Privy Council Appeal No. 21 of 1980

Loke Hong Kee (S) Pte. Limited – – – – – *Appellants*

v.

United Overseas Land Limited – – – – – *Respondents*

FROM:

THE COURT OF APPEAL IN SINGAPORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 31ST MARCH 1982

Present at the Hearing:

LORD DIPLOCK
LORD ELWYN-JONES
LORD KEITH OF KINKEL
LORD LOWRY
LORD BRANDON OF OAKBROOK

[*Delivered by* LORD KEITH OF KINKEL]

This appeal comes before the Board from a judgment dated 25th July 1979 of the Court of Appeal in Singapore. By that judgment the Court (Wee Chong Jin C.J., Kulasekaram and F. A. Chua JJ.) reversed a judgment of D'Cotta J. and answered in favour of the respondents certain questions contained in a consultative Case Stated by the Arbitrator in the course of arbitration proceedings in which the appellants are claimants and the respondents are respondents.

The arbitration arises out of contractual arrangements between the parties concerned with the construction by the appellants, as contractor, for the respondents, as employer, of two blocks of flats at Cairnhill Plaza, Singapore. There are two contractual documents to be considered. The first of these (" the Main Contract ") was dated 8th March 1974. It was in the then current standard form of the Singapore Institute of Architects, and it provided *inter alia* that the construction of the flats should be completed by 16th March 1976. The works were to be under the supervision of an architect, Mr. William Chen, and were to be carried out and completed to his reasonable satisfaction.

Problems arose in the course of the works, and on 23rd March 1976 the parties entered into a Supplemental Agreement. This proceeded upon a narrative setting out *inter alia* that the contractor was not expected to be able to meet the extended completion date of 4th May 1976 fixed by the architect, that the contractor had certain claims against the employer, that the contractor had failed to pay to various nominated

sub-contractors substantial sums that were due to them, and that the contractor was in debt for almost $2m. in respect of materials supplied to him. The Supplemental Agreement went on to provide for such matters as financial assistance by the employer to the contractor, and for payments to be made direct by the employer to sub-contractors and to suppliers of materials, such payments being deductible from contract payments from time to time due to the contractor.

Article V, under the heading " Progress of Works " provided *inter alia* as follows:—

" 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:

(*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.

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 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.

. . . . . .

5. Upon the said determination or upon any determination of the employment of the Contractor under the Principal Agreement the Contractor shall forthwith remove all works from site and shall forthwith surrender the site to the Employer and not retain possession thereof and not do any thing or carry out any act of whatever kind to prevent the Employer from taking possession of the site or from carrying out any works therein.

6. Upon the Employers regaining possession of the site the firm of Pakatan International Suckling McDonald of 37B Tanglin Road, Singapore 10 Tel: 648211/2358211 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. The costs and fees of the said quantity surveyor shall be borne by the parties hereto equally."

Article VIII (1) provided:—

" 1. 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 effect or modify or diminish any right of the Employer and the Contractor of whatever kind against each other arising out of or 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."

On 1st March 1977 the architect sent to the respondents, with copy to the appellants, a letter containing the following passage: —

> " I am of the opinion that progress of the works is unsatisfactory and from my letters to Loke Hong Kee (S) Pte. Ltd. it is obvious that
>
> (*a*) The contractor has failed to adhere or maintain the progress of works as specified in the Third Schedule of the Supplemental Agreement dated the 23rd day of March, 1976 between you and the contractor.
>
> (*b*) The contractor is not making any serious attempt to adhere or maintain the progress of works as specified in the said Third Schedule.
>
> (*c*) The contractor is not carrying out the works expeditiously and with every diligence.
>
> I hereby give the recommendation specified in Clause 3 Article V of the said Supplemental Agreement. You may now determine the employment of the contractor under the Principal Agreement forthwith by notice in writing should you so desire."

On the same date the respondents sent to the appellants a letter purporting to terminate forthwith their employment under the Main Contract. The appellants disputed the lawfulness of the termination. This dispute, with others, was referred to a sole arbitrator under Clause 34 of the Main Contract, which was in these terms: —

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

At an early stage of the arbitration proceedings the arbitrator was requested by the parties to state for the decision of the High Court, under section 28 of the Arbitration Act (c. 16), a case raising a number of points of law. The case as stated set out various questions of law, of which three only remain relevant to be answered at this stage. They are:—

> "A.1 Whether I am entitled to open up review or revise an opinion of the Architect under Article V Clause 3 of the Supplemental Agreement pursuant to the powers conferred upon me by Clause 34 of the Main Contract.
>
> A.2 Whether for the purposes 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.
>
> A.3 Whether or not by virtue of the powers conferred upon me as Arbitrator under Clause 34 of the Main Contract, I am entitled to direct that Claimants' claims under paragraphs 4 and 4A of their Points of Claim be measured and/or valued as may in my 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."

D'Cotta J. answered the first and third of these questions in the affirmative and treated the second as superseded. The Court of Appeal, reversing his judgment, answered the first and third questions in the negative and the second in the affirmative.

The main issue in the appeal is concerned with the correct answer to Question A.1. It is not in dispute that the arbitration clause in the Main Contract, Clause 34, applies to differences between the parties arising out of the terms of the Supplemental Agreement. The argument revolves round the question whether the opinion of the architect that the progress of the works is unsatisfactory, given under Article V(3) of the Supplemental Agreement, is final, or whether it is liable to be opened up and reviewed by the arbitrator under the provisions of Clause 34. Counsel for the appellants relied strongly on the terms of Clause 34(3), particularly the provision that the arbitrator should have power "to open up, review and revise any . . . opinion . . . in the same manner as if no such . . . opinion . . . had been given". He drew attention to a number of contexts in the Main Contract containing reference to opinions being given by the architect upon a variety of matters, which opinions were plainly intended to be capable of review by the arbitrator under Clause 34(3), and submitted that a similar intention was to be inferred as regards an opinion given under Article V(3). Support for this submission was sought to be derived from the circumstances that Article V(3) did not say that the architect's opinion was to be final, whereas this was expressly stated as regards the valuation by quantity surveyors provided for by Article V(6). Where the parties intended a particular decision to be final they made express provision to that effect and, this not having been done in Article V(3), the proper inference was that an opinion given thereunder was not intended to be excluded from review.

These are powerful arguments, but their Lordships are of opinion that the Court of Appeal was right to conclude that they should not prevail. The question is one of construction of Article V(3) of the Supplemental

Agreement, to be resolved by ascertainment of the intention of the parties from the language they have used, having regard to the context and to relevant surrounding circumstances. These circumstances include the serious difficulties into which the contractor had fallen, as enumerated in the preamble to the agreement. In that situation it would not be surprising that the employer might seek, and the contractor might agree to, some unusually drastic and summary sanction capable of being invoked if the progress of the works was not improved. The phrase " in the opinion of the architect unsatisfactory " which appears in Article V(3) carries the kind of subjective connotation which is necessarily associated with words expressive of satisfaction or dissatisfaction. It is the view of the particular architect as to what is or is not satisfactory which is to be the criterion, not any objective standard. It was argued for the respondents that significance was to be attached to the consideration that, if the contract were to be terminated following a recommendation by the architect made after formation by him of the requisite opinion, matters would be irretrievable, in respect that the contractor would have been removed from the site and it would be impracticable to set the contract on foot again. It was said to be unlikely in such a situation that the parties would have intended that the architect's opinion should be capable of being opened up with the possibility of it being decided *ex post facto* that the contract had not been lawfully terminated. By contrast, in the other contexts of the Main Contract where the architect's opinion might lead to certain results affecting the parties' rights, there was an opportunity of review by arbitration before matters had gone too far to be capable of being put right. There is some force in this argument, but the edge is somewhat taken off it when it is observed that in the case of the other two limbs of Article V(3)—failure to maintain the progress of works as specified in the Third Schedule, and any breach by the contractor of the Supplemental Agreement—it would turn on the ascertainment of objective facts whether or not the employer was entitled to terminate on the architect's recommendation. This necessarily opens up, in relation to these two limbs, the possibility of an *ex post facto* decision that the employer was not entitled to terminate, which makes it hard to say that such a possibility is unlikely to have been in contemplation as regards the first limb. At the same time, it is a reasonable view that the contexts of the Main Contract bearing reference to the architect's opinion are all concerned with matters relating to foreseeable incidents likely to arise in the ordinary course of the contract, with which the drastic occurrence of complete termination is to be contrasted.

Then it is to be noted that the provisions of Article V(3) are thereby stated to be " in addition to the Employer's rights under " the Main Contract, and that by Article VIII (1) it is provided that the terms and conditions of the latter " 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 ". Clause 25(1) of the Main Contract gives the employer the right to terminate the contract, in the event of various defaults by the contractor, if the default is not remedied within a certain time after the expiry of 14 days' notice. None of these defaults, one of which (paragraph (b)) is failure to proceed regularly and diligently with the works, is expressed as turning in any way on the opinion of the architect. The introduction into Article V(3) of the reference to the opinion of the architect must, having regard to the surrounding circumstances and to the general context of the Supplemental Agreement, be intended to have some content in the nature of conferring upon the employer some special kind of remedy. The right to terminate merely upon the recommendation of the architect following on the formation by the latter of the requisite opinion is special in respect that it does not turn upon an objective

ascertainment of the facts regarding the progress of the works. If it were intended that the right to terminate should depend on establishing objectively that such progress was unsatisfactory, and that if necessary this would have to be done to the satisfaction of the arbitrator, the reference to the opinion of the architect would be quite futile. The architect's opinion would be of no consequence whatsoever, if it were liable to be opened up and reviewed by the arbitrator, as if it had never been given, in the course of the latter deciding for himself whether or not progress had been unsatisfactory. The conclusion must be that this opinion of the architect was intended to be a special kind of opinion, different from the various opinions of his mentioned in the Main Contract, and that the general powers of the arbitrator contained in Clause 34(3) were not intended to apply to it. It follows that the function of the arbitrator is limited to deciding whether as matter of fact the opinion was given and was *bona fide,* and that the Court of Appeal rightly answered Question A.1 in the negative and A.2 in the affirmative.

The parties were agreed that in that situation Question A.3 was rightly answered in the negative.

For these reasons their Lordships dismiss the appeal and remit the case to the Court of Appeal in Singapore for them to deal with those questions in the Case Stated which have not yet been disposed of. The appellants must pay to the respondents the costs of the appeal to this Board.

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In the Privy Council

LOKE HONG KEE (S) PTE. LIMITED

v.

UNITED OVERSEAS LAND LIMITED

DELIVERED BY

LORD KEITH OF KINKEL

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1982