28, 1971

Appeal No. 38 of 1969.

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG (APPELLATE JURISDICTION)

B E T W E E N

TAK MING COMPANY LIMITED Appellants

AND

YEE SANG METAL SUPPLIES COMPANY Respondents

CASE FOR THE RESPONDENTS

RECORD

1. This is an appeal from the judgment of the Full Court of Hong Kong (Blair-Kerr and Williams JJ) dismissing the Appellants' Appeal from the judgment of Pickering J. in the Supreme Court of Hong Kong adjudging that the Appellants were liable to the Respondents for the balance, if any, of the price of work done on the Appellants' site by the Respondents in excess of the sum of Hong Kong $884,000 already received by the Respondents in respect thereof.

2. It was also ordered that the amount of any such balance should be separately assessed.

3. The Appellants are the registered owners of the land registered in the Land Office in Hong Kong as Section A of Kowloon Inland Lot. No. 1571

4. On 27th October, 1964, the Appellants, as employer, entered into a written contract (hereinafter referred to as "the main Contract") with the Defag Construction Company as p.103-108

contractor, (hereinafter referred to as "the main Contractor") to erect for the said Company a sixteen-storey building (hereinafter referred to as "the said building") on the said land. The main Contractor was the First Defendants in the Respondents' action at first instance in the Supreme Court of Hong Kong and the Appellants were the Second Defendants.

5. The prices stated in the main contract in respect of the erection of the building was the fixed price of $4,692,000 (which included payments to nominated sub-contractors and suppliers and contingencies). Instalments of the fixed price were to be due from the
p.106-108 Appellants to the main Contractor in accordance with a table of payments set out in an Appendix to the main contract. These instalments totalled $4,500,000 (and not $4,692,000) and comprised 41 payments. This Appendix stated that no payment was required in respect of the construction of reinforced cement concrete pile caps, with a value of about $700,000. Instead, payment of this sum of $700,000 was to be spread over the 41 instalments, and thus did not become payable, as to the full amount, upon the completion of the said pile caps, but only upon completion of the erection of the said building. Further, the Appendix stated that only 75% of each of the 41 instalments was to be paid at the date that instalment became due and that the retained balance of 25% should be paid within 30 days from the date of issue of the occupation permit in respect of the completed building.

6. This deferment of payment in respect of the reinforced concrete pile caps, plus the right of the Appellants to retain 25% of each of the 41 instalments, meant that the main Contractor was to some extent financing the erection of the said building.

7. The Appellants gave security for the
p.92-102 subsequent payment of the 25% retained from each instalment. This security consisted of a mortgage of the said building by the Appellants to the main Contractor. This mortgage was executed on 16th November 1964

and by that mortgage the date for the Appellants to pay to the main Contractor the 25% of each instalment retained was postponed from the date stated in the Appendix to the main contract (namely 30 days from the date of the occupation permit) to six months after the completion of the said building.

8. Because of the onerous financial terms of the main contract, the main Contractor ran into serious financial difficulties and in November and December 1964 there was little progress on the site. p.39,l.18

9. At these dates the Appellants were also under financial strain. In January 1964 they had entered into a mortgage with Henry Fok Estates Ltd. to secure a loan of $5,000,000 granted to the Appellants. p.38, l.17 On 30th October the Appellants created a further charge on the said building in favour of the same Henry Fok Estates Ltd. to secure an additional loan of $1,500,000. p.38, l.17

10. On 20th January 1965, the main Contractor entered into a sub-contract with the Respondents. The sub-contract was in writing in Chinese. By this sub-contract, the Respondents, as sub-contractors, were to carry out all the reinforcement work, including the supply of labour and steel, in respect of the erection of the said building. p.113-115 A time period, of from 2 to 4 days, was agreed as the time within which, for each floor, the actual fixing of the reinforcement in the columns and the floor slabs was to be completed. p.114, l.7.

11. By the sub-contract, 21 instalments of payment were to be made. Each of these instalments, other than the first instalment, was to be made in accordance with the main Contractor's payment dates as set out in the Appendix to the main contract. p.113-114 The learned trial judge held this provision to mean that the last 20 instalments of the sub-contract price were to coincide with, and to be effected from, the first twenty payments due to the main Contractor under the main contract. However, only payments 1-17 under the main contract related to the reinforced concrete work; Payments 18, 19 and 20 related to

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p.63, l. 2-10. brickwork with which the Respondents were not concerned.

12. Further, the learned trial judge held that it was the evidence that the total of the instalments under the sub-contract was not to be the total of the sum due under the sub-contract, but that there was to be a final adjustment of accounts on the basis of the weight of steel used.

p.62, l.42-47

13. By virtue of the terms of the sub-contract relating to payment, the Respondents were to some extent financially aiding the main Contractor.

p.74, l.23

14. After the sub-contract had been signed, the main Contractor handed a copy of it to the Appellants.

p.70, l.36

15. Thereafter there was a meeting between the Appellants and the Respondents at the Mandarin Hotel in Hong Kong. The learned trial judge held that this meeting was not a one-sided approach by the Respondents, but that the Appellants were very anxious that the Respondents should continue with the sub-contract works and that the Appellants had every reason to meet the Respondents' request as far as they could.

p.74, l.19

16. As a result of that meeting, the Respondents sent to the Appellants a letter in Chinese dated 5th February, 1965. In that letter, the Respondents requested the Appellants to give a written guarantee that, in the event of the construction work under the main contract having to be let out on contract to another building contractor because of the main Contractor's abandonment of that work during the course of the construction of the said building, the sub-contract for the reinforcement work entered into between the Respondents and the main Contractor should remain effective. That letter further requested that the Appellants should be responsible to the Respondents for the payment of the labour and materials for the reinforcement work on the due dates out of the amount of the construction costs allotted to the main Contractor.

p.121

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17. In their reply dated 9th February, 1965 the Appellants confirmed that p.123-124

(1) In case of the breach of the main contract on the part of the main Contractor, the Appellants and Respondents might by mutual agreement continue the sub-contract even although the main Contractor might be forced off the site;

(2) In the event of failure to reach such a mutual agreement, the Appellants would pay the Respondents for the works done on the site against architect's certificates in accordance with the main contract

This undertaking was subject to the Respondents complying with their sub-contract with the main Contractor and also subject to the Respondents carrying out the sub-contract works properly and expeditiously in accordance with the Schedule of Works submitted to the Appellants by the main contractor.

18. By virtue of the Sub-Contract, the Respondents were required to fulfil the terms of that Sub-Contract. By the terms of the Sub-Contract, there was no obligation upon the Respondents to carry out the sub-contract works in accordance with the Schedule of Works referred to in the said letter of 9th February 1965. p.113-115

19. The Respondents contended that following the exchange of letters dated 5th and 9th February 1965 there was a contract between the Appellants and the Respondents p.70, 1.13 p.74, 1.33 p.88, 1.8 p.88, 1.29

20. The learned trial judge held that Paragraph 2 of the letter of 9th February 1965 amounted to the establishment of a direct contractual relationship between the Respondents and the Appellants. The consideration for this contract was held not to be the Respondents' implied promise to comply with the sub-contract, (although it was stated that the Respondents could rely upon this implied promise) but the actual compliance by the Respondents with the condition upon which the Appellants' promise to p.74, 1.36 p.74, 1.45

RECORD

pay was dependent, namely the completion of all the steelwork within the time specified in the revised Schedule of Works. Compliance by the Respondents with this Schedule was found as a fact by the learned trial judge to have occurred - this finding overruling the Appellants' express denial of such compliance

p.75, pp. 3-15
p.77, l.16
p.188-189

21. Williams J. in his judgment on the appeal noted that counsel for the Appellants did not criticise or reject as fallacious the learned trial judge's references in support of his ruling as to what was the consideration for the direct contract between the Respondents and the Appellants; and the learned judge did not himself find it necessary to consider the matter further.

p.88, l.31

22. One benefit to the Appellants that Williams J. did find as arising out of this direct contract between the Respondents and the Appellants was the assurance that the reinforced concrete work would be carried out, and the necessary steel supplied by the Respondents, at a time when the financial climate was none too satisfactory, and when the Appellants were very anxious that the Respondents should continue with the sub-contract.

p.88,l.22
p.87, l.18
p.87, l.41

23. The Respondents claim payment under Paragraph 2 of the letter of 9th February 1965. This paragraph states

> In case of the failure to reach a mutual agreement between us, we shall pay you for the works done on the captioned site against our architect, Mr. Eric Cumine's certificates in accordance with the main contract.

p.124, l.6

The learned trial judge held that this paragraph must be construed in the context of the whole of the letter embodying it, and that there appeared to be no reason for denying to the words of that paragraph their ordinary and natural meaning.

p.75, l.18

24. Applying this meaning, the learned trial judge held that, pursuant to paragraph 2 of this

letter the Appellants were to pay the Respondents for "the works done on the captioned site". This, he held, could only refer to work done by the Respondents, and related to the whole of the steelwork. Payment was to be "against our architect, Mr. Eric Cumine's certificates in accordance with the building contract". Such certificates, however, had been issued in accordance with the main contract in respect of the whole of the steelwork. So far as the Appellants were concerned, their undertaking was to pay for work done on the site by the Respondents against Architect's certificates. That work had been done, and the relevant certificates having been issued it was held that the liability of the Appellants was complete.

p.75, l.33
p.75, l.40
p.75, l.29
p.76, l.19

25. Consequently the Appellants' obligation was to pay to the Respondents any balance found to be due to them in respect of the work done on the site by the Respondents: the yardstick to be used in the calculation of such a balance, if any, was the prices for mild steel bars and high tensile steel bars specified in the sub-contract.

p.76, l.21

26. The learned trial judge was satisfied that, despite the Appellants' witness's evasiveness before the court, the above construction of Paragraph 2 accorded with the Appellants' intention at the date the letter of 9th February 1965 was written

p.76, l.29

27. The two learned judges of the Full Court of Hong Kong expressly approved the construction given by the Court of first instance.

p.90, l.7
p.90, l.18

AND THE RESPONDENTS WILL CONTEND:-

1. That a contract was entered into between the Appellants and the Respondents at the beginning of February 1965;

2. That the said contract was supported by consideration moving from the Respondents to the Appellants;

3. That the learned trial judge's interpretation of the said contract was correct;

4. That the Respondents having complied with the conditions stated in the said letter, upon which the Appellants' promise to pay was made dependent; the Appellants have a legal obligation, pursuant to Paragraph 2 of the said letter, to pay to the Respondents the value of the work executed by the Respondents and certified by the Appellants' architect in excess of the sum already received by the Respondents in respect thereof;

5. That the decisions in this matter of the Supreme Court of Hong Kong given at first instance and on appeal should be confirmed.

MICHAEL CHAVASSE

D. G. VALENTINE

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Respondents

CASE FOR THE RESPONDENTS

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