

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1996] SGHC 100

OM 25/1995, 26/1995

Between

United Boulevard Pte Ltd

... Applicant

And

Ahong Construction (S) Pte
Ltd

... Respondent

GROUND OF DECISION

Arbitration — Award

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

[1996] SGHC 100

OM 25/1995, 26/1995

Lai Kew Chai J

10 May 1996

1 The long standing disputes between the developers and the building contractors in respect of the building contract for the development of Orchard Boulevard has yet again given rise to the filing of two originating motions. OM 25/95 was filed by United Boulevard Pte Ltd (the developers) against Ahong Construction (S) Pte Ltd (the contractors). The next numbered originating motion was filed by the contractors against the developers. I shall deal with both sets of proceedings in this judgment. They were filed to determine questions of law under s 29(1)(a) of the Arbitration Act (Cap 10) (the Act) with the consent of the arbitrator and the consent of both parties. It was not in issue before me that the determination of the questions of law, as required by s 29(2) of the Act, might produce substantial savings of costs to the parties and that those questions of law were those in respect of which leave to appeal would likely to be given under s 28(3)(b) of the Act.

2 A substantial part of the background which has to be borne in mind when dealing with the two sets of questions of law raised in the two originating motions may be gleaned from my decision reported in **Ahong Construction (S) Pte Ltd v United Boulevard Pte Ltd** [1995] 1 SLR 548 . For present

purposes, this may be summarized within a reasonably brief compass. The developers alleged that the contractors had delayed the construction and was also liable for defective works. They held back \$2,990,561.54 under these two heads of claims from money due to the contractors under the architects' certificates of payment. The contractors on the other hand claimed for specific losses and expenses. In December 1986 the disputes were referred to arbitration after the practical completion of the development. The final award was given on 7 May 1992. In it, the arbitrator awarded to the contractors the full extension of 396 days. The architects' certificate was overruled. This meant that the contractors had built within the contractual time frame. There was absolutely no delay. The contractors were also awarded \$1,260,695 for loss and expenses. On the other hand, the developers were awarded \$445,882 on their counterclaim for having to make good the defects. In effect, the contractors were kept out of their money for a long period of time. Inevitably, they claimed interest. The arbitrator rejected the claim. The High Court remitted the final award to the arbitrator to hear submissions and reconsider the matter. The arbitrator adhered to his original decision and in his published supplementary award, he disallowed interest. The relevant grounds expressly stated by him were these. First, he reasoned that if the contractors had been more competent and organized, they could have succeeded in completing the work earlier than the period of extension claimed. Secondly, he said that overall, the contractors had been adequately compensated by the full extension of time in the final award. The contractors, as required, applied for leave to appeal and I granted it: see [1994] 2 SLR 735 . The developers appealed to the Court of Appeal in CA 52/93 but it was dismissed. Accordingly, the appeal of the contractors to the High Court proceeded.

3 In my judgment as reported in [1995] 1 SLR 548 , I allowed the appeal as the arbitrator had failed on the face of the award to exercise his discretion judicially. In the judgment, it was mentioned twice that the arbitrator must exercise his discretion judicially when awarding interest. It was also expressly stated that the supplementary award had `comprehensively` set out the arbitrator`s grounds for having disallowed interest. It was in that case contended on behalf of the developers that the arbitrator had made a global finding. This was rejected. There was no support for this on any interpretation of the final award. I concluded that `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.` I ruled that the arbitrator had failed to exercise his discretion judicially and had erred as a matter of principle and that he had `misdirected himself`. My order of 30 November 1993 directed, inter alia, that interest be awarded by the arbitrator on the two sums recovered by the contractors under the final award. The developers also appealed against this decision but the appeal was subsequently discontinued.

4 Following my orders of 30 November 1993, the parties appeared before the arbitrator on 1 March 1995 to hear submissions. In the written submissions filed on behalf of the developers, it was submitted to the arbitrator that he was `entitled on his findings of fact to award interest which accord(ed) with his sense of justice`. It should be noted that the court had directed him that he had to exercise his discretion judicially. It was also repeated, yet again, before the arbitrator that he `had adopted a global approach on deciding not to award any interest...`. This submission to the arbitrator was remarkable, to say the least, in view of the court`s ruling. It was also contended, equally without merit, that the developers had not wrongfully withheld payment. They did and there was absolutely no doubt about it.

5 There inevitably arose serious disagreement between counsel on several issues. To begin with, the very proper scope and province of the second remission hearing was hotly disputed. It was even questioned whether the arbitrator had the power to refuse to award any interest. This was most surprising after what had been stated at some length in the court's judgment. It must be commonplace that as a matter of principle interest should ordinarily be awarded. The submissions made to the arbitrator included the broadest possible hint as to how the arbitrator could award the minimum rate of interest over the minimum period without being found yet again to be have misdirected himself. It was submitted that if the arbitrator were to award a rate of say 1% pa it would be wrong in principle but if the rate were to be say 4% pa, this might be successfully defended. It was further suggested that the arbitrator could order a lump sum for interest without stating either the rate or the period; an approach which by masking the bases could elude analysis. It was because of this very problem that the court had to direct that the interest be awarded 'at the rate or rates and for a period or periods that the arbitrator may fix.'

6 Following the obfuscations presented to the arbitrator, he wrote a letter dated 22 March 1995 to the solicitors of both parties. The letter stated as follows:

22 March 1995
Donaldson & Burkinshaw
24 Raffles Place
15-00 Clifford Centre
Singapore 0106
Attention: Mr CS Wu
Wong Partnership
80 Raffles Place #58-01

UOB Plaza 1

Singapore 0104

Attention: Mr Wong Meng Meng

Dear Sirs

Bel-Air Arbitration

I refer to the submissions of counsel made on 1 March 1995 and to the subsequent letter from Donaldson & Burkinshaw of the same date.

7 At the very commencement of the hearings in this arbitration I had clearly stated that I would, at the end of the proceedings, make my award without expounding my reasons therefore. This was agreed to by counsel for both parties.

8 In my final award made on 7 May 1992, I had adopted an overall perspective in considering the claims and counterclaims of the respective parties. I adopted a holistic approach and the final award was in a way `a package deal`.

9 However, on making my final award, I felt impelled to make some comments. These were not in relation to any specific item of award I was making. They were remarks meant to help prevent similar conundrums arising in other building construction contracts in future.

10 It will be recalled that counsel had submitted to me on the question of interest. I am not unmindful of the fact that I have power to award interest. I had considered whether or not to award interest to the claimants in making the final award. I decided not to award interest to the claimants as I felt that I had compensated adequately by granting full extension of time.

11 Throughout the proceedings in this arbitration I had, in my deliberations, adopted a holistic perspective. Consequently, the various components of my award were conceived and composed as integrated parts of what I felt was equitable.

12 My final award made on 7 May 1992 may not have been explicit on the approach I had adopted on the issues brought before me for my consideration and decision. I thought that I had been more explicit in the supplementary award of 24 February 1993.

13 I had adopted an overall perspective in considering the claims and counterclaims of the respective parties. My awards were made with such an overall approach, especially so in regard to the issues of extension of time and claims for interest. The full extension of time was granted to compensate for the non-award of interest.

14 In my considered view and assessment I would not have granted the extension of time till the actual date of completion of the construction works if I had realized that I would, in additions, have to make an award of interest as well.

15 Now that I have been directed `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,` I would like to have directions on the following:

(a) Is it within my discretion to award interest at any rate that in my opinion would be fair to both parties even though it may not necessarily be at a commercial rate?

(b) Do I have the discretion to award interest for any period that may be less than the eight years claimed by the claimants?

(c) In making an award for interest can I take into consideration the factors that I have set out above?

I would be much obliged and grateful for your assistance.

Yours faithfully

Sgd: William Lim

William Lim Associates Pte

cc M/s Chor Pee & Co - Mr Lim Chor Pee

16 In OM 25/95 the developers sought the court's determination on the following questions of law:

(1) Whether, as a matter of law, an arbitrator is entitled to take a global or holistic approach to the circumstances surrounding a claim and make a global award such that there is no separate computation or award for interest.

(2) If so, whether an arbitrator who has made his award on the basis of this global or holistic approach, when ordered by a court to award interest at a rate or rates that the arbitrator may fix and for a period or periods that the arbitrator may fix, is entitled to maintain such a global or holistic approach in making an award of interest and if so, be entitled:

(a) to award interest at any rate that in the arbitrator's opinion would be fair to both parties even though such rate may not necessarily be a commercial rate; or

(b) to award interest for any period that in the arbitrator's opinion would be fair to both parties even though such period may be less than the eight years claimed by the claimants; or

(c) to award a nominal sum for interest, or to award a sum based on a nominal rate or period; or

(d) not to award any interest to a claimant.

(3) Whether the order of court dated 30 November 1993 directing the arbitrator to award interest at a rate that the arbitrator may fix and for a period or periods that the arbitrator may fix removes the power of the arbitrator to maintain a global and holistic approach in making an award of interest, and if so;

(a) whether such an order is a proper intervention by the court in the powers of the arbitrator; and

(b) whether such an order vitiates the whole of the arbitrator's final award and supplementary award, so as to require them to be set aside.

17 In OM 26/95, the contractors posed the following questions of law for the court's determination:

(1) Whether, in the light of the outcome of the various proceedings in the High Court arising from the publication of the arbitrator's said final and supplementary awards, the arbitrator is as a matter of law entitled at this stage to refuse awarding any interest at all to the applicants by reason of the matters disclosed in his letter to the parties of 22 March 1995.

(2) Having regard to the order of court dated 30 November 1993, ordering, inter alia, 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, directions are being sought by the said arbitrator on the following:

(a) Is it within the arbitrator's discretion to award interest at any rate that in the arbitrator's opinion would be fair to both parties even though it may not necessarily be at a commercial rate? (b) Does the arbitrator have the discretion to award interest for any period that may be less than the eight years claimed by the claimants? (c) In making an award for interest can the arbitrator take into consideration the factors that the arbitrator has set out above?

18 I return to the arbitrator's letter. First, I deal with his clarification that he had adopted a 'holistic', ie global approach in the sense that his final award was 'in a way a package deal'. It was not at all apparent in his supplementary award. On the contrary, what was stated there revealed the misdirections dealt with at length in my earlier judgment. The court's finding is res judicata and the arbitrator should punctiliously bear in mind not to repeat his earlier misdirection. I would also caution against any further rationalization in this matter. It was clear beyond any peradventure that the court had expressly found against a 'global' approach having been adopted by the arbitrator in his final and supplementary awards. The arbitrator will be misdirecting himself if he

relies upon the reasons set out in his letter of 22 March 1995 in order to justify any decision not to award any interest or any reduction of the interest.

19 I will now give my responses and answers to the questions raised by the developers' originating motion. I decline to answer question No. 1. If it is a general question, it is hypothetical, if not obviously rhetorical. At any rate, it must be well known that as a general proposition of law it is unexceptional: see ***Business Computers Ltd v Anglo-African Leasing Ltd*** [1977] 2 All ER 741. I now turn to the four questions grouped under question No 2. I refer to the predicate in reference to the case of an arbitrator 'who has made his award on the basis of this global or holistic approach'. The arbitrator in the present case did not. Answering the four questions in the context of these originating motions, my answer to question (a) is in the negative. The contractors had urged the arbitrator at the second remission hearing that an appropriate rate of interest should be 9% pa, whilst they left it to the arbitrator to decide on the rate of interest to award. They submitted that since the debt arose from a commercial transaction, a commercial rate should be awarded. A letter from Hongkong Bank dated 5 January 1990 was produced and its contents on the applicable rates over the relevant period were not challenged. There was also evidence that the contractors' overdraft during the period in question well exceeded the net sum that was withheld from them by the developers. A court of law would normally award the commercial rate unless some special reason is shown. As for question (b), I have to answer it in qualified terms. The arbitrator may fix a shorter period if he has a valid reason or valid reasons for it. I have considered the relevant submissions of the contractors in paras A1 to A4 and B1 to B3. Good reasons will have to be shown for shortening any period. Both questions (c) and (d) are answered in the negative. Finally, I must deal with the two questions under question 3. The judgment of this court of 27 October 1994 stands, the developers

having withdrawn their appeal. Question 3(a) requires no answer, inasmuch as it is completely irrelevant. Question (b) does not arise at all since it is too late in the day for the developers to set aside the final award.

20 I turn to the questions raised in the contractors' originating motion. All the questions, in my judgment, should be answered in the negative for the reasons which have been stated by me when I dealt with those posed by the developers.

21 In the premises, the developers are ordered to pay the contractors the costs for both motions.

22 ***Order accordingly.***

Lai Kew Chai J

Alvin Yeo and Tay Peng Cheng (Wong Partnership) for the
applicants in OM 25/95 and respondents in OM 26/95
CS Wu (Donaldson & Burkinshaw) for the respondents in OM 25/95
and applicants in OM 26/95
