MAIN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 101

Originating Summons No 1448 of 2019
(Summons No 6129 of 2019)

In the matter of section 27 of the Building and Construction Industry Security of Payment Act (Cap 30B)

And

In the matter of Order 95, Rule 2 of the Rules of Court (Cap 322, Rule 5)

And

In the matter of Adjudication Application No SOP/AA 350 of 2019

Between

CFA

… *Applicant*

And

CFB

… *Respondent*

GROUNDS OF DECISION

[Building and Construction Law] – [Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev. Ed)] – [Setting aside adjudication determination] – [Fraud]

TABLE OF CONTENTS

CFA
v
CFB

[2020] SGHC 101

High Court — Originating Summons No 1448 of 2019 (Summons No 6129 of 2019)
Lee Seiu Kin J
20 January, 10 March 2020

19 May 2020

Lee Seiu Kin J:

Introduction

1 A judgment procured by fraud cannot stand: *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 at 712. An adjudication determination is no different. In this application, the respondent sought to set aside an adjudication determination ("AD") made pursuant to the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed)("the Act"). Its pleaded grounds were fraud and breach of natural justice. I accepted the former and rejected the latter. Accordingly, I granted the application and set aside the AD. I now give the grounds for my decision.

Facts

The parties and their contractual relationship

2 The parties are involved in the "[title of construction project redacted]" ("the Project").[1] The respondent ("CFB") is the sub-contractor tasked with procuring and installing façade panels for the project. CFB in turn subcontracted this work to the applicant ("CFA"). The terms of their contract were spelt out in a written agreement made on 3 August 2018 ("the Subcontract").[2] The written agreement comprised a letter of award and a set of standard conditions.

3 CFA was engaged to fabricate, deliver and install window panels at the Project site.[3] In total, the Subcontract called for 864 window panels, of which 489 panels remained undelivered by the time of the adjudication determination.[4] The present application centred on these 489 panels ("the missing panels").

Background to the dispute

4 CFA commenced adjudication proceedings on the basis that there had been no payment response to its payment claim served and dated 25 September 2019 ("the Payment Claim"). The adjudication application was lodged on 10 October 2019[5] and the adjudication itself was conducted over two days on 25 October 2019 and 6 November 2019.[6] CFA claimed that it had

---

1 Applicant's Core Bundle of Document ("ACB") p 1

2 ACB pp 1 - 49

3 ACB pp 1 – 49; Respondent's Written Submissions p 4 para 11

4 Lim Kian Seng's 1st Affidavit dated 9 December 2019 ("LKS1") p 9 para 28

5 ACB pp 98 - 99 para 13

6 ACB p 105 para 31

"completed all the supply works" and that "even though some materials [had not been] delivered to [the Project site]",[7] they were entitled to payment. CFB replied that a payment response had not been due yet and that CFA's adjudication application had been premature.[8] Additionally, CFB argued that CFA was only entitled to payment upon successful delivery of the window panels that it had contracted to fabricate.[9]

5 The adjudicator determined that a payment response had indeed been due by 2 October 2019 and that CFB had accordingly failed to provide a payment response in time.[10] The adjudicator also held that the window panels, though undelivered and uninstalled, were claimable under s 7(1)(*b*) of the Act: *Chuang Long Engineering Pte Ltd v Nan Huat Aluminium & Glass Pte Ltd* [2019] 4 SLR 901 at [30] and [33] ("*Chuang Long*").[11] Accordingly, the adjudicator ruled in CFA's favour and CFB was ordered to pay both the adjudicated amount and 75% of the adjudication costs (together, "the adjudicated sum").[12] The AD was recorded on 15 November 2019.

6 It bears mentioning that there were allegedly some representations made about the missing panels at the adjudication conferences. However, the accounts of these representations conflicted with each other.[13] Finding both accounts to

---

7 ACB p 39 para 29

8 ACB p 66 para 10

9 ACB p 68 paras 13 – 14

10 ACB p 98 para 11, pp 112 – 113 paras 47 – 48

11 ACB p114 para 52 and p99 para 14(d)

12 ACB p130 para 97, p129 para 92.

13 LSK1 p 12 para 38; Han Binbin's 1st Affidavit dated 26 December 2019 (HBB) pp 2 – 3 paras 5 – 9

be self-serving at best, I proceeded with the adjudicator's account of what was said at the adjudication conferences – namely, that "parties' oral submissions at the … conference[s] broadly accorded with and expanded upon the written submissions tendered".[14] I noted the following in the written submissions and the adjudication determination:

(a) CFA claimed that it had "completed all the supply works" and that "some of the materials [were] stored at [CFA's] warehouse and some [were] stored at [CFB's] warehouse";[15] no mention was made of materials stored anywhere else.

(b) CFA claimed storage costs for "materials … kept in [its] warehouse for 6 months".[16] The "materials" here referred to those that had not been delivered to CFB at the time of the adjudication determination *ie,* the missing panels.

(c) Both CFA's submissions and the adjudicator's determination made no mention of any difficulty or trouble that CFA had experienced in getting the missing panels from its Chinese supplier ("ABC"). In fact, ABC was not mentioned at all.

7 It later transpired that some 169 of the missing panels were in China, rather than in CFA's warehouse. ABC had ceased business with CFA, and had contacted CFB directly on 22 November 2019 to sell the remaining window

---

14 ACB p 106 para 32

15 ACB p39 para 29

16 ACB p58 para 8(8); LKS1 p1684 - 1689

panels in its possession.[17] CFB professed surprise at this revelation[18] as it had been operating under the impression that CFA had possession of all the missing panels. In fact, CFB had been attempting to pay the adjudicated sum in exchange for the missing panels since 19 November 2019.[19] CFA had neither acceded to that request[20] nor had it offered any assurance that it had the missing panels in its possession. Indeed, CFA had persistently refused to give CFB any proof that it possessed the missing panels and had simply insisted on being paid the adjudicated sums.

8 By the time the parties first appeared before me on 20 January 2020, CFA had given CFB neither an opportunity to inspect its warehouse[21] nor any other proof that CFA was in a position to deliver all the missing panels. This was despite CFB's constant assurances that it was "willing and ready to pay [the adjudicated sums] so long as [it was assured] that CFA had all the materials with them and would release and deliver the same to [CFB]".[22]

Issue to be determined

9 The first issue, an alleged breach of natural justice, was a nonstarter. CFB's contention was that payment for the window panels were not due until delivery was made (see above at [4]). It relied on cl 8 of the letter of award and cl 11 of the standard conditions to substantiate its claim. CFB's complaint was

---

17 LKS1 p 1637

18 LKS1 p 12 para 38

19 LKS1 p12 para 35

20 LKS1 p12 para 36

21 LSK1 p 14 para 45

22 LKS1 p15 para 46.

that the adjudicator had failed to consider these clauses in valuing the construction work carried out and had therefore breached s 17(3)(*b*) of the Act. This, CFB alleged, had been a breach of natural justice.

10 I did not accept this argument. It was no more than an attempt to appeal against an unfavourable adjudication determination, which is impermissible: *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797 at [48]. In truth, the adjudicator had applied his mind to those clauses before rejecting CFB's arguments[23] – argument which, I noted, were identical to those before me in the present application. He had expressly considered not just the clauses CFB had highlighted but also the entirety of the contract[24] before concluding that CFB's submissions "held [no] water".[25] I therefore took CFB's recycled arguments as an impermissible invitation to consider the merits of the AD. Accordingly they were rejected.

11 The only issue therefore, was whether there had been fraud on CFA's part in making and pursuing the payment claim.

The applicable legal principle

12 Fraud is a valid ground for setting aside ADs. I respectfully agreed with Tan Siong Thye J's comments in *Mansource Interior Pte Ltd v Citiwall Safety Glass Pte Ltd* [2014] 3 SLR 264 at [31] and *OGSP Engineering Pte Ltd v Comfort Management Pte Ltd* [2018] 3 SLR 1031 at [34]–[37] ("*OGSP"*).

---

23 ACB p115 paras 53 - 54

24 ACB p115 para 53

25 ACB p115 para 54

Though there are no explicit provisions in the 2006 statutory scheme that allow adjudication determinations to be set aside on the basis of fraud, I shared Tan J's sentiments that "the court will not allow its processes to be used to facilitate fraud" (*OGSP* at [37]). Fraud unravels all.

13 I also noted that the recent 2018 amendments to the Act set out some non-exhaustive grounds for setting aside an AD. Fraud is one such ground (see the new s 27(6)(*h*) of the Building and Construction Industry Security of Payment Amendment Act 2018 (No 47 of 2018)). In introducing this provision, Minister of State for National Development, Mr Zaqy Mohamed indicated that "[t]hese grounds were consistent with those that have been developed by the Courts over time".[26] I took this to mean that the fraud ground was, at the very least, consistent with the other grounds on which ADs had been set aside.

14 In any case, it was undisputed between the parties that fraud was a valid ground for setting aside ADs. The test was set out in *QC Communications NSW Pty Ltd v CivComm Pty Ltd* [2016] NSWSC 1095 where the New South Wales Supreme Court interpreted the provisions of the Building and Construction Industry Security of Payment Act 1999 (Act 46 of 1999), which is *in pari materia* with the Act (at [32]):

---

[26] *Singapore Parliamentary Debates, Official Report* (2 October 2018) vol 94 (Zaqy Mohamad, Minister of State for National Development)

> A judgment may be set aside on the basis of fraud where:
>
> (a) The application is based on facts discovered after the judgment which are material: *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534; and
>
> (b) It is reasonably clear that the fresh evidence would have provided an opposite verdict: *Orr v Holmes* [1948] HCA 16; (1948) 76 CLR 632 at 640.

15 I have termed these conditions the Material Fact Requirement and Opposite Verdict Requirement, respectively.

My decision

Material Fact Requirement

16 There were three material facts discovered after the AD was issued. First, 169 of the missing panels were not in Singapore at all.[27] Second, CFA had been having serious disputes with its supplier regarding the delivery of those window panels to Singapore. The disputes had risen to such a level that their contract had been terminated on 13 October 2019.[28] This fact was not brought up at any of the adjudication conferences.

17 Third, CFA had been experiencing significant difficulty negotiating (both before and after the contractual termination) for those window panels to be delivered to Singapore. These negotiations had been going on since 27 September 2019 when ABC had first indicated to CFA that it would be delaying delivery.[29] Nothing had come out of them. Indeed, by CFA's own

---

27 LKS1 p 1637

28 Lim Kian Seng's 3rd Affidavit dated 2 March 2020 ("LKS3") p 3 para 8

29 Wang Weiyuan's 2nd Affidavit dated 21 February 2020 ("WWY2") p 7 para 26.5

account, ABC had proven to be unreasonable and unreliable.[30] Yet, CFA had failed to inform CFB of the fact that 169 of the missing panels remained in the possession of its somewhat capricious supplier.

18 These facts were relevant because CFA's payment claim was for fabrication of the entire contract quantity. This meant the claim's scope necessarily extended to the missing panels. But a payment claim for materials cannot be sustained if the claimant is in no position to deliver when called upon to do so. To hold otherwise would mean that the respondent is obliged to make payment even when the claimant is unable to fulfil his obligation to deliver. Any facts that went towards challenging the claimant's ability to deliver the goods were therefore material facts.

Opposite Verdict Requirement

19 In determining whether the fresh evidence would have resulted in an opposite verdict, I first considered what the adjudicator relied on in his determination.

20 The issue before the adjudicator was whether CFA had been entitled to payment notwithstanding the fact that the missing panels had not been delivered yet. The adjudicator had held in the affirmative, relying on *Chuang Long* as authority. If the material facts stated above (at [16]–[17]) had been before the adjudicator, I was of the opinion that the issue would have been framed differently. The real inquiry would have been whether CFA had been entitled to payment notwithstanding the fact that it was not in a position to secure delivery

---

30 WWY2 p 8 paras 33 – 34, p 11 paras 48 - 49

of all of the missing panels if called upon to do so. On the undisputed facts, this would have been answered in the negative.

21 *Chuang Long* would therefore have been inapplicable to the facts and therefore unavailable for reliance by the adjudicator. *Chuang Long* stood for the proposition that contractors may claim payment for fabrication of materials that had not been delivered or affixed to the property as yet (see [33]). It did not necessarily follow that contractors *must* be paid for materials so long as they are prefabricated and in existence but their delivery not secured. In my view, a party is not entitled to payment for prefabricated materials if there is a serious dispute with its supplier, particularly one resident overseas, that renders the claimant unable to effect shipment if called upon to do so. This does not detract from but rather, is entirely consistent with *Chuang Long*. In that case, Chan Seng Onn J's ruling was informed by the legislative purpose of the Act – an intent to "facilitate cashflow and enable the construction project to move along" (*Chuang Long* at [33]). This reasoning however, has a natural extension. The adjudication mechanism cannot be abused by contractors who are not able to fulfil the contractual obligations for which they are seeking payment. This amounts to fraud and cannot be allowed to stand.

22 Here, the evidence showed that CFA did not have the window panels on hand when it applied for adjudication on 10 October 2019. In fact, it was still negotiating with ABC for the window panels by the time of the first adjudication conference on 25 October 2019.[31] Even at the second adjudication conference, it had nothing more than an "agreement in principle" for the delivery of the

---

[31] WWY2 pp8 – 9 paras 36 - 38

missing panels.[32] The final agreement was still being drafted whilst CFB and CFA were waiting for the adjudication determination[33]and though signed on 14 November 2019,[34] ultimately fell through on 22 November 2019. [35] In other words, CFA could not have secured delivery of the missing panels at any point during the adjudication proceedings. Such evidence would have seriously called into doubt CFA's ability to fulfil its contractual obligations.

23 To this, CFA had two main submissions disclaiming any fraud on its part. The first was that there had been no explicit misrepresentation by any of its officers at the adjudication conferences.[36] Even if there had been, the adjudicator had not relied on any of those supposed misrepresentations.[37] I rejected this argument. This was a mischaracterisation of CFB's case. CFB had also submitted that CFA had "not [been] forthcoming in submitting its [payment] claim in the Adjudication"[38] and "had … defrauded the Adjudicator in alluding to the effect that all the panels had been shipped."[39] There was therefore no need for CFB to rely on alleged misrepresentations made at the adjudication conference to establish its case. As stated above (see [20]-[22]), I found that CFA's fraud had been in claiming payment for 169 of the missing window panels which it had been in no position to deliver.

---

32 WWY2 p 9 para 39

33 WWY2 p10 paras 44–45

34 WWY2 p 10 para 45

35 Hu Yungang1 ("HYG") p 5 para 23

36 Applicant's Written Submissions ("AWS") p 8 paras 17 - 18

37 AWS pp8 - 9 paras 19- 23

38 Respondent's Written Submissions ("RWS") p 14 para 36

39 RWS p 14 para 34

24 CFA's second contention was that it had acted in good faith. It had "genuinely believed that settlement with ABC for [the Project had been] successful … and that, after that, the materials could be delivered shortly".[40] I could not accept this bare assertion. There was no credible support in the affidavits for such a proposition. CFA pointed to the continued attempts to negotiate with ABC and the fact that negotiations had been at an advanced stage during the adjudication proceedings (an "agreement in principle" by the time of the second adjudication conference[41] and a written agreement by the time of the adjudication determination[42]). This, CFA submitted, was evidence of its *bona fides*. I was not convinced.

25 The "agreement in principle" was nothing more than a bare assertion. There was no evidence of such an agreement. The only chatlogs produced were of those between CFA and ABC from 12 September 2019 to 8 October 2019.[43] These were entirely unhelpful since the supposed agreement was discussed in "late October 2019".[44] Likewise, the supposed written agreement signed by CFA and ABC on 14 November 2019 was not produced either. Earlier drafts were produced,[45] and photos of Chinese men signing indecipherable papers[46] were tendered. But the signed written agreement itself was never placed before the court. More importantly, it simply does not matter if these pleaded facts are

---

40 WWY2 p 13 para 54.4

41 WWY2 p 9 para 39

42 WWY2 p 10 para 45

43 WWY2 p 78

44 WWY2 p 9 para 38

45 HYG pp 11 – 31

46 HYG pp 58 – 59

true. Even if proven, these facts could just as easily have been support for a more cynical theory. Namely, CFA had never been confident of securing delivery of the missing panels and its tenacious negotiations were a sign of its desperation. I was not meaningfully persuaded to adopt either theory, and simply took CFA's evidence of its negotiations to be neutral at best.

26 What was unambiguously clear however, was that CFA had been in serious disputes with its supplier throughout the course of the adjudication proceedings. This had even resulted in it terminating its contract with ABC three days after it had applied for adjudication.[47] And yet, none of this had been brought to the adjudicator's attention. Indeed, if CFA had "genuinely believed that settlement with ABC" had been successful, it begged the question why these disputes were not simply disclosed at the adjudication conferences. To me, this strongly suggested that CFA had been operating on mere hope (that matters would work out) rather than genuine belief (that they had indeed worked out). A contractor that could only *hope* to deliver materials when called upon to do so, cannot claim payment for their fabrication.

---

47 Lim Kian Seng's 3rd Affidavit dated 2 March 2020 ("LKS3") p 3 para 8

Conclusion

27 Accordingly, I granted CFB's application to set aside the AD and dismissed CFA's application to enforce the AD. Costs followed the cause.

Lee Seiu Kin
Judge

Chong Kuan Keong, Ernest Sia, Gan Siu Min Cheryl, Derek Tay and Andy Yeo (Chong Chia & Lim LLC) for the applicant;
Neo Kim Cheng Monica and Oung Hui Wen Karen (Chan Neo LLP) for the respondent.