28, 1971

IN THE PRIVY COUNCIL No.38 of 1969

ON APPEAL
FROM THE SUPREME COURT OF HONG KONG

BETWEEN

TAK MING COMPANY LIMITED

- and -

YEE SANG METAL SUPPLIES COMPANY (Respondent)

CASE

- for the -

APPELLANT

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Respondent.

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Appellant

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1. This is an appeal from a judgment dated the 2nd June, 1969 of the Supreme Court of Hong Kong in its appellate jurisdiction (Blair-Kerr and Williams, J.J.). dismissing an appeal from a judgment dated the 15th February, 1969, of the said Supreme Court in its original jurisdiction (Pickering, J.) ordering the Appellant to pay the Respondent such sum as would be awarded to the Respondent for the balance of the price of work done on the site by the Respondent in excess of the sum of $884.000.00 and to pay the costs of the action. The said site is that parcel of land registered in the Hong Kong Land Office as Section A of Kowloon Inland Lot No. 1571.

2. These proceedings were commenced by a writ issued on the 16th day of November, 1966. The Respondent was the Plaintiff in the action, the Appellant was the 2nd Defendant and the 1st Defendants were building contractors, Defag Construction Company. At the time the Writ in the P.1/2

Action was issued the Respondent had obtained judgment against the 1st Defendants for the amount of his claim, however the said judgment had and it still has not been satisfied. RECORD

3. The Statement of Claim is dated the 13th day of March, 1967, but was twice amended thereafter. In its ultimate form, the statement of claim contained inter alia, the following allegations:- P2A et seq P.8 et seq

(a) The Respondent is a firm and carried on the business of inter alia, steel works contractors.

(b) The Appellant is a limited company incorporated under the Companies Ordinance in Hong Kong and is the registered owner of the property registered in the Hong Kong Land Office as Section A of Kowloon Inland Lot No. 1571.

(c) By a contract in writing between the 1st Defendants and the Appellant No.574 dated 27th October 1964, the 1st Defendants contracted to build a 16-storey building on the Appellant's said property for use as a school to be known as the Tak Ming Middle Schools.

(d) By a contract in the Chinese Language between the Respondent and the 1st Defendants dated 20th January, 1965, the Respondent undertook to carry out the steel work for the proposed school building.

The 1st Defendants promised to pay to the Respondent the sum of $100.000.00 and further promised that the balance of the price namely $950.000.00 would be paid by the Appellant through the Appellant's solicitor. It was agreed in the said contract that these were not final figures but the weight of steel used was to be calculated according to the plans and an interim adjustment of $70.000.00 was agreed between the Respondent and the 1st Defendants.

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(e) By a letter dated 8th February, 1965 addressed to the Respondent and copied to the 1st Defendants, the Appellant by its solicitors promised to pay to the Respondent the sum of $70,000.00 as well as the sum of $950.000.00 by instalments as set out in the letter by the 1st Defendant authorising the Appellant to pay the said sums. P.123

The Respondent contended that this arrangement for payment through the Appellant's solicitors at law constituted a binding obligation on the part of the Appellant to pay the said sums of money to the Respondent; but the Respondent abandoned this as well as other and alternative grounds pleaded in paragraphs 11 & 12 of the Statement of Claim at the trial. P. 16 L. 10

(f) That an exchange of correspondence between the Respondent and the Appellant consisting of a letter in the Chinese language from the Respondent to the Appellant dated 5th February 1965 and the reply in English of the Appellant dated 9th February 1965 was the culmination of earlier discussions between Mr. Yiu Tak Yee of the Respondent and Mr. Chun Yuen (Cheng Yuen Choi) of the Appellant. By its said letter dated 9th February 1965, the Appellant undertook to the Respondent that in the event of a breach of the contract between the 1st Defendants and the Appellant on the part of the 1st Defendants, and in the further event of the Appellant and the Respondent failing to reach an agreement for the continuance of the contract between the Respondent and the 1st Defendants, the Appellant would pay the Respondent for the work done on the Appellant's said property. P.121 P.123-124

(g) That the Respondent performed his contract with the 1st Defendants on the strength of the Appellant's promises to pay contained in the P10 P17

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exchange of letters dated the 5th February 1965 and 9th February 1965 respectively. P121 and 123

(h) That the Appellant purported to terminate the 1st Defendants' contract with the Appellant on or about 3rd September 1966 on the grounds that the 1st Defendants had been in breach of that said contract. The Respondent and Appellant had been unable to agree to the continuation of the said contract. The Respondent had totally performed his side of the contract with the exception of some ironbinding work to the roof top water storage at the said property costing about $600.00 because of the refusal of the Appellant to permit the Respondent to complete the said work after the Appellant had terminated the 1st Defendant's contract. P11 L.1 P181

(i) That a total of $348.565.37 was owed to the Respondent by the Appellant. P.11 L.11

4. The Defence of the Appellant was dated the 4th day of May, 1967 and was to the following effect:- P.3 et seq.

(a) The Appellant admitted the contract of 27th October, 1964 between the 1st Defendants and the Appellant (referred to in the Defence and herein as "the Building Contract").

(b) The Appellant admitted in paragraph 5 of the Defence that the 1st Defendants by a letter dated 8th February, 1965 authorised the Appellant to pay the sums of $950.000.00 and $70.000.00 to the Respondent but alleged that the said sum of $950.000.00 was to be paid by instalments and to be deducted from the 1st Defendants' Interim Payments in accordance with the schedule for interim payment under the Building Contract and against the Architect's certificates for the said interim payments. P122

(c) Pursuant to the said arrangement the

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Appellant's Solicitors paid to the Respondent six payments of $50.000.00 each upon the Architect's certificates of interim payment under Payments Nos. 1 to 6 respectively as provided for in the Building Contract.

(d) By a letter dated 14th January, 1966 the Respondent and the 1st Defendants jointly informed the Appellant that the contract between the Respondent and the 1st Defendants had been varied in that the Respondent was thereafter to receive $40.000.00 each under the 7th to 10th Payments and to receive $36.000.00 each under the 11th to 20th Payments and to receive $230.000.00 under the 41st Payment. The Appellant's Solicitors pursuant to the arrangement as varied by the said letter dated 14th January, 1966 paid to the Respondent further sums totalling $584.000.00. The said sums were paid as and when each Architect's certificate for Payments Nos. 7 to 19 inclusive was issued. The Respondent therefore accepted the said variation and confirmed the same in its letter of 18th January, 1966. P144 P.146

(e) The Appellant also admitted in paragraph 10 of the Defence the exchange of correspondence between the Respondent and the Appellant but alleged that by the letter dated 9th February 1965 the Appellant only agreed that the Appellant would pay the Respondent for work done against the Architect's certificates issued in accordance with the Building Contract. The Respondent had already received payment under the Architect's certificates certifying payment due under Payments Nos. 1 to 19 totalling $884.000.00 and the Architect had never issued any certificate certifying payment under Payments Nos. 20 to 41.

5. The Respondent delivered a Reply dated the 16th August 1967 in which the

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Respondent were to be paid by the instalments as alleged by the Appellant but subject to the over-riding condition that the Respondent should be paid in full within twenty days after completion of the work. The Respondent alleged that the provisions for payment by instalments related to time of payment only and did not make the payment contingent upon the issue of an Architect's certificate in favour of the 1st Defendant. The Respondent admitted payment of the total sum of $884.000.00 which, the Respondent said, was part payment of the claim. The Respondent also alleged that the Appellant's obligation to pay contained in the Appellant's undertaking dated 9th February, 1965 arose in the event of the Appellant terminating the 1st Defendants' contract and not continuing with the Respondent's contract and those obligations were to pay the Respondent for work done against the Architect's certificate for such work, which said certificates had been issued but the Respondent had not been paid in full. P.123

6. The action was tried before Pickering J. between the 9th October and the 17th October 1968. At the outset, the learned trial Judge granted the joint application by the Appellant and the Respondent for the question of liability to be tried and the question of damages postponed and he made the order accordingly. P.61 L13

7. Yiu Tak Kee the managing partner of the Respondent firm gave evidence on behalf of the Respondent. The sub-contract, referred to in the Record of Proceedings as "the chinese Contract", and varied letters were identified by Yiu Tak Kee in his evidence in chief. P.12 et seq.

Yiu said he met Cheng Yuen Choi, director of the Appellant company at the Mandarin Hotel shortly before he wrote the letter dated 5th February, P.21 P.121

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1965. He then wrote the letter of 5th February, 1965 to put in writing what he had orally requested at the Mandarin Hotel. His letter contained two requests he said (i) for a written guarantee that if the work was let out to another main contractor the sub-contract entered into between the 1st Defendants and the Respondent should remain effective. He stated he was requesting the Appellant to continue the sub-contract if the 1st Defendants were kicked out. Yiu said that at the Mandarin Hotel Cheng promised to continue the sub-contract in the presence of Kee Lin Sang, sole proprietor of the 1st Defendants. He said Cheng replied to his first request by letter dated 9th February, 1965 in terms of paragraph one thereof. Yiu continued to say that all the second request in his said letter meant was that out of sums payable by the Appellant to the 1st Defendants, certain amounts should be deducted and paid to the Respondent, the Respondent went on to say in evidence that in the Appellant's letter dated 9th February, 1965 when the Appellant was replying to his second request, all that the Appellant was saying in the second paragraph of the Appellant's said letter was promising that whenever money was owing to the 1st Defendants by the Appellant and at the time the 1st Defendants owed the Respondent money under the sub-contract, the Appellant would deduct and pay to the Respondent..

P21 L30-40

8. At the completion of Yiu Tak Kee's evidence in chief Counsel for the Respondent stated that his claim was in essence confined to the last two lines of paragraph 13 of the statement of claim.

P16 L.11

9. Kee Lin Sang the principal of the 1st Defendant was called by the Respondent. He maintained that he was present at the Mandarin Hotel meeting and said it was he who

P25-35

arranged that meeting. In evidence he said that at the Mandarin Hotel Yiu made two requests and asked Cheng to agree. Kee said that Cheng agreed. The two requests were :- RECORD

(i) That after completion of foundation work Yiu was to be paid $100.000.00 which was to come from a loan of $250.000.00 being made by the Appellant to the 1st Defendant.

(ii) That for any work done after completion of foundation work Mr. Cheng was to be held responsible for payment. Mr. Cheng said to Yiu "You write me a letter and I will give you a reply".

10. Cheng Yuen Choi, a director of the Appellant gave evidence on behalf of the Appellant. He said that Kee, the sole proprietor of the 1st Defendants had arranged the appointment at the Mandarin Hotel but did not attend because Yiu had indicated that he had a matter to discuss with Cheng alone. This matter was the possible ouster of the 1st Defendant. P.36 et seq.

Cheng said that Yiu requested that in the event of the 1st Defendants in breach of contract and thus ousted, the Respondents should be allowed to continue the sub-contract. Cheng said that he refused but said that they could try to reach a mutual agreement. Cheng also stated that Yiu requested that if mutual agreement could not be reached, Cheng should pay the Respondent for the work Yiu had done for the 1st Defendant. Cheng said that his reply was that he did not mind paying Yiu for the work he had done for the 1st Defendant but only out of the money that the Appellant had to pay to the 1st Defendant as this would not make any difference at all to the Appellant. Cheng made it clear however, that he wanted the authority of

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the 1st Defendant first. This was given on 9th February, 1965. Cheng said that he suggested that letters should be written.

It is contended by the Appellant that the above evidence was confirmed under cross examination.

11. The Respondent's case was based on the interpretation of the Appellant's letter of 9th February, 1965. The second paragraph is applicable to the situation. This letter was subsequent to the correspondence between the 1st Defendant to the Appellants then solicitors by which authority for deduction and payment direct to the Respondents was given and the letter dated 8th February,1965 from the Appellant's then solicitors to the Respondent.

P123/4

P122

P123

Cheng said that the meaning of the second paragraph was that the Appellant would pay the Respondent direct out of money due to the 1st Defendants under the said schedule of payments with them. The reason behind Yiu's request was his fear that if the Appellants paid the 1st Defendants the 1st Defendants might not pay the Respondent. Thus Cheng said what was in his mind when he wrote the letter of 9th February was that what the Appellant might eventually have to pay would be the amounts in the schedule to the Chinese Contract. This was almost the same as had been agreed between the Appellant's then solicitors and the Respondents, but went further in that the Appellant promised that the Respondent would be paid for work done up to the date of the ouster of the 1st Defendants provided eventually that an Architect's certificate was forthcoming. No such certificate was ever issued.

L.8 P.46

P.46 L.35

P.46 L.22

Cheng made it clear that if he meant by the second paragraph of his letter of 9th February 1965 that the Respondent was to be paid by the Appellant for all work

P.46 L.1

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performed then this would mean that the Appellants would in fact have to make two payments for the same work. Cheng said that the 1st Defendants had been paid under the Architect's certificates issued already for the work completed by the Respondent up to that time and he did not see why he should pay twice for the work done.

12. In this Judgment the learned Trial Judge found that by the letter dated 9th February, 1965, the Appellant undertook to the Respondent to pay for the work done by the Respondent on the Appellant's property and was therefore liable to pay to the Respondent the balance, if any, of the price of work done on the Appellant's site by the Respondent in excess of the sum of $884.000.00 already received by the Respondent. P.60 et seq.

13. The Appellant appealed against such Judgment by a notice of appeal dated the 16th of January, 1969. The appeal was heard by Blair-Kerr and Williams J.J. and the Judgment of Williams J. with which Blair-Kerr J. concurred, was delivered on the 2nd July 1969. P.80

14. The learned appeal Judges said (inter alia) that they agreed with the findings of the learned trial Judge and the appeal was dismissed with the costs. P.82 et seq.

15. The Appellant respectfully submits that this appeal ought to be allowed and the Judgments of the Supreme Court of Hong Kong in its original and appellate jurisdictions ought to be reversed for the following (among other)

REASONS

(i) Because the Appellants' letter of 9th February 1965 did not on its true construction bind the Appellant to pay for any and all work done by the Respondents on the First Defendants' property but was an undertaking to pay for works done on the site

against the architect's Certificates under the Principal Contract.

(ii) Because the receipt of an Architect's Certificate was a condition precedent to payment under the Principal Contract and all that the Appellant undertook by their letter of 9th February 1965 was that in the event of the First Defendants being ousted from the building site, the Appellant would make deductions from monies due to the First Defendants under any outstanding certificates and pay those monies direct to the Respondent in respect of work actually done by them as so certified by the Architect.

(iii) Because the Respondent was only entitled under the undertaking of the Appellant to be paid in accordance with the Architect's certificate; the Architect's certificate No.41 under which the Respondent was to receive $230.000.00 was never issued. The Respondent in its letter of 18th January 1966 admitted knowledge of such mode of payment and thereby accepted the same. Such acceptance was subsequent to and therefore took priority over the Appellant undertaking of 9th February 1965.

(iv) Because the learned trial Judge failed properly to appreciate that the Appellant by its letter of 9th February 1965 was replying specifically to the requests of the Respondent contained in the Respondent's letter of the 5th February, 1965 and that all the Appellant says in that letter was (i) that should the First Defendants be ousted the continuation of the sub-contract was a matter for mutual agreement (ii) that should no mutual agreement as to the continuation of the sub-contract be reached the Appellant was prepared to pay the Respondent for the works done on the Appellant's site against the Architect's certificates in accordance with the principal contract and that by payment of the sum of $884.000.00 the Appellant has complied with the provisions of the second paragraph of his letter.

(v) Because the learned trial Judge and the appeal Judges who concurred attached undue

weight to the evidence of financial stresses and to the allegation that the Appellant was anxious to have the Respondent as sub-contractor because of the measure of financial assistance given by the Respondent to the First Defendant and to the fact that it was in the interests of both the Appellant and the First Defendants that the works were to be completed expeditiously and promptly. There was no good reason why the Appellant should undertake such unlimited liability towards the work done by the Respondent as the principal contract was lump sum contract. It was however no disadvantage to the Appellant to agree to pay direct to the Respondent sub-contractor rather than to the First Defendant as main contractor.

(vi) Because the Respondent's letter of 5th February 1965 and the Appellant's reply of 9th February 1965 did not constitute a contract by the Appellant as building owner to pay the Respondent as sub-contractor in respect of works done on the building site pursuant to a contract between the Respondents as sub-contractors and the First Defendants as main contractors to which the Appellants were not privy nor party.

(vii) Because the decisions of the learned trial Judge and of the Full Court were wrong and should be reversed.

R. A. R. STROYAN

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15th January, 1971.

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