# Ng Huat Engineering Pte Ltd v Jurong Town Corp
# [2003] SGHC 12

**Case Number** : OS 1416/2002; OM 23/2002

**Decision Date** : 27 January 2003

**Tribunal/Court** : High Court

**Coram** : Choo Han Teck J

**Counsel Name(s)** : S Thulasidas (Ling Das & Partners) for the Plaintiffs/Applicants; Andre Maniam and Christopher Chong (Wong Partnership) for the Defendants/Respondents

**Parties** : Ng Huat Engineering Pte Ltd — Jurong Town Corp

*Arbitration – Application for extension of time to apply for leave to appeal – Test for granting for extension of time – Whether applicants' appeal had prospects of success*

1. The plaintiffs, a company under judicial management, were the main contractors to the defendants in a pipes and manholes installation project in Pulau Sakra. Dispute arose between them and the parties went to arbitration. The arbitrator was asked to decide on two preliminary claims by the plaintiffs. These were, first, a claim for "prolongation costs", that is, costs for delays caused by the defendants that resulted in additional costs and expenses incurred by the plaintiffs. Secondly, the plaintiffs claimed the costs of variations to the contract. These variations concerned the changing of reinforced concrete pipes (RC pipes) originally provided, to H-class or vitrified pipes (VC pipes). The arbitrator made his award ("the interim award") on these two issues and the plaintiffs, being dissatisfied, applied for leave to appeal to the High Court.

2. The plaintiffs, being out of time, had to apply by Originating Summons 1416 of 2002 for an extension of time to apply for leave. The interim award was made on 5 September 2002. The intended appellant had 21 days from the date of the award to apply for leave to appeal. That would have, in this case, expired on 27 September 2002. However, the plaintiffs' solicitors mistook the time limit to be 28 days as provided under the Arbitration Act 2001. If that had been the time limit, the last day for applying for leave would have been 5 October 2002. The plaintiffs thus applied for leave on 2 October 2002 but on 3 October 2002, their attention was drawn to the provision that the Act only applies to arbitration proceedings that commenced on or after 1 March 2002. The arbitration proceedings in this case commenced on 14 March 2000.

3. On 23 October 2002 I granted the extension of time prayed for. Mr Maniam, counsel for the defendants wrote and asked for further arguments on the ground that by virtue of the Court of Appeal decision in *Hong Huat Development (Pte) Ltd v Hiap Hong & Co Pte Ltd* [2000] 2 SLR 609, a part of the test for granting an extension of time is the same as that in an application for leave to appeal, namely, that the applicant must convince the court that there is a prospect of success. I shall elaborate on this aspect of the test shortly.

4. Relying on the *Hong Huat* case, Mr Maniam then asked for the further arguments in respect of the application for extension of time to be heard together with the application for leave. He pointed out that that was what the Court of Appeal did in the *Hong Huat* case.

5. The appellant in *Hong Huat* were out of time and their application for an extension of time to file their application for leave to appeal was dismissed. They appealed to the Court of Appeal who allowed

their appeal for an extension of time and also granted leave to appeal.

6. The principles set out in *Chen Chien Wen Edwin v Pearson* [1991] SLR 212 in respect of an application for extension of time were accepted and applied by the judge at first instance as well as the Court of Appeal in *Hong Huat*'s case. In short, the court is bound to consider the length of delay, the reasons for the delay, and also the question of prejudice to the respondents. I shall refer to these as the stage one considerations. Following *Hong Huat*, the court must also consider the prospects of the appellants' case on the appeal – and not merely the prospects of succeeding in getting an extension of time to apply for leave to appeal. I shall refer to this as the stage two consideration.

7. Thus, in an application for an extension of time for leave to appeal, the application will be dismissed if the applicant fails to satisfy the stage one considerations. In other words, if the court is of the view that the application was made after an inordinate delay, or that the reason for the delay was unjustifiable or without any merit, or that an extension of time would prejudice the respondents then an extension of time shall not be granted. None of these factors operated sufficiently in the present case against the plaintiffs.

8. If an applicant satisfies the court in respect of the stage one consideration then he may still be refused an extension of time if he fails to satisfy the court on the stage two considerations. When stage two is reached, it means that should the court be of the view that there are merits in the applicants' substantive appeal, then not only will an extension of time be granted but leave to appeal shall also be granted at the same time because the test is essentially the same. It means, therefore, that an application for an extension of time should be heard together with the application for leave to appeal.

9. In the present case, I am of the view that the appellants had satisfied the stage one considerations. I will only point out that a solicitor's mistake in itself is not an excuse, but the error must be considered in the context of the case and the circumstances in which the error arose. At the hearing of further arguments, Mr Maniam concentrated only on the second stage considerations.

10. In this regard, the basic question concerned the test that the court ought to apply in determining the prospects of success of the appeal. Counsel drew my attention to *American Home Assurance Co v Hong Lam Marine Pte Ltd* [1999] 3 SLR 682. In that case, the Court of Appeal accepted the approach taken in two English cases, namely *The Nema* [1982] AC 724 and *The Antaios* [1985] AC 191. The Court of Appeal observed that the trend was towards restricting the possibility of appeals from arbitration awards especially when the dispute concerned the interpretation of words inserted into a commercial contract in order to ascertain the meaning intended by the parties. In such cases, the speed and finality of an arbitral decision ought not generally to be disturbed.

11. The Court of Appeal recognised the discretion to grant leave to appeal may be exercised differently, depending on "whether the question of construction arises in the context of a 'one-off' contract or clause, or that of a standard form contract or clause". The authorities that I mentioned above drew a distinction between cases involving a "one-off" contract and those involving a standard form contract. They applied a stricter test in the former case. The rationale is that in a "one-off" construction, no one else would benefit from the decision other than the successful party in that

appeal. There are other factors that support this approach. Parties to an arbitration are at liberty to select an arbitrator by mutual consent; whereas parties in a court action have no right to choose their judge. In this small way, it is not unreasonable to expect the parties to adhere to the decisions of their arbitrator especially in matters of construction unless that decision was, in the words of Lord Diplock in the *Antaios*, "in the judge's view so obviously wrong as to preclude the possibility that he might be right" [1985] AC 191, 206. In the cases in which standard form contracts are in question, the courts would grant leave to appeal if, again in Lord Diplock's words, "a strong *prima facie* case" has been made out that the arbitrator was wrong. To that it has been added that the court must first be satisfied that "the resolution of the question of construction would add significantly to the clarity, certainty and comprehensiveness of the law" per Yong CJ in *American Home Assurance Co v Hong Lam Marine Pte Ltd* [1999] 3 SLR 682, 695. In other words, the appeal must be able to benefit parties in future cases. These two parts are intended to be applied cumulatively so that even if the appeal would add to the clarity of the law, the intended appellant must persuade the court that a "strong *prima facie* case that the arbitrator was wrong has been made out".

12. Before I move on to consider whether the present application before me concerned a "one-off" contract or a standard form contract, I would note that the use of the phrases "obviously wrong" and "strong *prima facie* case" invites comment. In the case of "one-off" contracts, the effect of refusing leave to appeal on the basis that the arbitrator was not "obviously wrong" implies that when leave is granted, the appeal itself is as good as having been heard. I say "as good as" because allowance must be given to the fact that the judge hearing the appeal (whether the same judge who granted leave or some other judge) is entitled to differ. But the use of the adjective "obviously" appears to be a deliberate one. In accepting the formulation, as I do, it appears that the test, in so far as "one-off" contracts are concerned, implies that the applicant may have to prove his entire case even at this leave to appeal stage; especially if he would otherwise be unable to show why the arbitrator was so "obviously wrong as to preclude the possibility that he might be right". In showing why the arbitrator was or was not 'obviously wrong' the parties ought to put their best case forward if they are to persuade the court one way or the other. 'Obviously wrong' does not mean '*prima facie* wrong' or 'wrong unless proven otherwise at the hearing of the appeal'.

13. I now revert to the facts at hand. Mr Thulasidas, for the plaintiffs, submitted that the lower ("strong *prima facie* case') test is applicable in the present case because the contract was signed on the defendants' standard form contract. Mr Maniam disagreed and submitted that although the standard form was used as the base document, it was an old form that is no longer in use and would therefore not be of interest to anyone in future. Secondly, he submitted that the terms were negotiated terms and the standard terms had thus been specifically altered. In the circumstances, he submitted that the contract must be regarded as a "one-off" and following that, leave to appeal should only be granted if the arbitrator was shown to be so "obviously wrong as to preclude the possibility that he might be right".

14. There are two aspects in which the plaintiffs say the arbitrator erred. The first concerned the construction of cl 32(b) of the Conditions of Contract. For convenience, that clause is set out as follows:

> "(b) If the [plaintiffs] shall be prevented from or be materially impeded or delayed in the execution or completion of the Works by reason or in consequence of any acts or omissions of the [defendants] contrary to the true intent and meaning of these presents such prevention, impediment or delay shall not vitiate the Contract or affect the same except that in such cases

the question whether any or what compensation or allowance ought to be paid or made to the [plaintiffs] in respect of such prevention, impediment or delays and in what manner such compensation or allowance ought to be paid or made shall be determined and settled by the [defendants] whose decision shall be final."

I shall refer to this as the first question.

15. The first question, broken down to its essence, is whether the arbitrator correctly construed the clause to mean that compensation for delays shall be determined by the defendants even though arbitration proceedings had already commenced. The arbitrator answered this question in the affirmative. Mr Thulasidas argued forcefully before me that the issue of compensation must be reserved to the arbitrator once the arbitration proceedings have commenced. Counsel relied on the authority of *Milestone v Yates* [1938] 2 All ER 439 in support. That case, as well as the local case of *Loke Hong Kee v United Overseas Land* [1978-79] SLR 391, in turn, relied on *Lloyd v Milward* [1985] Hudson BC (4th ed.) Vol. 2 page 262. These cases lay down the principle that where a contract provides that the architect's certificate shall be final and conclusive, it shall be so except that the architect shall not issue his certificate after arbitration proceedings have commenced between the employer and the contractor.

16. In substance a comparison of those clauses and the present cl 32(b) will show that they are different. In those cases cited, the architect was a third party who ought rightly to step aside and, unless specifically allowed under the contract, decline to act in a way which may have an impact on the outcome of the arbitration between the principal parties. In the present case, cl 32(b) reserved a right to the defendants as a principal party, and there being no express limitation as to the exercise of that right, the arbitrator was not wrong to hold that the defendants were entitled to exercise it even though arbitration had began. Whether the difference is significant or not is a matter within the purview of the arbitrator. The question I need to ask is whether the Diplock test has been met. So far as this first question is concerned, I am inclined to the view that it was a standard form clause and, in holding that leave to appeal against this question should not be granted, I applied the test that the plaintiffs had not made out a strong *prima facie* case that the arbitrator was wrong. Under the contract, the decision of the defendant would be final. It was not argued before me whether such a term occludes a challenge on the ground of *mala fides* since no determination was in fact made, and I shall express no opinion on it save to say that in my view, cl 33(b) seems clear and unambiguous and if there is any room whatsoever for challenge it would have to be based on the argument of *mala fides*. Hence, on the facts the arbitrator's decision cannot be faulted.

17. I come now to the second question. The dispute in this regard concerned the question of what formula was to be adopted when the contract was varied so that RC or 'M' type pipes were changed to VC or 'H' type pipes. The essence of the opposing formulae was that the defendants' version resulted in a pipe-for-pipe exchange but the plaintiffs claimed that this formula was inadequate because it did not take into account the costs of excavating and laying the new pipes. I need not expand on the details as much of it can be found in the arbitrator's interim award.

18. The difficulty in calculating the rates for the variations stems from the fact that the rates stipulated in the standard schedule to the contract were different from those found in the supplementary schedule. The plaintiffs contended that the rates in the standard schedule applied by virtue of cl 8 of the supplementary schedule in order to supply the omission of rates for the specified

'H' type and VC type pipes:

> "This Supplementary Schedule of Rates, which shall be completed by the Tenderer is to form part of the Contract Documents and shall supersede similar items in the Standard Schedule of Rates. This Schedule of Rates will be used for assessing the value of variations for the specified items of works stated herein. The rates inserted by the Contractor herein shall be those rates used by him in the pricing of his Tender. The Superintending Officer reserves the right not to use any rate entered herein that he considers unrealistic. Tenderers shall note that a completed schedule with realistic rates will enable the evaluation of variations for items of works stated herein to be settled amicably"

19. The defendants disputed the plaintiff's construction and they contended that the variation rates must be taken from both the standard as well as the supplementary schedules. There was no clear and definitive rates from which a calculation for the variations can be costed. Accordingly, after considering the rival contentions of the parties, the arbitrator produced a formula based on the evidence as he was able to gather from the parties, and used the rates in the supplementary schedule as a base. The details he arrived at that formulation are set out essentially in [3.3.9] to [3.3.20] of the Interim Award.

20. In these circumstances, I am unable to fault the arbitrator in any way. Although this particular question is, in my view, a "one-off" issue and therefore the "obviously wrong" test ought to apply, I do not think that it passed even the lower test, that is to say, that there is a strong *prima facie* case that the arbitrator was wrong. I think that the most that can be said in the plaintiffs' favour is that another arbitrator might have used a different formula, but, given the vagueness of the contract on this point, it can be expected that different arbitrators may come to different conclusions as to what the correct formula should be. The arbitrator in this case had balanced the competing contentions, sought additional evidence and facts, and arrived at a reasoned decision that had no indication of being *prima facie* wrong.

21. Furthermore, in the interests of speed and finality, I am of the view that leave to appeal should not be allowed and I therefore dismissed the plaintiffs' application. The application for an extension of time to apply for leave was consequently also dismissed. I should add generally, that in respect of the way the arbitrator came to his decision on the two disputed points, I am of the view that had the arbitrator decided in the way the plaintiffs say he should and the defendants were to ask for leave to appeal, their application would similarly have been dismissed