Lian Teck Construction Pte Ltd v Woh Hup (Pte) Ltd and Others
[2006] SGHC 118

Case Number : Suit 98/2006, RA 124/2006

Decision Date : 06 July 2006

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Sean La'Brooy (Wong Partnership) for the appellant; Wong Por Luk Paul and Loh Jen Wei (Rodyk & Davidson) for the respondents

Parties : Lian Teck Construction Pte Ltd — Woh Hup (Pte) Ltd; Shanghai Tunnel Engineering Co Ltd; NCC International Aktiebolag

Civil Procedure – Rules of court – Defendants to action applying for stay of proceedings in favour of arbitration – Plaintiff filing cross-application for interim payment – Whether applications for stay and interim payment ought to be heard together – Section 6 Arbitration Act (Cap 10, 2002 Rev Ed), O 29 r 10 Rules of Court (Cap 322, R 5, 2006 Rev Ed)

6 July 2006

Andrew Ang J:

1 The defendants/respondents were the main contractors for a Land Transport Authority project known as "Contract 825 – Design, Construction and Completion of Stations at Millenia, Convention Centre, Museum and Dhoby Ghaut including tunnels" ("the project").

2 The defendants appointed the plaintiff/appellant as earthworks subcontractor for the project under a subcontract ("the subcontract") evidenced, *inter alia*, by a letter of award dated 23 June 2002. Subsequently, by way of a letter dated 19 February 2004, the defendants gave notice to the plaintiff of partial termination of the subcontract.

3 The plaintiff took this to be a repudiation of the subcontract and by its letter of 5 March 2004, accepted such repudiation without prejudice to its right to recover damages against the defendants.

4 For the works already performed under the subcontract which remained unpaid, the plaintiff claimed an aggregate amount of $2,560,239.52. Payment of the same not having been made, the plaintiff issued a writ of summons against the defendants on 24 February 2006 claiming, *inter alia*, the said amount, loss of profits (to be assessed) and special damages.

5 The defendants entered an appearance in the action on 3 March 2006 and on 22 March 2006 (which was the last day for filing their defence under the Rules of Court (Cap 322, R 5, 2006 Rev Ed) timelines), filed a summons application (Summons No 1259 of 2006) seeking an order that proceedings in the action be stayed in favour of arbitration pursuant to s 6 of the Arbitration Act (Cap 10, 2002 Rev Ed).

6 On 30 March 2006, the plaintiff filed a cross application (Summons No 1394 of 2006) for interim payment, pursuant to O 29 r 10 of the Rules of Court. This application was fixed for hearing on 5 April 2006 together with the defendants' stay application.

7 On 3 April 2006, the defendants filed a summons (Summons No 1455 of 2006) seeking, *inter alia*, an extension of time to file and serve their affidavit in reply to the plaintiff's application for interim payment after the final resolution of the stay application including all appeals originating

therefrom and also an order that the hearing of the interim payment application be adjourned to a date after the final resolution of the stay application including all appeals originating therefrom. In seeking such directions, the defendants took the position that the plaintiff's application for interim payment should not be heard until final disposal of the stay application.

8 The assistant registrar who heard the summonses ordered, *inter alia*:

(a) In respect of the plaintiff's application for interim payment (Summons No 1394 of 2006), that an extension of time be granted to the defendants to file and serve their affidavit(s), if necessary, 14 days after the final resolution of the stay application in Summons No 1259 of 2006 (including all appeals originating therefrom and thereafter).

(b) That the plaintiff file and serve its affidavit(s) in reply to the defendants' affidavit(s) in Summons No 1394 of 2006, 14 days after the service of the defendants' affidavit(s).

(c) The hearing of Summons No 1394 of 2006 be adjourned to a date after the final resolution of Summons No 1259 of 2006 (including all appeals originating therefrom and thereafter), to be fixed by the registry of the Supreme Court.

The plaintiff's appeal before me was against these orders, its contention being that both applications should be heard together.

9 Prior to the amendment of O 14 r 1 allowing an application for summary judgment to be made only after a defence has been filed, the practice was to hear an O 14 application and a stay application together. See, for example, *Tropicon Contractors Pte Ltd v Lojan Properties Pte Ltd* [1989] SLR 610 ("the *Tropicon* case") and *Aoki Corp v Lippoland (Singapore) Pte Ltd* [1995] 2 SLR 609 ("the *Aoki Corp* case").

10 If a contract, such as a building contract, contained an arbitration clause and a dispute arose between the parties, the court could give judgment for a sum indisputably due under O 14 and stay the rest of the claim for arbitration. This followed the practice in England prior to the Arbitration Act 1996 (c 23) (UK). (The 1996 Act removed the court's power under the Arbitration Act 1975 (c 3) (UK) to refuse to stay legal proceedings where it was satisfied that "there is not in fact any dispute between the parties with regard to the matter agreed to be referred", the purpose of such change being to exclude the jurisdiction to give summary judgment based on an investigation of what was in fact disputable. See *Halki Shipping Corporation v Sopex Oils Ltd* [1998] 1 WLR 726 at 750 and 762, *per* Henry and Swinton Thomas LJJ.) In the words of Bridge LJ in *Ellis Mechanical Services Ltd v Wates Construction Ltd* (1976) 2 BLR 60 ("*Ellis v Wates*") at 65:

> To my mind the test to be applied in such a case is perfectly clear. The question to be asked is: is it established beyond reasonable doubt by the evidence before the court that at least £*x* is presently due from the defendant to the plaintiff? If it is, then judgment should be given for the plaintiff for that sum, whatever *x* may be; and in a case where, as here, there is an arbitration clause, the remainder in dispute should go to arbitration. *The reason why arbitration should not be extended to cover the area of the £x is indeed because there is no issue, or difference, referable to arbitration in respect of that amount*. [emphasis added]

11 In *Associated Bulk Carriers Ltd v Koch Shipping Inc* (1978) 7 BLR 22, the English Court of Appeal, following *Ellis v Wates*, clarified that judgment under O 14 may only be given where, in the words of Browne LJ at 30:

> [T]here is by admission, or can be by a decision of the court, a quantified sum as to which 'there is not in fact any dispute'.

This meant that where the defendants' counterclaim was unquantified and uncertain, summary judgment under O 14 could not be given. The question then arose whether, in such circumstances, an order for interim payment under O 29 might be made if the court was satisfied that, unquantified though it was, the counterclaim (if successful) would be for an amount less than the plaintiff's claim. Could not the court order that the difference be paid in the interim – even if the dispute was to be stayed and referred to arbitration?

12 In *Imodco Ltd v Wimpey Major Projects Ltd and Taylor Woodrow International Ltd* (1987) 40 BLR 1 ("the *Imodco* case"), the English Court of Appeal answered this question in the affirmative, observing that there was nothing in O 29 of their Rules of the Supreme Court (*in pari materia* with ours) that precluded its application in such a case. This was a logical extension given that summary judgment could be given for a quantified part of a claim not in dispute before a stay order was made for the remainder in dispute to be referred to arbitration.

13 When O 14 r 1 was amended in Singapore, it became no longer possible to apply for summary judgment before the defence was filed. Where a stay application was made by the defendants, this gave rise to difficulties which were clearly brought into focus in the Court of Appeal decision in *Samsung Corp v Chinese Chamber Realty Pte Ltd* [2004] 1 SLR 382 ("*Samsung*"). The facts are set out in the headnote as follows:

> The respondents ("CCR") engaged the appellants ("Samsung") to build a 30-storey office building. There were apparently delays in the completion of the project. The project's architect issued a delay certificate in favour of CCR, which then sought payment under the certificate, relying on the temporary finality provision under cl 31(11) of the Singapore Institute of Architects Conditions of Contract ("the SIA contract"). Samsung entered appearance, and applied for a stay on the ground that there was an arbitration clause in the SIA contract.
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> Order 14 r 1 had recently been amended so that no application for summary judgment ("O 14 application") could be made until after the defence had been filed. As such, CCR could not file an O 14 application.
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> Samsung's stay application came up for hearing before an assistant registrar, who invoked the inherent powers of the court under O 92 r 4 to allow CCR to file its O 14 application. She ordered the stay application and the O 14 application to be heard together.
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> [Samsung] appealed to a judge in chambers, who held that an O 14 application could only be made after the defence had been filed, but ordered Samsung to file its defence with the caveat that this was not to be construed as a step in the proceedings ("the compromise order").

14 As explained by S Rajendran J in the court below in *Chinese Chamber Realty Pte Ltd v Samsung Corp* [2003] 3 SLR 656 at [2]–[4]:

> 2 This amendment [to O 14 r 1] brought in its wake, difficulties in relation to obtaining summary judgments under O 14 for contracts – particularly building contracts – which provided for disputes to be referred to arbitration. Despite the existence of such arbitration clauses the practice had developed for a plaintiff – such as a contractor or sub-contractor who had not been paid progress payments due under an architect's certificate – to commence proceedings in the civil courts in order to obtain the benefit of a speedy judgment under O 14. When such an action

was commenced, the defendant – if he wished the matter to be heard by the arbitrator – would apply for a stay of proceedings on the grounds that the parties had contractually agreed to arbitration and that arbitration was the more appropriate mode for resolving the disputes. It was the practice – pre-December 2002 – for the O 14 application and the stay application to be heard together.

3 Under the amended O 14 provisions, however, the plaintiff would have to wait for the defendant to file his Defence before applying for O 14 judgment, but a defendant who wanted the dispute resolved by arbitration would not file his Defence for fear that by so doing he would be deemed to have taken a step in the proceedings and thereby waived his rights to arbitration. To avoid that consequence, the defendant – as happened in this case – would have to apply for leave that he be allowed to file his Defence only after the application for stay had been dealt with.

4 If the court granted the defendant's application for leave to file the Defence after the stay application had been dealt with, the plaintiff would not be able to apply for summary judgment under the amended O 14. The result would be that the stay application would be heard without the O 14 application being heard at the same time. In those circumstances, if the stay application were granted, the plaintiff would be precluded from making an O 14 application. It is only if the stay application was refused that the plaintiff, after the defendant had filed his Defence, could proceed to apply for O 14 judgment.

15 The question that arose in *Samsung* ([13] *supra*) was whether it was proper, in the light of the amended O 14 r 1, for the court to compel a defendant to file his defence so as to enable the plaintiff to file an O 14 application, where the defendant had already filed an application for a stay of the proceedings. Rajendran J ordered Samsung to file its defence (thereby enabling the plaintiff to proceed with the O 14 application) but added a caveat that the filing of such defence was not to be construed as a step in the proceedings ("the compromise order"). This was reversed by the Court of Appeal. Adopting the reasoning of Woo Bih Li JC (as he then was) in *Yeoh Poh San v Won Siok Wan* [2002] 4 SLR 91, the Court of Appeal held (at [25]) that the compromise order was "inconsistent with logic and conceptually wrong".

16 This was because, on the one hand, the order required the defendant to file his defence despite the rule laid down in s 6(1) of the Arbitration Act (that a defendant who applies for a stay on the ground of there being an arbitration clause must not take any step in the proceedings) and, on the other hand, it provided that the defence so filed would not be regarded as a step in the proceedings for purposes of s 6(1) of the Arbitration Act.

17 The Court of Appeal went on to say that the Rules Committee must have been aware of the practice till then of hearing the stay application together with the O 14 application so that in amending the rules, their intention must have been that while a stay application is pending, no O 14 application should be made. On that basis, the court concluded that the compromise order was neither in line with the spirit and intendment of s 6(1) of the Arbitration Act nor with O 14 r 1.

18 In the face of *Samsung*, it was of course not open to the plaintiff to apply for summary judgment; presumably this was why it applied for interim payment instead. The question before me was whether the Court of Appeal's reasoning in *Samsung* similarly applied to an application for interim payment under O 29 r 10 in the absence of any express provision therein precluding such an application while a stay application was pending.

19 After careful consideration, I came to the view that it was not sensible to distinguish

between an O 14 r 1 application and one under O 29 r 10 in the context of a stay application. My reasons are as follows:

(a) An application for interim payment is an application on the merits and akin to an application for summary judgment. This is because before granting an order for interim payment, the court has to be satisfied that the plaintiff would obtain judgment for a substantial amount at trial (see O 29 rr 11 and 12). It was held by Browne-Wilkinson VC in *British and Commonwealth Holdings Plc v Quadrex Holdings Inc* [1989] QB 842 at 866 that when considering whether to grant an order for interim payment, it was not sufficient for the court to be of the view that the claim was likely to succeed; the court had to be satisfied that it would succeed.

(b) If the defendant were to file affidavit(s) opposing the application for interim payment, such affidavit(s) would necessarily have to dwell on the merits of the claim. In so doing, the defendant would be taking a step inconsistent with its contention that the court had no jurisdiction by reason of the agreement to arbitrate.

(c) More importantly, so to do would constitute the taking of a step in the proceedings prohibited by s 6(1) of the Arbitration Act which provides as follows:

> Where any party to an arbitration agreement institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and *before delivering any pleading or taking any other step in the proceedings*, apply to that court to stay the proceedings so far as the proceedings relate to that matter. [emphasis added]

The phrase "taking any other step in the proceedings" has been considered many times before by the English courts. In *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd's Rep 357, Lord Denning MR at 361 stated:

> On those authorities, it seems to me that in order to deprive a defendant of his recourse to arbitration a "step in the proceedings" must be one which impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with a determination by the Courts of law instead of arbitration.

This passage was subsequently followed in *Kuwait Airways Corporation v Iraq Airways Co* [1994] 1 Lloyd's Rep 276 and cited with approval by Belinda Ang Saw Ean J in *Australian Timber Products Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2005] 1 SLR 168. Although, conceivably, an affidavit resisting the application for interim payment could be filed with the express reservation that this was without prejudice to the defendants' position taken under the stay application, my own inclination is that the filing of such an affidavit going, as it must, into the merits of such application would be a step in the proceedings. In my view, the Court of Appeal's reasoning in *Samsung* in this regard applies not only to applications for summary judgment but also to applications for interim payment as well. Such a holding makes for a more uniform and consistent approach.

20 The plaintiff cited the *Imodco* case ([12] *supra*) in support of its contention that the application for interim payment should be heard together with the stay application and that the court was not precluded from ordering an interim payment before staying the matter in favour of arbitration. In their commentary prefacing the report of the case, the editors of the Building Law Report doubted the correctness of the decision. They suggested that the court failed to take into account the difficulty in the court subsequently carrying out a final adjustment (which is provided for under O 29

r 17) where the court would no longer be seised of the dispute, the same having been referred to arbitration.

21 I further looked at the matter from the stand point of fairness. (However, I should reiterate that in the appeal before me, I was not called upon to consider the merits of either the stay application or that for interim payment. The appeal concerned only the procedural issue whether the two applications ought to be heard together.) It was argued that to delay the hearing of an application for interim payment until after the stay application had been finally disposed of would cause hardship to a deserving plaintiff. As a partial answer to that, it should be noted that adjudication under s 12(1) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) as an alternative means of obtaining interim payment is available unless the contract was entered into on or after 1 April 2005. Besides, although the point was not argued by counsel, I believe it is open to the claimant to seek an interim award from the arbitrator if the matter went to arbitration. Therefore the hardship to a claimant may perhaps not be quite as severe as might be imagined.

22 For the foregoing reasons, I dismissed the appeal with costs to the defendants fixed at $4,000.