L.K. Ang Construction Pte Ltd v Chubb Singapore Private Limited
[2002] SGHC 309

Case Number : Suit No 355 of 2002

Decision Date : 18 December 2002

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Raymond Chan (Chan Tan LLC) for the Plaintiff; Wong Yoong Phin (Wong Yoong Phin & Co) for the Defendant

Parties : L.K. Ang Construction Pte Ltd — Chubb Singapore Private Limited

Contract – Formation – Whether execution of agreement a mere formality – Whether intention to enter into contract before or without signed agreement

Tort – Defamation – Qualified privilege – Whether recipients of letters interested in contents of letters – Whether defendant reckless in publishing defamatory words – Whether malice inferred from late apology

Judgment

Cur Adv Vult

GROUNDS OF DECISION

1. This action touches on two main issues, the formation of a building sub-contract and libel.

2. The plaintiff L.K. Ang Construction Pte Ltd was the main contractor for addition and alteration works to be carried out on a factory. The employer was Techplas Industries Pte Ltd. The contract between the plaintiff and the employer incorporated the SIA Conditions of Contract 6th Edn.

3. The consultants to the project included –

Architect - K C Kan Architects Pte Ltd

Mechanical and Electrical Consultant - Chee Choon & Associates

Quantity Surveyor – LCH Quantity Surveying Consultant

4. The defendant Chubb Singapore Pte Ltd tendered successfully for the Fire Protection Installation Works ("the FPI works"). On 5 Dec 2001, it was informed by the M&E consultant that it would be appointed the nominated sub-contractor for the FPI works.

5. On 6 Dec 2001 the architect instructed the plaintiff to issue a letter of award to the defendant and to enter into a nominated sub-contract with it. The plaintiff, in compliance with the architect's letter, wrote to the defendant on 18 Jan 2002 that

> We refer to the enclosed Architect's Instruction No. A 01 dated 6 December 2001 and are pleased to appoint you as the Nominated Sub-Contractor for the Fire Protection Installation Work for the above-mentioned project.
>
> The Performance Bond in the form of Banker's Guarantee as stated in the Main Contract should cover for the period from 5 December 2001 to 28 September 2003.
>
> The formal contract will be issued to you in the near future.
>
> You shall take this letter as instruction to proceed with the preparation of the

> works for the timely delivery according to our project schedule. Please note that the terms and conditions of your Sub-Contract shall be same as the Main Contract as far as your scope of works and shall be strictly followed.

Although it was not stated that a sub-contract was formed between them by the issuance of the letter, the plaintiff's case is that such an agreement was formed.

6. The defendant commenced work as instructed (it had started some preparatory works even before 18 Jan), and submitted its progress claims for work done on 21 Jan and 28 Feb.

7. It also caused a financial credit search to be made on the plaintiff in compliance with its financial risk policy. A credit reference agency DP Information Networks Pte Ltd was engaged for the purpose. The defendant was disturbed by the agency's report which concluded with

> Unfavourable & favourable factors carry similar weight in credit consideration. Capability to overcome financial difficulties seems comparatively limited or considered not known. Capability to pay both interest and principal sums is doubtful.

8. It sought to alter the payment arrangements so that it could receive payment for the sub-contract works direct from the employer, rather than through the plaintiff as the main contractor. The request was made to the architect by letters dated 18 Feb and 20 Feb, the second of which enclosed a copy of the credit report. In the letters the defendant gave notice that it would not sign a sub-contract with the plaintiff if direct payment from the employer was not allowed.

9. On 26 Feb it sent the architect a third letter which is the subject of this action. The letter reads -

> Reference is made to the above, our earlier request letter Ref. No. CON/15190/02/PC/L and CON/15192/02/PC/L dated 18 Feb 2002 and 20 Feb 2002 respectively.
>
> *Our request for direct payment comes about from the findings of the Company business overview/financial check.*
>
> *As L K Ang Construction Pte Ltd have a poor credit rating, we cannot accept and sign the contract with the main contractor (L K Ang Construction Pte Ltd) if necessary commercial precautions are not put in place to avoid unnecessary consequences.*
>
> *Based on your reply letter Ref. no. 0108/chubb/002/02 dated 22 February 2002, rejecting the direct payment request or any other precautionary option, we regret to confirm that we are unable to accept and formalize the Nominated Sub-Contract with L K Ang Construction Pte Ltd.*
>
> With the above confirmation and the site works provided for December 2001, January 2002 and February 2002, we trust that payment shall be made for the January and February 2002 payment certificates.
>
> Please take note that we shall cease work for the above project on the 28 February 2002 and all contractual duties, responsibilities and liabilities shall expires accordingly.
>
> (Emphasis added)

10. Copies of the letter were sent to the employer, the M&E consultant, the quantity surveyor and the plaintiff.

11. The request was turned down and the defendant stopped work on 28 Feb. The plaintiff regarded the stoppage of work as a repudiation of the sub-contract. It accepted the repudiation and treated the sub-contract as terminated. It appointed another sub-contractor, Sprinkler Engineering Pte Ltd to undertake the work for $223,388 and sued for damages for breach of the sub-contract.

12. The plaintiff also claimed that the italicised portions of the letter of 26 Feb were defamatory in that in its natural and ordinary meaning it meant that

> 5.1. the Plaintiffs were financially unstable;
>
> 5.2. the Plaintiffs were not creditworthy;
>
> 5.3. the Plaintiffs as Main Contractors could not be relied upon to pay to the Defendants and other sub contractors any monies received from the Employer;
>
> 5.4. the Plaintiffs' financial standing rendered them unreliable and untrustworthy as Main Contractors;
>
> 5.5. the Plaintiffs were unfit to be appointed as Main Contractors in view of their financial instability;
>
> 5.6. the Plaintiffs could not be relied upon financially to complete their works;
>
> 5.7. the Plaintiffs were not creditworthy and unfit to enter into Nominated Sub Contracts with the Defendants and other Nominated Sub contractors.

13. The defendant initially denied that the letter was defamatory, but conceded in the closing submissions that the letter was defamatory in that it meant that

> (1) the Plaintiffs were financially unstable;
>
> (2) the Plaintiffs were not creditworthy;
>
> (3) the Plaintiffs as Main Contractors could not be relied upon to pay to the Defendants monies received from the Employer; or
>
> (4) the Plaintiffs were not creditworthy and unfit to enter into a Nominated Sub Contract with the Defendants.

14. I find the plaintiff's reading of the letter overly broad, especially on the plaintiff's unreliability and untrustworthiness. The defendant's construction was more reasonable.

15. The defence then was that although the letter was defamatory, it was published on an occasion of qualified privilege in that

> (a) the Defendants and the Architect, the M & E Consultant, the QS and/or the Employer had a common and/or corresponding interest in the subject matter of the letter and/or the words complained of; and/or
>
> (b) the Defendants wrote and published the said letter and/or the words in the reasonable protection of their own legitimate interests(s) to the Architect, the Employer, the M & E Consultant and the QS who each had a like interest in

receiving the same.

16. A privileged occasion is classically defined as

> (A)n occasion where the person who makes a communication has an interest, or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it.

per Lord Atkinson, *Adam v Ward* [1917] AC 309 @ 334

17. There was no dispute that the defendant had an interest in the financial standing of the plaintiff, as its receipt of payments under the sub-contract would be affected if the plaintiff ran into financial difficulties in the course of the project.

18. The architect had an interest in the progress of the project. He was the proper party for the request to be addressed, and he needed to know of the reason for the request to advise the employer on it. The M&E consultant also had an interest. The FPI works came within the purview of the mechanical and electrical works. It negotiated with and recommended the appointment of the defendant for these works, issued the letter of 5 Dec, and would monitor the works when they were carried out. It was reasonable for the defendant to inform the M&E consultant of the request and the reason for it, as its views may be sought by the employer.

19. However the plaintiff denied that the quantity surveyor had any interest in the FPI works to justify sending the letter to him. Counsel for the defendant submitted at length that the quantity surveyor was a proper recipient of the letter, but length was not matched by content. There was nothing to show that that quantity surveyor had any role in the appointment of the defendant or any interest to be informed of the defendant's apprehensions over the plaintiff's financial position and the request to change the payment procedure.

20. The plaintiff contended that the qualified privilege defence was not available because the defendant acted with actual malice. The plaintiff argued that there was malice because (i) the words were published recklessly, (ii) the defendant was late to apologise or withdraw the words, and (iii) the defendant's true intention was to withdraw from the sub-contract because its price was too low.

21. The defendant was acting properly in obtaining a credit report on the plaintiff from D P Information Networks. When it received the report, it regarded it as a negative report. However it forwarded a copy of the report to the architect with its request.

22. In the letter of 26 Feb it stated that the plaintiff had a poor credit rating. Those words were not used in the report, but was the defendant's reading of it. The credit report had placed the plaintiff in the fifth of seven categories of descending creditworthiness. The defendant conceded that the letter was defamatory. The plaintiff contended that it was made with malice because it was made recklessly. The plaintiff relied on the proposition that "(W)here a defendant has allowed himself to get into a state in which he is reckless as to whether what he publishes is true or false, he is treated as if he has stated what he knows to be false." - *Gatley on Libel and Slander* (8th Edn) para 774.

23. Was the defendant reckless? The defendant had written the letter on the basis of the credit report. It read more into the report than was justified. It could have been more careful, but it was not so careless as to be considered reckless. In this regard, it is apposite to refer to Lord Esher M.R.'s words in *Royal Aquarium v Parkinson* [1892] 1 QB 431 that

> If a person from anger or some other wrong motive has allowed his mind to get into such a state as to make him cast aspersions on other people, reckless whether they are true or false, it has been held, and I think rightly held … that he abused the occasion …

There was no suggestion that the defendant intended to injure the plaintiff when it sent the letter.

24. The plaintiff also submitted that the defendant's malice can be inferred because it did not issue an apology for the letter till 16 Aug 2002. I will be careful in drawing such an inference. The delay may be the defendant's decision-making process, or its belief in the truth of the statement, or its disagreement that the statement should be read in the manner the plaintiff read it. As there is nothing to show that the

defendant withheld or delayed the apology to prolong the injury it caused, I will not draw the inference.

25. The plaintiff did not pursue the assertion that the defendant was motivated by the intention to withdraw from the sub-contract because its price was too low, as there was no evidence of that.

26. I therefore find that the defence of qualified privilege succeeds with regard to the publication to the architect, employer, M&E consultant, but not for publication to the quantity surveyor. I order that the defendant pays damages to the plaintiff, and that the damages be assessed by the registrar.

Whether there was a binding sub-contract

27. It was not disputed that a signed sub-contract was contemplated and that no such agreement was signed. The plaintiff contended that a sub-contract came into being on 18 Jan 2002, while the defendant's position was that there was no sub-contract till it was signed.

28. A review of the contemporaneous documents will help to determine which position is correct. The starting point is the defendant's tender offer dated 18 Oct 2001 in the form furnished by the architect. The offer was addressed to the employer and stated that

> 9) If our tender is accepted we undertake to enter into a Sub Contract with the Main Contractor in accordance with The Conditions of Sub-Contract;
>
> ……
>
> 11) We agree that until a formal agreement is prepared and executed this tender together with the Letter of Acceptance thereof by the Employer shall constitute a binding contract between us.

29. The defendant was informed by the M&E consultant that its bid was accepted. The consultant informed the defendant in its letter of 5 Dec 2001

> Letter of Intent
>
> We refer your tender submission on 20th September 2001 and are pleased to inform that we intend to appoint you as the Nominated Sub Contractor for the above caption subject to the following terms and conditions:
>
> > 1. Nature of Subcontract
> >
> > With the issuance of this Letter of Intent, the Architect shall forthwith be nominating you as the Nominated Subcontractor to the Main Contractor.
> >
> > Subject to the reasonable objection by the Main Contractor to the nomination, you shall upon his acceptance of the nomination become his Nominated Subcontractor and shall enter into a Subcontract Agreement with him in accordance with the terms and conditions of the Subcontract, construed consistently with the requirements of the Main Contract insofar as they concern the Works under this Subcontract.
> >
> > The Form of Subcontract shall be the Conditions of

> Subcontract for use in conjunction with the SIA Main Building Contract (Articles and Conditions of Building Contract, Sixth Edition, 1999) issued by the Singapore Institute of Architects.

The identity of the main contractor was not disclosed in this letter.

30. The architect also informed the plaintiff of the selection of the defendant. In its letter of 6 Dec 2001 it instructed the plaintiff to enter into a nominated sub-contract and issue a letter of award to the defendant.

31. In compliance with the instruction the plaintiff wrote to the defendant on 18 Jan 2002 that

> We refer to the enclosed Architect's Instruction No. A 01 dated 6 December 2001 and are pleased to appoint you as the Nominated Sub-Contractor for the Fire Protection Installation Work for the above-mentioned project.
>
> ……
>
> The formal contract will be issued to you in the near future.
>
> You shall take this letter as instruction to proceed with the preparation of the works for the timely delivery according to our project schedule. Please note that the terms and conditions of your Sub-Contract shall be same as the Main Contract as far as your scope of works and shall be strictly followed.

32. Two points stand out in these documents. First, there was the consistent reference to the execution of a formal contract, and no indication of the formation of a sub-contract between the plaintiff and the defendant at any time before that.

33. Second, the defendant's tender offer in the form furnished by the architect provided that until the execution of a formal agreement, the tender and the employer's letter of acceptance constituted a binding contract between it and the employer. Consequently when the letter of 5 Dec 2001 was issued, there was a binding agreement between the defendant and the employer which was to be replaced by a sub-contract between the defendant and the plaintiff when the formal agreement is executed. If there was also a sub-contract between the defendant and the plaintiff prior to the execution of the formal agreement, the defendant would have similar contracts with the employer as well as the plaintiff at the same time. This cannot be the intention of the parties.

34. The plaintiff argued that the M&E consultant's letter was not the Letter of Acceptance, that it was no more than a letter of intent (as the letter was captioned) by the M&E consultant which was not stated to be written on behalf of the employer.

35. This argument ignored some important facts. The letter was issued by the M&E consultant specifically in response to the defendant's tender submission. Furthermore the letter referred to "this letter of award" and "this Letter of Award". Counsel did not venture to suggest what was awarded if it was not the sub-contract for the FPI works. The letter can only be fairly construed as a letter of acceptance. If it was not, it would appear that the defendant's tender offer was never accepted by the employer, and that was not consistent with the plaintiff's own case.

36. Nevertheless the plaintiff's case is that there was a contract between itself and the defendant despite the absence of the formal agreement. It argued that by 18 Jan the terms of the sub-contract were settled, and there were no further terms to be resolved, and when the plaintiff appointed the defendant as the sub-contractor, a contract was formed. This argument overlooked the fact that the letter of 5 Dec identifying the form of sub-contract was not from the plaintiff. It was issued by the M&E consultant on behalf of the employer, with no reference to the plaintiff. Although the parties in the tendering process were aware of the form of the sub-contract to be entered into, there was nothing which points to an agreement between the plaintiff and the defendant to enter into the sub-contract between themselves in that form.

37. The plaintiff also submitted that

> In respect of building contracts, the entering into a formal contract in the future does not prevent a contract from being formed if the material terms are settled and work commences at the site. In building contracts the parties often provide that a formal contract will be executed in the future. Unlike conveyancing practice for instance, the building contract will come into effect once all the terms have been settled and work commences at the site.

38. That is partly correct. The requirement for signing a formal contract may be just that – a formality. But it may be more than that, and it is necessary in each case to consider all the circumstances to decide if an agreement has come into being without the formal document. However it is wrong to contend without such consideration that an agreement will come into effect, as it is wrong to say that it will not.

39. We should not apply contractual rules differently to different activities. Parties engaged in all activities should conduct their affairs in compliance with the rules, and should not expect that the rules be adapted for them. The parties had intended that there was to be a signed agreement. They had not stated expressly or impliedly that there was to be a sub-contract before or without a signed agreement, or that the execution of the agreement was a matter of formality only.

40. Counsel submitted that the parties to a building contract may be more concerned with the execution of the contracted works than the contract document, and are apt to delay or overlook the execution of the contract. Even if that were so, the rules do not have to be applied differently. There are existing rules which can assist an aggrieved and deserving party, particularly the rules of waiver and estoppel. If indeed the parties had acted on the basis that there was a concluded contract, neither of them should be allowed to evade liability because the formal agreement was not signed.

41. But that was not the plaintiff's case, and waiver and estoppel were not raised. If they were pleaded, was either established? The defendant was informed that it was selected on 5 Dec. On 18 Jan the plaintiff appointed the defendant as its nominated sub-contractor. On 18 Feb, the defendant requested for a change in the payment terms. It did not make any representation to the plaintiff that it would enter into a sub-contract with it. To the contrary, it gave notice that without the change it would not enter into the sub-contract, and no sub-contract was forwarded for it to execute. There can be no waiver or estoppel in the circumstances, or anything which rendered the execution of an agreement unnecessary.

42. On the evidence before me, I find that there was no binding sub-contract between the plaintiff and the defendant. With this finding, the claim for damages for breach of contract fails. I will add that even if there was a sub-contract and it was wrongly repudiated by the defendant, there were shortcomings in the plaintiff's presentation of its claims.

43. The plaintiff's claim was particularised as

Cost of Replacement Sub-Contract Works	$223,388.00
Cost of works carried out on behalf of Defendants	$ 2,400.00
Cost of rectification works	$ 4,380.00
Less:	
Original Sub-Contract sum of Defendants' works	$183,388.00
	$ 46,780.00

44. It transpired at the hearing that the scope of the replacement sub-contract was identical to that offered to the defendant. That is not right because the defendant had carried out some of the FPI works. The replacement sub-contract ought not include those works, and the

plaintiff cannot claim the difference in the two contracts from the defendant.

45. There was no evidence of the works alleged to have been carried out on behalf of the defendant, and no explanation why this sum should be treated as an additional item to the sub-contracted works. There was no confirmation by the architect, M&E consultant, quantity surveyor or any other party to confirm that those works were works which the defendant should have executed. Besides showing a claim by Air & Air Engineering Pte Ltd for $2,400 submitted to the plaintiff for approval, there was no evidence that the work was done or that the claim was approved or paid. Similarly with regard to the claim for $4,380 for rectification works, there was only a fax message from the replacement sub-contractor referring to the work which required rectification, with a quotation therefor submitted to the plaintiff. There was no confirmation that these were proper rectification works, or that they were executed, or that the amount of $4,380 was reasonable or paid. The claims were not properly proved.

Conclusion

46. The plaintiff's action succeeds on libel, but fails on breach of contract. I will defer my order on costs pending the assessment of damages.

Sgd:

Kan Ting Chiu

Judge