

O N A P P E A L
FROM THE COURT OF APPEAL OF
SINGAPORE

B E T W E E N :

LOKE HONG KEE (S) PTE LTD. Appellants

- and -

UNITED OVERSEAS LAND LIMITED Respondents

CASE FOR THE APPELLANTS

Record

- 10 1. This is an appeal from a judgment dated 25th July 1979 of the Court of Appeal of Singapore (Wee Chung Jin C.J., Kulasekeram, Chua J.J.), allowing an appeal from a judgment dated 8th September 1978 of the High Court of the Republic of Singapore (O'Cotta J.) in which the Court of Appeal answered questions of law stated for the opinion of the High Court by the Arbitrator in the reference pursuant to S.28 of the Arbitration Act of Singapore (Cap. 16) in a sense favourable to the Respondents.
 - p.80
 - p.58
 - pp.38-48
 - p.80

- 20 2. The questions stated for the High Court which remain in issue in this Appeal and answers given by the Court of Appeal to those questions are as follows:-
 - Question A1: Whether the Arbitrator is entitled to open up review or revise an opinion of the Architect under Article V Clause 3 of the Supplemental Agreement pursuant to the power conferred on the Arbitrator by Clause 34 of the main contract. Answer: Negative.
 - p.41
 - lines 33-38
 - p.80
 - line 35

- 30 Question A2: Whether for the purpose of Article V Clause 3 of the Supplemental Agreement and the recommendation of the Architect given pursuant thereto it is sufficient that the Architect should have formed an opinion in good faith on the information available to him at the time. Answer: Affirmative.
 - p.48
 - lines 1-8
 - p.80
 - line 36

<p><u>Record</u> p.42 lines 27-39</p>	<p><u>Question A3:</u> Whether by virtue of the powers conferred on the Arbitrator under Clause 34 of the Main Contract, the Arbitrator is entitled to direct that the Appellants' claim under paragraphs 4 and 4A of their Points of Claim be measured and/or valued as may in his opinion be desirable in order to determine the rights of the parties and/or open up review or revise the valuation of works executed and materials supplied by the Claimants and carried out by Pakatan purportedly pursuant to the provisions of Article V Clause 6 of the Supplemental Agreement. <u>Answer:</u> Negative.</p>	<p>10</p>
<p>p.80 line 37</p>	<p>3. The issues in this appeal and questions stated by the Arbitrator depend on the following provision of the Main Contract (otherwise called Principal Agreement).</p>	
<p>Exhibit 'A' pp.82-133</p>	<p>Clause 34: Arbitration</p>	
<p>p.131 line 11</p>	<p>(1) Provided always that in case any dispute or difference shall arise between the Employer or the Architect on his behalf and the Contractor, either during the progress or after the completion or abandonment of the Works, as to the construction of this Contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith (including any matter or thing left by this Contract to the discretion of the Architect or the withholding by the Architect of any certificate to which the Contractor may claim to be entitled or the measurement and valuation mentioned in Clause 30(5)(a) of these Conditions or the rights and liabilities of the parties under Clauses 25, 26, 21 or 32 of these Conditions), then such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties, or, failing agreement within 14 days after either party has given to the other a written request to concur in the appointment of an Arbitrator; a person to be appointed on the request of either party by the President or a Vice-President for the time being of the Singapore Institute of Architects.</p>	<p>20</p> <p>30</p>
<p>p. 124 line 38 - line 48</p>		
<p>p.104 pp.108-114 pp.128-130</p>		
<p>p. 131 143 p. 131 line 43 - p. 132 lines 1 - 3</p>	<p>(2) Such reference, except on Article 3 or Article 4 of the Articles of Agreement, or on the questions whether or not the issue of an instruction is empowered by these Conditions, whether or not a certificate has been improperly withheld or is not in accordance with these Conditions, or on any dispute or difference under</p>	<p>40</p> <p>50</p>

Clauses 31 and 32 of these Conditions, shall not be opened until after Practical Completion or alleged Practical Completion of the Works or termination or alleged termination of the Contractor's employment under this Contract, or abandonment of the Works, unless with the written consent of the Employer or the Architect on his behalf and the Contractor.

Record
pp.127-130

10 (3) Subject to the provisions of Clauses 2(2) and 30(7) of these Conditions the Arbitrator shall, without prejudice to the generality of his powers, have power to direct such measurements and/or valuations as may in his opinion be desirable in order to determine the rights of the parties and to ascertain and award any sum which ought to have been the subject of or included in any certificate and to open up, review and revise any certificate, opinion, decision, requirement or notice and to determine all matters in dispute which shall be submitted to him in the same manner as if no such certificate, opinion, decision, requirement or notice had been given.

p.132
line 4
p.132
lines 4-20

(4) The award of such Arbitrator shall be final and binding on the parties.

p.132
lines 21-22

And the following provisions of the Supplemental Agreement:

Exhibit 'B'
pp.133-145

ARTICLE V

p.142
line 10

PROGRESS OF WORKS

30 (1) The Contractor shall adhere to the progress of Works specified in the Third Schedule hereto to ensure that completion of the Works shall take place on or before the following:

p.142
lines 12-20

(a) in respect of Block 1 - 30th April 1977

(b) in respect of Block 2 - 30th October
1977

(2) The Contractor shall carry out the Works expeditiously and with every diligence and complete the same.

p.142
lines 21-23

40 (3) In the event of the progress of the said Works being in the opinion of the Architect unsatisfactory and/or in the event of the Contractor failing to adhere or maintain the progress of Works as specified in the said Third Schedule and/or upon any breach of this Agreement by the Contractor then upon the recommendation of the Architect in writing and in addition to the

p.142
lines 24-37

Record

Employer's rights under the Principal Agreement the Employer shall be at liberty to determine the employment of the Contractor thereunder forthwith by notice in writing.

...

- p. 143
lines 12 - 22 (6) Upon the Employers regaining possession of the site the firm of Pakatan International Suckling McDonald & Co. of 37B Tanglin Road, Singapore 10 Tel: 648211/2358211 shall within 2 weeks from the date hereof measure the Works as completed by the Contractor and the valuation of the said quantity surveyor shall be binding on both parties and shall be final. The costs and fees of the said quantity surveyor shall be borne by the parties hereto equally. 10
- p. 2
lines 27 - 29 4. The Appellants carry on business as Building Contractors and the Respondents are Property Owners and Developers formerly known as Faber Union Limited. The parties entered into a main contract in Standard Form dated 8th March 1974 for the construction of a 35 storey apartment complex to be known as Cairnhill Plaza (the Works) for the sum of Singapore \$26,903,379. 20
- p. 9
lines 1 - 8
p.13
lines 49 - 52
p. 14
lines 1 - 15
p. 3
lines 7 - 29
p. 3
lines 29 - 39
pp.133-145
pp.108-110
p.149
p.150 5. The Works were started but disputes arose during the course of construction. The Respondents maintained that the Appellants' progress was unsatisfactory and that the Appellants were not paying nominated sub-contractors monies due to them. The Appellants did not accept these contentions and claimed to be entitled to payment of further sums on account of work carried out by them and claims arising under the contract. The Appellants further regarded such delay as had occurred as being due to the failure of the Respondents' architect to issue instructions for the Works timeously. In order to enable the Works to proceed the parties entered into a Supplemental Agreement on 22nd March 1976. The Respondents' architect again became dissatisfied with the progress of the Works. On 9th May 1976 the architect served a notice pursuant to Clause 25 of the Main Contract and further purported to issue his recommendation pursuant to Article V Clause 3 on 1st March 1977. By letter of the same date the Respondents purported to determine the Appellants' employment under the Principal Agreement (Main Contract). 30 40

Thereafter the Appellants' workmen and plant were removed from the Works, which were completed by another contractor.

After the Respondent had regained possession of the site the firm of Pakatan International Suckley McDonald (Pakatan) purporting to act pursuant to Article V Clause 6 made a measurement and valuation of the works which had been completed by the Appellants, but the Appellants contended that that valuation was too low and made instead the claims which are set out in paragraphs 4 and 4A of the Amended Points of Claim.

Record

p.3
lines 17-28

10 6. A dispute having arisen between the parties under the Principal Agreement (Main Contract) and Supplemental Agreement, the dispute was referred to the decision of an Arbitrator Mr. Hiew Siew Nam. By the Amended Points of Claim re-dated 18th November 1977 the Appellants claim Singapore \$3,912,424.03 as money due under the Agreement and damages for the wrongful termination of their employment under the Main Contract on 1st March 1977. By their further re-amended Points of
20 Defence and Counterclaim the Respondents aver that the termination of the Appellants' employment under the Main Contract was lawful, deny that the Appellants are entitled to any further amount on account of work done by them and maintain a counterclaim for damages representing, inter alia, the increased cost of completion of the works.

pp.1-2
p.2 line 25
p.4 line 15

p.5 line 24 -
p.18

pp.12-18

30 7. The hearing of the arbitration was started on the 23rd May 1978. It became clear to the parties' advisers that there were points of law involved in the reference which could conveniently be dealt with by way of Special Case. The Arbitrator was invited to and did state a Special Case for the opinion of the Court, the questions material to this appeal being set out at paragraph 2 of this Case.

pp.37-47

40 8. The Special Case was heard by D'Cotta J. on 25th July 1978. The Learned Judge gave judgment on 8th September 1978. After setting out the material facts the Learned Judge decided that the Supplemental Agreement fell to be read in conjunction with the Main Contract/Principal Agreement and subject to Clause 34 of that Main Contract which applied to disputes arising under the Supplemental Agreement. D'Cotta J. further decided that the arbitration clause was wide enough to enable the opinion of the architect comprised in the letter of 1st March 1977 to be opened up, reviewed and revised. He therefore answered question 1 in the affirmative and did not
50 find it necessary to answer Question 2. Question 3 was also answered in the affirmative. The remaining questions answered by the Learned Judge are not material to this appeal.

pp.48-58

p.51

p.52

p. 52
lines 44-50

capable of review.

Record

11. The Appellants respectfully submit that the opinion of the architect comprised in the recommendation dated 1st March 1977 to the Respondents is open to review. It is now conceded that the Arbitrator has jurisdiction to determine disputes under the Supplemental Agreement. Even in the absence of such concession it is clear in the Appellants' submission that the Supplemental Agreement is so closely connected with the Main Contract that any dispute arising under the Supplemental Agreement arises "in connection with" the Main Contract. There is no reason to limit the Arbitrator's jurisdiction in respect of disputes under the Supplemental Agreement so as to deprive the words in Clause 34(3) of the Main Contract of any effect, the material part being:

Exhibit 'D'
p.149

p.22
line 43 -
end

p.132
lines 4-20

".. and to open up, review and revise any certificate, opinion, decision, requirement or notice and to determine all matters in dispute which shall be submitted to (the Arbitrator) in the same manner as if no such certificate, opinion, decision, requirement or notice had been given".

12. The Appellants respectfully submit that the words in Article V Clause 3 of the Supplemental Agreement, "in the opinion of the Architect" cannot be said to be deprived of any effect because that opinion is subject to review. The Principal Agreement provides expressly or by implication in many places for the Architect to give certificates and to express opinions, decisions or requirements and to give and receive notices to and from the Contractor. The Architect does those things as the Employer's agent who is administering the contract as a professional man on behalf of the Employer. It is to the advantage of the Contractor that the Architect should so act because he is thereby protected from the capricious or uninformed exercise by the Employer of powers given to the Employer by the contract. The words in question, "in the opinion of the Architect" are not deprived of any effect if that opinion is made subject to review. If such a contention were correct then by parity of reasoning all of the following (inter alia) would be of no effect because all of them are certificates, opinions, decisions, requirements or notices, which are subject to review and revision by the Arbitrator pursuant to Condition 34(3) of the Principal Agreement as if they had not been given -

p.142
line 25

p.132
lines 4-20

<p><u>Record</u> p.38 lines 39-51</p>	<p>(i) the Architect's opinion/decision that the Contractor should be responsible for the cost of remedying errors in setting out: Principal Agreement Condition 5;</p>	
<p>p.88 line 52 - p.89 line 31</p>	<p>(ii) the Architect's opinion/decision that work or materials are not in accordance with the contract: Principal Agreement Condition 6;</p>	
	<p>(iii) the Architect's decision that a person should be dismissed from the Works: Principal Agreement Condition 6;</p>	<p>10</p>
<p>pp.90-93</p>	<p>(iv) the Architect's opinion/decision whether or not an instruction given by him involves a variation: Principal Agreement Condition 11;</p>	
<p>p.91 line 24- p.92 line 48 p.93 line 9- line 36</p>	<p>(v) the Architect's opinion/decision that a variation has or has not involved the Contractor in direct loss and expense for which he would not be reimbursed by payment in respect of a valuation made in accordance with the rules contained in Condition 11(4) of the Principal Agreement: see Condition 11(6) thereof;</p>	<p>20</p>
<p>p.94 p.95</p>	<p>(vi) the Architect's certificates that the Works are practically complete and that defects etc. have been made good: Principal Agreement Condition 15(1) and 15(4);</p>	
<p>pp.107-108</p>	<p>(vii) the Architect's opinion that the Contractor has or has not been involved in direct loss and expense for which he will not be reimbursed by reason of the matters referred to in Condition 24 of the Principal Agreement;</p>	<p>30</p>
<p>p.108 line 20 p.109-line 6</p>	<p>(viii) the Architect's notice specifying default given under Condition 25(1) of the Principal Agreement;</p>	
<p>p.122 line 43 p.133 line 5</p>	<p>(ix) the Architect's certificates for interim payment pursuant to Condition 30(1) of the Principal Agreement.</p>	
<p>p.142 p.108</p>	<p>In the present case the opinion of the Architect under Article V Clause 3 of the Supplemental Agreement is comparable to the Architect's notice specifying default under Condition 25(1) of the Principal Agreement. Both have effect and are capable of being acted upon. However should the Arbitrator decide that the opinion or notice should be revised and that there were no sufficient grounds for the opinion or the notice then the determination in accordance with the relevant</p>	<p>40</p>

	clause fails. The opinion under Article V Clause 3 is therefore effective but capable of revision like all the other certificates, opinions, decisions, requirements or notices of the Architect.	<u>Record</u> p.142
10	13. Further it is respectfully submitted that the Supplemental Agreement should be governed by the same policy as the Principal Agreement to which it is supplemental. By Article VIII of the Supplemental Agreement it is expressly provided that nothing contained in the Supplemental Agreement should, "effect (sic) or modify or diminish any right of the Employer and Contractor of whatever kind against each other arising out of any act or default of either party under the Principal Agreement <u>the terms and conditions of which shall remain valid and binding on the parties hereto subject to the provisions of this Agreement</u> " (emphasis added).	p.144 line 8 p.144 lines 13-20
20	One of the conditions of the Principal Agreement is the arbitration clause (Condition 34). It is clear from that Clause that, subject to certain exceptions stated in Conditions 2(2) and 30(7), every dispute or difference which may arise between the Employer <u>or the Architect on his behalf</u> (emphasis added) and the Contractor is referable to arbitration. Since Condition 34 remains valid and binding on the parties subject to the provisions of the Supplemental Agreement, it follows that the wide power of the Arbitrator to open up, review and revise any certificate, opinion or decision of the Architect remains binding upon them unless the provisions of the Supplemental Agreement expressly provide to the contrary. Had the Employer wished to provide that the opinion or recommendation of the Architect referred to in Article V Clause 3 of the Supplemental Agreement was to be exempt from review by the Arbitrator he should have ensured that express words to that effect were inserted. No such words have been inserted and there is nothing anywhere in the Supplemental Agreement to indicate that the policy of the Principal Agreement, to be gathered from Condition 34, that all certificates, opinions, decisions or notices of the Architect who acts as agent on behalf of the Employer should be subject to review by the Arbitrator is not to apply.	p.131 p.85 lines 15-22 p.126 line 20- p.127 line 17
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		p.142
		p.84
		p.133
		p.131
50	Further of the three disjunctive grounds for the recommendation of the Architect in Article V Clause 3 the latter two (failure to maintain progress as specified in the Third Schedule and/or breach by the Appellants of the Supplemental Agreement) are indisputably matters of objective	p.142 line 25 p.145 line 38

Record

analysis into which the Arbitrator could inquire. Accordingly the opinion of the Architect is to be construed sui generis so as to mean the opinion of the Architect objectively and not subjectively considered, and so as to allow the Arbitrator to enquire whether there were proper grounds for that opinion, and not merely whether the opinion was bona fide.

p.142

14. The Appellants respectfully submit that there is no basis for imputing to the parties an intention that the Architect's opinion and recommendation under Article V Clause 3 should be final and binding in the absence of fraud. The Appellants' intention might be thought to be quite otherwise than to place himself in a situation where the contract for very substantial and extensive works could be determined on the opinion of the Architect in circumstances where the opinion could be swayed by self interest and erroneous but not fraudulent, and where the Appellants, when entering into the Supplemental Agreement, were maintaining that some part of the delays suffered were due to the Architect's failure to produce instructions timeously.

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15. Further, even if the opinion of the Architect that the progress of the 'work was not satisfactory' is not open to review, nonetheless the recommendation is itself a further opinion or decision. The Architect may be of opinion that the work is unsatisfactory but conclude that he ought not to recommend to the Employer that the employment of the Appellants be determined, either because the Appellants' default reflected in the unsatisfactory progress of the works is insufficiently serious, or, alternatively, because the unsatisfactory progress is a consequence, not of any failure by the Appellants, but of the default of the Respondents or their Architect (whether wholly or in part). The recommendation involves, therefore, an exercise of discretion and evaluation which is open to review under the arbitration clause as an opinion or decision, independently of the Architect's opinion as to the progress of Works. A determination under Article V Clause 3 requires therefore the following steps:

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p.142

- (1) The Architect must form an opinion as to the Appellants' performance;
- (2) The Architect must further decide whether the default in performance is of such a character that he ought to recommend the determination of the Appellants' employment under the contract;

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(3) The formal recommendation in writing; and Record

(4) The Respondents' notice of determination in writing.

10 16. The Court of Appeal heard no argument from either party concerning Question A3. The Chief Justice indicated orally to Mr. C.S. Wu who was Counsel for the present Appellants in the Court of Appeal that he should confine his argument exclusively to the proper construction of Article V Clause 3 of the Supplemental Agreement and that he should not address the Court of Appeal on any other matter. p.78

20 17. The Appellants concede that if their employment was validly determined pursuant to Article V Clause 3 of the Supplemental Agreement the measurement and valuation made by Pakatan is binding upon them. It is, however, respectfully submitted that if the determination of their employment was wrongful, as they submit it was, the circumstances in which Pakatan had authority to make a measurement and valuation which would be binding on both parties and final never arose. In that case, therefore, the measurement and valuation by Pakatan purportedly made under Article V Clause 6 of the Supplemental Agreement has to be discarded and it becomes necessary for the Arbitrator to direct that such measurements and valuations should be made as he considers desirable in order to determine the rights of the parties and to ascertain the sums, if any, which should be paid by the Respondents to the Appellants in respect of their claims made in paragraphs 4 and 4A of the Amended Points of Claim. p.142 p.143 lines 13-23

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18. The Appellants respectfully submit that the Arbitrator is given power to direct those measurements and valuations under Condition 34 of the Principal Agreement. p.132

40 19. On 15th October 1979 the Court of Appeal of Singapore made an order granting the Appellants leave to appeal to the Judicial Committee of the Privy Council. p.81

20. The Appellants respectfully submit that the judgment of the Court of Appeal of Singapore was wrong and ought to be reversed and that the judgment of the Learned Judge ought to be restored in respect of the answers given to Questions A1, A2 and A3, for the following reasons (amongst others):

R E A S O N S

1. BECAUSE the Arbitrator has jurisdiction to resolve disputes arising under the Supplemental Agreement.
2. BECAUSE the Arbitrator has jurisdiction to open up review and revise all the opinions and decisions of the Architect except only such (if any) as are expressly excluded by the terms of the Principal Agreement or Supplemental Agreement. 10
3. BECAUSE the Arbitrator's powers are not limited to an inquiry as to whether or not the opinion was expressed bona fide.
4. BECAUSE the Court of Appeal of Singapore misdirected themselves as to the presumed intention of the parties.
5. BECAUSE on the true construction of the Supplemental Agreement the Architect's opinion falls to be considered objectively and not subjectively and therefore investigation of whether or not there were necessary and/or sufficient grounds for that opinion is permissible and necessary. 20
6. BECAUSE the policy of the Main Contract is that, with stated exceptions, the opinions, decisions and certificates of the Architect are subject to review and the Supplemental Agreement should not be taken to be inconsistent with that policy.
7. BECAUSE the Arbitrator's power to open up, review and revise the opinion referred to in Article V Clause 3 of the Supplemental Agreement is not excluded by the terms of either the Principal Agreement or the Supplemental Agreement. 30
8. BECAUSE the Architect's recommendation is itself an opinion or decision which is subject to review.
9. BECAUSE the Court of Appeal did not hear argument by the parties as to Question A3 and the Chief Justice told Counsel for the Appellants to confine his argument to the proper construction of Article V Clause 3 of the Supplemental Agreement. 40
10. BECAUSE if the Respondents' termination of the Appellants' employment was wrongful,

Pakatan had no authority to make a measurement or valuation which was binding on the parties or final.

- 10 11. BECAUSE Condition 34 of the Principal Agreement confers on the Arbitrator power to direct such measurements and/or valuations as may in his opinion be desirable in order to determine the rights of the parties and to ascertain and award any sum which ought to have been the subject of or included in any certificate.

DAVID GARDAM Q.C.

IN THE PRIVY COUNCIL

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