When Does Non-Payment Constitute Repudiation Of A Contract?

Introduction

The case of Chua Tian Chu and another v Chin Bay Ching and another [2011] SGHC 126 (“Chua Tian Chu”) serves as a useful reminder of some of the general legal principles applicable to construction disputes over payment and damages for delayed completion.

In Chua Tian Chu, the plaintiffs were the purchasers of a property and the defendants were both the vendors as well as the developers of the property. The plaintiffs had withheld payment to the defendants on the basis that the defendants were liable to the plaintiffs for liquidated damages and defective work. The defendants in turn claimed that the plaintiffs’ failure to make timely payment constituted a repudiatory breach of the contract.

When Does Non-payment Constitute a Repudiation of the Contract?

In considering whether the withholding of payment by the plaintiffs constituted a repudiation of the contract, the Court noted that “the mere failure or delay in making payment per se would not amount to a repudiation of the contract” and that repudiation was defined to be a “clear indication of absence of readiness or willingness to perform”.

The Court observed that the plaintiffs’ conduct was inconsistent with repudiatory conduct as the plaintiffs had indicated that they were willing and ready to complete the matter subject to the defendants agreeing to recognise the plaintiffs’ right to set off for rectification costs as well as liquidated damages. The Court held that the plaintiffs’ actions were not a result of an unwillingness to perform the contract, but instead arose from the plaintiffs’ belief that it was validly exercising its rights of set off pursuant to the contract.

The Court also considered whether the plaintiffs had repudiated the contract by depriving the defendants of substantially the whole benefit which the defendants were intended to obtain under the contract. In this regard, the Court noted that 90% of the purchase price for the property had already been paid. Furthermore, under the contract, the retention of the remaining 10% of the purchase price was intended to protect the plaintiffs from the difficulties of certification or possible expenses for defects liability. The contract entitled the plaintiffs to set off such costs, if validly
incurred, against the amounts withheld. Taking these two facts into consideration, the Court held that the defendants had not been deprived of substantially the whole benefit of the contract.

**Plaintiffs’ Claim for Liquidated Damages**

The Court also reviewed the effect of the “prevention principle” on the plaintiffs’ right to claim for liquidated damages.

An act of prevention is defined to be an act which “operates to prevent, impede or otherwise make it more difficult for a contractor to complete the works by the date stipulated in the contract.” The prevention principle is derived from the well-known legal maxim that no man shall take advantage of his own wrong. The Court noted that it was immaterial whether the hindrance or delay by the plaintiffs was the cause of part or the whole delay. In either case, the act of prevention on the part of the plaintiffs would result in the plaintiffs being unable to rely on the liquidated damages clause in the contract unless this was accompanied by a proper exercise of an extension of time clause.

On the facts, the Court in *Chua Tian Chu* held that the plaintiffs had committed acts of prevention by requiring the defendants to carry out works which were beyond the scope of the contract. As a result of the plaintiffs’ actions, time was set at large for the contract and the plaintiffs were not entitled to rely on the liquidated damages clause in order to claim for damages.

**Plaintiffs’ Claim for General Damages for Delay**

As a result of the Court’s decision that time had been set at large, the plaintiffs subsequently attempted to amend its pleadings in order to claim for general damages for delay. The Court held that where time is set at large, the burden will shift on the plaintiffs to establish a reasonable date for completion and any unreasonable delay thereafter. In *Chua Tian Chu*, the plaintiffs had failed to address the primary question of whether the delay occasioned was unreasonable and, if so, whether any losses were suffered as a consequence. The Court was therefore unable to award any damages to the plaintiffs.

**Conclusion**

The issues raised in *Chua Tian Chu* are recurring and common in most construction disputes. The case illustrates two important points which both contractors and owners should take note of.

1. Contractors must be careful when alleging a repudiation of a contract due to non-payment. It is important to note that non-payment in itself may not be sufficient to release the contractor from the performance of its own obligations under the contract.

2. Owners must be careful to ensure that their right to claim for liquidated damages is preserved by carefully crafted extension of time clauses and good project management.
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