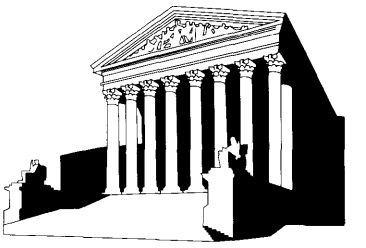
Four days in Court for a Sub-sub-contractor — Some Easy Lessons



Sometimes it is said that everyone is entitled to his or her day in court. Practice though is quite different and many, due to costs, delays and other reasons, do not make it. This month, in the first of a series of regular contributions, *Professor Arthur McInnis* looks at a quiet case where the wait for one party paid off.

Facts

The action was small, less than HK$1 million. The parties were situated well down the contractual chain, with a sub-sub-contractor suing its sub-contractor. The causes of action alleged are difficult to establish. In the face of most facts like this an action is usually not commenced let alone goes to court. Yet that is precisely what happened here. In fact, the plaintiff went all the way — a four-year wait for four days in court. We pick up the story with who won, who lost and why. The action was begun by Sun Kai Engineering Co Ltd, a sub-sub-contractor engaged by the defendant Tileman Asia (HK) Ltd on the new chimney project at the Lamma Power Station. Tileman in turn was a sub-contractor of Nishimatsu Construction Company Ltd, the main contractor on the project. Hong Kong Electric Company Limited was of course the employer. Sun Kai's role was small — simply to supply workers for concreting the windshield structure of the chimney. The parties' contract too was short, just a Letter of Invitation to Tender and subsequent Letter of Acceptance dated June 8, 1994.

Sun Kai's Claims

Sun Kai claimed against Tileman under three traditional heads:

1. Retention — for the balance of the contract price;

2. Loss and Damages — arising from an extension of time to the project; and

3. Quantum Meruit — for extra time involved in workers attending a concrete demonstration.

Tileman's defence to the retention claim was brief. Initially it said that Sun Kai had been paid in full but later changed their position to admit a sum was owing and then disagreeing over when it had to be paid. This probably hurt Tileman's credibility. **LESSON 1: raise inconsistent defences at your peril.**

Tileman's defences concerning the loss and damages were more elaborate and can be summarised as follows:

Tileman's Defences to Loss and Damages

1. Tileman's programme had to conform to Nishimatsu's programme. Therefore Tileman had to be flexible and it was not bound by any commencement or completion dates.

2. The contract was 'back-to-back', meaning that it mirrored certain provisions of Tileman's contract with Nishimatsu. Since Tileman did not claim against Nishimatsu it followed that Sun Kai should not claim against the defendant.

3. On the terms of the contract, floor slabs and roof slabs were to be cast on an 'as called for' basis. Since both parties accepted that these slabs may have to be done outside the two months' construction period stated in the contract, Sun Kai's total working time under the contract could not have been limited or defined by the two-month period.

4. There were no labour rates as such in the contract and all payments under the contract had to be on a measured quantities basis.

Dismissing the Defences

The Retention Claim

The retention claim was dealt with quickly by Judge Kotewall. Looking back, had the parties' Letter of Acceptance not been so brief it is unlikely that any issue would have even arisen about the obvious questions a contract should address: who, what and when. With that said, why was the claim denied so long? The retention claim was easily decided in Sun Kai's favour.

Loss and Damages

Two paragraphs from the Letter of Acceptance were especially

important in the judge's view, paragraphs 5 and 6, though Sun Kai relied on additional paragraphs:

5. All works shall be carried out in full compliance with the Tileman Construction programme.

6. No extra payment shall be made for overtime works for windshield construction and the labour content shall be 34 man/shifts until the slipform rises to 31 metres high. The construction of the windshield is scheduled to be finished in two months working time. The floor slabs and roof slab concrete shall be cast on an as called for basis decided by Tileman.

The wording in the Letter was very important because no formal sub-sub-contract was entered into between the parties. **LESSON 2: sign complete contracts.**

The first issue was whether the two-month period might be only an estimate. Judge Kotewall dismissed this suggestion:

> *Paragraph 6 does not provide for an estimate. It would be completely unmanageable for the plaintiff if it had to make all the necessary arrangements and pay for workmen only to be told, apparently at any time, that the defendant was entitled to suspend work or call for stoppages and presumably for which the plaintiff would have no recourse or recompense. In my judgment, the effect of clause 6 is clear. The plaintiff was to carry out the works within two months of the commencement date, which turned out to be June 3, 1994, and it had two months from June 3, 1994 with which to do so.*

Fixed with a continuous time period in which to carry out the work the next question became who should be responsible for delays — Sun Kai or Tileman. The delays were alleged by Sun Kai to have been Tileman's responsibility, namely, delayed or short supplies of concrete and hoist breakdowns. Sun Kai argued in effect that Tileman had to co-operate with it during its work and this meant it could not hinder progress. Several leading cases were relied upon by Tileman including *Wells v. Army & Navy Co-operative Stores Ltd* [1903], Hudson's Building Cases, 4th Ed at 354; and *Jardine Engineering Corp Ltd & Ors v. Shimizu Corp* [1992] 2 HKC 271. Judge Kotewall quoted from the cases and held in effect that Tileman had not co-operated, or had hindered Sun Kai and it followed that this could not be a defence to its claim. **LESSON 3: it pays to co-operate.**

Regarding the second 'back to back' defence and the effect of the provision being to incorporate certain contract terms across contractual tiers, Judge Kotewall noted that while some of the terms were similar, not all of them were and so he didn't know which ones were incorporated or not. Hence, if Tileman were to have been successful here it would to have had done more than simply say the contracts were 'back to back'. **LESSON 4: don't pretend your contracts are back to back if they are not.**

The third and fourth defences were dismissed largely on the basis of relevancy. It simply was not present.

Turning to the quantum meruit claim, Judge Kotewall once again found in favour of Sun Kai. The elements for a quantum meruit claim had been satisfied and briefly which could be construed as a request to do work, at no fixed price, which was outside the contract. **LESSON 5: there is no free lunch.** Sun Kai had won and gone "three for three".

Summing Up

The lessons are simple. Contracts should be clear. Parties do have rights. Remedies can be ordered. This short little judgement without very much money in issue, less than HK$1 million, is also a testament to Sun Kai's determination. Substantial completion of the project took place more than four years ago. Thus Sun Kai waited to be heard. When they eventually were heard they established a number of difficult causes of action including co-operation and quantum meruit. Both types of action often arise because the parties have not taken the time to address the true nature and type of the work involved. In this case at least, the cost of not taking that time became Tileman's to bear. In a footnote to the case, while it took four years to bring to court it only took four days for the case to be presented and the reasons for judgement to be handed down. Congratulations to Judge Kotewall on running that programme — the Lamma Power station project should have run as smoothly. AAC

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Correction

In last month's column the membership for the newly formed Society of Construction Law was incorrectly stated to be HK$450. With apologies it should be HK$950.