

CLARIFYING THE SCOPE OF THE INDEPENDENT CONTRACTOR DEFENCE

Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd and others (King Wan Construction Pte Ltd and others, third parties) [2016] SGHC 38

In Summary

This Singapore High Court decision on 16 March 2016 has shown that the Developer, Architect and Main Contractor of a construction project could rely on the defence of being independent contractors in a claim in tort against them for building defects, such that they were not liable for the alleged defects in tort.

Facts

In Suit No 563 of 2011 ("S 563/2011"), the MCST brought proceedings against four defendants in respect of defects in the common areas of the condominium, namely, the developer, the Main Contractor, the Architect and one of the Architect's sub-contractors.

The claims made by MCST in the action against the Main Contractor and the Architect were as follows:

(a) Against the Main Contractor - (i) in tort for failing to carry out the construction works in a good and workmanlike manner and/or in accordance with approved plans, specifications and industry standards; and for (ii) breach of warranties which were issued jointly and severally by the Main Contractor and their sub-contractors to the developer and subsequently assigned to the MCST.

(b) Against the Architect – in tort for failing to employ reasonable care and skill in the design of the development and/or supervision of the works for The Seaview.

The four defendants wrote the MCST proposing that certain preliminary issues be tried and determined prior to the main trial of the action. The MCST objected to a separate trial of the proposed preliminary issues and took



the position that those issues should be decided together with the rest of the issues in the action as they were inextricably bound.

Issues

The High Court had directed the issue on the applicability of the Independent Contractor Defence be tried as a preliminary issue, which was whether the developer, the main contractor, and the architect are entitled to raise the Independent Contractor Defence against the MCST's claim in tort in relation to all or some of the alleged building defects.

Prior Legal Position

In essence, the general principle behind the Independent Contractor Defence is that an employer is not vicariously liable for the negligence of an independent contractor, his workmen or agents in the execution of the contract.

In *MCST 2297 v Seasons Park Ltd* [2005] 2 SLR@ 613, the Court of Appeal held that a developer could avail itself of the Independent Contractor Defence against a claim in tort by an MCST.

There was no previous decision on whether a main contractor or a construction professional or consultant can rely on the Independent Contractor Defence against a claim in tort.

Holding of the High Court

After considering the nature of the relationship between the parties in the context of possible vicarious liability, the judge concluded that:

(a) the developer, the main contractor and the architect were entitled to rely on the Independent Contractor Defence, where they had engaged independent competent sub-consultants or sub-contractors to perform the relevant works.

Law on Independent Contractor Defence – The Independent Business Test

To distinguish an independent contractor from an employee/servant, the extent of the control exercised by the employer over the servant was traditionally regarded almost as the conclusive test but has hence been rationalised as being only a factor to be considered, albeit an important one.

The relevant test was whether the contractor was performing services as a person of business on his own account.

The extent of the control exercised by the employer over the servant ("the control test") is only a factor to be considered, albeit an important one.

However, the employer still has the duty to exercise proper care in appointing an independent contractor.

Other relevant factors cited by Cooke J in *Market Investigations* that may point to a contractor being an independent contractor as opposed to an employee include:

- (a) whether the contractor performing the services provides its own equipment;
- (b) whether the contractor hires its own helpers;
- (c) what degree of financial risk the contractor takes;
- (d) what degree of responsibility for investment and management the contractor has; and
- (e) whether and how far the contractor has an opportunity of profiting from sound management in the performance of his task.

Generally, if a contractor performing services does so in the course of an already established business of its own, the application of the fundamental Independent Business Test is “easier” as this strongly points to the contractor being an independent contractor and its contract being a contract for services. This is opposed to the contract being a contract of service with an employer-employee relationship where vicarious liability can be attributed to the employer for the employee’s tortious acts.

In arriving at its decision, the High Court considered the commercial realities of the modern construction industry:

- “Commercially, the complexities of modern buildings and the growth of specialization have necessitated reliance on specialist sub-contractors, even by construction professionals such as architects...”
- “Due to the diversity of skills and materials required, the involvement of various parties of different disciplines and specializations is only to be expected.”
- “Additionally, the nature of the joint enterprise in the development process requires specialists of different disciplines interacting and communicating with one another and necessitates coordination and cooperation.”

The High Court also rejected the MCST’s public policy argument – the main contractor and architect should not be entitled to the Independent Contractor Defence as the MCST would then have little or no recourse in respect of the alleged defects (as the MCST would have difficulties in identifying the sub-contractors):

- “The fundamental fault-based principle in the law of torts that liability lies with the party that has engaged in the tortious act in question should not be easily abrogated”

Liability may still arise due to the employer's negligence in selecting and appointing an independent contractor. The liability here may be personal to the employer for his negligent selection of an incompetent contractor, or liability may be attributed to the employer secondarily through its independent contractor.

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In this case, the Court found that the Defendants had exercised proper care in their appointments of their respective independent contractors as

- The Developer had engaged in a formal tender exercise in the appointment of the Main Contractor;
- Both the Main Contractor and Architect are established firms with an extensive track record in the construction industry in Singapore; and
- Due diligence on the part of the main contractor (when it comes to nominated sub-contractors) is still required – on the facts, no evidence to show the main contractor was negligent

Concluding Views

Although this case establishes the availability of the independent contractor defence to main contractors and other construction professionals, they may nevertheless be liable if they have interfered in the manner of the independent contractor's performance of its work. Similarly, they cannot escape liability if they had not taken proper care in appointing the independent contractors.

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**EXCEPTIONS TO THE TEMPORARY FINALITY OF INTERIM PAYMENT CERTIFICATES AND
CLARIFYING ARCHITECTS' ROLES IN ENFORCEMENT PROCEEDINGS**

Ser Kim Koi v GTMS Construction Pte Ltd [2016] SGCA 7

In Summary

This Singapore High Court decision on 16 March 2016 sets out the circumstances where temporary finality, which facilitates cash flow for contractors in the building and construction industry, may be withheld from interim payment certificates issued by an architect. It also clarifies the architect's role in enforcement proceedings.



Facts

In Suit No 563 of 2011 ("S 563/2011"), Mr Ser Kim Koi (the "Employer") entered into a construction contract (the "Contract") on the SIA Conditions with GTMS Construction Pte Ltd (the "Contractor") to build three buildings on his property.

On 30 April 2013, the buildings failed an inspection by the Building and Construction Authority ("BCA") for the issue of the Temporary Occupation Permit ("TOP"). On 15 May 2013, Mr Chan Sau Yan ("Architect") issued the Completion Certificate (the "Completion Certificate") despite the fact that TOP was not obtained.

The Architect subsequently issued two interim payment certificates on 3 September 2013 and 6 November 2013 ("Disputed Certificates"). The Employer refused to make payment on the Disputed Certificates, alleging extensive defects in the buildings.

Relying on the principle of temporary finality of interim certificates in SIA clauses 31(13) and 37(3)(h), the Contractor applied for summary judgement for payments due under the Disputed Certificates. The summary judgment was granted by the assistant registrar and

affirmed by the High Court on appeal. The employer appealed to the Court of Appeal.

Issues before the Court of Appeal

The primary issue before the Court of Appeal was whether the Employer had made out any exceptions in clause 31(13) of the Contract to deprive the Disputed Certificates of temporary finality and thus entitle the Employer leave to resist summary judgment.

The Employer argued that leave to defend should be given because there was a bona fide defence of fraud as shown by the Architect's reckless conduct in issuing the Completion Certificate when the Buildings were not ready for occupation and use, and not completed.

The Employer also impugned the Architect's honesty when contrary to the Schedule, there were in fact "extensive defects" to the Buildings. The Employer also alleged recklessness in certifying payment in the Disputed Certificates due to the incorrect timber decking thickness and soil type used.

The Contractor contended that the Employer could not argue that the Disputed Certificates were tainted by fraud by taking issue with the Completion Certificate since they were separate certificates. The Contractor also took issue with the lack of evidence showing fraud. Lastly, it was argued that the Architect had a genuine

honest subjective belief that the works were substantially complete, and that the defects on the Buildings were trivial and minor, when he issued the Completion Certificate.

Decision of the Court of Appeal

The Court of Appeal stressed that at the enforcement stage of interim payment certificates, the courts are concerned with whether an architect's certificate was validly issued in accordance with the terms of the contract, rather than the merits of the certificate. Any allegation of irregularity in a bid to undermine the validity of such a certificate must at the very least be backed up by evidence.

With regards to the Employer arguing that the Architect recklessly issued the Completion Certificate and the Disputed Certificates and had thus committed fraud, the Court of Appeal agreed with the Employer that reckless certification can amount to fraud and therefore temporary finality can be denied to certificates issued by the Architect which are, to the knowledge of the Architect false, or issued by the Architect without any belief in its truth, or recklessly, without caring whether the certificate is true or false.

In this case, the Court held that the Architect had breached the requirement to issue the Completion Certificate only "when the Works appear to be complete and to comply with the Contract in all respects"

(clause 24(4) of the SIA Conditions), and until all parts of the works were in the Architect's opinion ready for occupation and use, and all services are tested, commissioned and operating satisfactorily.

This was due to the Architect issuing the Completion Certificate despite being aware of the fact that (a) the TOP inspection had failed, (b) standards set out in the TOP inspection letter on staircases and barriers had not been met, and (c) certain basic works and services had not yet been tested, commissioned or checked.

Therefore it was held that the Architect was at least reckless in issuing the Completion Certificate.

Failure to certify release of retention sums

Another issue on this matter was the Architect failing to certify the release of retention sums upon the issue of the Completion Certificate, as required under clause 31(9) of the SIA Conditions. The retention sums were released under the Disputed Certificates instead, which were issued more than three months after the Completion Certificate. The Architect also failed to certify liquidated damages for delay in completion, which would entitle the Employer to set off against the Contractor's claims.

Architect's role to enforce interim payment certificates in proceedings

The Court of Appeal held that in enforcement proceedings where the temporary finality of the Architect's certificates is in question, it is important for the court to hear from the architect himself. It is not for interested parties such as the contractors to explain the certification process on behalf of the architect. On the facts, the Architect was made a third party to the action but chose not to give evidence to explain the non-compliance of the certificates with the Contract. Despite the Contractor's attempts to speak for the Architect, the court held these explanations of "very little weight".

Whether other defects in the Buildings removed temporary finality

The Court of Appeal rejected the Employer's assertion that the other defects in the Buildings operated to withhold temporary finality of the Disputed Certificates. This would have meant examining the merits of the certificates and making unwarranted inroads into the principle of temporary finality.

Concluding Views

This case provides much needed clarification that any deviation at all from contract terms in the issuance of certificates could deprive the certificates of temporary finality, as well as the architect's role in proceedings to enforce interim payments. It is good practice for Architects to ensure that the works are fit for occupation and use before issuing completion certificates.

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