IN THE APPELLATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2024] SGHC(A) 28

Appellate Division / Civil Appeal No 38 of 2023

Between

Builders Hub Pte Ltd

… *Appellant*

And

JP Nelson Equipment Pte Ltd

… *Respondent*

In the matter of Originating Application No 616 of 2022

Between

JP Nelson Equipment Pte Ltd

… *Applicant*

And

Builders Hub Pte Ltd

… *Respondent*

EX TEMPORE JUDGMENT

[Building and Construction Law — Building and construction contracts]
[Building and Construction Law — Dispute resolution — Alternative dispute resolution procedures]
[Building and Construction Law — Jurisdictional objection]
[Building and Construction Law — Statutes and regulations]

Builders Hub Pte Ltd
v
JP Nelson Equipment Pte Ltd

[2024] SGHC(A) 28

Appellate Division of the High Court — Civil Appeal No 38 of 2023
Woo Bih Li JAD, Kannan Ramesh JAD and See Kee Oon JAD
18 September 2024

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Woo Bih Li JAD (delivering the judgment of the court *ex tempore*):

Introduction

1 This is an appeal arising from the decision of the General Division of the High Court in *JP Nelson Equipment Pte Ltd v Builders Hub Pte Ltd* [2023] SGHC 186 (the "Judgment"). The background to this appeal is relatively simple. The issues involve an application of the Building and Construction Industry Security of Payment Act 2004 ("SOPA") and the consideration of its scope.

2 JP Nelson Equipment Pte Ltd ("JPN") had engaged Builders Hub Pte Ltd ("BH") as its main contractor to build an office/dormitory and factory with office at 28 Benoi Road. The contract was awarded on 8 June 2018.

3 On 20 May 2022, BH served Payment Claim No 37 ("PC 37") on JPN for $2,287,156.69, inclusive of GST. On 10 June 2022, JPN served its payment response certifying $329,284.98, inclusive of GST as being payable to BH. BH

refers to this as "PR 37" while JPN refers to it as "IV 37" (for Interim Valuation 37). We will use "IV 37" to minimise confusion.

4 Out of the $329,284.98 certified under IV 37, $248,052.47 was for variation works. BH then applied for adjudication on the balance of some of the variation works claimed under PC 37, *ie*, $1,464,395.70 less $248,052.47 = $1,216,343.23.

5 On 4 August 2022, an adjudicator decided that BH was entitled to $538,003.04 of the balance. After deducting a 10% retention sum of $53,800.30, the sub-total was $484,202.74. With GST of $33,894.20, the sub-total became $518,096.94. However, the adjudicator then added the $329,284.98 under IV 37 and hence the figure increased to $847,381.92. We will refer to this award as the "AA".

6 Upon an application by JPN for review, the review adjudicator removed the $329,284.98 on 12 September 2022. This was because this sum had already been paid by JPN on 1 July 2022 although this fact was not disclosed to the adjudicator when the AA was made. The net amount payable to BH reverted to $518,096.94. We will refer to this award as the "RA".

7 In the meantime, on 26 August 2022, JPN terminated its contract with BH for alleged breaches of contract. BH also terminated the contract on the same day alleging repudiatory breaches by JPN (Judgment at [10]).

8 On 29 September 2022, JPN then filed HC/OA 616/2022 ("OA 616") to set aside both the AA and the RA. Its initial ground was that BH's application for adjudication had been filed prematurely. However, two days before the hearing of OA 616, JPN sought leave to rely on an additional ground of fraud.

JPN relied on five documents to prove the alleged fraud. They were referred to as the "Five Cappitech Documents". These documents purported to show that BH had made certain payments to a third party for the supply of aircon equipment. According to JPN, it relied on the documents to certify a payment of $155,160 to BH as "Downpayment for Aircon equipment". The downpayment was the aggregate amount certified under Interim Valuation 31 ("IV 31") dated 16 December 2021 and Interim Valuation 34 ("IV 34") dated 9 March 2022, *ie*, about five months and two months before PC 37 respectively. However, the Five Cappitech Documents were false as no payment had been made by BH to the third party.

9 JPN was allowed to raise the fraud argument. The Judge ruled in favour of BH on the timeliness of its application for adjudication. On the question of fraud, the Judge ruled that BH had fraudulently submitted the Five Cappitech Documents to deceive JPN. He then ruled that the AA and RA were not affected by the fraud. However, he nevertheless reduced the RA by $155,160 for reasons which we elaborate later below.

10 BH then filed an appeal against the Judge's decision to reduce the RA by $155,160. The timeliness of BH's application for the adjudication determination is not in issue on appeal. The fraudulent conduct of BH is also not disputed.

11 Under s 27(6)(*h*) of the SOPA, a party may apply to set aside an adjudication determination if "the making of the adjudication determination was induced or affected by fraud or corruption". Under s 2 of the SOPA, an "adjudication determination" means the determination of an adjudicator and an "adjudicator" includes a review adjudicator. In the present case, the question is whether the AA or RA was affected by fraud. In *Facade Solution Pte Ltd v Mero*

Asia Pacific Pte Ltd [2020] 2 SLR 1125 ("*Facade Solution*"), the Court of Appeal set out a two-stage test in setting aside an adjudication determination on the ground of fraud:

(a) Step 1: The adjudication determination must be based on facts which the party seeking the claim knew or ought reasonably to have known were untrue.

(b) Step 2: Whether the facts in question were material to the issuance of the adjudication determination.

12 The issues in the appeal are whether JPN has satisfied the test in *Facade Solution* to set aside the adjudication determinations. If not, whether the Judge had erred in reducing the amount awarded in the RA by $155,160.

13 BH's case on the fraud allegation is relatively straightforward. It says that the fraud arose in the past and in connection with earlier claims which led to IV 31 and IV 34. It had nothing to do with PC 37 or IV 37. Furthermore, the Five Cappitech Documents related to claims under the original contract and not variation works whereas the adjudication determinations in question pertained only to variation works. Hence, neither the adjudicator (in the initial application) or the review adjudicator had regard to the false documents which were not facts relied on by either of them.

14 However, JPN argues that BH's claim under PC 37 was for $258,600 for the aircon system being 75% of the aircon contract price. This was reinforced by BH's claim being for the "reference period from 11 September 2018 to 20 May 2022". IV 37 for $329,284.98 had taken into account the total sum certified so far, *ie*, $258,600 less the 10% retention sum and amounts previously certified (see RWS at [7]). The 75% of the aircon contract price included the

downpayment of $155,160 being 45% of the aircon contract price. Hence, the $155,160 was in issue in the adjudication determinations.

15 The Judge did not agree with JPN and concluded that JPN did not meet the test in *Facade Solution*. However, he then noted that because "fraud unravels everything", it would not be just to allow BH to hold onto the fruits of its fraud. Accordingly, he decided to consider the value of the aircon equipment, which JPN still had not received, to see how much the court should deduct from the RA (see [82]–[84] of the Judgment).

16 The contract sum for the aircon system was $344,800 (*ie*, $309,700 + $35,100). The Judge noted that according to BH, the value of the aircon equipment amounted to $91,740.73, *ie*, 26.61% of the contract price of $344,800. Since BH had been paid 75% of the contract sum, the balance was 25%. The difference between 26.61% and 25% was 1.61% and this amounted to $5,540.73. We digress to mention that 1.61% of $344,800 is actually $5,551.28 and not $5,540.73. This difference may be because the $91,740.73 is actually 26.6069% of the contract sum which the Judge rounded up to 26.61%, but in calculating the dollar value, he may have used 1.6069% (instead of 1.61%). The difference is immaterial and we mention it for completeness. On the other hand, JPN had alleged that the aircon equipment cost roughly 54% of the contract sum but did not adduce sufficient evidence to support this argument. Nevertheless, the Judge was of the view that it would be an inadequate expression of the court's disapprobation towards fraud to simply order BH to repay the sum overpaid, *ie*, $5,540.73. Accordingly, the Judge reduced the amount under the RA by $155,160 instead.

17 In our view, it is quite clear that neither of the determinations in the AA or the RA was affected by the fraud perpetrated by the Five Cappitech Documents as alleged by JPN.

18 Although PC 37 had mentioned a reference period from 11 September 2018 to 20 May 2022, it is obvious that PC 37 is a progress claim for one month and not for that entire period. The reference period related to the duration of the entire works so far. Likewise, any reference by either BH or JPN to amounts previously claimed or certified is because of the way they administer the contract. This is just an arithmetical approach to compare what has been claimed or certified in the past and the present claim which represents the difference. Thus, for example, the substance of the claim in PC 37 for the aircon system is not 75% but 5% because 70% had already been claimed and paid for. Likewise, the substance of any response or valuation by JPN would be in respect of the 5% claimed and not 75%.

19 In addition, the 5% claimed by BH for the aircon system was approved by JPN in IV 37 and hence it was never an issue which was to be adjudicated upon. As BH also argues, it was part of the original contract works and not even part of the variation works for which an adjudication determination was sought. Accordingly, both the AA and RA would not have been affected by the fraud and the Judge was correct in finding that they were not affected.

20 The remaining issue is whether the Judge was correct to reduce the amount under the RA because of the fraud on the basis that "fraud unravels everything". While we understand the sense of justice underpinning the Judge's decision, we are of the view that it was not open to him to do so as that is not the scheme under SOPA and is outside its scope. Under that scheme, an adjudication determination (whether original or upon review) has temporary

finality and can only be set aside (or varied) if it is affected by the fraud. If the Judge was correct in reducing the RA even though neither of the awards was affected by the fraud, then the words in s 27(6)(*h*) SOPA (quoted above at [11]) would be otiose. There would be no need to establish that a particular adjudication determination is affected by fraud.

21 Furthermore, JPN had not established the quantum of its loss as claimed. We note that the approach of the parties and the Judge was to ascertain the quantum of JPN's loss by establishing the value of the unsupplied aircon equipment. JPN had claimed that the value of the unsupplied equipment was roughly 54% of the contract sum for the aircon system. However, BH had argued that the value of the equipment would be about 26.61%. As mentioned, the Judge noted that JPN did not have enough evidence to support its allegation on the value of the equipment, but nevertheless reduced the RA by $155,160. We are of the view that the Judge erred in doing so when that was not the approach adopted to ascertain the quantum of the loss.

22 Nevertheless, it remains open to JPN to seek payment from BH whether by agreement from the liquidators of BH (as BH is now in liquidation) or a court order in the light of BH's fraudulent conduct which is undisputed. As we understand that $518,096.94 has been released to BH from the Trust Account of the Singapore Mediation Centre after the RA, it is not open to JPN to set off its claim against that sum.

23 In the circumstances, while we also disapprove of the fraud practised by BH, we allow BH's appeal for the reasons given and set aside the decision below in respect of the reduction. As mentioned, it is open to JPN to make a claim for overpayment due to the fraud. Hence, this is not a case where a fraudulent person is allowed to keep the fruits of the fraud. Hopefully, JPN's claim will be

resolved with the liquidators in principle and on quantum without the need for further litigation.

24 There is one other matter. BH says that JPN had garnished $23,668.05 pursuant to the decision of the Judge to reduce the RA by $155,160. It argues that this sum should be returned to BH if the appeal is allowed. On the other hand, JPN asks for a stay of the return of the garnished amount pending the outcome of arbitration between the parties. JPN has filed a proof of debt but has not sought consent of the liquidators or the court to continue with arbitration. It relies on *WY Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 at [70] for a stay. We do not think this case assists JPN. We order JPN to return the garnished sum to BH forthwith.

25 We award BH the costs of the appeal fixed at $20,000 inclusive of disbursements with the usual consequential orders. We set aside the costs order of the Judge and order JPN to pay BH's costs below fixed at $17,000 all in.

Woo Bih Li
Judge of the Appellate Division

Kannan Ramesh
Judge of the Appellate Division

See Kee Oon
Judge of the Appellate Division

Lee Peng Khoon Edwin, Amanda Koh Jia Yi and Smrithi Sadasivam (Eldan Law LLP) for the appellant;
Chuah Chee Kian Christopher, Koh Huini Valerie, Chiam Yunxin and Michelle Choy (Christopher Chuah Law Chambers LLC) for the respondent.
