

Hong Kiat Construction Pte Ltd v Ngiam Benjamin
[2009] SGHC 158

Case Number : OS 1184/2008, RA 418/2008
Decision Date : 07 July 2009
Tribunal/Court : High Court
Coram : Choo Han Teck J
Counsel Name(s) : Eugene Tan (Drew & Napier LLC) for the plaintiff/respondent; Tan Chee Kiong (Seah Ong & Partners) for the defendant/appellant
Parties : Hong Kiat Construction Pte Ltd — Ngiam Benjamin

Arbitration

7 July 2009

Choo Han Teck J:

1 This was an appeal by the defendant against the order of the Assistant Registrar allowing the plaintiff's application to appoint Mr Johnny Tan as an arbitrator in an on-going arbitration between the plaintiff and the defendant. The plaintiff was the builder for the house at 8 Brizay Park belonging to the defendant. A dispute arose between the parties from that contract and the plaintiff claimed \$177,237.30 against the defendant who counter-claimed for \$280,500. The claim and counter-claim was being arbitrated by Mr Yang Yung Chong. The Assistant Registrar also ordered costs to be paid by the defendant to the plaintiff fixed at \$4,000. The arbitration was commenced by the plaintiff in January 2000 pursuant to Clause 37 of the Singapore Institute of Architects Conditions of Contract in the contract between the parties dated 14 July 1998. Mr Yang was appointed sole arbitrator about March 2000. The process was long drawn and the interlocutory proceedings took place over six years. On 15 December 2006 the plaintiff's then solicitor and the defendant's solicitor attended before Mr Yang for directions. These included the exchange of affidavits and the questions and answers to and by the architect by 15 March 2007, and written submissions by 15 May 2007. The parties did not comply with the directions in that the affidavits and questions and answers by the parties were not exchanged by 15 March 2007.

2 Mr Yang then wrote to the parties on 29 March 2007. The letter stated as follows:

I refer to my letter dated 15 December 2006 and to the directions given for the conduct of the arbitration proceedings.

As the parties have yet to comply with the directions, please let me know if the parties have agreed or will be agreeing on varied directions.

Unless I hear from either of the parties within 7 days from date hereof, I shall consider my appointment as arbitrator as having been terminated by conduct and thereafter close my file on this matter.

On 5 April 2007 the plaintiff's then solicitor called Mr Yang to ask for more time. Nothing more happened until 8 June 2007 when Mr Yang wrote to ask the parties if the plaintiff was proceeding with the matter. His letter stated:

I refer to my letter dated 29 March 2007 and to the telephone conversation that I had with Mr David Ong on 5 April 2007.

Please let me know in due course whether the Claimants are in a position to proceed with the matter.

The defendant wrote on 13 June 2007 expressing surprise that Mr Yang still considered himself the arbitrator. The defendant's letter is set out for convenience:

1. We refer to your letter dated 8th June 2007.
2. We are surprised by the same as your letter dated 29th March 2007 stated that you shall consider your appointment as terminated after seven days thereafter of neither party responds to the same.
3. There has been no written respond to date and our client has assumed that the matter has been ended. Hence, he has allowed the expert's request to destroy his file. Our client is severely prejudiced in this aspect. On our part, we have also closed our file and rendered our final invoice.
4. Our client's position is that the arbitration has been terminated accordingly.
5. Thank you for your attention.

3 On 10 July 2007 Mr Yang wrote to say that he had given the parties reasonable opportunities to proceed with directions and since that did not take place, he said "I am hereby treating my appointment as terminated." Hence the plaintiff applied under s 8 (1)(b) and s 8(2) of the Arbitration Act, Cap 10 (1985 Ed), which was the applicable version, to appoint a new arbitrator. The application was allowed by the Assistant Registrar. The defendant appealed against that order on the ground that the arbitration proceedings had been terminated, alternatively, that s 8(1)(b) applied only if the arbitrator refuses to act or is incapable of acting, or dies. Counsel for the defendant argued that none of these situations applied since the arbitrator did not refuse to act. He argued that the arbitration had been terminated by the parties' agreement. Finally, counsel submitted that this court should exercise its discretion by virtue of the plaintiff's conduct not to allow the application.

4 I agree with counsel for the plaintiff that the arbitrator terminated his own appointment which is not the same as the parties having terminated the arbitration by agreement. I also noted that there had been undue delay but it appeared from the record that it was due to the protracted sloth on both sides although eventually a large part of the blame lay with the then solicitor for the plaintiff. I accept the plaintiff's explanation that its solicitor did not notify it of the progress of the proceedings, especially of Mr Yang's letter of 29 March 2007. In this regard, the plaintiff might, had this application failed, have recourse against the solicitor in question, but that has some very difficult problems, namely, that to succeed against the solicitor the plaintiff will have to prove that its claim against the defendant would have succeeded. That would mean instituting the claim afresh in court. I am of the view that the better recourse was to have the solicitor show cause why he should not bear the costs of this application and appeal. Neither counsel appeared to want to take this route. There is no basis on the record that the parties had agreed to terminate the arbitration and I do not think that the arbitrator could have unilaterally terminated his own appointment. Furthermore, I found it strange that the defendant through counsel declared that the defendant would abandon his counterclaim if the court agrees that the arbitration is at an end. The defendant's counterclaim far exceeds the plaintiff's

claim. Finally, both counsels submitted that were this appeal be dismissed, they would prefer to re-appoint Mr Yang as arbitrator since he was au fait with the case.

5 For the reasons above, this appeal is dismissed.

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