IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1997] SGHC 124

OS 85/1997

Between

Kwang In Tong Chinese Temple

… Plaintiff

And

Fong Choon Hung Construction Pte Ltd

… Defendant

GROUNDS OF DECISION

Arbitration — Stay of court proceedings — Grounds

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Kwang In Tong Chinese Temple v Fong Choon Hung Construction Pte Ltd

[1997] SGHC 124

OS 85/1997
Warren Khoo L H J
12 May 1997

1 This is an application to stay proceedings in the subordinate courts and to refer the claim of the defendants for arbitration. The defendants are contractors. They were engaged by the plaintiffs on a contract to build a temple on land at Paya Lebar Road. The contract is not in the Singapore Institute of Architects form of contract. It is headed `Private Edition (For Minor Works) 1978 Printing`. I am not sure about the origin of this form of contract. Only the articles of agreement and the general conditions have been produced. It appears that the contract sum was $760,000. Clause 10(ii) of the general conditions provides that if it becomes apparent that the works will not be completed by the date for completion for reasons beyond the control of the contractor, the contractor shall so notify the architect, who shall extend the time for completion by a reasonable period. Clause 10(iii) provides that if the works are not completed by the completion date or by any extended completion date fixed under sub-clause (ii), then the contractor shall pay the employer liquidated damages stated in the appendix. The appendix, which also appears to contain stipulations regarding the commencement and completion date, has not been produced.

2 Clause 14 provides that the architect shall if requested by the contractor at intervals of four weeks certify interim payments to the contractor in respect of the value of the works executed, and the employer shall pay to the contractor the amount so certified within 14 days of the date of the certificate. Clause 15 provides that any dispute or difference concerning the contract shall be referred for arbitration.

3 The contractors claim in the subordinate courts the sum of $55,590.42, being the amount due on an interim certificate issued by the architect. The owners apply for a stay of the proceedings on the ground that they have a cross-claim for damages for defective works and for liquidated damages for delay in completion. The application is made here rather than in the subordinate courts as `court` in the Arbitration Act (Cap 10) is defined as the High Court.

4 The affidavit for the owners is brief in the extreme. The defective works are not particularised, but a letter dated 23 August 1996 from the architect to the contractors is exhibited, in which the architect said that on a site inspection on the previous day, the following defects had been noted (sic):

> (a) sinking and crack at the apron concrete area,
>
> (b) crack and loose ceramic floor tiles to the apron area,
>
> (c) sinking and stagnant of water at the toilet floors.

5 Particulars of the cross-claim for liquidated damages are equally lacking. The owners only exhibit a letter which they had written on 24 November 1995 to the contractors. In this letter the owners purported to reject the contractors` request for an extension of time. They also told the contractors

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that because of the contractors` delay, they would stop progress payments until `your outstanding work is completed`.

6 The contractors in their affidavit say that the delays in the completion of the building were due to the owners` engineers` delay in approving drawings; to the Drainage Department`s delay in approving drawings for the road works and culverts; to the delay of the piling contractors in cutting off excess piles; to the owners` requests for variations; and to inclement weather. By letters dated 18 and 20 December 1995 to the architect, the contractors had applied for extension of time to complete, on these grounds. However, there is no evidence that this application or any part of it was granted. So far as the defects are concerned, the contractors say that there is a retention sum from which the owners could deduct any damages that might be payable. The contractors therefore submit that there is no dispute fit to go to arbitration.

7 There is no reply affidavit from the owners. In these circumstances, the question is whether the claim of the contractors for payment of the interim certificate should be stayed, so that the contractors` entitlement as well as the owners` claim for liquidated damages and defects should all be referred for arbitration.

8 Counsel for the owners submits that, on the terms of the contract, the owners` right to set up cross-claims in resistance of the contractors` claim for payment, has not been taken away or qualified in any way. He refers to the decision of the House of Lords in the case of **Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol)** [1974] AC 689. Since the employers have cross-claims referred to, he submits that both the contractors` claim and the employers` cross-claims should be referred for arbitration.

9 In the ***Gilbert-Ash*** case, the plaintiffs were specialist steelwork erectors and sub-contractors of the defendant main contractors. The plaintiffs claimed for money due on certificates of the architect, against which the defendants cross-claimed for delay (the extent of which had been certified by the architect) and for defective work. The sub-contract provided as follows:

> *If the sub-contractor fails to comply with any of the conditions of this sub-contract, the contractor reserves the right to suspend or withhold payment of any moneys due or becoming due to the sub-contractor. The contractor also reserves the right to deduct from any payments certified as due to the sub-contractor and/or otherwise to recover the amount of any bona fide contra accounts and/or other claims which he, the contractor, may have against the sub-contractor, in connection with this or any other contract.*

10 The House of Lords, taking a view contrary to that in a series of decisions of the Court of Appeal beginning with **Dawnays Ltd v FG Minter Ltd** [1971] 1 WLR 1205, held that the common law right of a defendant to raise a set-off in diminution or extinction of an instalment of a sum which has become due under a contract can only be taken away by clear, unequivocal words; that whether that right has been excluded depends in every case on the terms of the particular contract or sub-contract; and that there is no general presumption in building contracts entered into between contractors and sub-contractors that it was intended that the right of set-off should be excluded. Their Lordships held that on the true construction of the second sentence in the provision set out above the main contractors were entitled to deduct from any payments certified as due to the sub-contractors quantified amounts claimed by them from the sub-contractors.

11 Although the ***Gilbert-Ash*** case concerned a sub-contract, it seems plain that the general principles enunciated by their Lordships would apply equally to a main contract between the owner and main contractor.

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12 In the instant case, an examination of the terms of the contract shows that there is nothing, expressly or by necessary implication, which excludes the owners` right of set-off. Unlike the SIA form of contract, which regulates deductions and set-offs by certificates of the architect, and which therefore introduces a condition to the exercise of the right of set-off or deduction from certified payments, there is nothing like that here. So, on the face of it, as counsel for the owners rightly points out, the owners` remedy at law and in equity of set-off has not been excluded or qualified in any way.

13 However, there is the question whether the owners have shown sufficiently that they have a cross-claim in diminution or extinction of the contractors` claim. In this respect, I think certain principles in court litigation in relation to applications for summary judgments are applicable, if not directly, then at least by analogy. One starts with the premise that, the architect having duly certified the interim payment, the contractors are prima facie entitled to summary judgment for the sum certified, as cl 14 provides for right to payment within 14 days. If there was no arbitration clause and the case was litigated in court, then, on an application for summary judgment by the contractors, the owners could not resist the application by merely stating that he has a set-off or counterclaim without giving particulars of what gave rise to the set-off or counterclaim. He must adduce material facts with sufficient particularity in support of his claim of a set-off or counterclaim. The same principle applies, in my view, where a defendant seeks to refer his cross-claim for arbitration and to persuade the court that the judgment for the plaintiff`s claim should not be entered immediately. The substitution of one tribunal for another should make no difference to the applicability of the principle. The defendant must condescend to particulars so that the court can see that he has a bona fide case.

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14 With these general propositions and observations in mind, I turn to consider the two heads of set-off which the owners have asserted.

15 **Liquidated damages**

16 The owners have made rather vague and general allegations that they have a claim for liquidated damages. They merely refer to their own letter of 24 November 1995, which I referred to earlier.

17 The contractors, on the other hand, as mentioned earlier, set out in their affidavits, with a fair degree of particularity what they say were the causes of delay, including acts and omissions of the owners and their engineers, as well as of others; these also include inclement weather. There is no answer from the owners to any of these allegations.

18 In these circumstances, two pertinent questions arise. First, is the wording of the extension clause, cl 10 (ii), wide enough to cover the events which have occurred? Secondly, has the time for completion been validly extended?

19 **Effect of prevention**

20 The problem arising from acts of prevention of the employer merits special mention. It is settled law that acts of prevention by the employer resulting in delays in the contractor`s performance of a building contract have the effect of setting at large the stipulated date for completion, with the result that the employer`s right to claim or deduct liquidated damages is gone, since there is no longer a valid date for completion from which any liquidated damages can be calculated. Such a result can be prevented by providing in the

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contract for extensions of time in the event of the employer`s acts or omissions affecting the progress of works, and by the actual grant of extensions of time. Both the provisions for extension and the actual grant or grants of extension are necessary. The omission of either has the effect of setting time for completion at large in the event that prevention on the part of the employer does occur (**Peak Construction Ltd v McKinney Foundations Ltd** [1971] 69 LGR 1).

21 In the instant case, the wording of cl 10 (ii) might well be held to be insufficient to include preventive acts and omissions of the owners and their engineers. See ***Perini Pacific Ltd v Greater Vancouver Sewerage*** (1966) 57 DLR (2d) 307, **Wells v Army and Navy etc Society** [1902] 86 LT 764 and ***Peak Construction Ltd v Mckinney Foundations Ltd*** , supra. It may well be held that the architect does not have the power to extend time to take account of the owners` preventive acts and omissions so as to keep alive the owners` remedy of liquidated damages. Even if he has the power, there is no evidence that he has exercised it. In short, on the face of the evidence available at this moment, the owners` claim of a set-off for liquidated damages is open to the most serious doubt.

22 As far as the cross-claim for defects is concerned, the only defects brought up by the owners are shown in the architect`s letter of 23 August 1996. It is a rather short list, and it was quite some time ago. I do not know what is the present state of things as far as defects are concerned. Counsel for the owners told me in response to my query that the owners were engaging experts to report on the defects, and the arbitrator could go into the subject in due course. I do not think that this is good enough. Thus, as far as defects are concerned, the owners have not said what defects remain, let alone how much it would cost to put them right. The contractors say that there is enough in the retention money

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to meet the cost of putting right any defects, and such defects are minor. There is no reply from the owners.

23 So, I return to the question, which I re-phrase as follows: Have the employers demonstrated a set-off which they can seriously put forward to resist the contractors` claim. They clearly have not. In fact, the evidence presented by the contractors shows to the contrary.

24 The application is made under s 7 of the Arbitration Act. This Act governs domestic arbitrations, and the conditions for ordering a stay of legal proceedings are quite different from those provided for in the International Arbitration Act. Section 7 of the Arbitration Act gives the court a discretion whether to order a stay, although once an applicant has shown that a dispute falls within an arbitration clause, the court tends to order a stay unless the party opposing the stay can show cause to the contrary. See **Heyman v Darwins Ltd** [1942] AC 356 at p 388. In the instant case, the contractors have indeed shown cause to the contrary. I would therefore refuse a stay, and the application is dismissed, with costs.

Warren Khoo L H J

Khush Chopra (Kush Chopra) for the plaintiffs
Charan Singh (Myintsoe Mohamed Yang & Selvaraj) for the defendants

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