LH Aluminium Industries Pte Ltd *v* Newcon Builders Pte Ltd [2014] SGHCR 10

Case Number : Originating Summons No 159 of 2014; Summons No 1385 of 2014

Decision Date : 28 May 2014

Tribunal/Court : High Court

Coram : Eunice Chua AR

Counsel Name(s) : Richard Yeoh Kar Hoe (David Lim & Partners LLP) for the plaintiff; Joseph Lee and Tang Jin Sheng (Rodyk & Davidson LLP) for the defendant.

Parties : LH Aluminium Industries Pte Ltd — Newcon Builders Pte Ltd

Building and Construction Law

Civil Procedure

28 May 2014

Eunice Chua AR:

1 In this application, the defendant seeks to set aside an adjudication determination made in SOP/AA004 of 2014 pursuant to s 27(5) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the Act") on three bases: (a) the premature filing of the adjudication application; (b) the invalidity of the payment claim on the ground that it was a repeat claim; and (c) the existence of a settlement agreement between the parties.

2 After considering the evidence before me and the submissions of counsel, I dismissed the defendant's application and now set out the detailed reasons for my decision.

Factual background

3 The plaintiff was the main contractor for a project described as "Additions and Alterations to Existing 3 Storey Commercial Development/Light Rapid Transit System Depot cum Station on Lot 3496X MK11 at Choa Chu Kang/Woodlands Road" ("the Project"). The defendant was the sub-contractor for aluminium and glazing installation works in relation to the Project.

4 The relevant letter of acceptance between the parties in respect of the Project dated 21 January 2011 ("the Contract") contained the following clauses on payment:

> 10.2 Payment Terms
>
> You are required [*sic*] present your monthly payment claim for work done to us, in time for checking and inclusion in our overall monthly progress claim for Main Contract and in any event shall be not later than 22nd day of each month
>
> 10.3 Payment Response
>
> Within 21 days after the payment claim is served, or the date stipulated for the service of a payment claim, whichever is later, the Payment Response shall be issued.

5 It is not disputed that the Contract incorporated the Singapore Institute of Architects Conditions of Sub-Contract (3rd Edition, 2005) ("the SIA Sub-Contract"). Clauses 14.4 and 14.5 of the SIA Sub-Contract state in relevant part as follows:

> 14.4 (a) The Sub-Contractor shall be entitled to serve on the Contractor a payment claim as follows:
>
> (i) where pursuant to clause 14.1(a), the progress payment is to be based on periodic valuation, the Sub-Contractor shall submit the payment claim on the last day of each month following the month in which the Sub-Contract is made; or
>
> (ii) where pursuant to clause 14.1(b), the progress payment is to be by stage instalments, on the certified completion of the relevant stage.
>
> …
>
> (c) Provided that if the Sub-Contractor submits a payment claim before the time stipulated herein for the making of that claim, such early submission shall not require the Architect to issue the interim certificate or the Contractor his payment response in respect of that payment claim earlier than would have been the case had the Sub-Contractor submitted the payment claim in accordance with the Contract.
>
> 14.5 The Contractor shall respond to the payment claim by providing, or causing to be provided, a payment response to the Sub-Contractor within 21 days after the payment claim is served by the Sub-Contractor or the time by or the day on which the Sub-Contractor is required under clause 14.4 to submit his payment claim. This clause shall not apply to a supply contract, which shall be governed by clause 14.6 hereof.

6 Under cl 2.2 of the SIA Sub-Contract:

> The Sub-Contractor shall be deemed to have full knowledge of the Main Contract and in so far as any ambiguity or doubt may arise as to the meaning of any of the provisions or descriptions in this Sub-Contract the terms and provisions of the Main Contract shall be considered in order to resolve such ambiguity, and whenever possible this Sub-Contract shall be construed consistently with the requirements of the Main Contract and all its Contract Documents and provisions in so far as they may concern the works and goods or materials to be carried out or supplied under this Sub-Contract.

7 On 2 December 2013, the plaintiff submitted payment claim no. 24 ("the Payment Claim") for the sum of $631,683.71, excluding GST for work done up to 22 November 2013. It was not disputed the Payment Claim was a repeat claim in the sense that it repeated the same amount as a previous payment claim without new work having been done. The defendant issued a payment response ("the Payment Response") for the sum of $0 on 20 December 2013.

8 On 3 January 2014, the plaintiff submitted an adjudication application ("the Adjudication Application") in respect of the Payment Claim and the defendant duly submitted an adjudication response on 13 January 2014. The adjudicator rendered a determination in favour of the plaintiff on 7 February 2014.

Issues

9 The issues before me may be summarised as follows:

(a) Whether the Adjudication Application was premature because "the dispute settlement period" referred to in s 12(2) of the Act had not ended by the time the plaintiff made the Adjudication Application;

(b) Whether the Payment Claim was a repeated claim and in breach of s 10(1) of the Act; and

(c) Whether the dispute between the parties had been substantially settled such that the plaintiff was not entitled to make the Adjudication Application.

Whether the adjudication application was premature

10 Part III of the Act governs payment claims and responses and provides in relevant part that:

Payment responses, etc.

11.—(1) A respondent named in a payment claim served in relation to a construction contract shall respond to the payment claim by providing, or causing to be provided, a payment response to the claimant —

(*a*) by the date as specified in or determined in accordance with the terms of the construction contract, or within 21 days after the payment claim is served under section 10, whichever is the earlier; or

(*b*) where the construction contract does not contain such provision, within 7 days after the payment claim is served under section 10.

…

Entitlement to make adjudication applications

12. —(1) Subject to subsection (2), a claimant who, in relation to a construction contract, fails to receive payment by the due date of the response amount which he has accepted is entitled to make an adjudication application under section 13 in relation to the relevant payment claim.

(2) Where, in relation to a construction contract —

(*a*) the claimant disputes a payment response provided by the respondent; or

(*b*) the respondent fails to provide a payment response to the claimant by the date or within the period referred to in section 11(1),

the claimant is entitled to make an adjudication application under section 13 in relation to the relevant payment claim if, by the end of the dispute settlement period, the dispute is not settled or the respondent does not provide the payment response, as the case may be.

…

(5) In this section, "dispute settlement period", in relation to a payment claim dispute, means the period of 7 days after the date on which or the period within which the payment response is required to be provided under section 11(1).

11 The defendant's argument is that pursuant to s 12(2) of the Act, the entitlement to make the Adjudication Application arose only if the dispute was not settled or it did not provide the payment response "by the end of the dispute settlement period". This was defined by s 12(5) of the Act to mean the period of 7 days after the date on which or the period within which the payment response is required to be provided under s 11(1) of the Act. The defendant contends that if the Adjudication Application was not filed within those 7 days after the expiry of the dispute settlement period, such an application would be in breach of s 12 of the Act and must be rejected by the adjudicator.

12 The crux of the defendant's case is that cl 14.4(c) of the SIA Sub-Contract should be read to mean that although early submission of a payment claim is not precluded, such an early submission will not set the 21 day period for a payment response in motion. According to the defendant, the Payment Response should only be required 21 days after the date on which the Payment Claim *should have been made* and not the date on which the Payment Claim was, *in fact*, actually made.

13 In other words, although the Payment Claim was served on 2 December 2013, it ought to have been deemed to have been served on either 21 December 2013 (pursuant to cl 14.4 of the SIA Sub-Contract) or 22 December 2013 (pursuant to cl 10.2 of the letter of acceptance). The Payment Response would then only be due 21 days later (pursuant to cl 10.3 of the letter of acceptance read with cl 14.5 of the SIA Sub-Contract) on 15 January 2014 (taking into account the intervening public holidays). Accordingly, the defendant submitted, the "dispute settlement period" would mean the 7 days after 15 January 2014, i.e. 16 January 2014 to 22 January 2014, and since the Adjudication Application was filed on 3 January 2014, it was premature.

14 In my judgment, the defendant's arguments are not supported by a proper construction of cl 14.4(c) of the SIA Sub-Contract. That provision merely provided that where a payment claim had been filed earlier than was required, a payment response need not be submitted until the time contemplated by the contract. However, it did not go so far as to *prevent* a payment response from being served earlier if that was desired. In fact, the defendant had served the Payment Response on 20 December 2013 although it could have done so, according to its calculations, as late as 15 January 2014. Where a payment response is in fact served at an earlier date, there is nothing in cl 14.4(c) or 14.5 of the SIA Sub-Contract or cl 10.3 of the Contract that suggests that the "dispute settlement period" should only run from the date at which the payment response was contractually due.

15 This would also be commercially sensible as otherwise any adjudication, if required, would be delayed without good reason. As both parties have already made clear their positions to each other via a payment claim and payment response, there is no prejudice to the parties if the "dispute settlement period" commences from the actual making of a payment response. Such a reading would further be consistent with the purpose of the Act to provide a speedy and effective dispute resolution process for the building and construction industry.

16 In any event, even if the adjudication application was made prematurely in the sense that the dispute settlement period had not ended, I am doubtful whether this would be sufficient ground for setting aside an adjudication determination. However, as this issue was not canvassed before me I say no more on it.

Whether the payment claim was invalid

17 Whether or not the Payment Claim was invalid turned on whether the approach in *JFC Builders Pte Ltd v LionCity Construction Co Pte Ltd* [2013] 1 SLR 1157 ("*JFC Builders*"), where the High Court held that s 10(1) of the Act impliedly precluded a claimant from making a claim that merely repeated

an earlier claim without any additional item of claim, should be followed.

18 Woo Bih Li J in *JFC Builders* noted at [77]–[78] that the Court of Appeal in *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 ("*Terence Lee*") had stated *obiter* that it did not approve of the finding in a case involving a repeat non-adjudicated premature claim that s 10(1) of the Act prohibits all repeat claims. However, Woo J took the view that it was not clear whether the Court of Appeal was referring to a repeat claim as defined in *JFC Builders* and observed that no reasons were given for the Court of Appeal's statement.

19 In a later High Court decision, *Admin Construction Pte Ltd v Vivaldi (S) Pte Ltd* [2013] 3 SLR 609 ("*Admin Construction*"), Quentin Loh J took a different view of the Court of Appeal's decision as follows at [51]–[52]:

> Whilst I may instinctively empathise with the view of Woo J, given the possibility of abuse which was alluded to and the proffered construction of s 10(1), I think the Court of Appeal's decision in *Terence Lee* has put the matter beyond doubt. …
>
> Terence Lee made clear the following in relation to "repeat claims":
>
> (a) First, a subsequent payment claim can include a sum which has been previously claimed (and therefore in one sense a "repeat" claim), but has not been paid. Section 10(4) of the Act specifically deals with this. A fortiori, I would imagine that if a piece of work was done within the relevant month but not included for any reason in the relevant payment claim, there cannot be a bar against it being included in a later payment claim.
>
> (b) Secondly, where a payment claim has been made, but has not been adjudicated upon, eg, because no adjudication application was made, it still remains an "unpaid" claim and could be the subject matter of a later payment claim and adjudication; see Terence Lee at [92]. For example, a claimant may choose not to lodge an adjudication application as he is too tied up trying to carry out his works or the requirements in s 12 of the Act were not or not yet satisfied; therefore the subsequent payment claim may include ("repeat") items in common and they nonetheless remain unpaid claims for the purposes of s 10(4) of the Act.
>
> (c) Thirdly, a payment claim that has been dismissed by an adjudicator for being served prematurely or as an untimely claim under reg 5(1) or a premature adjudication application may be the valid subject of a subsequent adjudication provided it was not adjudicated upon and dismissed on its merits; it does not provide any ground for an estoppel.
>
> (d) Fourthly, a payment claim or any part thereof which has been validly brought to adjudication and dismissed on its merits cannot be the subject of a subsequent payment claim or subsequent adjudication.

20 Loh J further noted the extra-judicial comment made by former Chief Justice Chan Sek Keong, who delivered the judgment in *Terence Lee*, in the Foreword to Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) at para 12, where it was stated that the Court of Appeal in *Terence Lee* had explained that the Act "does not bar a claim that has not been adjudicated on the merits, eg, where it has been rejected on technical grounds of prematurity", and that having regard to the substantive decision in *Terence Lee*, it would be "inconsistent with principle and the scheme of the Act" to bar the claimant from making a claim that had never been adjudicated on the merits subsequently.

21 The plaintiff referred to *Associate Dynamic Builder Pte Ltd v Tactic Foundation Pte Ltd* [2013] SGHCR 16 and argued that as a matter of *stare decisis*, I am bound to follow the approach in *JFC Builders* since the decision in relation to the issue of repeat claims in *Terence Lee* and *Admin Construction* did not form part of the *ratio decidendi*. The plaintiff also submitted that as a matter of substance, Woo J's approach ought to be followed.

22 Given the developments after *JFC Builders*, it appears to me that the weight of authority lies in favour of the defendant. Although there are risks of abuse of process as noted by Loh J in *Admin Construction* at [42], these will have to be addressed by the legislature. In the circumstances, as the Payment Claim in question had not been adjudicated upon its merits, I find that it was not an invalid payment claim in breach of s 10(1) of the Act.

Whether there was settlement between the parties and, if so, the effect of the settlement

23 The plaintiff argues that the parties had entered into a settlement agreement on or around 4 November 2013 agreeing that the sum of $513,917.47 claimed in backcharges would be settled by the defendant refunding $250,000 to the plaintiff.

24 The plaintiff relies, in particular, on two letters in a series of correspondence between the parties. The first letter was dated 10 October 2013 from the defendant to the plaintiff stating:

> Refer to your email dated on 1 October 2013, regarding the backcharge settlement.
>
> We have proposed goodwill offer to refund the backcharge of $200,000.00 to your goodself in our letter ref: NCB.J10/LH/13/0160 dated 03 May 2013.
>
> During our meeting on 16 Aug 2013, we have further offered to refund another additional $50,000.00 out of total backcharge as the final settlement, provided you shall rectify all defective works that highlighted by the Client & Consultants promptly. We would like to reiterate that our goodwill offer is still remain.
>
> Further to our letter ref:NCB/TBJ/Letter/13/0309 dated 1 Oct 2013, please be reminded again that your delay in completing the rectification works has caused delay to issuance of Maintenance Certificate from Architect. We shall engage the third party to carry out the rectification works and backcharge all the cost to you, should you keep on delay and fail to complete the works on time. We reserve the right to hold your fully responsible for all loss and damages caused.

25 The second letter was the plaintiff's reply to the defendant dated 3 November 2013 stating as follows:

> We refer to your letter dated 10th October 2013.
>
> Without any admission to your backcharges totalling $513,917.47 (inclusive of GST), details of which are set out in your letter and payment response dated 18 June 2013 ("Backcharges"), on a without prejudice basis, we accept your proposed goodwill offer of $250,000.00 as full and final settlement of the Backcharges. However, our acceptance of the goodwill offer above is on condition that there are no further backcharges relating to and/or arising from the matters/issues set out in the Backcharges.

26 The defendant's position is that there was no agreement between the parties as a crucial term

relating to the time of payment of the $250,000 was still being discussed by the parties in later emails. For example, in an email dated 7 November 2013 sent at 10.38am ("the defendant's 7 November 2013 email"), the defendant wrote:

> Refer to your letter ref: LHG-MGT-LETT-176-11/13 dated 4 Nov 2013, it is acceptable but subject to FEO's release of Maintenance Certificate and 2nd half of retention. In the meantime, you have to clear all outstanding defect ASAP. Any cost incurred from above including the cost back-charged from FEO shall be borne by LH.

27 In reply, the plaintiff wrote in an email of the same date sent at 11.05am ("the plaintiff's 7 November 2013 email"):

> As spoken, defects under our scope will be carried out expeditiously. However, it is an open secret that FEO release of Maintenance Certificate is contentious. The backcharges currently in question is not bounded by this because contractually, the amount withheld by NewCon had been paid and disbursed by the Client and Consultant to us via NewCon. Hence, we are looking towards the release of the agreed backcharges of some $250k after the existing defects have been rectified, not upon the release of the Maint Cert and retention fund.

28 It is not disputed that there was no further correspondence on this issue.

29 In my judgment, there was no settlement agreement between the parties on the issue of backcharges. The plaintiff's reply dated 3 November 2013 did not constitute an acceptance of the defendant's offer as it was stipulated as conditional upon there being "no further backcharges relating to and/or arising from the matters/issues set out in the [payment response dated 18 June 2013]". I disagreed with the defendant that this went without saying and did not require any agreement of the defendant. In fact, the issue of additional costs was addressed in the defendant's 7 November 2013 email where the defendant stated that any costs incurred from remedying the outstanding defects, including costs back-charged from the main contractor are to be borne by the plaintiff.

30 The further email discussions between the parties also cast doubt on the existence of a settlement agreement because there appeared to be no agreement in relation to the time for payment to be made. The defendant's 7 November 2013 email sought to impose further conditions relating to the release of the maintenance certificate and retention monies by the main contractor. These conditions were not accepted in the plaintiff's 7 November 2013 email.

31 In this context, that there was no further correspondence on the matter ought not to be construed as signifying that the defendant had acquiesced to the proposals set out in the plaintiff's 7 November 2013 email. For the same reason, there was no basis for the court to imply into the agreement that payment was to be made at a reasonable time, as submitted by the plaintiff. The authorities cited by the plaintiff to imply such a term had no application in a factual situation where parties had an apparent disagreement as to when payment should be made.

32 In the circumstances, it was not necessary for me to consider the further question of whether the existence of a settlement agreement had the effect of rendering the adjudication application capable of being set aside.

Conclusion

33 For the foregoing reasons, I dismissed the application. After hearing parties on the issue of costs, I ordered that costs be paid by the defendant to the plaintiff fixed at $6,000, plus reasonable

disbursements.