

Choi Peng Kum and another v Tan Poh Eng Construction Pte Ltd
[2013] SGHCR 19

Case Number : Originating Summons No 275 of 2013
Decision Date : 05 July 2013
Tribunal/Court : High Court
Coram : Eunice Chua AR
Counsel Name(s) : Philip Ling and Ang Hou Fu (Wong Tan & Molly Lim LLC) for the applicants; Tan Joo Seng and Wee Qian Liang (Chong Chia & Lim LLC) for the respondent.
Parties : Choi Peng Kum and another — Tan Poh Eng Construction Pte Ltd

Building and Construction Law – Statutes and regulations

Civil Procedure

5 July 2013

Judgment reserved.

AR Eunice Chua:

1 The application before me was for the setting aside of an adjudication determination made pursuant to the Building and Construction Industry Security of Payment Act (“the SOP Act”) (Cap 30B, 2006 Rev Ed). The parties raised issues of the interaction between the SOP Act and the terms of the underlying contract between the parties, which incorporated the Singapore Institute of Architects, Articles and Conditions of Building Contract, Lump Sum Contract, 9th Edition (“the SIA Conditions”). After hearing the submissions of counsel, I reserved judgment to fully consider the matter.

Background

2 The applicants are property owners and the respondent is a contractor. On 25 November 2011, the applicants employed the respondent to carry out reconstruction works on their property. Their contract incorporated the SIA Conditions and also an addendum (“the Addendum”), which provided that:

Save for [the Architect’s role being to provide the relevant design, drawings/plans and to furnish all necessary information and clarification for works to be carried out by the Contractor], the Architect’s responsibility and/ or obligations to give directions and instructions including extensions of time to the Contractor for works would be carried out by the Quantity Surveyor. The Quantity Surveyor will also be responsible for certification of payment, determining variation works, omissions and the value of any works carried out by the Contractor.

3 Suffice to say, disputes arose between the applicants and the respondent surrounding alleged defective works or works that had not been carried out. It is not disputed that on 7 February 2013, the applicants terminated the employment of the respondent.

4 However, before the termination, on 31 January 2013, the respondent issued to the applicants “Progress Claim No. 9” for the sum of \$480,109.97. The applicants did not respond to Progress Claim No. 9, *inter alia*, because they took the position that Progress Claim No. 9 was not supported by any

valuation by the quantity surveyor and only consisted of a description and breakdown of all items claimed without enclosing supporting documentation.

5 On 7 March 2013, the respondent lodged an adjudication application in respect of Progress Claim No. 9 pursuant to the SOP Act. The adjudication application was served on the applicants on 8 March 2013. The applicants lodged their adjudication response at 5.20pm on 15 March 2013.

6 On 22 March 2013, the appointed adjudicator issued an adjudication determination in favour of the respondent for the full amount of Progress Claim No. 9. The adjudicator considered the adjudication response to have been lodged on 16 March 2013 as it was lodged after 4.30pm on 15 March 2013. Accordingly, pursuant to s 16(2) of the SOP Act, the adjudicator regarded the adjudication response as out of time and did not consider the adjudication response.

7 It is noted that the quantity surveyor issued "Progress Valuation No. 9", dated 14 March 2013, certifying the sum of \$7,086.61 as being payable on Progress Claim No. 9.

8 On 28 March 2013, the applicants filed this application to set aside the adjudication determination and for other consequential orders.

9 The applicants argued that the adjudication determination should be set aside for two reasons.

10 First, because their contract with the respondent was terminated on 7 February 2013, cl 32(8) (a) of the SIA Conditions applied and prevented any payment claim from being made. Under cl 32(8) (a) of the SIA Conditions:

In the event of the termination of the employment of the Contractor ... (a) no further sum shall be certified as due to the Contractor until the issue by the Architect of the Cost of Termination Certificate ... nor shall the Employer be bound to pay any sums previously certified if not already paid ...

11 Second, and in the alternative, the applicants argued that the respondent was not entitled to any progress payment under Progress Claim No. 9 because, assuming that Progress Claim No. 9 was an interim claim and not a final claim as defined in the SIA Conditions, it was not supported by a valuation as required by cl 31(4) of the SIA Conditions. Clause 31(4) of the SIA Conditions states in relevant part as follows:

Where ... interim payment is to be based on periodic valuation, the sum certified in interim certificates shall be based on a retrospective re-evaluation of all the work carried out under the Contract as claimed by the Contractor up to a date ... not exceeding 7 days before the date of issuing the Certificate itself. ...

12 Both these arguments were premised on the propositions that an entitlement to seek adjudication under the SOP Act only arose when the contractual right to a progress payment can be established and that a court may set aside an adjudication determination on the basis that there was no entitlement to payment under the terms of the construction contract.

Issues

13 The issues before me, accordingly, were as follows:

(a) Whether a court may set aside an adjudication determination under the SOP Act on the

basis that there was no entitlement to payment under the terms of the construction contract;

(b) If so, whether the respondent can establish a contractual entitlement to Progress Claim No. 9 consistent with the SIA Conditions.

Setting aside an adjudication determination on the basis that there was no entitlement to payment under the terms of the construction contract

14 To determine whether an adjudication determination obtained under the SOP Act may be set aside on the basis that there was no entitlement to payment under the terms of the construction contract, I begin with considering the relevant provisions of the SOP Act.

15 Section 5 of the SOP Act states that:

Any person who has carried out any construction work, or supplied any goods or services, under a contract is entitled to a progress payment.

16 Section 6 of the SOP Act stipulates how the amount of progress payment is to be calculated and s 10 of the SOP Act states the requirements of a payment claim, including that:

(1) A claimant may serve one payment claim in respect of a progress payment on —

(a) one or more other persons who, under the contract concerned, is or may be liable to make the payment; or

(b) such other person as specified in or identified in accordance with the terms of the contract for this purpose.

17 The applicants argued that these provisions meant that the right to a progress payment is created by the construction contract and not the SOP Act and that if there is no progress payment due under the contract, then there is no entitlement to a payment claim and no entitlement to make an adjudication application.

18 In support of this argument, the applicants relied on *Roseville Bridge Marina Pty Ltd v Bellingham Marine Australia Pty Ltd* [2009] NSWSC 320 ("*Roseville*") at [43] where the court stated that:

The [New South Wales equivalent of the SOP Act ("the Act")] does not create a right to remuneration for construction work – that right is created by the construction contract. What the Act does is to create and regulate a right to obtain a progress payment. It is inherent in the concept of a progress payment that it be a payment on account of the amount ultimately due. The contract provides the starting point for the determination of rights under the Act.

19 The applicants also relied on Chow Kok Fong, *Security of Payments and Construction Adjudication* (2nd Ed, LexisNexis, 2013) ("*Chow*"), where the learned author observed at para 3.14 that the "qualification 'under a contract' in [s 5 of the SOP Act] serves to premise the right to be paid on the performance of a contract so that if there is a breach of performance, the right to be paid does not crystallise".

20 The respondent submitted that the entitlement to a progress payment arose from the SOP Act and not from the underlying contract. It also argued that the issue of whether or not there was a right to a progress payment under the contract was an issue that went to the merits of an

adjudicator's decision, not to the adjudicator's jurisdiction.

21 At the request of counsel for the respondent at the end of the hearing, I granted leave to the respondent to submit additional authorities on the SIA Conditions and received these authorities on 28 June 2013. I had directed the applicants to write in to seek leave to submit additional authorities in response if necessary – the applicants did not do so. The additional authorities submitted by the respondent comprised, *inter alia*, extracts from Chow ([19] above) at 329–336, Philip CF Chan, *Statutory Adjudication in Singapore* (Sweet & Maxwell Asia, 2008) at 166–190 (“Chan”), and Wong Meng Meng SC and Chow Kok Fong, “Security of Payments in the Construction Industry: When is the Claim Triggered?” Singapore Law Gazette (April 2005) (“Wong and Chow”).

22 Having considered the authorities, in my view, counsel for the applicants was arguing for a position that was too extreme. The implication of the applicants' submissions was that the court hearing an application for setting aside an adjudication determination or an application to set aside an order for the enforcement of an adjudication determination would have to summarily determine whether or not there was an entitlement to payment arising from the terms of the contract in order to find an entitlement to a progress payment and to make a payment claim under the SOP Act.

23 This would run contrary to the scheme of the SOP Act, which has been described in *Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal* [2013] 1 SLR 401 (“*Lee Wee Lick Terence*”) at [2]–[3] as a “fast and low cost adjudication system to resolve payment disputes” to “help facilitate the cash flow of contractors” operating as follows:

To paraphrase the Explanatory Statement attached to the Bill, the [SOP Act] provides that any person who has carried out construction work or supplied goods or services under a construction contract or supply contract has a *statutory entitlement to payment*. The [SOP Act] also establishes an adjudication procedure by which such a person may claim payment as well as provides for remedies when the adjudicated amount is not paid. *A contractor obtains the right to seek adjudication after serving a payment claim in the prescribed form on the customer ...*, to which the customer has to serve a payment response or else be barred from contesting the amount claimed before the adjudicator The adjudicator's decision as to the payable amount is *binding in an interim manner ...*

[emphasis added]

24 Under s 5 read with s 2 of the SOP Act, the entitlement to a progress payment arises as long as any person has carried out any construction work or supplied any goods or services under a construction contract or a supply contract. Once there is an entitlement to a progress payment, pursuant to s 10(1) of the SOP Act, a claimant may then serve “one payment claim in respect of a progress payment” on a person “who, under the contract concerned, *is or may be liable* to make the payment” [emphasis added], or such other person “as specified in or identified in accordance with the terms of the contract for this purpose”. These provisions make clear that the entitlement to a progress payment and to make a payment claim under the SOP Act is a separate matter from the liability to make payment under the construction contract. The former depends on satisfying the conditions specified in the SOP Act, whereas the latter depends on satisfying the conditions specified in the construction contract.

25 Because the applicants failed to draw this distinction, their reliance on *Roseville* and Chow was misplaced.

26 *Roseville* was a case where the plaintiff sought declaratory and injunctive relief to restrain the defendant from enforcing an adjudication certificate obtained under the Building and Construction Industry Security of Payments Act 1999 (Act 46 of 1999) (New South Wales) (“the NSW SOP Act”) in respect of construction work performed by the defendant for the plaintiff on the basis that there was a binding agreement between the parties whereby the remaining payments due and to become due under the contract (except in relation to demolition works) were negotiated and agreed, so as to exclude other claims. Notably, the plaintiff in *Roseville* neither sought to impugn the adjudication process, nor allege that the adjudication was void – its arguments were based solely on arrangements between the parties *outside the adjudication process* that it argued were not inconsistent with the NSW SOP Act because they did not exclude the defendant’s right to receive contractual remuneration by progress payments in accordance with the NSW SOP Act. Accordingly, I find that *Roseville* had no application to the present case where the applicants *were* trying to exclude the respondent’s right to receive contractual remuneration by progress payments under the SOP Act.

27 Similarly, the relevant passage of *Chow* ([19] above) should not be read to mean that *the entitlement to make a payment claim under the SOP Act* only crystallises when there is due performance of a contract. This is apparent from the sentence following that quoted by the applicants in para 3.14, which states that:

However, while the right to be paid derives from the underlying contract, the right to be paid progressively – the entitlement to progress payments – is given statutory force by the Singapore SOP Act.

28 In other portions of *Chow*, the learned author also explains, for example at para 6.113, that “in relation to the operation of the statutory regime under the SOP Act, some of [the common law principles governing the operation of a payment certificate] and terms of the contract have very little relevance” as a payment response “derives its force principally from the provisions of the [SOP Act]”. In *Wong and Chow* ([21] above), the learned authors further make clear that the statutory right to make a payment claim under the SOP Act cannot be subordinated to an express contractual requirement of a payment certificate.

29 This reading of the SOP Act is buttressed by the Court of Appeal decision of *Lee Wee Lick Terence* ([23] above) where the role of the court in applications to set aside adjudication determinations has been described at [66]–[67] as follows:

66 ... the court should not review the merits of an adjudicator's decision. The court does, however, have the power to decide whether the adjudicator was validly appointed. If there is no payment claim or service of a payment claim, the appointment of an adjudicator will be invalid, and the resulting adjudication determination would be null and void.

67 Even if there is a payment claim and service of that payment claim, the court may still set aside the adjudication determination on the ground that the claimant, in the course of making an adjudication application, has not complied with one (or more) of the provisions under the Act which is so important that *it is the legislative purpose that an act done in breach of the provision should be invalid*, whether it is labelled as an essential condition or a mandatory condition. A breach of such a provision would result in the adjudication determination being invalid.

[emphasis in original]

30 If the court hearing a setting aside application is required to delve into whether or not a contractual entitlement to a progress payment exists in addition to whether or not the statutory

entitlement to a progress payment exists based on satisfaction of the provision of the SOP Act, this will result in a review of the merits of the adjudicator's determination, the elements of which are described in s 17 of the SOP Act and include "the provisions of the contract to which the adjudication application relates". It is immaterial that on the facts of the present case the adjudicator may not have fully considered the contractual entitlement of the respondent to the amount claimed as the applicants did not make a payment response and their adjudication response was filed out of time.

31 At this juncture, I pause to note that the situation before me is a different one from that in *Admin Construction Pte Ltd v Vivaldi (S) Pte Ltd* [2013] SGHC 95 ("*Admin Construction*"). In that case, the High Court set aside an adjudication determination on the basis that an *ex facie* valid settlement agreement entered into between the parties that had not been set aside extinguished all disputes between the parties in relation to the disputed payment claim and, accordingly, there was no right to apply for adjudication. It is an important feature of *Admin Construction* that the settlement agreement was in full and final settlement for all works under the construction contract and was entered into between the parties *before* the service of the disputed payment claim. The High Court could therefore find that the settlement agreement had extinguished any rights the parties had under the construction contract, and accordingly, any entitlement to make a payment claim. As the High Court observed at [30], "the right to invoke the statutory adjudication regime is invariably linked to a payment claim and/or a payment response, which are premised on progress payments themselves which are in turn premised on the existence of a construction or supply contract". Here, however, Progress Claim No. 9 had been served before the construction contract was terminated and such termination did not extinguish the rights of parties under the construction contract.

32 In the present situation, the appropriate recourse for the applicants was not the setting aside of the adjudication determination, but a final resolution of the merits of their dispute over Progress Claim No. 9 with the respondent through other available means.

33 I therefore find in favour of the respondent on the first issue and would accordingly dismiss the application to set aside the adjudication determination on this basis alone.

Whether Progress Claim No. 9 is consistent with the SIA Conditions

34 However, I note for the sake of completeness that even if I am wrong on the first issue, I would still have dismissed the application as, in my judgment, Progress Claim No. 9 was consistent with the clauses of the SIA Conditions relied on by the applicants to impugn Progress Claim No. 9 – cll 32(8)(a) and 31(4).

35 Clause 32(8)(a) of the SIA Conditions read with the Addendum states that the quantity surveyor shall not certify further sums as due to the contractor until the quantity surveyor issues a Cost of Termination Certificate and that the employer shall not be bound to pay any sums previously certified if not already paid.

36 I agree with the respondent and the adjudicator in *VN Pte Ltd v VO Pte Ltd* [2010] SCAdjR 259 that there is nothing in this clause that purports to bar the contractor from making a payment claim and lodging an adjudication application. It also does not bar an adjudicator from arriving at a determination on an appropriate amount that the employer shall pay the contractor.

37 The applicant's interpretation of this clause is not consistent with the words of the clause read in the context of the SIA Conditions as a whole.

38 As stated in *SA Shee & Co (Pte) Ltd v Kaki Bukit Industrial Park Pte Ltd* [2000] 1 SLR(R) 192 at

[34]–[37], cited by the respondent, cl 32(8)(a) of the SIA Conditions may be relied on by an employer to withhold payment on interim certificates to the contractor in the event of termination of the construction contract. However, here, the respondent was not seeking payment pursuant to interim certificates issued by the quantity surveyor, but pursuant to the mechanism for progress payment under the SOP Act. Clause 32(8)(a) did not prevent the respondent from doing so.

39 Similarly, the applicant has read too much into cl 31(4) of the SIA Conditions. That clause states that when interim payment is to be based on periodic valuation, “the sum certified in interim certificates shall be based on a retrospective re-evaluation of all the work carried out under the Contract as claimed by the Contractor up to a date ... not exceeding 7 days before the date of issuing the Certificate itself”.

40 In essence, the clause stipulates how a periodic valuation of work done under the contract is to be assessed where payment is sought pursuant to the contractual mechanism for interim payment. It does not purport to extinguish the contractor’s entitlement to payment under the SOP Act if an interim certificate is not issued.

41 As observed by Chan ([21] above), the contractual payment scheme exists in “parallel” with the adjudication scheme under the SOP Act. This is also consistent with the position taken in New South Wales in relation to the NSW SOP Act, as summarised in Wong and Chow ([21] above).

42 In my view, there was no issue of cl 32(8)(a) or cl 31(4) of the SIA Conditions running afoul of s 36 of the SOP Act which prevents contracting out of the provisions of the SOP Act.

43 As there was no necessity for me to do so, I make no finding on whether or not Progress Claim No. 9 was an interim or final payment claim under the SIA Conditions or whether or not other provisions of the SIA Conditions may be rendered void by virtue of s 36 of the SOP Act.

Conclusion

44 For the foregoing reasons, the application is dismissed. I will hear parties on costs.