

Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd
[2007] SGHC 142

Case Number : OS 711/2007

Decision Date : 31 August 2007

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Andrew Ang (PK Wong & Associates LLC) for the plaintiff; Tai Chean Ming and Tan Joo Seng (Chong Chia & Lim LLC) for the defendant

Parties : Tiong Seng Contractors (Pte) Ltd — Chuan Lim Construction Pte Ltd

Building and Construction Law – Statutes and regulations – Section 34(1) Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) – Whether Act applicable to final payment claims

31 August 2007

Judgment reserved.

Lai Siu Chiu J:

Introduction

1 These proceedings raised an important and unprecedented point of law *viz.* does a final progress claim come under the purview of the Building and Construction Industry Security of Payment Act (Cap 30B 2006 rev. ed) (“the Act”) for purposes of adjudication?

2 In this Originating Summons (“the OS”), the plaintiff Tiong Seng Contractors (Pte) Ltd took the position that the Act does not extend to “final claims” and that the Adjudicator had no jurisdiction to make the determination in Adjudication Application No. SOP AA 08 of 2007 (“the Adjudication”). Accordingly, the plaintiff applied to set aside the Adjudication. The defendant Chuan Lim Construction Pte Ltd on the other hand defended the award (which was in their favour) by asserting that the Act does apply to such “final claims”.

The undisputed facts

3 The salient facts surrounding the present controversy can be briefly summarized. The plaintiff had been appointed as the main contractor for a construction project at Sentosa and had contracted with the defendant to undertake certain earthworks for the project.

4 After earthworks had commenced, the defendant raised claims which included the Final Claim dated 25 January 2007 and Progress Claim No. 10 dated 26 February 2007 respectively.

5 Under the Final Claim, the defendant sought payment of S\$481,155.77. In response to this claim, the plaintiff made a preliminary payment of S\$210,553.68, based on a preliminary evaluation of the work done at that time, leaving S\$270,602.09 unpaid (“the unpaid balance”). The defendant responded by raising Progress Claim No. 10 for the unpaid balance.

6 When further payment was not forthcoming from the plaintiff, the defendant sought an adjudication under the Act based on Progress Claim No. 10. The Singapore Mediation Centre nominated Tay Cher Seng as adjudicator (“the Adjudicator”) and an Adjudication Conference was convened on 16 April 2007.

7 At the Adjudication Conference, the plaintiff submitted *inter alia*, that Progress Claim No. 10 had been issued after the Final Claim, and could not be relied upon to found a claim under the Act.

8 Notwithstanding the plaintiff's arguments, the Adjudicator made a finding that the defendant was entitled to receive a sum of S\$169,949.94 plus 5% GST of another S\$8,497.50 for a total of \$178,447.44 ("the Adjudicated sum"). In addition, the Adjudicator determined that the plaintiff should pay 60% of the Adjudicator's fee (of S\$6,300) as well as of the adjudication application fee (of S\$525).

9 The plaintiff informed the defendant on 4 May 2007 of its intention to challenge the Adjudication determination. On 8 May 2007, the defendant served on the plaintiff a statutory demand under s 254(2)(a) of the Companies Act (Cap 50 2006 rev. ed.). The plaintiff's immediate response was to file and serve the OS on the defendant's solicitors. The plaintiff thereafter applied for directions to make payment of S\$182,542.44 to the Accountant-General. The sum comprised the Adjudicated sum plus 60% of the Adjudicator's fee (\$3,780) and application fee (\$315).

10 On 16 May 2007, the defendant applied by Summons No. 2144 of 2007/K ("the application") to strike out the OS and/or for leave to enforce the Adjudication award because the plaintiff had failed to provide security at the time of filing the OS by paying into court the unpaid portion of the Adjudicated sum as required under O 95 r 3(3) of the Rules of Court (2006 rev. ed.) read with s 27 (3) of the Act. The application was withdrawn (with costs to the defendant) at the adjourned hearing of the OS as by then the plaintiff had rectified its omission by making payment into court of \$182,542.44.

Whether a final progress claim comes under the purview of the Act for purposes of adjudication

11 The present controversy is a result of a steady escalation in property prices and burgeoning demand in the construction industry. Before I go further, it would be apposite to set matters in their proper context by tracing the legislative origins and development of the Act to its present form, so that there can be a proper appreciation of the practical purposes sought to be achieved by its enactment as well as by any subsequent amendments thereto.

Legislative origins

12 The Act is a legislative enactment of fairly recent origin, having come into effect on 1 April 2005. The Act was modeled on various statutes in existence in other jurisdictions, such as Australia, UK and New Zealand. Notably, the Act drew inspiration from the New South Wales Building and Construction Industry Security of Payment Act, 1999 ("the NSW Act"), which originally defined "progress payment" as "a payment to which a person is entitled under section 8".

13 The NSW Act was subsequently amended in November 2003 to include a more specific definition of "progress payment", which reads as follows:

a payment to which a person is entitled under section 8, and includes (without affecting any such entitlement):

(a) the *final payment* for construction work carried out (or for related goods and services supplied) under a construction contract, or

(b) a single or one-off payment for carrying out construction work (or for supplying related goods and services) under a construction contract, or

(c) a payment that is based on an event or date (known in the building and construction industry as a 'milestone payment')

[emphasis added]

Our current version

14 Notably, our current version of the Act does not capture all the amendments from the NSW Act, but simply defines "progress payment" as:

a payment to which a person is entitled for the carrying out of construction work, or the supply of goods or services, under a contract, and includes -

(a) a single or one-off payment, or

(b) a payment that is based on an event or a date

15 The plaintiff accordingly seized on the specific omission of claims for "final payment" and concluded therefrom that the Act was not intended to extend to claims for final payment. The defendant submitted otherwise on the basis that the broad ranging provisions of the Act do not expressly or impliedly exclude "final claims".

16 Indeed, the present interpretative controversy has been exacerbated by conflicting views expressed by treatises, the Building and Construction Authority ("the BCA") and adjudicators in subsequent mediations under the Act as can be seen in the following examples.

(a) Includes adjudication of "final payments"

17 In *AU v AV* [2006] SGSOP 9, a construction contract was terminated and a claim was made under the Act, effectively amounting to a claim for final payment. Philip Jeyaretnam SC concluded that he had jurisdiction under the Act to hear the claim. His reasoning (at [13]) was as follows:

I also noted to both counsel in the course of the hearing that while the New South Wales Act expressly included within the definition of "progress payment" "the final payment for construction work carried out", our Act did not. Nonetheless, I am of the view that the Act does apply even after a contract is terminated. First, the intention to protect cash flow would not be achieved if the interpretation put forward by the Respondent is adopted. If cash flow is blocked on one project, that will affect a contractor or service provider's financial resources for other projects. Secondly, although one always speaks of termination of a contract when it is really the right and obligation to do work and be paid for it which is terminated for the future, the contract continues to govern the relationship between the parties in relation to the work already done.

18 Such a conclusion is further vindicated by the "Information Kit" released by the BCA (the main proponent of the Act), which states (at cl 2.2) that:

Progress payment claims made after completion dates, including claims for final payments (where applicable), are also covered under the Act. The payment claims must be made in relation to the contract.

(b) Excludes adjudication of "final payments"

19 In stark contrast to the foregoing conclusions, Seah Choo Meng in *BC v BD* [2006] SGSOP 10 concluded that a final claim should not be dealt with under the Act. In this regard, he stated (at [43]-[44]) that:

43. I am satisfied that this is an ongoing dispute about possible variation and the final accounts. It requires a detailed analysis of the provisions of the contract; of the scope of works; and a technical review of the works carried out. These points together with the letters of 15 June 2005 and 11 August 2005 need to be examined carefully with other relevant parties being cross examined. These are clearly matters that cannot [sic] be dealt with under provisions of the Act.

44. As the aim of the Act is to solve cash flow problems on monies unreasonably withheld, it is clear to one that it cannot resolve every payment issue especially one as I have described in paragraph No 43 above. The Claimant cannot [sic] just disregard the entire event that had taken place and simply raise their Payment Claim in the hope that it will be dealt with and disposed of under the Act. It must also be recognized that the payment obligations by the Respondent had largely been performed.

20 Indeed, the above extract appears to be in alignment with the holding in *Jemzone Pty Ltd v Trytan Pty Ltd* [2002] NSWSC 395 ("Jemzone") which the plaintiff relied heavily on, in which Austin J held (at [37]) that the NSW Act (as it applied then) did not extend to claims for final payment:

The definition of 'progress payment' is unhelpful, because s 8 confers an entitlement to payment only for a 'progress payment', without further defining or explaining those words. In my opinion, the words 'progress payment' when used in s 8 and other parts of the Act should therefore be given the meaning that they have under the construction contract. That accords with the structure of the Act itself, which generally leaves it to the construction contract to define the rights of the parties but makes 'default provisions' to fill in the contractual gaps: see second reading speech, at p 1013. It also accords with the stated object of the Act. If the Act was intended to apply in the case of the final payment on practical completion, it would have been a simple matter for the drafter of the statement of the object of the Act in s 3(1) to refer to the entitlement to receive all payments due under the construction contract, rather than only "specified progress payment". The minister's concern with the cash flow of subcontractors (second reading speech, at pp 1012 and 1013) also suggests that attention was focused on progress payments rather than the final balancing of account between the contracting parties.

21 In a similar vein, the author Chow Kok Fong in "*Security of Payment and Construction Adjudication*" suggested (at p 72) several reasons why a final payment would reasonably be excluded from the ambit of the Act:

Firstly, the certification of the final payment is expected towards the end of the contract when the risks associated with non-payment are generally less likely to threaten the delivery and completion of the works. Secondly, it might be thought that since the final payment is an incident encountered at the end of the contract, parties should be able to submit disputes relating to the final payment for final resolution by the Courts or arbitration. Thirdly, quantity surveyors generally consider the final payment to constitute a definitive statement of the final financial position between the parties in respect of the subject contract and, accordingly, the final statement should not be subject to the same pressure of timelines as those encountered with the processing of progress payment. There is some attraction in the force of these arguments on the policy consideration that the intention behind the legislation is to minimise disruption to the

progress of construction works arising from payment problems.

22 Interestingly enough, the author acknowledged the contrary view taken by the BCA and enunciated several opposing considerations mandating an opposite result (discussed below at [35]). In light of the unsettled nature of this issue, a determinative pronouncement from the courts is timely.

Resolving the conflict

23 Notwithstanding the undeniable merits of the plaintiff's interpretation, I am of the view that the broader interpretation, to the effect that the Act does encompass and provide for the adjudication of "final progress payments", is to be preferred.

(1) Literal interpretation

24 Adopting a literal perspective, such an interpretation is justified by the unambiguous wording of the Act, which defines "progress payments" as "*a payment to which a person is entitled for the carrying out of construction work or the supply of goods or services, under a contract*" ("the main limb"). Such a definition expressly *includes* a "single or one-off payment" or a payment "based on an event or date" ("the supplementary limb").

25 The plaintiff had submitted that the Act does not cover final claims on the basis that it is not expressly provided for. I have several comments to make on this submission. First, the word "*includes*" alludes to the non-exhaustive nature of the sub-provisions that follow. From this perspective, the operative definition of "progress payment" should be centered on the *main* limb rather than the supplementary limb.

26 The plaintiff appeared to have adopted the tack that "final payments" should not be included simply because they were not specifically identified in the supplementary limb as included within the main limb. This approach with respect, neglects the structure of the provision, which unambiguously defines "progress payments" at the outset, as payments to which a person is entitled for the carrying out of construction work under a contract.

27 Looking at the structure and wording of the provision, it appears that an exclusion of "final payments" from the ambit of the Act can only be justified by express wording to that effect. It would not suffice to infer a legislative intention to exclude simply on the basis that "final payments" were not included in a non-exhaustive supplementary definition, ostensibly provided for clarification. If the legislature had intended to exclude final claims from the adjudicatory ambit of the Act, it could have clearly included a proviso or provision to that effect. In the absence of such express exclusion, the primary broad ranging definition in the main limb must be determinative.

28 In addition, a plain reading of "a payment that is based on an event or a date" or a "single or one-off payment" clearly encompasses final payments. Such a conclusion is vindicated by the fact that the Act at no time makes any distinction between "final claims" and "non-final claims". Implying such a distinction from the supplementary limb would severely impair the protection afforded by the Act, as it would create a *carte blanche* for contractors to renege on the final stages of payment, which would have an equally deleterious effect on cash flow affecting other ongoing construction projects.

29 In the same vein, Member of Parliament Dr Amy Khor, in support of the Bill at its second reading, emphasized the broad scope of its application in the following terms:

Firstly, wide scope of the Bill's application. The SOP applies to the entire value chain of the construction industry, not just contractors and sub-contractors, but also developers and consultants. It applies not just to construction work done, but also to related goods and services supplied in the industry and to any other related matter. Construction work is given the broadest definition so that virtually all type of construction works fall within the Bill... Making the proposed SOP Act applicable throughout the construction value chain will not only facilitate payments and cashflow, but also help streamline industry practices, instill discipline among the various key players and bring about a more orderly industry.

30 The broader interpretation of the definition of "progress payments", which is "couched in fairly wide terms" (see Wong Partnership's *Annotated Guide to the Building and Construction Industry Security of Payment Act 2004*) to include final payments clearly accords with the legislative intent underscored by the above extract, which brings me to the next point.

(2) Purposive construction

31 Construing the relevant provisions purposively leads to a similar conclusion. To begin with, the preamble of the Act describes itself as "an Act to facilitate payments for construction work done or for related goods or services supplied in the building and construction industry, and for matters connected therewith".

32 The *raison d'être* of the Act has been similarly clarified by the then Minister of State for National Development at the second reading of the Bill as follows:

[B]y upholding the rights of any party in the industry to seek payment for work done or goods supplied, this Bill will help to deter and weed out the practice of delaying or withholding payment without valid reasons. The speedy and low cost adjudication process will expedite the resolution of genuine payment disputes so that cashflow will not be disrupted. It will identify contractors who are facing financial difficulties early, before they cause more problems downstream.

33 From the above extract, it appears that the Act is primarily directed at safeguarding the continued financial viability of contractors who are victims of payment delays or disputes made in bad faith perpetuated by upstream contracting parties. From this perspective, it makes no sense to draw an artificial distinction between allegedly "final" and "non-final" payments, as the withholding of either would create the exact same downstream ripple effect intended to be "deterred and weeded out" by the Act.

34 Admittedly, the Bill cannot be expected to resolve every payment issue or payment woe in the industry. Nonetheless, the avowed intention of the legislature remains central in resolving the present controversy. All things being equal, an interpretation which best advances the legislative intent should be preferred.

35 My interpretation is reinforced by Chow Kok Fong in "*Security of Payment and Construction Adjudication*", who expressed (at p 73) a similar opinion which merits reproduction in full:

[I]f the objective is to encourage good payment behaviour on the part of the various parties down the contractual chain, there is little reason why the payment discipline intended by the BCISP Act should not be allowed to visit final payments as well. The definition of 'progress payment' in the Act expressly includes 'a payment that is based on an event or a date'. Furthermore, the same considerations which justify the coverage of the Act to include contracts which provide for a single, one-off payment would apply to the security of the final payment as

well. It is considered that where the final payment is expressed to be triggered by reference to an event such as the issue of a Final Completion Certificate, one view is that the claim for a final payment in such a situation would fall within the description of 'a payment that is based on an event or a date' as stipulated in paragraph (b) of the definition of 'progress payment' in the Act. On this construction, the definition of 'progress payment' under the Act would extend to include a final payment claim made pursuant to the Final Certificate issue under clause 31(10) of the SIA Conditions of Building Contract and a payment claim following the Final Account Certificate issued under clause 32.5(7) of the Public Sector Standard Conditions of Contract.

36 These compelling considerations make eminent sense in view of the legislative intent and the structure of the Act as a whole. Final payments triggered by the issue of a completion certificate undeniably fall within the definition of "a payment that is based on an event or a date". To exclude such "final" payments on the sole basis of their "finality" would be to infer an illusory distinction unjustified by the clear and unambiguous wording of the Act.

(3) Policy implications

37 Finally, my analysis would not be complete without considering the broader policy implications or risks of such an interpretation. In particular, several concerns need to be addressed.

38 The first relates to the availability of other (apparently) more appropriate avenues of "final payment" dispute resolution such as arbitration or the courts as was alluded to in *Security of Payment and Construction Adjudication* (above at [21]). I believe such a concern is not only overstated but has also been preempted by s 34(1) of the Act which provides:

Effect on other proceedings

34. – (1) Nothing in this Act shall affect any right that a party to a contract may have (a) to submit a dispute relating to or arising from the contract to a court or tribunal, or to any other dispute resolution proceeding; (b) to apply for adjudication under this Act, notwithstanding that the dispute is the subject of proceedings in a court or tribunal or the subject of any other dispute resolution proceeding;...

39 Indeed, the above provision makes it clear that the availability of other dispute resolution proceedings is not determinative of the adjudicatory scope or ambit of the Act. Rather, the Act is meant to ease contracting parties through interim periods of constricted cash flow by providing a platform for swift and efficient adjudications of protracted payment disputes, without prejudice to other available enforcement mechanisms.

40 Adopting the plaintiff's position of excluding "final claims" from the scope of the Act would undermine the legislative objective of protecting sub-contractors from unfair delays in payment, resulting in potentially adverse downstream effects on other projects, as upstream main contractors favouring delay could easily allege the "finality" of certain payments, in an attempt to exclude it from the ambit of the Act. Indeed, in a worst case scenario, our courts could potentially be beset with "tactical" applications seeking to set aside adjudication determinations based on "finality".

41 My conclusion is vindicated by the views held by the BCA (above at [18]) which develops and regulates Singapore's building and construction industry, and would have acquired an important familiarity with industry practices and customs.

42 The second obstacle which needs to be overcome relates to the underlying principle that

"risks associated with non-payment are generally less likely to threaten the delivery and completion of the works" and that the definitive statement of the final position between the parties "should not be subject to the same pressure of timelines as those encountered with the processing of progress payment" (above at [21]).

43 Whilst a "final" payment claim is arguably subject to less pressing timelines than interim "progress payments", such a perspective appears to be premised on the assumption of discrete and independent stand-alone construction projects, which hardly reflects commercial reality these days. The truth is that contractors undertake a multitude of construction projects for which a stoppage of cash flow on one will undoubtedly have an adverse effect on another. Because of the interwoven nature of construction contracts (and not discrete construction projects), the distinction between the repercussions of delays in payment claims, whether final or non-final, is irrelevant. The construction industry cannot allow a semantic narrow definition of "progress payments" to impair the financial protection afforded by the Act.

44 I am of the view that Austin J's holding in *Jemzone* (above at [20]) loses its significance once we appreciate that s 8 of the NSW Act (as it then was) did not define or explain the term "progress payment". Amidst such a statutory 'clean slate', it made eminent sense for Austin J not to preempt the legislature by judicially defining 'progress payments', but to simply attribute to the term the meaning that the words had under each individual construction contract. In contrast to the NSW Act (as it then was), our current version of the Act unambiguously defines "progress payments" as "a payment to which a person is entitled for the carrying out of construction work, or the supply of goods or services, under a contract" – a definition which leans towards the adjudicatory ambit of the Act.

45 Moreover, the NSW legislature's response to *Jemzone* constituted by its subsequent amendment of the definition of "progress payment" to *specifically* include "final payments", "a single or one-off payment" or "a payment that is based on an event or date" unequivocally suggests that the NSW Act (our primary predecessor) *was* intended to extend to the adjudication of "final" payments, which lends further credence to my preferred broader interpretation.

46 Third, the lack of any corresponding inclusion of "final payments" within the supplementary limb definition of "progress payments" is outweighed by a whole host of literal, purposive and policy considerations already discussed above. A comparative review of predecessor legislation is merely a factor to take into account and should not be allowed to hamper the overriding task of the court which is to adopt an interpretation consistent with the spirit and intent of the Act. As previously discussed, policy objectives are overwhelmingly in favour of bringing "final" payments within the ambit of the Act and are more than justified by literal and purposive interpretations of the clear and unambiguous statutory wording within the broader framework of the Act. Nor do parliamentary debates suggest otherwise.

47 The final concern to be addressed is underscored by the case of *BC v BD* [2006] SGSOP 10 (above at [29]), which suggested the possibility that final accounts encompassing substantial disputes of fact were not susceptible to be dealt with under the Act. To begin with, substantial disputes of fact are likely to be equally prevalent and inherent in payment disputes regardless of whether claims are characterized as final or non-final. It makes no sense to draw an artificial distinction between "progress payments" and "final claims" on the basis that the Act's platform is inadequate for purposes of the latter. Indeed, the "highly technical and complicated" nature of claims coming up for adjudication was specifically recognized during the second reading of the Bill, when the Minister in charge reiterated the need for well qualified and experienced professionals as adjudicators.

48 At this juncture, I should not overlook the fact that s 18 of the Act provides for a review mechanism for parties dissatisfied with or aggrieved by an adjudication determination. There is no denial of due process or any material distinction between the processes of adjudication of final or non-final claims. As was clarified by the Minister of State for National Development at the second reading of the Bill, the effect of the adjudication under the Act is simply that:

[T]he adjudicated sum must be paid up first prior to the review so that payment to the claimant will not be delayed further. Although the adjudicator's decision is binding, it is not final. Parties may still pursue their right under the contract to challenge the adjudication determination in any court proceedings or arbitration.

49 It should also be noted that Dr Amy Khor's concern about "interim finality" caused by "an appeal to the court without any pre-condition" was considered and dismissed during the second reading of the Bill by the aforementioned Minister of State who had this to say:

Beyond the review, I think the right of appeal to a court or to an arbitrator is always available to anyone, and it is not correct for this Bill, while trying to solve one aspect of the problem faced by the industry, to deny that right of appeal to a court of law itself ... But I would like to assure the Member that the very cost associated with litigation is a deterrent for anyone to bring about frivolous or vexatious appeals to the courts. The costs and the time needed are sufficient to deter people from doing so unless they have a genuine case which they feel strongly about and which they think will prevail in a court of law.

50 Such objections stemming from an apparent lack of finality by proceeding with an interim determination under the Act (instead of proceeding directly to an arbitrator or to the courts) are further undermined in situations of impending insolvency, whereby recourse through the Act's adjudication will at least ensure that some money is secured early, in contrast with the alternative of a "final" but unenforceable paper judgment.

51 In light of the efficiency considerations I have referred to which are reinforced by due process assurances, I can see no reason why the courts should adopt an interpretation which abridges the prophylactic nature of the Act.

Conclusion

52 Having regard to the clear and unambiguous definition of "progress payments" read in the context of the objectives sought to be achieved by the Act, I am of the view that the ambit of adjudication under the Act should extend to both "final" and "non-final" payments.

53 Consequently, the plaintiff's attempt to set aside the Adjudication determination by the OS is dismissed with costs to the defendant to be taxed unless otherwise agreed.

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