IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHCR 10

HC/S 1255 of 2016
HC/SUM 2210 of 2019

Between

P & P Engineering & Construction Pte Ltd

… *Plaintiff / Applicant*

And

Kori Construction (S) Pte Ltd

… *Defendant / Respondent*

JUDGMENT

[Civil Procedure – Interim Payments]

P & P Engineering & Construction Pte Ltd
v
Kori Construction (S) Pte Ltd

[2019] SGHCR 10

High Court — Suit No 1255 of 2016 (Summons No 2210 of 2019)
Justin Yeo AR
15 May 2019

26 June 2019 Judgment reserved.

Justin Yeo AR:

1 This is an application for interim payment under O 29 r 10 of the Rules of Court (Cap 322, R 5, Rev Ed 2014) ("Rules of Court"). It concerns a unique situation where the High Court had (a) adjudged after trial that the defendant was liable to the plaintiff for work done under a contract; and (b) by agreement of the parties, ordered that the quantification be made by a jointly appointed quantity surveyor. Prior to the quantity surveyor being appointed, the plaintiff brought the present application for interim payment of a sum allegedly admitted by the defendant as the minimum amount due under the contract.

2 I heard oral arguments on 15 May 2019 and received further written submissions on 27 May 2019. I dismiss the application for the reasons in this judgment.

Background

3 P & P Engineering & Construction Pte Ltd ("the Plaintiff") brought a claim against Kori Construction (S) Pte Ltd ("the Defendant), for steel fabrication work done under a fabrication contract ("the Contract"). The Plaintiff claimed a sum of $893,273.36 for the work done.

4 After a trial of the matter, the Judge found that the Plaintiff had undertaken steel fabrication work for the Defendant under the Contract (see *P & P Engineering & Construction Pte Ltd v Kori Construction (S) Pte Ltd* [2018] SGHC 277 ("*P & P Engineering*") at [75]). However, in view of the evidential shortcomings at trial, the Judge did not determine the amount due for such work. Instead, the Judge ordered that the Plaintiff's claim documents which have not been verified and certified by the Defendant be so verified and certified in accordance with the terms of the Contract and the procedure previously adopted by the parties. Based on the procedure previously adopted by the parties, the Defendant would verify the quantities that the Plaintiff claimed to have delivered and issue certificates to the Plaintiff; the Plaintiff would then issue its invoices on the basis of the certificates (*P & P Engineering* at [10]).

5 On 1 February 2019, the Defendant provided its verification and certification, quantified at $79,019.50. The Plaintiff did not agree with this sum. As such, the parties agreed to have the sum determined by a jointly appointed quantity surveyor, and to be bound by that decision. In view of the parties' agreement, the Judge made the following orders on 27 March 2019:

> Upon the trial of the matter and upon further hearing Counsel for the Plaintiff and Counsel for the Defendant,
>
> It is ordered that:

> 1. Parties are to jointly appoint a Quantity Surveyor to determine the amount payable by the Defendant to the Plaintiff. Costs of the Quantity Surveyor to be shared initially by both parties equally and the Court will determine the issue of the Quantity Surveyor's costs after the issuance of his/her report which shall be binding on both parties.
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> 2. Other outstanding issues to be resolved at the hearing to consider the Quantity Surveyor's report. Further legal costs to be discussed after the Quantity Surveyor issues the report.

6 On 23 April 2019, the Plaintiff sought payment from the Defendant "on the admitted sum … of $79,019.50", failing which, the Plaintiff "shall apply to court for Judgment on the sum of $79,019.50 pursuant to admission".[1] The Defendant contended that the certification "[did] not amount to an admission", and was instead merely a verification and certification of the delivery orders carried out pursuant to the order in *P & P Engineering*.[2] The Defendant further pointed out that as the Plaintiff disputed the certification and was not prepared to issue the necessary invoice, the Defendant was unable to make payment unless and until the actual sum due and payable was assessed by the jointly appointed quantity surveyor.

7 On 30 April 2019, the Plaintiff filed the present application ("the Application") for interim payment of $79,019.50 and interest.

The relevant provisions

8 For ease of reference, I set out the relevant legislative provisions and rules relating to interim payment.

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1 Affidavit of Krishnamoorthy Pugazendhi (30 April 2019), at p 23.

2 Affidavit of Krishnamoorthy Pugazendhi (30 April 2019), at p 24.

9 The statutory basis for the High Court's power to order interim payment is found in the First Schedule to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the First Schedule" and "the SCJA", respectively), which provides:

> **Interim payment**
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> 15. Power to order a party *in a pending proceeding* to make interim payments to another party or to a stakeholder or into court on account of any damages, debt or other sum, excluding costs, which he may *subsequently in the proceeding be adjudged to be liable to pay*.
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> (emphasis added in italics)

10 O 29 rr 10, 11, 12 and 17 of the Rules of Court set out the framework for interim payment, as follows:

> **Application for interim payment (O. 29, r. 10)**
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> **10**.—(1) The plaintiff may, at any time after the writ has been served on a defendant and the time limited for him to enter appearance has expired, apply to the Court for an order requiring that defendant to make an interim payment.
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> (2) An application under this Rule shall be made by summons but may be included in a summons for summary judgment under Order 14.
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> (3) An application under this Rule shall be supported by an affidavit which shall —
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> (*a*) verify the amount of the damages, debt or other sum to which the application relates and the grounds of the application;
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> (*b*) exhibit any documentary evidence relied on by the plaintiff in support of the application; and
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> (*c*) if the plaintiff's claim is made under the Civil Law Act (Cap. 43), contain the particulars mentioned in section 20(6) of that Act.
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> (4) The summons and the supporting affidavit or affidavits must be filed at the same time, and must be served on the

defendant against whom the order is sought within 3 days from the date of filing.

(5) Notwithstanding the making or refusal of an order for an interim payment, a second or subsequent application may be made upon cause shown.

Order for interim payment in respect of damages (O. 29, r. 11)

11.—(1) If, on the hearing of an application under Rule 10 in an action for damages, the Court is satisfied —

(*a*) that the defendant against whom the order is sought has admitted liability for the plaintiff's damages;

(*b*) that the plaintiff has obtained judgment against the defendant for damages to be assessed; or

(*c*) that, if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the defendant or, where there are 2 or more defendants, against any one or more of them,

the Court may, if it thinks fit and subject to paragraph (2), order the defendant to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff after taking into account any relevant contributory negligence and any set-off, cross-claim or counterclaim on which the defendant may be entitled to rely.

(2) No order shall be made under paragraph (1) in an action for personal injuries if it appears to the Court that the defendant is not a person falling within one of the following categories:

(*a*) a person who is insured in respect of the plaintiff's claim;

(*b*) a person whose means and resources are such as to enable him to make the interim payment.

Order for interim payment in respect of sums other than damages (O. 29, r. 12)

12. If, on the hearing of an application under Rule 10, the Court is satisfied —

(*a*) that the plaintiff has obtained an order for an account to be taken as between himself and the defendant and for any amount certified due on taking the account to be paid;

(*b*) that the plaintiff's action includes a claim for possession of land and, if the action proceeded to trial, the defendant would be held liable to pay to the plaintiff a sum of money in respect of the defendant's use and occupation of the land during the pendency of the action, even if a final judgment or order were given or made in favour of the defendant; or

(*c*) that, if the action proceeded to trial, the plaintiff would obtain judgment against the defendant for a substantial sum of money apart from any damages or costs,

the Court may, if it thinks fit, and without prejudice to any contentions of the parties as to the nature or character of the sum to be paid by the defendant, order the defendant to make an interim payment of such amount as it thinks just, after taking into account any set-off, cross-claim or counterclaim on which the defendant may be entitled to rely.

…

Adjustment on final judgment or order or on discontinuance (O. 29, r. 17)

17. Where a defendant has been ordered to make an interim payment or has in fact made an interim payment, whether voluntarily or pursuant to an order, the Court may, in giving or making a final judgment or order, or granting the plaintiff leave to discontinue his action or to withdraw the claim in respect of which the interim payment has been made, or at any other stage of the proceedings on the application of any party, make such order with respect to the interim payment as may be just, and in particular —

(*a*) an order for the repayment by the plaintiff of all or part of the interim payment;

> (*b*) an order for the payment to be varied or discharged; or
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> (*c*) an order for the payment by any other defendant of any part of the interim payment which the defendant who made it is entitled to recover from him by way of contribution or indemnity or in respect of any remedy or relief relating to or connected with the plaintiff's claim.

Parties' arguments

11 At the hearing, Counsel for the Plaintiff, Mr Andrew John Hanam ("Mr Hanam"), proceeded on the basis of O 29 r 11(1)(*b*) of the Rules of Court, which relates to interim payment in an "action for damages" where "the plaintiff has obtained judgment against the defendant for damages to be assessed". He made the following arguments:

(a) First, the sum of $79,019.50 was the minimum sum payable by the Defendant to the Plaintiff. As this is the "irreducible sum that can be paid", the Court should order interim payment of that sum (citing *American International Assurance Co Ltd v Wong Cherng Yaw and others* [2009] 3 SLR(R) 1117 at [24]).

(b) Second, as liability has already been established, it is "generally appropriate and just to make an interim order where there will be some delay until the final disposal of the case" (citing *Main-Line Corporate Holdings Ltd v United Overseas Bank Ltd* [2010] 2 SLR 986 at [33]).

(c) Third, the proceedings are arguably not yet concluded, because the Judge's order of 27 March 2019 provides for "[o]ther outstanding issues" to be resolved by the Court, *ie*, issues of interest and costs.

12 Counsel for the Defendant, Mr Twang Kern Zern ("Mr Twang"), made the following arguments:

(a) First, as a preliminary point, the Application and the supporting affidavit do not state the specific rules and sub-paragraphs upon which the Application was based. The Application was therefore defective from the outset.

(b) Second, the power to order interim payment only arises in a "pending proceeding" where judgment on damages, debt or other sum will subsequently be delivered (citing paragraph 15 of the First Schedule). The present action is no longer a "pending proceeding" because the trial is concluded, as evidenced from the case status in eLitigation stating that the case is "concluded". There is no further trial at which the Plaintiff can obtain judgment against the Defendant, and no order has been made for damages to be assessed. In addition, the Plaintiff has not made any application under O 37 r 1 of the Rules of Court in relation to an assessment of damages.

(c) Third, the Plaintiff cannot satisfy any of the provisions in O 29 r 11(1) of the Rules of Court because the claim for fabrication work under the Contract was not pleaded as a claim for damages, but rather, a claim for a liquidated sum due under the Contract.

13 While Mr Hanam proceeded on the basis of O 29 r 11(1)(*b*) of the Rules of Court, the Plaintiff's supporting affidavit stated that the claim in the suit was for "work done", which is conceptually distinct from "damages". In view of the uncertainty, and also to clarify counsels' positions on how the relevant

provisions were to be interpreted, I sought further written submissions in relation to whether, on a literal or purposive understanding of O 29 rr 11(1)(*b*) and/or 12(*c*), the present suit would fall within the situations envisaged in those provisions.

14 In his further submissions, Mr Hanam made the following contentions:

(a) First, O 29 r 11(1)(*a*), (*b*) and (*c*) of the Rules of Court were intended to cover all situations where a claim has been filed in Court and a plaintiff seeks interim payment prior to conclusion of the suit. Adopting a purposive interpretation, the present situation would fall within O 29 r 11(1)(*b*) of the Rules of Court; otherwise, the Plaintiff would be in a worse position simply because the Judge did not order an assessment of damages but instead ordered an "alternative way for damages to be determined".[3]

(b) Second, O 29 r 12(*c*) of the Rules of Court allows the Court to order interim payment in the situation where, if the action proceeded to trial, the plaintiff would obtain judgment against the defendant for a substantial sum of money "apart from any damages or costs". The sum to be determined by the quantity surveyor would fall within such a description. While O 29 r 12(*c*) of the Rules of Court refers to "if the action proceeded to trial", the word "trial" should be read purposively

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[3] Plaintiff's further submissions (27 May 2019), at paragraph 11.

to "include an assessment by a third party which was ordered by the Court".[4]

(c) Third, the Court "should be slow to adopt a construction which would… defeat the evident purpose of [O 29 rr 11 and 12 of the Rules of Court] forming, as they do, part of a single code" (citing *Shearson Lehman Brothers Inc and another v Maclaine, Watson & Co Ltd and others* [1987] WLR 480 ("*Shearson Lehman Brothers*") at 492H). The Defendant's argument that the Plaintiff cannot avail itself of interim payment just because the quantification is being done by a third party outside the court is "repugnant to commonsense and contrary to the purpose of the interim payments code" (citing *Shearson Lehman Brothers* at 493H).[5]

15 Mr Twang argued in his further submissions that the present situation would not fall within either O 29 rr 11(1)(*b*) or 12(*c*) of the Rules of Court, for the following reasons:

(a) First, in relation to O 29 r 11(1)(*b*) of the Rules of Court, there is clearly no order for damages to be assessed; instead, the Judge's order of 27 March 2019 simply states that the quantity surveyor's report "shall be binding on both parties". The specific outstanding issues mentioned in the Judge's order relate to the quantity surveyor's costs and legal costs, which do not constitute an assessment of damages.

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4 Plaintiff's further submissions (27 May 2019), at paragraph 12.

5 Plaintiff's further submissions (27 May 2019), at paragraphs 13–14.

(b) Second, it is clear that the present action would not fall within the description of "if the action proceeded to trial" in O 29 r 12(*c*) of the Rules of Court, because the trial has already concluded. O 29 r 12(*c*) of the Rules of Court requires a pending trial and judgment because interim payments are an interim remedy subject to final evaluation and adjustment as seen in O 29 r 17 of the Rules of Court. As such, there is no basis for ordering interim payment.

Issues

16 The issues before me are as follows:

(a) Preliminary issue: the failure to identify the rule and sub-paragraph under which the Application is based.

(b) Whether there is basis to exercise the power to order interim payment.

(c) Whether the requirements of O 29 rr 11(1)(*b*) or 12(*c*) of the Rules of Court are met.

Decision

Preliminary Issue

17 The Plaintiff has not identified, in either the Application or the supporting affidavit, the rule and sub-paragraph upon which the Application is based. This is contrary to the guidance provided in *Singapore Civil Procedure 2019* vol 1 (Justice Chua Lee Meng gen ed) (Sweet & Maxwell, 2019) ("*Singapore Civil Procedure 2019*"), which emphasises the necessity for an applicant to state, in the supporting affidavit, "upon which provision of r. 11(1)

or r. 12 the application is based" (*Singapore Civil Procedure 2019*, at paragraph 29/10/6).

18 The need to identify the specific provision is not just good general practice; it is an integral part of verifying the "grounds of the application" as required in O 29 r 10(3)(*a*) of the Rules of Court. The failure to identify the specific provision under which the Application is brought would lead to ambiguity and confusion *vis-à-vis* the basis of the application, as was evident in the present case (see also *HRA Corp (SG) Pte Ltd v Cheng Mun Yip Marcus and others* [2018] SGHCR 7 ("*HRA Corp*") at [21]–[22], [25] and [31]). On a reading of both the Application and the supporting affidavit, it is impossible to determine whether the Application is based on O 29 rr 11(1) or 12 of the Rules of Court, let alone the specific sub-paragraphs in those rules. As each rule and sub-paragraph deals with a different situation, the Defendant had to consider and address the various possibilities. The failure to identify the specific provision also resulted in the need for further submissions so as to obtain a better understanding of which specific rule may be applicable to the present case (see [13] above).

19 In view that Mr Twang was ready to proceed notwithstanding this preliminary defect in the Application, and was prepared to rely only on legal arguments, there was no substantive impediment to the Application being heard and determined. The failure to identify the specific provision may, however, have consequences in costs.

Whether there is basis to exercise the power to order interim payment

20 The basis of the High Court's power to order interim payment is found in paragraph 15 of the First Schedule (see [9] above). It is evident from the provision that the power to order interim payment relates to "a pending proceeding", where a party may "subsequently in the proceeding be adjudged to be liable to pay [damages, debt or other sum, excluding costs]". In other words, interim payment can only be ordered at a point *before* a party is "adjudged to be liable to pay" an amount of "damages, debt or other sum".

21 The issue is whether the fact that the proceeding before the quantity surveyor is pending would render the present action "a pending proceeding" for the purposes of paragraph 15 of the First Schedule. I do not think it does, for the reasons elaborated below.

22 The term "proceeding" is used twice in the same paragraph. Read in the context of the paragraph, both references must refer to the same proceeding. Put another way, the reference to "the proceeding" in the latter half of the paragraph ought to be understood as a reference to the "pending proceeding" mentioned in the former half. In this regard, I am of the view that the term "proceeding" in paragraph 15 of the First Schedule refers to a pending proceeding in *court* where the *court* has yet to determine the "damages, debt or other sum" payable. There are two reasons for this interpretation:

(a) First, the First Schedule is situated within the SCJA – "[a]n Act relating to the constitution and powers of the superior courts of judicature" – and expressly relates to additional powers of the High Court.

(b) Second, the term "adjudged" in paragraph 15 of the First Schedule is a term widely used in legislation and common parlance in reference to judicial determinations by a court. This supports the view that the power to order interim payment is limited to pending matters which will, in due course, be judicially determined by the Court. While "adjudged" could conceivably refer to quasi-judicial determinations (*eg*, s 4(6) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) makes reference to a matter "adjudged by a superintendent"), no convincing argument has been made that the determination by a quantity surveyor in the present case falls within the meaning of "adjudged" in paragraph 15 of the First Schedule.

23 I note for completeness that the interpretation advanced above would be consistent with the framework relating to interim payment, as set out in O 29 of the Rules of Court. Specifically, under O 29 r 17 of the Rules of Court, the Court retains the power – when "giving or making a final judgment or order" – to make adjustments in the light of any interim payment previously made pursuant to the Court's order. Where there is no longer any scope for the Court to determine "damages, debt or other sum", there is also no longer an avenue for adjustments to be made by the Court; as such, interim payment should not be ordered in these circumstances.

24 I acknowledge Mr Hanam's point (see [11(c)] above) that the Judge's order of 27 March 2019 has the effect or reserving issues of costs and interest to the Court, and that the Court proceedings are arguably not yet concluded. However, this does not mean that there are "pending proceedings" for the purposes of paragraph 15 of the First Schedule. In relation to "costs", these are

expressly excluded from paragraph 15 of the First Schedule. In relation to "interest", while there is no similar exclusion, it is not necessary for me to consider whether this would provide a basis for exercising the power in paragraph 15 of the First Schedule, because: (a) the sum of $79,019.50 is alleged to be the minimum *principal* sum due under the Contract (*contra* interest); and (b) there is no admission of an "irreducible sum" or "minimum sum" in relation to interest given the Defendant's position that no interest is payable. Furthermore, and in any event, Mr Hanam did not raise any arguments along these lines.

25 In the present case, the trial is already over and the Judge has ordered that the quantity surveyor's determination be binding on the parties. There is no further room for the Judge to determine the "damages, debt or other sum" payable to the Plaintiff. There is no longer any "pending proceeding" for the purposes of paragraph 15 of the First Schedule. I therefore find that there is no basis for exercising the power in paragraph 15 of the First Schedule.

Whether the requirements of O 29 rr 11(1)(b) or 12(c) of the Rules of Court are met

26 Even if I have erred in coming to my conclusion in [25], and proceed instead on the basis that the power to order interim payment extends to the present situation, I find that neither the requirements of O 29 rr 11(1)(*b*) nor 12(*c*) of the Rules of Court are met.

27 In relation to O 29 r 11 of the Rules of Court, the provision expressly provides for interim payment to be ordered "in an action for damages". In the present case, the determination by the quantity surveyor relates not to damages,

but to the quantum of the quantity of steel fabricated as work done under the Contract. Mr Hanam sought to argue that the quantity surveyor's determination is "an alternative way for damages to be determined", but this appeared to be a mere assertion with no convincing basis, particularly in view of the findings in the trial judgment (see *P & P Engineering* at [75]).

28 For the avoidance of doubt, there is also no room for contending that a purposive approach would widen the meaning of "damages" in O 29 r 11 of the Rules of Court to include "sums other than damages", in view that O 29 r 12 of the Rules of Court is specifically intended to cover "sums other than damages".

29 In relation to O 29 r 12(*c*) of the Rules of Court, I recognise that Mr Hanam initially proceeded only on O 29 r 11(1)(*b*) of the Rules of Court, and that his arguments on O 29 r 12(*c*) of the Rules of Court were made only following my request for further written submissions. However, leaving that fact aside, I agree with Mr Twang that the reference to "if the action proceeded to trial" in O 29 r 12(*c*) of the Rules of Court must mean that the present situation does not fall within the provision. In addition, I am unable to agree that the term "trial" can be extended to the quantity surveyor's determination, given the ordinary meaning of the term, and also the use of the term throughout the SCJA as a reference to a trial in court.

30 Finally, I address Mr Hanam's arguments relating to *Shearson Lehman Brothers* (see [14(c)] above). The citation of this case does not assist the Plaintiff's cause. In *Shearson Lehman Brothers*, the English Court of Appeal was concerned with the situation where the Court was satisfied that the applicant would recover *either* "damages" *or* "sums other than damages", but it was impossible to tell, *at the interlocutory stage*, whether the sum claimed would be

in the nature of damages or otherwise (see also *HRA Corp* at [28]–[31]). It was against this backdrop that the Court observed (*per* Nicholls LJ) the need to "be slow to adopt a construction which would… defeat the evident purpose of [O 29 rr 11 and 12 of the Rules of Court] forming, as they do, part of a single code" (*Shearson Lehman Brothers* at 492H). Indeed, Nicholls LJ had expressly noted in the same case that the underlying purpose of O 29 rr 11 and 12 of the Rules of Court is "to mitigate hardship or prejudice to a [party] which may exist *during the period from the commencement of an action to the trial*" (emphasis added) (*Shearson Lehman Brothers* at 492G). In other words, the observations relating to the "single code" were not intended to, and do not, extend the reach of the provisions to the present case.

Conclusion

31 For the foregoing reasons, I dismiss the Application, and will hear counsel on costs.

Justin Yeo
Assistant Registrar

Mr Andrew John Hanam (Andrew LLC) for the Plaintiff;
Mr Twang Kern Zern (Central Chambers Law Corporation)
for the Defendant.