

W Y Steel Construction Pte Ltd v Osko Pte Ltd
[2012] SGHC 194

Case Number : Originating Summons No 484 of 2012
Decision Date : 27 September 2012
Tribunal/Court : High Court
Coram : Lee Seiu Kin J
Counsel Name(s) : Henry Heng Gwee Nam, Corinne Taylor Lai Sze Huei and Gina Tan Yiting (Legal Solutions LLC) for the plaintiff; Chelliah Ravindran and Alison Jayaram (Chelliah & Kiang) for the defendant.
Parties : W Y Steel Construction Pte Ltd — Osko Pte Ltd

Building and Construction Industry Security of Payment Act – setting aside Adjudication Determination

27 September 2012

Lee Seiu Kin J:

1 On 7 May 2012, the adjudicator appointed under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the Act") ordered the plaintiff to pay the defendant the sum of \$1,767,069.80 ("the Adjudication Determination"). In this originating summons, the plaintiff applied to set aside the Adjudication Determination. On 8 August 2012, after hearing counsel for the parties, I upheld the Adjudication Determination and ordered the sum of \$1,767,069.80 paid into court to be paid out to the defendant on 8 September 2012, if there is no appeal. The plaintiff has filed an appeal on 7 September 2012, which is the last day to file an appeal. As the procedure under the Act was established to ensure that claimants under a construction or supply contract received progress payments in a timely manner, I have therefore expedited my written grounds of decision.

2 The following is the chronology of events:

- (a) 12 April 2011: the Singapore Turf Club appointed the plaintiff as the main contractor for alterations and additions to the existing grandstand for the lump sum price of about \$6m ("the Project").
- (b) 13 September 2011: the plaintiff and defendant entered into a sub-contract ("the Subcontract"), backdated to 12 April 2011, wherein the plaintiff appointed the defendant as its sub-contractor for the Project. The Subcontract was valued at about \$3.75m, and covered all works except specialist steel works which the plaintiff retained for itself, and electrical works which was sub-contracted to Sanyo Engineering & Construction Pte Ltd.
- (c) 12 March 2012: the plaintiff served a letter to the defendant to terminate the Subcontract.
- (d) 31 March 2012: the completion date of the Project stipulated in the Subcontract.
- (e) 31 March 2012: the defendant served on the plaintiff payment claim no 10, which stated

that it was a payment claim under the Act.

- (f) 14 April 2012: the deadline under the Act for service of payment response expired.
- (g) 19 April 2012: the defendant served on the plaintiff a notice of intention to apply for adjudication under the Act.
- (h) 20 April 2012: the defendant filed with the Singapore Mediation Centre ("SMC") an adjudication application under the Act. SMC served the adjudication application on the plaintiff.
- (i) 24 April 2012: the SMC appointed Mr Naresh Mahtani as the adjudicator.
- (j) 27 April 2012: the deadline under the Act for submission of adjudication response expired.
- (k) 30 April 2012: the defendant applied by email to adjudicator to proceed with adjudication under the Act. The adjudicator forwarded the email to the parties and proposed an adjudication conference to be held on 2 May 2012.
- (l) 1 May 2012: the plaintiff sent email to the defendant's solicitors, the adjudicator and SMC claiming that the adjudication application was only served on them on 25 April 2012 (and not 20 April 2012). The adjudicator sought clarification from SMC and was advised that the adjudication application was served on 20 April 2012.
- (m) 2 May 2012: the plaintiff attempted to file an adjudication response but was rejected by SMC on the ground that it was filed out of time.
- (n) 7 May 2012: the adjudicator made the Adjudication Determination, ordering the plaintiff to pay the defendant the sum of \$1,767,069.80 within seven days.
- (o) 16 May 2012: the defendant filed originating summons no 467 of 2012 for leave to enforce the Adjudication Determination as it was not paid by 14 May 2012.
- (p) 21 May 2012: the plaintiff filed originating summons no 484 of 2012 ("the present OS") to set aside the Adjudication Determination and applied therein for an interim injunction to restrain the defendant from enforcing the Adjudication Determination until disposal of the present OS.
- (q) 4 June 2012: the court ordered that the present OS would be treated as an application to set aside the Adjudication Determination.

3 Before me, the plaintiff set out three grounds for setting aside the Adjudication Determination, as follows:

- (a) the adjudicator had no jurisdiction to make the order;
- (b) the adjudicator had contravened the rules of natural justice; and
- (c) the adjudicator had erred in fact and law.

First Ground: Lack of Jurisdiction

4 The plaintiff's first basis under this ground was that the contract between the parties had been terminated on 12 March 2012 and therefore there was no existing contract upon which the defendant

could base the claim for progress payment, which was for work in the period 1 to 31 March 2012. The plaintiff claimed that only minimal work had been done by the defendant up to 12 March 2012 as the defendant had ceased work sometime in February 2012. The defendant's position was that the termination was wrongful and therefore invalid and ineffective. Further, the defendant claimed that it had remained on site and continued to carry out work on the Project until 31 March 2012 and claimed it has evidence of this from eye-witnesses as well as documents.

5 It is very clear that under the Act, the matters set out in the preceding paragraph are reserved under the Act for determination by the adjudicator. So long as the adjudicator is vested with the jurisdiction to hear the matter, he has the powers to determine those issues. Pursuant to s 21 of the Act, an adjudication determination shall be binding on the parties unless or until (a) leave to enforce it is refused under s 27; (b) the dispute is finally determined by a court or arbitrator; and (c) the dispute is settled by the parties. I have held in *Sungdo Engineering & Construction (S) Pte Ltd v Italcor Pte Ltd* ("*Sungdo*") [2010] 3 SLR 459 (at [11]-[12]) that the Act was enacted for the purpose of providing fast and low costs adjudication in order to ensure cash flow of claimants are not disrupted by disputes concerning liability and quantum so that construction work can proceed smoothly. To achieve this, the Act has established a regime in which a neutral party would adjudicate a disputed payment claim which will have temporary finality. Therefore timelines for various steps are kept short and both claimants and respondents are not only required to state their positions at the outset, but they are precluded from deviating from it, in order to ensure that the process does not become bogged down by any amendments. In *Sungdo*, I had held that, because of the strict requirements as to time and setting out the grounds in the respondent's payment response, it was necessary for a claimant to make it clear in the payment claim that it was a payment claim under the Act (at [22]). It follows that once a valid payment claim is served then the adjudicator is not only vested with jurisdiction to hear the matter, his adjudication determination may not be disturbed as it has temporary finality under s 21 of the Act. As the Act only vests his determination with temporary finality and any error can be corrected at the final determination of all the disputes between the parties under the contract, whether before a court or an arbitrator, or under a settlement agreement. I would add that it would go against the objective of the Act if the court is empowered to overrule the adjudicator's findings where his jurisdiction is established. Indeed, this would result in an even more cumbersome procedure than the regime prior to the enactment of the Act.

6 The plaintiff's second basis under this ground was that there was an express and/or implied agreement between the parties that the contract between them was one in which the plaintiff was actually the sub-contractor of the defendant. This was denied by the defendant who pointed out that there were numerous references in the documents and communications between the parties that the defendant was the sub-contractor of the plaintiff. Again, this was an issue for determination by the adjudicator and not the court under an application for enforcement of the Adjudication Determination.

7 I therefore hold that, except for the possible exception of a clear case of fraud, the Adjudication Determination was valid and enforceable under the Act, notwithstanding that the adjudicator may eventually be found to be wrong based on the evidence before him.

Second Ground: Natural Justice

8 The plaintiff's complaint in this regard was that the adjudicator had not permitted the adjudication response it had attempted to file on 2 May 2012 to be taken into consideration. I noted that the SMC had not permitted the plaintiff to file an adjudication response on that date on the ground that it was late. I would comment that the SMC has no role in determining whether an adjudication response is late, much less prevent a respondent from filing it as a result of such

conclusion. The SMC's role is only to accept whatever document is filed and to note the time and date of filing. The decision whether it is late, and the consequence of that, should be left to the adjudicator to make.

9 In the event, the adjudicator refused to take into account the points made in the adjudication response that the plaintiff had attempted to file on 2 May 2012. However the plaintiff had not suffered any prejudice because it had not filed any payment response, which it is supposed to do under s 11 of the Act. As I have pointed out in *Sungdo* (at [13] and [21]), this is potentially fatal to the respondent as s 15(3) precludes him from including in the adjudication response any reason for opposing the claim that was not in his payment response. Not only that, the adjudicator is prevented by the same provision from considering any reason not included in the payment response. That was the reason I gave such importance to the necessity for a claimant to clearly communicate to the respondent that any document served on the respondent as a payment claim was intended to be a payment claim. However the Act makes it clear that, once a payment claim is served, the respondent must give the reasons it intends to rely on to oppose the claim in its payment response. He will not be allowed to raise any other ground in any subsequent adjudication.

10 The cry for natural justice is a strong and emotive one, but any person with full knowledge of the scheme and objective of the Act will not be impressed by the plaintiff's plea in these circumstances. The plaintiff had not availed itself of the adjudication process even though s 15(3) clearly sets out the consequences of such omission. In any event, the Adjudication Determination is only of temporary finality and the parties will have an opportunity at a subsequent litigation or arbitration to resolve all the conflicts between them. It is at that tribunal that both parties will have the opportunity to fully ventilate their claims and defences.

11 Therefore I found that the adjudicator had not made his determination in breach of natural justice.

Third Ground: Error of Fact and Law

12 This pertains to findings of the adjudicator that the plaintiff challenged on the ground that they were contrary to the evidence and to the relevant law. For the same reasons that I have given under the first ground (see above at [4] to [7]), the Adjudication Determination is valid.

Conclusion

13 On the basis of the foregoing, I held that the adjudicator was vested with jurisdiction as the payment claim was valid on its face and was validly served. Therefore the Adjudication Determination was binding on the plaintiff and I dismissed the plaintiff's application in the present OS and ordered payment out of the sum of \$1,767,069.80 paid into court unless the plaintiff appealed within time.

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