

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1994] SGHC 134

OM 20/1993

Between

Ahong Construction (S) Pte
Ltd

... Applicant

And

United Boulevard Pte Ltd (No
2)

... Respondent

GROUND OF DECISION

Arbitration — Award — Recourse against award

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**Ahong Construction (S) Pte Ltd v United Boulevard Pte Ltd
(No 2)**

[1994] SGHC 134

OM 20/1993
Lai Kew Chai J
11 May 1994

1 This application for leave to appeal was made under s 28(2) of the Arbitration Act (Cap 10) ('the Act') against the supplementary award of the arbitrator dated 24 February 1993 and under which the arbitrator refused to award to Ahong Construction (S) Pte Ltd ('the applicants') interest on the amounts recoverable by the applicants under his final award dated 7 May 1992. After hearing it and in exercise of my discretion I granted the leave to appeal and ordered that a special date be fixed for the hearing of the appeal and for the costs of the application to be reserved. I now give my reasons.

2 To succeed, the applicants had to satisfy this court that the appeal would relate to a question of law, that it came within the well-known 'Nema guidelines' which were reinforced by *Antaios Compania Naviera SA v Salen Rederierna AB*, and that the relevant question of law would substantially affect their rights. In connection with the Nema guidelines applicable to this application, I accepted that it was correct in law to state that (i) where the question of law involved was a 'one-off' point, leave to appeal should not be given unless it was apparent to the court upon a mere perusal of the reasoned

award itself without the benefit of adversarial argument that the arbitrator was obviously wrong; and (ii) where the question was not `one-off`, eg where it concerned the construction of a standard term contract, leave to appeal should not be given unless the court considered that a strong prima facie case has been made out that the arbitrator was wrong. These stringent conditions to govern applications for leave to appeal obviously were formulated under the relevant statutory arbitral provisions to control the flood of litigation following arbitral awards and the resultant delays had threatened the despatch of dispute resolutions for which arbitration was originally conceived, developed and chosen by parties in dispute.

3 It is relevant for present purposes to reproduce s 28(2), (3) and (4) of the Act:

(2) Subject to subsection (3), an appeal shall lie to the court on any question of law arising out of an award made on an arbitration agreement; and on the determination of such an appeal the court may by order - (a) confirm, vary or set aside the award; or (b) remit the award to the arbitrator or umpire for reconsideration together with the court's opinion on the question of law which was the subject of the appeal, and where the award is remitted under paragraph (b) the arbitrator or umpire shall, unless the order otherwise directs, make his award within 3 months of the date of the order. (3) An appeal under this section may be brought by any of the parties to the reference - (a) with the consent of all the other parties to the reference; or (b) subject to section 30, with the leave of the court. (4) The Court shall not grant leave under subsection (3)(b) unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement; and the court may grant any leave subject to such conditions as it considers appropriate.

4 The material facts are as follows. The applicants, who were building contractors, agreed to construct a residential complex for United Boulevard Pte

Ltd (‘the respondents’). The construction period was 18 months and contractual completion was agreed to be on 1 September 1983. In fact, the building was completed 13 months later. Disputes inevitably followed the completion. They were referred to the arbitrator. The applicants claimed they were entitled to the extension of the full period of 13 months, ie to 1 October 1984, for a host of reasons which are no longer live nor necessary for us to recall. The respondents had contended before the arbitrator that the applicants were entitled to an extension of not more than 238 days as certified by the architects. In relation to the major issue of the extension of time allowable to the application, the arbitrator stated in his final award as follows: ‘... I award time extension till date of practical completion, that is till 1 October 1984.’ In consequence, the arbitrator in the final award decided that the respondents had to refund to the applicants \$1,920,420.67 that they had wrongfully deducted as liquidated damages from the moneys due and payable to the applicants between September 1984 and August 1985. It is noteworthy that various component amounts of this sum were withheld from the applicants as far back as 1984 and 1985. Secondly, the arbitrator also made an award in favour of the applicants for loss and expense for the prolongation of the contract period the net sum of \$1,269,038.94. The two sums exceeded \$3m and the relevant period extended some 7-8 years. An estimate of the amount of interest involved was said to be \$1.5m.

5 In the final award dated 7 May 1992, the arbitrator did not order the payment of any interest on the sums which he found were wrongfully withheld as liquidated damages and on the sums which he held ought to have been paid for the loss and expenses directly flowing from the prolongation of the contract period.

6 Having referred to substantial claims of interest of the applicants, I should at once say that it is strictly a matter for the arbitrator to decide the rate

of interest payable on what sums and over what periods. Those threefold questions are not within the purview of this court, even if the appeal following the leave granted here succeeds.

7 One of the sources and origins of the disputes, which manifestly continued to cast its shadows even in these court proceedings, was a term in the bills of quantities section of the building contract under which, at least to and according to the respondents and the architects, the applicants had in writing, under the provision known as 'B1/12 the limited extension clause', agreed that 'the maximum delay is 90 days, notwithstanding any legitimate reason or excuse the [applicants as 'the contractor'] may offer.' It was common ground, and it must be apparent from the decision of the arbitrator, that this clause was not relied on and did not feature at all in the arbitration proceedings.

8 By Originating Motion No 42 of 1992, the applicants applied for leave to appeal against the arbitrator's award on the question of interest, or alternatively, for an order that the award be remitted to the arbitrator pursuant to s 16(1) of the Act with a direction that interest should be awarded to the applicants on the sums recoverable under the award at a rate or rates and for a period or periods to be fixed by the arbitrator. GP Selvam JC (as he then was) heard the motion and ordered that the award be remitted to the arbitrator under s 16(1) of the Act for him to hear submissions by counsel on the question of interest and to reconsider the matter. The remission hearing was heard on 5 February 1993. The arbitrator reserved his decision. By the supplementary award dated 24 February 1993, the arbitrator affirmed his disallowance of interest for the reasons stated therein and ordered costs against the applicants.

9 It is necessary to set out in full the supplementary award:

24 February 1993

Dear Sirs

Arbitration Case No 20/86

*Ahong Construction (S) Pte Ltd v United Boulevard Pte Ltd -
Supplementary Award*

In my award dated 7 May 1992, I had considered the claims for interest and dismissed both claims in para 31. Pursuant to the remission order dated 26 December 1992, I have heard counsel on the question of interest and I have reconsidered the matter in the light of their submissions.

10 I accept the submissions of counsel for the claimants that normally interest should be awarded against the party who is liable to pay a sum of money to the successful party unless there are good reasons for not awarding interest.

11 I disallow interest on the following grounds:

12 The claimants entered into the contract with the respondents which provides for an extension of a maximum of 90 days delay (notwithstanding any legitimate reason or excuse the contractor may offer). Presumably because of this special constraint, the claimants agreed to a rescheduled programme of work allowing for completion with an extension of 90 days. This was a wholly unrealistic programme.

13 In my view, the claimants should have at that point of time drawn the attention of the architect and the respondents (the employer) that as a result of delays that had occurred (which was not due to the fault of the claimants) the claimants could not possibly have completed the work within the said limitation period. By giving the impression to the architect and the respondents in their rescheduled programme that they could complete within the 90-day period, the claimants had partially contributed to their misfortune. The claimants should have pointed out to the architect that it would have been impossible to complete the work without an extension exceeding 90 days. By failing to inform the

architect of their predicament, the claimants could have misled him into believing that the claimants were able to comply with the rescheduled programme. Subsequently, the programme was further revised.

14 Furthermore, if the claimants had been more competent and organized, they could have succeeded in completing the work earlier than the period of extension claimed by the claimants, and it might have been possible for practical completion to have taken place earlier. In my opinion, the claimants could have mitigated the problem if they had been more organized in their programme of work.

15 I have given the claimants an award for the full period of completion claimed and I have also allowed a portion of the preliminaries. Consequently, the claim for liquidated damages by the respondents was dismissed. I consider that, under the circumstances, the claimants should not be entitled to interest.

16 Overall, the claimants have been adequately compensated by the full extension of time in the award in the light of my observations about their efficiency and competence.

17 The claimants shall pay the respondents the costs of the further hearing fixed at \$15,000 and the costs of the arbitrator.

Yours faithfully

[Sgd: William SW Lim]

William SW Lim

(arbitrator)

18 As was evident on the face of the supplementary award, the arbitrator gave two reasons and finally expressed the overall opinion or view that the

applicants had been adequately compensated. On behalf of the applicants, it was submitted that the appeal raised a question of law whether the arbitrator had exercised his discretion judicially; that this would be an appeal not of a `one-off` nature; and that the application satisfied the Nema guidelines.

19 I came to the conclusion that this was an appeal not of a `one-off` nature as understood. The applicants persuaded me that there was a strong prima facie case that the arbitrator was wrong in refusing to allow interest. If the arbitrator had allowed in full the extension of time as claimed by a contractor, as had happened in this case, it must incontrovertibly follow that the contractor had been competent and efficient enough to fulfil his contractual obligations and must be compensated by way of interest if he was not paid and deprived of the use of the money unlawfully withheld. It appeared to me that the entire reasoning as set out in the supplementary award, culminating in the penultimate paragraph, required justification and explanation in an appeal. The decision not to award interest, for the reasons given, may well call for some clear judicial guidelines on the principles governing the power and discretion whether or not to award interest.

20 Application allowed.

Lai Kew Chai J

Ahong Construction (S) Pte Ltd v United Boulevard Pte Ltd (No 2) [1994] SGHC 134

CS Wu (Donaldson & Burkinshaw) for the applicants
Alvin Yeo and Lee Hooi Kian (Wong Meng Meng & Pnrs) for the
respondents
