

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1994] SGHC 269

OM 20/1993

Between

Ahong Construction (S) Pte
Ltd

... Applicant

And

United Boulevard Pte Ltd (No
3)

... Respondent

GROUND OF DECISION

Arbitration — Award

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**Ahong Construction (S) Pte Ltd v United Boulevard Pte Ltd
(No 3)**

[1994] SGHC 269

OM 20/1993

Lai Kew Chai J

27 October 1994

1 This appeal was against the decision of an arbitrator in a supplementary award in which the arbitrator had refused to award any interest to the building contractors who had succeeded in their claims in the arbitration. The building contractors contended that in arriving at his decision the arbitrator had erred in law because he had on the face of the award failed to exercise his discretion judicially. The developers, on the other hand, raised the basic argument that the arbitrator in this arbitration had no jurisdiction in any event to award any interest. In the alternative, and on the basis that there was jurisdiction, they contended that the arbitrator had properly exercised his discretion, with the result that this court should not interfere with the arbitrator's decision. In the light of the material facts and for the reasons which are set out below the appeal was allowed with costs.

2 In allowing the appeal, this court ordered that the building contractors' appeal be allowed, that the supplementary award of 24 February 1993 be remitted to the arbitrator pursuant to s 28(2)(b) of the Arbitration Act (Cap 10) (the Act) for reconsideration, together with this court's judgment that interest

should be awarded on the two sums recovered by the building contractors under the final award of 7 May 1992 at a rate or rates and for a period or periods that the arbitrator may fix. It was further ordered that the costs of this motion, including the costs of the application for leave to appeal, be paid by the developers. It was also ordered that the arbitrator's directions as to the costs in respect of the remission hearing be rescinded, and the arbitrator be ordered to issue new directions as to costs in respect of the earlier remission hearing, as well as any subsequent remission hearing that he may convene to hear counsel on the rate or rates and the period or periods of interest to be awarded. Finally, in respect of Originating Motion 42 of 92, in which the parties hereto were parties, this court ordered that costs thereof be reserved and be determined at a later date.

3 **The material facts**

4 The material facts, so far as they were limited in such an application, were set out by this court following the granting of leave to the building contractors: [1994] 2 SLR 735 . For present purposes, it is necessary to restate them and some other material facts. The respondents ('the developers') developed a residential building known as the Orchard Boulevard at Orchard Boulevard, Singapore. In February 1982 the applicants ('the building contractors') were awarded a contract for \$35m (in round figures) for completion within 18 months. Contractual completion, subject of course as usual to any lawful extensions, was to have taken place on 1 September 1983. Construction work commenced in the month following the award of the contract. However, the certificate of practical completion was issued on 1 October 1984, and before the arbitration proceedings began the developers took the view that there was an overrun of 396 days or 13 months.

5 In the event, the project architects awarded the building contractors an extension of 238 days under the building contract, ie about eight months, so that the building contractors on that basis became liable to the developers under cl 22 of the conditions of the building contract for liquidated damages of \$1,920,420.67. Liquidated damages was fixed at \$15,000 per day less adjustments for partial delays. The developers, as they thought they were entitled to, deducted the sum of \$2,990,561.54 from moneys due to the building contractors under the certificate dated 11 November 1987. The deduction was for liquidated damages, which totalled \$1,920,420.67 and another approximately \$1m for the costs of rectifying defects in the building.

6 Following the practical completion of the project on 1 October 1984, as stated earlier, the building contractors gave notice of arbitration on 6 December 1986. The arbitration commenced in January 1990 and the final award was given on 7 May 1992.

7 In the final award, the building contractors were awarded the full extension of 396 days, ie 13 months. The architects' certificate was overruled. This decision to grant the full extension was not the subject of any challenge before this court. It followed as a necessary consequence that it was the developers who had to pay the building contractors the sum of \$1,920,420.67. This sum had been wrongfully deducted as liquidated damages under the architects' certificate; the building contractors were not paid for years.

8 In addition, the building contractors were also awarded the sum of \$1,260,695 for loss and expense, in lieu of extra preliminaries of approximately \$600,000 which was previously certified by the project architects. Again, and it bears emphasis, this award for loss and expense in favour of the building contractors was not challenged before the court. At any rate it was not

amendable to any viable challenge. Counsel for the developers mentioned the fact that the building contractors had made rather much higher claims for loss and expense, variations and financial costs. In my view, nothing turned on this for the simple reason that the fact of any exorbitant claims of the building contractors was not taken into account by the arbitrator who, as will be apparent later in these grounds of judgment, had expressly mentioned the matters upon which he entirely based his reasons for refusing to award any interest. Further, the developers had not made any tender to the building contractors to pay whatever sums they reasonably thought were due; they had throughout the arbitration simply denied total liability. In the arbitration, on the other hand, the developers were awarded only \$445,882 on their counterclaim for loss and damage for making good the defects.

9 I now turn to the manner in which the arbitrator dealt with the building contractors' substantial claims for interest and the developers' claims for interest. The arbitrator rejected the claims of both parties for interest. He stated in the final award that he had decided to reject and disallow on the claims of both parties for interest on the sums due to each from the other. This decision had the consequence of denying the building contractors interest which would have been much higher than any the developers could possibly have claimed. In effect, the building contractors were denied interest on the sum of \$1,920,420.67 payable for the period of about eight years up to the date of the final award; nor were they awarded any interest by way of compensation on the difference between the sums of \$1,260,695 and approximately \$600,000 extra preliminaries previously certified. By comparison and in contrast, the developers' claim for interest was for the sum of \$445,882 in respect of their counterclaim for loss and damage in connection with making good the defects.

10 Not satisfied with this decision, the building contractors filed Originating Motion No 42 of 92 seeking leave to appeal pursuant to s 28 of the Act or, alternatively, an order to remit the final award to the arbitrator pursuant to s 16(1) of the Act with the court's opinion that interest should be awarded. GP Selvam JC (as he then was) ordered that the final award be remitted to the arbitrator for him to hear submissions by both parties on the issue of interest and to reconsider the matter. The judicial commissioner did not express the opinion that interest should be awarded. I was told that the remission hearing took place on 5 February 1993, after which the arbitrator published the supplementary award dated 24 February 1993. This was in the following terms:

24 February 1993

Dear Sirs

Arbitration Case No 20/86 - 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.

11 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.

12 I disallow interest on the following grounds:

13 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.

14 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.

15 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.

16 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.

17 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.

18 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)

19 **Arbitrator`s power to award interest**

20 Before the consideration accorded by the court to the submissions of both parties is set out together with the views of the court, it may be convenient to refer to the position at common law and the impact of subsequent legislation relating to the power of courts to award interest. At common law, both the courts and a fortiori an arbitrator have no power to award interest for any wrongful detention of a sum found to be due and payable: , per Lord Herschell at p 437 and , per Watkins LJ at p 681. In the United Kingdom, ss 28 and 29 of the Civil Procedure Act 1833 conferred power on the jury to award interest for certain debts and in certain types of action. These two sections were repealed by the Law Reform (Miscellaneous Provisions) Act 1934 (‘the Law Reform Act’) and s 3 of the Law Reform Act read:

Power of courts of record to award interest on debts and damages

(1) In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:

Providing that nothing in this section - (a) shall authorise the giving of interest upon interest; or (b) shall apply in relation

to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or (c) shall affect the damages recoverable for the dishonour of a bill of exchange.

21 I was told and it was not disputed that s 35A of the English Supreme Court Act 1981 and s 19A of the English Arbitration Act 1950 were introduced by the Administration of Justice Act 1982.

22 Section 35A of the English Supreme Court Act 1981 which came into force on 1 April 1983 reads:

Power of High Court to award interest on debts and damages

(1) Subject to rules of court, in proceedings (whenever instituted) before the High Court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for all or any part of the period between the date when the cause of action arose and - (a) in the case of any sum paid before judgment, the date of the payment; and (b) in the case of the sum for which judgment is given, the date of the judgment.

23 Section 19A of the English Arbitration Act 1950 which also came into force on 1 April 1983 reads:

Power of arbitrator to award interest

(1) Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the arbitrator or umpire may, if he thinks fit, award simple interest at such rate as he thinks fit - (a) on any sum which is the subject of the reference but which is paid before the award, for such period ending not later than the date of the payment as he thinks fit; and (b) on any sum which he awards, for such period ending not later than the date of the award as he thinks fit.

(2) The power to award interest conferred on an arbitrator or umpire by subsection (1) above is without prejudice to any other power of an arbitrator or umpire to award interest.

24 The position under both English and Singapore laws is now summarized. Section 3 of the Law Reform Act has been repealed. Both ss 35A and 19A set out above confer on the courts and arbitrators power to award interest prior to the award or judgment. Previously, s 3 conferred power to award interest by a court of record in proceedings on a judgment sum for the whole or any part of the period between the date when the cause of action arose and the date of the judgment. The provisions in s 3 were exclusively words to describe a court, the nature of its proceedings and the nomenclature for the decision of a court (ie judgment); and the language has significantly nothing to do with anything connected with arbitrations.

25 As to Singapore law, s 9 of the Singapore Civil Law Act is identical to s 3 of the English Law Reform Act. On the clear language of both sections, when construed in its true and natural meanings, the power contained in these sections was not conferred in terms on an arbitrator: see ***Re an Arbitration between the Podar Trading Co Ltd, Bombay, and Francois Tagher, Barcelona*** at p 290. It was also common ground that we do not in Singapore have ss 35A and 19A.

26 The propositions set out so far were accepted or appeared to be unexceptionable to both parties before the court. The controversy began with their analysis and interpretation of where the English Court of Appeal, on this single surviving issue which remained for decision on a case stated by the arbitrator, overruled and held that an arbitrator had jurisdiction to award interest. Tucker LJ at pp 262-263 said that an arbitrator did not derive his powers from the Act of 1833, `but that he derived them from the submission to him, which necessarily gave him the "implied powers" ...` and Tucker LJ saw `no reason why, since the Act of 1934, an arbitrator should not be deemed impliedly to have the same powers.` The other two members of the Court of Appeal agreed

with him and it has been firmly established since 6 March 1950, the date of the decision, that the power of an arbitrator to award interest was derived from the contractual submission of the parties to him for arbitration and that this submission gave him the power to decide `all matters in difference` according to the existing law of the contract, exercising every right and discretionary remedy of a court except limited examples such as the issue of an injunction which an arbitrator cannot order as he has not the power to enforce it.

27 Counsel for the developers submitted that the reasoning of the Court of Appeal in was `logically flawed`. It was stressed that an arbitrator could not by any stretch of logic be said to be deciding the matter according to the law of the land, when one could not but observe that the statutory provision relied on did not in terms deal with the position of an arbitrator. Any filling of the gap ought to be done by legislation. Counsel also countered the consequentialist argument about harm to the arbitral system owing to the questionable practice of employers deliberately delaying payment until the eve of the award. He submitted that at law a plaintiff could claim damages for the delay in any payment, though this claim would have entailed having to prove the damage actually incurred. Finally, counsel for the developers contended that the issue of interest was merely a procedural and not a substantive matter and that accordingly the submission to arbitration did not include a conferment of jurisdiction on the arbitrator to award interest on a sum due from the date payable up to the date of the award.

28 These arguments of the developers more or less were in fact eloquently set out in the minority judgment of Barwick CJ in the decision of the High Court of Australia in . The same issue arose in Australia within identical statutory framework and in that case and the earlier and first English case on this issue of were, however, approved by Stephen J, one of the three judges in the

majority. Stephen J pronounced the proposition that generally a claimant should be able to obtain from arbitrators just such rights and remedies as would have been available to him were he to sue in a court of law. The basis of the decision of the other two majority judges, Mason and Murphy JJ differed slightly from that of Stephen J and rested on the law of implied terms to be derived from the submission to arbitration and the statutory provisions in New South Wales, Australia.

29 In the end, I came to the conclusion that so far as the power to award interest was concerned, it was in my view implicit in a reference or submission to arbitration that parties have conferred power on the arbitrator to award interest as if the matter in difference were litigated in a court of law.

30 **The arbitrator`s decision not to award interest**

31 Although an arbitrator acting in a reference to him under the Act has the power to award interest, his power is discretionary and like all discretionary powers it has to be exercised judicially or rationally and fairly according to reason and principles. He has to take care and weigh all the relevant factors and avoid every irrelevant consideration. He cannot act arbitrarily or capriciously. The purpose and intention always is to achieve and mete out discretionary justice.

32 With regard to the specific exercise of awarding interest in an arbitration, it is the law that generally interest should be awarded on a successful claim. An arbitrator who awards a sum of money but fails to award interest to compensate the successful claimant accordingly has prima facie misconducted himself in the technical sense of the word: . Lord Denning MR (as he then was) said: `(i)n a commercial transaction if the plaintiff has been out of his money

for a period, the usual order is that the defendant should pay interest for the time for which the sum has been outstanding. No exception should be made except for good reason.` An arbitrator may decline to award any interest or award interest at a lower rate or for a shorter period but he must have reasonable grounds for doing so and he should set out these reasonable grounds in his award.

33 I have in this judgment repeated the reasons which the arbitrator had comprehensively set out in the supplementary award. In my earlier decision reported in [1994] 2 SLR 735 , I had alluded to the difficulties which were apparent on the face of the supplementary award. As had been noted, the arbitrator gave two reasons and finally expressed the overall view or conclusion that the building contractors had been adequately compensated. The first reason relied on by the arbitrator related to a clause in the building contract which provided a maximum extension of 90 days, whatever the reasons which might have caused the delays. The arbitrator held the building contractors responsible for having agreed to this clause. That was entirely unjustified. Both parties had agreed on the clause. In the course of the arbitration the developers decided to place no reliance on the effect whatsoever of the clause. No blame or responsibility should have been attributed to the building contractors; nor either of the parties for that matter. It was and should have been treated as an irrelevant matter so far as the question of interest on the award was concerned.

34 The second reason indicated by the arbitrator was that `if the (building contractors) had been more competent and organized, they could have succeeded in completing the work earlier than the period of extension claimed by the (building contractors), and it might have been possible for practical completion to have taken place earlier.` The arbitrator expressed the opinion that if the building contractors had been more organized they might have

mitigated the problem. In this piece of reasoning, the arbitrator had fallen into error. Having granted the building contractors' claims for extension in full and in its entirety, this reason and the opinion were inconsistent with his primary decision. His primary decision meant that the building contractors were entitled to all the extensions. They had therefore fulfilled their contractual obligations and were granted the full extensions by the arbitrator. The arbitrator could not take it back, either wholly or in part.

35 Two new grounds were advanced at the hearing of the appeal proper. Counsel for the developers submitted that there was really no inconsistency in the decision of the arbitrator. It was strenuously pointed out for example that there were, as in the nature of building contracts, what were commonly referred to as 'overlapping delays'. Though the developers had delayed matters, it was observed in argument that such delays had fallen during the period in which the building contractors had themselves delayed. It was therefore argued that the developers were not liable for any delay. The weakness of this submission was that it did not face up to the arbitrator's decision and the fact that the building contractors were granted full extensions by the arbitrator. It meant that they had carried out their contract timeously, in the sense that their performance was such as not to deny them an extension of time for completion.

36 This conveniently leads to the consideration of the other submission made on behalf of the developers. This court was invited to conclude that the reason the arbitrator had refused to award interest was because he had taken everything into account when issuing the final award, including the question whether any interest was payable to the building contractors. For the developers it was submitted that the arbitrator had made a global finding. I was unable to find any support whatsoever for this contention from a reading of the final award, and as later enlarged upon by the supplementary award. It was

undeniable that the arbitrator had allowed the entire claim of the building contractors for a full extension of time. The extensions granted meant in effect that the building contractors had fulfilled their contractual obligations. It was plain that the question of the interest due to the building contractors was left out of consideration in the final award by the arbitrator. In the light of the unsupportable reasons given in the supplementary award, the court was ineluctably driven to the conclusion that the arbitrator had failed to exercise his discretion judicially and had erred as a matter of principle. He had misdirected himself. In fairness to the arbitrator, who was in many respects very conscientious in the course of this arbitration, it has to be said that the court does not intend any criticism of the arbitrator in view of the protracted period this matter took, the chequered procedures taken, and the nature of the issues which were more of a legal genre than of an architectural type more within the expertise and experience of the arbitrator.

37 ***Appeal allowed.***

Lai Kew Chai J

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