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Can a contractor sue on a quantum meruit basis after terminating a contract for repudiation?

KK Cheung

In the recent case of *Peter Mann v Paterson Constructions Pty Ltd* [2019] HCA 32, the High Court of Australia had to consider whether remuneration for work and labour done by the Respondent for the Appellants under a domestic building contract, before the contract was terminated by the Respondent's acceptance of the Appellant's repudiation, was recoverable by the Respondent under the contract, or alternatively, as restitution for unjust enrichment (on a quantum meruit basis) and, if the latter, whether the contract limited the amount that could be awarded.

Background

The Appellants had engaged the Respondent to build two townhouses under a Master Builders Association Form HC-6 (Edition 1-2007) Contract for a fixed price of AU\$971,000 (the Contract). A dispute arose between the parties in relation to the works. The Respondent claimed that the Appellants had repudiated the Contract and purported to accept that repudiation by terminating it. The Respondent then claimed that it was entitled to recover payment for work done, including variations, on a quantum meruit basis i.e. entitled to the reasonable value of work performed. The Respondent succeeded in its claim before the Victorian Civil and Administrative Tribunal, Supreme Court of Victoria and Court of Appeal and the Appellants now appealed to the High Court of Australia.

Issues before the High Court

The issues before the Court were:

- (1) Was the Respondent entitled to sue on a quantum meruit basis after having terminated the Contract for repudiation?
- (2) If so, did the Contract price operate as a ceiling on the amount claimable on a quantum meruit basis?

Court's Decision

The Court held that insofar as the work and labour was done in response to a requested variation within the meaning of the Domestic Building Contracts Act 1995 (Vic) (DBC Act) any amount of remuneration had to be determined in accordance with the DBC Act.

To the extent that the work and labour done, not being variations, comprised completed stages of the Contract as defined in the Contract, the amount of remuneration payable was essentially prescribed by the Contract for those stages and, any damages for breach of contract were to be calculated accordingly. The Court said that serious difficulties would arise if the law sought to expand the law of restitution to redistribute risks for which provision had been made under the applicable contract. In the present case, there was no good reason to consider that damages for breach of contract would fail to meet the justice of the case such that a restitutionary claim for quantum meruit should be available.

However, the Court said that insofar as any of the work and labour done, not being variations, comprised part of a stage of the Contract that had not been completed at the time of termination, the Respondent was entitled, at its option, to damages for breach of contract or restitution, but if the latter, the amount should be limited in accordance with the rates prescribed by the Contract i.e. could not exceed the portion of the overall price set by the Contract that was attributable to the work.

Comment

There is no equivalent of the DBC Act in Hong Kong. The ruling of the Australian Court on the basis of recovery of the price of variations in the judgment is therefore irrelevant. What is interesting is the Respondent's claim for value of work done on a quantum meruit basis after having terminated the Contract.

Quantum meruit is applied to enable a contractor to recover reasonable remuneration for work done. A typical example is that no binding contract was formed by reason of the employer failing to confirm the contract after issuing the letter of intent but the contractor nevertheless completing the works. It is generally believed that the contractor's recovery is not limited to his contract price in such case. The facts of the above judgment are distinguishable from the case when no contract had ever come into existence. Having reviewed various authorities carefully, the Australian Court decided that termination of the contract provides no reason to disregard the contract price which reflects the parties agreed allocation of risk since the discharge of a contract by repudiation operates only prospectively and it is not equivalent to rescission ab initio.

English Court confirms that an injunction to restrain adjudication will rarely be granted

Joseph Chung

In the recent case of *MillChris Developments Ltd v Fiona Selski Waters* [2020] 4 WLUK 45, before England's Technology and Construction Court, a party to an adjudication applied for an injunction to prohibit the adjudication continuing on the grounds that due to COVID-19 it had insufficient time to comply with the adjudicator's directions and would be unable to attend a site visit. The Court declined to make the injunction and ordered that the adjudication proceed. It said that the Court will only very rarely grant an injunction in respect of an ongoing adjudication and only in very clear-cut cases. The Court decided that the threshold for granting an injunction had not been met as the Contractor, MillChris, had not shown that COVID-19 and the fact it was no longer trading prevented it from preparing for the adjudication such that proceeding with it would be in breach of the rules of natural justice. The Court also commented that parties to an adjudication had no right to be present at a site visit and that the adjudicator could therefore conduct the site visit on his own or arrangements could be made for the site visit to be recorded for MillChris or for it to list specific matters for the adjudicator's attention beforehand.

Background

A home owner (Waters) engaged a contractor (MillChris) to carry out works at her property under a standard form JCT Homeowner Contract, which included a provision for adjudication. The works commenced in September 2017 and in November 2019 MillChris ceased trading. On 23 March 2020 Waters commenced an adjudication, alleging defective works and also that she had been overcharged by £45,000.

Adjudication

An adjudicator was appointed who directed that a response be served by 3 April 2020 and a site visit take place on 14 April 2020. On 26 March, MillChris's solicitor wrote to the adjudicator stating that it was not possible to comply with the deadline due to the COVID-19 situation and that the adjudication proceedings should be postponed until the COVID-19 lockdown was lifted. Although the adjudicator recognised the difficulties posed by COVID-19, he decided that the

adjudication should proceed and proposed a two-week extension to the timetable. MillChris did not agree to that extension, asserting that it could take several months to get the COVID-19 situation under control. MillChris submitted that if the adjudication went ahead, it would be conducted in breach of the rules of natural justice because it had insufficient time to prepare for it as a result of COVID-19 and the fact that it was no longer trading. MillChris said that its solicitor had been forced to self-isolate at home, which had made it difficult to obtain evidence from those with knowledge of the dispute, and that it would be unfair to proceed with the site visit where none of its representatives were able to attend and there was insufficient time to appoint an independent surveyor to be present.

Injunction Application

MillChris applied for a prohibitory injunction prohibiting Waters from continuing with the adjudication. It also sought a mandatory injunction that Waters withdraw the reference to adjudication. It was accepted that the Court had jurisdiction to grant an injunction which would inhibit or stop the progress of an adjudication.

Court's Ruling

The Court declined to grant the injunction and ordered that the adjudication should proceed. It held:

- The Court will only very rarely grant an injunction in respect of an ongoing adjudication and only in very clear-cut cases.
- In determining whether an injunction should be granted in the instant case, the question was whether there was a serious issue to be tried in that the adjudication would necessarily be conducted in breach of natural justice with the inevitable consequence that it would be unenforceable.
- The threshold for granting the injunction had not been met.
- In any adjudication, issues had to be addressed within a short time scale. MillChris had given no explanation as to why papers could not be transported or scanned over to its solicitor or anyone else instructed in the matter. Furthermore, the reason for not having been able to obtain evidence had little to do with COVID-19 but rather with the fact that MillChris had been unable to contact its former managing director within the short time available.
- Nor had MillChris attempted to contact its former project manager for the purposes of the adjudication.
- In any event, MillChris could have accepted the adjudicator's offer of a two-week extension, which could have ameliorated any issues it encountered in terms of contacting witnesses and obtaining evidence.
- The parties to an adjudication had no right to be present at a site visit. The adjudicator could therefore conduct the site visit on his own. It was clear that Waters was likely to be present, as it was her property, but arrangements could be made for the visit to be recorded or for MillChris to list specific matters for the adjudicator's attention beforehand.

Comments

This is the first case brought to our attention arising out of Covid-19. Whilst adjudication is not common in Hong Kong, similar objections may be raised in arbitration during the lockdown and how the Hong Kong Court will deal with such has yet to be seen.

English Court holds that an expert can owe a fiduciary duty of loyalty to a client

Justin Yuen

In the recent case of *A Company v X, Y, Z* [2020] EWHC 809 (TCC), England's Technology and Construction Court granted an injunction restraining the Defendants (a global expert firm) from acting in an arbitration, due to breach of the fiduciary duty of loyalty to the client. It held that where independent experts are engaged by a client to provide

advice and support in arbitration or legal proceedings, in addition to expert evidence, they can owe a fiduciary duty of loyalty to their clients. Here, that duty had been breached as there was plainly a conflict of interest for the Defendants to act for the Claimant in one arbitration and against them in another arbitration concerning the same delays in a construction project and with a significant overlap in the issues. This was the case, despite two separate offices of the Defendant firm being appointed (one in London and one in Asia). The Court said that where a fiduciary duty of loyalty arises, it is not limited to the individual concerned, but extends to the firm or company and may extend to the wider group. Here it was owed by the whole of the Defendant group.

Background

The Claimant, the developer of a petrochemical plant (the Project), entered into agreements with third party group companies (the Third Party) for engineering procurement and management services in connection with the Project (EPCM Agreements). The Claimant subsequently entered into two contracts with a contractor for the construction of facilities in connection with the Project.

Disputes arose between the contractor and Claimant concerning delays to the works and the contractor commenced ICC arbitration proceedings against the Claimant in London (the Works Package Arbitration). In the Works Package Arbitration, the contractor claimed additional costs incurred by reason of delays to its works, including the late release of Issued For Construction (IFC) drawings. The IFC drawings were produced by the Third Party pursuant to its EPCM agreements with the Claimant. The Claimant's position was that if, and to the extent that, it was liable to pay additional sums to the contractor as a result of the Third Party's late issue of the IFC drawings, the Claimant would seek to pass on those claims to the Third Party.

The Claimant engaged an expert witness company based in Asia (the 1st Defendant, X) to provide delay analysis expert services in connection with the Works Package Arbitration. K was the individual expert assigned by X to provide the expert services to the Claimant and he started work on the Works Package Arbitration from June 2019.

In the summer of 2019, the Third Party commenced ICC arbitration proceedings against the Claimant in London (EPCM Arbitration) in which the Third Party claimed sums due under the EPCM Agreements. The Claimant brought counterclaims against the Third Party in respect of delay and disruption to the Project, including any additional sums payable by the Claimant to the contractor caused by the Third Party's alleged failure to manage and supervise the contractor.

In October 2019 the Defendants were approached by the Third Party's solicitors to provide (outside Asia) quantum and delay expert services in connection with the EPCM Arbitration. X took the view that working on the two matters (in different offices) would not constitute a "strict" legal conflict and that they had the ability to set the engagements up in a manner so that there was the required physical and electronic separation between the teams and there would therefore be no conflict of interest. M was the individual expert assigned by X to provide the expert services to the Third Party in respect of the EPCM Arbitration. The Claimant disagreed and obtained an interim injunction to prevent the Third Party from using M, which it now sought to continue on the ground that provision by the Defendants of services to the Third Party in connection with the EPCM Arbitration was a breach of the rule that a party owing a duty of loyalty to a client must not, without informed consent, agree to act or actually act for a second client in a manner which is inconsistent with the interests of the first.

Issues before the Court

Do independent experts engaged by a client to provide advice and support in arbitration or legal proceedings, in addition to expert evidence, owe a fiduciary duty of loyalty to their clients?

It was the Claimant's case that the Defendant's engagement gave rise to a fiduciary duty of loyalty on their part and they were in breach of such by agreeing to provide expert services to the Third Party, given the conflict of interest or potential conflict of interest. The Defendants argued that independent experts do not owe a fiduciary duty of loyalty to their clients, since experts have an overriding duty to the tribunal and a fiduciary duty would be inconsistent with the independent role of an expert.

The Court distilled the following general principles from the legal authorities cited by the Defendants:

- In principle, an expert can be compelled to give expert evidence in arbitration or legal proceedings by any party, even in circumstances where that expert has provided an opinion to another party.
- When providing expert witness services, the expert has a paramount duty to the court or tribunal, which may require the expert to act in a way which does not advance the client's case.
- Where no fiduciary relationship arises, having regard to the nature and circumstances of an expert's appointment, or where the expert's appointment has been terminated, the ongoing obligation to preserve

confidential and privileged information does not necessarily apply to preclude an expert from acting or giving evidence for another party.

The Court said none of those authorities supported the Defendant's argument that an independent expert does not owe a fiduciary duty of loyalty to his client. It said that as a matter of principle, the circumstances in which an expert is retained to provide litigation or arbitration support services could give rise to a relationship of trust and confidence. In common with counsel and solicitors, an independent expert owes duties to the court that might not align with the interests of the client. However, the paramount duty owed to the court is not inconsistent with an additional duty of loyalty to the client. The terms of the expert's appointment will encompass that paramount duty to the court and therefore, there is no conflict between the duty that the expert owes to his client and the duty that he owes to the court.

Was the Claimant entitled to a fiduciary obligation of loyalty from the Defendants?

Yes. The Court said that the 1st Defendant was engaged to provide expert services for the Claimant in connection with the Works Package Arbitration. The 1st Defendant was instructed to provide an independent expert report and to comply with the duties set out in the CIArb Expert Witness Protocol as part of the engagement. However, it was also engaged to provide extensive advice and support for the Claimant throughout the arbitration proceedings and in those circumstances a clear relationship of trust and confidence arose, such as to give rise to a fiduciary duty of loyalty. The Court said that where a fiduciary duty of loyalty arises, it is not limited to the individual concerned, but extends to the firm or company and may extend to the wider group. Here it was owed by the whole of the Defendant group.

Had the duty of loyalty or confidence been breached?

Yes. The Court said that the fiduciary duty of loyalty is not satisfied simply by putting in place measures to preserve confidentiality and privilege. A fiduciary must not place himself in a position where his duty and his interest *may* conflict. The 1st Defendant had been advising and assisting the Claimant in the formulation and presentation of its defence to the contractor's claims in the Works Package Arbitration, including the provision of advice, analysis and opinions as to the cause of delays to the Project. In the EPCM Arbitration, the Claimant sought to pass on to the Third Party any claims arising from late provision of the IFC drawings. The arbitrations were concerned with the same delays and there was a significant overlap in the issues. There was, the Court said, plainly a conflict of interest for the Defendants in acting for the Claimant in the Works Package Arbitration and against the Claimant in the EPCM Arbitration.

Should the Court exercise its discretion and grant the injunction?

Yes. The Court said that in circumstances where the grant of the injunction, albeit an interim injunction, will in effect provide the claimant with the whole relief which it seeks in the claim, the court should only grant it if it is likely that the claimant will succeed at trial. However the court has a discretion whether or not to issue the injunction based on where the balance of justice lies. On the material before it, the Court was satisfied that the Claimant was likely to succeed at trial and that the balance of justice lay in continuing the injunction

Accordingly, the Court continued the injunction restraining the Defendants from providing expert services to the Third Party in respect of the EPCM Arbitration.

Comments

Issues of conflict seldom arise in engaging expert witnesses. They will usually take a conservative approach in deciding whether to accept instructions acting for the opposite party. In this case, the individuals acting as expert were different, although they were from the same company. The Court did not accept that setting up a "Chinese Wall" between the two experts was good enough. One important feature in their engagement was that the company was not only providing expert witness services, but also arbitration support services to their clients. The boundary between these two types of services is often not clear in Hong Kong.

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