

When do you require a specialist builder's licence for structural steelwork?

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Overview

In *Nam Hong Construction & Engineering Pte Ltd v Kori Construction (S) Pte Ltd* [2016] SGCA 42, the Court of Appeal (CA) firstly, affirmed the High Court decision that a disjunctive interpretation of the term “structural steelwork” under s 2(1)(d) of the Building Control Act (BCA) should be adopted. Secondly, it held that the licensing regime under Part VA BCA does not apply to subcontractors.

This update takes a closer look at the Court of Appeal's landmark decision.

Background

Kori Construction (S) Pte Ltd (Kori) was engaged by Sato Kogyo (Sato Kogyo) to perform construction works for the MRT Downtown Line Project (the Project). Kori then subcontracted part of the works to Nam Hong Construction & Engineering Pte Ltd (Nam Hong). Nam Hong was to carry out “fabrication, loading and unloading” of steel strutting works including connection plates and stiffeners (the Works).

The dispute arose when Kori defaulted on the final invoice sum of S\$147,538.39. Nam Hong sued Kori in the District Court to recover payment. Kori argued that Nam Hong was not entitled to payment as Nam Hong did not possess an appropriate builder's licence at the material time. Their case was that Nam Hong had carried out “structural steelwork”, a type of “specialist building works” within the meaning of s 2(1) BCA, without a licence as mandated by the BCA.

Section 29B(3) BCA makes it an offence for builders to carry out “specialist building works” without a licence, while s 29B(4) BCA precludes a builder from recovering remuneration for works done without an appropriate licence. Section 2(1) defines “specialist building works”. This includes “structural steelwork” which is defined in s 2(1)(d) as “comprising”:

- (i) fabrication of structural elements;
- (ii) erection work like site cutting, site welding and site bolting; *and*
- (iii) installation of steel supports for geotechnical building works.

Nam Hong contended that all three limbs have to be read conjunctively. This would mean that all three elements must be fulfilled for the steelworks to fall within the meaning of “specialist building works” in s 2(1)(d). Kori, on the other hand, argued that the performance of any one of the three elements would amount to “specialist building works” and thus argues for a disjunctive interpretation.

Parties agreed that Nam Hong had carried out (i) and (ii) above but not (iii). Hence, the distinction between a

conjunctive and disjunctive interpretation was crucial in determining if Nam Hong's claim would be precluded. If a conjunctive interpretation were adopted, Nam Hong's claim would not be denied because it would not fall within the ambit of "specialist building works". In that case s 29B(4) BCA would not apply, and Nam Hong would not be precluded from claiming payment.

The decisions below

The District Judge preferred the conjunctive interpretation and held that the claim was not precluded by s 29B(4). On appeal by Kori to the High Court however, the learned Judicial Commissioner held that the disjunctive interpretation should be preferred and allowed the appeal on three grounds:

- (i) a disjunctive reading would promote the underlying object of the BCA;
- (ii) a conjunctive interpretation defeats the objects of the licensing regime; and
- (iii) a conjunctive reading renders the definition of "minor specialist building works" under s 29(1)(b) BCA otiose

Nam Hong appealed to the CA.

Decision of the Court of Appeal

Nam Hong's appeal centred on whether Nam Hong:

- (a) had carried out "specialist building works" under s 2(1); and
- (b) being a subcontractor and not a "builder" under s 2(1) fell within the BCA's licensing regime.

The CA allowed the appeal holding that while Nam Hong had carried out "specialist building works" within the meaning of s 2(1), it did so in its capacity as subcontractor to whom the licensing regime in Part VA BCA did not apply. Therefore, Nam Hong did not require a licence for the "specialist building works" and s 29B(4) did not operate to preclude Nam Hong's claim against Kori for non-payment.

Conjunctive or disjunctive interpretation?

The CA held that both the conjunctive and disjunctive interpretations are grammatically possible. The word "comprising" can be interpreted to mean that "structural steelworks" refers to a single set of items, all of which must be present before it can be said to have been carried out. On the other hand, it can also be read to mean that "structural steelworks" come in different forms, including those as stipulated in s 2(1)(d).

Notwithstanding this, the CA ultimately found itself in agreement with the High Court that a disjunctive interpretation should be adopted for two reasons:

(A) Purposive Argument

Conjunctive interpretation is contrary to the objectives of the BCA which is to improve safety standards in all areas of the construction industry. In essence, a conjunctive interpretation would not subject underground building works to tighter regulation because it would mean that builders who only install steel supports for geotechnical works would not need to be licensed. By contrast, the disjunctive interpretation would require every builder that carries out underground building work to be licensed.

(B) Textual Argument

Conjunctive interpretation would render the exceptions of "minor specialist building works" contained under sections

29B(2)(b) and 29A(1) BCA completely otiose. Briefly, s 29B(2)(b) provides that persons who are only in the business of carrying out “minor specialist building works” need not apply for a specialist builder’s licence. Instead, they would only need a general builder’s licence. Section 29A(1) further lists four separate categories of “minor specialist building works” of which only one relates to structural steelwork. According to the court, should a conjunctive interpretation be adopted, the performance of fabrication work and/or erection work of *any dimension* would not fall within the definition of “specialist building work” unless it also includes the installation of steel-supports for geotechnical work. Thus, this would render the carve-outs in s 29A(1) above completely redundant.

The licensing regime

The CA held that the licensing regime in question did not apply to subcontractors on the basis that it was not Parliament’s intention for it to do so.

They provide two reasons for this conclusion:

(a) Such a licensing requirement would preclude a significant number of small and medium corporations from taking on specialist works. At present, a corporation that seeks to be granted a specialist builder’s licence must have a paid up capital of not less than S\$25,000 and it must be accredited or registered with a prescribed professional or technical body or association. Additionally, the corporation must also satisfy numerous other conditions under both the BCA and the Building Control (Licensing and Builders) Regulations 2008. The CA held that “...to expect all subcontractors to be licensed would be unduly onerous.” They were instead satisfied by the recommendation made by the Building and Construction Authority that the regulatory objective of the BCA would be adequately served as long as “there is a general builder and [specialist] builder on record for the carrying out of the building works.”

(b) Second, the CA was of the view that geotechnical works were already tightly regulated under other parts of the BCA. Hence there was no justification for the imposition of the requirement that each and every subcontractor involved in specialist building and geotechnical works must be separately licensed.

Rectifying construction

In light of the compelling arguments as to whether the licensing regime should apply to sub-contractors, the CA considered the possibility of addressing the perceived ambiguities in the BCA and giving effect to Parliament’s intention. The act of “rectifying construction” involves the court proposing the adding or substituting of words to a statute to give effect to Parliament’s intentions. The test for when rectifying construction is permitted is set out in *Kok Chong Weng v Wiener Robert Lorenz* [2009] 2 SLR(R) 709. The three conditions that need to be satisfied before the court would read words into a statute to rectify what it perceives to be an error in legislative drafting are:

(a) It was possible to determine from consideration of the Act read as a whole, the mischief Parliament sought to remedy with the Act.

(b) It was apparent that the draftsman and Parliament had overlooked and omitted to deal with the eventuality that was required for the purpose of the Act to be achieved.

(c) It was possible to state with certainty what the additional words that the draftsman would have inserted and that Parliament would have approved if their attention had been drawn to the omission.

The CA held that the three conditions were satisfied in this case. In so holding the CA found that when the BCA was examined in totality, the object of its licensing regime in increasing safety standards in the industry would be achieved so long as there is at least one licensed builder of each type (general and specialist) involved in the building works. The CA was of the view that as it presently stood, the words of the statute seemed to cover a wider scope

than necessary to achieve the object which Parliament had in mind. As such, the CA proposed the following amendment to s 29A(2)(b) (highlighted in bold and enclosed in square brackets):

“a person carries on the business of a specialist builder if the person carries out, or undertakes to carry out, (whether exclusively or in conjunction with any other business) any specialist building works for or on behalf of another person for a fixed sum, percentage, or valuable consideration, or reward other than wages, [but not if the person carries out, or undertakes to carry out, specialist building works only as a sub-contractor]”

Comments

The effect of the CA pronouncement reaffirms the disjunctive reading of s 2(1)(d) BCA. This effectively means that all works falling within the ambit of the three limbs: (i) fabrication of structural elements; or (ii) erection work like site cutting, site welding and site bolting; or (iii) installation of steel supports for geotechnical building works would require specialist builder licences. However, subcontractors were not required to comply with this requirement.

The CA rectifying construction approach demonstrates that the courts are amenable to going the extra mile to address ambiguities in drafting. This heralds a novel step in the construction industry, and Parliament might soon step in to respond accordingly.

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