

Lau Fook Hoong Adam v GTH Engineering & Construction Pte Ltd
[2015] SGHC 220

Case Number : Originating Summons No 915 of 2014
Decision Date : 20 August 2015
Tribunal/Court : High Court
Coram : Aedit Abdullah JC
Counsel Name(s) : Chia Chee Hyong Leonard and Tan Hin Wa, Jason (Asia Ascent Law Corporation) for the plaintiff; Lam Kuet Keng Steven John (Templars Law LLC) for the defendant.
Parties : Lau Fook Hoong Adam — GTH Engineering & Construction Pte Ltd

Building and Construction Law – Statutes and Regulations

20 August 2015

Aedit Abdullah JC:

1 On 25 May 2015, I issued a judgment (reported as *Lau Fook Hoong Adam v GTH Engineering & Construction Pte Ltd* [2015] SGHC 141) (“the Original Judgment”) in favour of the defendant, dismissing the plaintiff’s application for, *inter alia*, a declaration that an adjudication application is null and void or that the adjudicator lacked jurisdiction to adjudicate the matter. This judgment supplements the Original Judgment and I adopt the definitions which I have used in the latter.

2 After I issued the Original Judgment on 25 May 2015, the plaintiff applied to tender further submissions in the light of that judgment. I allowed further submissions to be tendered. In short, the plaintiff makes two points:

(a) The adjudication determination “was not existent at the time the [Originating Summons] was filed” and the plaintiff’s application could thus not be considered as a poorly concealed attempt to set aside the adjudication determination since there was no adjudication determination to set aside in the first place at that time. Consequently, there was no need for the plaintiff to provide any security pursuant to s 27(5) of the SOPA and O 95 r 3 of the Rules of Court and the plaintiff’s application should not have been dismissed on account of the plaintiff’s failure to provide security.

(b) The application was for a stay of the adjudication proceedings and not a stay of the enforcement of an adjudication determination.

I shall deal with each point in turn.

Existence of the adjudication determination

3 According to the plaintiff, the adjudication determination was only issued after the plaintiff had filed his application on 29 September 2014. There was thus no adjudication determination to set aside at the time of the application and the plaintiff’s application could not be regarded as an attempt to set aside the adjudication determination. As I had noted in the Original Judgment (at [18]), the adjudication determination was issued on 1 October 2014. Thus the plaintiff is indeed correct in

saying that his application to challenge the adjudication application and the jurisdiction of the adjudicator was filed prior to the issuance of the adjudication determination by the adjudicator.

4 The plaintiff's reason for mounting the application prior to issuance of the adjudication determination is premised upon the following passage in the Court of Appeal decision of *Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal* [2013] 1 SLR 401 ("*Chua Say Eng*") (at [36])

In our view, if the respondent's objection to the jurisdiction or power of the adjudicator to conduct the adjudication is based on an invalid appointment, such a jurisdictional issue *should be raised immediately with the court and not before the adjudicator*. The reason is that since the objection is against the adjudicator's jurisdiction as an adjudicator, he has no power to decide if he has jurisdiction or not. He cannot decide his own competency to act as an adjudicator when such competency is being challenged by the respondent. An adjudicator who decides the issue may face one or other of the following consequences. If he accepts the respondent's objection and dismisses the payment claim, the claimant may commence court proceedings against him to compel him to adjudicate the payment claim. If he dismisses the respondent's objection and makes an award, the respondent could still raise the same objection in enforcement proceedings with respect to his award. *Accordingly, the adjudicator should proceed with the adjudication and leave the issue to the court to decide.* [emphasis added]

5 In the light of this pronouncement by the Court of Appeal, I am of the view that there is nothing wrong with the plaintiff's application in that the plaintiff is entitled to make the application he made prior to the issuance of the adjudication determination. Further, such an application may possibly not require the provision of any security in the absence of an adjudication determination. However, it must be noted that the adjudication nonetheless proceeds regardless of such an application and *the adjudicator is entitled to issue an adjudication determination before the court determines the application*. To say otherwise would only lead to a possibility of respondents adopting dilatory tactics by mounting jurisdictional challenges prior to the issuance of an adjudication determination. The plaintiff's application should not and does not put a stop to the adjudication process.

6 In this regard, the subsequent issuance of the adjudication determination prior to any determination of the jurisdictional issue by the court is critical in the present case. This is because whilst an adjudication determination may not be existent at the time the application was filed, it would be in existence at the time of judgment. Thus, any judgment allowing a jurisdictional challenge made would lead to the inevitable conclusion that the subsequently issued adjudication determination is null and void and should be set aside (as stated in the Original Judgment at [29], jurisdictional challenges are a basis for setting aside an adjudication determination). While it may not be a setting aside application proper, the plaintiff could simply rely on the judgment obtained in his present application for the purposes of setting aside the adjudication determination in future proceedings.

7 The plaintiff also argues that he was merely following the instructions of the Court of Appeal in *Chua Say Eng* when he filed his application to "immediately" challenge the adjudicator's jurisdiction. As I have noted, there is nothing wrong with adopting such a course of action. However, this does not mean that the plaintiff may then disregard any subsequent adjudication determination issued prior to the determination of his application. It cannot be the case that the nature of an application is determined solely at the time it is filed. The better course of action for the plaintiff to adopt would be to convert his application into a setting aside application and provide the requisite security since he must be taken to be well aware of the effect of the success of his application on the adjudication determination. The plaintiff should not be permitted to turn a blind eye *vis-à-vis* the existence of the

adjudication determination and avoid putting up the statutorily required security on the sole basis that his application was filed prior to the issuance of the adjudication determination.

8 In conclusion, while the plaintiff is correct to say that he could not have intended to challenge the adjudication determination at the time he filed his application, such an intention could not be sustained in good faith after the issuance of the adjudication determination. The plaintiff, during the course of the proceedings after the issuance of the adjudication determination and at the hearing of the matter on 9 January 2015, must be taken to know at that time that his application, if successful, would be tantamount to declaring the adjudication determination null and void. It is on this basis that I had found in the Original Judgment (at [28]) that the plaintiff's application was in effect a setting aside application in that his application, if successful, would at the very least mean that the adjudication determination should be set aside. It is also on this basis that the plaintiff is required to put up the security pursuant to s 27(5) of the SOPA and O 95 r 3 of the Rules of Court. I am thus of the view that regardless of when the plaintiff's application was filed, it was, at the time the matter was heard, an application which would lead to the setting aside of the adjudication if the plaintiff were successful. He was under a statutory obligation to provide security and his failure to do so meant that his application had to be dismissed.

Stay of proceedings

9 The plaintiff has pointed out that his application was to stay the adjudication proceedings (since the adjudication process had not ended at the time of his application) and not the enforcement of the adjudication determination. However, this would mean that there were no adjudication proceedings to stay at the time the matter was heard on 9 January 2015 since the adjudication had concluded on 1 October 2014 with the issuance of the adjudication determination. Further, given the Court of Appeal's statement that the adjudicator should continue with the adjudication regardless of any jurisdictional challenge, I find it difficult to envisage how a jurisdictional challenge can be a basis to stay an adjudication since, as noted above (at [5]), this would encourage the adoption of dilatory tactics—something which the SOPA seeks to prevent.

Miscellaneous

10 Counsel for the Defendant in the course of the further oral arguments referred to the recent decision of the Court of Appeal in *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797 to support the proposition that a challenge to jurisdiction should be made through s 27 SOPA and O 95. I was of the view though that that case was primarily concerned with the characterisation of the nature of the High Court's jurisdiction and powers in a s 27 challenge. It was therefore not a controlling authority on the issue in this case.

Conclusion

11 For the reasons given above, I am of the view that the plaintiff's application should be dismissed despite his further submissions.

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