

Choi Peng Kum and another v Tan Poh Eng Construction Pte Ltd
[2013] SGHC 272

Case Number : Originating Summons No 275 of 2013 (Registrar's Appeal Nos 218 and 261 of 2013)
Decision Date : 18 December 2013
Tribunal/Court : High Court
Coram : Woo Bih Li J
Counsel Name(s) : Philip Ling and Ang Hou Fu (Wong Tan & Molly Lim) for the plaintiffs; Tan Joo Seng and Wee Qian Liang (Chong Chia & Lim LLC) for the defendant.
Parties : Choi Peng Kum and another — Tan Poh Eng Construction Pte Ltd

Building and Construction Law

18 December 2013

Woo Bih Li J:

Introduction

1 The plaintiffs, Choi Peng Kum and Pay Ah Lui ("the Plaintiffs") are husband and wife who are owners of a dwelling house in Chancery Lane. On 25 November 2011, they entered into a contract ("the Contract") to appoint the defendant Tan Poh Eng Construction Pte Ltd ("the Defendant") as the main contractor for reconstruction works for their house. The Contract is subject to the Singapore Institute of Architects, Articles and Conditions of Building Contract (Lump Sum Contract, 9th Ed) ("SIA Conditions").

2 As disputes arose between them, the Defendant lodged an adjudication application ("AA") on 7 March 2013 under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOPA"). Mr Lam Wei Yaw was appointed as the adjudicator ("the Adjudicator"). He made an adjudication determination ("AD") on 22 March 2013 in which he decided that the Plaintiffs were to pay the Defendant \$480,109.97 (excluding GST) with interest and costs.

3 The Plaintiffs filed the present originating summons on 28 March 2013 to set aside the AD. On 3 April 2013, the Plaintiffs paid \$486,076.26 ("the Sum") into court pursuant to s 27(5) SOPA and O 95 r 3(3) of the Rules of Court (Cap 322, R 5 2006 Rev Ed). The Sum was supposed to be the unpaid portion of the adjudicated amount under the AD. There was no explanation for the difference between the Sum and the amount allowed under the AD. Perhaps the difference was attributable to interest and costs. On 5 July 2013, an Assistant Registrar dismissed the Plaintiffs' application. The Plaintiffs then filed an appeal to the judge in chambers by way of Registrar's Appeal No 218 of 2013 ("RA 218/2013"). I heard the appeal on 23 August 2013. On 13 September 2013, I dismissed the appeal.

4 There was also an appeal by the Defendant by way of RA No 261 of 2013 ("RA 261/2013"). This appeal was against the decision of another Assistant Registrar made on 26 July 2013 in which that Assistant Registrar decided that the Sum paid into court by the Plaintiffs was to remain in court pending the outcome of RA 218/2013. Apparently, the Defendant was of the view that it was entitled to receive the Sum after the decision of the Assistant Registrar in its favour in the originating

summons and that it did not have to await my decision in RA 218/2013. I heard arguments on RA 261/2013 on 12 August 2013 and reserved my decision.

5 After I dismissed RA 218/2013 on 13 September 2013, I gave my decision on RA 261/2013 on the same day.

6 I decided that, strictly speaking, the Plaintiffs were not entitled to a further stay after the Assistant Registrar's decision on the originating summons. However, as the point was novel, for reasons which I shall elaborate on later, I nevertheless ordered a stay of execution in respect of \$350,000 pending the outcome of the Plaintiffs' intended appeal to the Court of Appeal. The balance was to be paid to the Defendant's solicitors who were allowed to release the same to the Defendant.

7 The Plaintiffs have filed an appeal to the Court of Appeal against both my decisions in RA 218/2013 and RA 261/2013. I elaborate below on the background to the appeals and the reasons for my decisions.

Background

8 On or about 31 January 2013, the Defendant issued Progress Claim No 9 ("PC No 9") directly to the Plaintiffs. The Plaintiffs said that they did not respond to this claim as it did not appear to be supported by any valuation from the quantity surveyor PQS Consultants ("PQS"). Furthermore, they alleged that PC No 9 did not have any supporting documents. They were unable to evaluate the claim.

9 Subsequently, as a result of various disputes between the parties, the Plaintiffs' solicitors, Wong Tan and Molly Lim ("WTL") issued a letter dated 7 February 2013 to the Defendant to terminate the Plaintiffs' contract with the Defendant with immediate effect.

10 As mentioned above, the Defendant lodged the AA on 7 March 2013. It was lodged with the Singapore Mediation Centre ("SMC") in respect of PC No 9 and was served on the Plaintiffs on 8 March 2013. PQS prepared a Progress Valuation No 9 on 14 March 2013. The Plaintiffs lodged the Adjudication Response ("AR") with SMC at 5.20pm on 15 March 2013.

11 Under s 15(1) SOPA, the Plaintiffs had seven days to lodge the AR. However under cl 2.2 of SMC's Adjudication Procedure Rules, "[A]ll documents to be lodged with [SMC] shall be lodged during the opening hours of 9am to 4.30pm from Monday to Friday (except public holidays) and 9am to 12.00noon on the eve of Christmas, New Year and Chinese New Year. Documents which are submitted after opening hours shall be treated as being lodged the next working day."

12 As the AR was lodged at 5.20pm on 15 March 2013, it was treated as being lodged the next working day, which was outside the seven-day time limit.

13 Accordingly, under s 16(2)(b) SOPA, the Adjudicator had no choice but to reject the AR.

14 Nevertheless, the Adjudicator proceeded to scrutinise the AA to satisfy himself that there was a basis for the various claims made by the Defendant. After doing so, he made the AD for \$480,109.97 plus interest and costs on 22 March 2013. The \$480,109.97 was the full amount claimed under PC No 9.

15 The Plaintiffs filed the present originating summons on 28 March 2013 and paid the Sum into court as security. As mentioned above, an Assistant Registrar dismissed their application and I

dismissed their appeal.

The court's reasons for RA 218/2013

16 The Plaintiffs did not dispute that they were out of time in lodging the AR. Neither did they allege that the Adjudicator was wrong in rejecting the AR. Before me, they raised two arguments of law:

(a) First, they submitted that because PC No 9 was not supported by a valuation from PQS, PC No 9 was not a valid claim for the purpose of SOPA.

(b) Secondly, they submitted that as the Defendant's contract had been terminated on 7 February 2013, the Adjudicator had no jurisdiction to entertain the AA by virtue of cl 32(8)(a) of the SIA Conditions.

Whether PC No 9 is a valid claim

17 Under s 10(1)(a) SOPA, a claimant may "serve one payment claim in respect of a progress payment on one or more other persons who, under the contract concerned, is or may be liable to make the payment".

18 Under s 11(1), a respondent named in a payment claim is required to respond to a payment claim by providing a payment response within a certain time frame set out in s 11(1)(a) or (b) (whichever is applicable). It is undisputed that after the Plaintiffs received PC No 9, they did not provide a payment response.

19 Under s 12(2)(b), a claimant is entitled to make an AA under s 13 if there is no payment response.

20 However, the Plaintiffs submitted that the Defendant had to be "entitled" to serve a payment claim in the first place before it could serve a payment claim under s 10(1)(a). The Plaintiffs relied on various provisions in SOPA and in the Contract.

21 Section 5 SOPA states that:

Any person who has carried out any construction work, or supplied any goods or services, under a contract is entitled to a progress payment.

22 Section 6 SOPA states that:

The amount of a progress payment to which a person is entitled under a contract shall be —

(a) the amount calculated in accordance with the terms of the contract; or

(b) if the contract does not contain such provision, the amount calculated on the basis of the value of the construction work carried out, or the goods or services supplied, by the person under the contract.

23 Section 2 SOPA defines "progress payment" as "a payment to which a person is entitled for the carrying out of construction work ... under a contract".

24 The Plaintiffs submitted that because of the reference to "entitled" in the above provisions, the

clear intention of Parliament is that only a party who is entitled to a progress payment for work done under a contract may have recourse to the fast and low cost adjudication system established by SOPA. They submitted that the Defendant's right to payment is found in the Contract and not in SOPA and that the Defendant was not entitled to submit a progress payment unless it was supported by PQS' valuation for the following reasons:

- (a) Under Art 2(c) of the SIA Conditions, interim payment "shall be by periodic valuation of the Works in accordance with cl 31(4) of the [SIA Conditions]."
- (b) Pursuant to cl 31(4) of the SIA Conditions, where interim payment is to be based on periodic valuation, the sum certified "shall be based on a retrospective re-evaluation of all the work carried out under the Contract."
- (c) Pursuant to cl 3 of the Addendum (to the Contract), PQS shall be responsible for certification of payment for works carried out by the Defendant.

25 It seemed to me that the Plaintiffs had conflated a claim for payment with a progress payment and also overlooked the fact that there are dual tracks for a contractor to claim payment. Under the Contract, the Defendant is permitted to submit a claim for a progress payment. This is referred to under s 10(1) SOPA as a payment claim. When it does so, its claim is supposed to be valued by PQS whereupon PQS will certify the amount of payment, if any, that is to be made to the Defendant. The Defendant is entitled under the Contract to be paid the amount certified but it is also entitled under SOPA to lodge an AA for the difference. Previously, before SOPA was enacted, the Defendant would have had to claim the difference in arbitration or court proceedings if the Contract did not preclude it from doing so before the final completion of the Contract.

26 The valuation is the payment response that is supposed to be given to the Defendant under s 11 SOPA. It is precisely because there is no valuation that the Defendant is entitled to lodge an AA pursuant to s 12(2)(b) SOPA.

27 If the Defendant is precluded from lodging an AA until a valuation is done by PQS then, it will be a simple matter for the Plaintiffs to stymie the Defendant's recourse to the adjudication process under SOPA by instructing PQS not to issue any valuation.

28 Furthermore, under the Contract, the Defendant is only entitled to be paid whatever is certified by PQS pending recourse to arbitration or the courts. If the AA is confined to what the Defendant is "entitled" to receive under the Contract, meaning whatever is certified by PQS, then the AA is unnecessary in most instances and the Defendant will not be entitled to lodge an AA for an amount more than what is certified. That is the antithesis of the adjudication process under SOPA.

29 In my view, s 5 SOPA does not preclude the Defendant from lodging an AA.

30 Thus, in *Chow Kok Fong, Security of Payments and Construction Adjudication* (2nd Ed, LexisNexis, 2013) , para 6.114 states:

As a result of [SOPA], the absence of a payment certificate no longer presents an impediment against a contractor's recovery of payment for work done provided that a payment claim has been issued in accordance with section 10(1) of the Act. This effectively circumvents the operation of any term in the contract which provides for the issue of an interim certificate as a condition precedent for payment. As noted earlier, the onus is on the respondent to issue a payment response within the prescribed period in the contract, failing which, section 15(3) of the

Act applies to deny the respondent the right to challenge the payment claim on its merits. ...

The text cites as authority for this proposition the case of *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266. Para 6.114 of the text then goes on to say:

In *Consolidated Constructions Pty Ltd v Ettamogah Pub (Rouse Hill) Pty Ltd* (2004), McDougall J of the New South Wales Supreme Court summarised the position of a claim under a security of payment regime when he said that a claimant's 'ability to serve a valid payment claim depends on either actual or claimed entitlement'. Hence, notwithstanding that a claimant may not be 'entitled' to a progress payment on the terms of the underlying contract, he may still serve a payment claim and this is sufficient to trigger the adjudication process provided for under the Act.

31 In my view, PC No 9 was a valid claim for the purpose of SOPA notwithstanding the absence of any valuation by PQS. As mentioned above, the valuation came only later on 14 March 2013 but as the valuation was part of the AR which was filed late, the Adjudicator did not have regard to the valuation.

Whether cl 32(8)(a) SIA Conditions precluded the adjudication process under SOPA

32 Clause 32(8)(a) SIA Conditions states:

In the event of the termination of the employment of the Contractor under Sub-Clause (2), or (6) or (7) hereof:

(a) no further sum shall be certified as due to the Contractor until the issue by the Architect of the Cost of Termination Certificate hereinafter mentioned in this Sub-Clause nor shall the Employer be bound to pay any sums previously certified if not already paid;

33 However, neither sub-clause (2), (6) or (7) applied. Instead, the Plaintiffs relied on cl 32(10) which states:

In the event of the Employer being entitled and selecting to treat the Contract as repudiated by the Contractor under the general law and deciding to complete the Works by other contractors, the powers, remedies and damages conferred by Sub-Clause (8) hereof shall be exercisable and recoverable by the Employer in the same way as if a valid Notice of Termination had been given.

34 It was not disputed that WTL's letter dated 7 February 2013 to terminate the Contract was sent on the basis that the Plaintiffs were treating the Contract as having been repudiated by the Defendant and were accepting the Defendant's alleged repudiation of the same. It was also not disputed that the Plaintiffs were seeking to complete the works through others. Therefore, cl 32(8)(a) *prima facie* applied.

35 The question therefore was whether cl 32(8)(a) precluded the Defendant from engaging the adjudication process under SOPA and precluded the Adjudicator from making an AD under SOPA. If so, whether cl 32(8)(a) was void to the extent that it precluded the above.

36 The Singapore Institute of Architects' *Guidance Notes on Articles and Conditions of Building Contract* (Incorporating 9th Ed Main Contract and 4th Ed Sub-Contract Conditions) (3rd Ed) did not provide any assistance. The textbook referred to above at [30] also did not provide any guidance.

37 The Plaintiffs relied on *S A Shee & Co (Pte) Ltd v Kaki Bukit Industrial Park Pte Ltd* [2000] 1

SLR(R) 192 ("*S A Shee*"). There, the Court of Appeal said at [36]:

However, the position here was different. While cl 31(11) provided that summary judgment could be obtained on the basis of an interim certificate, it was subject to the exception "in the absence of express provision". Clause 32(8)(a) appeared to be one such "express provision". Furthermore, the rationale for giving temporary finality to an interim certificate could no longer hold good when the contract had come to an end. The contractor would not be carrying out any more work. So the need to minimise "cash flow problems" for the project no longer existed.

38 It is important to bear in mind that *S A Shee* was decided before SOPA was enacted. However, the Plaintiffs were relying on the court's observation in the last sentence of [36] in *S A Shee* to argue that the adjudication process under SOPA was no longer necessary as a means to expedite payment to contractors like the Defendant because since the Contract was terminated, the need to minimise cash flow problems for the works no longer existed. I would add a qualification to that observation. Most contractors have more than one project. The money received under one project may be used for the same project and/or for other projects. The fact that a project is ended by termination and that the contractor is no longer carrying out works thereunder does not necessarily mean that his concern for cash flow ends. The fact that he is no longer carrying out works under that project does not mean that all his expenses come abruptly to a halt. Furthermore, he might also be under liabilities and/or have made payments to other sub-contractors or suppliers for the same project for which he was seeking reimbursement, plus the profit element, from the owner before the project is terminated.

39 In *VN Pte Ltd v VO Pte Ltd* [2010] SCA_{AdJ}R 259, the adjudicator was of the view that cl 32(8)(a) did not preclude a contractor from lodging an AA or an adjudicator from making an AD. The Assistant Registrar agreed with this view. So did I. It seemed to me that cl 32(8)(a) applies only to preclude certificates from being issued under the Contract and not to the adjudication process under SOPA.

40 If cl 32(8)(a) had the effect contended by the Plaintiffs it would in any event be rendered void by ss 36(1) and 36(2)(a) and (b) SOPA which states:

36.—(1) The provisions of this Act shall have effect notwithstanding any provision to the contrary in any contract or agreement.

(2) The following provisions in any contract or agreement (whether in writing or not) shall be void:

(a) a provision under which the operation of this Act or any part thereof is, or is purported to be, excluded, modified, restricted or in any way prejudiced, or that has the effect of excluding, modifying, restricting or prejudicing the operation of this Act or any part thereof;

(b) a provision that may reasonably be construed as an attempt to deter a person from taking action under this Act.

41 The Plaintiffs also relied on *Roseville Bridge Marina Pty Ltd v Bellingham Marine Australia Pty Ltd* [2009] NSWSC 320 ("*Roseville*") to argue that if cl 38(2)(a) had the effect it contended for, cl 38(2)(a) did not run afoul of s 36(1) or (2) SOPA. In my view, the facts in *Roseville* were quite different and therefore did not assist the Plaintiffs.

The court's reasons for RA 261/2013

42 Section 27(5) SOPA states that where any party commences proceedings to set aside an AD,

he is to pay into court as security the unpaid portion of the adjudicated amount that he is required to pay under the AD "pending the final determination of those proceedings".

43 The Plaintiffs contended that the phrase "the final determination of those proceedings" means the outcome after all avenues of appeal have been exhausted. Unsurprisingly, the Defendant contended that the phrase referred to the final decision, as opposed to an interlocutory one, of the first court which hears the proceedings to set aside the AD.

44 There was no parliamentary speech, textbook or case on similar legislation to assist me. The case of *Regina v Kuxhaus* [1988] 1 QB 631 which the Plaintiffs relied on was on a different piece of legislation and related to a different factual scenario.

45 However, the Defendants referred to s 18(3) SOPA. Under s 18(1) and (2), a respondent who is aggrieved by an AD may lodge an application for a review of that determination, but, under s 18(3), he is not to lodge the application for review unless he has paid the adjudicated amount to the claimant.

46 This was quite different from s 27(5) SOPA which only requires the respondent to pay the unpaid portion of an adjudicated amount into the court as security when an application is made to set aside an AD instead of for a review.

47 The Defendant submitted that s 18(3) reinforced the point that SOPA was meant to expedite payments to contractors and, therefore, applying the same philosophy, s 27(5) should not be construed to mean that the security was not to be released until all avenues of appeal were exhausted. That would only further delay payment to a contractor who would otherwise have been entitled to payment under an AD.

48 Neither party could assist me on the reason as to why s 27(5) SOPA is different from s 18(3) in that s 27(5) does not require payment to be made directly to the claimant. Perhaps the reason for the distinction was that an application to set aside would be on more fundamental grounds than an application for review and therefore pending the outcome of an application to set aside, the disputed or unpaid amount should not be paid to a claimant yet.

49 Nevertheless, bearing in mind that the purpose of SOPA is to provide an expeditious means of resolving payment claims of a contractor, although on an interim basis, it seemed to me that it would not be consistent with that purpose to conclude that the phrase has the meaning contended by the Plaintiff, *ie*, that the security was to be held pending the exhaustion of all avenues of appeal. Accordingly, I was of the view that the correct interpretation was that it was to be held as security pending the final decision of the first court, to hear the setting aside proceedings, only.

50 My decisions on RA 218/2013 and 261/2013 meant that, strictly speaking, the entire amount deposited as security should be released to the Defendant. Notwithstanding a suggestion by the Plaintiffs that the Defendant may not be able to pay back the Sum, there was no concrete evidence to substantiate the suggestion. However, because of the novelty of the issue, I ordered a stay of execution on \$350,000 pending the outcome of the Plaintiffs' intended appeal to the Court of Appeal with the balance to be released as stated above.

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