Eltraco International Pte Ltd v CGH Development Pte Ltd
[2000] SGHC 114

Case Number : Suit 214/2000

Decision Date : 23 June 2000

Tribunal/Court : High Court

Coram : Woo Bih Li JC

Counsel Name(s) : Christopher Chuah (Drew & Napier) for the plaintiffs; Stanley Wong (Jing Quee & Chin Joo) for the defendants; Zaheer Merchant (Madhavan Louis Partnership) for the insurers

Parties : Eltraco International Pte Ltd — CGH Development Pte Ltd

Banking – Performance bonds – Call on performance bond by beneficiary – Interlocutory injunction to restrain payment – Whether beneficiary entitled to make call on performance bond – Whether beneficiary must establish breach of contract first – Whether contractual terms preclude call on performance bond – Whether unconscionable for beneficiary to receive payment under performance bond

: ***Background***

By a letter of award dated 20 May 1996 from the defendants` architect, the plaintiffs were engaged by the defendants as the main contractors in respect of a proposed super-structure for proposed service apartments cum shops at 1st storey with two basement carparks on Lots 30-1, 30-2 and 31 TS No 20 at Killiney/Lloyd Road at a contract sum of S$24,388,000 (`the project`).

The main contract between the parties (`the contract`) incorporated the Articles and Conditions of Building Contract (Measurement Contract) Fourth Edition, reprint March 1990 issued by the Singapore Institute of Architects (`the SIA Conditions`) with amendments.

The architect of the project was originally Mr Eric Huay Kwok Meng of Ong & Ong Architects and subsequently, one Mr Steven Low of Ong & Ong Architects (`the architect`). The quantity surveyor of the project was WT Partnership (`the quantity surveyor`).

On 28 August 1999, the plaintiffs submitted progress claim No 32 for an amount of S$1,605,574.43 being all work done as at the date of completion. The progress claim included the balance of variation works which the quantity surveyor had assessed as approximately S$200,000 due to the plaintiffs but not yet included in the previous payment certificates issued by the architect.

The project was completed on 29 August 1998 according to the completion certificate issued by the architect. The maintenance period commenced on 30 August 1998. The maintenance period was stipulated to be 12 months and `For defects which occurred (sic) at more than two complaints of the same trade over at different place, such liability to extend for a further period of 6 monthly (sic)`. Hence, the maintenance period for defects should have expired on 29 August 1999 or 29 February 2000.

Under cl 27(2) of the SIA Conditions, the architect was to deliver a Schedule of Defects not later than 14 days after the expiry of the maintenance period and on receipt of directions or instructions to do so, the plaintiffs are to rectify all remaining defects.

Under cl 27(4), the architect was entitled to require that the contract sum be reduced, such reduction to be assessed by the quantity surveyor, in lieu of rectification work.

Under cl 27(5), when the defects had been rectified or had been dealt with under cl 27(4), the architect was to issue a maintenance certificate.

The plaintiffs were placed under judicial management on 21 January 2000 and Mr Chee Yoh Chuang and Mr Lim Lee Meng were appointed judicial managers pursuant to an order of court.

As at the date of completion of the project, the defendants had retained a total sum of S$1,219,400 being retention moneys up to 5% of the contract Sum. During the maintenance period, the first half of the retention moneys was released in tranches to the plaintiffs. The defendants retained the second half of the retention moneys amounting to S$609,700.

By a letter dated 4 October 1999, the plaintiffs requested the quantity surveyor to recommend a payment certificate for the balance of variation works assessed by the quantity surveyor to be approximately S$200,000.

The plaintiffs alleged that notwithstanding various requests from them, the architect did not certify the plaintiffs` progress claim No 32.

By a letter dated 21 March 2000, the quantity surveyor wrote a letter to the architect stating that the plaintiffs` claim No 32 could not be recommended because the final accounts had yet to be finalised and that the defective works had not been fully rectified. This letter was forwarded to the plaintiffs vide the architect`s letter dated 22 March 2000. The plaintiffs replied to the quantity surveyor`s letter in its letter dated 31 March 2000 to the architect alleging that the interim payment sought had nothing to do with the final account as it was for work carried out before the issuance of the completion certificate.

Performance Bond No 01-6501802 for S$2,438,800

Pursuant to the main contract, the plaintiffs had procured Performance Bond No 01-6501802 to be issued by QBE Insurance (International) Limited (`QBE`) dated 17 July 1996 for the sum of S$2,438,800 in favour of the defendants (`the bond`).

By a letter dated 18 February 2000, the defendants through their solicitors, M/s Jing Quee & Chin Joo made a demand on the bond for S$2,438,800. The plaintiffs, through its former solicitors, M/s Lourdes Chen & Lee objected to the call on the bond through their letters dated 21 February 2000 and 25 February 2000.

Action against QBE

On 7 April 2000, the defendants commenced an action in the High Court in Suit 129/2000 against QBE for the sum of S$2,438,800 under the bond.

Plaintiffs` action

On 27 April 2000, the plaintiffs commenced the present action, ie Suit 214/2000 against the defendants. The primary relief sought was a permanent injunction to restrain the defendants from receiving the S$2,438,800 or any part thereof under the bond.

The plaintiffs also sought a stay of the action against QBE.

On the same day, the plaintiffs applied for an interlocutory injunction to restrain the defendants from receiving the S$2,438,800 or any part thereof under the bond and for a stay of the action against QBE and other consequential relief.

On 28 April 2000, counsel for the plaintiffs, for the defendants and for QBE attended before the court and the plaintiffs` application was adjourned three weeks for full arguments on an inter parte basis. In the meantime, the court ordered that there be no payment out on the bond until further order.

On 17 May 2000, counsel for each of the three parties appeared before me. After hearing arguments, I granted an order in terms of the primary relief sought by the plaintiffs with the qualification that the defendants are restrained from receiving more than $1.6m under the bond until further order. In other words, the defendants could receive up to $1.6m under the bond but no more.

My order was to apply until further order as the main litigants were going to arbitration for their disputes. Consequential orders were made.

The plaintiffs have appealed against that part of my order which did not restrain the defendants from claiming the S$2,438,800 or any part thereof. In other words, the plaintiffs want the defendants to be restrained from receiving the $1.6m which I was prepared to allow the defendants to receive.

Terms of the bond

The material terms of the bond for present purposes are:

> *1 In consideration of you not insisting on the contractor paying Singapore Dollars Two Million Four Hundred And Thirty Eight Thousand and Eight Hundred Only (S$2,438,800.00) as a security deposit for the contract, we hereby irrevocably and unconditionally undertake, covenant and firmly bind ourselves to pay to you on demand any sum or sums which from time to time may be demanded by you up to a maximum aggregate of Singapore Dollars Two Million Four Hundred And Thirty Eight Thousand and Eight Hundred Only (S$2,438,800.00 (`the said sum`).*
>
> *2 Should you notify us in writing, at any time prior to the expiry of this bond, by notice purporting to be signed for and on your behalf or by notice from your solicitors that you require payment to be made of the whole or any part of the said sum, we irrevocably and unconditionally agree to pay the same to you immediately on demand without further reference to the contractor and notwithstanding any dispute or difference which may have arisen under the contract or any instruction which may be given to us by the contractor not to pay the same.*
>
> *3 We hereby confirm and agree that we shall be under no duty or responsibility to inquire into:*
>
> *(a) the reason or circumstances of any demand hereunder, or*

(b) the respective rights, obligations and/or liabilities of yourselves and the contractor under the contract or otherwise, or whether there is any dispute between yourselves and the contractor, or

(c) the authenticity of your notice or the authority or entitlement of persons signing such notice,

but that we shall be entitled to and shall rely upon any written demand by you hereunder.

4 Any payment to be made by us hereunder shall be made without any set-off, deduction or counterclaim whatsoever.

5 We agree that our liability hereunder shall not be discharged, affected or impaired in any way by reason of any modification, amendment or variation in or to any of the conditions or provisions of the contract or the contract Works or by reason of any breach or breaches of the contract by the contractor, whether the same are made with or without our knowledge or consent. We further agree that no invalidity in the contract nor its avoidance, suspension or termination shall discharge, affect or impair our liability hereunder and that no waiver, compromise, indulgence or forbearance, whether as to time, payment, performance or any other matter afforded by you to the contractor under the contract, shall discharge, affect or impair our liability hereunder.

Whether defendants must prove a breach of contract before calling on the bond

Mr Chuah for the plaintiffs submitted that the defendants had to prove a breach of contract by the plaintiffs before calling on the bond. He referred to the following statement from the judgment of LP Thean J (as he then was) in **Royal Design Studio Pte Ltd v Chang Pte Ltd** [1990] SLR 1116 at 1125-1126:

> *In innumerable cases, courts have, in appropriate circumstances, in exercise of their equitable jurisdiction granted interim injunctions restraining parties from enforcing their contractual provisions until the resolution of their disputes then pending ... In this case, the defendant is only entitled to call on the bond in the event of breach of contract by the plaintiff. The defendant alleged that the plaintiff was in breach of contract but that allegation is hotly contested; the plaintiff said that it was not in breach and that it was the defendant who was in breach. Obviously, this issue can only be resolved at the trial or arbitration, depending on which forum the parties choose to conduct their litigation. Until that issue is decided in favour of the defendant, it cannot be said that at the moment the defendant is entitled under the agreement to call on the bond.*

I was of the view that that statement did not apply generally. There the beneficiary of the bond had alleged that a breach had occurred. Hence it was only logical that the beneficiary had to prove the breach. Furthermore, the terms of the bond there may be such as to require a breach to be established first.

Whether a beneficiary has to establish a breach before calling on a performance bond must depend on the terms of the bond. In the present case before me, it was clear that the terms of the bond did not require the defendants to establish a breach by the plaintiffs before being entitled to call on the bond.

Certain terms of the contract

Mr Chuah`s next argument was that certain terms of the contract between the plaintiffs and the defendants dictated that the defendants were not entitled to call on the bond just yet.

Mr Chuah referred to the amended cll 42 and 43 of the contract. They state:

> *42 Urgent Repairs*
>
> *If, at any time during the currency of the contract, the Architect determines that any remedial, protective, repair or other like works is urgently necessary to prevent loss of or damage to the Works or to any property or to prevent personal injury to or the death of any person the Architect shall, as soon as practicable thereafter, notify the contractor of that determination and the contractor shall carry out the work immediately on receipt of that notice and if the contractor is unable to (sic) unwilling at once to do the work the Employer may, by his own or other workmen, do such work as the architect may determine to be necessary. If the work so done by the Employer is work which the Architect determines to be work which the contractor was liable to do at his own expense under the contract then all costs and charges properly incurred by the Employer in doing the work shall be repaid to it by the contractor and may be recovered by the Employer as a debt due to the Employer by the contractor, or may be deducted by the Employer from any moneys which may then be or thereafter become payable to the contractor by the Employer, including any retention moneys then held by the Employer and, if such moneys are insufficient for this purpose, from the contractor`s Performance bond under the contract.*
>
> *Response time for defects (sic) works is as follows:*

Nature of Defects	Response Time	
1	Emergency Works	Within 1 day
2	Nuisance Defects	Within 2 days
3	Poor Workmanship	Within 1 week
4	Poor Materials Within	Within 2 weeks
Note: Nature of defects to be determined by the Architect		

> *43 Performance bond*

> *The contractor shall as a condition precedent to the commencement of any Works under this contract, furnish the Employer with an unconditioned (sic) banker`s guarantee from a Singapore bank or a foreign bank with office in Singapore in a sum equal to ten percent (10%) of the contract Sum by way of a deposit of security for the due performance and observance by the contractor of all stipulations, conditions and agreements herein contained. The bond or guarantee so furnished hereunder shall cover the Twelve (12) months Maintenance period and shall be released after the expiry of Maintenance period.`*

Mr Chuah submitted that even if there were rectification works required to be done by the plaintiffs, the defendants would first have to get others to do such work. Thereafter the defendants were to deduct the cost of the rectification works from moneys payable by the defendants to the plaintiffs including any retention money held by the defendants. Lastly, if the moneys payable to the plaintiffs were insufficient, then the defendants could call on the bond.

As for cl 43, Mr Chuah conceded that it was contrary to his submission because cl 43 required the plaintiffs to furnish an unconditional banker`s guarantee. However, Mr Chuah submitted that on the contra proferentem rule, the contradiction should be read against the defendants as the amended cll 42 and 43 were, he believed, drafted by the architect who is the agent of the defendants.

Mr Chuah also submitted that the terms of the contract are independent of the terms of the bond. He said that in deciding whether the defendants were obliged to satisfy certain requirements first before calling on the bond, I should consider cll 42 and 43 independently of the bond.

Mr Wong of the defendants submitted that cl 42 pertained only to urgent rectification works.

I am of the view that Mr Wong`s submission on the meaning of cl 42 is the correct one. It applies only when the architect determines that works are `urgently necessary to prevent loss of or damage to the Works or to any property or to prevent personal injury to or the death of any person`. In that situation the plaintiffs are to carry out the work required by the architect `immediately on receipt` of the notice from the architect. The response time to carry out such works varied from one day to two weeks.

Furthermore, such urgent work does not have to arise from the plaintiffs` default. If it arises from the plaintiffs` default, and the defendants had to get someone else to do the works that the defendants may recover the cost thereof by deducting the cost from moneys held by the defendants and payable to the plaintiffs and lastly, if such moneys are insufficient, then to call on the bond.

It was not suggested that the disputes between the parties regarding rectification works were works that were urgently required.

Accordingly, there was no contradiction between cll 42 and 43.

In any event, even if, for the sake of argument, Mr Chuah`s interpretation of cl 42 is correct, that would not assist the plaintiffs.

I do not agree that the contract terms are to be construed independently of the terms of the bond. The shoe is on the other foot as the plaintiffs are attempting to restrain the defendants from

receiving moneys under the bond (as the call has already been made). It is the terms of the bond that are to be construed independently of the terms of the contract between plaintiffs and the defendants.

Even if I were to take into account the terms of the contract and assuming, for the sake of argument, that Mr Chuah`s interpretation of cl 42 is correct, it was common ground that the bond was issued after the amended cll 42 and 43 were included in the contract and that the plaintiffs had caused the bond to be issued on the terms contained therein. I am of the view that by causing the bond to be issued on the terms therein, the plaintiffs would then have varied the terms of cl 42 or waived their right to argue that various requirements in cl 42 must be complied with first by the defendants before they were even entitled to call on the bond.

Unconscionability

Mr Chuah`s final argument was that although the bond was payable on demand, it was unconscionable for the defendants to receive any moneys under the bond.

He submitted that fraud was not the only reason to restrain a beneficiary from receiving moneys under such a bond, and that unconscionability was another reason. He cited a few cases for this proposition but it is only necessary for me to refer to one.

In **GHL Pte Ltd v Unitrack Building Construction Pte Ltd** [1999] 4 SLR 604 , the Court of Appeal said at [para] 24 p 615:

> *We agree that performance bonds are used frequently in the construction industry; that they are provided by and to parties who deal at arm`s length; that the use of performance bonds has resulted in substantial benefits to the parties and also in savings; that the courts should give effect to the intention of the parties; and that the law in relation to performance bonds should be placed on `a clear and unambiguous footing` so that they could be accepted by parties whether in Singapore or abroad. But, with respect, these are not the points involved with which we are concerned. We are concerned with abusive calls on the performance bonds. It should not be forgotten that a performance bond can operate as an oppressive instrument, and in the event that a beneficiary calls on the bond in circumstances, where there is prima facie evidence of fraud or unconscionability, the court should step in to intervene at the interlocutory stage until the whole of the circumstances of the case has been investigated. It should also not be forgotten that a performance bond is basically a security for the performance of the main contract, and as such we see no reason, in principle, why it should be so sacrosanct and inviolate as not to be subject to the court`s intervention except on the ground of fraud. We agree that a beneficiary under a performance bond should be protected as to the integrity of the security he has in case of non-performance by the party on whose account the performance bond was issued, but a temporary restraining order does not prejudice or adversely affect the security; it merely postpones the realisation of the security until the party concerned is given an opportunity to prove his case (per Chan Sek Keong J in **Chartered Electronic** at p 31 of the transcript).*

I consider this judgment to be binding on me. Furthermore, Mr Wong did not dispute that the court could restrain the defendants from receiving moneys under the bond if it was unconscionable for them to do so. However he submitted that it was for the plaintiffs to establish unconscionability and that

this should require something more than unfairness. He submitted that where there was a genuine dispute, then regardless of what the court might think of the merits of the respective positions, it was not unconscionable for the defendants to receive moneys under the bond.

In the unreported judgment in ***Raymond Construction Pte Ltd v Low Yang Tong & Anor*** , Lai Kew Chai J referred to the concept of unconscionability as involving `unfairness, as distinct from dishonesty or fraud, or conduct of a kind so reprehensible or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party` (at [para] 5). This definition was adopted in **Sin Kian Contractor Pte Ltd v Lian Kok Hong & Anor** [1999] 3 SLR 732 at [para] 22 and repeated in **Min Thai Holdings Pte Ltd v Sunlabel Pte Ltd & Anor** [1999] 2 SLR 368 (see the article entitled `Restraining a call on performance bond: Should "Fraud or Unconscionability" be the new orthodoxy?` by Adrian SP Wong in the ***Singapore Academy of Law Journal*** Vol 12, March 2000 at p 162, 170 and 171).

Mr Chuah accepted that it was for the plaintiffs to establish unconscionability.

Liquidated damages for delay

The architect had issued a delay certificate dated 5 May 1998 against the plaintiffs and subsequently a termination of delay certificate and a further delay certificate.

Under the terms of the contract, liquidated damages were payable by the plaintiffs at the rate of $12,000 per day. Under the delay certificates, the liquidated damages payable was $1,131,876.30.

Mr Chuah submitted that even if the plaintiffs were liable for the full sum of liquidated damages or part thereof, the sum had earlier been deducted or set-off against progress payments certified to be due to the plaintiffs. This was not disputed by Mr Wong. Hence the liquidated damages are not relevant for the application before me.

Defects

There was correspondence from the architect about defects and eventually the architect issued a letter to the plaintiffs dated 10 November 1999 enclosing a schedule of defects (`the schedule of defects`).

The plaintiffs alleged that they then attended to the rectification works. Thereafter, they sent a letter dated 24 January 2000 to the architect. In that letter they alleged that `most` of the items in the Schedule had been made good and some were not within their responsibility.

The architect replied on 27 January 2000 to say that there would be a joint site inspection of the outstanding defects on 2 February 2000.

A letter dated 10 February 2000 from the architect to the quantity surveyor refers to the joint site inspection. It said that the inspection viewed only the major defects. It then listed twenty items which were supposed to comprise the major defects. These were:

> *01 Main Lobby Marble Flooring Inherent Defects*
>
> *EIPL laid marble with inherent defects despite verbal objections before laying.*

EIPL suggests monetary compensation.

02 Swimming Pool Solhofen Tiles Badly Stained & Discolored

CGH alleged that stains were from the spraying and cleaning up of the fa+ade.EIPL claimed this defect was previously signed off. O&O to adjudicate.

03 External Granite-Look Sprayed Textured Coating

EIPL suggest monetary compensation for the shoddy workmanship. It was noted application of coating in some areas were by roller/brush.

04 Efflorescence at Pool Deck RC Trellis

EIPL confirmed not attending to this defect and suggest monetary compensation.

05 Curtain Walling Water Seepages

Defects are being attended to by M/s Acme as there is an indemnity for curtain walling. Plastic sheet debris behind spandrel panel were not removed.

06 Window Water Seepages

As discussed and agreed, EIPL to clean up dampness and fungi growth at bedroom wall of Room 221 and let dry for monitoring over next 3-4 days. This is to ascertain source of dampness, whether through window frame, brick parapet wall or due to condensation.

07 Podium Granite Cladding Defects

Defects include installation without backer rod, sealer coating to back of granite resulting in water seepages, water stain marks and unpolished edges.

08 Meeting Room Sliding/Folding Door Defects

Alleged defects were rough and unvarnished door lippings and no sound insulation. Contract specified custom-made and not proprietary door system.

09 Meeting Room Veneer Wall Panelling Defects

Veneer panels remain stained due to water seepages through boiler flue duct which has since been rectified.

10 Timber Doors/Frames and Architraves Defects

O&O opined standard of varnish is generally acceptable except few with scratches, chips and stains.

11 Timber Skirting Defects

Defects include loosen fixing, unmatched color of timber and incomplete

rectified work. EIPL suggest monetary compensation.

12 Guestroom Corridor False Ceiling Defects

Defects include uneven surface, hairline cracks and patchy rectified work.

13 Damaged Wallpaper Covering

Dampness and fungi growth in wallpaper covering were viewed in Rooms 221 and 820. Bad workmanship in laying were apparent in housekeeping offices.

14 Cracked Marble Vanity Top in Guest Bathrooms

CGH claimed 56 pieces were cracked, mended and installed.

15 Invertedly Installed Vanity Fascia

CGH claimed 5 pieces were invertedly installed.

16 Damaged Long Bath

CGH claimed 62 long bath were damaged while EIPL claimed only 18 were in the original defects list.

17 Varying Height of Stainless Steel Railing Fronting Guestroom Windows

EIPL suggest monetary compensation. Actual numbers with defects to be jointly verified and confirmed.

18 Main Lobby Sensor Sliding Glass Door Defects

Warranty for sensor mechanism is already over. Door is currently working well. CGH to carry out regular maintenance.

19 Omission of 2 Rainwater Outlets at Roof Level

EIPL claimed raising of slab was instructed verbally by CGH, thereby deviating from O&O`s given construction drawing and causing no place for its installation. O&O stressed it is EIPL`s responsibility to seek architect`s approval before proceeding with any deviation. Reinstatement of these 2 outlets now is not possible. Kerbs have been erected to prevent future occurrences of flooding and disruption too lift operations.

20 Replacement Cost of Missing Accessories

The letter ended with the architect requesting the quantity surveyor to evaluate the quantum required to rectify the defects where the plaintiffs had suggested monetary compensation in order than an amicable settlement could be reached.

By a letter dated 18 February 2000, the defendants` lawyers made a call on the bond.

By a letter dated 17 March 2000, the judicial managers of the plaintiffs wrote to the architect to ask for the amount of compensation assessed in respect of outstanding defects and issuance of a payment certificate for progress claim No 32.

By a letter dated 22 March 2000, the quantity surveyor wrote to the architect to give an estimated cost for rectifying the defective works for certain items only. The estimated cost pertained to eight items of defects only and amounted to $627,600.

Mr Chuah submitted that apart from the Schedule of Defects, the architect had issued various directions, the last being dated 1 March 2000. He said that all had been complied with and there were no further directions from the architect and this indicated that there was nothing further to be done by the plaintiffs.

Mr Chuah also submitted that the plaintiffs` attempts to carry out rectification works had at times been frustrated by failure to obtain access to units.

As regards the $627,600 estimated cost of eight items of defects, Mr Chuah submitted that the defendants were holding sufficient funds to cover that. ie the defendants were still holding half of the retention moneys amounting to $609,700 and the plaintiffs` progress claim No 32 for $1,606,574.43 (including the $200,000 for variations) had yet to be certified.

The defendants referred to two quotations from WTK Builder Pte Ltd and Shan Construction Pte Ltd dated 20 August 1999 and 13 September 1999, ie before the Schedule of Defects (attached to the 10 November 1999 letter from the architect) was issued before the joint inspection on 2 February 2000 and before the 22 March 2000 estimate of costs by the quantity surveyor in respect of eight items.

Mr Chuah submitted that these quotations were irrelevant in the light of the Schedule of Defects. He argued that it was not for the defendants to take matters into their own hands but for the architect to issue instructions or directions.

I am of the view that while it is for the architect to issue instructions or directions, this does not mean that the defendants must stand by idly and they are entitled to obtain quotations for rectification works.

Mr Wong relied primarily on the quotation from WTK Builder Pte Ltd (`WTK`). This quotation was for a sum of $2,528,986.

I asked Mr Wong if he could match the items in the quotation from WTK to the Schedule of Defects. Notwithstanding an attempt by him, he was not able to do so to my satisfaction. However, I had to bear in mind that the Schedule of Defects was issued by the architect after the quotation. Therefore WTK would not have intended to try and match the works in its quotation with those in the Schedule of Defects. Neither was it suggested that the Schedule of Defects was intended to match the works mentioned in the quotation. Besides, the words used in each document may be different although they refer to the same thing. In any event the quotation had not yet been revised after the Schedule of Defects had been issued or after the list of twenty items of major defects had been stated arising from the joint inspection on 2 February 2000.

I did not consider it safe to reject the quotation from WTK from all consideration at this stage.

The quotation included the cost of $1,030,000 for rectifying curtain walling and aluminium works.

Water seepage at curtain walling was mentioned in the twenty items of major defects after the joint inspection. The quantity surveyor`s estimate of costs for the eight items did not include this item.

Mr Chuah sought to persuade me that the curtain walling seepage was no longer in issue and that any other water seepage problem was confined to two rooms only.

On the other hand, Mr Wong drew my attention to various letters. I need refer to only two:

(a) A letter dated 23 March 2000 from the architect to the plaintiffs stated at para 2 thereof:

> *2.0 We refer to paragraph (2) of your letter. We refute your claim that only two guest rooms had leakage problems. The two guest rooms were inspected at random and does not construe to mean that only these two guest rooms has leakage problems.*

(b) Another letter dated 29 March 2000 from the architect to the plaintiffs stated at para 2 thereof:

> *2.0 We refer to 3rd paragraph of your letter. We refute your statement that the architect detected no water seepage through the wall during the joint inspection on 15 February 2000. Our Mr Steven Lee was at the joint inspection to observe the condition of the wall and did not made any comments confirming no water seepage detected through the wall.*

It will also be recalled that the quantity surveyor had written a letter dated 21 March 2000 to the architect stating that the plaintiffs` claim No 32 could not be recommended because, inter alia, the defective works had not been fully rectified.

Such correspondence shows that there is a water seepage problem and it is not necessarily confined to two rooms although it did not mention water seepage at the curtain wall. However, I note that item 5 of the twenty items mentioned in the architect`s letter dated 10 February 2000 to the quantity surveyor mentioned curtain walling water seepages being attended to by M/s Acme who was perhaps a specialist sub-contractor. This showed that as at the date of that letter, there was such a problem.

It was not clear to me whether the water seepage at the curtain walling had been resolved and if so what the extent of the other water seepage problem, which did not pertain to the curtain wall, was.

As regards the estimate of costs by the quantity surveyor for eight items of defects, he executed an affidavit to say that they were based on rates in the contract between the plaintiffs and the defendants and refuted any notion that they could be used as a gauge of the cost of another contractor to perform the rectification works.

As regards Mr Chuah`s point that the architect had not issued any further directions, Mr Wong countered that the architect also had not issued the maintenance certificate.

As for progress claim No 32, too much should not be made out of the architect`s omission to certify payment of the same. It will be recalled that this progress claim was dated 28 August 1998, one day before the certified completion date of 29 August 1998. The progress claim may have been more in

the nature of a final claim. Indeed it appeared that if the plaintiffs were paid the entire $1,605,574.43 under this claim, there might not be a final claim from them.

It is clear to me that there are genuine disputes between the plaintiffs and the defendants. However, the extent of the disputes and the cost of rectification works are not clear to me. This is not surprising bearing in mind the nature of the application before me and that the nature of disputes regarding building defects are among the most technical and complex. Accordingly, it was not unconscionable for the defendants to receive moneys under the bond.

Quantum claimed under the bond

However I did consider the quantum claimed under the bond. The call on the bond was for about $2.43m. The quotation from WTK was for about $2.5m. I also took into account the fact that the defendants were still holding about $600,000 as part of the retention sum and there was about $200,000 worth of variation works which was not really disputed by them. Although the plaintiffs still had a substantial claim under claim No 32, besides the claim for the $200,000 variation works, it was uncertain how much of the claim would be allowed.

Using a broad-brush approach, I deducted $800,000 (being the $600,000 retained and the $200,000 undisputed variation works) from $2.4m and hence restrained the defendants from receiving more than $1.6m. I considered that it was unconscionable for the defendants to receive more than $1.6m but that they should be entitled to receive up to that sum pending final resolution of the disputes.

Outcome:

Order accordingly.