

Shin Khai Construction Pte Ltd v FL Wong Construction Pte Ltd
[2013] SGHCR 4

Case Number : Originating Summons No 1134 of 2012/Y
Decision Date : 28 January 2013
Tribunal/Court : High Court
Coram : Jordan Tan AR
Counsel Name(s) : Edwin Lee Peng Khoon and Radika Mariapan (Eldan Law LLP) for the plaintiff;
John Lim Kwang Meng (Harry Elias Partnership LLP) for the defendant.
Parties : Shin Khai Construction Pte Ltd — FL Wong Construction Pte Ltd

Building and Construction Law

28 January 2013

Judgment reserved.

Jordan Tan AR:

Introduction

1 This case raises the question of whether an adjudication determination may be set aside on the ground that the adjudication application was lodged later than the period of entitlement stipulated under s 13(3)(a) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the Act"). This was a question considered but left open by the Court of Appeal in *Lee Wee Lick Terence @ Li Weili Terence v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering)* [2012] SGCA 63 ("*Chua Say Eng*") (at [61]) as it was not in issue.

2 The plaintiff, Shin Khai Construction Pte Ltd ("SK"), filed this application to set aside an adjudication determination dated 15 November 2012 ("the Determination") in respect of Adjudication Application No SOP AA0111 of 2012 ("the Adjudication Application") on the grounds that the payment claim was formally defective and the Adjudication Application was lodged out of time.

Background

3 In February 2012, SK, a general contractor, appointed the defendant, FL Wong Construction Pte Ltd ("FL"), a renovation contractor, to carry out works for a project, which was described as the "Proposed Erection of a Single-Storey Single-User Light Industrial Development with a 4-Storey Ancillary Office Building on Lot 04167M MK 07 at Tuas Avenue 11". FL was to be paid \$768,768. Under cl 1 of the Letter of Award ("the Contract"), the works to be carried out are to be based on bills of quantities and are subject to re-measurement and re-calculation.

4 On 25 September 2012, FL sent Payment Claim No 8 ("the Payment Claim") to SK. That claim reads as follows:

Date : 25-September-12

Claim No : 8th...

Dear Sir

Period: From 1.9.2012 To 25.9.2012

Being payment claim for work done as follows :-

Project:

**PROPOSED ERECTION OF A SINGLE-STOREY
SINGLE-USER LIGHT INDUSTRIAL DEVELOPMENT WITH A
4-STOREY ANCILLARY OFFICE BUILDING ON LOT 04167M
MK07 AT TUAS AVENUE 11**

**Letter of Award dated 1 February 2012 (Ref:
SK/12L/FLW/117) - Sub-Contract:
Formwork, Reinforcement Work and Concrete Work**

No	Description	Amount S\$
1	Accumulated Progress Interim Claim (Refer Attachment)	\$ 862,838.19
	Less Retention 10% (Max 5% of Ctt Sum)	\$ 43,141.91
	+ Accumulated supply labour/ others claim	\$ 9,075.00
	Less Previous Certified/ Received Payment	\$ 616,817.90
	Grand Total Claim for the Month (b/f GST)	\$ 211,953.38

[emphasis in original]

5 The attachment referred to under the heading "Accumulated Progress Interim Claim" contained a detailed breakdown of the work done in the month of September 2012 but only stated the sum claimed for each month from February to August 2012. FL received no response and on 18 October 2012, gave notice of its intention to adjudicate and proceeded to lodge the Adjudication Application. On the same day, SK sent FL an email alleging that it had faxed its payment response to FL on 15 October 2012. The Determination was issued on 15 November 2012.

6 Dissatisfied with the Determination, SK sought to set it aside on the following grounds:

(a) The Payment Claim does not comply with the formal requirements under the Act and the relevant regulations; and

(b) Even if the Payment Claim is valid, FL had lodged its Adjudication Application out of time and that application should have been rejected by the adjudicator pursuant to s 16(2) read with s 13(3)(a) of the Act.

The parties' submissions

7 With regard to the first ground, SK argued that the Payment Claim was defective because although it referred to the period "1.09.12 To 25.09.12", it sought to claim payment for works done outside of that period, in particular, February to August 2012. SK also argued that the Payment Claim was defective because it only provided a detailed breakdown for September 2012 but not for February to August 2012. The Payment Claim therefore did not meet the requirements in s 10(3) of the Act and

regulation 5(2) of the Building and Construction Industry Security of Payment Regulations ("the Regulations") which read as follows:

[Section 10(3) of the Act]

(3) A payment claim –

(a) shall state the claimed amount, calculated by reference to the period to which the payment claim relates; and

(b) shall be made in such form and manner, and contain such information or be accompanied by such documents, as may be prescribed.

[Regulation 5(2) of the Regulations]

(2) Every payment claim shall –

(a) be in writing;

(b) identify the contract to which the progress payment that is the subject of the payment claim relates; and

(c) contain details of the claimed amount, including –

(i) a breakdown of the items constituting the claimed amount;

(ii) a description of these items;

(iii) the quantity or quantum of each item; and

(iv) the calculations which show how the claimed amount is derived.

8 As for the argument that FL had lodged the Adjudication Application out of time, SK argued that under s 13(3)(a) of the Act, FL should have lodged the application sometime from 10 to 16 October 2012. SK's argument was as follows. The Payment Claim was served on 25 September 2012. In the absence of a contractually agreed timeline for service of the payment response, s 11(1)(b) of the Act prescribed a default seven days and s 12(5) prescribed another additional seven days as the dispute settlement period. The combined fourteen day period after 25 September 2012 ended on 9 October 2012. Therefore, the seven day window to lodge the Adjudication Application which began immediately after that period was from 10 to 16 October 2012. FL lodged the Adjudication Application on 18 October 2012 and was thus out of time.

9 In response, FL argued that it was clear that the Payment Claim was a monthly progress claim for September 2012 which also included a claim for work done for previous months which had not been paid. It argued that it was entitled to include the claim for the previous months under s 10(4) of the Act. It also pointed out that the claim for the previous months was the subject of previous payment claims. As for the argument that it had filed the Adjudication Application out of time, FL argued that there was a contractual clause in the form of cl 49 which provided that SK had ten days after receipt of a payment claim to evaluate and issue a payment certificate. FL argued that this payment certificate is intended to function also as a payment response and that instead of the default seven days under s 11(1)(b) of the Act, the ten day period applied. Taking into account the seven day additional dispute settlement period, the time for service of a payment response only

ended on 12 October 2012. Accordingly, the window for FL to lodge the Adjudication Application was from 13 to 19 October 2012. By lodging the application on 18 October 2012, FL was not out of time.

My decision

Whether the Payment Claim was formally defective

10 It is clear that the court has the power to set aside an adjudication determination under s 27(5) of the Act and O 95 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) and in deciding whether to do so, may review the validity of a payment claim (see *JFC Builders Pte Ltd v Lioncity Construction Company Pte Ltd* [2012] SGHC 243 at [23]-[25]; see also, *Chua Say Eng* at [28], [31] and [37]).

11 On the first issue of whether the Payment Claim complied with the formal requirements, I disagree with SK that the Payment Claim was defective for not being in compliance with s 10(3) of the Act and regulation 5(2) of the Regulations. First, in my view, although the Payment Claim could have been better drafted, it met the requisite standard under s 10(3)(a) for the claimed amount to be calculated by reference to the period to which the payment claim relates. It was clear that the sum claimed was an *accumulated sum* as this was stated on the first page of the Payment Claim. This is allowed under s 10(4) of the Act (see *Chua Say Eng* at [92]). The attachment referred to then sets out those other months for which the claim was made in addition to the month of September 2012.

12 In totality, the use of the words "accumulated" on the first page of the Payment Claim accompanied by the reference to the attachment make it clear that: (1) the Payment Claim was in respect of an accumulated sum which included a period prior to September 2012, namely, February to August 2012; and (2) FL had added the sum claimed for the month of September 2012 to the outstanding sums.

13 As for providing a detailed breakdown as required under regulation 5(2) of the Regulations, I reject SK's argument that FL needed to give a detailed breakdown for the other months *in addition* to the detailed breakdown for September 2012. As FL had rightly argued, those months were the subject of previous payment claims and there was no need to rehash the information previously provided to the same level of detail.

14 I note that FL had also sought to argue that the way SK had responded, in seeking to reduce the amount claimed by setting it off against sums incurred in months other than September 2012, showed that SK also understood that the Payment Claim was not limited to work done in September 2012. But, having found that the Payment Claim had complied with the formal requirements, there was no need for me to rely on this argument. After all, whether or not the respondent properly understood the Payment Claim was irrelevant to the court's *objective* assessment as to whether the Payment Claim met the formal requirements of the Act and the Regulations. That said, in a case where a payment claim is not in accordance with the formal requirements, it may well be that the respondent is estopped from arguing that the payment claim is formally defective because it understands and has shown that it understood the payment claim. But, having found that the Payment Claim is in accordance with the formal requirements, there was no need for me to consider this argument any further.

Whether the Adjudication Application was lodged out of time

15 With regard to the argument that the Adjudication Application was filed out of time, in order for SK to succeed, it needed to show that: (1) a violation of s 13(3)(a) was a basis for setting aside an adjudication determination; and (2) that the Adjudication Application was indeed lodged out of time.

The effect of a breach of s 13(3)(a)

16 Concerning the effect of a breach of s 13(3)(a), the Court of Appeal in *Chua Say Eng* observed thus:

57 Section 17(2)(a) of the NSW Act provides that an adjudication application cannot be made unless: (a) the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim; and (b) the respondent has been given an opportunity to provide a payment schedule to the claimant within five business days after receiving the claimant's notice. In contrast, ss 13(2) and 13(3) of the Act (which correspond to s 17(2) of the NSW Act) are structured differently. These sections provide as follows:

(2) An adjudication application *shall not be made unless* the claimant has, by notice in writing containing the prescribed particulars, notified the respondent of his intention to apply for adjudication of the payment claim dispute.

(3) An adjudication application —

(a) shall be made within 7 days after the entitlement of the claimant to make an adjudication application first arises under section 12;

(b) shall be made in writing addressed to the authorised nominating body requesting it to appoint an adjudicator;

(c) shall contain such information or be accompanied by such documents as may be prescribed;

(d) shall be accompanied by such application fee as may be determined by the authorised nominating body; and

(e) may contain or be accompanied by such other information or documents (including expert reports, photographs, correspondences and submissions) as the claimant may consider to be relevant to the application

[emphasis added]

58 Like s 17(2) of the NSW Act, s 13(2) of the Act is also directed at the claimant and not the ANB, the adjudicator or the court. The words "shall not be made" in s 13(2) of the Act are words of prohibition. They have stronger force than the words "cannot be made" which are merely words of disablement. Hence, applying the reasoning in *Chase Oyster*, it should follow that if s 13(2) of the Act is breached, no valid adjudication application can be made. *However, with respect to the time period within which an adjudication application may be made, s 13(3)(a) of the Act provides that it "shall be made within 7 days after the entitlement of the claimant to make an adjudication application first arises under [s] 12". Suppose the claimant makes an adjudication application on the eighth day after his entitlement arises, does not the word "shall" connote a mandatory requirement? One may reasonably contend that it should be treated as a directory requirement because, far from prejudicing the respondent, it actually benefits him in so far as the delay in making the application results in a corresponding delay in his having to pay a progress payment claim.*

59 By way of rebuttal, it may be argued that even if the mandatory force of the words "shall be made within 7 days" prevents an application from being made outside the prescribed period, no harm will be caused to the claimant because the claimant can still include the undetermined payment claim in a fresh payment claim where the application for the appointment of an adjudicator complies with s 13(2) of the Act. The same reasoning would also apply to an invalid adjudication determination that has been set aside by the court as such payment claims would not have been rejected by the adjudicator on the merits. In other words, a breach of a mandatory provision of the Act will not bar the claimant from serving fresh payment claims, but only delay their adjudication in accordance with the provisions of the Act.

60 In this connection, attention may be drawn to the observations of McDougall JA in *Chase Oyster* at [233], with reference to the NSW Act, that:

... the question of compliance with s 17(2)(a) is both relatively simple in a factual sense and something peculiarly within the knowledge of the claimant. It is unlikely that the trap will be sprung by some esoteric piece of factual or legal analysis which has the result that a determination is found to be void.

61 As no issue has arisen in this appeal that requires this court to determine the nature of the requirement under s 13(3)(a) of the Act, we shall leave it for further consideration in an appropriate case in the future. However, it seems to us in the context of the different provisions and structure of the Act (as compared with the NSW Act) that the characterisation of an essential condition in *Brodyn* as a condition the breach of which would invalidate an adjudication is substantially the same as the characterisation of a mandatory condition in *Chase Oyster* the breach of which would lead to the same result.

[emphasis added]

17 The Court of Appeal observed that a failure to give notice of an intention to apply for adjudication as required under s 13(2) of the Act will render the adjudication application invalid. With regard to s 13(3)(a), the court considered some possible arguments for and against a finding that s 13(3)(a) is a mandatory requirement but left the question open. Subsequently, in *RN & Associates Pte Ltd v TPX Builders Pte Ltd* [2012] SGHC 225, although the issue of the nature of s 13(3)(a) was not raised, Andrew Ang J, made the following pertinent observations (at [54]):

... s 16(2) of the SOP Act circumscribes the jurisdiction of an adjudicator by laying out the circumstances wherein an adjudicator *must* reject an adjudication application, *viz*, where the application does not comply with s 13(3)(a), (b) or (c) of the SOP Act. ...

18 Section 16(2) reads as follows:

(2) An adjudicator shall reject —

(a) any adjudication application that is not made in accordance with section 13(3)(a), (b) or (c); and

(b) any adjudication response that is not lodged within the period referred to in section 15(1).

19 In my view, reading s 13(3)(a) with s 16(2), a breach of s 13(3)(a) is a ground for the setting aside of a determination in a case where the adjudicator failed to reject the adjudication application despite the breach.

20 I note the two points stated by way of preliminary analysis in *Chua Say Seng* (at [58]-[59]), namely, that: (1) the delay does not prejudice and in fact benefits the respondent in so far as a delay in making an application results in a corresponding delay in his having to pay a progress payment claim; and (2) the rebuttal that even if s 13(3)(a) was viewed as a mandatory requirement, no harm will be caused to the claimant because the claimant can still include the undetermined payment claim in a fresh payment claim.

21 I would respectfully add that in certain circumstances, a claimant does risk considerable disadvantage if his adjudication application is rejected for breach of s 13(3)(a) even though his undetermined payment claim may be included in a subsequent fresh payment claim.

22 Consider a situation where a payment claim has gone unanswered in that no payment response is given. If the matter proceeds for adjudication, the claimant will very likely succeed as s 15(3) proscribes the respondent from including in the adjudication response, and the adjudicator from considering, any ground for refusing payment which has not already been specified in the payment response. Section 15(3) reads as follows:

(3) The respondent shall not include in the adjudication response, and the adjudicator shall not consider, any reason for withholding any amount, including but not limited to any cross-claim, counterclaim and set-off, unless —

(a) where the adjudication relates to a construction contract, the reason was included in the relevant payment response provided by the respondent to the claimant; or

(b) where the adjudication relates to a supply contract, the reason was provided by the respondent to the claimant on or before the relevant due date.

23 The effect of s 15(3) is such that a respondent's position is locked in if the matter proceeds for adjudication. Therefore, in a situation where a payment claim goes unanswered in that the respondent has not given a payment response, his position is locked in at the adjudication stage and the claimant will likely succeed. If, however, the adjudication application is rejected and the claimant tries to recover by making the undetermined payment claim a part of a fresh payment claim, the respondent will have another opportunity to issue a payment response. The claimant therefore risks a real disadvantage in such a situation.

24 The claimant is also disadvantaged, although to a lesser extent, if his adjudication application is rejected *even if* the respondent had previously given a payment response because if he tries to recover by issuing a fresh payment claim, the respondent is given another opportunity to augment his payment response and to include whatever grounds he had not previously included.

25 Hence, s 13(3)(a) has a real bite if it is mandatory. If a claimant lodges an adjudication application late and it is rejected for breach of s 13(3)(a), he risks the foregoing disadvantages.

26 But, be that as it may, whether s 13(3)(a) should be read to be directory or mandatory ultimately turns, as the Court of Appeal in *Chua Say Eng* emphasises, on the legislative intent. In this regard, s 16(2) in stating that the adjudicator "shall reject" the adjudication application if there has been a breach of s 13(3)(a) uses clear language which demonstrates that the legislative intent is for s 13(3)(a) to be treated a mandatory.

27 Furthermore, s 16(2) is directed at the adjudicator. If s 13(3)(a) was directory and not mandatory, an intolerable uncertainty which would considerably compromise the regime under the Act

would be introduced. The adjudicator would be called upon to decide when an application is late but forgivable so as to accept the adjudication application, and late and unforgivable so as to reject it. In the continuum of time, apart from the extreme cases, there would be little predictability and considerable uncertainty as to where such a distinction will lie. In contrast, if s 13(3)(a) was mandatory, the certainty introduced by the bright line test in s 13(3)(a) which excludes any adjudication application outside of the seven day window period leaves no room for doubt and is more consistent with and emblematic of the regime.

28 For these reasons, I conclude that an adjudication determination may be set aside if there has been a breach of s 13(3)(a), *however slight the breach*.

29 It leaves me now to consider whether the Adjudication Application was indeed lodged out of time with the result that the Determination should be set aside. Whether the Adjudication Application was lodged out of time turns on an interpretation of the Contract. If cl 49 of the Contract is taken to cover payment responses as well as payment certificates, then the duration in which a response has to be provided will be the contractually stipulated period of ten days. Coupled with the seven day dispute settlement period, the Adjudication Application would have been lodged in time.

30 Clause 49 reads as follows:

The Sub-contractor shall submit interim progress claim base on work done upto [*sic*] the date of claiming on every **25th of the month**. The Contractor shall within 10 days after receipt of the Sub-Contractor's claim, evaluate and issue a Sub-Contractor's Payment Certificate certifying the amount of work done, such sums as may be properly due and payable, less the **retention money of 10%** upto [*sic*] a maximum of 5% of the contract sum. ... [emphasis in original]

31 SK argues that in the absence of an express clause which provides that a payment certificate is to be deemed as a payment response, cl 49 must be read to refer to a payment certificate and nothing more. SK refers to cl 32.2(2) of the Public Sector Standard Conditions of Contract for Construction Works 2008 as an example of such a deeming clause. That clause reads as follows:

The Payment Certificate issued under Clause 32.2(1) shall be deemed the Payment Response from the Employer, which meaning shall be the same ascribed in the Act if the Employer does not provide any response within 14 days from the Payment Claim. Where the Employer provides a Payment Response in compliance with the Act within 14 days from the Payment Claim, the Employer's Payment Response shall take precedence over the Payment Certificate issued pursuant to Clause 32.2(1) and shall constitute the Payment Response defined in the Act.

32 In my view, of course the inclusion of such a clause would make it clear that the contractual provision is not limited in its reference to a payment certificate but also refers to a payment response. However, the absence of such a clause does not lead to the conclusion that the contractual provision therefore does not refer as well to a payment response. Ultimately, it remains a matter of the *construction* of the contract.

33 In this regard, the following observation by Chow Kok Fong in *Security of Payments and Construction Adjudication* (LexisNexis, 2005 Ed) at p 181 is apposite:

...Where the terms allow the respondent-owner to assert his cross-claims and defence of set-offs on the certificate for defects, liquidated damages for delay and any other claim, ... it is conceivable that a progress payment certificate may be tendered as a payment response.

34 In other words, where the terms of the contract attribute to the payment certificate characteristics of a payment response, this points, *as a matter of construction*, to the intention of the parties to treat the payment certificate as a payment response.

35 In my view, cl 49 does not provide for certification by an architect or engineer as is usually the case. Instead, certification is made by the contractor, *ie* SK. In certifying the sums "as may be properly due and payable", cl 49 contemplates allowing SK to include, *inter alia*, set-offs and cross-claims. On a construction of the Contract, although cl 49 ostensibly refers to a "Payment Certificate", even in the absence of a deeming provision to equate such a payment certificate with a payment response, cl 49 does refer *in substance* to a payment certificate which may function as well as a payment response within the meaning of the Act.

36 I appreciate the argument of FL that the certificates SK had issued in their course of dealing made it clear that the parties had intended the certification process to serve the same purpose as that of a payment response. In particular, SK had set off contra-charges in Interim Payment Certificates No 1 to 7 and had made deductions for liquidated damages for Certificates No 6 and 7. In so arguing, FL was relying on SK's subsequent conduct in seeking to persuade the court that cl 49 had envisaged a payment certificate which was to also function as a payment response.

37 I note that the Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 had observed (at [132(d)]) that "there should be no absolute or rigid prohibition against evidence of previous negotiations or subsequent conduct, although, in the normal case, such evidence is likely to be inadmissible." But, in this case, I found such subsequent conduct to be unhelpful in interpreting the Contract. This is so because SK could have simply been responding in a way which would satisfy the *parallel* requirements under the Contract and the Act.

38 In any event, for the reasons I had already expressed (at [30]-[35]), I took the view that cl 49 referred both to a certificate as well as payment response within the meaning of the Act. In the circumstances, I found that the contractual period for the serving of the payment response under cl 49 applied with the result that FL had lodged the Adjudication Application within time.

Conclusion

39 For the foregoing reasons, I dismiss this application to set aside the Determination.

40 I will hear the parties on costs.