Yee Hong Pte Ltd v Powen Electrical Engineering Pte Ltd
[2005] SGHC 114

Case Number : OM 1/2005

Decision Date : 01 July 2005

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Edwin Lee and Looi Ming Ming (Rajah and Tann) for the applicant; P Jeya Putra and Wendy Leong (AsiaLegal LLC) for the respondent

Parties : Yee Hong Pte Ltd — Powen Electrical Engineering Pte Ltd

Arbitration – Arbitral tribunal – Improper conduct – Party to arbitration proceedings seeking further discovery – Whether application for discovery necessary – Whether arbitrator's failure to call for hearing of application before making order amounting to improper conduct of arbitration proceedings and violation of rules of natural justice – Section 22 Arbitration Act (Cap 10, 2002 Rev Ed)

Arbitration – Arbitral tribunal – Powers – Arbitrator ordering exchange of affidavits by certain date failing which hearing to proceed as scheduled – Whether arbitrator acting in excess of power by making such order – Articles 5.1, 12.1(c) Singapore Institute of Architects Arbitration Rules

Arbitration – Arbitral tribunal – Removal – Whether improper conduct or loss of confidence in arbitrator sufficient to justify removal of arbitrator – Whether substantial injustice caused to party seeking removal of arbitrator – Section 16(1)(b) Arbitration Act (Cap 10, 2002 Rev Ed)

1 This was an application by Yee Hong Pte Ltd ("Yee Hong") to remove Lim Kheng Chye ("Lim") as arbitrator in respect of arbitration proceedings commenced on or about 24 June 2003 by the respondent, Powen Electrical Engineering Pte Ltd ("Powen"), against Yee Hong. Yee Hong was the main contractor of a condominium at Upper Bukit Timah Road known as Southaven II and Powen was the electrical installation nominated sub-contractor. The application, which was made under s 16(1)(*b*) of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the Act"), was based upon the alleged failure of the arbitrator to properly conduct the arbitration proceedings and that such failure had caused or would cause substantial injustice to Yee Hong.

2 The allegations in relation to the arbitrator's failure to properly conduct arbitration proceedings related to Lim's decision to proceed with the hearing of the substantive claim in the arbitration fixed for hearing on 19 to 21 January 2005. In the result, Yee Hong was ordered to exchange its affidavits of evidence-in-chief on or before 14 January 2005 failing which the arbitrator would proceed ahead to hear the substantive issues on the dates fixed for hearing without regard to the affidavits of evidence-in-chief from Yee Hong. Yee Hong contended that the order was peremptory in nature and it was made without affording the parties the opportunity to be heard. The other complaint was that Lim had acted in excess of his powers in making a peremptory order against Yee Hong on 11 January 2005. On Yee Hong's application for further discovery of documents and consequential application for extension of time to exchange affidavits of evidence-in-chief, Lim had failed to hold hearings when requested to do so. Mr Edwin Lee for Yee Hong submitted that Lim had violated the rules of natural justice and the most basic duty as an arbitrator. He referred me to s 22 of the Act, which provides that

> The arbitral tribunal shall act fairly and impartially and shall give each party a reasonable opportunity of presenting his case.

3 Powen was represented by Mr Jeya Putra of AsiaLegal LLC ("AsiaLegal") who argued that Yee Hong's allegations were unfounded as the applicant's account of the events was inaccurate. The

application also failed to meet the requirements of s 16(1)(*b*) of the Act. He pointed out that Yee Hong's formal application for further discovery, request for a suitable date to hear that application and application for time extensions were all made on 11 January 2005 *after* the Peremptory Order (at [21] below) and the tribunal's Directions No 2 (at [22] below). Mr Jeya Putra further submitted that at the hearing on 10 January 2005, the arbitrator heard arguments for and against an order of a peremptory nature. Moreover, submissions in letters from both parties were forwarded and duly considered by the tribunal before the Peremptory Order and Directions No 2 were issued. Mr Jeya Putra submitted that, in any event, Lim Huay Ee ("LHE"), the applicant's planning manager, had not in his affidavit of 13 January 2005 demonstrated that substantial injustice resulted or was likely to be caused.

4 The Arbitration Act of 2001 which came into force on 1 March 2002 provides for a set of new domestic arbitration laws which are in line with the UNCITRAL Model Law and at the same time it adopted some features of the UK Arbitration Act 1996 (c 23). Previously, under the former legislation, an arbitrator may be removed for misconduct either of himself or of the proceedings or for delay in proceeding with the reference and making the award. The new Act avoids the label "misconduct" and s 16(1) of the Act reads as follows:

> A party may request the Court to remove an arbitrator —
>
> (*a*) who is physically or mentally incapable of conducting the proceedings or where there are justifiable doubts as to his capacity to do so; or
>
> (*b*) who has refused or failed —
>
> (i) to properly conduct the proceedings; or
>
> (ii) to use all reasonable despatch in conducting the proceedings or making an award,
>
> and where substantial injustice has been or will be caused to that party.

5 The expression "failure to conduct the proceedings properly" covers a multitude of manifestations and situations. Mustill & Boyd in *Commercial Arbitration – 2001 Companion Volume to the Second Edition* (Butterworths, 2001) at 291 commented that the expression could cover failure to comply with the general duty of the tribunal under s 33 of the UK Arbitration Act 1996 (which is similar in part to our s 22), the tribunal exceeding its powers, and failure of the tribunal to conduct the proceedings in accordance with the procedure agreed to by the parties. The refusal or failure to conduct the proceedings must be established by evidence: see *Russell on Arbitration* (Sweet & Maxwell, 22nd Ed, 2003) at para 7-081.

6 The power to remove an arbitrator is not exercised unless the failure to conduct the proceedings properly has caused or will cause substantial injustice to the applicant. Whilst a failure to comply with s 22 of the Act may manifest improper conduct of the proceedings, that in itself is not enough to warrant the removal of the arbitrator under s 16(1)(*b*). There is a second stage of the investigation which is required by s 16(1)(*b*) and that is as to whether the failure has caused or will cause substantial injustice. Actual or cogent evidence of injustice of a substantive nature as the case may be has to be shown before the court will intervene. The test of "substantial injustice" is a high one for any applicant to surmount.

7 Reference is made to "substantial" injustice which indicates that the use of s 16(1)(*b*), like

its equivalent provision, namely s 24(1)(*d*) of the UK Arbitration Act 1996, should be confined to exceptional circumstances only: see Robert Merkin, *Arbitration Law* (LLP, 12 May 2003 release) at para 8.73. Each case would depend, *inter alia*, on the surrounding circumstances, the conduct of the arbitrator and terms of reference. My further observations on this point, on the facts of this case, are at [48] below.

8 I turn to the facts of the present case. It is convenient to set out the chronology of events. They are not seriously in dispute. According to the tribunal's directions of 4 November 2004, affidavits of evidence-in-chief were to be exchanged on 17 December 2004. The arbitration was fixed for hearing from 19 to 21 January 2005. On 10 December 2004, Yee Hong requested Powen to agree to exchange affidavits of evidence-in-chief on 7 January 2005. Powen agreed on condition that the hearing dates remained. The arbitrator was informed of the situation on 15 December 2004. The tribunal was agreeable to the extension.

9 On 7 January 2005, Yee Hong informed Powen that it was not ready to exchange affidavits of evidence-in-chief. No alternative date for the exchange was mentioned. On the same day, Mr Edwin Lee's firm, M/s Rajah & Tann, on behalf of Yee Hong sent a letter by fax requesting further discovery as well as further and better particulars of the Statement of Claim dated 16 February 2004. The tribunal convened an urgent meeting on 10 January 2005 after being informed of the recent developments by Mr Jeya Putra who in his letter dated 7 January 2005 to the arbitrator asked that the hearing of the arbitration proceed as previously directed. His clients were ready to exchange affidavits of evidence-in-chief but not Yee Hong. In his view, Yee Hong's last-minute demands for further documents and further and better particulars were plainly excuses to delay proceedings.

10 I should mention that Powen's general manager, Wong Chiu Yin ("Wong"), in his affidavit of 18 January 2005 stated that the reason earlier given to Powen for the first extension of time to exchange affidavits (*ie*, from 17 December 2004 to 7 January 2005) was that the applicant's representatives were travelling during that period and more time was needed to finalise the affidavits. This was not disputed by Yee Hong.

11 Wong further deposed that further discovery of four categories of documents (see [13]) were not pursued by Yee Hong after AsiaLegal's fax of 24 November 2004 objecting to discovery on the ground of relevancy. Earlier on 19 November 2004, Rajah & Tann said that they would go ahead to apply for further discovery if they did not hear positively from AsiaLegal by the close of business on 24 November 2004. No application for further discovery was taken out despite Powen's position on the matter. It was brought up again on 7 January 2005 in Rajah & Tann's fax, the very day the parties were expected to exchange affidavits of evidence-in-chief. As for the request for further and better particulars of the Statement of Claim, the request was made for the first time on the day fixed for exchange of affidavits and that was close to a year after the Statement of Claim was submitted way back in February 2004.

12 Rajah & Tann said that they tried to call Ms Wendy Leong of AsiaLegal about further discovery of the four categories of documents on 30 December 2004 but they were told that she was on leave until 7 January 2005. Wong in his affidavit deposed that Ms Wendy Leong was away from 22 December 2004 to 5 January 2005 but counsel, Mr Jeya Putra, was in the office between those dates and, in particular, on 30 December 2004 when Rajah &Tann telephoned AsiaLegal. Mr Jeya Putra received no call from Rajah & Tann on 30 December 2004 and the latter left no message with AsiaLegal.

13 LHE deposed that at the hearing on 10 January 2005, the arbitrator was informed of three outstanding issues. First, copies of some documents previously disclosed had not been made available

to Yee Hong. They were identified as documents that Yee Hong was entitled to before the exchange of affidavits of evidence-in-chief. Second, Yee Hong had earlier on 29 October 2004 requested six categories of documents but Powen had only provided on 19 November 2004 two categories, leaving four categories of documents outstanding. The outstanding four categories of documents were:

(a) any applications for and/or grants of extension of time made pursuant to cl 11 of the Conditions of Sub-contract for use in conjunction with the Main Contract;

(b) the Sub-contract Completion Certificate issued pursuant to cl 11 of the Conditions of Sub-contract for use in conjunction with the Main Contract;

(c) All M&E site records, memoranda, reports like test reports and commissioning reports and other documents on the status of the progress of the M&E works for the project; and

(d) The report made by [Powen's] expert.

The third outstanding issue was Yee Hong's request for further and better particulars.

14 On 10 January 2005, Mr Edwin Lee also pointed out AsiaLegal's position that the four categories of documents were not relevant and thus not discoverable. Mr Jeya Putra had not said that the documents were not in Powen's custody, possession and/or power. The arbitrator queried Mr Jeya Putra whether Powen had the documents. Mr Jeya Putra said he would take instructions but the appropriate thing was for Yee Hong to take out a formal application for further discovery, if that was what Yee Hong desired.

15 LHE deposed that at that hearing, Mr Edwin Lee informed the arbitrator that Yee Hong would be making a formal application for further discovery as well as to seek an extension of time for exchange of affidavits of evidence-in-chief. Wong in his affidavit stated that the tribunal directed that such application, if any, be fixed for hearing on the first day of the arbitration. Again this point was not disputed by Yee Hong.

16 After the conclusion of the hearing on 10 January 2005, the arbitrator, by way of confirmation, issued Directions No 1 dated 11 January 2005. It is useful to set out the directions in full:

After carefully considered the oral submissions of Mr P Jeya Putra, Counsel representing the Claimants and Mr Edwin Lee and Ms Looi Ming Ming, Counsel representing the Respondents at the interlocutory meeting held in my office on 10 January 2005 at 6.30pm, I hereby order and direct the following:

(1) The Counsel for the Claimants is to forward the documents listed as Nos. 339, … 348 to 352, 359, 366, 387 to 389, 393, 423, 442 and 443 to the Respondent's Counsel by 10.00am on 11 January 2005 as confirmed by the Counsel representing the Claimants.

(2) As agreed by the Counsel representing the Claimants, he is to confirm on [10] January 2005 by 10.00am the availability of the other documents under Paragraph (5) of the Counsel for the Respondents' letter dated 7 January 2005 addressed to the Claimants' Counsel. If such documents are available, then the Claimants' Counsel is to forward copies of such documents to the Respondents' Counsel notwithstanding the fact that the latter party may have them in their possession.

(3) The Counsel for the Respondents, upon the receipt from the Claimants' Counsel of the documents listed as Nos. 339, … 348 to 352, 359, 366, 387 to 389, 393, 423, 442 and 443, is to confirm by 3.30pm on 11 January 2005, the relevancy of such documents in their preparation for the Witness Statements/Affidavits of Evidence in Chief to be exchanged.

The cost of this Order shall be equally borne by both the Claimants and the Respondents.

17 By way of explanation, para 5 of Rajah & Tann's letter dated 7 January 2005 referred to in Directions No 1 relates to the four categories of documents set out in [13] above. As for items 1 and 3 of Directions No 1, Rajah & Tann in their earlier letter of 7 January 2005 categorically stated:

> However, the documents requested [in] our letter to you dated 24 December 2004 are still outstanding. Kindly let us have a copy each of the same as soon as possible, as the documents are essential for the preparation of the witness statements of evidence-in-chief.

Naturally the arbitrator wanted to hear further from Mr Edwin Lee since he had blamed Yee Hong's inability to exchange affidavits on Powen's delay in making available copies of some disclosed documents. On 10 January 2005, the deadline for exchange had expired and there was no application before the arbitrator for time extension. The hearing was scheduled to start in nine days. Powen was ready to press ahead.

18 Mr Jeya Putra complied with item 1 of Directions No 1 by 0858 hours of 11 January 2005. He also wrote to Rajah & Tann on the same day informing them that of the four categories of documents, the documents either did not exist or that Powen did not have them in its custody, possession and/or power.

19 Contemporaneously, Mr Jeya Putra also informed the arbitrator that the documents under item 1 were sent to Rajah & Tann as directed by the arbitrator. At the same time, Mr Jeya Putra pointed out to the arbitrator that the documents he had sent were documents which Yee Hong should have had as they were documents which Yee Hong had disclosed in its own list of documents in Suit No 814 of 2003 commenced in the High Court on 6 October 2003. The same list of documents disclosed in Suit No 814 of 2003 was also disclosed by Yee Hong in this arbitration. Mr Jeya Putra complained that:

> [B]y requesting at the doorstep of this reference for copies of documents which they clearly already have in their possession, and contending that they require these documents (which they already have) to prepare their Affidavit of Evidence In Chief is wholly without merit and purely designed to delay proceedings. No prejudice has been caused to [Yee Hong] as they are already in possession of the documents requested for above.

20 Responding to item 3 of Directions No 1, Rajah & Tann in their letter of 11 January 2005 to the arbitrator stated:

> Separately, we have also since had a quick perusal of the documents that were forwarded to us. These include minutes of Meetings and Consultants' Instructions which are surely relevant to the claim. While similar copies of these documents may have been in our clients' possession, the documents disclosed by the Claimants are different in that some of them contain handwritten notes. In any event, it is not entirely relevant whether similar documents are already in our clients' possession - the simple position is that our clients are entitled to these documents, and are entitled to peruse them before preparing their affidavits.

21 Following the replies from both sides to Directions No 1, the arbitrator issued on the same day at 1801 hours an order entitled "Peremptory Order to Respondents" (*ie*, Yee Hong) in these terms:

> I made an Order in my letter of 16 December 2004 in which I set the deadline for the exchange of the Witness Statements/Affidavits of Evidence in Chief to be on 7 January 2005.
>
> From the letter dated 7 January 2005 from the Claimants' Counsel, I came to know that they (quote) "… *have just been notified by the Respondents that they are not in a position to exchange the Affidavits today*" (unquote). The Claimants' Counsel had said in the same letter that the Claimants [Powen] are in a position to exchange the Affidavits on that day which was 7 January 2005. I have also noted that up to 7 January 2005, the Respondents have not made an application for the extension of the deadline for the exchange of the said Affidavits.
>
> An interlocutory meeting was then held in my office on 10 January 2005 at 6.30pm and an Order for Directions has been issued to both the Claimants' Counsel and the Respondents' Counsel on 11 January 2005.
>
> On the morning of 11 January 2005, the Claimants' Counsel had delivered to the Respondents' Counsel the documents stated in item (1) of my Order for Directions No 1. Another letter dated 11 January 2005 was forwarded to me stating that the same documents were already disclosed by the Respondents in the List of Documents in their Suit No 814 of 2003/H in the High Court of Singapore.
>
> In regard to the other documents as requested by the Respondents, the Claimants' Counsel in his letter dated 11 January 2005 addressed to the Respondents, confirmed that they are not in their possession.
>
> I am not persuaded by the statement by the Respondents' Counsel in his letter dated 11 January 2005, that (quote) "*In any event, it is not entirely relevant whether similar documents are already in our client's possession - the simple position is that our clients are entitled to these documents, and are entitled to peruse them before preparing their affidavits*" (unquote). Although the Claimants have faulted in not releasing copies of the said documents to the Respondents' Counsel earlier as requested, the fact remains that those same documents are already in the possession of the Respondents. As such, I do not see the logic in the said Respondents' statement and I conclude that the late submission of such documents by the Claimants' Counsel could in no way, affect the [Respondents'] preparation of the Witness Statements/Affidavits of Evidence in Chief.
>
> I therefore hereby order that unless the Respondents make their exchange with the Claimants, of their Witness Statements/Affidavits of Evidence in Chief on or before 14 January 2005 (Friday), I shall not be taking into consideration the Respondents' Witness Statements/Affidavits of Evidence in Chief and I shall subsequently after the Hearing, proceed to deliberate and make my award on the case without regard to the said submission.
>
> The cost of this Order shall be borne by the Respondents.

22 The arbitrator also issued very shortly thereafter Directions No 2 to the parties. The directions were as follows:

> After having carefully considered the written submissions dated 11 January 2005 by the Counsel representing the Claimants and the Counsel representing the Respondents, I hereby state, order

and direct the following:

> (1) The Claimants [Powen] have faulted in not forwarding the documents listed as Nos. 339, … 348 to 352, 359, 366, 387 to 389, 393, 423, 442 and 443 to the Respondents [Yee Hong] as requested by the Respondents' Counsel, prior to the expiry date of 7 January 2005 and have instead only delivered the said documents to the Respondents' Counsel on the morning of 11 January 2005 and had not confirmed earlier as requested by the Respondents' Counsel that the other documents were not in their possession until 11 January 2005.
>
> (2) The Respondents have failed to make application for an extension of the deadline (expired on 7 January 2005) for the exchange of the Witness Statements/Affidavits of Evidence in Chief. The Respondents' Counsel had said at the interlocutory meeting held in my office on 10 January 2005 at 6.30pm that he did not have the said documents mentioned in (1) above but the Claimants' Counsel in his letter of 11 January 2005 had shown proof that such documents were already disclosed by the Respondents in the List of Documents in their Suit No 814 of 2003/H in the High Court of Singapore. The Respondents' Counsel in his letter dated 11 January 2005 did not deny that such documents are in the Respondents' possession.

As my Peremptory Order dated 11 January 2005 issued to the Respondents orders that the Respondents to make the exchange of the said Affidavits with the Claimants on or before 14 January 2005, I hereby direct that the deadline for the exchange of the Witness Statement/Affidavits of Evidence in Chief to be further extended to 14 January 2005.

I also hereby directed that the dates for the hearing be re-scheduled for 26, 27 and 28 January 2004 instead of 19, 20 and 24 January 2005.

The cost of this Order shall be equally borne by both the Claimants and the Respondents.

23 Mr Edwin Lee explained at the time the Peremptory Order and Directions No 2 were faxed through to his office, he was in the midst of preparing the formal application for further discovery and was not aware of the arbitrator's orders and directions. He was apprised of the situation after he had faxed through to the arbitrator at 1831 hours, Yee Hong's application for further discovery. Neither Yee Hong nor Rajah & Tann contacted the arbitrator about the Peremptory Order and Directions No 2. They read the situation with grave misgivings and Rajah & Tann on behalf of Yee Hong rushed off this originating motion, which was filed the next day on 12 January 2005. An application to suspend the hearing of the arbitration pending the hearing of the application to remove the arbitrator was also sought.

24 Yee Hong did not obtain an order to suspend the hearing when the application came up for hearing before me on 24 January 2005. I should also mention that the parties exchanged affidavits of evidence-in-chief on 14 January 2005.

25 In the present case, the arbitrator on 10 January 2005 was faced with a situation where in acting fairly to both parties, he had to balance the consideration of progressing the reference against the need to afford Yee Hong a fair opportunity to test the case of the claimant and put forward its own defence. This meant considering the three outstanding issues as highlighted to him by Mr Edwin Lee. This balancing exercise is sometimes difficult, where, as here, the arbitrator was faced with a party who had sought an earlier adjournment for exchange of affidavits of evidence-in-chief and who appeared tardy from the degree of alacrity with which Yee Hong had shown in making its applications.

As at 7 January 2005, Yee Hong had not applied for any extension of time to exchange affidavits of evidence-in-chief even though it was the last day for the exchange and Yee Hong was not ready and able to meet the deadline. Yee Hong had not applied for further discovery even though Powen's position was made known as early as 24 November 2004. Yee Hong's request for further and better particulars of the Statement of Claim was also made on the very day fixed for exchange. Along the way this request appeared to have been dropped as nothing more was said about it after Mr Jeya Putra's letter of 11 January 2005. These last-minute demands were naturally viewed with suspicion by Powen and they were, for the reasons below, nothing more than delaying tactics.

26 In my judgment, it was clear that the arbitrator properly balanced the consideration to which I have referred in [25] above in a manner that could not be the subject of any arguable criticism of the kind advanced by Yee Hong. In my view, given the course the arbitration had taken and the material before the arbitrator on 11 January 2005, Lim was entitled to conclude (and he had given reasons) that there was no basis for not proceeding to hold the hearing on the substantive issues on the scheduled dates. It is extremely undesirable if arbitrators were discouraged from approaching the situation presented to Lim on 10 January 2005 in the way he had done by threats of applications under s 16(1)(*b*) of the Act. After all, an arbitrator plainly has a wide discretion in reaching his decisions as to what the duty of acting fairly demands in the circumstances of a given case.

27 Of the different allegations raised by Yee Hong, on analysis they all amounted to the complaint that the arbitrator decided not to adjourn the hearing of the substantive claim. The allegations outlined in [2] above, save for the allegation that the arbitrator acted in excess of power, were simply different reasons advanced for securing an adjournment.

28 The only reason which Rajah & Tann had given in their letter of 7 January 2005 for holding back the exchange of the affidavits of evidence-in-chief was the failure of Powen to make available copies of some documents from the discovered lists. As it turned out, the documents in question came from Yee Hong, who should have copies of the documents. Yee Hong did not deny this. Yee Hong said on 11 January 2005 that it was nonetheless entitled to see the documents to formulate its affidavits. The arbitrator rejected the explanation as illogical. He found that Powen's delay in making the documents available could not have affected Yee Hong's preparation of the affidavits of evidence-in-chief. Yee Hong had had ample time to prepare the affidavits of evidence-in-chief. The arbitrator did not allow inaction by Yee Hong to be a ground for successfully deferring the scheduled hearing.

29 As it turned out, Powen also did not have the four categories of documents that Yee Hong wanted further discovery of. I should mention that the arbitrator in item 2 of Directions No 1 had in fact covered the converse situation should Powen have some or all of the four categories of documents sought by Yee Hong. If Powen had them, they were to be given to Rajah & Tann even though the latter might already have copies. This alternative direction is in my judgment significant for the reason that Powen's objection to discovery on the ground of relevancy was effectively put aside by the arbitrator so much so that Yee Hong would have obtained the documents without the need for a separate application, assuming Powen had them. As it turned out, Powen did not have the documents. In Directions No 2, the arbitrator observed that until 11 January 2005, Powen had not confirmed that it did not have the other four categories of documents earlier as requested by Yee Hong.

30 In these circumstances, there was really nothing in Yee Hong's allegations that the arbitrator had violated rules of natural justice and failed to hear its application for further discovery and consequential application for time extension. There was no need for that application given (a) the alternative direction which I have just mentioned in [29] above and (b) Powen's confirmation that it

did not have the four categories of documents before the application for further discovery was faxed to the arbitrator who had accepted Powen's position as stated. As to why Yee Hong formally applied for further discovery when it was not even its case that it disbelieved Powen's story that it did not have the documents, Rajah & Tann and Yee Hong did not proffer an explanation. Even if Powen was not to be believed, the proper thing to do was to cross-examine, if necessary, the witnesses attending the hearing on the veracity of Powen's position. I saw no basis for Yee Hong's complaints in this originating motion on what I regard as an academic application for further discovery.

31 As the deadline for the exchange of affidavits had expired, it was well within the powers of the arbitrator to order a fresh date for exchange and costs under the Peremptory Order. In further granting a "further time extension" to 14 January 2005 under Directions No 2, the arbitrator was exercising his discretion, which was affected by the material before him, particularly in respect of the replies from the respective firms. Similarly, it was well within the powers of the arbitrator to re-schedule the hearing dates to 26 to 28 January 2005.

32 I was not persuaded that in making the Peremptory Order, the arbitrator made the order without hearing parties and had also acted in excess of his powers. Both allegations may be grouped together. The order requiring exchange to take place on or before 14 January 2005 (and later on extended further to 14 January 2005 under Directions No 2) was consequential upon the finding that Yee Hong had no valid excuse for not exchanging affidavits on 7 January 2005 and there was also no valid reason for vacating the hearing. The arbitrator had heard arguments from both sides on 10 January 2005 and was in receipt of responses from the parties following Directions No 1.

33 On the issue of the arbitrator exceeding his power to grant a peremptory order, Mr Edwin Lee said that the power to grant such an order was not provided for in the Act unlike the position under the UK Arbitration Act 1996. I agreed with him on this point. Mr Edwin Lee also argued that the arbitrator had no power to make a peremptory order because the Singapore Institute of Architects Arbitration Rules ("SIA Arbitration Rules") did not apply to this reference. The Sub-contract between the parties was the first edition, which was published before the SIA Arbitration Rules. Mr Jeya Putra agreed that the SIA Arbitration Rules were published later. That notwithstanding, all the while the parties and the arbitrator had proceeded as if the SIA Arbitration Rules governed the conduct of the arbitration. At no time in the past had Mr Edwin Lee raised a contrary stance.

34 Mr Jeya Putra began his argument with the appointment of Lim as sole arbitrator by the President of the Singapore Institute of Architects on 1 December 2003. Thereafter, Lim wrote to the respective firms of lawyers on 2 January 2004 proposing a preliminary meeting on 8 January 2004 to discuss the procedures and programme for the conduct of the arbitration. In that letter, Lim stated:

> This arbitration will be conducted in accordance with the Arbitration Rules as laid down by the Singapore Institute of Architects.

35 In the same letter the SIA Arbitration Rules were tabled in the agenda for the preliminary meeting as an item for discussion. Mr Edwin Lee argued that at the preliminary meeting, which was held later on 15 January 2004, the SIA Arbitration Rules were not discussed. Whilst that may have been the case, somehow the arbitration progressed as if the SIA Arbitration Rules applied.

36 As Yee Hong had submitted a counterclaim, the arbitrator on 17 March 2004 wrote to AsiaLegal to inform them that Rajah & Tann had submitted Yee Hong's Defence and Counterclaim on 16 March 2004. He directed that:

> [I]n accordance with the Arbitration Rules of the Singapore Institute of Architects, I hereby

request for your submission by 16/04/2004, of your Statement of Reply together with your Defence to Counterclaim ...

This letter was copied to Rajah & Tann.

37 On 26 April 2004, the arbitrator wrote to Rajah & Tann to inform them that AsiaLegal had submitted their clients' Reply and Defence to Counterclaim on 26 April 2004 and that:

> [I]n accordance with the Arbitration Rules of the Singapore Institute of Architects, I hereby request for your submission by 25/05/04, of your Statement of Reply ...

38 This letter was copied to AsiaLegal. If the position of Yee Hong on the applicability of the SIA Arbitration Rules was any different from the arbitrator's belief as expressed and adopted by Powen, their lawyers, Rajah & Tann, ought to have raised it at that time.

39 The SIA Arbitration Rules were again mentioned at the hearing of Yee Hong's application to suspend the ongoing arbitration proceedings pending the disposal of Yee Hong's application to remove the arbitrator. In his skeletal arguments, Mr Jeya Putra categorically stated that it was not disputed that the SIA Arbitration Rules governed the arbitration proceedings. He also exhibited the SIA Arbitration Rules in his bundle of authorities. Mr Edwin Lee did not object to Mr Jeya Putra's statement and that gave the court and Mr Jeya Putra the impression that the SIA Arbitration Rules were applicable.

40 The first time Mr Edwin Lee objected to the applicability of the SIA Arbitration Rules was at the adjourned hearing of Yee Hong's application to remove the arbitrator. In my judgment, it was an afterthought and too late in the day for Yee Hong to object to the applicability of the SIA Arbitration Rules.

41 In my assessment, the objection was taken at this late stage to bolster Yee Hong's argument that the arbitrator had no power to make a peremptory order. To wait until the hearing to raise an objection cannot be supported as reasonable and did not represent what passed between the arbitrator and the parties previously. It was an objection which Yee Hong should not be allowed to now take. In any event, I should mention that on the last day of the hearing on 11 March 2005, Mr Edwin Lee conceded, for the purpose of this originating motion, that the SIA Arbitration Rules were applicable. He then argued that even if the SIA Arbitration Rules applied, the arbitrator still did not have the power to make a peremptory order.

42 Ms Wendy Leong relied on Arts 5.1 and 12.1© of the SIA Arbitration Rules. Article 5 provides that the arbitrator has the widest discretion allowed by law to ensure the just, expeditious, economical and final determination of the dispute. Article 12.1(c) states:

> In addition to the jurisdiction to exercise the powers defined elsewhere in these Rules, the Arbitrator shall have jurisdiction to:
>
> …
>
> c) proceed in the arbitration and make an Award notwithstanding the failure or refusal of any party to comply with these Rules or with the Arbitrator's written orders or written directions, or to exercise its right to present its case, but only after giving that party written notice that he intends to do so.

43 Although the order may have been entitled a "Peremptory Order", I agreed with Ms Wendy Leong that in the context of Art 12.1©, it was no more than the arbitrator's notice, as required by Art 12.1©, warning that in not complying with the order to exchange the affidavits on or before 14 January 2005, the arbitrator would proceed with the hearing as he had indicated. In my judgment, the arbitrator had jurisdiction to make the order including costs in those terms on 11 January 2001 against Yee Hong. As it happened, Directions No 2 further extended the exchange date to 14 January 2005 without the notice as required by Art 12.1© of the SIA Arbitration Rules and the date of hearing was re-scheduled to 26 to 28 January 2005.

44 As stated, the arbitrator had considered and fully explained his reasons for the findings he made in both the Peremptory Order and Directions No 2. Each party put the material before the arbitrator and he made his findings. There was, in my judgment, nothing in Yee Hong's allegations that was said to manifest, or could be described as amounting to, improper conduct of the proceedings.

45 Even if I reached a contrary position and concluded that the arbitrator had conducted the proceedings improperly as alleged, the fact is that Yee Hong had not shown that substantial injustice had been or would be caused to Yee Hong, and that is fatal to the application under s 16(1)(*b*) of the Act.

46 Yee Hong, through the affidavit of LHE, said that substantial injustice had been and/or would be caused in the following ways as summarised:

(a) the applicant was forced to file affidavits of evidence-in-chief within three days of 11 January 2005 before completion of discovery.[1]

(b) the applicant had lost confidence in the arbitration process and in the arbitrator.[2]

47 Yee Hong must pass the test of showing "substantial injustice" before the court can act. I already alluded to the fact that the exchange took place on 14 January 2005. I could not see anything which could possibly be characterised as a substantial injustice by the refusal to vacate the hearing dates and by giving Yee Hong three days from 11 January 2005 to prepare and exchange affidavits which, in my view, was not inadequate bearing in mind that no discovery was outstanding.

48 LHE said that Yee Hong had lost confidence in the arbitration process and the arbitrator. What he was saying is that Yee Hong's confidence in the arbitrator had been undermined and it would be unfair to Yee Hong to allow the arbitration to continue before the same arbitrator. Under s 16(1)(*b*) of the Act, an applicant has to show that the arbitrator's conduct of the proceedings has caused or will cause him to suffer substantial injustice. Loss of confidence in an arbitrator's ability to come to a fair and balanced conclusion is itself not capable of being substantial injustice. Dyson J in *Conder Structures v Kvaerner Construction Ltd* [1999] ADRLJ 305 said, and I adopt his statement, that loss of confidence in an arbitrator is neither a sufficient nor a necessary condition of substantial injustice. Previously, as long as the court was satisfied that from the conduct of the arbitrator a reasonable person would think that he had displayed real likelihood of not being able to act judicially, that was enough to remove him for misconduct. That is no longer the case. The test now is different. I did not find *Koh Bros Building & Civil Engineering Construction Pte Ltd v Scotts Development (Saraca) Pte Ltd* [2002] 4 SLR 748 helpful.

49 For completeness, I should mention that I disallowed Yee Hong leave to file a very late affidavit affirmed by Looi Ming Ming. The application was made on the very last day of the hearing and no valid reasons existed for the late affidavit.

50 For these reasons, I therefore concluded that there was no basis for this application. I dismissed the application with costs fixed at $15,000.

---

[1]Para 94 of Lim Huay Ee's affidavit

[2]Paras 95, 103 and 104 of Lim Huay Ee's affidavit

Copyright © Government of Singapore.