When Is An Architect Not An Architect?

A recently reported case from the Court of Final Appeals looks at not only when architects might not be architects but also when their certificates might not be certificates as well. This month our regular contributor Dr Arthur McInnis tells you why.

Background

August 1993 – it seems so long ago. Perhaps you will recall it was a time of rapid appreciation in the property market. Certainly that fact was not lost three on companies, aptly named Grand Million Development Ltd, Global Time Investments Ltd and Super Keen Investments Ltd, who wished to capitalise on this fact. The companies were respectively head purchaser, sub-purchaser and sub-sub-purchaser under three contracts for purchase and sale of a building that was yet to be constructed.

The original owner of the site was Simpson Development Investment Ltd. Simpson signed a building contract as employer incorporating the HKIA standard form conditions with K & R Construction Ltd as the contractors and naming Gordon Yeung & Associates as the architect. Two things are important about these facts. First of all Simpson and K & R were connected or related companies. Secondly Gordon Yeung did not know he was named as the architect. All Yeung knew was that he was the Authorised Person on the project.

Shortly after construction got underway the first of several agreements for the sale of the building was signed between Simpson and Grand Million in December 1993 for some HK$256m. Three months later Grand Million entered into a second provisional agreement to "flipsell" the property to Global Time for HK$405m. Remarkably, eleven short days after this another flipsell agreement (the third one) was signed between Global Time and Super Keen to sell the building for HK$600m. All the provisional agreements became binding and deposits were paid.

Clause 14 of the first agreement provided that the building should be "completed with Occupation Permit issued on or before 30/6/1995 subject to the usual architect's extension". Time was also stated to be "of the essence". The second and third agreements gave the respective purchasers in the chain of sales rolling rights to rescind their contracts should their predecessors in title (sellers) also become entitled to exercise any rights to rescind their purchase contracts for the building.

Time Passed And Values In The Property Market Fell

In the end while the value of the building did rise sufficiently for the first purchaser Grand Million to cover its costs and make a small profit (about HK$34m) it was never sufficient to cover the cost of the subsequent purchase at HK$405m let alone HK$600m. This fact was not lost on either of the subsequent purchasers. Thus for Global, it was no longer the "Time for Investments" and for Super... it was no longer "Keen" to complete! Both subsequent purchasers thought that they had a way out of their agreements though because the building was far from complete. However before they could rely upon their rights to rescind in turn for late completion, and much to their surprise, the architect, Yeung, granted K & R Construction a 294-day extension of time.

Neither Global nor Super Keen accepted the certificate's validity, their agreements were rescinded in turn and they demanded return of their respective deposits. Grand Million, you will recall and still in a position to make a profit on its sale at least to someone other than Global, completed its deal. Meanwhile, with no deposits forthcoming Super Keen sued Global for its deposit and Global sued Grand Million for return of its deposit or wrongful rescission of the agreements. The deposits were each in the order of about HK$100m. There was, as it turned out, also a claim made relating to the exterior of the building but I leave this to one side.

The Lower Courts

The original trial, part claim and part counterclaim or third-party proceedings procedurally, took place before Justice Findlay. The main issue was whether the architect's certificate was a valid grant of an extension of time under the sale agreements. To answer this Justice Findlay posed two similar questions under the HKIA form. Counsel for Grand Million argued that the certificate was valid if Yeung acted bona fide and came to his decision under the HKIA form. Opposing counsel, for Super Keen, argued instead for the same rights in disputing the certificate that would exist in other situations. This view, put ably by John Scott, SC was regrettably not

accepted. In my view had it been accepted it would have made life simpler for architects. In the end, Justice Findlay took a narrow view and ordered the return of the deposits. In effect the architect was not the architect at least insofar as the sales agreements were concerned. Why was Yeung not the architect under these agreements? Put simply, Yeung had not been performing his duties under the building contract. He has also only been "appointed" to grant the extension of time.

So, just what types of duties should an architect be performing to according to Justice Findlay? Generally all of those contemplated under clause 23 of the HKIA form, at a minimum requiring and reading reports coming from the contractor and paying periodic visits to the site. The Court of Appeal agreed with the result and a last appeal was taken to the Court of Final Appeal (CFA).

Before the CFA

The first point the CFA addressed was admitted to be unusual. The CFA asked:

"whether Mr Gordon Yeung was the architect under the building contract. This may seem a strange question to ask, because the contract expressly said that he was. In the Court of Appeal, Keith JA...said that this was enough. But I do not think that the question can be answered so easily."

The reason it could not be answered easily is because Yeung did not do anything under the building contract in the CFA's view. Sure he was named in the agreement. Sure he was named as the Authorised Person but after all he really didn't do anything under the building contract. Yes, he too may have granted an extension of time when asked by the developer or contractor – it was not really clear who asked because the same Wong spoke for both of them – but this was thought to beg the question of what counted as being an architect for the purposes of granting the very extension.

Now, this may come as a surprise to the architectural profession but it appears that a higher value is placed upon their worth by the CFA than some local developers. The CFA said in effect that if you name someone as the architect under your building contract then you better darn well make sure that they behave like an architect or third parties expected to rely upon what they do can choose to ignore them instead. In fact, they can ignore their certificates.

Judges rarely just rely upon one reason to support their conclusions and this was true here. So even if Yeung could be viewed as the architect for purposes of the sales agreements but did his actions fall within what was contemplated by clause 23 of the HKIA form? The short answer was no. This was despite the fact that in his certificate Yeung apparently said he was architect, referred to clause 23 and specified the grounds that he said applied. This is what one would hope the architect to do. But when it came to trial Yeung was less sure. His evidence was tentative at best and he had not applied his mind to the question whether those grounds existed and instead said he acted according to what he viewed was fair and reasonable. It sounds as if Yeung fell apart on cross-examination. This is sad and sadder for the true weight to be given to certificates in practice. They should after all be taken at face value. Now, in what will undoubtedly become a much-quoted extract from the judgment Lord Justice Hoffman said this.

"I have already said that there is force in [taking the certificates at face value and]...about the need for certainty. But (counsel)...presses the argument too far. In the absence of express words making the certificate conclusive, I do not think that the parties should be assumed to have wanted certainty at the expense of having to accept total capriciousness and irrationality."

In summary, for the CFA there was no "usual architect's extension" within the meaning of the sales agreement, it was not granted by the architect and it was not part of the building contract. Again, to someone looking at the building contract in the HKIA form naming Yeung and the certificate itself making reference to it this would have to be quite a shock. So where does it leave us?

What Next?

The judgment is not helpful in the building context however useful it may become in the context of sale and purchase agreements. Why? Because solicitors and subsequent judges risk losing sight of the fact that there were these subsequent agreements and could seek to apply the CFA's comments on building contracts and certificates to construction cases alone. That might not be a good idea. The case could have been dealt with in a much simpler way. First of all the CFA made no reference to any cases – in particular those cases that construe certificates and set out reasonable grounds for challenging them. If it had done so it could likely have set the certificate aside on one of them perhaps fraud. Of course, much had been made of various connections between Simpson and K & R. Equally there appears to have been employer interference and this too could have been used to the same effect. Naturally such grounds would have had to have been pleaded and proved, but surely this is not too much to ask with six barristers involved. Alternatively, the CFA could have implied such terms in the sales agreements and achieved again the same result. Instead with someone not having done their homework it now falls to others to do. AAC

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