IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 247

Originating Summons No 622 of 2016

In the Matter of section 27(5) of the Building and Construction Industry Security of Payment Act (Cap 30B) and Order 95 of the Rules of Court (2006 Revised Edition)

And

In the Matter of an Adjudication Determination dated 24 May 2016 in Adjudication Application No SOP/AA 168 of 2016

Between

JFC Builders Pte Ltd

… *Plaintiff*

And

Permasteelisa Pacific Holdings Ltd

… *Defendant*

GROUNDS OF DECISION

[Building and construction law] — [Dispute resolution] — [Adjudication]

JFC Builders Pte Ltd
v
Permasteelisa Pacific Holdings Ltd

[2016] SGHC 247

High Court — Originating Summons No 622 of 2016
Lee Seiu Kin J
9 September 2016

7 November 2016

Lee Seiu Kin J

1 This was the plaintiff's application to set aside an adjudication determination under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the Act") dated 24 May 2016 ("the AD"). The AD was in respect of Adjudication Application No SOP/AA168 of 2016. The plaintiff's basis for its application was that the defendant's works did not fall within the definition of "construction work" under the Act.

Background facts

2 The plaintiff was the main contractor for a hotel development at Telok Blangah Road ("the Development"). By way of a quotation dated 16 August 2010 ("the Quotation"), the plaintiff engaged the defendant to carry out certain works at the Development. The subject matter of the present

dispute pertained to two variation orders dated 26 July 2011 ("VO 1") and 3 November 2011 ("VO 2").

3 VO 1 comprised a list of omitted works and, more importantly for present purposes, a list of additional works. The additional works were as follows (with the minor details omitted):

1	To supply, fabricate and install for following built-in fitment
a	Bay Window in selected laminate finish
b	Study Table with 2 drawers & flit-up for power point and side return, internally in selected laminate finish
c	Full height wardrobe c/w door, mini fridge compartment internally in laminate finish, additional pull-out trays above refrigerator and additional drawer for safe
d	To replace laminate finish to existing vanity cabinet (internal carcass in laminate finish)
e	Full height box-up for TV are.
f	Additional wall panelling with laminate finish
g	Additional timber shelf

4 VO 2 comprised the following additional works (with the minor details omitted):

	To supply, fabricate and install for following built-in fitment.
1	Additional work to drill wire holes
2	Amendment of Fridge's backing
3	Mirror backing in show room (2 room)
4	Mirror glass panel in Unit 02-35 show unit
5	Demolish fridge's backing
6	Supply labour to install stone vanity top
7	Additional 880mm width side plate and plywood for Vanity Counter

8	Additional Vanity Cabinet
9	Supply and install timber box support for study lamps installed at headboads [*sic*] with drill wire holes (For Small Room)
10	Amendment of opening for plugs on table top and drill opening for power point and plugs on full height cabinet with supply 4 nos black grommet for each room
11	Additional compartment/extension of existing full height cabinet
12	Timber plywood mirror backing
13	Additional extension of full height cabinet @ Unit 207 and additional drawers (wall mounted) for study table @ Unit 501, Unit 701, Unit 801, Unit 901 and Unit 1001
14	Supply labour to box up full height cabinet with 15mm thk [sic] plywood and laminate finish @ Suite Room

5 In the AD, the Adjudicator decided in favour of the defendant.

The issues

6 At the hearing, counsel for both parties agreed that the primary issue was whether the works carried out by the defendant, based on which the payment claim was made, fell within the definition of "construction work" in s 3(1) of the Act.

7 Consequently, there were two issues that arose for my determination. First, what were the defendant's works? Second, did the defendant's works fall within the definition of "construction work" in s 3(1) of the Act? I now turn to consider these issues *ad seriatim*.

What were the defendant's works?

8 The plaintiff submitted that VO 1 and VO 2 were essentially for the carrying out of "extremely minor works". On the other hand, the defendant submitted that its works consisted of "supplying, fabricating, and installing various furniture and fitment". The defendant further submitted that:

> (a) Its scope of works was to prefabricate to measure the components described in the Quotation and VO 1 and VO 2, and then affix them to the hotel rooms.
>
> (b) The objective purpose of affixing the furniture and fitments to the hotel rooms was to enhance the value and utility of the rooms, and thus the Development.
>
> (c) The furniture and fitments, being fixed items of furniture made especially for the hotel rooms, were obviously not intended to be easily repositioned or removed from the hotel rooms, but had instead been installed with a high degree of permanence.

9 On my part, it was clear that the defendant's works in VO 1 and VO 2 were for the supply, fabrication and installation of furniture that was attached to the building, with such attachment intended to be permanent. This is indicated both by the individual descriptions of the works and also the general description that the furniture to be supplied, fabricated and installed was "built-in". I therefore found that the defendant's works were for the supply, fabrication and installation of furniture that was attached to the building, and intended to be permanently attached thereto.

Did the defendant's works fall within the definition of "construction work" in s 3(1) of the Act?

Parties' submissions

Plaintiff's submissions

10 The plaintiff submitted that the defendant's works did not fall within the definition of "construction work" in s 3(1) of the Act.

11 In this regard, the plaintiff relied on the decision of Judge Richard Seymour QC in *Gibson Lea Retail Interiors Ltd v Makro Self Service Wholesalers Ltd* [2001] BLR 407 ("*Gibson Lea*"). In that case, the claimant ("Gibson Lea") carried on business as a supplier and installer of shop fittings while the defendant ("Makro") carried on business as a cash and carry wholesaler. Makro employed Gibson Lea to undertake the supply and installation of shop fittings in four of its stores. Judge Seymour QC had to consider whether the works were "construction operations" as defined in s 105(1) of the UK Housing Grants, Construction and Regeneration Act 1996 (c 53) (UK) ("the UK Act"). This definition is broadly similar to the definition of "construction work" in s 3(1) of the Act. It seems that the pertinent provisions in that case were ss 105(1)(a) and (c) of the UK Act, which refer, respectively, to the "construction … of … structures forming, or to form, part of the land (whether permanent or not)" and the "installation in any building or structure of fittings forming part of the land". These correspond to ss 3(1)(*a*) and (*c*) of the Act.

12 Judge Seymour QC held that the phrase "forming part of the land" imported the common law on fixtures. He observed (at [15]) that:

> … What might be involved in a structure or fittings "forming part of the land" is not something which is addressed in the

> [UK] Act. However, in the context of the law of real property the concept of a fixture is well-established, and it seems to me that that to which the parts of the definition of "construction operations" in section 105(1) of the [UK] Act which I have just set out is directed is *whether the particular structure or fittings will, when completed, amount to a fixture or fixtures*. In the law of real property one of the factors which is relevant to a determination of whether a chattel attached to a building is a fixture or not is whether the attachment is intended to be permanent … [emphasis added]

This observation was subsequently reiterated when he noted (at [20]) that "it does appear that the intention of Parliament was to introduce into the [UK] Act by means of the words "forming part of the land" the existing law as to fixtures" and (at [22]) that:

> … I have already indicated my view that the effect of referring to "forming, or to form, part of the land" is to import into section 105(1)(a) of the [UK] Act the concepts and tests of the law relating to fixtures. … In my judgment it is clear that the words in section 105(3) of the [UK] Act "fittings forming part of the land" is a reference to fixtures.

Parenthetically, I should point out that this last reference to s 105(3) of the UK Act appears to be a typographical error and it is likely that Judge Seymour QC had intended to refer to s 105(1)(c) of the UK Act instead.

13 On the facts, Judge Seymour QC concluded (at [23]) that none of the items supplied by Gibson Lea to Makro were, as and in so far as installed, fixtures. Consequently, the works done by Gibson Lea for Makro were not "construction operations".

14 I pause to note that Judge Seymour QC's view is shared by Chow Kok Fong in *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013), where the learned author writes (at para 3.74) as follows:

> The [Act] is silent on what is meant by the expression 'form part of the land' but the courts may be expected to determine

> this on the basis of the common law principles relating to fixtures.

Defendant's submissions

15 The defendant, on the other hand, submitted that its works were for the installation of fittings that form part of the land and the prefabrication of components to form part of the building, which were an integral part of the said installation. It was submitted that these constituted "construction work" under the Act. In particular, the defendant relied on limbs (*c*) and (*d*)(v) of the definition of "construction work" in s 3(1) of the Act.

16 Two cases were relied on by the defendant. The first was the decision of Akenhead J in *Savoye and another v Spicers Ltd* [2015] Bus LR 242 ("*Savoye*"). In that case, Spicers Ltd ("Spicers") had engaged the claimants ("Savoye") to design, supply, supervise and commission a new conveyor system at its existing factory site. Savoye sought to enforce an adjudicator's decision in its favour against Spicers, and the only issue was whether the underlying contract between the parties was a construction contract involving "construction operations" as defined in s 105 of the UK Act. The focus in that case was on ss 105(1)(a) to (c) of the UK Act, which read as follows:

> (1) In this Part "construction operations" means, subject as follows, operations of any of the following descriptions—
>
> > (a) construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land (whether permanent or not);
> >
> > (b) construction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land, including (without prejudice to the foregoing) walls, roadworks, power-lines, electronic communication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells,

> sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;
>
> (c) installation in any building or structure of fittings forming part of the land, including (without prejudice to the foregoing) systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or security or communications systems …

I pause to note that there is some difference in s 105(1)(b) of the UK Act as set out in *Gibson Lea*, on the one hand, and in *Savoye*, on the other. However, this difference was immaterial.

17 Akenhead J considered *Gibson Lea* but declined to follow the approach taken by Judge Seymour QC. He held (at [24]) as follows:

> I am not as certain as Judge Seymour QC was that the law relating to fixtures was incorporated lock, stock and barrel by the reference to the words "forming part of the land". It seems to me much more likely that Parliament was simply setting a *factual test* as to whether the building, structure, works and fittings were forming or to form part of the land. I have formed the view therefore that, *whilst the law relating to fixtures casts useful light on the test, it is not some sort of pre-condition that the test or threshold of "forming part of the land" can only be "passed" if the item of work etc is a fixture as understood in the law of real property*. This is because it is not necessary to read the words used as requiring that, the word "fixture" is not used and there are some hints in the wording that the full fixture test is not required, not least of which are the words in section 105(1)(a) that buildings and structures need not be "permanent", in section 105(1)(b) the words "industrial plant" (not apparently limited only to large plant) and in section 105(2)(d) the words "building or engineering components or equipment, … materials, plant or machinery" (again without limitation). As will be seen by the following cases dealing with fixtures, the law relating to "fixtures" is not particularly simple and, *if Parliament had intended to incorporate the law relating to fixtures, it could and would have done so rather than use some sort of verbal code form which some but not all might infer that the law relating to fixtures was to be applied*. [emphasis added]

18 After an extensive survey of the authorities relating to fixtures and the ownership of buildings and the like, Akenhead J summed up (at [36]) the "law and practice" in a number of points, including the following:

> …
>
> (c) Whether something forms or is to form part of land is ultimately a question of fact and this involves fact and degree.
>
> (d) The factual test of whether something forms or is to form part of the land is informed by but not circumscribed by principles to be found in the law of real property and fixtures. Something which is or is to become a "fixture" will, almost invariably, "form part of the land" for the purposes of the [UK] Act.
>
> …
>
> (f) To be a fixture or to be part of the land, an object must be annexed or affixed to the land, actually or in effect. An object which rests on the land under its own weight without mechanical or similar fixings can still be a fixture or form part of the land. It is primarily a question of fact and degree.
>
> (g) In relation to objects or installations forming part of the land, one can and should have regard to the purpose of the object or installation in question being in or on the land or building. Purpose is to be determined objectively and not by reference simply to what one or other party to the contract, by which the object was brought to or installation brought about at the site, thought or thinks. Primarily, one looks at the nature and type of object or installation and considers how it would be or would be intended to be installed and used. One needs to consider the context, objectively established. If the object or system in question was installed to enhance the value and utility of the premises to and in which it was annexed, that is a strong pointer to it forming part of the land.
>
> …
>
> (i) Simply because something is installed in a building or structure does not mean that it necessarily becomes a fixture or part of the land. Mr Justice Dyson J in the [*Nottingham Community Housing Association Ltd* case [2000] BLR 309] was not saying otherwise. A standing refrigerator or washing machine can be installed in a building but nobody, thinking rationally, would suggest that they had become fixtures or part of the land.

> (j) The fixing with screws and bolts of an object to or within a building or structure is a strong pointer to the object becoming a fixture and part of the land but it is not absolutely determinative. Many of the old cases referred to above demonstrate that such fixings did point towards the object so affixed being part of the land. However, [*Gibson Lea*] produced a different answer, even though some items were affixed by nails and screws.
>
> (k) Ease of removability of the object or installation in question is a factor which is a pointer to whether it is to be treated as not forming part of the land. One can have regard however to the purpose which the object or installation is serving, that purpose being determined objectively. The fact that the fixing can not be removed save by destroying or seriously damaging it or the attachment is a pointer to what it is attaching being part of the land. A significant degree of permanence of the object or installation can point to it being considered as part of the land.

19 On the facts, Akenhead J concluded (at [44]) that the conveyor system was to and did form part of the land for the purposes of s 105 of the UK Act.

20 The second case relied on by the defendant was *J & D Rigging Pty Ltd v Agripower Australia Ltd & Ors* [2013] QCA 406 ("*Agripower*"). That case concerned a large treatment and storage plant. The owner of the plant and equipment sold it to the respondent, who engaged the appellant to dismantle the plant and to remove it from the site. When the respondent did not pay the appellant after being served with a payment claim, the matter went to an adjudication, which was decided in favour of the appellant. The respondent brought proceedings to have the adjudication decision declared void. It alleged that the contract in question was not for "construction work" within the meaning of s 10 of the Queensland Building and Construction Industry Payments Act 2004 (Qld) ("the Queensland Act"). Under the Queensland Act, "construction work" is defined to include "dismantling of buildings or structures, whether permanent or not, forming, … part of land". The "substantial issue" in that case was whether the phrase "forming, or to form,

part of land" in s 10(1) of the Queensland Act should be interpreted in the context of that statute by reference to rules about fixtures in the law of real property.

21 Applegarth J, with whom Holmes JA and Boddice J agreed, observed (at [18]) that the issue should be resolved having regard to the subject matter of the Queensland Act and the context in which the words appeared. With regard to the former, he held (at [19]) that the Queensland Act was concerned with interim payments for the carrying out of construction work and it was not apparent why common law rules about the ownership of property should be imported into s 10 of the Queensland Act. He said (at [21]) that he was not persuaded that rules about the ownership of fixtures should be adopted in interpreting s 10 of the Queensland Act. As for the latter, he held (at [27]) that the immediate context of the words suggested that common law rules were not imported. He further held (at [28]) that the context of the statute as a whole also did not suggest otherwise. He concluded (at [57]) that the words of s 10 of the Queensland Act did not call for an inquiry into whether the plant formed part of land according to common law rules about the ownership of fixtures, and that the requirements of the law of real property about ownership of things affixed to land were not imported into s 10 of the Queensland Act. Instead, the degree of annexation would be relevant to the issue of whether or not a thing formed part of land.

22 On the facts, Applegarth J found (at [60]) that the contract between the appellant and the respondent was a contract, agreement or other arrangement by which the appellant undertook to carry out "construction work" within the meaning of s 10 of the Queensland Act.

My decision

23 As mentioned earlier, the defendant relied on limbs (*c*) and (*d*)(v) of the definition of "construction work" in s 3(1) of the Act. These provide as follows:

> **Definitions of "construction work", "goods" and "services"**
>
> **3.**—(1) In this Act, unless the context otherwise requires and subject to subsection (2) —
>
> "construction work" means —
>
> …
>
> (*c*) the installation in any building, structure or works of fittings that form, or are to form, part of the land, including systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, and security or communications systems;
>
> (*d*) any operation which forms an integral part of, is preparatory to, or is for rendering complete, works of the kind referred to in paragraph (*a*), (*b*) or (*c*), including —
>
> …
>
> (v) the prefabrication of components to form part of any building, structure or works, whether carried out at or on the construction site or elsewhere …
>
> …
>
> …

24 It was clear to me that in the present context, limb (*d*)(v) had to be read with limb (*c*). Thus, the crux of the issue was the meaning to be ascribed to the phrase "fittings that form, or are to form, part of the land" in limb (*c*).

The purpose of the Act

25 I was of the view that the meaning to be ascribed to the phrase "fittings that form, or are to form, part of the land" in limb (*c*) had to be determined

with reference to the purpose of the Act. In this regard, s 9A(1) of the Interpretation Act (Cap 1, 2002 Rev Ed) states as follows:

> **Purposive interpretation of written law and use of extrinsic materials**
>
> **9A.**—(1) In the interpretation of a provision of a written law, an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object.

26 It is uncontroversial that the purpose of the Act is to preserve cashflow in the construction industry, so that construction projects are not disrupted or delayed. In his speech at the second reading of the Building and Construction Industry Security of Payment Bill 2004 (Bill 54 of 2004), then Minister of State for National Development Mr Cedric Foo Chee Keng said as follows (*Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at cols 1119–1120):

> The speedy and low cost adjudication process will expedite the resolution of genuine payment disputes so that cashflow will not be disrupted. It will identify contractors who are facing financial difficulties early, before they cause more problems downstream.

27 This same point was recognised by Court of Appeal in *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 when it observed (at [18]) that:

> … It has often been said that cash flow is the life blood of those in the building and construction industry. If contractors and sub-contractors are not paid timeously for work done or materials supplied, the progress of construction work will almost inevitably be disrupted. Moreover, there is a not insignificant risk of financial distress and insolvency arising as a result. In the years before the immediate predecessor of the Act (*viz*, the Building and Construction Industry Security of Payment Act 2004 (Act 57 of 2004) ("Act 57/2004")) was enacted in 2005, there had been several such cases. It was

> with the specific aim of minimising such disruptions that Act 57/2004 (now superseded by the Act) was passed. …

The present case

28 Having regard to the purpose of the Act, I was of the view that the phrase "fittings that form, or are to form, part of the land" in limb (*c*) clearly includes furniture that is attached to, and that is intended to be permanently attached to, the building. First of all, there is no reason to exclude such furniture from the ambit of this phrase. Secondly, it should be noted that limb (*c*) expressly includes the installation of "systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, and security or communications systems". Contractors undertaking the installation of furniture that is attached to, and that is intended to be permanently attached to, the building are as engaged on the site as those undertaking the installation of these fittings and cash flow is equally important to all of them. There is no reason to treat the installation of such furniture differently.

29 As stated earlier, the defendant's works included the installation of furniture that was attached to, and that was intended to be permanently attached to, the building (see [9] above). Consequently, they fell within limb (*c*).

30 The defendant's works also included the fabrication of furniture that was attached to, and that was intended to be permanently attached to, the building (see [9] above). Therefore, they also fell within limb (*d*). Such fabrication doubtlessly "form[ed] an integral part of, [was] preparatory to, or [was] for rendering complete" the installation of such furniture. However, it was less clear if the defendant's works fell within limb (*d*)(v). Although there

may be some overlap between the two concepts, the *fabrication* of furniture (which is what is mentioned on the face of VO 1 and VO 2) is obviously not synonymous with the *prefabrication* of the same (which is what the defendant submitted its works included (see [8(a)] and [15] above), and which is also what is required under limb (*d*)(v)). Nonetheless, this point was moot as I was satisfied that the defendant's works, to the extent that they included fabrication, fell squarely within limb (*d*) even without reference to limb (*d*)(v).

31 As regards the English and Australian authorities cited by counsel, I agreed with Akenhead J in *Savoye* and Applegarth J in *Agripower* that the common law on fixtures is not imported into the definition of "construction work" in s 3(1) of the Act. First, the phrase "fittings that form, or are to form, part of the land" in limb (*c*) does not unambiguously import the common law on fixtures. As Akenhead J alluded to in *Savoye*, Parliament did not use the word "fixtures" even though it could have done so (see [17] above). Second, neither does the purpose of the Act suggest that the common law on fixtures should be imported. As Applegarth J observed in *Agripower*, the common law on fixtures has to do with ownership of property (see [21] above). Thus, whether something is a fixture in law is an inquiry that is, with respect to Judge Seymour QC in *Gibson Lea*, quite beside the point.

*The ambit of limb (*c*) beyond the present case*

32 I must emphasise, however, that my decision in this case is not intended to lay down a rule that the furniture installed or to be installed must be furniture that is attached to, and that is intended to be permanently attached to, the building before it can come within the ambit of limb (*c*). While it was clear to me that the installation of such furniture by the defendant fell on the right side of the metaphorical line, this does not mean that the installation of

anything else will necessarily fall on the wrong side of the same. Where exactly the line should be drawn (if indeed a line should be drawn) is a question best answered by a future court which has the benefit of full arguments on the matter.

33 That said, I note, purely by way of observation, that the delivery of furniture not attached to the building would probably fall on the wrong side of the line. It would strain the statutory language to consider chairs or coffee tables as "fittings that form, or are to form, part of the land". Moreover, any disruption or delay from contractor failure would not be as serious because it would not involve any work to detach the furniture from the building. As to whether something that has a less permanent attachment to the building (*eg*, a refrigerator with an ice maker which requires a water pipe to be connected to it) falls within the ambit of limb (*c*), this is something that will have to be determined by a future court.

Conclusion and consequential orders

34 In addition to what has already been set out, the plaintiff had, in its written submissions, also complained about the defendant's alleged delay in lodging its claim under the Act. However, it was clear to me that the plaintiff was not relying on this as a separate ground to set aside the AD. In light of this, as well as my findings above, the plaintiff's sole ground for setting aside the AD was not established and it was therefore also unnecessary for me to consider the defendant's other grounds for opposing the application, which were set out in the defendant's written submissions.

35 In these premises, I dismissed the application with costs fixed at $8,000 (inclusive of disbursements). I also ordered payment out to the defendant of the sum paid into court by the plaintiff.

36 Counsel for the defendant, however, informed me that the plaintiff's payment into court only covered the adjudicated amount and part of the interest. He prayed for an order that the plaintiff do pay the balance interest and the plaintiff's share of the adjudication costs. Counsel for the plaintiff, on the other hand, said that the court had no power to make such an order. She submitted that as the present application was brought by the plaintiff to set aside the AD, the defendant had to take out a separate originating summons or summons for leave to enforce the AD in accordance with s 27(1) of the Act.

37 I was of the view that requiring the defendant to take out a separate application for the small sum in question would cause the plaintiff to incur further losses disproportionate to the amount in question. I was of the opinion that I had residual or inherent powers to order the plaintiff to pay these amounts as the Act already provides for payment into court of the adjudicated amount. I therefore ordered the plaintiff to pay to the defendant the sum of $4,534.13 as the plaintiff's share of the adjudication costs and interest at 5.33% of the adjudicated amount of $70,865.45 from 31 May 2016 to the date of full payment of the adjudicated amount.

Lee Seiu Kin
Judge

Li Jiaxin (Michael Por Law Corporation) for the plaintiff;
Teo Kah Wee (Chan Neo LLP) for the defendant.
