KALLANG PUDDING ROAD

We act for M/s Soil Build (Pte) Ltd

We refer to your letter dated 17 November 1999 addressed to M/s Salem Ibrahim & Partners and your letter to Soil Build Pte Ltd dated 30 November 1999.

Your scope of work is described in detail in your letter of appointment dated 18 June 1999, a copy of which is enclosed for your reference.

In relation to your duties pertaining to the identification of defects, you are (as per the letter of appointment) required, inter alia, to do the following:

- (a) Carry out a comprehensive site inspection.
- (b) Draw up a reasonable time frame for completion of the rectification works.
- (c) If there are still outstanding works at the end of the stipulated time frame, assess the cost of rectifying these defects.

We note that you produced a detailed expert [report] in August 1999 pursuant to what we had deemed to be a 'comprehensive' site inspection. You have therefore satisfactorily carried out your function under paragraphs (a) and (b) above.

What remains is for you to inspect the site with a view to assessing the cost of rectifying outstanding defects as per (c) above. The letter of appointment dated 18 June 1999 is very clear in stipulating your obligation to make this assessment at paragraph 5 of the said letter. It is therefore not additional or further work as you seem to suggest. Once you have carried out this final task, you will be discharged of any further obligations.

Please proceed with the necessary assessment of cost of rectification works as per the letter of appointment dated 18 June 1999."

11 In response to that letter to BAPL, SIP wrote to A&G on 8 December 1999 to protest the manner in which the Plaintiffs had unilaterally instructed BAPL. SIP stated that they had written an urgent letter to A&G dated 3 December in which they had suggested convening a meeting of the various actors involved in order to resolve the impasse. SIP reiterated that such a meeting should be held. A&G replied to this letter on 13 December to state, among other things, that their 7 December letter to BAPL did not contain any new instructions but merely reminded BAPL of the express terms of their appointment. On 22 December, SIP wrote to A&G requesting to know when BAPL would be making a final inspection of the building as the Defendants wish to have their representatives present when this was done. This letter was copied to BAPL. The Plaintiffs sent an urgent fax to BAPL on the same day, making reference to SIP's letter, and asked if BAPL would wish to conduct any final inspection. BAPL replied to the Plaintiffs on 23 December 1999 in the following manner:

"We are in the midst of preparing a cost estimation for the proposed rectification works. We will not require the gondola on site. The gondola can be removed, please instruct accordingly."

Implicit in this response is the assertion that they would not be conducting a final inspection.

12 On 3 January 2000, BAPL submitted their report of the cost estimates in purported fulfilment of the terms of reference of their appointment. BAPL assessed that the total cost of rectification was \$85,580. However there was this note appended to the report:

"We must highlight that these are estimated costs as the only way of obtaining an accurate figure is by the preparation of a detailed specification and obtaining competitive quotations."

This enigmatic sentence was to become a further bone of contention between the parties. On 25 January, SIP wrote to A&G and the material paragraph states as follows:

"Our clients do not accept the cost estimates of [BAPL] dated 3 January 2000. A proper estimate of the costs can only be obtained by the preparation of detailed specifications and obtaining quotations from parties willing to undertake the rectification works."

SIP stated that the Defendants reserved all their rights on the matter.

13 A&G replied on 28 January and said the following:

"... you state that your clients do not accept the cost estimates of [BAPL] dated 3 January 2000. You must be aware that your clients' position is a clear breach of the agreement between our respective clients to appoint an independent third party to, inter alia, identify and value the outstanding rectification works without interference from any of the parties concerned. We wish to remind our clients that all determinations made by the third party were, as agreed by our respective clients, final, conclusive and binding."

A&G also stated that the Plaintiffs reserved their rights in this matter.

14 On 11 February SIP, on behalf of the Defendants, made a second call on the bond for the full sum of \$1.27 million. In response the Plaintiffs took out Suit No. 600180/2000 in which the substantive relief sought was a declaration that the determination by BAPL on 3 January 2000 of the costs of rectification works was valid and binding on the Defendants. At the same time the Plaintiffs applied for an interlocutory injunction to restrain the Defendants from receiving any payment under the bond until trial. This application came up before me on summons day on 25 February 2000. The parties asked for a special date to be fixed and I adjourned it accordingly. The matter then came up before Justice Rubin on 21 March. At that hearing, counsel for the parties informed the learned judge that the parties were in negotiation and there was a possibility that the matter could be settled. Justice Rubin accordingly adjourned the matter. Counsel for the parties next appeared before me on 18 April and reported that they had agreed to settle the matter by appointing a third party Quantity Surveyor to value the outstanding rectification works. In view of that, I adjourned the matter for another 2 months. The parties subsequently agreed to re-appoint BAPL to undertake this work. They agreed to the exact terms of this appointment and this is set out in A&G's letter to BAPL dated 12 May 2000 which provides as follows:

"We refer to your letter dated 3 January 2000 wherein you had enclosed your cost estimate of \$85,580.00 on the incomplete defective works in respect of the above project.

The said letter is silent as to whether your above costs estimate was done pursuant to a comprehensive site inspection of the above project in respect of outstanding defects. The parties have agreed to jointly instruct you, pursuant to your function as an independent third party, to undertake a comprehensive site inspection, and provide your final assessment of the value of the outstanding works based on your original report of August 1999.

Although you are jointly instructed to prepare the further report by both Sim Yam Huat Investment Holding Pte Ltd and our clients, our clients undertake to pay your additional costs in respect of this matter. The terms of your appointment are otherwise unchanged from Soil Build's letter dated 18 June 1999.

Please proceed to do the necessary site inspection as soon as possible. Your report should be completed no later than 31 May 2000."

15 BAPL reverted on 19 May and set out their proposal for undertaking the appointment. According to this letter, this comprised:

"A) Scope Of Work

- i) Carry out a further comprehensive site survey of the premises, on the 'alleged' defects;
- ii) Preparing a cost estimate for the necessary rectification works;
- iii) Inviting specialist contractors on cladding work to submit quotations for the necessary rectification works;
- iv) Providing a detail breakdown of the cost estimate on the rectification works;
- v) Prepare (4) four copies of our report of the above including all necessary photographs."

16 A&G replied to BAPL on 22 May to object to their defining their own scope of works. A&G pointed out that the terms of their appointment must be strictly in accordance with the A&G letter to BAPL of 12 May 2000 read with the Plaintiffs' letter to BAPL of 18 June 1999. A&G also objected to BAPL's proposal item (iii), i.e. to invite specialist contractors on cladding works to submit quotations in order to assess the cost of their rectification.

17 BAPL then reverted with a modified proposal in which item (iii) was omitted. However SIP wrote to A&G on 24 May to protest this "interference" by A&G of BAPL's functions. SIP reiterated their view that a proper cost estimate can only be done by obtaining quotations as originally proposed by BAPL and insisted that the cost estimate be prepared on the basis of their original proposed scope of works. A&G opposed this and the solicitors then engaged in an exchange of correspondence which did not end in any agreement. These letters were copied to BAPL. At one point, the Defendants sent a cheque to BAPL for \$1,700 for the additional work incurred in inviting specialist contractors to quote for the rectification of the cladding works. However BAPL did not accept this and on 9 June 2000 wrote to A&G as follows:

"RE: PROPOSED 7-STOREY FLATTED WAREHOUSE AT KALLANG PUDDING ROAD:
ASSESSMENT OF RECTIFICATION WORKS OF EXTERNAL CLADDINGS

We refer to the above matter and the various correspondences between respective solicitors and noted the contents therein.

We are in receipt of a cheque from M/s Sin Yam Huat Realty, in a sum of S\$ 1,700.00.

We regret that we are unable to accept the cheque payment, as the fee payment of our services has been agreed.

In order for our firm to expedite the report, we suggest that parties allow us to carry out the assessment independently.

We are in the midst of completing the cost assessment of the rectification work and the report will be ready by the 13th June 2000."

18 In the event, BAPL proceeded with their determination of the cost estimate and sometime in June 2000 submitted a report stating that the cost of outstanding rectification works was \$149,510, which included an estimate of the diminution of value of a

small part of the works which BAPL had concluded was not practical to rectify. Meanwhile the Architect had, on 22 May 2000, issued a final certificate in which he determined that the sum payable by the Defendants to the Plaintiffs was \$368,205.34 (inclusive of GST). This sum took into account a deduction made by the Architect on the basis of his assessment that the value of the outstanding defective works was \$142,890.64. Proceeding upon the determination by BAPL, the Plaintiffs made a demand on the Defendants for the sum of \$350,861.56 (before GST) by substituting BAPL's determination of the cost of rectification for the Architect's. When the Defendants refused to pay, the Plaintiffs commenced Suit 406/2000 on 23 June 2000. On 26 June, the application in S600180/2000 for an injunction came up before me. At the end of that hearing I granted the injunction. On 17 July 2000 both suits, S406/2000/G and S600180/2000, were ordered to be consolidated.

19 The Plaintiffs applied, in SIC 513/2000 for, *inter alia*, summary judgment on 2 alternative bases:

(a) on the valuation of works in the Architect's final certificate with the total sum reduced by the amount determined by BAPL to be the costs of rectification, alternatively;

(b) on the Architect's final certificate which had already deducted a sum equivalent to his assessment of the cost of rectification works.

The learned Assistant Registrar heard the application on 29 September and dismissed the application, granting the Defendants unconditional leave to defend the action. The Plaintiffs appealed in the present appeal.

20 In respect of basis (a) above, as the Architect's certification is not disputed, the crux of the matter is whether BAPL's assessment of \$149,510 is determinative of the dispute between the parties. It is not in dispute that the parties have agreed to appoint BAPL to make this assessment which will be binding on them. This is akin to an arbitration agreement on that sole issue. Therefore the only question is whether BAPL had made the assessment in accordance with the terms of their appointment. This would include considering whether, in making their assessment, BAPL had been influenced in any manner by the Plaintiffs. I found that in objecting to BAPL's proposed scope of works set out in their letter of 19 May 2000, the Plaintiffs had interfered with the discretion granted to BAPL to determine the matter. This is because there was nothing in any of the 3 letters of appointment to BAPL (dated 18 June, 7 December 1999 and 12 May 2000) that constrained them to make the assessment in a particular manner. Therefore in objecting to BAPL's proposal to call for quotes in order for them to arrive at their assessment, the Plaintiffs had interfered in such determination.

21 However in respect of basis (b), there is no question that the Architect's certificate is to be given temporary finality in a Contract which adopts the SIA Conditions. Clause 31(11) of those conditions provides as follows:

"No certificate of the Architect under this Contract shall be final and binding in any dispute between the Employer and the Contractor, whether before an arbitrator or in the Courts, save only that, in the absence of fraud or improper pressure or interference by either party, full effect by way of Summary Judgement or Interim Award or otherwise shall, in the absence of express provision, be given to all decisions and certificates of the Architect ... whether for payment or otherwise, until final judgement or award, as the case may be, and until such final judgement or award such decision or certificates shall (save as aforesaid ...) be binding on the Employer and the Contractor in relation to any manner [sic] which, under the terms of the Contract, the Architect has as a fact taken into account or allowed or disallowed, or any disputed matter upon which under the terms of the Contract he has as a fact ruled, in his certificates or otherwise. The Architect shall in all matters certify strictly in accordance with the terms of the Contract. In any case of doubt the Architect shall, at the request of either party, state in writing within 28 days whether he has as a fact taken account of or allowed or disallowed or ruled upon any matter in his

certificates, if so identifying any certificate and indicating the amount (if any) taken into account or allowed or disallowed, or the nature of any ruling made by him, as the case may be."

The Defendants had made no complaints in relation to the Architect's certificate. Therefore pending a determination which is final and binding between the parties of the costs of the rectification works, the Plaintiffs are entitled to have effect given to the Architect's final certificate in this action. Accordingly, I gave judgment for the Plaintiffs in the sum of the certificate, i.e. \$368,205.34. However in view of the Defendants' counterclaim in respect of the rectification works, I ordered a stay of execution of the judgment pending determination of such counterclaim.

Lee Seiu Kin

Judicial Commissioner

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