IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1993] SGHC 104

Suit 1986/1991

Between

SP Chua Pte Ltd

… *Appellant*

And

Lee Kim Tah (Pte) Ltd

… *Respondent*

GROUNDS OF DECISION

Arbitration — Stay of court proceedings; Building and Construction Law — Building and construction contracts — Traditional type of contracts; Civil Procedure — Pleadings — Further and better particulars

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SP Chua Pte Ltd v Lee Kim Tah (Pte) Ltd

[1993] SGHC 104

Suit 1986/1991
Amarjeet Singh JC
10 May 1993

1 The defendants, a construction company, entered into a contract dated 6 February 1986 with the Singapore Institute of Standards and Industrial Research (`SISIR`) to put up a building known as `SISIR Building`. The defendants later engaged the plaintiffs as a nominated sub-contractor to carry out waterproofing works in respect of the roofing of the said building under a sub-contract (`the sub-contract`) dated on or about 4 September 1986.

2 In the midst of executing their works, the plaintiffs ran into financial difficulty. They then entered into an oral arrangement with the defendants which was confirmed in writing by the plaintiffs whereby the defendants would undertake the purchase of material or payment of labour on the defendants` account. Each time the plaintiffs requested the defendants to purchase building materials for them, they wrote to the defendants confirming at the same time that the costs of such purchases could be deducted from progress payments due to them.

3 When the plaintiffs brought an action to recover the balance of a sum of $102,368.65 for work done and materials supplied by the plaintiffs under the

sub-contract in respect of the waterproofing works between the end of 1986 and beginning of 1988, the defendants refused to pay the balance due contending that they had a good defence to the action in that:

> (i) the plaintiffs performed defective waterproofing works and the defendants were entitled to make such claims by way of deductions or set-offs as are necessary to defray the defendants` costs incurred in carrying out rectification works;
>
> (ii) the defendants were further entitled to make deductions and claim a set-off in respect of the cost of supply of certain material on the plaintiffs` behalf and such claims in set-offs exceeded the plaintiffs` claim.

4 After entering an appearance in the proceedings against them, the defendants requested from the plaintiffs an extension of time to file a defence and counterclaim and when time was granted followed up instead with a request for further and better particulars by way of a letter which was served on the plaintiffs and filed in court. The plaintiffs responded by filing and serving the further and better particulars. Thereafter the defendants took out an application for an order that all further proceedings in this action be stayed pursuant to s 7 of the Arbitration Act (Cap 10), the plaintiffs and the defendants having under the sub-contract agreed to refer to arbitration the matters in respect of which the action was brought by the plaintiffs.

5 The learned assistant registrar dismissed the defendants` application with costs with the result that the defendants filed an appeal against that decision. I allowed the appeal and stayed the proceedings in the suit and fixed the defendants` costs, the parties not objecting to the same.

6 Two issues were canvassed before me:

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> (1) whether the dispute falls within the arbitration clause;
>
> (2) if so, whether the defendants had taken `a step` in the proceedings pursuant to s 7 of the Arbitration Act by requesting an extension of time to file their defence and counterclaim and/or by the request for further and better particulars and had thereby elected to abandon their right to stay the proceedings in favour of allowing the action to proceed.

7 Clause 14(1) of the sub-contract and s 7 of the Arbitration Act provide as follows:

> *Clause 14(1):*
>
> *Any dispute between the parties hereto as to any matter arising under or out of or in connection with this sub-contract or under or out of or in connection with the sub-contract works or as to any certificate decision direction or instruction of the architect, shall be referred to the arbitration and final decision of a person to be agreed by the parties or failing such agreement within 28 days of either party giving written notice requiring arbitration to the other, to a person to be appointed on the written request of either party by or on behalf of the president or vice-president for the time being of the Singapore Institute of Architects, or failing such appointment within 28 days of receipt of such written request, such person as may be appointed by the courts.*
>
> *Section 7:*
>
> (1) If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings against any other party to the arbitration agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings.
>
> (2) The court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

8 **Whether dispute falls within arbitration clause?**

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9 The plaintiffs` contention that the dispute did not fall within the arbitration clause was two-fold. Firstly, it was that the architect who had supervision of the project had certified the sums for payment as they became due to the plaintiffs in respect of the works done and material supplied by them and the defendants were thus bound to honour the payments under the sub-contract as a certification would not have been done if the works were defective. The defendants could not, in the circumstances, raise a claim in respect of alleged defective works and any rectifications they may have done. Secondly, the defendants could not set-off any sums against those due to them in respect of material and labour supplied by the defendants after they ran into financial difficulties as that arrangement was made subsequent to the sub-contract and the dispute was therefore not within the scope of the said sub-contract.

10 In respect of the first argument, the defendants countered that notwithstanding the certification of the architect, the architect had conveyed his dissatisfaction with the completed works which was reflected in the architect`s letter dated 10 May 1991 requesting for a remedial work to be done upon the defects being discovered. The plaintiffs had refused or neglected to respond and as such the defendants had to carry out the rectification works to comply with the architect`s specifications. The defendants had a contractual right to deductions and set-off as this was provided for in the main contract with SISIR. Under the sub-contract the plaintiffs were deemed to have knowledge of the provisions of the main contract, the provisions of which were applicable to resolve any ambiguity in the terms of the sub-contract between the parties.

11 In respect of the second issue, the defendants submitted that even if the oral arrangement made by the defendants to supply material and labour to the plaintiffs after they became financially troubled was made after the sub-

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contract, the arbitration clause was wide enough to cover the dispute in question since the subsequent oral arrangement was in connection with the sub-contract.

12 I upheld the submission of the defendants` counsel. In my opinion, the words of the arbitration clause `arising out of and in connection with this sub-contract or under or out of or in connection with the sub-contract works or as to any certificated decision direction or instruction of the architect` is wide enough to cover the dispute in question relating to the first objection raised by the plaintiffs. The term `as to any matter arising under or out of or in connection with this sub-contract or under or out of or in connection with this sub-contract works` was decided in the case of ***HE Daniels Ltd v Carmel Exporters and Importers Ltd*** , to cover every dispute except a dispute whether there was ever a contract at all. The clause is wide enough to cover the issue of construction as well: ***Thorburn v Barnes.*** The clause is similarly wide enough to cover the dispute in relation to the question of the oral arrangement made by the plaintiffs with the defendants to supply them with material and labour when during the course of the sub-contract they became financially strapped. The oral arrangements to supply material was confirmed by the plaintiffs in writing. They had also agreed to the cost of the material supplied by the defendants be deducted from the progress payments due to them. The dispute in respect of the set-off over these payments was, in any case, in my opinion in connection with the sub-contract works as the material supplied was for the sub-contract and not otherwise.

13 **Whether `step in the proceedings` taken**

14 The defendants had in the instant case admittedly:

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> (i) requested for an extension of time to file their defence and counterclaim and had been given such an extension by the plaintiffs;
>
> (ii) requested for further and better particulars and also sent a reminder to the plaintiffs in respect thereof and the plaintiffs had subsequently filed and served the same on the defendants.

15 The question was whether any or both these acts constituted a step in the proceedings so as to deprive the defendants of their recourse to arbitration.

16 Quite apart from the request by the defendants for extension of time to file their defence and counterclaim, the plaintiffs` counsel contended that the filing of the further and better particulars constituted a pleading and a letter requesting for such particulars forms part of the pleadings as under O 18 r 12(6) the rule requires a defendant applying to court for particulars to first make a request by letter for the particulars and goes on to state that the court may refuse to make the order for particulars subsequently unless there are sufficient reasons for an application by letter not having been made in the first place. Further, counsel argued that under r 7, were particulars are given pursuant to a request, the request has to be incorporated with the particulars, each item of the particulars following immediately after the corresponding item of the request in much the same way as in an order of the court; further, the defendants had sought and the plaintiffs had given ample particulars. As a result, counsel stated the defendants had clearly by their acts intended to defend the proceedings.

17 What constitutes a `step in the proceedings` was discussed in ***Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd.*** Drawing on previous authority, Lord Denning MR stated:

> *In order to ask for the court proceedings to be stayed, the defendant must apply to the court: ... at any time after appearance and before delivering or taking any other steps in the proceedings. Those are the words of s 4 of the 1950 Act and s 1*

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> *of the 1975 Act. It has been discussed in several cases. On principle it is a step by which the defendant evinces an election to abide by the court proceedings and waives his right to ask for arbitration: Like any election, it must be an equivocal act done with knowledge of the material circumstances ...*

18 Lord Denning went on to state at p 361:

> *... in order to deprive a defendant of his recourse to arbitration a `step in the proceedings` must be one which impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with a determination by the courts of law instead of arbitration`.*

19 The case discussed in ***Eagle Star*** draws a distinction between what may be described as an extra judicial act done by the defendant and one by which he invokes the jurisdiction of the court. Thus in ***Ives and Barker v Willans,*** a defendant by a formal document, applied for a delivery of a statement of claim from the plaintiff. The application was held not to be a `step in the proceedings` as the defendant was entitled to ask for materials affecting his right and remedies to form an opinion as to course of conduct he should take and choose between alternatives. In ***Brighton Marine Palace and Pier Ltd v Woodhouse*** it was held that the defendants` solicitors writing for further time to deliver a defence did not constitute a step in the proceedings. In ***Ford`s Hotel v Bartlett*** on the other hand, where the defendants` fourth request for an extension of time being refused (the earlier requests being allowed) the defendants` subsequent act of applying by a summons for such an extension proved fatal and was equated with a statement to the effect that the defendants were to defend the action. In ***Parker, Gaines & Co Ltd v Turpin*** the respondents applied for discovery of documents. Having obtained the order, they were given discovery in the action. Subsequently they applied to the court to have the proceedings stayed on the ground that they had forgotten or overlooked the arbitration clause in the contract. It was held that the respondents had already taken an unequivocal step

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which clearly evinced an election to abide by the court proceedings. Mr Justice AT Lawrence said obiter in the course of his judgment:

> *I should have been disposed to look leniently upon the respondent`s application for particulars, if that had been the only step alleged, because the particulars were not very ample. But an application for discovery is a very different matter.*

20 Having considered the arguments and the law, I was of the view that the `particulars` given in support of the plaintiffs` claim in respect of the balance of $102,368.65 said to be due to them were sketchy. There was an inadequate description of the plaintiffs` claim in respect of the amount due before deductions. The deductions were themselves in turn lumped together without particulars. The `agreed bills` of the defendants were themselves not particularized with their amounts in the statement of claim.

21 The defendants were therefore correct in requesting for more particulars so that they could be fully appraised of the details of the plaintiffs` works and materials supplied and relate their claims to the amounts due to them for materials supplied and cost incurred in respect of the rectification works. The particulars were also not as ample as they were made out to be. The request for particulars could not, in my opinion, be equated with an application to court for further particulars. At most, it was a piece of correspondence between the solicitors of the parties and did not, in my opinion, constitute a step in the action. Indeed, Mr Justice AT Lawrence in the ***Parker, Gaines***

22 `s case7 had gone much further when he said, though obiter, that he would have been disposed to looking leniently where the respondent had made an application for particulars, if that was the only step he had taken.

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23 In the circumstances, as the dispute falls within the arbitration clause and the defendants had not taken any step in the proceedings and as they were ready and willing to do all things necessary to the proper conduct of the arbitration, I set aside the decision of the assistant registrar and allowed the defendants` appeal with costs and stayed the proceedings in the action.

24 Appeal allowed.

Amarjeet Singh JC

Andre Yeap (Allen & Gledhill) for the appellants
Ravintheran Krishnasamy (Ching & Co) for the respondents

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