IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 32

Originating Summons No 1433 of 2018
(Summons No 5522 of 2018)

Between

United Integrated Services Pte Ltd

… *Applicant*

And

(1) Civil Tech Pte Ltd
(2) Harmonious Coretrades Pte Ltd

… *Respondents*

GROUNDS OF DECISION

[Building and Construction Law] — [Statutes and regulations] — [Building and Construction Industry Security of Payment Act] — [Adjudication determinations]

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United Integrated Services Pte Ltd
v
Civil Tech Pte Ltd and another

[2019] SGHC 32

High Court — Originating Summons No 1433 of 2018 (Summons No 5522 of 2018)
Chan Seng Onn J
15, 31 January 2019

14 February 2019

Chan Seng Onn J:

Introduction

1 This is an application by the Applicant, United Integrated Services Pte Ltd ("the Main Contractor") to stay the enforcement of the Adjudication Determination in relation to SOP/AA 368/2018 ("1AD") obtained by the 1st Respondent, Civil Tech Pte Ltd ("the Sub Contractor") against the Main Contractor.[1]

2 On 31 January 2019, after hearing the further arguments of the parties, I granted the application for the stay of enforcement of 1AD.

3 As the matter led me to consider a point of law in relation to the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed)

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[1] 1st Respondent's Submissions ("1RS") at [1].

("SOPA"), I detail my grounds of decision herein.

Facts

4 In early 2018, the Main Contractor and Sub Contractor entered into a Sub-Contract Agreement ("the Sub-Contract") worth $25,000,000, whereby the Sub Contractor agreed to carry out "additions & alterations to [an] existing semi-conductor factory development involving [the] new erection of [a] 4-storey production building…".[2]

5 Following disputes in relation to Payment Claim 6 ("PC6"), the Sub Contractor referred the matter to adjudication, pursuant to SOPA. This culminated in 1AD dated 23 October 2018,[3] which determined that the Main Contractor was to pay the Sub Contractor $1,369,987.02 plus interest and costs.[4]

6 On 19 November 2018, the Sub Contractor was granted leave to enforce 1AD.[5]

7 However, shortly thereafter, on 23 November 2018, a second Adjudication Determination ("2AD") determined that no amount was payable by the Main Contractor to the Sub Contractor as the adjudicated amount was a negative sum of $1,176,050.67.[6] 2AD had arisen due to a reference by the Sub Contractor to adjudicate a further Payment Claim 7 ("PC7") on 30 October 2018.[7] In arriving at his determination, the learned adjudicator had adopted the

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2 Wang Haw Li's Affidavit ("WHL") at p 25 (Tab WHL2).

3 Ashok Kumar Rai's Affidavit ("AKR") at p 6.

4 AKR at pp 138–139, [292] – [297].

5 1st Respondent's Bundle of Documents ("1RBOD") at pp 14 – 15.

6 Tan Han Meng's 1st Affidavit ("THM1") at p 152.

7 THM1, p 154 at [13].

valuation of all the work items and variation works considered in 1AD.[8] Thereafter, he considered claims for work done, liquidated damages[9] and back-charges[10] which were not before the learned adjudicator in 1AD.[11]

8 Given that 2AD had in effect superseded 1AD, the Main Contractor applied to stay the enforcement of 1AD by the Sub Contractor.

The primary issue

9 The primary issue before me was whether a stay of enforcement ought to be granted when a prior Adjudication Determination ("AD") had effectively been superseded by a subsequent AD which took into account the prior AD. As a matter of course, this presupposes that the prior AD had not been successfully enforced upon the release of the subsequent AD, as was the case here; if the prior AD had been successfully enforced, there would simply be no enforcement of such prior AD to be stayed.

10 Before me, the parties agreed that SOPA was silent on this point and that no authorities have directly determined the matter.[12]

11 Nonetheless, in resisting the stay application, the Sub Contractor relied on the Court of Appeal's pronouncement on the temporary finality of ADs[13] in

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8 THM1, pp 159 – 160 at [32] – [37].

9 THM1, p 244; 31 January 2019 Oral Transcript ("31 Jan"), 2:39 – 2:42.

10 THM1, pp 240 – 243 (Appendix B of Adjudication Determination in SOP AA 405 of 2018).

11 THM1, p 160 at [36.2].

12 FTR 15 Jan 2019 Chamber 4C ("FTR 15 Jan") at 10:26:10 – 10:26:20; FTR 31 Jan 2019 Chamber 4C ("FTR 31 Jan") at 3:08:12.

13 Request for Further Arguments (Dated 29 January 2019) at [26] – [27].

W Y Steel Construction Pte Ltd v Osko Pte Ltd [2013] 3 SLR 380 ("*W Y Steel*") at [71]:

> An adjudication determination is provisional in the sense that it may ultimately be reversed if it is challenged in a court or tribunal or some other dispute resolution body. However, as far as the rights of the parties to the adjudication are concerned, *to the extent that the adjudication determination remains intact pending any such challenge, it has the effect of* ***absolutely and conclusively determining the parties' rights*** *until and unless it is eventually reversed* in accordance with the provisions of the Act … [emphasis added in italics and bold italics]

12 Hence, given that both 1AD and 2AD had not been set aside, the Sub Contractor argued that both ADs ought to be enforceable as they "absolutely and conclusively determin[ed] the parties' rights" (*W Y Steel* at [71]).[14] As a result, it was up to the Sub Contractor to choose which AD it wished to enforce.[15] Here, since 1AD entitled it to payment while 2AD did not, the Sub Contractor elected to enforce 1AD.[16]

13 I did not agree with the Sub Contractor.

Unintended windfall

14 First, were the Sub Contractor correct that each AD could be enforced independently at its choosing, a subcontractor could gain a windfall which was likely unintended by the drafters of the SOPA. I explain further.

15 Preliminarily, s 17(5) SOPA stipulates that a subsequent adjudicator must ascribe the same value to construction works carried out under the contract as the prior adjudicator unless the claimant or respondent satisfies the

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14 Request for Further Arguments (Dated 29 January 2019) at [27].

15 Request for Further Arguments (Dated 29 January 2019) at [28] – [29].

16 FTR 15 Jan at 10:23 AM.

adjudicator that the value has changed since the previous determination. The learned author Chow Kok Fong noted that in practice (Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) at para 16.61):

> … where an adjudication determination is made during the course of a project, the rulings contained therein will normally be relied on by the parties in the conduct and regulation of their relationship with one another for the remainder of the project. As a result, *most adjudicators would consider it a disservice to the parties to vary or alter earlier rulings unless there are very compelling reasons for so doing.* … [emphasis added in italics]

16 Hence, ADs are essentially *cumulative*. The practice is that the subsequent adjudicator will consider and adopt the findings of the prior adjudicator, while making necessary additions or deductions to account for any work done, liquidated damages, or back-charges that were not considered in the prior AD. The subsequent adjudicator will also factor in all prior payments (if any) made to the subcontractor whether under the subcontract or pursuant to prior adjudications made in favour of the subcontractor, in order to arrive at the final amount to be paid under the adjudication claim. Clearly, the adjudicator will have to take into account any monies that have been paid (if any) at the time of his adjudication because under s 17(3)(h) SOPA, he shall have regard also to "any other matter that the adjudicator reasonably considers to be relevant to the adjudication" in determining an adjudication application.

17 This was in fact what occurred in the present case. In computing the final amount payable under 2AD, the second adjudicator took into account the amount adjudicated in 1AD which remained unpaid at the time of his determination. Nonetheless, 2AD was a negative determination for the Sub Contractor as the second adjudicator also considered liquidated damages and back charges which were not claimed by the Main Contractor in 1AD. Hence,

2AD was a culmination of the ruling in 1AD *and* further claims which were not incorporated in 1AD.

18 Given the cumulative nature of ADs, the Sub Contractor's contention that *both* 1AD and 2AD are independently enforceable due to their temporary finality status could lead to a windfall for subcontractors, a result that could not have been intended by the drafters of the SOPA.

19 To illustrate, consider the following scenario, in which a subcontractor completes the first tranche of work pursuant to a construction contract, and accordingly issues its Payment Claim for $2,000,000 ("PC1"). Thereafter, the main contractor disputes PC1, and the matter is submitted to adjudication. The adjudicator publishes an AD in favour of the subcontractor in the sum of $2,000,000. However, the subcontractor does not enforce the AD. Instead, it submits a further Payment Claim for $2,000,000 ("PC2") in the next month for the *same* works it had previously completed, and which remains unpaid. PC2 is then subject to adjudication, and the adjudicator, after considering the prior AD, adopts the prior adjudicator's decision and therefore issues an AD in the subcontractor's favour for $2,000,000 (assuming no liquidated damages or back-charges have arisen yet). This process is repeated *ad infinitum,* and the subcontractor obtains multiple ADs each in the value of $2,000,000 in its favour.

20 All of these ADs have temporary finality. However, in coming to their AD, each adjudicator would have considered the decision of the prior adjudicator, and hence the final AD would be the *cumulative* result of all prior ADs. Yet, taking the Sub Contractor's contention to the logical extreme, the subcontractor in this illustration can claim the value of all ADs in its favour, even though they relate to the same $2,000,000 works which it had completed.

The subcontractor may therefore enjoy a windfall unless and until the ADs are reversed by a challenge in a court or tribunal or some other dispute resolution body.

Contrary to legislative intention

21 The Sub Contractor contended that the temporary windfall which a subcontractor may enjoy ought not to usurp the SOPA's overriding intention of ensuring a consistent stream of progress payments for subcontractors.[17] As observed when the Bill that culminated in the SOPA was debated (*Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at cols 1112 – 1113 (Cedric Foo Chee Keng, Minister of State for National Development) ("the Debates")):

> The financial problems affecting some construction firms have in turn affected subcontractors and suppliers further downstream along the construction value chain. They face delays or non-payments for work done or materials supplied …
>
> The SOP Bill will preserve the rights to payment for work done and goods supplied of all the parties in the construction industry. It also *facilitates cash flow by establishing a fast and low cost adjudication system* to resolve payment disputes. Affected parties will have the right to suspend work … if the adjudicated amount is not paid in full or not paid at all …
>
> [emphasis added]

22 However, putting the problem of the unintended windfall aside, the Sub Contractor's contention that it may choose between ADs even after the subsequent AD had considered and adopted the findings of the prior AD and taken into account all actual payments previously made would clearly be against the intention of the SOPA of ensuring "prompt payment for work done or materials supplied" (the Debates at col 1113). Reverting to the illustration at

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17 FTR 31 Jan at 3:09:05 – 3:09:12.

[19] above, taking the Sub Contractor's contention that it may elect which of the ADs to enforce, the subcontractor would be wise to withhold enforcement of the ADs. Upon accumulating sufficient ADs, the subcontractor may then elect to enforce each AD in its favour so as to enjoy the temporary windfall. Hence, subcontractors would be incentivised to be slow in enforcing the ADs in its favour so as to enjoy the temporary windfall. This clearly goes against the legislative intention of ensuring prompt payment to subcontractors so that the project would not be unnecessarily stifled by payment issues.

23 Therefore, when faced with two or more ADs which have not been enforced, each of which have considered and adopted the determination of the prior AD(s), the sensible outcome which best furthers the legislative intention must be that only the *final* AD, which has accumulated the findings of all prior ADs and taken into account all matters reasonably relevant to the adjudication (including actual payments made till the date of adjudication), is enforceable.

24 Accordingly, I ordered the stay of the enforcement of 1AD "unless the [Sub Contractor] obtain[ed] an order setting aside the 2nd Adjudication order" ("the Condition").

Further arguments: stay without condition due to the Sub Contractor's insolvency

25 In further arguments, the Main Contractor raised the fresh point that a stay of enforcement ought to be granted on account of the Sub Contractor's insolvency.[18] As the Court of Appeal observed in *W Y Steel* at [70]:

> a stay of enforcement of an adjudication determination may ordinarily be justified where there is clear and objective evidence of the *successful claimant's actual present insolvency*,

[18] FTR 31 Jan at 4:06.

> or where the court is satisfied on a balance of probabilities that if the stay were not granted, the money paid to the claimant would not ultimately be recovered if the dispute between the parties were finally resolved in the respondent's favour by a court or tribunal or some other dispute resolution body. Further, we agree … that a *court may properly consider whether the claimant's financial distress was, to a significant degree, caused by the respondent's failure to pay the adjudicated amount* and, also, whether the claimant was already in a similar state of financial strength or weakness (as the case may be) at the time the parties entered into their contract. [emphasis added]

26 Having considered the evidence before me, I was satisfied that there was clear and objective evidence that the Sub Contractor was insolvent, and that such insolvency was not caused by the Main Contractor's failure to pay the adjudicated amount in 1AD.

27 First, starting from June 2018, the Sub Contractor started facing problems in paying its own subcontractors (collectively "the sub-sub contractors").[19] As such, the Main Contractor had to take over the contracts of multiple sub-sub contractors from the Sub Contractor from August 2018 onwards,[20] suggesting that the problems relating to payment were not caused by the Main Contractor's inability or failure to pay the Sub Contractor.

28 Secondly, as at the time of hearing, there were multiple applications to wind up the Sub Contractor on account of its inability to pay its debts, pursuant to s 254(1)(e) of the Companies Act (Cap 50, 2006 Rev Ed).[21] In total, $1,563,234.11 was owed to the creditors of the winding-up applications.[22] While the Sub Contractor contended that it would be able to repay such debts *if* the

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19 WHL1 at [41] and [43].

20 WHL1 at [41] and [43], Tab WHL-14.

21 WHL1 at [47], Tab WHL-17.

22 FTR 31 Jan at 4:09:23; 1st Respondent's Submissions at [45].

adjudicated amount of $1,369,987.02 in 1AD was paid by the Main Contractor, I did not think that this was sufficient. This was because a separate sub-sub contractor, Harmonious Coretrades Pte Ltd ("Harmonious") had obtained a final garnishee order in the sum of $1,277,000.00 in relation to the sums payable to the Sub Contractor by the Main Contractor under 1AD.[23] Hence, even if the adjudicated amount in 1AD was paid out, a significant portion of the payout would go to Harmonious rather than the Sub Contractor. Crucially, Harmonious had not filed a winding-up application against the Sub Contractor, and the debt that it was owed was therefore *in addition to* the $1,563,234.11 due to the creditors in the winding-up applications.

29 In response to the point on the significant debt owed to its sub-sub contractors, the Sub Contractor simply submitted a list of assets to argue that it was not insolvent.[24] However, there was no balance sheet to demonstrate that such assets were not subject to substantial loans (in particular secured loans).[25] Accordingly, I was satisfied on a balance of probabilities that the Sub Contractor was insolvent.

30 Therefore, I amended the order to remove the Condition, and granted an unconditional stay of enforcement of 1AD.[26]

Garnishee order absolute

31 For completeness, I should also add that Harmonious was the 2nd Respondent in this case, as the Main Contractor had applied for a stay of

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23 WHL1 at [49], WHL1 Tab 18.

24 THM1 at [22] – [31], THM1 Tabs THM-3 – THM-9.

25 FTR 31 Jan at 4:12.

26 FTR 31 Jan at 4:15:30 – 4:15:53.

enforcement of Harmonious' garnishee order absolute against the Main Contractor in respect of the debt in 1AD.

32 However, given that an application had been made for the garnishee order absolute to be set aside (HC/OS 1113/2018) on account of 2AD which was delivered after the garnishee order was made absolute,[27] I made no order in this regard.[28]

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27 Garnishee order made absolute on 2 November 2018 (see WHL1 Tab 18), 2AD delivered on 23 November 2018.

28 FTR 15 Jan at 10:58:00 – 10:58:36, 11:03.

Conclusion

33 In conclusion, I ordered a stay of enforcement without condition of 1AD by the Sub Contractor, and made no orders in respect of the stay application in relation to the garnishee order absolute.

Chan Seng Onn
Judge

Lee Mei Yong, Debbie (ECYT Law LLC) for the applicant;
Ashok Kumar Rai (Eversheds Harry Elias LLP) for the first respondent;
Lu Huiru, Grace (Holborn Law LLC) for the second respondent.