

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1993] SGHC 131

OM58/1992

Between

United Boulevard Pte Ltd

... Plaintiff

And

Ahong Construction (S) Pte
Ltd

... Defendant

GROUND OF DECISION

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United Boulevard Pte Ltd v Ahong Construction (S) Pte Ltd

[1993] SGHC 131

OM58/1992
G P Selvam J
16 June 1993

1 **Judgment:**

2 CORAM: G P SELVAM, JC

3 **GROUND OF DECISION**

4 This is an application by United Boulevard Pte Ltd ("the applicants") seeking an order for an arbitration award made on 7 May 1992 to be set aside or remitted for reconsideration by the arbitrator.

5 It relates to part of the award which allowed a claim for an extension of time and extra preliminaries to Ahong Construction (S) Pte Ltd ("the respondents") who were engaged for the construction of a building known as Bel Air Project. The applicants were the developers of the building.

6 The contract between the parties called for completion of the works within 18 months - the contractual completion date being 1 September 1983.

7 The project was completed on 1 October 1984 after an overrun of 396 days (13 months). The contractors gave notice of arbitration on 6 December 1986. The hearing proper of the arbitration commenced on 9 January 1990 and ended on 20 November 1991.

8 The contractors claimed :

9 (a) Extension for the full period of the overrun (396 days).

10 (b) Loss and expense, which amount fluctuated between \$3,110,135.08 and \$7,059,358.22 during the course of the arbitration.

11 (c) Costs of re-polishing the marble finishes and other miscellaneous items, like variations.

12 (d) Interest.

13 (e) Costs.

14 The developers claimed and defended their position on the ground that:

15 (a) Extension of 238 days by the architect was fair, and the contractors were not entitled to more days.

16 (b) The contractors were not entitled to loss and expense beyond the extra preliminaries of approximately \$590,000 certified by the architect.

17 (c) The re-polishing of the marble was properly the responsibility of the contractors.

18 (d) No interest should be awarded.

19 The developers had relied initially, inter alia, on a provision at B1/12 ("the limited extension clause") of the Bills of Quantities limiting the contractors' right to claim extension of time to only 90 days. It read as follows :

20 Notwithstanding clause No 23 of the Conditions of Contract and notwithstanding the fact that the Liquidated and Ascertained Damages shall be imposed on any delay to the completion of each period stated, it is hereby stipulated and agreed that the maximum delay to this Contract SHALL NOT EXCEED 90 days.

21 Within the terms of this Contract, the Contractor may be entitled to claim for a number of days extension to the Contract periods giving various legitimate reasons. However, as stated in paragraph ... above and as an amendment to the Contract, the MAXIMUM DELAY is 90 days, notwithstanding any legitimate reason or excuse the Contractor may offer ("the 90 day provision").

22 In law the limitation clause was not binding on the contractors if the original contract was departed from. In the event, the applicants dropped their reliance on the limitation clause and accordingly the arbitrator was free and bound to ignore the limitation clause and decide the extension of time issue based purely on the merits.

23 It is common ground that no evidence was led on it and there was no cross-examination of witnesses as to the effect of the provision. Neither counsel submitted on the provision.

24 On the issue of extension of time the award was as follows :

25 EXTENSION OF TIME - On this claim, I award time extension till date of Practical Completion, that is till 1 October 1984.

26 Consequent upon the full extension the arbitrator further awarded extra preliminaries. The extension of time of 396 days was 72 per cent of the contract period of 550 days. The extra preliminaries awarded accordingly was 72% of the BQ (bill of quantities) amount for the respective items.

27 The arbitrator then itemised the extra preliminaries and the total amount was \$1,260,695.

28 The award of full extension (396 days) to the contractors thus was more than four times the extension permitted under the limited extension clause (90 days). At once it is apparent that the limited extension clause was not the basis of his award of the extension of time and the extra preliminaries.

29 The arbitrator, however, made gratuitous reference to the limited extension clause in a somewhat enthusiastic fashion. He said in the award :

30 It will be recalled that as early as in February 1988 both parties to this arbitration had agreed that my decision on the issues to be arbitrated upon would be a bare statement of the awards without comment. Notwithstanding that I would like to make some preliminary remarks of a general nature before detailing out this Final Award. It is my hope that some of these would be of guidance to parties entering into building contracts in future.

31 Much that has been in issue in this arbitration and much of the friction and palpable animosity between the parties have, in my considered view, been

due to one single villain of the piece. This was the imposition of the 90-day limit on extension of time.

32 This imposition was an amendment to the Standard Form of Building Contract of the Singapore Institute of Architects.

33 The introduction of such an immutable condition cannot but invite trouble when the contextual scenario for the building works fails to unfold itself as envisaged at the time the contract was entered into.

34 The 90-day limit condition was the cause of much anxiety and unrealistic manipulations of the works programme, especially in the early stages of the building works.

35 I cannot over-emphasise the fact that the Standard Form of Contract has had the benefit of much thought in its drafting and has well stood the test of time. Any modifications of its basic terms or conditions should not be lightly undertaken without giving adequate consideration to the likely implications of such changes to the Contract.

36 The remarks of the arbitrator and the granting of the full extension have now become the main bone of contention between the parties.

37 The Jurisdiction to set aside or remit an award

38 The application to set aside the time extension award or remit it for reconsideration is based on s 17 and s 16 of the Arbitration Act (Cap 10). The material parts read :

39 16 (1) In all cases of reference to arbitration the court or a judge thereof may remit the matters referred, or any of them to the reconsideration of the arbitrators or umpire.

40 17 (2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the court may set aside the award.

41 The above provisions are equivalent to ss 22 and 23 of the English Arbitration Act, 1950.

42 Atkin's Court Forms, Second Edition, Vol 6 gives a succinct summary of the guidelines for setting aside or remitting an award.

43 The court has jurisdiction to set aside an award :

44 (1) where an arbitrator or umpire has misconducted himself or the proceedings;

45 (2) where an arbitration or an award has been improperly procured;

46 (3) where the award was made in excess of jurisdiction;

47 (4) where there are patent defects in the award. (Page 80).

48 An award may be remitted to the arbitrator :

49 (1) where there has been an admitted mistake and one of the parties or the arbitrator himself asks for remission;

50 (2) where additional evidence which could not with reasonable diligence have been discovered earlier is discovered after the making of the award;

51 (3) where there has been misconduct on the part of the arbitrator or umpire;

52 (4) where the arbitrator has made an award in excess of jurisdiction;

53 (5) where, without any misconduct on the part of the arbitrators, there has been a procedural mishap leading to injustice;

54 (6) where there are patent defects in the award. (Page 77).

55 It will be noted that misconduct is a common ground for setting aside or remitting an award for reconsideration.

56 Grounds of the application

57 The grounds of this application are :

58 (a) That the arbitrator had misconducted himself and/or the proceedings by placing undue and improper reliance in deciding the issue of extension of time (and consequent to that, the issue of extra preliminaries) on the limited extension clause.

59 (b) This was so notwithstanding that the provision was not pleaded nor relied upon in any way in the arbitration hearing by the Applicants.

60 (c) That the Arbitrator has misconducted himself and/or the proceedings in so relying on the 90 day provision without informing the parties that he

intended to do so and without giving the parties, or alternatively the applicants, an opportunity to call evidence and/or make submissions to him in relation to the 90 day provision, thereby causing a grave injustice to the applicants.

61 (d) The applicants highlighted the arbitrator's description of the limited extension clause as the "one single villain of the piece" and as having led to "much that has been in issue in this arbitration and much of the friction and palpable animosity between the parties", as "an absolute limitation", and as an "immutable condition" which "cannot but invite trouble when the contextual scenario for the building works fails to unfold itself as envisaged at the time the contract was entered into". In support of their submission the applicants further relied on the arbitrator's statement that the provision was "the cause of much anxiety and unrealistic manipulations of the works performance, especially in the early stages of the building works" and that "any modifications of the Standard Form of Contract's basic terms or conditions should not be lightly undertaken without giving adequate consideration to the likely implications of such changes to the Contract" and that "some of the remarks that he had made will be of guidance to parties entering into building contracts in future."

62 (e) Another argument advanced by the applicants was that the award was bad on its face, as, having described the 90 day provision as an "absolute" limitation and an "immutable" condition, the arbitrator proceeded to award the respondents a full extension of time up to the date of Practical Completion of the Project, a period of 396 days.

63 The crux of the applicants' submission was that in making his award on the extension claim the arbitrator misconducted himself and/or the proceedings because he reached his decision on the basis of a point which was never raised as an issue or argued before him in the arbitration hearing, without giving the

parties, or alternatively the applicants, any warning that the point was one which he had in mind and so giving the parties, or alternatively the applicants, no opportunity of dealing with it, resulting in unfairness to the applicants.

64 The applicants relied on *Interbulk Ltd v Aiden Shipping Co Ltd* < 1984 > Vol 2 Lloyd's Rep 66 and *Societe Franco-Tunisienne D'Armement-Tunis v The Government of Ceylon* < 1959 > 2 Lloyd's Rep 1 and *Malayan Insurance Co Inc v Chek Brothers Construction Co* < 1973 > 1 MLJ 185 for the proposition that if an arbitrator makes an award on the basis of a point which unpleaded and never argued and on which there was no evidence, that would be technical misconduct of the arbitrator as it would breach the rules of natural justice. It must be emphasised that the gravamen of the ground is that extraneous matters formed the basis of the arbitrator's decision.

65 Another submission was that there was likelihood of bias on the part of the arbitrator. Bias in one sense means conduct and condition of mind which renders the arbitrator unable to adhere to the two rules of natural justice - that is (a) both sides must be given full opportunity to present their case and evidence and (b) the arbitrator must not be a judge in his own cause. In a wider and overlapping sense it means the predisposition of the arbitrator to decide the issues before him in a way unsupported by evidence and reasoning. Bias need not be actual. Likelihood of it is sufficient. The test applied for the determination of likelihood bias is set out in *Halsbury's Laws of England*, 4th Ed Vol 1(1) *Administrative Law*, Para 89 :

66 Likelihood of bias: It is generally unnecessary to establish the presence of actual bias, although the courts are not precluded from entertaining such an allegation. It is enough to establish a real likelihood that in the circumstances of the case an adjudicator will be biased. Alternatively, it may be sufficient to

establish that a reasonable person acquainted with the outward appearance of the situation would have reasonable grounds for suspecting bias. In some situations a more exacting test will be adopted, and the court may set aside a determination if justice has not been manifestly seen to be done, such a test has been applied in cases where a clerk to a tribunal has retired with the tribunal, and given the impression of participating in its decision.

67 The argument based on bias rested on a recurrent reference to the arbitrator's comments on the limited extension clause and the fact of full extension. Counsel for the applicants said that full extension is a thing unheard. It therefore meant that the arbitrator must have been influenced by the limited extension clause which was out of the case. The arbitrator's comments on the clause thus was evidence of likelihood of bias.

68 After hearing and considering the arguments advanced by the applicant I had no hesitation in rejecting them summarily for the simple reason that the award of full extension was not based on the limited extension clause and the contrary position is the truth of the matter. An award based on the limited extension clause can lead to only one conclusion - that the contractors were entitled to 90 days extension and no more. By granting four times the limited extension of 90 days the arbitrator clearly ignored the clause in making the award.

69 Additionally describing his comments as "preliminary remarks of a general nature" and by stating that the preliminary remarks were of "a general nature before detailing out his final award" he made it clear that the comments were detached from the award.

70 Further, the arbitrator's hope "that some of these remarks would be of guidance to parties entering into building contracts in future" made it clear that they had no bearing on the award he made.

71 It is perfectly clear what prompted the arbitrator to make the remarks. The limited extension clause was actually part of the arbitration and had been a bone of contention between the parties until it was dropped after the arbitration hearing had started. It was part of the historical setting.

72 The arbitrator, however, did not apply the clause to the case before him. He, therefore, impliedly complimented the applicants' counsel for dropping it.

73 Finally, under the law as it stands injustice in the sense of an error of fact or law alone is not sufficient to set aside or remit an award. That is in the nature of things when parties select their judge and agree to be bound by his decision. Some patent defect in the award or misconduct on the part of the arbitrator must be shown - see *Moran v Lloyd's* < 1981 > 1 Lloyd's Reports 413. Atkin LJ in *Gillespie & Co v Thompson Bros & Co* (1922) 13 Lloyd's Rep. 519 at 524 stated the law with the clarity which was characteristic of him :

74 It is no ground for coming to a conclusion on an award that the facts are wrongly found. The facts have got to be treated as found; Nor is it a ground for setting aside an award that the conclusion is wrong in fact. Nor is it a ground for setting aside an award that there is no evidence on which the facts could be found, because that would be mere error in law, and it is not misconduct to come to a wrong conclusion in law and would be no ground for ruling aside the award unless the error in law appeared on the face of it.

75 But the Arbitration Act by s 28 (1) has taken away the jurisdiction of the court to set aside or remit an award on the ground of errors of fact or law on the face of the award.

76 In this case, however, I found no error of fact or law on the face of the award and the applicants failed to make out their case that the arbitrator had misconducted himself or the proceedings. Accordingly I refused the application.

G P Selvam J

Wong Meng Meng with Lim Khoon for the applicants
C S Wu with John Chung for the respondents
