IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 188

Originating Summons 778 of 2019

In the matter of section 27(5) of an Amended Adjudication Determination dated 30 May 2019 in Adjudication Application SOP/AA 144 of 2019

Between

Tong Hai Yang Construction Pte Ltd

… *Plaintiff*

And

Little Swan Air-Conditioning & Engineering Pte Ltd

… *Defendant*

JUDGMENT

[Building and Construction Law] — [Statutes and regulations] — [Building and Construction Industry Security of Payment Act] — [Adjudication determinations] — [Waiver]

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v
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16 August 2019 Judgment reserved.

Vincent Hoong JC:

Introduction

1 By this application, the Plaintiff seeks to set aside an Amended Adjudication Determination dated 30 May 2019, in which the Adjudicator determined, among others, that the Plaintiff was liable to pay $135,546.00 to the Defendant ("the AD"). Briefly, the Plaintiff disputes the Adjudicator's finding that it was liable to the Defendant for certain variation works which it contends fell outside the contract between the parties.

2 Having heard the parties, I dismiss the Plaintiff's application to set aside the AD.

Facts

3 By way of background, the Plaintiff was appointed by the Singapore Recreation Club ("the employer") as the main contractor for a construction project.[1] On 29 November 2017, the Plaintiff appointed the Defendant as its sub-contractor for a lump sum of $500,000.00 ("the Contract"). The scope of the Defendant's work related to Air-Conditioning and Mechanical Ventilation, Electrical, Fire Prevention and Protection System, and Additional Optional Works ("the Works").[2]

4 The completion certificate for the Works was issued on 11 June 2018.[3] On 22 March 2019, pursuant to the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOPA"), the Defendant served Progress Claim No 5 ("PC5") on the Plaintiff, claiming $174,601.00, of which $105,937.50 was for works it had carried out pursuant to 21 Variation Orders ("the VOs").[4]

5 The Plaintiff did not file a payment response to PC5.[5] Consequently, on 25 April 2019, the Defendant lodged Adjudication Application 144 of 2019 ("AA144").[6] On 30 May 2019, the Adjudicator issued the AD, which had been

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1 Lim Wei Ping's First Affidavit ("LWP1") p 3, para 4.

2 LWP1 pp 3 – 4, para 6; pp 146 – 152.

3 LWP1 pp 886 – 887.

4 LWP1 pp 766 – 770.

5 LWP1 p 4, para 8.

6 LWP1 p 5, para 9.

amended, in which he determined, among others, that the Defendant was to be paid $135,546.00 by the Plaintiff, of which $69,437.50 was for the VOs.[7]

6 The Plaintiff seeks to set aside the AD on the sole ground that the Adjudicator had overlooked a material patent error in AA144 as he had accepted the VOs as being part of the Contract.[8]

The Plaintiff's case

7 In the main, the Plaintiff argues that the Adjudicator had wrongly included the VOs amounting to a total value of $69,437.50 in the AD. It submits that these VOs were not part of the Contract, and hence the Plaintiff ought not to be liable for them. This is because the quotations for the VOs were addressed directly to the employer's representative, EWC Engineers Pte Ltd ("EWC") *only*. Similarly, they were accepted and approved by EWC, and the Plaintiff was never addressed in any of the communications between EWC and the Defendant.[9] Therefore, it submits that the 'offer' and 'acceptance' in relation to the VOs were exclusively between the Defendant and EWC (on behalf of the employers), and constituted a separate contract for which the Plaintiff ought not to be liable.[10]

8 To support its submission, the Plaintiff refers to various clauses in the Contract. As a starting point, the contractual sum of $500,000 was specified to "be fixed and firm and shall not be subjected to adjustment for any fluctuation

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7 LWP1 p 37.

8 Plaintiff's Skeletal Submissions ("PSS") para 7.

9 LWP1 pp 911 – 985.

10 PSS paras 7 – 11.

in costs of labour, material …".[11] The lump-sum nature of the Contract is reiterated at clause 4.14, which provides:[12]

> Variations
> You are reminded that this is a lump sum fixed price sub-contract. It is deemed that your tender has allowed for all implied works necessary to be done even though not shown in the Drawings … No variation will be allowed unless due to changes in the requirements of the Authorities and/or in the design subsequent to the award.

9 Furthermore, in response to the Adjudicator's queries in relation to the VOs, the Defendant clarified that the procedure was as follows:[13]

> 6.1 Verbal instructions to carry out additional work were issued by [EWC].[14]
>
> 6.2 The [Defendant] would submit quotations for the additional works raised.
>
> 6.3 [EWC] would usually confirm within 3 days whether to proceed or not …
>
> 6.4 The [Defendant] would carry out the works immediately/shortly after confirmation …

10 Plainly, even on the Defendant's own evidence, the procedure in relation to the commissioning and carrying out of the VOs excluded the Plaintiff entirely.

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11 LWP1 p 147, clause 1.0.

12 LWP1 p 150.

13 LWP1 p 1931.

14 EWC is the M&E Consultants: see LWP1 p 1913.

The Adjudicator's determination in relation to the VOs

11 The Adjudicator considered the Plaintiff's arguments in relation to the VOs, but decided that they formed part of the Contract between the Plaintiff and Defendant. While the Adjudicator noted that the Defendant did not copy the Plaintiff in its quotations for the VOs that were sent to EWC, he opined that the Plaintiff had been put on notice as regards the VOs. Despite that, the Plaintiff failed to clarify whether the VOs were outside the scope of the Contract. As such, it was determined that the Plaintiff was liable for the VOs.[15]

12 In essence, the Adjudicator found that the Plaintiff's failure to clarify rendered it liable for the VOs. The question that flows from the Adjudicator's finding is whether the Plaintiff had such a positive duty to clarify, or to raise objections when put on notice of the VOs.

Waiver in the context of SOPA

13 The issue of whether a contractor's failure to clarify amounts to an estoppel which would bar the contractor from raising such objections during SOPA adjudication proceedings was considered by the Court of Appeal in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 ("*Audi Construction*"). In that case, the court observed that "mere silence or inaction will not normally amount to an unequivocal representation", although in certain circumstances, a person may owe a duty to speak, such that mere silence may amount to such a representation: *Audi Construction* at [58].

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15 LWP1 pp 33 – 36, paras 41 – 48.

14 In the context of SOPA, the court noted that a contractor who disputes a payment claim ought to raise its objection by filing a payment response. If it fails to do so, the contractor would be deemed to have waived its right to raise the objection before the adjudicator: *Audi Construction* at [63] and [66]–[67].

15 Here, it is undisputed that the Plaintiff had failed to file a payment response to PC5,[16] by which the Defendant had clearly claimed payment for the VOs.

16 Furthermore, documents sent by the Defendant to the Plaintiff *prior to* the disputes in relation to PC5 show that the Plaintiff had been put on notice of the VOs completed by the Defendant.

17 First, in a letter dated 12 July 2018, long before AA144 had commenced and a month after the issuance of the completion certificate on 11 June 2018, the Plaintiff acknowledged receipt of a form from the Defendant. In the form, the Defendant had set out the quotations for VO1 to VO19, being quotations which it had sent EWC for 19 out of 21 of the VOs claimed for under PC5.[17] Despite this, the Plaintiff did not raise any objections to the VOs.

18 Thereafter, in the Final Account Document submitted by the Defendant to the Plaintiff on 8 March 2019, the Defendant expressly claimed "Total Variation Order[s]" in the sum of $105,937.50. This $105,937.50 was in addition to the contractual sum of $500,000, bringing the "Total Value of Work

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16 LWP1 p 4, para 8.

17 Hoh How Hui Affidavit ("HHH") p 11.

Done" to $605,937.50.[18] The Plaintiff also acknowledged receipt of the Final Account Document without raising any issues concerning the VOs.[19]

19 The Plaintiff submits that both the 12 July 2018 letter and the 8 March 2019 Final Account Document were acknowledgment forms, and amounted merely to notifications by the Defendant to the Plaintiff of works it had carried out for the employer.[20] Being mere notifications, the Plaintiff's failure to respond to them ought not to constitute a waiver. I am unable to agree with this argument. While the 12 July 2018 letter was titled an "Acknowledgment Form", the Defendant had expressly specified therein that the VOs were with regard to the Contract, and not a separate contract which it had entered into with the employer:[21] The subject title of the letter was stated as:

> RE: Proposed Additions & Alterations to the Existing Singapore Recreation Club Involving Conversion of Guest Rooms to Function Halls, Board Room, Kitchen and Ancillary Facilities with Retention of a Temporary Bar at 1st Storey of LOT 00244W, 00245V and 00246P TS10 at B Connaught Drive (Downtown Core Planning Area)

This mirrors the Contract that was sent by the Plaintiff to the Defendant, which stipulated that the Defendant was being engaged as the Plaintiff's sub-contractor for:[22]

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18 LWP1 p 1892.

19 LWP1 p 1891.

20 PSS para 12.

21 HHH p 11.

22 LWP1 p 146.

> Proposed Additions and Alterations to Existing Singapore Recreation Club Involving Conversion of Guest Rooms to Function Halls, Board Room, Kitchen and Ancillary Facilities with Retention of a Temporary Bar at 1st Storey on Lot 00244W, 00245V and 00246P TS 10 at B Connaught Drive (Downtown Core Planning Area)

20 The 8 March 2019 Final Account Document is even clearer. In that document, the Plaintiff was stated as the Main Contractor, while the Defendant was named as the Nominated Sub-Contractor.[23] Neither EWC nor the employer was named, and the Project was again titled:

> Proposed Additions and Alterations to existing Singapore Recreation Club involving conversion of Guest Rooms … at B Connaught Drive (Downtown Core Planning Area)[24]

The Defendant's claim for $105,937.50 for the "Total Variation Order[s]" in the Final Account Document was therefore clearly with respect to the Contract between the Plaintiff and Defendant *only*. Yet, the Plaintiff failed to raise any objections to the Final Account Document.

21 In fact, on 26 April 2019, after PC5 had been referred to adjudication, the Plaintiff sent a letter to the Defendant, stating that the Defendant had accepted in a meeting between the parties that "*some* of [the Defendant's] VO items being [*sic*] invalid" [emphasis added].[25] As such, the Defendant allegedly agreed to have the "final account amount" to be evaluated.[26] The "VO items" referred to in the letter clearly relate to the VOs, as the "Amount Approved"

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23 LWP1 p 1892.

24 LWP1 p 1892.

25 LWP1 p 1886 at para 1.0.

26 LWP1 p 1886 at para 1.0.

reflected in Appendix A of the Plaintiff's letter included the Defendant's assertion that $69,437.50 of the VOs had been approved.[27] This $69,437.50 is precisely the amount which was allowed by the Adjudicator for the VOs in his AD.[28] The Defendant disputes the correctness of the Plaintiff's letter.[29] Nonetheless, the Plaintiff's letter, which was not made without prejudice and which refers to the VOs, amounts to a concession that only *some*, but not *all,* of the VOs were disputed.

22 Therefore, the Plaintiff's position before this court and the Adjudicator, in which it asserts that *all* the VOs fell outside its Contract with the Defendant and were therefore disputed, represents a marked departure from its position as conveyed in its 26 April 2019 letter to the Defendant.

23 Accordingly, quite apart from having remained silent by failing to respond to PC5 and issuing a query after having received the 12 July 2018 letter and the 8 March 2019 Final Account Document, the Plaintiff also appears to have accepted that it was liable for at least *some* of the VOs. Hence, the Plaintiff has clearly waived its right to object to the VOs on the basis that they fell outside of its Contract with the Defendant.

Patent error

24 However, this does not end the inquiry. As the Court of Appeal explained in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018]

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27 LWP1 p 1888.

28 LWP1 p 37, para 52.

29 LWP1 p 1889.

1 SLR 979 ("*Comfort Management*") at [34], "regardless of whether any payment response has been filed, an adjudicator has an *independent duty* to address his mind to and consider the true merits of a payment claim" [emphasis added]; where a payment response has not been filed, the main contractor is "permitted to challenge the payment claim before the adjudicator by highlighting *only* patent errors in the material properly before the adjudicator." [emphasis in original] The same sentiments were echoed in *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] SGCA 36 at [72], where it was reiterated that "a respondent who has not filed a payment response remains entitled to raise patent errors in the material properly before the adjudicator".

25 A patent error "is an error that is obvious, manifest or otherwise easily recognisable", and it must be "an error that is in the *material* that is properly before the adjudicator for the purpose of his adjudication" [emphasis in original]. Importantly, "[i]t is … strictly not an error that is *committed* by an adjudicator" [emphasis in original]: *Comfort Management* at [22]. Examples of what constitutes a patent error for the purposes of adjudication were considered in *Comfort Management* at [23]:

> An example of a patent error might be **[1]** where the contract adduced by the claimant in support of the payment claim is not even the contract between the parties. **[2]** Another example … is where "the documentary evidence submitted by the claimant plainly contradict[s] the claimed amount". **[3]** Yet another example might be where no supporting material or explanation whatsoever is adduced to support the payment claim. While in principle these are *not exhaustive examples of patent error, it is difficult to conceive of other forms of error that may properly be regarded as patent*. Ultimately, whether an error is properly characterised as patent will depend on the facts. But the point to be made here is that patent errors constitute by definition an *exceptional and extremely narrow category of errors*. [emphasis added]

26 This duty to consider patent errors flows independently from the adjudicator's duty to adjudicate, and "he must have at least some *positive* basis for his determination, and not simply lack a reason not to allow the claim" [emphasis in original] (*Comfort Management* at [56]). As s 2 of SOPA provides, a payment claim is a claim for "progress payment", which is defined as "a payment to which a person is entitled for the carrying out of construction work … *under a contract*" [emphasis added]. As a result, even if the Plaintiff may have waived its right to object to the VOs on the basis that they fell outside of its Contract with the Defendant, that does not entitle the Adjudicator to allow the sums claimed for the VOs as of right. The Adjudicator must independently assess whether the Defendant was entitled to payment for the VOs, insofar as there was no patent errors in the payment claim and its supporting materials.

27 When a patent error is allegedly overlooked by the adjudicator, the "central task of a respondent who seeks to set aside an adjudication determination … is to show the court that there are patent errors in the material properly before the adjudicator that the adjudicator failed to recognise". For example, if the adjudicator allowed a payment claim for which there is absolutely no supporting material, the court will not hesitate to conclude that

the adjudicator was merely rubber-stamping the claim, and had failed to recognise the patent error in the payment claim: *Comfort Management* at [81]. In this regard, the court's task is restricted to considering whether the adjudicator had failed to recognise a patent error in allowing a payment claim; the court cannot review the adjudicator's decision on its merits: *Comfort Management* at [94].

28 By way of example, in *Comfort Management*, OGSP claimed payment from Comfort for, among others, works done pursuant to Variation Order No 2. The adjudicator allowed OGSP's claim with respect to Variation Order No 2. Comfort argued that in so doing, the adjudicator had failed to take into account clause 11 of the parties' contract, which stipulated that OGSP had to first serve a written notice for variation works to be undertaken, and to seek Comfort's approval in writing to carry out such works *before* they could claim for additional payment. Comfort alleged that if the adjudicator had considered clause 11, it would have realised that OGSP had produced no evidence that the variation works were ordered by Comfort. However, the adjudicator had remarked explicitly that he had examined the documents in the adjudication application, and this meant that it could not be said that he did not have regard to the parties' contract. Thus, "the true substance of Comfort's argument was that OGSP produced *insufficient* documentation to support its claim on [Variation Order No 2], and that the adjudicator erred in nevertheless allowing the claim" [emphasis in original]. This, however, was insufficient to set aside the adjudicator's determination, as "to set aside the adjudicator's determination for that error is tantamount to asking the court to review his decision on the merits. This, the court cannot do": *Comfort Management* at [94].

29 Similarly, in this case, the Adjudicator clearly considered that the quotations and approvals for the VOs had not been copied to the Plaintiff. In fact, the Adjudicator noted that the "[Defendant] should also take some responsibilities for this miscommunication. The [Plaintiff] is the pay master for the [Defendant] in this sub-contract. All quotations made by the [Defendant] to architect/consulting engineers should have been copied to the [Plaintiff]."[30] Nonetheless, the Adjudicator allowed the Defendant's claim for the VOs as he found that the matter of the VOs had been drawn to the Plaintiff's attention from as early as when the Plaintiff received the 12 July 2018 letter, but the Plaintiff "did not seek to clarify whether these works were outside the scope of the [Contract]".[31] Furthermore, the Adjudicator considered EWC's instructions for the VOs, which were clearly marked as "variation orders". This, according to the Adjudicator, implied that they were intended as variations to the Contract, and that they were not intended to have been carried out in a separate contract, as alleged by the Plaintiff. Patently, the Adjudicator had considered the material before him in relation to the Plaintiff's allegation that the VOs fell outside of the Contract.

30 The materials that were considered by the Adjudicator are now before me. In substance, the Plaintiff is now seeking to re-adjudicate the Adjudicator's finding that the VOs formed part of the Contract. This is beyond the scope of the court's remit, and is properly to be considered by way of final determination of the dispute(s) between the parties, either (a) by a court or tribunal or some other dispute resolution body, or (b) by way of a settlement agreement between

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30 LWP1 p 36, para 49.

31 LWP1 p 33, para 41.

the parties: *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 ("*W Y Steel*") at [13] and [71].

31 The limited scope of the court's powers of review of ADs, as the Court of Appeal explained in *W Y Steel*, is "in keeping with the purpose of the [SOPA], which was to provide a fast and low-cost adjudication process to ensure that a contractor's cash flow was not disrupted by disputes arising from or relating to construction contracts" (at [13]). To allow a re-assessment of the merits of the Adjudicator's determination would unnecessarily prolong the adjudication process, thereby hampering the spirit and purpose of the SOPA regime.

Conclusion

32 For these reasons, I dismiss the Plaintiff's application to set aside the AD.

33 I will now hear parties on the question of costs.

Vincent Hoong
Judicial Commissioner

Choa Sn-Yien Brendon and Zachariah Chow Jie Rui (ACIES Law Corporation) for the plaintiff;
Chong Kuan Keong, Sia Ernest and Gan Siu Min Cheryl (Chong Chia & Lim LLC) for the defendant.