

Cordells Rompotis

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Construction Law

Re-measurement clause considered by the High Court Chan Chi Lam v Lam Woo & Co Ltd [2017] HKCFI 421

Facts

The Plaintiff claimed HK\$4.8M for work done against the Defendant ("the JV"), who was the main contractor engaged by the Water Supplies Department ("WSD") under Contract No. 22/WSD/02 for the replacement and rehabilitation of water mains in Cheung Sha Wan Kwai Chung and Tsing Yi.

The claim comprised 58 works orders:

- some of them allegedly subject to re-measurement, on a back-to-back basis against what the WSD/its engineers assessed and certified on their re-measurement of the works under the main contract as the re-measurement clause had been arguably incorporated into the contract between the parties;
- some of them allegedly having no rates agreed and therefore payment thereof should be assessed on a *reasonable price* or *quantum meruit* basis.

By its counterclaim, the JV sought contra charges to the value of HK\$6.2M.

The Plaintiff claimed that he had agreed with the JV that the works would be assessed "in accordance with the agreed rates of similar works items in other works orders". As to the re-measurement clause, the Plaintiff claimed that on its proper construction, it simply meant that the method of measurement of the works was to follow that of the main contract between the JV and WSD, but that the WSD re-measured quantities were not binding upon the Plaintiff.

Issues for determination

The key issues were as follows:

- whether the re-measurement clause had been incorporated into the contract between the Plaintiff and Defendant in respect of the works orders without agreed rates

- the interpretation and meaning of the re-measurement clause
- the rate for assessing payment to the Plaintiff in respect of the work orders without agreed rates
- whether the contract between the Plaintiff and Defendant was subject to an implied term that the Defendant was required to submit the Plaintiff's claims to the WSD for assessment and, if so, whether the implied term had been breached
- the amounts due

Decision

Incorporation of the Re-measurement Clause

It was not disputed between the parties that for 16 work orders the Plaintiff issued quotations for and had agreed the applicable rates, the re-measurement clause included in the terms and conditions applied.

The Court considered that the re-measurement clause had been incorporated into the contract since, contrary to the Plaintiff's claim that he did not understand English, the quotations included handwritten notes in Chinese and had been signed by both parties.

Interpretation of the re-measurement clause

The Plaintiff submitted that the re-measurement clause was to be interpreted to mean that the same "method of measurement" provided for under the main contract between the WSD and the Defendant would be adopted for the contract between the Plaintiff and the Defendant. The relevant clause was as follows:

"Method of Measurement: as per the Main Contract. All the BQ quantities are provisional and subject to remeasurement as

based on back-to-back basic (sic). The quantities shown in the attached Bill of Quantities may be substantially decreased, Subcontractor cannot claim additional cost for this issue"

The Court held that quantities as measured by the WSD would be adopted for works orders solely carried out by the Plaintiff.

The Court held that the "back-to-back" basis of the contract to the main contract must refer and apply to both the re-measurement method and the quantities, which are stated to be provisional only at the time of the contract. The Court, referring to *Arnold v Britton* [2015] AC 1619 at 1628H, considered that the Plaintiff's subjective declaration of his understanding of the re-measurement clause was neither relevant or admissible.

Rate for assessing payment under work orders without agreed rates

The Court held that the starting and determinative point must be the pleaded case of the parties in the action. Since the Plaintiff did not submit any evidence (except for his assertion in his witness statement that rates for other work were to be assessed in accordance with agreed unit rates for similar items in his signed quotations), the Court could not accept the Plaintiff's argument.

Further, expert evidence indicated that there was no consistent standard of agreed rates, even for the works orders under which rates had been agreed. The expert had to, therefore, average the agreed rates to one standard rate for each item. The Court considered that this approach resulted in reasonable market rates.

Whether there was an implied term and, if so, whether it had been breached

The Plaintiff claimed that there was an implied term in the contract that the Defendant was required to submit all of his claimed quantities and substantiations to the WSD for assessment and afford him a reasonable opportunity to make submissions on the assessment, and that the Defendant was in breach of the implied term by failing or refusing to submit his re-measured quantities and supporting documents to the WSD for assessment and discussion.

The Defendant contended that the payment summary forms distinguish between quantities "submitted as built" and those for "final measurement". It was therefore inherently improbable that the Defendant would not submit the Plaintiff's measured quantities and supporting documents to the WSD. Accordingly, the Court held that even if there was an implied term, there was no evidence of its breach.

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