IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 11

HC/Suit No 92 of 2015 (HC/Registrar's Appeal No 94 of 2016)

Between

Lim Poh Yeoh (alias Aster Lim)

… *Plaintiff*

And

TS Ong Construction Pte Ltd

… *Defendant*

GROUNDS OF DECISION

[Civil Procedure] – [Stay of proceedings]

Lim Poh Yeoh (alias Aster Lim)
v
TS Ong Construction Pte Ltd

[2017] SGHC 11

High Court — HC/Suit No 92 of 2015 (HC/Registrar's Appeal No 94 of 2016)

Foo Chee Hock JC

5 September, 27 September 2016; 22 November 2016

31 January 2017

Foo Chee Hock JC

Introduction

1 In 2011, the plaintiff in HC/Suit No 92 of 2015 ("Suit 92"), Lim Poh Yeoh ("the Plaintiff") employed the defendant, TS Ong Construction Pte Ltd ("the Defendant") to construct a pair of three-storey semi-detached dwelling houses with an attic and an open roof terrace.[1] Disputes arose and spawned the following proceedings:[2]

(a) Suit 92: the present proceedings commenced by the Plaintiff wherein the Plaintiff claimed for, *inter alia*, liquidated damages on the basis of delay in completion of the construction works and unliquidated damages for defective works. The Defendant filed a counterclaim for the unpaid sum owing to it for the works it had completed. The value of the counterclaim was $248,195.40 (see para 16 of Defence and Counterclaim), which was less than the sum of the Plaintiff's claim (*ie*, approximately $412,316) (see para 28 of Statement of Claim).

(b) Originating Summons No 381 of 2013 ("OS 381"): the Defendant had registered an adjudication determination ("the Adjudication Determination") (pursuant to the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOPA")), wherein the Plaintiff was ordered to pay a sum of $138,660.16, with interest and costs to the Defendant; leave was granted to the Defendant to enforce the Adjudication Determination in the same

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[1] Para 8 of Plaintiff's Written Submissions ("P's WS") dated 5 Sept 2016.

[2] Para 15 of P's WS dated 26 Sept 2016. I have retained the description of the parties as "Plaintiff" and "Defendant" when referring to them in the other proceedings regardless of their positions therein.

manner as a judgment or an order of court ("the Judgment Debt").[3] This led the Defendant to take out several enforcement proceedings against the Plaintiff (see para 26 of Defendant's Written Submissions ("D's WS") dated 5 September 2016). First, it succeeded in obtaining a garnishee order against the Plaintiff's bank (*ie*, Oversea-Chinese Banking Corporation Limited) through which the Defendant managed to secure payment of the sum of $30,722.86. The Defendant also obtained an order for the examination of judgment debtor and, subsequently, a writ of seizure and sale against the Plaintiff's property, although United Overseas Bank as mortgagee of the property refused to consent to the sale.

(c) HC/Originating Summons (Bankruptcy) No 66 of 2015 ("OSB 66"): the Plaintiff applied to set aside a statutory demand issued by the Defendant. The statutory demand was set aside by Edmund Leow JC in HC/Registrar's Appeal No 350 of 2015. There is presently an appeal pending before the Court of Appeal against Leow JC's decision.

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[3] See the order of court dated 14 May 2013.

2 As a result of not having the various costs orders and the Judgment Debt satisfied, the Defendant filed HC/Summons No 6188 of 2015 ("SUM 6188") wherein it asked for a stay of Suit 92 pending the payment by the Plaintiff to the Defendant of all sums owed in respect of the orders of court made in OS 381 and OSB 66. The Assistant Registrar granted the stay.

3 In HC/Registrar's Appeal No 94 of 2016 ("RA 94") (*ie*, the present proceedings), the Plaintiff appealed against the decision of the Assistant Registrar[4] to stay Suit 92. It should be noted, however, that due to the statutory demand in OSB 66 being set aside by Leow JC on appeal (in favour of the Plaintiff) and due to the Plaintiff having paid the interlocutory costs orders which arose in Suit 92, what remained unpaid by the Plaintiff to the Defendant (when I made the present orders) were the outstanding costs and the Judgment Debt in OS 381 only.

4 The central issue before the court was therefore whether Suit 92 should be stayed because of the non-payment of the costs and the Judgment Debt. There were two aspects to this issue:

(a) whether the court had the power to order such a stay; and

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[4] In SUM 6188.

(b) if so, whether the court should exercise its discretion to order the stay.

5 On 22 November 2016, I delivered my decision to the parties wherein I answered both of the above questions in the affirmative. I decided, however, to grant the Plaintiff one final indulgence and allowed her (about) one month to satisfy the outstanding costs orders and the Judgment Debt in OS 381; in default all proceedings in Suit 92 were to be stayed.

6 The Plaintiff has now appealed against the whole of my decision.

Non-payment of costs

7 It was not disputed between the parties that the court has the power to stay proceedings for the non-payment of costs. In this respect, the Defendant submitted the following:[5]

> This principle has been succinctly set out in Halsbury's Law[s] of England vol 37 (4th Ed, 2001) at para 930, p 293 (see ***Roberto*** ... at [20]), namely as follows:
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> > "*Under its inherent jurisdiction the court has power to order the stay of proceedings or further proceedings in a variety of circumstances. These include power to stay*

[5] D's WS dated 27 September 2016, para 35.

> *proceedings … where the costs of a previous claim or previous proceedings have not been paid.*"

8 The Plaintiff, on the other hand, while accepting that the court has the power to stay proceedings for the non-payment of costs, argued that a stay should only be granted in exceptional circumstances.[6] In summary, the Plaintiff asserted that the court should only stay proceedings in one of the following two situations: (a) where the same plaintiff having failed in one action, with costs ordered against him, brought a second action for the *same cause of action* without paying the costs ordered in the first action; and (b) where the non-payment of *interlocutory costs orders* was held to be vexatious and where innocent parties would be affected and prejudiced.[7] In the light of the above, the Plaintiff submitted that a stay for the non-payment of costs should not be granted as "[w]hile all the … proceedings stem *from the same transaction*, i.e. the construction contract between the parties, the causes of action and the substance of the claims are different"[8] [emphasis added].

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[6] P's WS dated 26 September 2016, para 3.

[7] P's WS dated 26 September 2016, para 3.

[8] P's WS dated 26 September 2016, para 16.

9 I did not think, however, that the court should be constrained in the exercise of its discretion in the pedantic and technical manner advocated for by the Plaintiff. Neither should the two categories of cases identified by the Plaintiff in which a stay of proceedings had been granted be a closed list. In the present case, the Plaintiff had lost in other proceedings (*ie*, OS 381) and incurred costs to be paid to the Defendant. I did not think that it should be determinative that the Defendant was the claimant in the adjudication proceedings under SOPA and correspondingly the Plaintiff was the respondent. The fact remained that the Adjudication Determination, which formed the basis of OS 381, arose from the same construction contract and, at the very least, was one of the issues which would be canvassed in Suit 92. This was therefore a situation where the same parties were involved and the same subject-matter was engaged, with the SOPA proceedings being the precursor of the present proceedings to finally resolve the parties' dispute. Hence, I found that the necessary nexus was present – OS 381 emanated from the same dispute ("the same transaction, i.e. the construction contract" as the Plaintiff stated) that animated the present Suit 92.

10 Ultimately, whether a stay should be granted in such a situation would depend on the justice of the case and would include considerations such as whether there had been an abuse of process

although this would be balanced against the right of the defaulting party to be heard. In *Roberto Building Material Pte Ltd and others v Oversea-Chinese Banking Corp Ltd* [2003] 2 SLR(R) 353, the Court of Appeal made the following observation (at [19]), albeit in the context of whether a stay of an appeal for non-payment of costs in the first instance hearing should be ordered:

> Accordingly, the circumstances where such an order may be made must be rare indeed. We do not wish to prejudge matters or lay down any definite considerations. *It is the twin criteria of prejudice/justice which would be decisive.* Purely as an example, if a plaintiff was required by the court below to furnish security, and failed to do so, and the case went on to trial as the defendant wished to have the matter disposed of expeditiously, and the plaintiff then failed and appealed, this may be the sort of circumstance where the appeal court could invoke that jurisdiction to order payment of the costs below before the appeal may be allowed to proceed.
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> [emphasis added]

11 The twin criteria of prejudice/justice appeared to be similarly relevant in the United Kingdom. An example would be that of the English decision of *In re Wickham, Marony v Taylor* (1887) 35 Ch D 272 where the defendant sought a stay of all further proceedings by the plaintiff until the latter had paid the costs for certain interlocutory proceedings. In deciding to stay the proceedings, Lindley LJ observed (at p 282) that while the non-payment of costs *per se* was not ground for staying proceedings, "whenever it can be

shewn that a person is *proceeding vexatiously in not paying costs* which he has been ordered to pay, the Court has jurisdiction to stay the proceedings" [emphasis added].

12 In the present case, I found that the Plaintiff had the capacity and means to pay the outstanding costs ordered but was simply *refusing* to do so. The best case that Plaintiff's counsel could put forward for her during the hearing was to say that "Plaintiff has not said that she can pay but she has not said that she cannot pay" (see Notes of Proceedings dated 27 September 2016). I note that the Assistant Registrar, in SUM 6188, had made the similar finding that the Plaintiff was refusing to pay the sums owed.[9] Quite apart from the fact that the Plaintiff had never once asserted that she was unable to pay the outstanding costs (and the Judgment Debt), her course of conduct before me further reinforced my view that she had the means to pay but chose to make a mockery of the court process. When RA 94 came before me on 5 September 2016, apart from the costs and the Judgment Debt in OS 381, there was an outstanding amount of $500 costs which had arisen because of a prior adjournment of RA 94. Additionally, at the hearing on 5 September 2016, I allowed an application by the Plaintiff (*ie*, HC/Summons No 1703 of 2016 in Suit 92) for an extension of time

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[9] Notes of Proceedings dated 26 February 2016, p 6.

to serve the notice of appeal but ordered the Plaintiff to pay costs of $800 to the Defendant. The matter was then adjourned for written submissions on whether the court had the power to stay proceedings for the non-payment of costs and the Judgment Debt. I further directed that the Plaintiff should, by the next hearing, pay the said costs of $500 and $800. Subsequently, on 26 September 2016, the Plaintiff filed her written submissions where she took the position, as noted above (at [8]), that a stay of proceedings should only be granted in the two enumerated circumstances, one such circumstance being where the non-payment of *interlocutory costs orders* in the same suit was vexatious.

13 At the hearing on 27 September 2016, the Plaintiff's counsel then informed me that all the *interlocutory costs orders* in Suit 92 had been satisfied and submitted that since a stay should only be granted where the costs from interlocutory proceedings in the same suit had not been paid, the court should not order the stay (notwithstanding that the costs and the Judgment Debt in OS 381 remained unsatisfied by the Plaintiff). It was evident to me that the Plaintiff was simply picking and choosing which outstanding orders of court to comply with so that she would not contradict or weaken the legal position she was adopting. This brought to light the Plaintiff's attempt to game the system and there was no reason to believe that the Plaintiff was unable to satisfy the other

outstanding orders of court. In this regard, I agreed with the observations of the Assistant Registrar below that "[i]n effect, the [P]laintiff will use the power of this Court when it suits her and disregard it when it does not".[10]

14 A stay of the proceedings would therefore not cause the Plaintiff "prejudice" in the usual way that the concept was understood. This was unlike the situation in *Morton v Palmer* (1882) 9 QBD 89 where it was noted by Cave J (at p 91) that it would be "entirely contrary to justice" if the court prevented a litigant from bringing a just claim simply because "he may be *unable* to pay the costs of some interlocutory proceeding in which *he may have failed perhaps from no fault of his own*" [emphasis added].

15 The above cases reminded us of an important safeguard: that the court should be careful not to stifle a genuine claim. Indeed, the law and its particular rules sought to hold the ring between parties. However, as against a recalcitrant party who was gaming the system this way, there was no question of stifling a genuine claim. The Plaintiff simply needed to play by the rules and pay up the outstanding costs (which she was able to do) to re-

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[10] Notes of Proceedings dated 26 February 2016, p 6.

activate the present proceedings. In my view, her conduct amounted to an abuse of the process of the court and could not be countenanced. I therefore ordered that Suit 92 be stayed if the Plaintiff did not satisfy the outstanding costs orders within a month.

Non-payment of judgment debt

16 The parties did not submit a direct authority addressing the court's power to order a stay in the face of non-payment of a judgment debt. I did take into account, however, that one of the grounds on which the courts would exercise its inherent power to stay proceedings was where the proceedings were "likely to cause an abuse of process of court" (*Singapore Civil Procedure 2017: Volume I* (Foo Chee Hock gen ed) (Sweet & Maxwell, 2017) at para 92/4/4). The question was therefore whether the Plaintiff's conduct of the proceedings was or was likely to cause an abuse of process.

17 It was relevant here to consider that the Judgment Debt originated from an adjudication determination under SOPA, which was converted into a judgment debt in OS 381. The policy and purpose undergirding SOPA was articulated by Sundaresh Menon CJ in *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 as follows (at [59]):

> We have said above that the purpose of the Act is to ensure (*inter alia*) that even though adjudication determinations are interim in nature, *successful claimants are paid.* … If the respondent intends to apply for a review of the adjudication determination, he must first pay the adjudicated amount to the claimant: see s 18(3). If the respondent wants to set aside the adjudication determination, he must pay into court as security the unpaid portion of the adjudicated amount: see s 27(5). This requirement is repeated in O 95 r 3(3) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). *These provisions all point to one thing: where a claimant succeeds in his adjudication application, he is entitled to receive the adjudicated amount quickly and cannot be denied payment without very good reason.*
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> [emphasis added]

18 The above cited passage was illustrative for at least two purposes. First, it showed that the entire SOPA scheme was based upon successful claimants being paid speedily. The concept of temporary finality found concrete expression and implementation in the prompt payment by the employer (*ie*, Plaintiff here) of any sums found due to the contractor (*ie*, Defendant) by the adjudicator. The payment had to be made pending the resolution of the disputes and issues in the underlying construction contract between the parties. Amongst other purposes, the payment of sums found due would enable the contractor to avoid cash flow problems and continue with the works under the contract. When the underlying dispute in the construction contract was finally

determined – whether by litigation or arbitration – the accounts between the parties would be adjusted by the appropriate order.

19 Secondly (and flowing from the first point), even if any respondent wished to challenge the outcome of an adjudication determination, he must still either pay the adjudicated amount to the claimant or pay the unpaid amount into court as security. This point was germane in guiding my decision to stay the proceedings if the Plaintiff did not pay the Judgment Debt. While I noted that the Plaintiff was not in fact seeking to review the Adjudication Determination, and therefore the above cited provisions did not apply to the Plaintiff, it would be perverse for the reasons herein for her to be allowed to deprive the Defendant of its right to prompt payment. The Plaintiff was effectively choosing not to pay the Judgment Debt in the hope that upon having the matter determined at trial, the court would find in her favour and she would never have to pay this sum to the Defendant. I saw no reason why someone in her position should be better off, for instance, than a respondent who was seeking to challenge the validity of an adjudication determination (who would be compelled to make the payment pursuant to provisions of SOPA before such a challenge could proceed). In fact, it could be said that it was even more imperative for someone in the Plaintiff's position to pay the

Judgment Debt in the interim since she herself recognised the validity of the Adjudication Determination.

20 I also took into consideration two Australian decisions which were cited to me by the Defendant: *Tombleson v Dancorell Constructions Pty Limited* [2007] NSWSC 1169 and *Nazero Group Pty Ltd v Top Quality Construction Pty Ltd* [2015] NSWSC 232. In both cases, instead of applying to set aside the adjudication determination in question, the plaintiffs sought an order quashing the decision of the adjudicator and an injunction to prevent the enforcement of the adjudication determination. In so doing, s 25(4) of the Building and Construction Industry Security of Payment Act 1999 (NSW), which provided that the judgment debt must be paid into the court as security pending a setting aside hearing, was not triggered. Against that backdrop, the Supreme Court of New South Wales found that it could and should exercise its inherent power to stay the proceedings until the plaintiffs paid the adjudicated sum into court as security. While the facts of these two cases differed from the present one, in my view, the common theme emanating from those decisions was that parties should not be allowed to withhold payment of the adjudicated sum whilst seeking to effectively overturn the adjudication determination at the same time. The Plaintiff's attempt to withhold payment while using Suit

92 to overturn the Adjudication Determination must be construed as an abuse of the process of the court.

21 Based on the Defendant's research, this could be the first case where a party in the Plaintiff's position elected not to pay the judgment debt pending the determination of their dispute in the underlying contract. It would be fair to say that such unilateral action on the Plaintiff's part drove a coach and horses through the scheme established under SOPA and cynically defeated its legislative intent.

22 While I noted that the Adjudication Determination in OS 381 only pertained to one of the many claims which would be considered in Suit 92, it was again significant to me that the Plaintiff was ultimately able but unwilling to pay the Judgment Debt (as noted above at [12]). There was, therefore, to my mind no issue of depriving her of the right of access to the court to have her case heard in Suit 92 because it was within her control to pay the Judgment Debt and have the matter revived.

Conclusion

23 I was also unconvinced by the Plaintiff's argument that since enforcement proceedings were available to the Defendant, a stay should not be granted. Quite apart from the fact that the Defendant

had satisfied me that it had taken all reasonable steps to enforce the costs orders and the Judgment Debt against the Plaintiff, I did not think that the availability of possible enforcement measures which the Defendant could concurrently pursue should be a fetter on the court's power to stay the proceedings. In my view, the court could not stand by while the Plaintiff was abusing its process; it was incumbent upon the court to bring such abuse to an end. This was also to disabuse the Plaintiff of any further ideas she might have of circumventing the rules, for instance, by refusing to pay the Defendant (pending an appeal) should she fail in Suit 92.

24 In the light of the Plaintiff's deliberate conduct, I therefore found it necessary to exercise the court's inherent power to stay the proceedings in Suit 92 until she paid all outstanding costs ordered by the court and the Judgment Debt in OS 381. As noted above (at [5]), however, I granted her one final indulgence to pay these outstanding sums; in default all proceedings in Suit 92 were to be stayed.

Foo Chee Hock
Judicial Commissioner

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for the Defendant.
