JFC Builders Pte Ltd *v* Lioncity Construction Company Pte Ltd [2012] SGHCR 12

Case Number : Originating Summons 547 of 2012

Decision Date : 08 August 2012

Tribunal/Court : High Court

Coram : Chew Yi-Ling Elaine AR

Counsel Name(s) : Kishan Pillay (TSMP Law Corporation) for the plaintiff; Zhou Jingdi Cynthea (Rajah & Tann LLP) for the defendant.

Parties : JFC Builders Pte Ltd — Lioncity Construction Company Pte Ltd

Building and Construction Law

8 August 2012

AR Chew Yi-Ling, Elaine:

Introduction

1 In this Originating Summons ("OS 547"), JFC Builders Pte Ltd ("the plaintiff") sought to set aside an adjudication determination given in favour of Lioncity Construction Company Pte Ltd ("the defendant"), as well as an Order of Court in the Subordinate Courts granting leave to enforce the adjudication determination.

Facts

2 At the material time, the plaintiff was the main contractor of a building project for the erection of a hotel development. Pursuant to a letter of offer from the defendant to the plaintiff dated 12 May 2010 and accepted on 14 May 2010, parties entered into a contract in which the defendant was engaged as a subcontractor to carry out structural works ("the Structural Works Contract"). For the present purposes, the relevant terms of the contract were as follows:

> 7. Payment terms: claims shall be submitted monthly. Payment shall be made within 14 days upon receipt of progress claims.
>
> 8. This contract shall end upon full completion of structural works and successful inspection and acceptance by architectural trades. Defects Liability Period shall not apply.

On 26 June 2010, the defendant issued another letter of offer, this time for the supply of labour to undertake architectural works ("the Architectural Works Contract"). The plaintiff also accepted this. The contract provided as follows:

> 1. Payment terms: claims are to be submitted monthly. Payment shall be made within 14 days upon receipt of the progress claims.
>
> …
>
> 6. Schedule to be discussed upon confirmation.

7. Defects Liability Period shall ~~not~~ apply.

3 Pursuant to works carried out under the two contracts, the defendant submitted a payment claim to the plaintiff dated 15 December 2012. This payment claim ("Progress Claim No 7") related to works done up to 30 November 2010:

> We would like to submit herewith Progress Claim No. 6 [sic] for the work done as at 30 Nov 2010 for your perusal and certification:
>
> | | |
> |---|---|
> | 1 Contract Amount: | $5,065,000.00 |
> | 2 Previous Claims: | $1,008,041.37 |
> | 3 This Claim: | $ 164,197.58 |
> | 4 Accumulative Claim (2+3): | $1,172,238.95 |
> | 5 Previous Accumulative Payment Certified: | $811,984.61 |
> | 6 Less previous Accumulative Payment Certified (4-5): | $360,254.34 |
> | (a) GST (7%) | |
> | | $25,217.80 |
> | **7 Amount Due (4-5):** | $385,472.14 |
>
> Should you need any clarification on the quantities, please do free to contact our Mr Zhang Jian Dong.
>
> Kindly take note that the payment will be due on 31 Dec 2010 in accordance with the contract payment terms. We would be grateful if you could generously certify and make payment on time.

Progress Claim No 7 was never submitted for adjudication. The plaintiff also did not provide a payment response. Instead, it made payment of a sum of $125,000 to the defendant, received *after* the expiry of the period within which the latter would have been entitled to lodge a request for adjudication.

4 Subsequent to the plaintiff's payment, the defendant submitted another payment claim on 24 January 2011 ("Progress Claim No 8"). No works after 30 November 2010 were included in Progress Claim No 8. In fact, according to the defendant, no further works were carried out after 30 November 2010. Progress Claim No 8 read as follows:

> We thank you very much for the payment amounted to $125,000 today, however we note with concern that there is a significant shortfall of $251,722.14.
>
> We would like to submit herewith Progress Claim No. 8 which is identical to Progress Claim No. 7 for the work done as at 30 Nov 2010 for your certification and making payment:
>
> | | |
> |---|---|
> | 1 Contract Amount: | $5,065,000.00 |
> | 2 Previous Claim: | $1,172,238.95 |
> | 3 This Claim: | |
> | 4 Accumulative Claim (2+3): | $1,172,238.95 |

5 Previous Accumulative Payment Received:	$936,984.61
6 Less previous Accumulative Payment Certified (4-5):	$235,254.34
(a) GST (7%)	
	$16,467.80
7 Amount Due (4-5):	$251,722.14

In accordance with contract clause 7, all payment shall be made within 14 days upon receipt of our progress claims, that is, you shall make payment for this progress claim to us by 8 February 2011. In addition, this contract has no retention clause and we cannot accept retention deduction.

Kindly take note that you shall make payment response to us by 31 January 2011 in accordance with SOP Act and both parties shall manage to settle the disputes within the next 7 days, that is, by 8 February 2011.We respectfully believe that adjudication is a fair and reasonable process to deal with payment disputes, kindly please also take this letter as our notice of intention to apply for adjudication.

Moreover, we look forward to your acknowledge of the fact that we have completed the project structure with good progress and the entitlement of progress incentive amounted to $30,000 in accordance with contract clause 6.

We would be grateful if you could generously certify and make payment on time.

The plaintiff did not issue a payment response in respect of Progress Claim No 8 either.

5 On 14 February 2011, the defendant lodged its adjudication application in respect of Progress Claim No 8 with the Singapore Mediation Centre ("SMC"). By way of a letter dated 15 February 2011, SMC notified the plaintiff that the defendant had lodged an adjudication application and the plaintiff had 7 days to lodge its adjudication response. The plaintiff did not take up SMC's invitation.

6 Despite notification by email on 21 February 2011, fax on 23 February 2011 and telephone on 24 February 2011, the plaintiff did not attend the adjudication conference convened on 24 February 2011. The adjudication conference took place entirely without the plaintiff's participation. The plaintiff explanation was that it did not want to prejudice its position that a settlement agreement had been reached.

7 In his adjudication determination dated 1 March 2011, the adjudicator found that under s 10(4) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOPA"), the defendant was not precluded from including in Progress Claim No 8 the amount which had not been paid under Progress claim No 7 (see para 20). The adjudicator found that Progress Claim No 8 complied with the provisions of the SOPA. (see para 47). The adjudicator determined that the plaintiff should pay the defendant the sum of $204,734.09, interest, and ninety per cent of the costs of the adjudication. The difference between the amount awarded and the amount claimed was consequent on the adjudicator's finding that the defendant should not have included architectural works and incentive payments in Progress Claim No 8 (see para 71).

8 On 19 April 2012, the defendant filed Originating Summons No 141 of 2012 in the Subordinate

Courts, seeking leave to enforce the adjudication determination. On 18 May 2012, the defendant successfully obtained leave for such enforcement ("the 18 May Order"). Subsequently, on 8 June 2012, the present OS 547 was taken out to set aside the adjudication determination ("Prayer 1") and to set aside the 18 May Order ("Prayer 2").

The plaintiff's case

9 At the hearing before me, with regards to Prayer 1, the plaintiff submitted that there were conflicting decisions at common law as to whether the court could review the validity of a payment claim. It urged me to follow the position taken in *Sungdo Engineering & Construction (S) Pte Ltd v Italcor Pte Ltd* [2010] 3 SLR 459 ("*Sungdo*") and *Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) v Lee Wee Lick Terence (alias Li Weili Terence)* [2011] SGHC 109 ("*Chua Say Eng*") that such review could and should be undertaken. Assuming that the court could review the validity of a payment claim, the plaintiff's case was essentially that Progress Claim No 8 was not a valid payment claim for the purposes of the SOPA and therefore the adjudication determination should be set aside. It submitted that Progress Claim No 8 (a) was a repeat claim and (b) was served out of time.

10 With regards to Prayer 2, in written submissions, the plaintiff argued that the defendant failed to provide full and frank disclosure of material facts, especially the fact that a settlement agreement had been reached between parties.

The defendant's case

11 The defendant's first submission in relation to Prayer 1was that the court should refuse to review the merits of the adjudication determination. The defendant pointed out that in *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 ("*SEF Construction*"), it was held that the court's power in an application to set aside an adjudication determination was restricted to supervising the conduct of the adjudicator, and should not extend to a review of the merits of the adjudication determination. The defendant attempted to distinguish *Sungdo* on the basis that in that case, the document did not on its face appear to be a payment claim and the intention that such document be a payment claim was not transmitted to the recipient. As Progress Claim No 8 was clearly intended to be a payment claim and stated so on its face, the facts of the present case did not fall within the situation contemplated in *Sungdo*, and the position in *SEF Construction* should apply. Without pleading estoppel, the defendant also relied on the fact that the plaintiff had not availed itself of its right under s 18 of the SOPA to apply to the SMC for a review of the adjudication determination. It submitted that even if the court were to review the merits of the adjudication determination, such review ought to be restricted to grounds of *Wednesbury* unreasonableness (see *Associated Provincial Picture Houses Ltd v Wednesbury Corporatio*n [1947] 1 KB 223).

12 The defendant's second submission, in the event that the court reviewed the validity of Progress Claim No 8, was that the document was not invalid. The defendant agreed with the adjudicator that pursuant to s 10(4) of the SOPA, it was not precluded from including the unpaid amounts due in Progress Claim No 7 in its next claim. As the amounts in Progress Claim No 7 and Progress Claim No 8 were different, the latter did not constitute a repeat claim of the former. The defendant further argued that as Progress Claim No 7 had been issued within time, the proper reading of s 10(4) with reg 5(1) of the Building and Construction Industry Security of Payment Regulations (Cap 30B, 2006 Rev Ed, s 41) must be that Progress Claim No 8 did not violate the timelines set out under the SOPA regime.

13 On the point of Prayer 2, the defendant's written submission was that the proper process open

to the plaintiff would be to seek to enforce the terms of the settlement agreement by suing on it and not through a setting aside application.

My decision

14 On 18 July 2012, I delivered oral judgment in the present application. I now set out my grounds.

Prayer 1

Whether the court can review the validity of a payment claim

15 Section 27(5) of the SOPA clearly contemplates that a party may take out proceedings to set aside the adjudication determination provided he pays into court as security the unpaid portion of the adjudication amount that he was required to pay. However, the scope of the court's power of review under s 27(5), and in particular whether the court will consider the validity of a payment claim, has been the subject of some controversy at common law, no decision having been handed down by the Court of Appeal to date.

16 In the cases of *SEF Construction* (at [42] and [45]) and *AM Associates (Singapore) Pte Ltd v Laguna National Golf and Country Club Ltd* [2009] SGHC 260 ("*AM Associates*") (at [19]), the scope of review available under s 27(5) was narrowly circumscribed and the position was taken that no review of the validity of the payment claim was possible. The reasoning adopted was that the framework of the SOPA was intended to provide a speedy resolution and interim finality so that building and construction works could continue without interruption (*SEF Construction* at [38]). To allow parties to seek a substantive review of the adjudication determination in the courts, coupled with the prospect of multiple levels of appeal thereafter, would delay the process of dispute resolution, drive up costs and go contrary to the intentions of parliament (*SEF Construction* at [41]). In any event, parliament had already provided a process of adjudication review, which was absent from equivalent legislation in other jurisdiction, within which a substantive review of the merits of the adjudication determination could be undertaken (*SEF Construction* at [38]).

17 A slightly wider position was taken in *Sungdo* where it was held that the court could review the validity of a payment claim under s 27(5) of the SOPA. This was because the court had the power to "quash an adjudication order or declare it null and void on grounds of an error of law going to the jurisdiction of the statutory tribunal" (at [30]). If a payment claim were not valid, the power to appoint an adjudicator would not arise (at [32]). As such, the validity of the payment claim went towards the jurisdiction of the adjudicator and was an issue that the court could review under s 27(5) of the SOPA. However, while the court had the power to review the validity of a payment claim, (presumably to facilitate parliament's intention that the SOPA framework provide speedy resolution) where a document "[purported] to be a Payment Claim", the adjudicator's decision that it [satisfied] all the requirements of a payment claim should not be interfered with except on grounds of *Wednesbury* unreasonableness (at [34]). *Chua Say Eng* endorsed a similar but not identical position, which will be dealt with further below.

18 Having heard the submission of parties, I respectfully aligned myself with the *Sungdo* line of authority for a number of reasons. First, as noted by the judge, the court's supervisory powers over the adjudication process must necessarily mean that matters going towards jurisdiction may be considered. This ought to include the validity of a payment claim on which the SOPA's adjudication regime has been founded. To hold otherwise would mean that an adjudicator has the power to determine his own jurisdiction. It is unclear that parliament ever intended for this to be so. Second, while parliament intended for adjudication determinations to have interim finality as far as possible, it

was doubtful whether parliament intended for interim finality to apply in clear and obvious cases of error. That would be unjust, especially given that the person on whom a payment claim is served would be obliged to pay up upon an adjudication determination being made and enforced as if it were a judgment. If the defendant unjustly received payment and then went into liquidation, the plaintiff would have difficulty seeking recovery of moneys paid. Third, while lengthy appeals and delays to the adjudication process would go contrary to parliamentary intention to facilitate a speedy resolution, a balance could be struck if the court interfered with the adjudicator's finding of validity only in potential cases of obvious error, such as when allegations of *Wednesbury* unreasonableness were made out, or where the document did not purport on its face to be a payment claim. In my respectful view, the *Sungdo* line of authority struck the right balance in this regard. Fourth, while a process of adjudication review has been made available under the SOPA, this process is not open to all parties, but only to those who dispute a difference of more than $100,000 as opposed to what the adjudicator determined to be the sum payable. In any event, if the adjudicator at first instance had wrongly seized jurisdiction, on what basis would the SMC be appointing a second adjudicator to review the determination of the first? Neither adjudicator would have the jurisdiction to make the findings that would have been proper to be made. That would require the intervention of the court.

19 Turning to a related but different point, I did not accept the defendant's submission that *Sungdo* had to be confined to its facts as the judge in *Sungdo* had given no indication that he was confining the rule that the court could review the validity of a payment claim to only situations where the document in contention did not on its face purport to be a payment claim. If the defendant were correct, then *Chua Say Eng* would be wrongly decided as the judge saw fit to review the question of the validity of the payment claim in that case even though the document clearly stated on its face the words "Payment Claim No. 6".

Whether to set aside on the basis that Progress Claim No 8 was an invalid repeat claim

20 As seen from the text of Progress Claim No 8 set out above, the defendant had expressly invoked the SOPA regime and the document named itself as a progress claim. On an application of *Sungdo*, therefore, it was not open to me to disturb the adjudicator's findings on this point save on the grounds of *Wednesbury* unreasonableness. While I may have been inclined to take a different position from the adjudicator on the effect of s 10(4) of the SOPA, I did not find, on the facts of the present case, that the adjudicator's determination had been unreasonable in the *Wednesbury* sense. The adjudicator's findings on the effect of s 10(4) were not inarguable given that the sums claimed in Progress Claim No 7 and Progress Claim No 8 were numerically different.

21 I would also note that the present matter exemplifies why the adjudicator's determination on the point of validity ought not to be easily disturbed where the contested document purports in its face to be a payment claim. In the present instance, if I were to substantively review the adjudicator's findings on the validity of Progress Claim No 8, I would first have to consider as a matter of law whether a sum could be included in a fresh payment claim where no further works had been carried out after service of the original claim but the said sum had not been paid. I would also have to consider as a matter of fact what the nature of the works originally claimed and what the nature of the works claimed in the allegedly repeat claim were. This could entail a laborious process of looking at the breakdown of the claim and going into an understanding of how each item was incurred.

22 In the circumstances, I found there was insufficient basis to support setting aside the adjudication determination on the ground alone that Progress Claim No 8 was a repeat claim.

Whether to set aside on the basis that Progress Claim No 8 was time barred

23 In *Chua Say Eng*, one of the issues the court was concerned with was whether the payment claim had been served out of time. Significantly, *Chua Say Eng* represents an expansion of the ruling in *Sungdo* that the court can review the findings of the adjudicator in the sense that the judge did not appear to have contemplated that the *Wednesbury* unreasonableness criteria would apply to issues of time bar even if the concerned document named itself a payment claim. This was not surprising. The judge in *Chua Say Eng* at [49] had held that "payment claims for work done in a certain month must be served by the last day of the subsequent month". The SOPA requires the works claimed to be clearly stated on the payment claim. It also sets out a clear period within which a claim may be made. There would be little room for ambiguity so long as these statutory requirements that are pre-requisites to the founding of the adjudicator's jurisdiction were complied with. From that point, it would be a simple matter of mathematical calculation. Unlike a finding that a payment claim was a repeat claim, no lengthy fact finding exercise would usually have to take place.

24 In the present case, it was undisputed that Payment Claim No 8 was served on 24 January 2011 but the last date of works carried out was 30 November 2010. The only question that remained was whether the adjudicator was right to find that given Payment Claim No 7 had been served in time, Payment Claim No 8 was not time barred. I did not agree with the adjudicator's findings on this point. His findings effectively would mean that there is no time limitation for making a claim under the SOPA adjudication regime once an initial payment claim containing the disputed work has been served. The claimant would never be in a position of having to elect whether to pursue the adjudication process or not so long as fresh payment claims could be served even if no fresh works were taking place. Given that final payment claims may also be brought under the SOPA, the claimant would practically have carte blanche to indefinitely prolong the period within which it could trigger the adjudication process. That detracts from what parliament was trying to promote in instituting the SOPA regime, and places an unnecessary burden on the recipient of the payment claim. I also noted that the SOPA was meant to facilitate cash flow in the building and construction industry and not provide the claimant with an indefinite means of recourse for its claim. Before the period for adjudication expires, the claimant ought to take a business decision as to whether to proceed to adjudication or bear the risk of default. In any event, a claimant who chooses to bypass the adjudication process may nonetheless bring a suit for the recovery of moneys due.

25 Given the above, I granted Prayer 1of the plaintiff's application and set aside the adjudication determination on the basis that Progress Claim No 8 had been served out of time.

Prayer 2

26 During the hearing, I had queried counsel for the plaintiff whether it was appropriate that I hear an application for the setting aside of an order made in the Subordinate Courts. In my view, that would amount to a de facto appeal. Counsel for the plaintiff made a cursory attempt to convince me that on a reading of the Rules of Court, the setting aside of the determination and the order for enforcement should be heard together. That line of argument was not seriously pursued and in any event I was not convinced. Eventually, it emerged that his main argument lay in "practicality" and "convenience". I did not see how that was a basis for jurisdiction.

27 Given that counsel for the plaintiff failed to persuade me that I had jurisdiction over the setting aside of the 18 May Order, I declined to hear any arguments on the substantive merits of Prayer 2. I made no order on this prayer save that leave be granted to bring the application to set aside the 18 May Order in the Subordinate Courts. Counsel for the plaintiff asked if I would vary that to grant leave to bring an appeal in the High Court. I did not see how that was necessary. The procedural rules already entitle the plaintiff to bring an appeal, provided time has not run.

Conclusion

28 In light of the above, I granted Prayer 1 but made no order on Prayer 2 save that leave be granted to the plaintiff to take out an application to set aside the 18 May Order in the Subordinate Courts if necessary. I also took into account the fact that the plaintiff could have raised its objections far earlier by participating in the adjudication process but chose not to do so and awarded it only nominal costs.