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WHETHER A LUMP SUM CONTRACT IS A FEATURE OF DESIGN AND BUILD CONTRACTS

Goh Eng Lee Andy v Yeo Jin Kow [2016] SGHC 110

In Summary

This Singapore High Court decision on 2 June 2016 explored whether a lump sum contract is a feature of design and build contracts, and held that a design and build contract, in the absence of any terms to the contrary, necessarily incorporates a lump sum contract.

Facts

The Plaintiff (Goh) wanted to build a new house on a piece of land he purchased with his wife. He approached the Defendant (Yeo), a building contractor for this purpose, who provided three quotations for the construction work, the last of which contained the term "design and build" and stated that the "estimated completion date" for the project was March 2013.

At the time of the first quotation, the architectural design for the property was not ready yet. The Plaintiff accepted the last quotation but refrained from executing it until the construction drawings were finalized.

Work commenced on the project but appeared to have been abandoned around September 2013 over payment issues. The Plaintiff terminated the building contract and employed replacement contractors to complete the construction work. The Plaintiff then sued the Defendant for breach of contract and the Defendant counterclaimed for the cost of variation works undertaken by him. The Defendant also alleged in the counterclaim that the Plaintiff had breached the contract by failing to make progress payments and terminating the contract without basis.

Issues

The Singapore High Court had to decide on the issue of whether the contract was a "design and build" contract and if so, whether a "design and build" contract necessarily incorporates a lump sum contract.

The determination of this issue affected the parties' respective rights and obligations, such as whether the Defendant had performed the contract works and was entitled to payment for the variation works claimed.

Decision of the High Court

The court considered several issues in coming to a decision.

Whether the Contract is a "design and build" contract

The Court stated that the term "design and build", which was expressly referred to in the final quotation, is a legal term of art carrying a defined meaning in law. The inclusion of this term was therefore *prima facie* evidence of the parties' intention to enter into a "design and build" contract.

The Court also considered parties' conduct and held the Defendant undertook a course of conduct consistent with the obligations a contractor entering into a "design and build" contract would undertake.

The Court then compared the second and final quotation and found that although the scope of works were largely similar, the price of the final quotation was significantly higher than the second quotation. This indicated that the parties intended to enter into a more expensive "design and build" contract.

Whether the "design and build" contract necessarily incorporates a lump sum contract

On this issue, the Court held that a "design and build" contract, in the absence of any terms to the contrary, necessarily incorporates a lump sum contract.

A "design and build" contract and a lump sum contract had in common the feature that the contractor had to do all that was necessary to achieve the contractual scope of works at the agreed price.

The Court cited *Chow Kok Fong* in *Law and Practice of Construction Contracts (Volume 1)* (Sweet & Maxwell, 4th Ed, 2012) at paragraph 2.35 that "design and build" contracts by default give the owner little latitude to change or alter the design once the contract has been awarded, without incurring additional cost.

The additional feature of a "design and build" contract was that the contractor was also responsible for formulating and implementing the design of the project – including the engagement of professionals for that purpose – within the brief that was given by the owner and turning that design into reality by doing all that was reasonably necessary for that purpose at the agreed price.

Under a "design and build" contract, the contractor would have no recourse to the owner for additional payments unless it could be shown that the works undertaken were substantially different from the original design or that the additional expense came about as a result of the owner's breach.

In this case, the Court held that the "design and build" contract was a lump sum contract and so the Defendant had no basis to counterclaim for professional fees where these concerned the design of the property (unless specifically carved out). Further, the court held that the

Defendant could not claim for additional payment for variation work unless the variation work was extraneous to the work contemplated under the contract (which they were not).

Whether Plaintiff was entitled to terminate the contract

The Court decided that the Defendant had breached the contract by failing to complete the works by 31 March 2013 notwithstanding tha tit was stated in the final quotation to be an "estimated completion date". As a result, it was held that the Defendant had repudiated the contract and the Plaintiff was entitled to validly terminate the Defendant's services.

Defendant's Counterclaims

With regards to the Defendant's counterclaims, JC Kannan held that

(1) The Defendant could not claim for additional payment for variation work as none of these counterclaims for variation work were extraneous to, or deviated from, the work contemplated under the "design and build" contract;

(2) The Defendant could not claim for "profit and attendance" fees as such fees were part of the contract price in a "design and build" contract;

(3) The Defendant could not claim for his expenses in travelling to China to secure construction materials as this was part of his responsibility under a "design and build" contract;

(4) The Defendant was allowed to claim for the installation of a gate at the plaintiff sister's house since this work did not fall within the scope of the contract.

Concluding Views

This case highlights that the court may go beyond the strict wording used by parties in the contract. In determining the completion date and whether the contract was a design and build contract, the court did not confine itself to the words and descriptions used in the contract, and instead also examined the extrinsic evidence available, including the conduct of the parties.

The Court has clarified "design and build" contracts. The inclusion of such a term in a building contract would establish a prima facie position that the parties intended a contract which required the contractor to provide both design and construction services for a fixed price.

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SPORTING DISPUTE (COURT OF ARBITRATION FOR SPORT): ANTI-DOPING RULE VIOLATION & THE "NO SIGNIFICANT FAULT" DEFENCE

CAS 2016/A/4643 - Maria Sharapova v International Tennis Federation

In Summary

This Court of Arbitration for Sport ("CAS") Award deals with the use of Meldonium (or more commonly known under the brand "Mildronate"), a substance that was legal under the World Anti-Doping Code up until 1 January 2016 when it was included on the World Anti-Doping Agency's *Prohibited List* (setting out the prohibited substances and prohibited methods that are prohibited as doping at all times.

The Award also deals with the No Significant Fault defence and the extent of the personal duty of an athlete to ensure that they are not taking a prohibited substance.

Facts

The Appellant in these proceedings was Maria Sharapova, a top-level professional tennis player of Russian nationality, who is a member of the International Tennis Federation (the "Respondent"), the International Olympic Committee-recognised international sports federation for the sport of tennis. The Respondent is a signatory to the World Anti-Doping Code ("WADC") established by the World Anti-Doping Agency ("WADA"), and adopted the Tennis Anti-Doping Programme ("TADP") to implement the provisions of the WADC.

On January 2016, at the Australian Open Tournament in Melbourne, Australia, the Appellant underwent a doping control test in accordance with the TADP. On 2 February 2016, the Appellant underwent an out-of-competition anti-doping test in Moscow, Russia.

As a result of the above tests, on 2 March 2016 the Appellant was informed by the Respondent that her sample collected at the Australian Open Tournament had tested positive for the presence of Melodium at the concentration of 120 µg/ml, constituting an anti-doping rule violation under *Article 2.1* of the TADP ("ADRV").

An important fact to note is that Meldonium was not on the Prohibited List up until 29 September 2015.

After publicly announcing at a press conference in California that she had inadvertently committed an anti-doping rule violation by ingesting Mildronate, an Independent Tribunal was appointed by the Respondent to hear the Appellant's case. The Tribunal issued a decision banning the Appellant from the Covered Events (set out in *Article 1.10* of the *TADP*) for a period of 2 years commencing 26 January 2016.

On 9 June 2016, the Appellant filed an appeal with the Court of Arbitration for Sport ("CAS") challenging the Tribunal's decision

The Tribunal's Decision

The Tribunal found in its Decision that whilst the Appellant's ADRV was not intentional as she did not appreciate that Midronate contained a prohibited substance as of 1 January 2016, she did still bear sole responsibility for the contravention and very significant fault in failing to take any steps to check whether her continued use of this medicine was permissible.

Grounds for Appeal

The Appellant challenged the Tribunal's Decision on the following grounds:

(a) the lack of intentionality (for the purposes of *Article 10.2.2* of the *TADP*) was acknowledged by the Tribunal, and on that basis the baseline sanction should be 2 years of ineligibility;

(b) however if she can establish No Significant Fault (a defence provided for by *Article 10.5* of the TADP), the Panel has the discretion to reduce the period of ineligibility to one half (i.e. to 1 year); and

(c) in the circumstances of the case, the Panel should exercise its further discretion to reduce the ineligibility to a shorter period, consistent with the principle of proportionality.

Issues before the CAS Panel

The 2 issues before the CAS Panel (the "Panel") were:

(a) what was the Appellant's level of fault and more specifically, did she commit the ADRV with No Significant Fault; and

(b) if so, what is the proper sanction?

Appellant's Level of Fault

The Panel identified two conditions that need to be satisfied for the reduction of the ineligibility period to be applied to an anti-doping rule violation, as set out in *Article 10.5.2* of the *TADP*:

(a) the Appellant must establish how the prohibited substance entered her system; and

(b) the Appellant must establish that she bears "No Significant Fault or Negligence".

The Panel was of the opinion that the first condition was satisfied by way of the Appellant's admission that the prohibited substance Meldonium entered into her system as a result of her use of Mildronate, which was accepted by the Tribunal in her sample testing positive for Meldonium because of the Mildronate she ingested.

With regard to the second condition of the Appellant's significant fault or negligence, the Panel first noted that the the finding of such is very "fact specific", and must be established in view of the totality of the circumstances.

The Panel then noted that a period of ineligibility can be reduced based on No Significant Fault ("NSF") only in cases where the circumstances justify a deviation from the duty of exercising the utmost caution" are truly exceptional, although this bar should not be set too high. In effect, a claim of NSF is consistent with the existence of some degree of fault and cannot be excluded simply because an athlete left some stones unturned.

Whilst the Panel stated that an athlete can always read the label of the product used or make Internet searches to ascertain its ingredients, cross- check the ingredients so identified against the *Prohibited List* or consult with the relevant sporting or anti-doping organizations, consult appropriate experts in anti- doping matters and, eventually, not take the product, an athlete cannot reasonably be expected to follow all such steps in each and every circumstance, as this would render the NSF provision in the WADC meaningless.

The Panel also agreed with the Respondent's submission that when an athlete delegates (who is permitted to do so) elements of his or her anti-doping obligations to a third party (e.g. her agent from 2013 onwards in the Appellant's case) and commits an anti-doping rule violation, the athlete is at fault if he or she chooses an unqualified person as his or her delegate, fails to instruct the delegate properly or set out clear procedures the delegate must follow in carrying out the task, and/or fails to exercise supervision and control over the delegate in carrying out the task.

The Appellant in this case chose to rely on her agent and his organisation for the performance of all anti-doping related matters, which the Panel found reasonable in the circumstances of the case. However the Appellant did not give her agent instructions as to how this task had to be performed, nor establish any procedure to supervise and control the actions performed by her agent. The Panel held these circumstances show some degree of fault on the part of the Appellant, but did not exclude altogether the Appellant's ability to invoke NSF.

The Panel further stated that the Appellant had a reduced perception of risk she was incurring whilse using Mildronate, which was justified as she had used Mildronate for 10 years before without any anti-doping violation; she was using Milodronate for medical (and not performance enhancing) purposes; no specific warning had been issued by WADA, the Respondent or the Women's Tennis Association as to the change of status to a prohibited substance.

Proper Sanction to be Imposed

In determining the appropriate sanction to be imposed, the Panel held that it depends on the degree of fault, with the relevant measure of fault in the Appellant's case being whether she was reasonable in selecting the agency to assist her in meeting her anti-doping obligations. As discussed earlier, the Panel had already determined that her decision was reasonable, but fell short in her failure to monitor or supervise how the agency was meeting the anti-doping obligations. To simply allow an athlete to delegate his or her obligations to a third party and then not provide appropriate instructions, monitoring or supervision without bearing responsibility would be inconsistent with the WADC.

Based on the circumstances, the Appellant's fault was held to be greater than the minimum degree of fault falling within NSF, but noted as less than Significant Fault, and the Panel imposed a sanction of 15 months.

Concluding Views

This case demonstrates the degree of fault that can be imputed to an athlete for his or her failure to make sure all anti-doping obligations are met, and whilst it is reasonable for an athlete to deletgate his or her anti-doping duties to an agent, this does not mean that less blame will be left at his or her door. This case also shows the utmost importance for athletes to check the WADC for changes in the list of Prohibited Substances.

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If you would like more information on this or any other area of law, you may wish to contact us.

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