Motor Image Enterprises Pte Ltd *v* SCDA Architects Pte Ltd
[2010] SGHC 278

Case Number : Originating Summons No 264 of 2009

Decision Date : 17 September 2010

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Davinder Singh SC, Tan Siu-Lin and Alexander Lee (Drew & Napier LLC) for the plaintiff; Thio Shen Yi SC, Tan Sue-Ann and Jonathan Yang (TSMP Law Corporation) for the defendant.

Parties : Motor Image Enterprises Pte Ltd — SCDA Architects Pte Ltd

Arbitration

17 September 2010 Judgment reserved.

Judith Prakash J:

Introduction

1 This is an appeal on a question of law arising out of an arbitration.

2 The parties to the arbitration were SCDA Architects Pte Ltd ("SCDA"), a firm of architects that was engaged by Motor Image Enterprises Pte Ltd ("Motor Image") to be the architects in respect of the proposed retrofitting works and alterations ("the project") to be carried out to Motor Image's premises at 25 Leng Kee Road. The arbitration proceedings resulted from a dispute by the parties over the fees payable for the services rendered by SCDA.

3 SCDA was the claimant in the arbitration. It claimed the sum of $334,367.44 which it alleged constituted unpaid fees due to it for its work on the project. SCDA was largely successful in respect of its claim and by his award dated 5 February 2009 ("the Award"), the arbitrator, Dr Goh Chong Chia ("the Arbitrator") ordered, *inter alia*, that Motor Image was to pay SCDA its claim of $463,335 less payment to date.

4 Subsequently, Motor Image applied for leave to appeal to the High Court on a question of law arising out of the Award. On 2 October 2009, I granted leave to Motor Image to appeal on the following question of law ("the Question"):

Where an architect who is engaged under the Singapore Institute of Architects Conditions of Appointment and Architect's Services and Mode of Payment ("the Appointment Conditions") has agreed with his client to call for tenders based on an agreed set of drawings but instead calls for and receives tenders based on a different set of drawings, is the architect entitled to fees based on the lowest of the tenders under or by reference to clause 1.3(3)(b) of the Appointment Conditions?

5 On 12 October 2009, SCDA took out a summons ("SUM 5332/09") asking for leave under s 49(7) of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the Act") to appeal against the grant of leave to Motor Image to appeal on the Question. I dismissed this application some two weeks later and the appeal proper then came on for hearing in March and April this year.

Background

6 The appointment of SCDA as architects for the project took place in February 2004. The contract of service between the parties was subject to the Appointment Conditions. It was agreed that SCDA would be paid fees equivalent to 8.5% of the total construction cost subject to a minimum lump sum fee of $200,000. The Appointment Conditions provide by Condition 1.3(3) for the manner of calculating the construction cost as follows:

> 1.3(3) The total construction cost of the works for the purpose of calculating the fees shall include all builders' works as set out in the Building Contract and all specialists and/or sub-contractors' works forming part of the project. The total construction cost of the Works shall be arrived at in accordance with the order of priority as follows:-
>
> (a) For completed works, the total construction costs of all works including variations and additional work.
>
> (b) For works not contracted, the lowest bona fide tender received by the Architect.
>
> (c) For works where tenders have not been received by the Architect, the latest estimate of the total construction costs prepared by the appointed Quantity Surveyor, if any; or in the absence of the Quantity Surveyor, the Architect.

7 After its appointment, SCDA made three submissions of drawings to the Urban Redevelopment Authority ("the URA") for approval. The first submission was made on 18 August 2004, the second on 28 June 2005 and the final one on 18 August 2005. In addition, on 29 June 2005, Motor Image received another set of drawings from SCDA ("the 29 June 2005 drawings). Written permission for construction was finally obtained from the URA in September 2005. Motor Image was aware that the "use quantum" (*ie* the URA's requirement that only 40% of the premises could be used as a showroom or for ancillary purposes such as for offices or storerooms) was the major issue raised by the URA in the latter's written directions in response to the submissions and was responsible for the URA's rejection of the first two sets of drawings. Nonetheless, Motor Image briefed SCDA shortly before the second submission saying that it wanted more offices. It was common knowledge that this would delay and complicate the URA approval process.

8 After written permission was obtained, SCDA called a tender for the project (the "Main Contract Tender"). Motor Image subsequently decided to reduce the scope of the project. After Motor Image accepted a revised scope of works, SCDA called a second tender ("Tender No 2"). Finally, Motor Image decided to call the project off. The lowest tender for the Main Contract Tender was $9,480,000 and the lowest tender for Tender No 2 was $3,782,912.

9 The fees claimed by SCDA were calculated on the basis of 57.5% (being the stage of the work reached when the project was terminated, something that was not in dispute) of 8.5% of $9,480,000 being the lowest tender for the Main Contract Tender. Motor Image was not happy with this claim: it considered that it had been grossly overcharged for the work done especially because various mistakes had been made in the tender drawings.

The claim and the Award

10 SCDA based its claim in the arbitration on the results of the Main Contract Tender and the application to the same of Condition 1.3(3). The defences that Motor Image put up involved allegations of breach of contract, negligence, breach of statutory duty and or professional duties

and/or ethical duties and illegality. The gravamen of these allegations (apart from illegality) revolved around SCDA's alleged failure to ensure that the drawings complied with all relevant laws and regulations and to give proper advice to Motor Image on whether the design brief and drawings could be implemented lawfully or complied with the URA's prescribed use quantum and its further failure to advise Motor Image in a timely fashion that the prescribed use quantum had been breached and the design brief could not have been achieved. The allegation of illegality was based on the assertion that SCDA in the third submission to the URA had submitted an application and drawings which contained particulars or statements which were false, misleading, inaccurate and constituted a sham. This submission, it alleged, had resulted in a breach of the Planning Act (Cap 232, 1998 Rev Ed). Motor Image also put in a counterclaim.

11 The Arbitrator found no merit in any of Motor Image's defences or its counterclaim. His key findings were as follows:

> **Counterclaim for breach of contract of statutory duty/ obligations of professional duties and/or ethical duties**.
>
> It is my belief that two separate schemes were being prepared concurrently and it would be incorrect to conclude that one scheme was to mislead the URA and the other [Motor Image]. … [SCDA] was trying to fulfil Motor Image's brief in one, the URA in the other and at the same time preparing for tender. *It is not unusual for the submission drawings to be different from the tender drawings and not in full compliance to [Motor Image's] brief*. It is common practice for an amendment to be submitted later to regularise the works. … (Emphasis added)
>
> … [Motor Image] had full knowledge of the various steps and actions being taken by [SCDA].
>
> …
>
> I dismiss the allegation that SCDA had breached their statutory duties/obligations, professional duties and/or ethical duties.
>
> **Counterclaim on Negligence**
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> [SCDA] made mistakes, however, mistakes in themselves do not amount to negligence. [Motor Image] had alleged negligence by [SCDA], but did not present any assessment of the damage during the hearing ...
>
> This claim is rejected as no evidence was presented to establish the damage.
>
> **Defence of Illegality**
>
> [Motor Image] had pleaded in their Defence and Counterclaim dated 27 May 2007 that the contract and/or its performance thereof is illegal and/or unenforceable by reason of an alleged contravention/breach of the Planning Act and/or the Rules and Notifications and thus [SCDA] is not entitled to their claim for $334,674.44. [Motor Image's] contention was that the 3rd submission plans were false, misleading, inaccurate and/or for show/appearance sake in order to obtain Written Permission.
>
> …
>
> … Planning and developing a project is a process. To alleged [*sic*] illegality in midstream of the

process is not appropriate. Any difference in the submission drawings from the tender drawings would have had to be regularised through amendment submissions, appeals, waivers or concessions made as required to get approval. This is normal procedure.

…

I do not believe that after 2 years of developing the project with [SCDA], [Motor Image is] not aware, of the details in the design and the implication of use quantum, after having followed the process of obtaining [written permission] through its 3 submissions and re-terming. …

The process of submission and compliance to Authority requirements by [SCDA] although took 3 submission [*sic*] cannot be said to have been in breach of the Planning Act or were in any way illegal. I conclude that [SCDA] had not made any inaccurate, misleading or false statements to URA.

URA Submissions

In April 2005, shortly before the 2nd submission, [Motor Image] wanted more offices, conference/training room, meetings etc [*sic*] and not larger display area on the 2nd storey. A set of drawings responding to [Motor Image's] requirement[s] was prepared and submitted (ICB55) to [Motor Image] titled, as "Schematic Design-Planning submission." These drawings … received [by Motor Image] on 29 June 2005, were clearly drawings incorporating clients' brief and were not the 2nd submission to URA. … these were not the submission drawings.

Meanwhile on 29 June 2005, [SCDA] proceeded with the 2nd submission to URA which consisted of amended drawings from the 1st submission which continued to have "new parts display area" and no part of the previous showroom had been allocated for use as offices, conference/training room and meeting rooms as desired by [Motor Image]. …

…

I come to the conclusion that 2 sets of designs were being prepared concurrently and [it] would be a mistake to confuse the two sets of designs and present them as contradictions. They were separate legitimate attempts to satisfy [Motor Image] and the URA.

12 Motor Image had also made more specific arguments on the manner in which the fees should be calculated. It asserted that the Main Contract Tender was not a "*bona fide* tender" within the meaning of Condition 1.3(3)(b) and that the tender to use for computing the architects' fees should have been Tender No 2. The Arbitrator's findings on these issues were as follows:

Bona fide tender

Two tenders had been called. The contention was which of the tender [*sic*] was a bona fide tender on which tender construction cost was the fees to be computed from [*sic*] ...

[Motor Image] had asserted that the [Main Contract Tender] was not bona fide as:

1. it was not based on the 3rd submission

2. did not represented [*sic*] what [Motor Image] wanted.

...

[Motor Image] pointed out many mistakes and discrepancies in the drawings. These mistakes were not denied by [SCDA]. These mistakes in themselves do not make the Main Contract Tender a non bona fide tender.

...

I had earlier concluded that there were two concurrent processes going on at the time of tendering, one for planning application and the other for tender. The tender drawings were based on design [*sic*] and drawings received by [Motor Image] on 29 June 2005. This design was clearly what [Motor Image] wanted. Just because the tender was not based on drawings submitted to URA does not make it a non bona fide tender? [*sic*]

...

All the stages of the service were done with the full knowledge and agreement of [Motor Image]. Motor Image had not expressed any unhappiness with the service, the relationship was amicable and the agreement to a reduced scope of works and to recall the tender after the initial design tender was termed "not cost effective" was constructive. Up to that point in time there was no dispute on the fees ...

Both the expanded scope tender and the reduced scope tender were done with the full knowledge and consent of [Motor Image]. I rule that both tenders were bona fide.

Which tender to use for computing Architect's fees

The agreement between SCDA and Motor Image indicated a minimum fee of $200,000. That limit had passed after the Q.S. estimate. After agreeing for [SCDA] to [do] the additional work to recall the tender for a reduced scope of work and then to nullify the works for Tender No 1 and to suggest that that [*sic*] the fees should be based on the Tender No 2 lowest tender of $3,782,912 is not reasonable.

...

The lowest tender of $9.48 million was reasonable [*sic*] close to the QS estimate of 6 Sept 2005 of $8.24 million plus $930,000 provisional sum. For [SCDA] to base his fees on the first tender and on the lowest tendered sum and not submitted [*sic*] any claim for the additional service for preparing for the second tender is reasonable. There was nothing in the agreement requiring that [SCDA] to call the tender for the works twice.

...

In arriving at my decision, I had taken into consideration that [Motor Image] did agreed [*sic*] with all the submissions including calling of Main Contract Tender and Tender Addendum No 2. At no time was [SCDA] stopped for unsatisfactory service. ...

The decision is that [SCDA]'s claim [for] architectural fees based on the lowest tender from the Main Contract Tender without claiming any fees for preparing [Tender No 2] is fair and reasonable.

The appeal – preliminary issues

The appeal – preliminary issues

13 The main contention that SCDA put forward on the hearing of the appeal was that the Question was based on findings of fact that the Arbitrator did not make in the Award and therefore since it was not a question of law arising from the Award, the appeal should be dismissed. Motor Image responded with three contentions:

(a) that SCDA was estopped from raising issues that were already raised when the court considered Motor Image's application for leave to appeal under s 49(3)(b) of the Act;

(b) that a respondent to an appeal under s 49 of the Act could not challenge the factual premises of the question of law that the appellant had been granted leave to appeal on; and

(c) that it was an abuse of process to allow SCDA to reprise arguments it had already made during the hearing of SUM 5332/09 when it was seeking leave to appeal under s 49(7) of the Act.

14 The issues raised in [13] above have to be considered before I turn to the Question since the Question would be rendered otiose if SCDA's position is correct in relation to the Award, and it cannot be prevented from making those arguments.

Estoppel

15 Motor Image contended that the principles relating to issue estoppel applied in this case so as to prevent SCDA from re-litigating the following issues:

(a) Whether the Arbitrator found that Motor Image had instructed SCDA to call for tenders based on the third submission drawings or the 29 June 2005 drawings;

(b) Whether the Arbitrator found that the 29 June 2005 drawings and the third submission drawings were different;

(c) Whether Motor Image had exaggerated the effect of mistakes made by SCDA;

(d) Whether SCDA was entitled to architectural fees on the alternative basis of the "latest estimate of the total construction costs" pursuant to Condition 1.3(3)(c) of the Appointment Conditions; and

(e) Whether the Question was dealt with by the Arbitrator.

16 Motor Image further contended that all of the above issues had been argued by it at the leave stage and that SCDA had responded in detail to the same. In granting leave to appeal on the Question, the court had finally and conclusively determined all of these issues and accepted the arguments put forward by Motor Image. This determination was fundamental in the court's decision to grant leave to appeal because under s 49(5)(c) of the Act, the court could only grant leave if it was satisfied that the Question was one which the arbitral tribunal was asked to determine and that on the basis of the findings of fact in the Award the decision of the arbitral tribunal was obviously wrong or, at least, open to serious doubt. The lower threshold applied if the court also determined that the Question was one of general public importance.

17 The framing of the Question itself showed that the court had agreed with Motor Image's submission that the Arbitrator found that SCDA had called for tenders based on the 29 June 2005 drawings when Motor Image had instructed SCDA to call for tenders based on the third submission

drawings. That explained why the Question was premised on the disparity between (i) the agreement between the client and the architect as to what drawings would be used for the tender and (ii) the drawings that were actually used for the tender. If SCDA had persuaded the court that Motor Image had instructed it to call for tenders based on the 29 June 2005 drawings and not the third submission drawings, then leave would not have been granted and the Question would not have been framed. Clearly, therefore, the court had determined the issues when it granted leave to appeal. Further, the decision of the court was a final decision and conclusive on the issue of whether leave to appeal against the Award should be granted. Thus, Motor Image argued, the requirements of issue estoppel had been fulfilled.

18 As regards the law on what these requirements were, Motor Image cited *Wing Joo Loong Ginseng Hong (Singapore) Co Pte Ltd v Qinghai Xinyuan Foreign Trade Co Ltd and another and another appeal* [2009] 2 SLR(R) 814 which discussed the law of issue estoppel as determined by the case of *Lee Tat Development Pte Ltd v MCST Plan No 301* [2005] 3 SLR(R) 157 ("*Lee Tat*") at [165]:

> Issue estoppel, in particular, is the doctrine which prevents re-litigation of an issue which the court has already determined on the merits in previous proceedings between the same parties (see *Blair v Curran* (1939) 62 CLR 464 at 531-532). In *Lee Tat Development Pte Ltd v MCST Plan No 301* [2005] 3 SLR(R) 157 ... this court held that the following requirements had to be met in order to establish issue estoppel (at [14]-[15]):
>
> (a) there must be a final and conclusive judgment on the merits of the issue which is said to be the subject of an estoppel;
>
> (b) that judgment must be by a court of competent jurisdiction;
>
> (c) the parties in the two actions that are being compared must be identical; and
>
> (d) there must be identity of subject matter in those two actions.

There is no dispute that the above case correctly sets out the necessary requirements. As far as the argument that follows is concerned, the only dispute as to whether these requirements have been met relates to the first of them.

19 The question that arises is whether in granting leave to appeal I did in fact "finally and conclusively" determine the various issues raised in the leave application.

20 SCDA's submission was that when deciding whether to grant leave to appeal under s 49(3)(b) of the Act, the court simply had to consider whether a "strong prima facie case" existed: it did not have to make any final decision. SCDA relied on *Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Pte Ltd* [2000] 1 SLR(R) 510 ("*Hong Huat*"). In *Hong Huat* at [40], the Court of Appeal noted that the discretion to grant leave to appeal would be exercised differently according to the context in which the question of law arose and stated at [41] that where the matter concerned a standard form contract, the prospective appellants "need only show a strong *prima facie* case that the arbitrator is wrong in his determination". The question of law raised in *Hong Huat* involved a standard form contract. In that respect, there is no difference between the fact situation in *Hong Huat* and that raised here since the Question involves the Appointment Conditions which are standard form clauses.

21 *Hong Huat*, however, was decided under the old Arbitration Act (Cap 10, 1985 Rev Ed). Under the new Act, the test of "a strong prima facie case" which was applied in the situation of standard form contracts or clauses has been replaced with one of whether the arbitral tribunal's decision is "at

least open to serious doubt". I do not think that the change in terminology makes a difference to the conclusiveness of the court's finding. It is clear to me that when the court decides that an arbitrator's decision is "at least open to serious doubt", the court does not make and cannot be making a "final and conclusive judgment on the merits of the issue[s]" as required in *Lee Tat* to allow issue estoppel to operate. If the latter position were correct, it would reduce the subsequent substantive appeal stage to a "mere formality", as SCDA rightly submitted.

22 The first instance decision of Bingham J in *Tor Line A.B. v. Alltrans Group of Canada Ltd. (The "TFL Prosperity")* [1982] 1 Lloyd's Rep 617 ("*The TFL Prosperity*") at 627 is also of interest in this context. There, Bingham J first granted leave to appeal having found "a strong prima facie case"; then went right on to dismiss the appeal without a further hearing. The case supports the contention that granting leave to appeal is not akin to making a concluded decision on the issues such that the appeal is bound to succeed and the judge is precluded from dismissing it.

23 I am therefore satisfied that while in deciding to grant Motor Image leave to appeal I might have come to certain conclusions, those conclusions could not have been more than provisional and I did not render any final and conclusive decisions on the issues raised. Such decisions could only be given on the hearing of the appeal proper if the same issues arose for consideration. This conclusion is also supported by *Hiscox v Outhwaite (No. 2)* [1991] 1 WLR 545 where Lord Donaldson MR stated at 547 that the judge at the leave to appeal stage forms "provisional" views on the merits.

24 Therefore, SCDA is not estopped from bringing up those issues again.

Challenge to factual premises of the Question

25 Motor Image took the position that on the appeal, SCDA could not challenge the factual premises of the Question. It contended that the appeal was only concerned with whether the Arbitrator had erred and that the arguments and issues that were relevant at the leave stage were not relevant at the appeal stage. In this context, it relied on the following observation in D Rhidian homas, *Appeals from Arbitration Awards* (Lloyd's of London Press Ltd, 1994) ("*Thomas*") at [9.2.1]:

> There is a distinct and unambiguous difference between an application for leave and the full appeal. The application for leave is concerned with the question whether an appeal should be admitted into the judicature ... Where leave to appeal is given the sole question before the court is whether the award manifests an error of law, and if it does, to respond to the error in any of the ways provided for in [the Arbitration Act]. At this stage the history of the appeal and the policy associated with the initial question of leave to appeal play no part. The sole question is whether the appellant has established legal error in the award: the whole issue is one of right or wrong ...

Motor Image thus contended that on the appeal, SCDA could not challenge the premises or terms of the Question.

26 The discussion in relation to estoppel has, however, established that the arguments and issues relevant at the leave to appeal stage can still be relevant at the substantive appeal stage. It all depends on the circumstances. Whilst the task of the judge on hearing the appeal is to decide whether, as *Thomas* states, the award manifests an error of law – in order to make that determination, the appellate judge has to be satisfied regarding the factual basis from which the alleged error stems. Therefore, the appellate judge may, depending on the arguments, need to relook at the factual premises of the question. Further, while the judge at the leave to appeal stage forms provisional views on merits, the appellate judge must form final and conclusive views on the merits.

Therefore, the arguments on issues at the leave stage may very well be relevant at the appeal stage as well.

27 There is a precedent for this approach in the case of *Ng Huat Foundations Pte Ltd v Samwoh Resources Pte Ltd* [2006] SGHC 43 ("*Ng Huat Foundations*") which I decided. In that case, I allowed challenge of the factual premises of the question of law which the appellant was granted leave under section 49(3)(b) to appeal on. I noted at [16] that "the parties took different positions on what had been found by the Arbitrator as a question of fact", as is the case here, and went on to find at [29] that the question of law was "misconceived" because it was premised on facts that had not been found by the arbitrator and ignored both his views on the facts and his factual findings. Although there were no arguments on this point in *Ng Huat Foundations*, I consider that the approach taken there was correct. If Motor Image was right, it would mean that the court is asked at the leave stage to make final and conclusive determinations at least regarding the factual premises underlying the questions of law which the court gives leave to appeal on. It is not appropriate to ask this of the court at the leave stage.

28 The leave stage functions as a time and cost-saving filter against cases which are not even open to serious doubt. (See *Antaios Compania SA v Salen Rederierna AB (The Antaios)* [1985] AC 191 ("*The Antaios*") at 206G–207C, where Lord Diplock holds up the practice of the House of Lords in dealing with petitions for leave to appeal from judgment of the Court of Appeal in civil actions as an example to be followed: "generally a brief oral hearing *inter partes* is permitted of which the average duration is ten to fifteen minutes; the parties are not allowed to use the hearing as an opportunity to argue the appeal that is the subject of the petition."). Whilst arguments for leave in the courts here generally take somewhat longer than 15 minutes, the court should hear only enough at the leave stage to adopt a provisional view on the merits which allows it to decide whether a full-dress hearing is warranted. To ask the court to hear enough at the leave stage to make final and conclusive determinations would undermine the utility of the leave stage as a filter.

Abuse of process

29 Motor Image argued that if SCDA were allowed to revisit the issues that were argued at the leave stage, it would result in a serious mockery of the process of the court and would effectively mean that the application for leave and the exercise of framing the Question were a waste of time. It would also mean that the principles that govern whether a party can appeal a decision granting leave to appeal an arbitration award to the Court of Appeal could be easily undermined. This court had rejected SCDA's attempt by SUM 5332/09 to appeal against the grant of leave and now SCDA would be getting a second bite of the cherry because it was making the same arguments on appeal that it had made in SUM 5332/09. This was an abuse of process.

30 The argument that Motor Image has put forward cannot stand, however, because it is based on the wrong premise. SCDA was not allowed leave to appeal under s 49(7) because I accepted Motor Image's submissions that SCDA's approach to the s 49(7) application was misconceived. At that stage, Motor Image argued that leave to appeal under s 49(7) is granted only if the statutory guidelines governing leave to appeal to the High Court under s 49(5) required some elucidation. It cited English authorities on the English statutory equivalents (*eg The Antaios* at 205; *CMA CGM SA v Beteiligungs-Kommanditgesellschaft MS "Northern Pioneer" Schiffahrtsgesellschaft mbH & Co. and Others* [2003] 1 Lloyd's Rep 212 at 216-217.) However, SCDA did not make submissions relating to whether s 49(5) required some elucidation. Rather, it made submissions relevant to the present substantive appeal: for example, that the Question was not based on findings of fact in the Award.

31 I was persuaded by the English authorities which Motor Image cited at the s 49(7) leave to

appeal stage and considered that they should be applied to the interpretation of s 49(7). That is the main reason why SCDA was not granted leave to appeal under s 49(7). The fact that SCDA made irrelevant arguments during the hearing of SUM 5332/09 cannot, however, prevent it from making those same arguments on this substantive appeal as long as they are relevant to this appeal. As I have stated above, the arguments are relevant arguments and must be considered on this appeal.

32 Motor Image submitted that to allow SCDA to reprise its arguments would mean its failure to obtain leave to appeal under s 49(7) was of no consequence. This is not true. The consequence of SCDA's failure was that it expended its opportunity to convince the Court of Appeal to further elucidate s 49(5) of the Act in a manner which might have led to the reversal of my decision to grant Motor Image leave to appeal under s 49(3)(b).

33 In the circumstances, there is in my judgment no abuse of process on the part of SCDA in raising questions as to the factual findings of the Award as part of its case on this substantive appeal.

The substantive appeal

Did the Arbitrator find as a fact that SCDA had agreed with Motor Image to call for tenders based on the third submission drawings?

34 SCDA based its bill to Motor Image on the lowest tender received in response to the Main Contract Tender. The drawings used for the Main Contract Tender were not the same as the third submission drawings. The premise of the Question is that there was an agreed set of drawings for the Main Contract Tender but SCDA did not use those. To reprise, the Question reads:

Where an architect who is engaged under the Singapore Institute of Architects Conditions of Appointment and Architect's Services and Mode of Payment ("the Appointment Conditions") has agreed with his client to call for tenders based on an agreed set of drawings but instead calls for and receives tenders based on a different set of drawings, is the architect entitled to fees based on the lowest of the tenders under or by reference to clause 1.3(3)(b) of the Appointment Conditions?

In order for the Question to be raised on an appeal against the Award, it must arise out of a finding of fact in the Award. SCDA's main contention in the appeal was that the Question did not come out of such a finding.

35 SCDA argued that the Arbitrator never found that there was an agreement between the parties that the third submission drawings should be used as the basis for the Main Contract Tender. Instead, the Award described the exact opposite: that Motor Image knew and agreed to base the Main Contract Tender on the 29 June 2005 drawings. SCDA argued that the Arbitrator had found that Motor Image had agreed to a "concurrent process" for both the submission to the URA and the tender process. It continued to be "concurrent" at the time of the Main Contract Tender and could be regularised later by amendment or waiver, this being part of the normal design and approval process.

36 Motor Image disputed the contention that the Arbitrator had found that Motor Image had instructed SCDA to call for tenders based on the 29 June 2005 drawings. It argued that the Arbitrator could not have made such a finding given that he had dismissed Motor Image's defence of illegality in the Arbitration. This was that SCDA had tried to mislead the URA and had acted illegally by submitting the third submission drawings when it knew that what Motor Image actually wanted was the design shown in the 29 June 2005 drawings. In response to that defence, SCDA had argued that in late July 2005, Motor Image had decided to build, and therefore to call for tenders, based on the third

submission drawings and instructed SCDA to proceed on that basis. Given those instructions, SCDA argued, SCDA did not mislead the URA and did not act illegally in submitting the third submission drawings. Motor Image then stated that the Arbitrator had accepted SCDA's case that Motor Image had from late July 2005 decided to build and call for tenders based on the third submission drawings.

37 Secondly, Motor Image argued that SCDA's contention that the Arbitrator had found that Motor Image had instructed SCDA to call for tenders based on the 29 June 2005 drawings was not correct in the light of SCDA's own case in the Arbitration (which the Arbitrator accepted) that it had intended to prepare the tender drawings based on the third submission drawings and had left the 29 June 2005 drawings in the tender drawings by mistake.

38 Thirdly, Motor Image argued that SCDA's contention was baseless given the Arbitrator's dismissal of Motor Image's contention that even after the second submission was rejected, it had instructed SCDA at a meeting on 28 July 2005 that it still wanted only the design in the 29 June 2005 drawings and SCDA had assured it that that could be achieved.

39 In any event, Motor Image said, even if the Arbitrator did find that it had instructed SCDA to call for tenders based on the 29 June 2005 drawings, that would not help SCDA. It was clear that the tender drawings were not fully based on the 29 June 2005 drawings: they consisted of a patchwork of 29 June 2005 drawings and the third submission drawings.

40 To an extent, Motor Image's arguments miss the point. Although SCDA argued that the parties had agreed to base the tender on the 29 June 2005 drawings, the Question assumes that the Arbitrator found that the agreed drawings for the tender were the third submission drawings and that other drawings (unspecified) were used instead of the third submission drawings. The basic fact for the appeal therefore would be whether the Arbitrator found as a fact that the third submission drawings were the ones that were needed to be used for the Main Contract Tender. If he found this fact and then found the further fact that the drawings used for the Main Contract Tender were not the third submission drawings, it does not matter whether he found that the tender drawings were the 29 June 2005 drawings or a composite of the 29 June 2005 drawings and the third submission drawings or, for that matter, any other set of drawings that may have been floating around SCDA's office. I must therefore in my consideration of the Award concentrate on whether it contains a finding that the third submission drawings were to be the agreed basis of the Main Contract Tender.

41 I should first note that the Question was not before the Arbitrator. I have set out the various defences that Motor Image put forward to resist SCDA's claim. In none of those defences did it say directly that the fees claimed were not earned because it had instructed SCDA to use the third submission drawings for the Main Contract Tender and SCDA had used other drawings instead. Such an assertion would have placed the issue before me squarely before the Arbitrator as well. What the Arbitrator thought had been argued has to be gleaned from his findings and comments on the other defences raised.

42 Although Motor Image argued at the Arbitration that the Main Contract Tender was not *bona fide* because the tender drawings were based on the 29 June 2005 drawings instead of the third submission drawings, this argument was related to the illegality argument and was not an assertion that SCDA had gone against its express instructions to use the third submission drawings for the Main Contract Tender. The Arbitrator rejected the assertion that the Main Contract Tender was not *bona fide* by finding that there was a legitimate concurrent process at work right through the period during which the tenders were held and that Motor Image was fully informed and well aware of this at all times. This is a consistent theme running through the Award.

43 The following excerpts from the Award, some of which are repeated from [11] above, are instructive and worth highlighting:

> **Counterclaim for breach of contract of statutory duty/obligations of professional duties and/or ethical duties**
>
> I see the design drawings prepared [in and after April 2005] complying with introduction of [Motor Image's] new brief for more offices as a separate design exercise running concurrently with the submission exercise and could not possibly be similar to the resubmission drawings. ...
>
> It is my belief that two separate schemes were being prepared concurrently and it would be incorrect to conclude that one scheme was to mislead the URA and the other [Motor Image]. ...
>
> It is not unusual for the submission drawings to be different from the tender drawings and not in full compliance to [*sic*] [Motor Image's] brief. ...
>
> [Motor Image] had full knowledge of the various steps and actions being taken by [SCDA]. ...
>
> **Defence of Illegality**
>
> I see no evidence that [SCDA] had intention or had defrauded URA and [Motor Image]. [SCDA] had consulted URA on a regular basis and had been transparent with [Motor Image] on all the URA compliances. ...
>
> Planning and developing a project is a process. To alleged [*sic*] illegality in midstream of the process is not appropriate. Any difference in the submission drawings from the tender drawings would have had to be regularised through amendment submissions, appeals, waivers or concessions made as required to get approval. This is normal procedure. ...
>
> **URA Submissions**
>
> I come to the conclusion that 2 sets of designs were being prepared concurrently and it would be a mistake to confuse the two sets of designs and present them as contradictions. They were separate legitimate attempts to satisfy [Motor Image] and the URA.
>
> **Bona fide tender**
>
> [Motor Image's] contention was that the Main Contract tender was based on drawings they had received on 29 June 2005 and not based on the 3rd submission drawings. The design in the drawings received on 29 June 2005 was what [Motor Image] wanted but in their mind "would not be approved". [Motor Image] further content [*sic*] that the 3rd submission drawings which later obtained approval "were not what [Motor Image] wanted". This position is unreasonable. ...
>
> I had earlier concluded that there were two concurrent processes going on at the time of tendering, one for planning application and the other for tender. The tender drawings were based on design and drawings received by [Motor Image] on 29 June 2005. This design was clearly what [Motor Image] wanted. Just because the tender was not based on drawings submitted to URA does not make it a non bona fide tender? [*sic*] ...
>
> All the stages of the service were done with the full knowledge and agreement of [Motor Image]. ...

44 Nowhere in any of the above excerpts from the Award or anywhere else in the Award does the Arbitrator find either that Motor Image had instructed SCDA, or the parties had agreed, to use the third submission drawings for the purpose of the Main Contract Tender. Indeed, as SCDA submitted, the Arbitrator's finding of fact was the opposite *ie* that the third submission drawings were not to be used for the Main Contract Tender. The third submission drawings were used to get URA approval with the intention that during the development process, amendments could possibly be approved which would bring the building actually constructed more in line with what Motor Image actually wanted – which was encompassed in the drawings of 29 June 2005 which in turn were, basically, the drawings used for the Main Contract Tender.

45 Motor Image took the position that by the time of the Main Contract Tender, it had instructed SCDA to use the third submission drawings for the tender instead of the 29 June 2005 drawings which Motor Image and SCDA "had clearly discarded and abandoned." In other words, according to Motor Image, by that stage, only one set of drawings was relevant for the planning application process and the tender process: the third submission drawings. This is inconsistent with what the Arbitrator held in the Award: that there were two different sets of drawings used for the two concurrent processes which were "going on at the time of tendering".

46 The Arbitrator provided the last nail in the coffin of Motor Image's case under the heading "Which tender to use for computing Architect's fees":

> In arriving at my decision, I had taken into consideration that [Motor Image] did agreed [*sic*] with all the submissions including calling of Main Contract Tender and [Tender No 2]. At no time was [SCDA] stopped for unsatisfactory service.

47 This plainly suggests that the Arbitrator found that Motor Image agreed with SCDA's calling of the Main Contract Tender and did not raise any of the present issues then. In the face of such strong language in the Award, Motor Image cited page 8 of the Award to be read with a series of excerpts from SCDA's pleadings and submissions. Page 8 of the Award makes reference to the third submission drawings but does not suggest that Motor Image instructed SCDA to use the third submission drawings instead of the 29 June 2005 drawings as a basis to call the Main Contract Tender.

48 SCDA's closing submissions in the Arbitration had sought to establish that the third submission drawings were prepared and submitted to the URA with approval from Motor Image. This is consistent with the Arbitrator's finding that "[a]ll the stages of the service were done with the full knowledge and agreement of [Motor Image]." This does not show, however, that SCDA agreed with Motor Image to base the Main Contract Tender on the third submission drawings instead of the 29 June 2005 drawings. In any case, what is relevant to the present discussion is what the Arbitrator held, and not what the parties submitted.

49 Having mined the Award several times, I am unable to find a finding of fact that would support the premise of the Question. On the hearing of the leave to appeal application, whilst this issue was raised, I was more concerned with the proper interpretation of Condition 1.3(3)(b) and this concern was part of the reason for allowing the application.

50 Having now had the time and opportunity to consider the position and the Award in more detail, I am satisfied that the Question is not appropriate because it is premised on facts that were not found by the Arbitrator and ignores his factual findings as well as his view of the facts. The difficulty that Motor Image faced on the appeal is that the case it now seeks to run was not foreshadowed in its pleadings and submissions for the Arbitration. Indeed, some of the points it made before the Arbitrator are inconsistent with its present stand.

Conclusion

51 In the event this appeal must be dismissed with costs. I do not express any opinion on the substantive questions of interpretation raised in the course of the appeal as an interpretation exercise can only be conducted in the light of relevant facts. There are no such facts at present.