9/1982

No.21 of 1980

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL IN SINGAPORE

BETWEEN:

LOKE HONG KEE (S) PTE. LIMITED — Appellants (Claimants)

- and -

UNITED OVERSEAS LAND LIMITED — Respondents (Respondents)

CASE FOR THE RESPONDENTS — RECORD

1. This is an appeal to Her Britannic Majesty's Privy Council brought pursuant to leave granted by the Court of Appeal in Singapore on 15th October 1979 from a Judgment of that Court of Appeal dated 25th July 1979 (Wee Chong Lin CJ., Kulasekaram and F.A.Chua JJ), by which the Court of Appeal decided in favour of the Respondents two issues of construction raised in a consultative Case Stated by the Arbitrator in the course of an arbitration in which the Appellants are Claimants and the Respondents Respondents. p.81 p.70 p.37

2. By an agreement in writing dated 8th March 1974 (the "Main Contract") the parties agreed that the Appellants, as the Contractor, should carry out for the Respondents, as the Employer, and complete by 16th March 1976, certain building works comprising the erection of two blocks of flats with ancillary works at Cairnhill Plaza, Singapore. The Main Contract was in the standard form of the Singapore Institute of Architects (which is similar to the 1963 edition of the RIBA standard form). p.82

3. On 23rd March 1976, when it was anticipated by both parties that the works would not be completed by the completion date, even as extended pursuant to the Main Contract, the parties made a further Agreement in writing bearing that date (the "Supplemental Agreement"), whereby, inter alia, the Employer agreed to render financial p.133

RECORD

assistance to the Contractor.

4. The Supplemental Agreement provided that

(a) by Article V(3)

p.142 ll.24-36

"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 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".

(b) by Article V(6)

p.143 ll.12-22

"Upon the Employers regaining possession of the site the firm of Pakatan International Suckling McDonald of 37B Tangin Road, Singapore 10..shall within 2 weeks from the date thereof 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.. "

(c) by Article VIII

p.142 ll.9-24

"Notwithstanding the provisions contained in this Agreement the time for completion of the Works unless extended by the Architect under the principal Agreement shall remain as the 4th day of May 1976 and nothing herein shall affect or modify or diminish any right of the Employer and the Contractor of whatever kind against each other arising out of any act or default of either party under the principal Agreement the terms and conditions of which shall remain valid and binding on the parties hereto subject to the provisions of this Agreement particularly the additional rights and benefits of the Employer provided in this Agreement".

p.149

4. By letter of 1st March 1977 the Architect stated, inter alia, that he was of the opinion that progress of the Works was unsatisfactory and pursuant to Clause 3 of the Supplemental Agreement recommended that the Employer might determine the employment of the Contractor under the Main Contract should they so desire.

RECORD

5. By letter dated 1st March 1977 the Employer determined the employment of the Contractor under the Main Contract on the ground, inter alia, that the Architect was of the opinion that the progress of the works was unsatisfactory. Disputes arose between the parties including, in particular, a dispute as to whether such determination of the Contractor's employment was lawful or was a breach of contract. These disputes were referred to Mr. Hiew Siew Nam as sole arbitrator in accordance with Clause 34 of the Conditions of the Main Contract which read as follows : p.150

> "(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, 31 or 32 of these Conditions), the said 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 Arbitrators..... p.131 ll. 11-42
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> .... (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 p.132 ll. 4-20

RECORD

opinion, decision, requirements or notice had been given....."

6. The hearing of the arbitration was opened before the Arbitrator on 23rd May 1978. However, after the case had been opened and the Contractor's first witness had given his evidence-in-chief it was agreed that the Arbitrator should state a consultative case on points of law arising out of the reference. Mr. Hiew stated such a case raising a number of questions for the opinion of the High Court, numbered A1-5 and B1-3. However the Employer did not argue the majority of the Questions before the Court of Appeal, because, if the principal issue set out in paragraph 7 below, is determined in their favour, it will not be necessary for the Arbitrator to hear the remaining matters in dispute. Accordingly the Court of Appeal did not decide these other Questions, and they do not arise on this Appeal.

p.41 11.33 - p.48 1.9

7. The principal issue before the Court of Appeal and upon this Appeal (raised in Questions A1 and A2 of the Case stated) is whether, in order to justify the termination of the Contractor's employment on the said ground, the Employer has to prove before the Arbitrator

p.41 11.33-38 p.42 11. 1-7

(a) that the Architect did on 1st March 1977 hold a bona fide opinion that the progress of works was unsatisfactory; or

(b) that the progress of the works was in fact unsatisfactory.

The Contractor contends for (b) solely upon the ground that by clause 34(3) of the Main Contract the Arbitrator is given power, in order to determine the rights of the parties, to open up review and revise any certificate, opinion etc.

8. The second, and subordinate, issue (raised by Question A3) is whether the Arbitrator is, by virtue of the said clause 34(3), entitled to open up, review and revise the valuation which was in fact carried out by Pakatan International Suckling McDonald under Article V 6 of the Supplemental Agreement.

p.42 11. 26-39

9. At first instance the Learned Judge, D'Cotta J., erroneously treated these issues as matters going to the scope of the basic jurisdiction of the Arbitrator and relied on cases, such as Heyman v. Darwins (1942) AC 356, which considered whether an Arbitrator had any jurisdiction at all to decide the dispute between the parties.

p.48

In fact, however, the issues here are, as the Court of Appeal recognised, issues going to the construction of those terms of the agreement which govern the disputes which the Arbitrator has to decide within the scope of his undisputed jurisdiction. Upon this misunderstanding the Learned Judge decided these issues in favour of the Contractor.

RECORD

10. The Court of Appeal correctly approached these issues as matters of construction and decided them in favour of the Employer, stating upon the principal issue that "the plain, clear and indeed the only meaning of Article V Clause 3 is that the /Employers/ have a right to terminate the /Contractors/ engagement if the Architect was of the bona fide opinion that progress of the works was unsatisfactory"; and that the construction for which the Contractors contend "not only robs ths words 'in the opinion of the Architect' of any meaning and effect whatsoever and renders these words a nullity, but completely ignores the distinction in Article V Clause 3 between the first event, which is an opinion, and the second and third events which are an actual failure or breach".

p.70

p.76 l.29

11. The Respondents will respectfully submit that the Judgment of the Court of Appeal was correct for the reasons expressed therein and because

(i) Clause 34(1) of the Main Contract gives to the Arbitrator jurisdiction to determine disputes which have arisen between the parties. It is therefore essential to ascertain in any situation what is the relevant dispute between the parties

p.131 ll. 11-42

(ii) The relevant dispute between the parties on the present facts is whether or not the Respondents were lawfully entitled to determine the employment of the Appellants under the Main Contract

(iii) Article V Clause 3 gave to the Employer the right to determine such employment in the event of the Architect being of the opinion that the progress of the works was unsatisfactory

p.142 ll. 24-36

(iv) Therefore the relevant question for the Arbitrator to determine was whether the Architect was in fact on 1st March 1977 of that opinion.

(v) The power conferred by Clause 34(3) of the Main Contract to open up, review or revise opinions of the Architect extends only to any opinion expressed by the

p.132 ll. 4-20

RECORD

Architect as to any matter in dispute which has been submitted to the Arbitrator. This requires firstly (a) the existence of a dispute and then (b) the expression by the Architect of an opinion on that dispute.

(vi) On the present facts the opinion of the Architect was not expressed as to any matter in dispute or as to any dispute submitted to the Arbitrator for his determination.

(vii) If the Architect was of the bona fide opinion that the progress of the Works was unsatisfactory, then the Arbitrator can, and indeed must, decide that the determination was lawful without enquiring whether in his own view the progress of the Works was or was not satisfactory, since that is not a dispute which has been submitted to him.

(viii) The contention of the Contractor that although, as they conceded, Article V Clause 3 provided grounds upon which the Employer could "effectively" terminate the employment, such termination could nonetheless still be wrongful and actionable,was unfounded in either precedent or logic.

p.143 11.12-22 (ix) the contention of the Appellants on Article V Clause 6 :-

(a) renders nugatory and meaningless the provision of that Clause that the valuation of Pakatan International shall be binding on both parties and final, and indeed renders wholly pointless the entire provision for such a valuation.

(b) involves a construction of Clause 34(3) which entitles the Arbitrator to open up a valuation made by a stranger to the Main Contract, which valuation and which stranger were not contemplated by the Main Contract of which Clause 34(3) is part.

(x) the effect of the arbitration clause in the Main Contract is to lay down by what tribunal and procedure the rights of the parties shall be decided, and not to alter the substantive rights of the parties.

(xi) there is thus no conflict between Article V Clause 3 of the Supplemental Agreement and Clause 34(3) of the Main Contract. But if there was any such conflict, Article V Clause 3 must, as the Appellants accepted, prevail because:

RECORD
p.144

(a) by Article VIII of the Supplemental Agreement the terms and conditions of the Main Agreement were preserved only "subject to the provisions of /the Supplemental Agreement/ particularly the additional rights and benefits of the Employer provided in /that/ Agreement."

(b) the words of the Supplemental Agreement are the words specially chosen by the parties and should therefore prevail over words in standard printed Conditions.

(c) the words of Article V Clause 3 are particular words dealing specifically with the circumstances justifying termination and should therefore prevail over the general words of Clause 34(3).

12. Before the Court of Appeal, the Appellants sought in argument to contend that even if Questions A1 and A2 were to be answered in the Employer's favour the Arbitrator would be entitled to preclude the Employers from relying upon the Architect's opinion and recommendation under Article V Clause 3 of the Supplemental Agreement if he, the Arbitrator, were to be satisfied on the evidence before him that the Employer's own actions had prevented the Appellants from maintaining satisfactory progress of the Works. The Court of Appeal held that this argument did not arise on the Special Case and that it was not a question stated by the Arbitrator under the Special Case Stated. Not only was this ruling correct, but in fact this new point has not been raised by the Contractor on the pleadings in the arbitration and is contrary to the evidence so given. It is thus the contention of the Respondents that it was not open to the Appellants to raise this new point before the Court of Appeal and that it is not open to them to raise it before the Judicial Committee of the Privy Council on this appeal.

13. The Respondents respectfully submit that this appeal should be dismissed with costs for the following among other

R E A S O N S

(1) BECAUSE the Judgment of the Court of Appeal, and the reasoning thereof, was correct;

(2) BECAUSE for the purposes of Article V Clause 3 of the Supplemental Agreement it is sufficient (in order to entitle the

Respondents to determine the employment of the Appellants under the Main Contract) that the Architect should have formed an opinion in good faith on the information available to him at the time;

(3) BECAUSE the Arbitrator has therefore no need or reason to open up, review or revise such an opinion in order to determine the issues between the parties, and is therefore not entitled to do so.

(4) BECAUSE the Arbitrator is not entitled within the powers under Clause 34 of the Main Contract to direct that the Appellants' claims under Paragraph 4 and 4A in 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 to open up, review and revise the valuation of the Works executed and materials supplied by the Appellants carried out by Pakatan International Suckling McDonald purportedly pursuant to the provisions of Article V Clause 6 of the Supplemental Agreement.

BLEDISLOE

M. BRINDLE

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CASE FOR THE RESPONDENTS

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