# Hyundai Engineering and Construction Co Ltd v Rankine and Hill (Singapore) Pte Ltd [2004] SGHC 178

**Case Number** : OS 501/2004, NAOS 248/2004

**Decision Date** : 16 August 2004

**Tribunal/Court** : High Court

**Coram** : Choo Han Teck J

**Counsel Name(s)** : Vinodh Coomaraswamy and Kenneth Choo (Shook Lin and Bok) for plaintiff; Tan Lee Cheng and Kenneth Leong (Harry Elias Partnership) for defendant

**Parties** : Hyundai Engineering and Construction Co Ltd — Rankine and Hill (Singapore) Pte Ltd

*Civil Procedure – Originating processes – Plaintiff commencing action in negligence by way of originating summons – Whether action should be commenced by way of writ of summons*

*Contract – Plaintiff to credit developer for money saved from changing piping material – Plaintiff's calculations differing from defendant's calculations of value of such savings – Whether defendant adopted wrong formula for calculation – Whether matter of contract*

*Tort – Inducement of breach of contract – Whether defendant's calculation of savings induced developer to breach its contract with plaintiff*

*Tort – Negligence – Breach of duty – Whether defendant contractually bound to certify savings or reimbursement – Whether defendant in breach of any duty of care owed to plaintiff by calculating savings as such*

16 August 2004

**Choo Han Teck J:**

1 The plaintiff was the main contractor in the construction of the condominium known as Glendale Park. It was awarded the tender on 4 April 1997. Under this contract ("the main contract") the material for the pipe work was specified to be "hubless" cast iron for all soil and waste pipes with diameters of 150mm, 100mm and 80mm, but uPVC (a type of plastic) for pipes 50mm in diameter. No other measurements were indicated for pipe sizes. The lump sum values of these pipes were set out in the plaintiff's bill of quantities in items 5(a)(i) to (xii). It is important to note that in addition to the above stipulated work and tendered prices, the plaintiff also provided a document known as the schedule of rates in its contract documents. This schedule provided for the prices of materials that might have to be purchased on an *ad hoc* basis in the course of construction. That is to say, it was meant to provide a schedule of costs for items that had to be purchased which were not anticipated and set out in the bill of quantities. These would usually cover items or materials in variation works. There was a price differential between identical items in each of the two lists. The prices in the bill of quantities were lower because they were negotiated with suppliers on a "bulk purchase" basis.

2 The defendant was a company employed directly by the developer to be the mechanical and electrical consultant for the project. The defendant gave instructions on 18 March 1998 to change "all horizontal soil waste pipes from cast iron to uPVC". Two days later, the architect for the project issued his instructions to the plaintiff to comply with the defendant's instructions. The plaintiff duly implemented the changes as required. There were no complaints in respect of the completed work which was accepted as a variation. However, the change from cast iron to uPVC pipes was intended to and did result in a saving in costs to the developer. The plaintiff had, therefore, to credit the developer the difference, that is, the savings. The question was, how was the savings to be calculated? The problem arose in connection with this question.

3 The plaintiff made its calculations by using the differential between the costs of the uPVC pipes as set out in the schedule of rates (because these were variation items and had to be purchased *ad hoc*), and the price of the cast iron pipes as set out in the bill of quantities since these were the originally intended items. According to this calculation, the plaintiff had to credit or reimburse the developer the sum of $92,396. This was then submitted to the quantity surveyor in June 1998 after the work was completed. The defendant, however, valued the savings using a different formula based entirely on the bill of quantities, the defendant found the savings to be in the sum of $390,920.

4 The plaintiff rejected this valuation and commenced this action, by way of an originating summons, against the defendant. The plaintiff sought an order that on the true and proper construction of the main contract, the savings should be valued according to the formula used by the plaintiff and not any other – that is to say, that the formula used by the defendant was wrong. Secondly, the plaintiff sought a determination on whether in calculating the savings in the way it did, the defendant was "in breach of a duty of care in the tort of negligence". In the alternative, the plaintiff sought a determination as to:

> [W]hether if the Defendant were to determine and assess [the] value of the Variation otherwise than in accordance with [the formula adopted by the plaintiff] with knowledge that the Employer would rely on the Defendant's said determination and assessment in performing the Employer's obligations under the Contract, the Defendant would thereby induce wrongfully and tortiously the Employer to breach the Contract as against the Plaintiff; …

5 Miss Tan Lee Cheng, counsel for the defendant, in written submission demurred that the action was misconceived because the payment of the contract sum and, by that same token, any reimbursement, is between the developer and the plaintiff. The defendant was not a party to the contract between the developer and the plaintiff. She disputed the allegations that the defendant was negligent or had induced a breach of contract. Mr Coomaraswamy argued that the defendant's valuation was to be relied upon by the quantity surveyor, who in turn would report to the Architect and he, in his turn, would, on behalf of the developer, make a final determination of the sum payable. In this regard, counsel accepted that in principle, the quantity surveyor was not bound to agree with the valuation or the method of valuation of the defendant. Indeed, if he were to exercise his own judgment as he ought to, he would have to make his determination with reasoned grounds, and not simply adopt the assessment made by someone who was not contractually, or duty bound, to make such assessment. In the framework of the contractual structure, it appears that the person who was so bound was the quantity surveyor himself.

6 Mr Coomaraswamy argued, however, that the defendant owed a duty of care to the plaintiff that when it took it upon itself to carry out the valuation of the savings, it was bound to adopt a fair and reasonable formula. Counsel relied on the High Court decision in *Hiap Hong & Co Pte Ltd v Hong Huat Development Co* [2000] SGHC 131 in which the court, relied on two court of appeal cases (*RSP Architects Planners & Engineers v Ocean Front Pte Ltd* [1996] 1 SLR 113 and *RSP Architects Planners & Engineers (Raglan Squire & Partners FE) v Management Corporation Strata Title Plan No 1075* [1999] 2 SLR 449) for the proposition that a person who was charged with a duty to certify (in the cases cited it was the architect), was bound to discharge his duty with care and skill and owes a duty of care not to cause economic loss to the (in relevant cases) contractor. The *Hong Huat* decision on this point was not dealt with on appeal. The facts were also significantly different. The defendant here, who was not contractually bound to certify the savings or reimbursement, cannot be likened to the architect who was contractually bound to certify the satisfactory completion of work.

7 On the simple and so far undisputed facts that gave rise to the questions to be determined, some intractable problems stand in the way of the plaintiff. The person who had to certify the savings had to be either the quantity surveyor or the architect but it was not specifically stated which. All that the parties had agreed on was that the defendant had "assumed" the task of ascertaining the savings with the view of reporting it to the quantity surveyor, who it appeared, was waiting for the report. Assuming that that was so, there was no evidence before me that the quantity surveyor had vowed to accept the defendant's findings no matter what. It meant that at this point, it was not clear what the quantity surveyor would actually do. Thus, he might agree with the plaintiff, in which event, the plaintiff would have suffered no loss or damage. If the quantity surveyor adopted the defendant's valuation, the proper recourse would be for the plaintiff to dispute it as a matter of contract between itself and the developer, assuming that the developer wished to accept the quantity surveyor's certification. In that event, it would be questionable whether any cause of action would lie against the defendant. The issue as to how much the developer owes the contractor and how much reimbursement is due, are matters of contract between them.

8 If the plaintiff alleges that the assessment of the savings by the defendant caused the developer to rely erroneously on it and thus incurred loss and damage to the plaintiff, the loss and damage must first be proved. No damage had been proved. Counsel's argument that the quantity surveyor was almost likely to adopt the defendant's valuation is not sufficient. The tort of negligence requires proof of damage. It is not a tort that is actionable *per se*. Economic loss or potential economic loss does not merit a *quia timet* injunction. Injunctions of that nature may be granted in cases where there is a risk of imminent or impending physical harm or damage.

9 Furthermore, an action in negligence ought to be commenced by way of a writ action with particulars of negligence and damage properly and sufficiently pleaded. These particulars are wanting in this originating summons. There were other difficulties in the present case. If this court were to accept that the plaintiff's formula was correct, the finding would not bind the developer who is entitled to say that contractually, he would be right to use a different formula from that used by the plaintiff. If this court were to make a determination on the duties and rights under the contract, the developer must be a party to the proceedings since it was a party to the contract. Ordinarily, in the circumstances, the action ought to be dismissed. However, it is open to the plaintiff to commence the proper action in order to air its grievances, and as such an action might require the defendant to be made a party, I decided that the appropriate decision was to make no orders on the questions sought to be determined, but order costs to be awarded to the defendant as if the action was dismissed. After hearing submissions from Miss Tan and Mr Coomaraswamy I fixed costs at $5,000 plus reasonable disbursements.