Thian Sung Construction Pte Ltd *v* International Elements Pte Ltd [2015] SGHC 319

Case Number : Originating Summons No 683 of 2015

Decision Date : 17 December 2015

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : Lim Wee Teck (W T Lim & Partners) for the plaintiff; Raymond Chan (Chan Neo LLP) for the defendant.

Parties : Thian Sung Construction Pte Ltd — International Elements Pte Ltd

Building and Construction Law – Statutes and regulations

17 December 2015

Lee Seiu Kin J:

1 This was an application to set aside an adjudication determination made under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the Act") on the unusual ground that the payment claim was served by a party that was not entitled to do so. This case also captures some of the interplay between the Act and the practice of factoring trade debts, which does not appear to have attracted previous judicial attention.

Background

2 The facts relating to the present case are undisputed. The plaintiff was the main contractor for a construction project titled "Proposed 1 Block of 33-Storey Condominium Development (Total: 43 Units) with a Basement Carpark, Swimming Pool, Tennis Court and Clubhouse Facilities on Lot 715N TS 25 at Ardmore Park Singapore". By way of a Letter of award dated 8 November 2011, the plaintiff engaged the defendant as the sub-contractor for the supply and delivery of stone works.

3 In May 2013, the defendant and United Overseas Bank ("UOB") entered into a contract by which the defendant obtained credit facilities from UOB ("the Agreement"). The contract comprised a factoring arrangement that allowed for debts owed to the defendant to be transferred or assigned to UOB in exchange for credit facilities. Pursuant to this factoring arrangement, the defendant assigned all its "present and future trade debts" to UOB and the plaintiff was given notice of this assignment by both UOB and the defendant on 5 July 2013. As a consequence, the plaintiff was to pay all present and future amounts owed under the defendant's invoices to UOB, which it in fact did for numerous progress payments owed to the defendant.

4 On 24 April 2015, the defendant served on the plaintiff Progress Claim No 25 ("PC25") for the sum of $1,396,259.21. No payment was received for PC25 and on 11 June 2015, the defendant commenced adjudication proceedings against the plaintiff by filing Adjudication Application No 231 of 2015 ("the Adjudication Application"). The ensuing adjudication determination dated 14 July 2015 ("the Determination") was in the defendant's favour, and it is the Determination which the plaintiff now seeks to set side.

Whether the plaintiff's right to avail itself of the Act had been assigned

5 The plaintiff's case, premised on a narrow but intriguing proposition of law was this: the defendant, in assigning his trade debts to UOB, had lost its right to make a claim under the Act. This, the plaintiff argues, is because the assignment of the right to receive money owing to the defendant, being the assignment of a chose in action, assigned with it the right to *enforce* that chose in action. Therefore, the right to make PC25 and the Adjudication Application lay with UOB and not the defendant. The service of PC25 by the defendant was therefore in breach of s 10(1) of the Act, depriving the adjudicator of his jurisdiction to adjudicate the matter.

6 A preliminary question that had to be determined was whether the purported breach of s 10(1) of the Act rendered the payment claim "non-existent or inoperative", which would allow for the exercise of the court's supervisory function: see *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 at [39] and [66]. The plaintiff referred me to the case of *Gemini Nominees Pty Ltd v Queensland Property Partners Pty Ltd* [2008] 1 Qd R 139 ("*Gemini Nominees*"). It involved a claim for a progress payment under the Building and Construction Industry Payments Act 2004 (Qld) ("the Queensland Act"), which is modelled on the Building and Construction Industry Security of Payment Act 1999 No 46 (NSW) on which the Act is based. In *Gemini Nominees*, the Supreme Court of Queensland declared the plaintiff's claim to be falling outside the purview of the Queensland Act as it was statutorily prohibited from making claims for progress payments under the contract. Putting aside the question of the plaintiff's right to enforcement for now, I was prepared to accept the broader proposition that a payment claim served by a party not entitled to do so falls outside the Act and thus goes to the validity of the adjudicator's appointment. The real dispute, therefore, was whether the defendant's rights under the Act had been divested.

7 The defendant first argued that the Agreement did not, as a matter of fact, assign the defendant's statutory rights under the Act to UOB. The defendant highlighted that it was only the right to receive payment due under the invoices issued by the defendant that was assigned under the terms of the Agreement. In this regard, the plaintiff referred to s 4(8) of the Civil Law Act (Cap 43, 1999 Rev Ed) ("the CLA"), which reads:

> **Assignment of debts and choses in action effectual to pass right and remedy**
>
> (8) Any absolute assignment by writing under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed before 23rd July 1909, to pass and transfer the legal right to such debt or chose in action, from the date of such notice, *and all legal and other remedies for the same*, and the power to give a good discharge for the same, without the concurrence of the assignor.
>
> [emphasis added]

It therefore followed by operation of s 4(8) of the CLA that, UOB, as the assignee of the debts owed by the plaintiff to the defendant, *necessarily* acquired whatever remedies were available to recover that debt upon giving notice, which included its right to file a payment claim under s 10(1) of the Act.

8 That the Agreement was a legal assignment under s 4(8) of the CLA was not disputed by the defendant. It nevertheless argued that its right to avail itself to the regime under the Act was a

personal one that was incapable of assignment. I accepted the defendant's submission. Section 10(1) of the Act states that it is the "claimant" who may serve a payment claim. "Claimant" is defined in s 2 to mean any "person who is or claims to be entitled to a progress payment under section 5". Section 5 of the Act, in turn, states that "[a]ny person who has carried out any construction work, or supplied any goods or services, under a contract is entitled to a progress payment". It is therefore clear that it is only the person who had actually carried out the construction work or supplied the goods or services that may serve a payment claim. This is consonant with the underlying purpose of the Act. As stated in Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) at para 5.3:

> It is arguable that these provisions do not extend the statutory entitlement to progress payment to an assignee of the benefit of the progress payment. *Such a construction would be consistent with the policy objective of the Act since the regime was introduced to protect the cash flow of the parties who actually carried out the work or services or supplied goods for construction work.* Thus, where a contractor assigns the right to progress payments to a third party such as a bank, the bank may assert its rights to unpaid progress payments under the terms of the contract but it cannot make a payment claim under the Act. [emphasis added]

9 Quite apart from the construction of s 5 of the Act, I was of the view that certain aspects of the dispute resolution mechanism provided under the Act did not lend itself to the participation of a third party. For instance, an assignee that had not actually carried out the construction work would be in no position to dispute a payment response which challenged the merits of its payment claim. Section 26 of the Act, relating to a claimant's right to suspend work or supply, would also not apply, the assignee being neither the provider of services nor the supplier of goods.

Whether the plaintiff had nonetheless divested itself of its rights under the Act

10 It was therefore clear to me that the defendant could not have assigned its rights under the Act to UOB. But a question remained as to whether the defendant had nonetheless divested itself of those rights by way of the Agreement. The plaintiff relied on the case of *Cottage Club Estates, Limited v Woodside Estates Company (Amersham), Limited* (1928) 2 KB 463 ("*Cottage Club*") which concerned an arbitration award in favour of the claimant contractor against the building owner. The contractor had legally assigned "all moneys due or to become due under the contract" to its bank. The court set aside the award on the ground that to give effect to it would render the owner liable to the contractor on the basis of the award and to the bank on the basis of the assignment. The court rejected the claimant's argument that the award "could not receive effect except by order of the Court, … [but] that order would not be made, because once the award was made, the law by virtue of the assignment would transfer the debt to … the bank" (at 467).

11 Notwithstanding the parallels between *Cottage Club* and the present case, I was not inclined to find that the defendant had divested his rights under the Act. I first of all note that *Cottage Club* has been criticised by the English Court of Appeal in *Shayler v Woolf* [1946] Ch 320 in respect of its finding of an arbitration clause as a personal covenant which was not assignable. In my opinion, whether the defendant remained a "claimant" under s 5 of the Act was a matter of statutory construction. In this regard, the Act had to be construed with an eye to its objective of facilitating cash-flow in the construction industry. It could not have been contemplated that factoring agreements, which are commonplace in the industry, would disentitle a party from making payment claims. To find otherwise would have a wide-ranging impact on the construction industry – construction firms would find it more difficult to obtain financing from banks if they were no longer able to file payment claims on account of the assignments that they would be required by the banks to make. This would run counter to the legislative intent of the Act.

12 I also did not find the cases of *Admin Construction Pte Ltd v Vivaldi (S) Pte Ltd* [2013] 3 SLR 609 ("*Admin Construction*"), *Cant Contracting Pty Ltd v Casella* [2006] 2 Qd R 13 ("*Cant Contracting*") and *Gemini Nominees* to be relevant. All of these cases involved the extinguishment or non-existence of the right to the progress payment that was the subject of the payment claim. As the defendant pointed out, the defendant in *Admin Construction* was found to have had no right to apply for adjudication because any claim to the progress payment in that case had been extinguished by way of a settlement agreement. Similarly, the claimants in *Cant Contracting* and *Gemini Nominees* were found to have had no legal entitlement to the progress payments claimed as the construction contracts were held to be either unenforceable in law or falling outside the statutory scheme. In contrast, there is no question that the plaintiff's obligation to make the progress payment subsisted at the time PC25 was filed and continued to subsist thereafter.

13 There is really only one substantive point raised by the plaintiff, and that is in relation to the situation where a claimant, having assigned his debts under a factoring agreement, seeks to enforce an adjudication determination. However I do not see any difficulty with that situation as it is a case of a creditor attempting to enforce against his debtor, a debt that he has assigned to a third party. The debtor has an absolute defence to the assignor's claim on the basis of the assignment. Therefore if a claimant who has assigned his debts to a third party obtains leave under s 27(1) of the Act to enforce an adjudication determination, the respondent would be entitled to set aside such leave. In that situation, only the assignee is entitled to apply for leave to enforce an adjudication determination under s 27(1), which (unlike s 10(1) of the Act) does not prescribe who may make such an application.

14 In the present case, the trade debts under the factoring arrangement were re-assigned back to the defendant on 24 June 2015, after the payment claim was served. Therefore the defendant had, since 24 June 2015, become entitled to enforce the Determination.

Conclusion

15 For the reasons given, I dismissed the plaintiff's application and ordered that the amount of $1,407,574.46 that had been paid into court as security be released to the defendant. Costs of $8,000, including disbursements, were ordered in favour of the defendant.