

AM Associates (Singapore) Pte Ltd v Laguna National Golf and Country Club Ltd
[2009] SGHC 260

Case Number : OS 296/2009, RA 191/2009
Decision Date : 23 November 2009
Tribunal/Court : High Court
Coram : Judith Prakash J
Counsel Name(s) : Ng Yuen (Malkin & Maxwell LLP) for the plaintiff; Lim Lian Kee (Chong Chia & Lim LLC) for the defendant
Parties : AM Associates (Singapore) Pte Ltd — Laguna National Golf and Country Club Ltd
Building and Construction Law

23 November 2009

Judith Prakash J:

Introduction

1 This registrar’s appeal came before me as a result of the refusal of the Assistant Registrar to set aside a judgment entered by A.M. Associates (Singapore) Pte Ltd (“AMA”), the plaintiff herein, against Laguna National Golf and Country Club Ltd (“Laguna”), the defendant herein, under s 27(2) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) (“the SOP Act”). I dismissed Laguna’s appeal and Laguna now wishes to take its case to the Court of Appeal.

2 The background to the dispute is as follows. In July 2008, Laguna employed AMA to undertake certain project management work in relation to a construction project. On 15 January 2009, AMA served its Payment Claim No 1 (“Payment Claim 1”) on Laguna. Payment Claim 1 was in respect of the work period from July 2008 to 2 December 2008. The contract between the parties provided for stage payments and Payment Claim 1 covered three stages *viz* Stage 1 (upon approval of concept design), Stage 2 (WP submission) and Stage 3 (URA approval of WP submission). The total amount stated in Payment Claim 1 was \$1,027,000.

3 Under the terms of the SOP Act, Laguna should have issued a payment response to relation to Payment Claim 1 by 22 January 2009. No such payment response was made and on 5 February 2009, AMA served on Laguna a notice of intention to apply for adjudication. This application was duly made on 6 February 2009 and on 13 February 2009, the Singapore Mediation Centre (“SMC”) nominated Mr Chow Kok Fong to be the adjudicator (“the Adjudicator”). The Adjudicator accepted the nomination on the same day. On 16 February 2009, Laguna lodged an Adjudication Response with the SMC.

4 The Adjudicator convened an adjudication conference on 23 February 2009. This was attended by representatives of both parties and their respective counsel. Following the conclusion of the adjudication conference, the Adjudicator directed the parties that if they wished to make any further points, such submissions had to be filed no later than 5pm on 24 February 2009. The next day, both parties did file supporting documents and comments. The Adjudicator issued his Adjudication Determination on 2 March 2009. He determined (*inter alia*) that Laguna was to pay AMA the sum of \$1,027,000 inclusive of GST (the Adjudicated Amount) by 9 March 2009.

5 Laguna was not satisfied with the Adjudication Determination. It did not, however, make an application for an adjudication review. Nor did it pay the Adjudicated Amount or any part of the same. Accordingly, on 12 March 2009, AMA filed the originating summons herein for leave to enforce the Adjudication Determination against Laguna and for judgment to be entered in its favour for the Adjudicated Amount with interest and costs. On 16 March 2009, AMA obtained an order in terms of its summons. Laguna's application to set aside the Adjudication Determination and the judgment was filed about three weeks later.

The Adjudication Determination

6 The Adjudication Determination is a fairly detailed document (consisting of some 34 pages of text) in which the Adjudicator sets out the reasons for his determination. I will summarise the main points of the Adjudication Determination.

7 First, the Adjudicator dealt with the four jurisdictional grounds on which Laguna had challenged the Adjudication Application. These were as follows:

- (a) that the Adjudication Application had been served on the wrong party;
- (b) that Payment Claim 1 was not a payment claim for a progress payment under s 10 of the SOP Act;
- (c) that the Adjudication Application had been made out of time; and
- (d) that a claim relating to project management services in the manner that was defined in the contract between the parties did not fall within the purview of the SOP Act.

8 In relation to the first challenge, Laguna submitted that the subject contract had been made between AMA and an entity named Laguna Golf Resort Holding Pte Ltd and not between AMA and Laguna. The Adjudicator discussed the submissions, the law and the facts in paragraphs 21 to 31 of the Adjudication Determination and concluded that on the basis of both the construction of the SOP Act and the conduct of the parties, AMA was entitled to deal with Laguna for the purpose of the project and that it would have been inexplicable had AMA served Payment Claim 1 on any other entity.

9 In paragraphs 34 to 42 of the Adjudication Determination, the Adjudicator dealt with the contention that Payment Claim 1 was not a payment claim for progress payment under s 10 of the SOP Act. The argument was advanced on two grounds. The first was that Payment Claim 1 was not served on the person who was liable to make payment under the contract. This argument had been dealt with in relation to the first challenge. The second ground was that s 10(1) of the SOP Act entitled a claimant to serve only one payment claim in respect of a particular progress payment entitlement in a contract. Laguna submitted that Payment Claim 1 was a payment claim made in respect of progress payments for stages 1, 2 and 3 of the consulting work and this was identical to three earlier payment claims which AMA had made. In dealing with this point, the Adjudicator discussed the Australian cases of *Doolan (Sandra & Stephen) v Rubikcon* [2007] Adj LR 07/10 ("*Doolan*") and *Brodyn Pty Ltd v Davenport* [2004] 61 NSWLR 421 ("*Brodyn*") and also went into the facts of the Adjudication Application. He concluded that Payment Claim 1 could not be said to be a mere repetition of the earlier claims and that unlike *Doolan*, this was not a situation where the claimant reissued the claim because it had failed before a prior adjudicator. He therefore determined that Laguna's challenge to the Adjudication Application on this ground failed.

10 The Adjudicator also mentioned that AMA had offered an alternative argument against this aspect of Laguna's challenge. It had suggested that an invoice was a different instrument from a payment claim for the purpose of the SOP Act. The Adjudicator did not find it necessary to decide on the merits of this argument since he had already made his decision on the validity of Payment Claim 1.

11 The third challenge, *ie* that the Adjudication Application had been made out of time, was rejected since the validity of Payment Claim 1 had been upheld. Payment Claim 1 was made on 15 January 2009 and by virtue of s 11(1) of the SOP Act, the due date for making the payment response was therefore 22 January 2009. The dispute resolution period for the purpose of s 12(2) expired on 31 January 2009. Accordingly, the Adjudication Application had to be served not later than seven days after this date, that is to say 7 February 2009. Since AMA lodged the Adjudication Application on 6 February 2009, the Adjudicator ruled that it was not served out of time.

12 The final challenge involved construing s 3 of the SOP Act to ascertain whether the services provided by AMA to Laguna pursuant to the contract fell outside the purview of the SOP Act. The Adjudicator did not accept Laguna's submissions on this point. He found that its challenge was unsustainable on the basis of a proper reading of s 3 and the scope of services as set out in the contract between the parties.

13 The Adjudicator then turned to the substantive issues surrounding the claim in the Adjudication Application. He noted that Laguna had not furnished the payment response by 22 January 2009, the deadline for such response in the circumstances of this case. He then considered AMA's contention that having failed to furnish the payment response, by virtue of s 15(3) of the SOP Act, Laguna was not entitled to advance any reason for withholding payment in the Adjudication Response. Having considered the arguments and cases cited to him, the Adjudicator concluded that:

- (a) first, in a s 15(3) situation, an adjudicator would be precluded from considering any reasons which the respondent may advance beyond matters of jurisdiction and procedural regularity; and
- (b) second, the adjudicator would then have to ensure that (i) the adjudication process was not abused, (ii) there were no manifest flaws in the payment claim and (iii) the adjudication application complied with the SOP Act and the provisions of the underlying contract.

14 The Adjudicator found that he was precluded from considering the material and representations made by Laguna in support of its attempt to justify the withholding of the claimed amount since it had not filed a payment response. He then went on to consider the contract and whether the circumstances of the case entitled AMA to make a payment claim for progress claim. He found that it did and that the requirements set out in [13(b)] above had been met. He was satisfied that AMA's claim should be accepted at its face value and that it was entitled to receive \$1,027,000 from Laguna.

The court proceedings to set aside the Adjudication Determination and the judgment

15 According to the affidavit of Peter Kwee Seng Chio filed in support of Laguna's application to set aside the judgment obtained by AMA and the Adjudication Determination, the grounds of the application were as follows:

- (a) Laguna was not the person who was liable to make payment to AMA under the contract;
- (b) the SOP Act only empowered the Adjudicator to determine the Adjudicated Amount, the

date of payment, the interest and the costs and did not empower him to determine any question of law;

(c) the Adjudicator had no jurisdiction to adjudicate on the Adjudication Application as there was no valid payment claim; and

(d) the Adjudicator had failed to comply with the rules of natural justice because in coming to the Adjudication Determination, he had failed to take into consideration and/or give proper weight to material evidence tendered by AMA which showed a discrepancy in AMA's claim, in particular, its claim that the "Concept Design" was approved.

16 The Assistant Registrar who heard Laguna's application rejected these grounds:

(a) he did not find Laguna's arguments that it was not a party to the contract and hence not a party liable under the SOP Act, to be persuasive;

(b) he agreed with the Australian authority of *Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd* [2005] NSWSC 1152 ("*Shellbridge*") which had decided that an issue of "no contract" could be determined by the adjudicator;

(c) the challenge on the basis that Payment Claim 1 was invalid was not meritorious and the Australian decisions cited by Laguna in support were distinguishable because the SOP Act made specific reference to "invoice"; and

(d) the argument that the Adjudicator had failed to consider material evidence was not meritorious and many of the arguments canvassed under this head were not issues that were raised before the Adjudicator.

It should also be noted that the Assistant Registrar considered the Adjudicator's reasoning on various points and found no fatal flaw in such reasoning. He cited with approval the observation of Palmer J in *Brookhollow Pty Ltd v R and r Consultants Pty Ltd* [2006] NSWSC 1 ("*Brookhollow*") (at [65]):

If a fatal flaw in compliance with the Act or the contract is manifestly apparent from a consideration of these matters, the adjudicator will refuse to make a determination in favour of the claimant. If no fatal flaw appears, the adjudicator is entitled to make a determination in favour of the claimant even if a more penetrating analysis of the claim and the provisions of the Act or the contract would have revealed a flaw upon which the respondent could successfully have relied. In this regard, it must always be borne in mind that the adjudicator's determination is not final and binding on the parties; whatever defence to the claim the adjudicator may have overlooked in making the determination in this summary and provisional way may always be taken up by the respondent in civil proceedings to determine liability on a final basis...

17 When Laguna's appeal came up before me, Laguna contended that the decision below was wrong on the grounds that:

(a) the Adjudicator had had no jurisdiction to adjudicate the Adjudication Application because the same had been made in relation to an invalid payment claim; and

(b) the Adjudicator had failed to comply with the rules of natural justice.

The arguments that Laguna was not the party liable under the contract and that the Adjudicator had not had the jurisdiction to determine questions of law were not raised on the appeal.

My decision

Invalid payment claim contention

18 AMA argued that the court when hearing an application to set aside an adjudication determination should limit its consideration to issues of jurisdiction and natural justice and not delve into the merits of the case as determined by the adjudicator. This was because the court's jurisdiction to set aside was not an appellate jurisdiction. In this respect, counsel cited *Shellbridge* where Barrett J had noted (at [4]) that the avenues of attack upon an adjudication application under the Building and Construction Industry Security of Payment Act 1999 of New South Wales ("the NSW Act"), which is the New South Wales equivalent of the SOP Act, were limited to showing that there had been:

- (a) a failure to comply with the basic and essential requirements for the existence of a valid determination;
- (b) the lack of a *bona fide* attempt by the adjudicator to exercise the relevant power; and
- (c) a substantial denial of natural justice.

AMA also cited the decision of the Assistant Registrar Lim Jian Yi in *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2008] SGHC 159 to the effect that a court considering a setting aside application should not be concerned with substantive issues since the SOP Act provided a limited right of review of the substantive correctness of an adjudication determination through the adjudication review procedure. AMA submitted that *Shellbridge* was directly on point as it held that once the adjudicator had considered all relevant submissions and made a finding on (a) the existence of a contract under the SOP Act and (b) the validity of a payment claim even if it was an aggregate or re-composition of previous claims, the court should not disturb the finding and this was so even if the adjudicator's decision was an error of law. It noted Barrett J's observations in *Shellbridge*, where he said (at [22]):

Whether the adjudicator was right or wrong in the conclusion he reached on the question to which the no-contract submission were directed is beside the point for present purposes. The plaintiff accepts that neither error of fact nor error of law is capable of vitiating an adjudicator's decision. The only relevant question, in the context of the present discussion, is whether, in the words used in **Brodyn** at [57], "there is a failure by the adjudicator to receive and consider submissions, occasioned by breach of these provisions". ...

19 I agreed broadly with AMA's submissions although I must stress that I did not consider that the Australian requirement relating to the *bona fide* exercise of the adjudicator's powers applied in Singapore. I accepted that a setting aside application made under s 27(5) of the SOP Act did not have the characteristics of an appeal and that, accordingly, the court in considering such an application could not delve into the merits of the dispute that had been considered by the adjudicator. The court's jurisdiction was to ensure that the basic requirements essential for a valid adjudication determination had been met and that the adjudicator had conducted the adjudication in accordance with s 16(3) of the SOP Act. My views on the scope of the court's powers have been set out at length in my written judgment in *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2009] SGHC 257 ("*SEF Construction*"). I said there (at [41] to [46]):

41 In my judgment, bearing in mind the purpose of the legislation, the court's role when asked to set aside an adjudication determination or a judgment arising from the same, cannot be to look into the parties' arguments before the adjudicator and determine whether the adjudicator arrived at the correct decision. In this connection, I emphasise the intention that the procedure be speedy and economical. ...

42 Accordingly, instead of reviewing the merits (in any direct or indirect fashion), it is my view that the court's role must be limited to supervising the appointment and conduct of the adjudicator to ensure that the statutory provisions governing such appointment and conduct are adhered to and that the process of the adjudication, rather than the substance, is proper. After all, in any case, even if the adjudicator does make an error of fact or law in arriving at his adjudication determination, such error can be rectified or compensated for in subsequent arbitration or court proceedings initiated in accordance with the contract between the claimant and the respondent and intended to resolve all contractual disputes that have arisen.

...

45 Thus, I consider that an application to the court under s 27(5) must concern itself with, and the court's role must be limited to, determining the existence of the following basic requirements:

- (a) the existence of a contract between the claimant and the respondent, to which the SOP Act applies (s 4);
- (b) the service by the claimant on the respondent of a payment claim (s 10);
- (c) the making of an adjudication application by the claimant to an authorised nominating body (s 13);
- (d) the reference of the application to an eligible adjudicator who agrees to determine the adjudication application (s 14);
- (e) the determination by the adjudicator of the application within the specified period by determining the adjudicated amount (if any) to be paid by the respondent to the claimant; the date on which the adjudicated amount is payable; the interest payable on the adjudicated amount and the proportion of the costs payable by each party to the adjudication (ss 17(1) and (2));
- (f) whether the adjudicator acted independently and impartially and in a timely manner and complied with the principles of natural justice in accordance with s 16(3); and
- (g) in the case where a review adjudicator or panel of adjudicators has been appointed, whether the same conditions existed, *mutandis mutandi*, as under (a) to (f) above.

46 If the court finds that the answer to any of those questions is in the negative, then the adjudication determination and any judgment arising therefrom must be set aside. Whilst I note that s 16(3)(b) requires the adjudicator to avoid incurring unnecessary expense, I do

not consider that a failure to comply with that requirement should result in the setting aside of the adjudication determination since, even if unnecessary expense is incurred in connection with the adjudication, that is unlikely to affect the correctness of the determination as long as the adjudicator was independent and impartial and afforded the parties natural justice. ...

20 In support of its contention that Payment Claim 1 was not a valid payment claim, Laguna went into a detailed analysis of the facts and the earlier claims for payment at various stages which AMA had made to it. I did not find it necessary to examine these arguments in detail because of my decision as to the court's jurisdiction. It was not my place to determine whether Payment Claim 1 was a valid payment claim or not. This was an enquiry that fell squarely within the jurisdiction of the Adjudicator and it is one that he recognised and dealt with. What the court would be concerned with is whether prior to making an adjudication application the claimant had served a purported payment claim. In this case, Payment Claim 1 had been served by AMA and whether it was actually a "payment claim" within the meaning of that term under the SOP Act, was a mixed question of law and fact for the Adjudicator, who would be privy to the facts, to decide. As I also stated in *SEF Construction* (at [46]):

Similarly, although the SOP Act requires a payment claim to be served, whether or not the document purporting to be a payment claim which has been served by a claimant is actually a payment claim is an issue for the adjudicator and not the court. In this respect, I agree entirely with Hodgson JA's reasoning in *Brodyn* (at [66]):

... If there is a document served by a claimant on a respondent that purports to be a payment claim under the Act, questions as to whether the document complies in all respects with the requirements of the Act are generally, in my opinion, for the adjudicator to decide. Many of these questions can involve doubtful questions of act and law; and as I have indicated earlier, in my opinion the legislature has manifested an intention that the existence of a determination should not turn on answers to questions of this kind. However, I do not need to express a final view on this.

21 For the reasons given above, Laguna's first ground failed.

22 I should also like to observe that it would be helpful if the SOP Act or the regulations made thereunder contained a provision that payment claims made for the purposes of the SOP Act should be identified by an endorsement thereon to the effect that the document is a payment claim for the purposes of a claim under the SOP Act. There is such a requirement in the NSW Act but unfortunately it was not incorporated in the SOP Act. The SOP Act requires a respondent to file a payment response within a certain period after receiving a payment claim and if he fails to do so, he is unable to bring up and rely on his grounds for non-payment at the subsequent adjudication. Bearing in mind this sanction and the difficulty that a respondent sometimes has in identifying a document as a payment claim under the SOP Act, it would be fair that such a requirement was imposed. It would not cause the claimant any difficulty and would set out the position clearly for all parties and prevent tenuous objections to the validity of payment claims.

Failure to accord Laguna natural justice

23 There are two rules of natural justice: the first is that a man should not be the judge in his own cause and the second is that the judge or adjudicator or other arbiter must hear both sides of the dispute. The second rule is often referred to by its Latin tag, *audi alteram partem*. Laguna's

submissions, while not specifically identifying which rule of natural justice had been breached, appeared to refer to the second one.

24 Laguna submitted that the Adjudicator had failed to comply with the rules of natural justice in that in coming to the Adjudication Determination, he had failed to take into consideration and/or give proper weight to materials tendered by AMA which showed a discrepancy in AMA's claim, in particular, its claim that the Concept Design had been approved. Its submissions went into the evidence in order to establish the alleged discrepancy and it then argued that if the Adjudicator had given proper consideration and weight to such discrepancy and had taken into consideration the relevant evidence tendered by the parties, he would have held that all payment claim made by AMA had been made prematurely.

25 Although the paragraph above contains only a brief summary of Laguna's contentions, it can be gathered from such summary that what Laguna was complaining about was not really a failure on the part of the Adjudicator to hear both sides of the dispute but a failure on his part to decide the dispute as Laguna considered it should be decided. The *audi alteram partem* rule required the Adjudicator to receive both parties' submissions and consider them; it did not require him to decide the dispute in accordance with Laguna's submissions. It was clear from the Adjudication Determination that the Adjudicator had conducted the adjudication in accordance with the principles of natural justice: he had called an adjudication conference at which both parties were able to make their submissions and he had then given them the opportunity to make further written submissions, an opportunity which Laguna had availed itself of. Thereafter, as the Adjudication Determination itself made plain, the Adjudicator gave consideration to all points raised and he then came to certain conclusions for which he gave his reasons. However dissatisfied Laguna may be with those decisions, it cannot ask for the Adjudication Determination to be set aside because it considers the decisions to be against the weight of the evidence.

26 The principles of natural justice are concerned with the provision of a fair hearing to contending parties. They do not mandate any particular result. As long as the parties have been given a fair hearing, the decision cannot be set aside for failure to comply with natural justice. A party who is dissatisfied with the decision on its merits cannot use the principles of natural justice to have the decision set aside. In the scheme for adjudication set out by the SOP Act, a respondent who is dissatisfied with an adjudication determination can ask for a review adjudicator or review adjudication panel to be appointed to review the determination. If this is done, then the evidence can be revisited on the review and the review adjudicator may, if he sees fit, make a different decision from that made by the adjudicator. The SOP Act has provided a means for dissatisfied respondents to be reheard and that is the review adjudication; it is not the application to court for setting aside under s 27(5). The court cannot be asked under cover of an allegation of breach of natural justice to review the merits of the adjudicator's decision.

27 Accordingly, like the Assistant Registrar, I found that Laguna's arguments on breach of natural justice were devoid of merit.

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