IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 130

Originating Summons No 443 of 2019

Between

China Railway No. 5
Engineering Group Co Ltd
Singapore Branch

… *Plaintiff*

And

Zhao Yang Geotechnic Pte Ltd

… *Defendant*

JUDGMENT

[Building and Construction Law] — [Statutes and regulations] — [Building and Construction Industry Security of Payment Act] — [Payment claim] — [Performance bond proceeds]

TABLE OF CONTENTS

China Railway No 5 Engineering Group Co Ltd Singapore Branch
v
Zhao Yang Geotechnic Pte Ltd

[2019] SGHC 130

High Court — Originating Summons No 443 of 2019
Chan Seng Onn J
7, 13 May 2019

22 May 2019 Judgment reserved.

Chan Seng Onn J:

Introduction

1 The present originating summons involves one key issue, namely, whether adjudication under the Building and Construction Security of Payments Act (Cap 30B, 2006 Rev Ed) ("SOPA") is the appropriate forum to canvass construction disputes that arise purely in relation to performance bond proceeds.

2 At first blush, the issue appears to have been conclusively decided by Tan Siong Thye J ("Tan J") in the earlier decision of *SH Design & Build Pte Ltd v BD Cranetech Pte Ltd* [2018] SGHC 133 ("*SH Design*"). There, Tan J held that the adjudicator "had jurisdiction to account for the Bond Proceeds because these were included in the Payment Response" (*SH Design* at [57]).

3 On closer inspection, however, it will be seen that the decision in *SH Design* does not have such a wide ranging impact, and the facts of that case are distinguishable from the present case. For reasons to be elaborated on below, I therefore allow the application to set aside the adjudication determination ("AD") issued by the adjudicator.

Facts

4 The plaintiff, China Railway No 5 Engineering Group Co Ltd Singapore Branch ("the main contractor") engaged the defendant, Zhao Yang Geotechnic Pte Ltd ("the sub-contractor") to carry out works in relation to the "design and construction of Lentor station and construction of tunnels for Thomson line".[1]

The first adjudication

5 On 25 September 2018, the sub-contractor issued Payment Claim 35 ("PC35"), claiming from the main contractor a total sum of $848,584.93 (inclusive of Goods and Services Tax ("GST")).[2] The total sum related to works completed from 20 October 2015 to 25 September 2015.[3] Following a dispute in relation to PC35, the parties referred the matter to adjudication.

6 By his AD dated 13 December 2018, the adjudicator determined that $692,051.21 (inclusive of GST) was payable by the main contractor to the sub-contractor ("1AD").[4] It is not disputed that the adjudicated sum was paid in full by the main contractor to the sub-contractor.[5]

---

1 Lim Yit Sin's 1st Affidavit (4 April 2019) ("LYS") at Tab LYS-2, p 37.

2 LYS at Tab LYS-4, p 83, paras 11 and 12.

3 LYS at Tab LYS-4, p 83, para 12.

4 LYS at Tab LYS-4, p 80, para 4(a).

5 LYS at Tab LYS-5, pp 640–642.

The second adjudication

7 Not long after 1AD was issued, on 20 December 2018, the main contractor called on an on-demand performance bond issued by the United Overseas Bank Ltd ("UOB") in favour of the main contractor for the sum of $281,441.95.[6] The performance bond had been procured by the sub-contractor to serve as "a deposit or security for the due performance and observance by the Sub-Contractor of all stipulations, terms and conditions contained in the Sub-Contract."[7]

8 As a result of the call on the performance bond, on 25 December 2018, the sub-contractor served Payment Claim 36 ("PC36") on the main contractor for the sum of $301,142.89, being the value of the performance bond which had been called and 7% GST.[8]

9 In response to PC36, the main contractor issued its payment response, disputing the validity of PC36 as there was "no claim for any new works under PC 36 which is a repeat claim".[9] Further, the main contractor explained that PC36 was "not even a claim for construction work under the [SOPA] but rather an attempt by [the sub-contractor] to recover the sum of $281,441.95 paid to [the main contractor] under the unconditional performance bond".[10]

10 Given the dispute between the parties, the matter was referred to adjudication. At the adjudication, the adjudicator held that he had the jurisdiction to adjudicate on PC36 which relatedly *solely* to the proceeds of the

6 LYS at Tab LYS-3, p 74.

7 LYS at Tab LYS-3, p 70.

8 LYS at Tab LYS-5, p 249.

9 LYS at Tab LYS-5, p 440.

10 LYS at Tab LYS-5, p 440.

performance bond. In summary, as Tan J had held in *SH Design* that the adjudicator therein did not exceed his jurisdiction by accounting for the bond proceeds in that case,[11] and given that performance bonds are "an integral part of a construction contract",[12] the adjudicator determined that the adjudication application under SOPA was "a proper forum to address the issue of performance bond proceeds and hence, the adjudicator ha[d] the jurisdiction to adjudicate on this".[13]

11 Having found that he had jurisdiction to determine the matter, the adjudicator determined that the main contractor was to pay the sum of $281,441.95 (excluding GST) to the sub-contractor ("2AD").[14] By mirroring the sum called under the performance bond, 2AD reversed the call on the performance bond entirely.

12 Dissatisfied with the adjudicator's determination, the main contractor applied to set aside 2AD.

The two issues

13 Two interrelated issues arise for my consideration.

14 The first issue is whether s 10(1) SOPA, which delineates the scope of a payment claim under SOPA, is a mandatory provision, breach of which would mandate the adjudication determination arising from the underlying payment claim to be set aside.

---

11 LYS at Tab LYS-1, p 23, para 26.

12 LYS at Tab LYS-1, p 27, para 42.

13 LYS at Tab LYS-1, p 28, para 43.

14 LYS at Tab LYS-1, p 16, para 3(a).

15 If s 10(1) SOPA is deemed to be a mandatory provision, the second issue is whether a payment claim for performance bond proceeds only is a valid payment claim for the purposes of s 10(1) SOPA.

The first issue: Whether s 10(1) SOPA is a mandatory provision

The court's role in setting aside applications

16 As the Court of Appeal cautioned in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 ("*Comfort Management*") at [73], "the role of a court in reviewing an adjudicator's determination is not to review the merits of the determination, and that any setting aside must be premised on the adjudicator's acting in excess of his jurisdiction or in breach of the rules of natural justice."

17 In determining whether the adjudicator has acted in excess of his jurisdiction, the question is whether the SOPA provision alleged to have been breached is a mandatory provision (*Comfort Management* at [74]–[76]).

18 In this case, the main contractor relies on the sub-contractor's alleged breach of s 10(1) SOPA as its primary basis for setting aside 2AD.

19 Hence, the preliminary question is whether s 10(1) SOPA is a mandatory provision, breach of which enables the main contractor to succeed in its setting aside application.

Section 10(1) SOPA is a mandatory provision

20 In determining whether s 10(1) SOPA is a mandatory provision, the query is whether it is "so important that it is the legislative purpose that an act done in breach of that provision should be invalid" (*Comfort Management* at

[75]; see also *Australian Timber Products Pte Ltd v A Pacific Construction & Development Pte Ltd* [2013] 2 SLR 776 at [75], per Woo Bih Li J).

21 In this regard, section 10(1) SOPA provides as follows:

> **Payment claims**
>
> **10.**—(1) A claimant may serve one payment claim *in respect of a progress payment* on —
>
> (*a*) one or more other persons who, under the contract concerned, is or may be liable to make the payment; or
>
> (*b*) such other person as specified in or identified in accordance with the terms of the contract for this purpose.
>
> [emphasis added]

22 By stipulating that the payment claim must be "in respect of a progress payment", s 10(1) SOPA seeks to limit the scope of any payment claim to claims for progress payments *only*. Hence, s 10(1) SOPA will be breached if, for example, the payment claim is *not* in respect of a progress payment. Herein, a person is entitled to submit a progress payment if he has "carried out any construction work, or supplied any goods or services, under a contract" (s 5 SOPA), but not otherwise.

23 Furthermore, s 10(1) SOPA limits the persons on whom the payment claim may be served to (a) persons who may be liable to make the payment under the construction contract, or (b) any other persons identified in the construction contract. Payment claims against any other persons would breach s 10(1) SOPA.

24 Section 10(1) SOPA therefore ensures that only *valid* payment claims are made, and claimants who submit frivolous payment claims beyond the scope allowed under s 10(1) SOPA ought to have their claims dismissed entirely. This

is consistent with the goal of the SOPA adjudication framework, which "facilitates cash flow by establishing a *fast and low cost adjudication system* to resolve payment disputes" [emphasis added] (*Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 ("the Debates") at col 1113 (Cedric Foo Chee Keng, Minister of State for National Development)). By weeding out invalid payment claims which are not premised on work done or goods or services supplied under a contract (see s 5 SOPA), s 10(1) SOPA ensures that the SOPA adjudication framework will not be abused to resolve construction disputes outside the ambit of SOPA.

25 The importance of ensuring that payment claims remain within the scope of s 10(1) SOPA cannot be understated. As Lee Seiu Kin J highlighted in *Sungdo Engineering & Construction (S) Pte Ltd v Italcor Pte Ltd* [2010] 3 SLR 459 at [32], the adjudication process is "predicated by a whole chain of events initiated by the service of a Payment Claim by the claimant on the respondent under s 10 of the Act." Hence, a payment claim is the fundamental trigger for any SOPA adjudication, and ensuring that only validly-made ones are entertained is vital for maintaining a "fast and low cost adjudication system" (the Debates at col 1113). Accordingly, I have no doubt that s 10(1) SOPA, which prescribes the scope of a valid payment claim, is a mandatory provision, breach of which mandates the setting aside of the adjudication determination arising therefrom.

The second issue: Whether PC36 is a valid payment claim

26 Having determined that s 10(1) SOPA is a mandatory provision, the query then turns to whether PC36, being a claim for performance bond proceeds only, is a valid payment claim within the parameters of s 10(1) SOPA.

The main contractor's argument: PC36 was not a claim for construction work

27 In this regard, the main contractor argues that PC36 is an invalid payment claim as it is not a claim for "construction work".[15] Since PC36 relates only to the recovery of the performance bond proceeds and not for any works done, the main contractor submits that PC36 is an invalid payment claim, served in breach of s 10(1) SOPA.

The sub-contractor's reply: there is no requirement that construction work be done for a payment claim to be served

28 In reply, the sub-contractor argues that there "is no statutory requirement that the [sub-contractor] must have carried out new works since the previous payment claim".[16]

SH Design

29 To support the contention, the sub-contractor relies in the main on the case of *SH Design*. In that case, the plaintiff engaged the defendant as its sub-contractor. Pursuant to the requirements of the subcontract between the parties, the defendant procured an on-demand performance bond for the sum of $1,293,600 in favour of the plaintiff. The plaintiff later assigned all of its rights under the subcontract, including the performance bond, to a third party ("the Owner"). The Owner subsequently called on the bond in full.

30 On 23 May 2016, the defendant served a payment claim on the plaintiff for the sum of $4,250,683.08 for work that it had done from January 2015 to December 2015. On 7 June 2016, the plaintiff served its payment response for

---

15 The Main Contractor's Skeletal Submissions at p 9, Part V.

16 The Sub-Contractor's Skeletal Submissions at p 11, para 15.

a negative sum of $15,063,770.47. In its payment response, the plaintiff expressly accounted for bond proceeds which had been received by the Owner.

31 On 11 August 2016, the adjudicator issued his determination, holding that an amount of $1,127,088.40 was owed to the defendant. In arriving at the final adjudicated amount, the adjudicator had taken into account the bond proceeds ($1,293,600) which had been received by the Owner by adding it as an amount due to the defendant.

32 The plaintiff applied to set aside the AD. One basis for setting aside was that the adjudicator ought not to have accounted for the bond proceeds. Instead, the plaintiff submitted, the bond proceeds ought to have been accounted for only at the arbitration between the parties, rather than at the adjudication, which was not a full and final settlement of the matter (*SH Design* at [51]).

33 Tan J dismissed the plaintiff's application to set aside the AD. In relation to the adjudicator's decision to account for the bond proceeds, Tan J observed as follows (*SH Design* at [53]):

> … the Adjudicator's duty was to comprehensively determine the rights and obligations of the parties under the Subcontract, having regard to the Payment Claim and the Payment Response. Having assessed that the defendant was already liable to the plaintiff for the works done, … the Adjudicator was obligated to give credit for the Bond Proceeds …

34 This was necessary to "finalise the accounts between the parties" as the subcontract had been terminated on the same day as the call on the performance bond by the Owner (*SH Design* at [54]). Accordingly, Tan J found that the adjudicator had not exceeded his jurisdiction by accounting for the bond proceeds.

35 The sub-contractor asserts, on the basis of *SH Design*, that it is "clear that an adjudication under the SOP Act is the proper forum to account for such 'performance bond' proceeds."[17] I do not agree.

36 In *SH Design*, there was no doubt that the payment claim related to progress payment for construction works that had been carried out by the defendant. Indeed, in arriving at the adjudicated sum, the adjudicator had considered that $1,050,344.52 was owed to the defendant for work done (*SH Design* at [18]). The bond proceeds were raised by the plaintiff in its payment response, and only featured in the accounting stage when the adjudicator was determining the final adjudicated amount. As the payment claim was for work done, it was clearly valid, and the issue of breaching s 10(1) SOPA did not even arise before the adjudicator or Tan J. Therefore, the portion of *SH Design* relied on by the sub-contractor only relates to the correctness of accounting for performance bond proceeds *after* a valid payment claim has been filed. *SH Design* does not conclusively determine that any payment claim exclusively for the proceeds of the performance bond will be a valid payment claim that is within the confines of s 10(1) SOPA.

37 In the present case, PC36 relates *entirely* to the performance bond proceeds, and it is not disputed that it is not a claim for any construction work done by the sub-contractor which remains unpaid. In fact, the Statement of Claim attached by the sub-contractor to PC36 clearly stipulates that the claimed sum therein was for "(disputed) backcharges by [the main contractor] amounting to $281,441.95, … made via their letter dated 20 December 2018 to UOB demanding payment of the Guaranteed Sum of $281,441.95 under UOB's Performance Bond…".[18] Hence, rather than being a claim for construction

17 The Sub-Contractor's Skeletal Submissions at para 7.

18 LYS at Tab LYS-5, p 257.

works or the supply of goods or services, PC36 is indubitably a claim to recover the proceeds of the performance bond.

38 The appropriate query is therefore whether a payment claim purely for the performance bond proceeds is a valid one under s 10(1) SOPA. In this regard, for the reasons given at [36] above, *SH Design* does not assist the sub-contractor.

A payment claim must relate to construction work, or goods or services supplied

39 As alluded to at [22] above, a payment claim must be "in respect of a progress payment" (s 10(1) SOPA). Section 5 SOPA then prescribes 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." Hence, a contractor's entitlement to progress payment is contingent on it having carried out construction work, or supplied any goods or services.

40 The focus on work done and the supply of goods and services is aligned with the words of the Minister of State for National Development, who observed during the Second Reading of the Bill that SOPA would seek to "preserve the rights to payment for *work done* and *goods supplied* of all parties in the construction industry" [emphasis added] (the Debates at col 1112).

41 That payment claims are premised on work done, or goods and services having been supplied is also clear from how repeated payment claims are treated: while a contractor may repeat a previous payment claim, this is only permissible when the repeated claim relates to "work done or goods supplied" and the "previous payment claim for the same work or goods was not in fact

adjudicated on the merits" (*Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011 at [57])

42 Hence, the sub-contractor's argument that it is entitled to make a payment claim for performance bond proceeds flies in the face of clear statutory wording, which stipulates that entitlement to progress payment (from which a payment claim results) is premised on work done or goods or services being supplied. While the performance bond relates to the construction works, a call on the performance bond resulting in the main contractor receiving the bond proceeds cannot be considered as works done by the sub-contractor, which is a fundamental requirement under s 5 SOPA. On the contrary, the performance bond is usually called as a result of some alleged breach of the contract and it includes an alleged failure by the sub-contractor to carry out construction works, or supply goods or services, in accordance with the terms of the construction contract. It is therefore an allegation on the main contractor's part that construction works have *not* been done satisfactorily, or that goods or services have *not* been supplied in accordance with the contract. Allowing the sub-contractor to issue a payment claim for such *negative* work thus verges on the nonsensical.

Allowing the payment claim defeats the bargain struck

43 Furthermore, allowing PC36 will negate the efficacy of the performance bond entirely, thus defeating the bargain struck between the parties.

44 To elaborate, the parties had agreed to a performance bond in favour of the main contractor for the sum of $281,441.95. The performance bond was issued as a "deposit or security for the due performance and observance by the Sub-Contractor" of the contract.[19] It was also stipulated that the main contractor

could require payment of the performance bond proceeds "without any deductions whatsoever and notwithstanding the existence of any differences or disputes between the Main Contractor and the Sub-Contractor arising out of or in connection with the Contract or the carrying out of the works there under…".[20]

45 It is therefore clear that the performance bond functions as a deposit or security, and does not have to be used to offset any liquidated damages, back-charges or other sums owed by the sub-contractor to the main contractor.

46 Yet, after the performance bond was called, the sub-contractor served PC36, claiming the proceeds from the performance bond and GST. By virtue of 2AD, the performance bond proceeds were ordered to be returned by the main contractor to the sub-contractor.

47 The result of the chain of events is that the adjudication process is utilised by the sub-contractor to defeat the performance bond entirely. This contravenes ss 36(1) and 36(4) SOPA, which, when read collectively, stipulate that "except where a contract provision excludes, modifies, restricts or in any way prejudices the operation of the regime, the [SOPA] does not seek to reconfigure, alter or amend the effect of the terms of the underlying contract" (*Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) at para 4.24). The performance bond in this case operates independently from the construction contract between the parties, and serves simply as valuable security or deposit for the main contractor. It is the result of a bargain struck between the parties, and does nothing to exclude, modify, restrict or

---

19 LYS at Tab LYS-3, p 70.

20 LYS at Tab LYS-3, p 72.

prejudice the operation of the SOPA regime. Yet, the efficacy of the performance bond is negated by 2AD, in breach of s 36(4) SOPA.

Conclusion

48 In the circumstances, it is clear that PC36, which is in substance a claim for the performance bond proceeds rather than for work done or goods or services supplied, is in breach of s 10(1) SOPA, a mandatory provision. 2AD, which ordered the return of the performance bond proceeds, also breaches s 36(4) SOPA.

49 Accordingly, I set aside 2AD in its entirety. I also make the usual consequential orders for payment out of the security furnished by the main contractor.

50 Having heard parties on costs, I award $6,000 for the costs and disbursements of the main contractor to be paid by the sub-contractor.

Chan Seng Onn
Judge

Tan Jin Yong (Lee & Lee) for the plaintiff;
Choa Sn-Yien Brendon and Zachariah Chow Jie Rui (ACIES Law Corporation) for the defendant.