

Animal Concerns Research & Education Society v ANA Contractor Pte Ltd and another - [2010] SGHC 85 (17 March 2010)

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[\[2010\] SGHC 85](#)

Suit No: Suit No 639 of 2008

Decision 17 March 2010

Date:

Court: High Court

Coram: Kan Ting Chiu J

Counsel: Suresh Sukumaran Nair and Muralli Rajaram (Allen & Gledhill LLP) for the plaintiff; Lee Kwok Weng (Lee Kwok Weng & Co) for the first defendant; Spencer Gwee (Spencer Gwee & Co) for the second defendant.

Subject Area / Catchwords

Contract – Breach

Building and construction law – Contractors’ duties

Judgment

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 60 of 2010 was allowed by the Court of Appeal on 20 January 2011. See [\[2011\] SGCA 2.](#)]

17 March 2010

Judgment reserved.

Kan Ting Chiu J:

1 The plaintiff, the Animal Concerns Research & Education Society, an Institution of Public Character under the Charities Act (Cap 37, 2007 Rev Ed), had planned to establish a shelter for animals (“the shelter”) comprising several structures on a plot of land along Jalan Lekar (“the site”) leased from the Singapore Land Authority (“SLA”).

2 The first defendant, A.N.A. Contractor Pte Ltd, a general contractor, became involved in the construction of the shelter. The second defendant, Tan Boon Kwee, was a director of the first defendant as well as the first defendant’s clerk of works and site supervisor for the project.

3 Following discussions between the plaintiff and the first defendant, the latter sent a letter dated 27 September 2006 to the plaintiff, setting out the estimated costs of \$694,000 for constructing the shelter. On the basis of this letter the plaintiff and the first defendant entered into a Memorandum of Undertaking dated 28 September 2006 (“MOU”) which set out in greater detail the first defendant’s scope of works, which included:

- 1) The preparation of plans for the proposed development for submission to obtain the necessary approval from the relevant authorities.
- 2) The preparation of the site which includes site clearance, removal of unwanted trees and shrubs, earthfill and disposal of surplus material to formation of the required level of development.

Under the heading “Summary and Understanding” it was stated that:

The [first defendant has] forwarded a preliminary pricing of the development to the [plaintiff]. The [plaintiff] will begin to source and raise the fund required for the development. The [plaintiff] will advise the [first defendant] accordingly on the status of the fund raised from time to time so as the [first defendant] will be able to gauge [sic] as and when the next stage of work can proceed. The [plaintiff] will also inform the [first defendant] on the status of the proposed project development from time to time.

(the “status-of-funding provision”).

4 The first defendant commenced work in January 2007, and in February 2007, the plaintiff issued another document (“the 2007 Agreement”) which set out in even greater detail the scope of work, concluding with:

The scope of work shall also include the following:

- The preparation of plans for the proposed development for submission to obtain the necessary approval from the relevant authorities.
- The preparation of the site which includes site clearance, removal of unwanted trees and shrubs, earthfill and disposal of surplus material to formation of the required level for the development.
- Supply machinery with operator to break and excavate area for the construction of reinforced concrete work such as footings, slab, ramp, apron and surface drain for the various buildings and enclosures.
- The list of buildings and enclosures to be constructed are as shown in the Acres Wildlife Rescue Centre (AWRC) layout plans.

The construction of the AWRC will be completed and the site handed over to [the plaintiff] by the end of April 2007.

[emphasis added]

This document was initialled by Choo Kong Leong, project manager of the first defendant.

5 The first defendant did not see the construction of the shelter to fruition. Four issues arose which led to the present proceedings. The first was the delay in the execution of the works. The second was the use of wood chips as landfill and the consequences of that. The third was the plaintiff’s complaint that the first defendant had failed to construct the shelter in

accordance with the specifications. The last issue was the plaintiff's refusal to pay some of the first defendant's claims.

6 The plaintiff sued the defendants for the delay, the backfilling with the wood chips and the deficient construction, and the first defendant counterclaimed against the first defendant for the unpaid claims. The plaintiff based its action against the first defendant on contract and negligence, and against the second defendant on negligence. The first defendant's counterclaim was founded on contract.

The delay

7 The first defendant denied that there was an agreement that the shelter was to be constructed by end April 2007, and maintained that time for completion was at large under the status-of-funding provision.

8 The first defendant also raised a second defence that the delay was caused by some unspecified "supervening event" and "circumstances beyond the control of the 1st Defendant". [\[note: 1\]](#)

9 The records of the correspondence exchanged between the parties revealed the plaintiff's concern over the progress of the construction and the consequences of any delay. It wrote to inform the first defendant on 15 May 2007 [\[note: 2\]](#) that all buildings must be completed by 20 May 2007 and on 17 May 2007 [\[note: 3\]](#) that the first defendant was to pay the ground rent for the site until such time as the buildings were handed over to the plaintiff.

10 The first defendant's responded in an email dated 19 May 2007 [\[note: 4\]](#) stating, *inter alia*:

Pursuant to our agreement whether in writing or verbally, we have not at any point in time agreed to any compensation or damages resulting from our performance although we are abide [*sic*] to follow a schedule and the *target date set*.

Due to the unforeseen disruption of sand and granite supply nation wide since February 2007, its [*sic*] unavoidable for any project to delay. In addition at our contracted sum without material price compensation, any contractor would have abandoned the job by now. Legal proceedings and arbitrations will only lead to further delay and kill the project totally.

Even at the cost of material tripled [*sic*] today, we took pain [*sic*] to continue since its [*sic*] a charity funding project but only to met [*sic*] with further criticisms [*sic*]. The delay in our April 2007 progress payment further dampened the situation.

Despite the above, on a strictly without prejudice and goodwill basis, we will pay your rental cost of \$7,875 for May 2007. Beyond that, we will further evaluate the occupational condition of the various buildings before deciding further. Our offer will only apply if we receive our May 2007 and subsequent progress payment promptly.

[emphasis added]

11 Apparently no handover was made after that, and on 4 July 2007, the plaintiff's executive director, Louis Ng, wrote to the first defendant: [\[note: 5\]](#)

Please send us an official letter on [the first defendant's] letterhead explaining why the completion of the construction has been delayed and when it is expected to be completed.

The first defendant complied with its letter of 5 July 2007 which stated: [\[note: 6\]](#)

Delay in Completion

Main reasons caused for delay of the project

- 1) Commencement of site work begin [*sic*] only in early Mar 2007 instead of end Jan 2007 as planned (Authorities requirements)
- 2) The unforeseen sand and granite supply disruption causing severe material shortages in March 2007 and only stabilized sometime in April 2007.
- 3) The unusually heavy rainfall in the month of April 2007 at Sungei Tengah area causing slow progress in work done.

12 These replies of the first defendant are revealing and significant. The email of 19 May 2007 showed that there was a set target date, in contradistinction to the defence that time for completion was at large and dependent on the plaintiff's ability to pay for the development, and the letter dated 5 July 2007 indicated that completion was delayed, allegedly by the shortage of supply of sand and granite and unusually heavy rainfall.

13 In the light of the admission that a target completion date had been set, and that there was a delay, it was clear that the first defendant had delayed the completion of the construction of the shelter.

14 The first defendant's argument that the date for completion was at large was unfounded as it was inconsistent with the clear words of the 2007 Agreement and the clear admission of the first defendant.

15 The plea that the delay was caused by events and circumstances beyond the first defendant's control was not supported by any evidence in respect of the disruption of supply of sand and granite and unusually heavy rainfall and the first defendant also did not show that if those conditions had existed, they had the effect of extending the target date or excusing or reducing the liability of the first defendant to meet it.

The wood chips

16 The site was not level ground. Before the construction of the structures was to proceed, the land had to be levelled, and it was the first defendant's duty to do that.

17 The first defendant sought to do that by using backfill to raise the lower areas. It arranged with an entity known as Lok Sheng Enterprises ("Lok Sheng") to truck in wet soil and wood chips as the backfill for that purpose. Lok Sheng was a one-man operation. The first defendant did not know if the operator had any special qualification in land fills. In its agreement with Lok Sheng, while there was mention of "wet soil and wood chips", there were no specifications set for the soil and wood chips to be used. [\[note: 7\]](#) Lok Sheng did not

charge for the soil and the wood chips, and the first defendant only paid the transport and labour costs for them to be delivered to the site.

18 Soon after the back filling was done, there were signs that something was amiss. A foul smell was detected, and dirty waste water was discharged from the site. The plaintiff was concerned by the development and had made known its unhappiness. This led the first defendant to write to the plaintiff on 21 November 2007 that: [\[note: 8\]](#)

We regret and are perturbed by your action in broadcasting your complain [*sic*] and making issue to various departments with regard to the underground water discharge at the Quarantine area. These happened at a time when we have just completed clearing the wood chips that was accidentally buried at area [*sic*] near to the office block. Reinstatement works were also completed.

By this letter, the first defendant accepted responsibility for the wood chips and had regarded them as the cause of the problem although it was disingenuous to say that the wood chips were “accidentally buried” as it had arranged with Lok Sheng to use wet soil and wood chips as land fill on the site. The “reinstatement works” alluded to were of no effect.

19 The situation came to the attention of the SLA and the National Environment Agency (“NEA”). NEA collected and analysed the discharge and considered that it amounted to pollution of the Kranji Reservoir and the environment. Following NEA’s instructions, the first defendant engaged ENVIRONcorp Consulting (S) Pte Ltd (“ENVIRONcorp”) to undertake a site contamination survey of the site.

20 ENVIRONcorp conducted site investigations which involved drilling boreholes to obtain soil data and soil samples, collecting representative soil and fill material samples at selected depths for chemical analyses based on field observations and establishing groundwater monitoring wells at each borehole location to collect groundwater samples.

21 In its draft report released in March 2008, ENVIRONcorp concluded: [\[note: 9\]](#)

In summary, the Site Contamination Survey has identified *groundwater contamination at the site. The contaminants include petroleum hydrocarbons, volatile organic compounds and semi-volatile organic compounds.*

As no significant concentrations of pollutants were detected in the soil matrix and in the absence of initial soil baseline data for the site, it cannot be concluded at this time as to the source of the groundwater pollution. *Two possible scenarios are: (1) the pollutants were introduced with the fill material and were subsequently leached into the groundwater due to the heavy rainfall infiltration in recent months; or (2) the groundwater was already impacted from historical activities prior to the land filling.*

Additionally, *the groundwater generally has elevated [chemical oxygen demand] and [biochemical oxygen demand] concentrations; the cause of which is likely to be from the decomposition of the fill material (wood chip).* Due to the highly permeable nature of the fill, rainfall will readily infiltrate through the subsurface to the shallow water table. The groundwater flow is towards the west and south across the site. Rainfall infiltration will exacerbate the flow of groundwater to the embankments and discharge as rainfall runoff

along the perimeters of the embankments, as noted by the dark brown/black stains along the northern, western and southern slope embankments of the elevated site.

[emphasis added]

The draft report was accepted and relied on by NEA, the first defendant and the plaintiff, and no final report was issued.

22 When the plaintiff received a copy of that draft report, it engaged another company, Setsco Services Pte Ltd (“Setsco”) to carry out further tests to ascertain whether the backfill material caused the contamination. Setsco drilled boreholes to collect soil samples and converted these boreholes into groundwater monitoring wells to collect groundwater samples, examined the samples, and presented its report (“the Setsco report”).

23 Donald Folkoff, assistant manager in Setsco and the writer of the Setsco report, referred to the two possible sources of pollution mentioned in the ENVIRONcorp report. He agreed that the pollutants could have been introduced with the fill material, but he did not agree that the groundwater was polluted by historical activities prior to the land filling. He explained that the latter hypothesis was inconsistent with the history of the site as a rubber plantation; and the fact that the site was covered by brushes and trees when construction of the site began in early 2007.

24 The plaintiff forwarded the Setsco report (with the report of ENVIRONcorp annexed) to Associate Professor Wang Jing-Yuan of the School of Civil and Environmental Engineering, Nanyang Technological University for his expert opinion. Dr Wang described his area of specialisation as solid waste resource management, contaminated site assessment and remediation, risk assessment and environmental management, and his curriculum vitae showed him to be well qualified in these matters.

25 After studying the reports, Dr Wang arrived at the following conclusions:[\[note: 10\]](#)

7.1 The land was contaminated;

7.2 The contamination of the land did not arise out of historical events;

7.3 It is likely that the contamination of the land was caused by the backfill; and

7.4 The backfill material is not suitable to be used for the purpose of levelling the Site.

26 Another witness gave evidence on this issue. The first defendant engaged as its expert witness Chua Giok Pien, a mechanical engineer who claimed that over the years, he had acquired knowledge on environment, safety and health matters. He presented a report in which he stated, *inter alia*.[\[note: 11\]](#)

3. ... As this site is zone for Agricultural use by URA’s Master Plan and ACRE proposed use, it is completely rational for the material for backfill to comprise earth with woodchips etc

4. From my experience, wood chips is a by-product of nature and its benefits to the environment is well documented as a fertilizer the [sic] “back to nature” compost. It is not a toxin per se

27 Those opinions were of no value at all. He was not saying that all wood chips, whether natural or contaminated, are suitable land fill material, and he neither referred to the reports of ENVIRONcorp, Setsco and Dr Wang nor considered whether there would have been polluted discharge from the site if clean woodchips were used as backfill.

28 On the evidence presented, I accept that the woodchips used by the first defendant as landfill was the cause of the contamination and pollution.

Compliance with building plans

29 The plaintiff alleged that the first defendant failed to comply with the specifications in the building plans of the shelter that were submitted to the Building and Construction Authority (“BCA”). The first defendant’s response was that although the specifications were in the building plans, they were not in the layout plan.

30 The plaintiff pointed out that layout plans and building plans serve different functions and contain different information. Layout plans set out the layout of the different units of the shelter and the internal arrangements of the units, [\[note: 12\]](#) while building plans set out the manner in which the units were to be constructed. [\[note: 13\]](#)

31 If the first defendant’s contention were accepted, it would mean that it was entitled to construct the units as located in the plan to any design and with any material it chooses, without regard to the particular designs and specifications laid down in the approved building plans.

The unpaid claims

32 The first defendant’s claim was for \$182,108.91. It was made up of two parts: firstly, for the sum of \$145,402.56 due under its 7th progress claim dated 12 September 2007, and secondly, for \$36,706.35 for the progress of works from 12 September 2007 onwards. Two forms of the 7th progress claim were produced. One claimed the sum of \$182,108.91 (*ie*, the sum of the counterclaim) computed on the full completion of the items of work that were undertaken. [\[note: 14\]](#) The other claimed the sum of \$145,402.51 based on partial completion of some of these items. [\[note: 15\]](#) It was not explained how two progress claims were raised on the same day for different sums. There were also no particulars given on the post-12 September 2007 claim for \$36,706.35, *eg*, the work that was done, and when the work was done.

33 These were not the only difficulties with the claim. The parties had not agreed on a procedure on the making and payment of claims. The first defendant would have to establish that the work for which payment is claimed has been done, and that the payment was in accordance with the agreed sums, but the counterclaim was not presented in that way. All the first defendant had done was to produce the two versions of the 7th progress claim. No evidence was given to show that the work was done, or how the amount claimed was arrived at. The first defendant had only shown that there was a demand for payment in the 7th progress claim, but not the entitlement to the payment demanded. For the claim in respect of

\$36,706.35 for work allegedly done after 12 September 2007, neither demand nor entitlement was shown.

Findings of the court

The claims against the first defendant

34 The plaintiff had a contract with the first defendant. When the first defendant delayed in the construction of the shelter and caused the harmful backfill to be used, the first defendant was liable towards the plaintiff for any loss or damage it suffered. As the contractual relationship between the plaintiff and the first defendant was not in dispute, it was not necessary for the plaintiff to have proceeded against the first defendant on negligence, as any negligence on the part of the first defendant would be a breach of an implied term of the contract that the first defendant was to carry out its duties with due diligence to construct the shelter in accordance with the approved building plans, and to use proper landfill.

35 On the findings of fact I have made, the plaintiff has proved its claims against the first defendant.

The claim against the second defendant

36 The plaintiff crystallised its case against the second defendant in its closing submissions as follows:^{[note: 161](#)}

The Plaintiff's claim against the 2nd Defendant is for negligence in supervising the Unauthorised Earthworks and in particular, in ensuring that the Backfill material was suitable to be used as backfill.

This was on the basis that the second defendant was appointed as the Clerk of Works and site supervisor for the Project. The duties of a site supervisor are set out in s 10(5) of the Building Control Act (Cap 29, 1999 Rev Ed) ("the Act") which provides as follows:

(5) Every site supervisor appointed under this section in respect of any building works shall take all reasonable steps and exercise due diligence in giving —

(a) in the case of large building works — full-time supervision to the carrying out of the structural elements of the building works; and

(b) in the case of small-scale building works — immediate supervision to the carrying out of the critical structural elements of the building works,

to ensure that the structural elements or critical structural elements, as the case may be, of the building works in question are carried out in accordance with the plans of the building works supplied to him in accordance with section 9(1)(c) by a qualified person, and with any terms and conditions imposed by the Commissioner of Building Control.

The definition of "building works" in s 2(1) of the Act includes "site formation works" which is in turned defined in reg 2 of the Building Control Regulations (S 643/2008) to include earthworks for site stabilisation or any other kind of ground works. The plaintiff then

submitted that the backfill was a critical element of the building works and that the second defendant was under a duty to supervise it, and he had failed to do that.

37 That submission was wrong. Section 10(5) should be read carefully. Section 10(5)(b) obliges a site supervisor to supervise the critical structural elements of the building works, and s 2 of the Act states that:

"structural elements" means those parts or elements of a building which resist forces and moments, and includes foundations, beams, columns, shear cores, structural walls, struts, ground anchors, slabs, trusses, staircases, load bearing walls and all other elements designed to resist forces and moments but does not include doors, windows and non-load bearing walls;

Structural elements are parts or elements of a building. Earthworks are not parts or elements of a building as they are not structural elements, much less "critical structural elements" contemplated by s 10(5)(b).

38 Furthermore, even if the backfill was a structural element, a site supervisor's obligation under s 10(5) is to ensure that it is carried out in accordance with the plans of the building works or the terms and conditions imposed by the Commissioner of Building Control. There was no evidence that the plans referred to the backfill material to be used, or that the Commissioner had imposed any terms and conditions relating to it.

39 In the circumstances, the plaintiff has failed to establish that s 10(5)(b) of the Act imposed on the second defendant a duty to supervise backfilling works.

The counterclaim

40 As I have explained in [32] – [33] above, the first defendant's counterclaim for the unpaid claims was not proved, and therefore fails.

Conclusion

41 The plaintiff will have interlocutory judgment against the first defendant with damages to be assessed by the Registrar. The plaintiff will also have costs of the action up to this stage, to be taxed if not agreed on. Costs for the assessment of damages are to be determined by the Registrar at the assessment of damages.

42 The plaintiff's claim against the second defendant is dismissed with costs to the second defendant to be taxed if not agreed on.

43 The first defendant's counterclaim is dismissed with costs to the plaintiff to be taxed if not agreed on.

[note: 1] First defendant's defence and counterclaim, at paras 17 and 19

[note: 2] 1AB268

[\[note: 3\]](#) 1AB271

[\[note: 4\]](#) 1AB272

[\[note: 5\]](#) 1AB289

[\[note: 6\]](#) 1AB294

[\[note: 7\]](#) 1AB204

[\[note: 8\]](#) 2AB369

[\[note: 9\]](#) 2AB519—520

[\[note: 10\]](#) Wang Jing-Yuan's AEIC dated 8 May 2009, at p 9

[\[note: 11\]](#) Chua Giok Pien's AEIC filed on 24 April 2009,

[\[note: 12\]](#) Ng Kok Kwang Louis's affidavit, exhibit LN-3

[\[note: 13\]](#) Ng Kok Kwang Louis's affidavit, exhibit LN-9

[\[note: 14\]](#) Tan Boon Kwee's AEIC for the first defendant dated 24 April 2009, at pp 62-63

[\[note: 15\]](#) Tan Boon Kwee's AEIC for the first defendant dated 24 April 2009, at pp 64-65

[\[note: 16\]](#) Plaintiff's closing submissions, at para 83