Wellform Construction Pte Ltd v Lay Sing Construction Pte Ltd
[2001] SGHC 12

Case Number : Suit 1827/1999, RA 600343/2000 and 600347/2000

Decision Date : 13 January 2001

Tribunal/Court : High Court

Coram : Woo Bih Li JC

Counsel Name(s) : Terence Tan and Shahiran Ibrahim (Jeffrey Soh & Co) for the plaintiff; David Ong (David Ong & Co) for the defendant

Parties : Wellform Construction Pte Ltd — Lay Sing Construction Pte Ltd

JUDGMENT:

Cur Adv Vult

1. This is an action in which Wellform Construction Pte Ltd (Wellform Construction) is the plaintiff. It claimed an account from the defendant Lay Sing Construction Pte Ltd (Lay Sing).

2. Lay Sing had taken over two building projects regarding Canossa Convent School (9702) on the one hand, Canossaville Childrens Home and Magdelenes Kindergarten (9901) on the other hand. They were referred to as Phase 1 and 2 respectively in the proceedings.

3. The parties had a joint venture agreement in which both would manage and do the work. Payment by the owner would be made first to Lay Sing and the net profits were to be shared 30:70 as between Wellform Construction and Lay Sing respectively.

4. On 12 May 2000 an order was made by an Assistant Registrar in which directions were given for the taking of accounts in order to determine what amount, if any, was payable by Lay Sing to Wellform Construction. The order, inter alia, directed that Lay Sing was to file an affidavit by 31 May 2000 exhibiting an auditors report as well as depose that full discovery of relevant documents was made available to the auditors for their report. Wellform Construction was to file an affidavit by 21 June 2000 deposing to the profits and expenses in relation to the auditors report as well as exhibit a list of queries.

5. The report was done by Chio Lim & Associates (Chio Lim) but it turned out during cross-examination that the report was only for Phase 1 and not for Phase 2. Lay Sing should have ensured that it was for both phases but did not. Indeed no satisfactory reason was given as to this unsatisfactory state of affairs. It gave the impression that Lay Sing had not been candid with Chio Lim and with the court.

6. Chio Lims report dated 20 June 2000 showed that the net profit for Phase 1 was $158,397.68.

7. On the other hand, Wellform Construction produced print-outs obtained from Lay Sings computer which showed a set of accounts prepared by Lay Sing for Phase 1 and for Phase 2. The print-outs were exhibited in its affidavit in reply. There was no list of queries as such in this affidavit in reply.

8. Mr David Ong, for Lay Sing, argued that Wellform Construction was not entitled to object to the report by Chio Lim as it did not, in his affidavit in reply, filed on 8 August 2000, state a list of queries on the report although he informed me that a list of queries was filed on the day of the hearing before the Assistant Registrar. I do not think this is a valid argument.

9. In the first place, the report by Chio Lim did not comply with the order of court of 12 May 2000 in that it did not cover both phases as was intended. As Lay Sing had failed to obtain a report which complied with the order, Wellform Construction did not have to list out its queries as regards the report.

10. In any event, the purpose of the order of 12 May 2000 was for Wellform Construction to indicate to Lay Sing, by the list of queries, what objection it had to the report. In exhibiting the accounts prepared by Lay Sing for Phase 1 and 2 and which, for Phase 1, were different from Chio Lims report, Wellform Construction had made it clear to Lay Sing that it did not agree with the report and preferred to rely on the accounts prepared by Lay Sing itself.

11. As regards Phase 1, work thereon had been completed by 20 December 1998 and Lay Sings accounts for this phase were prepared in April 1999.

12. The last page of the accounts prepared by Lay Sing for Phase 1 showed that the profit was $1,394,629.66 as follows:

PROJECT ACCOUNT CLOSING AS AT: 31-03-1998

PROJECT CODE: 9702	PROJECT NAME: CANOSSA CONVENT	
OWNER: CANOSSA CONVENT SCHOOL		
WORK COMMENCEMENT: AUG 1997	WORK COMPLETION: 20 DEC 1998	
PROJECT STATUS: WORK-IN-PROGRESS	PERCENTAGE COMPLETION: 100%	
CONTRACT SUM : $9,494,219.50		
LIMIT OF RETENTION SUM : $474,710.00		
FINAL RETENTION SUM (2.5%) : $237,355.49		
PROGRESS PAYMENT RECEIVABLE	$1,132,650.86 Approx.	OUTSTANDING
PROGRESS PAYMENT RECEIVED TO-DATE	$7,612,326.97	BUILDERS WORKS
PROGRESS PAYMENT RECEIVED TO-DATE	$1,624,768.00	NSC WORKS
VOP - ADDITIONAL OF WORKS RECEIVED	$2,088,688.37	VOP WORKS
TO-DATE RETENTION TO-DATE (2.5%)	- $237,355.49	
INTERIM VALUATION NO. 23 -- JAN 99	$11,088,427.85	
Less: Lawsandy Payment Received	- $478,553.40	
	$10,609,874.45	

NOTE : ALL AMT EXCLUDE GST 3%

[Based on Interim Valuation No. 23 & Sub-Ctr payment till 1-28 Feb 99]

TOTAL AMT RECEIVED TO-DATE	$10,609,874.45	
APPROX. PAYMENT DUE	$1,132,650.86	
	$11,742,525.31	
Less : payment outstanding to DSC	$728,135.49	
Less : payment outstanding to NSC	$146,798.91	
	$10,867,590.91	
Less : Exiting Retention - DSC	$393,877.93	
Less : Exiting Retention - NSC	$61,547.23	
	$10,412,165.75	
Less : Payment paid to DSC	$5,404,853.48	
Less : Payment paid to NSC	$1,535,170.24	
PROFIT	$3,472,142.03	Excluding Materials and Prel
Less : Purchaser Cost	$2,376,548.65	

Add : Deduction to NSC/DSC

$299,036.28

_____

$1,394,629.66

13. There was no satisfactory explanation by Lay Sing or Chio Lim as to why, for Phase 1, there was this huge difference between the profit figure from the accounts prepared by Lay Sing on the one hand in April 1999 ($1,394,629.66) and from the report prepared by Chio Lim in June 2000 ($158,397.68). Neither Lay Sing or Chio Lim were asked by either counsel to elaborate on the difference. It also appeared that Chio Lim may not have been aware of the accounts prepared by Lay Sing for Phase 1.

14. The only explanations given by Mr Sim Lay Sing for Lay Sing as regards the accounts for Phase 1 prepared by Lay Sing was that:

a. The accounts prepared by Lay Sing provided for an approximate payment to it of $1,132,650.86. However it actually received $868,883.18, ie. a reduction of $263,767.48.

b. The profit element of $3,472,142.03 had excluded materials and preliminaries. The profit as reflected in such accounts was just an estimate.

15. On 11 November 2000, the Assistant Registrar Ms Chong Chin Chin made the following order:

a. Phase 1

That the accounts prepared by the Defendants were preliminary accounts and did not account for overhead costs.

That there is no distinction between structural works and architectural work as alleged by the Defendants.

That the Plaintiffs are not bound by the agreement entered into by the Defendants and Chon Hwa Construction Pte. Ltd.

That the accounts prepared by Messrs. Chio Lim & Associates for Phase 1 of the works in issue are correct. The profits earned by the Defendants in Phase 1 is a sum of $158,397.68.

b. Phase 2

The profits earned by the Defendants in Phase 2 is a sum of $328,447.74.

c. The Defendants Set-Off

The Defendants are entitled to set off these items against the Plaintiffs claim:

i. Set-off for the Ubi Project $41,729.00

ii. Advance payments $159,708.74

iii. Partial payment of profits $8,625.55

d. The total sum due to the Plaintiffs

The total sum due to the Plaintiffs from the Defendants, after the Defendants set-offs are accounted for, is a sum of $0.00.

e. The costs of this action is to the Plaintiffs, to be agreed to or taxed.

16. In doing So, Ms Chong, inter alia, adopted the profit figure for Phase 1 as stated in the report prepared by Chio Lim.

17. Wellform Construction appealed against part of Ms Chongs order on two grounds: (a) the Assistant Registrar was wrong to accept the profit figure for Phase 1 as stated in the accounts prepared by Chio Lim and (b) the Assistant Registrar should not have allowed a further deduction of $159,708.74 from the sum to be paid by Lay Sing to Wellform Construction as that sum had already been taken into account by Chio Lim.

18. On the other hand, Lay Sing also appealed against part of Ms Chongs order. In the appeal before me, Lay Sing confined its appeal to that part of the order which did not allow a further deduction of $80,000 from the profit figure for Phase 1, which $80,000 was allegedly paid by Lay Sing to another company as part of an earlier joint venture agreement pertaining to Phase 1 and 2. This would have meant not only that no payment should be made by Lay Sing to Wellform Construction but that Wellform Construction should make some payment to Lay Sing.

19. One of the arguments of Wellform Construction was that the report of Chio Lim was not admissible as it was hearsay evidence even though Mr Y C Chee of Chio Lim had given evidence. The argument of hearsay was that he had to rely on work done by his staff and he had no personal knowledge about the documents which he had to consider.

20. I do not agree that the report was inadmissible. Mr Chee was the person in charge of the report. He was entitled to rely on the work of his staff as one cannot expect the person in charge to do everything himself. Also he did not need to have personal knowledge of the documents which he considered. The weight to be given to the report was another matter.

21. After hearing arguments and considering the documents, I agree that the Assistant Registrar should not have accepted the report of Chio Lim in place of the accounts prepared by Lay Sing.

22. The last page of the accounts for Phase 1 as prepared by Lay Sing has been set out in paragraph 12 above. Although the fourth line from the bottom of the accounts had the qualification that materials and preliminaries were excluded, the next line, ie. the third line from the bottom, made a deduction of $2,376,548.85. This figure was derived from another page of the accounts prepared by Lay Sing which showed a break-down, by each month, of the costs for Phase 1 with separate columns for materials/machinery, wages (workers), staff salary and others. The second line from the bottom showed an add back and the last line from the bottom showed a net profit of $1,394,629.66.

23. It was therefore not accurate to look at the fourth line from the bottom of the last page only and ignore the last three lines. Contrary to Mr Sims assertion, Lay Sing had included cost of materials and preliminaries in this set of accounts to arrive at the eventual net profit figure of $1,394,629.66.

24. Mr Ong sought to argue that only some and not all the materials and preliminaries had been included in this set of accounts but that was not the evidence of Mr Sim, who gave the impression that all had been excluded. Furthermore, no explanation was given as to why Lay Sing should include some but exclude other expenses in its own attempt to determine the profit for Phase 1.

25. Secondly, Chio Lim had to draw certain conclusions which were not necessarily correct. For example, there was apparently no invoice to substantiate claims of and payments to NSCs (nominated sub-contractors) and DSCs (direct sub-contractors) against Lay Sing amounting to a total of $1,392,630.48.

26. Mr Chee was aware of this but said they had verified the payments from alternative sources such as certification of payment and claims.

27. It was not clear from paragraphs 5.1.3 and 5.1.4 of the report as to who had certified the payments to these sub-contractors, the architect or Lay Sing itself.

28. According to the notes of evidence, Mr Chee had said that for NSC claims, the payments were always approved by the architect. Even if this were so, it still left open the question about the claims by the DSCs.

29. If payments to the DSCs had indeed been made as claimed by Lay Sing, then there should be some other means of verifying the same such as by the cheque numbers, if cheques were used, or by bank statements of Lay Sing.

30. Further or alternatively, verification could and should have been obtained from the DSCs. This was not done.

31. During cross-examination at NE 22 line 23, Mr Sim said he would produce evidence to substantiate the payments to the NSCs and DSCs but no evidence was produced thereafter by him.

32. Another example of a conclusion drawn by Chio Lim which may not be correct is their treatment of certain payments in 1999 by Lay Sing to Wellform Construction. According to Mr Shahiran, acting for Wellform Construction, these payments totalled $159,708.74 but, including GST, they actually totalled $164,500. Chio Lim had treated the payments as part of expenses of Phase 1 but gave no reason why they did so.

33. According to Mr Sims second affidavit of 24 February 2000, paragraph 11.2, for Lay Sing, these payments were various advance payments to Wellform Construction by way of a loan.

34. According to Mr Johnny Thngs second affidavit of 14 April 2000, paragraph 10, for Wellform Construction, these payments were part of payments made to Wellform Construction for the purchase of raw materials to be used for our joint venture in the Canossa Convent Project and they were therefore advance payments towards the joint-venture profit and progress payments towards this amount.

35. Phase 1 had already been completed by 20 December 1998. I did not see how payments in 1999 could be for payments of raw materials to be used for Phase 1 as contended by Mr Thng. Besides Mr Thngs affidavit was contradictory on this point. On the one hand, he gave the impression that the payments were used to pay for expenses but yet on the other hand, the second part of his paragraph 10 said, they were therefore advance payments towards the joint venture profit . The two were inconsistent.

36. Thirdly, Mr Sim himself admitted during cross-examination at NE 21 line 10 to 17 that the accounts for Phase 1 prepared by Lay Sing were correct.

37. I therefore conclude that based on those accounts, the profit for Phase 1 was $1,394,629.66 subject to the qualification that since Lay Sing received a payment of $868,883.18 instead of the anticipated payment of $1,132,650.66, the profit should be reduced by the difference of $263,767.48 ie. it would then become $1,130,862.18 as follows:

(a) Profit (including anticipated payment)	$1,394,679.66
(b) Less $263,767.48 (being the difference between an anticipated and the actual payment)	$263,767.48
	$1,130,862.18

38. The profit for Phase 2 is agreed by the parties at $328,447.74. This is based also on a set of accounts prepared by Lay Sing.

39. The total profit for Phases 1 and 2 is therefore $1,459,309.92.

40. I now come to the second part of Wellform Constructions appeal.

41. Mr Shahiran argued that as the Assistant Registrar had accepted the set of accounts in the report by Chio Lim, then there was no need to deduct the payments totaling $159,708.74 to Wellform Construction from the profit derived by Chio Lim as the $159,708.74 had already been taken into account by Chio Lim in deriving the profit of $158,397.08. Mr Ong agreed provided the profit figure as determined by Chio

Lim was accepted by me and subject to Lay Sings appeal that $80,000 should be deducted from the profit figure.

42. However, for Phase 1, I did not accept the profit figure from the report by Chio Lim but from the accounts prepared by Lay Sing.

43. Mr Shahirans alternative argument regarding the $159,708.74 was that this figure should be deducted as expenses from the profit for Phase 1 first instead of deducting it from Wellform Constructions share of the profit as it was part of expenses.

44. I do not agree with this argument. The $159,708.74 was paid to Wellform Construction after Phase 1 had been completed. It was not paid as part of expenses for Phase 1 but to account of Wellform Constructions share of the profit for Phase 1, as was mentioned in the second part of paragraph 10 of Mr Thngs second affidavit (see para 35 above).

45. Accordingly, the deduction should be from Wellform Constructions share of the profit for Phase 1 as determined by Lay Sing. The sum to be deducted is $164,500 as this was the total sum received by Wellform Construction from the payments. As I have mentioned in paragraph 32 above, the figure of $159,708.74 given by Mr Shahiran excluded the GST which was received by Wellform Construction. This deduction is in addition to two other sums to be deducted, which deductions were not disputed.

46. Therefore, subject to Lay Sings appeal, the balance payable to Wellform Construction would be:

Total profits from Phase 1 and 2 (see paras 37 to 39 above)	$1,459,309.92
30% thereof	$437,792.98
Less:	
(a) Advance payments to Wellform Construction	$164,500.00 -
(b) Set-off for Ubi Project (undisputed)	$41,729.00 -
(c) Partial payment of profits (undisputed)	$8,625.55 -
	$222,938.43

47. I now come to Lay Sings appeal against part of Ms Chongs order which was argued before me. It was the part which did not take into account a sum of $80,000 allegedly paid by Lay Sing to another company, Chon Hwa Construction Pte Ltd (Chon Hwa) pursuant to an alleged agreement between Lay Sing and Chon Hwa dated 21 June 1997 in which Lay Sing purportedly agreed with Chon Hwa to set up a joint venture to carry out works pertaining to the upgrading of Canossa Convent Primary School and the relocation of Canossian School for the Hearing Impaired to the premises of Canossian Convent and the upgrading of Canossa Convent.

48. Under that agreement, Lay Sing purportedly agreed with Chon Hwa that Chon Hwa should retain 1% of the Building Contract for the works.

49. The Building Contract is not defined although Lay Sings position appeared to be that it pertains to both Phase 1 and 2.

50. Lay Sing alleged that it had subsequently by a sub-contract agreement dated 29 January 2000, agreed to let Chon Hwa have $80,000 as its share of the profit from Phase 1 and 2 and that this sum should be deducted from the profits to be shared with Wellform Construction.

51. That sub-contract agreement states:

> **SUB-CONTRACT AGREEMENT**
>
> LS/2000/01/DSC/CHONHWA/01/JW
>
> 29 January 2000
>
> CHON HWA CONSTRUCTION PTE LTD
> 7500A Beach Road
> #08-316 The Plaza

Singapore 199591

Attention: Mr. Chai Chon Yen

Dear Sir,

PROPOSED ERECTION OF 2 BLOCKS OF 4-STOREY FLAT (TOTAL 24 UNITS) WITH ATTIC, BASEMENT CARPARKS & A SWIMMING POOL ON LOTS 5741 & 5742 MK 26 AT NO. 4 LORONG M TELOK KURAU

LETTER OF AWARD - FULL SUB-CONTRACT

The above Main Contract has been awarded to us at a Lump Sum of S$4,737,864.08 (Singapore Dollar: Four Million Seven Hundred Thirty Seven Thousand Eight Hundred Sixty Four and Cents Eight Only), excluding Goods & Services Tax.

We are pleased to award to your company the full sub-contract for the above-mentioned project at a Lump Sum of S$4,510,000.00 (Singapore Dollars: Four Million Five Hundred and Ten Thousand Only), excluding Goods & Services Tax subject to the terms set out hereunder and our standard terms and conditions, a copy of which is known to you or otherwise you are deemed to have knowledge of.

	S$4,737,864.08
Lay Sings Contract Value:-	
Less	
Chon Hwa-Lay Sing Joint Ventures Commission:-	S$ 80,000.00 (Canossa Convent Project)
Less Chon Hwas Contract Value:	S$4,510,000.00
	S$ 147,864.08 (3.12% of Contract Value)

The scope of work shall be the entire Main Contract as undertaken by Lay Sing Construction. This shall be executed by Ms. Chon Hwa Construction Pte Ltd back to back to our Main Contract.

The Contract Period for the works shall be Fourteen (14) Consecutive Months from the date of Commencement of the project.

50% of Man year shall be allocated to Ms. Chon Hwa Construction Pte Ltd.

Mr. Chai Chon Yen of Ms. Chon Hwa Construction Pte Ltd shall be incharge of the project.

Chon Hwa Construction Pte Ltd is highlighted in particular that the Sub-Contract

price of sheet pile shall be inclusive of installation approved by the Consultant Engineer.

Unless and until a formal contract is executed between us, this letter and the terms and conditions above shall constitute a binding contract between us.

Yours faithfully,

LAY SING CONSTRUCTION PTE LTD Agreed and Accepted the above by:-

(Signed)

SIM LAY SING
Chairman

For and on behalf of Chon Hwa Construction Pte Ltd
Capacity:- _____

52. I do not see how that letter could substantiate the alleged payment of $80,000 by Lay Sing to Chon Hwa. It dealt with a different project at No 4 Lorong M Telok Kurau and the figure of $80,000 had nothing to do with the value of Chon Hwas contract for that project which value was $4,510,000.

53. Furthermore, there was no evidence that the intended joint venture between Lay Sing and Chon Hwa for Phase 1 and 2 had been carried out. Indeed, the evidence was to the contrary as Lay Sing eventually ended up with Wellform Construction to carry out the works for Phase 1 and 2. There was no reason why Lay Sing should let Chon Hwa have $80,000 for Phase 1 and 2 or why Wellform Construction should be affected by this.

54. It is quite clear to me that the sub-contract agreement dated 29 January 2000 is but a desperate attempt by Lay Sing to try and reduce the profits of Phase 1 and 2 so as to reduce the payment it has to make to Wellform Construction.

55. Accordingly, I am of the view that there is no need to reduce the profit figure of Phase 1 and 2 by $80,000 and Lay Sings appeal is dismissed.

56. In the circumstances, the appeal of Wellform Construction is allowed in that Ms Chongs order of 11 November 2000 is set aside and Lay Sing is to pay Wellform Construction $222,938.43 with interest at 6% per annum from the date of Writ of Summons until the day before my judgment as statutory interest runs from the date of judgment. Costs of the action up to the hearing before Ms Chong is to be paid by Lay Sing to Wellform Construction to be agreed or taxed.

57. I would also mention that should Lay Sing recover more monies from the owner regarding the difference between $1,132,650.66 which it anticipated receiving and the $868,883.18 which it received, then, 30% of the net monies recovered should be paid by Lay Sing to Wellform Construction.

58. I will hear the parties on costs of the appeal before me.

Woo Bih Li

Judicial Commissioner

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