Yee Hong Pte Ltd v Tan Chye Hee Andrew (Ho Bee Development Pte Ltd, Third Party) [2005] SGHC 163

Case Number : Suit 814/2003

Decision Date : 31 August 2005

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Edwin Lee (Rajah and Tann) for the plaintiff; Engelin Teh SC and Thomas Sim (Engelin Teh Practice LLC) for the defendant; Paul Sandosham (Wong Partnership) for the third party

Parties : Yee Hong Pte Ltd — Tan Chye Hee Andrew — Ho Bee Development Pte Ltd

Arbitration – Stay of court proceedings – Whether court having jurisdiction to stay proceedings and order parties to arbitrate where no arbitration agreement between parties existing – Whether court should stay proceedings and order parties to arbitrate where prior related matter between similar parties referred to arbitration – Section 6(5) Arbitration Act (Cap 10, 2002 Rev Ed)

31 August 2005

Lai Siu Chiu J:

The facts

1 Ho Bee Development Pte Ltd ("the Third Party") is the developer of a condominium project known as Southaven II ("the Project") at Upper Bukit Timah Road. Yee Hong Pte Ltd ("the Plaintiff") was the main contractor appointed under an agreement dated 18 November 1996 ("the main contract") while Andrew Tan ("the Defendant") was the architect appointed by the Third Party for the Project. The Defendant practises under the name and style of Andrew Tan Architects Pte Ltd.

2 The main contract incorporated the Singapore Institute of Architects ("SIA") Articles and Conditions of Building Contract – Measurement Contract (4th Ed, 1988) which contains an arbitration clause.

3 The commencement date of the main contract was 25 April 1996. The original contract period was 24 months. It was subsequently extended three times by the Defendant so that ultimately the completion date became 27 October 1998. The Defendant certified that the Project was completed on 8 February 1999 and a completion certificate was eventually issued four months later on 14 June 1999 followed by a final certificate on 8 February 2002.

4 Under the main contract, liquidated damages of $22,000 were payable for each day of delay. By a letter dated 28 February 2001 ("the delay certificate"), the defendant certified that there had been 104 days of delay and that the total liquidated damages payable amounted to $2,288,000.

5 The Plaintiff commenced this suit against the Defendant in relation, *inter alia*, to the delay certificate that the Defendant had issued.

6 The Plaintiff's Statement of Claim alleged, *inter alia*, that the Defendant breached his duties as the architect for the Project by wrongfully issuing the delay certificate which was backdated to 28 October 1998. The Plaintiff asserted that the Defendant failed to act fairly and impartially in administering the main contract as, at the time he issued the delay certificate, he was aware that

there were factors which entitled the Plaintiff to extensions of time. The Defendant had in fact recommended that the Third Party grant extensions of time to the Plaintiff by his letters to the Third Party dated 23 December 1998, 6 January 1999 and 21 May 1999 respectively. However, no extensions of time were granted by the Third Party.

7 The Plaintiff alleged that by withholding extensions of time which the defendant well knew the Plaintiff was entitled to, the Defendant had acted under the influence or interference of the Third Party.

8 As a result of the Defendant's issuance of the delay certificate, a sum of $2,288,000 was withheld by the Third Party from the Plaintiff as liquidated damages, thereby causing loss, damage and expense to the Plaintiff.

9 The Plaintiff further alleged that the Defendant engaged in private correspondence with the Third Party relating to certification functions. The Defendant wrongfully allowed the Third Party to obstruct his decisions and failed to act independently by agreeing to act in accordance with the Third Party's wishes. Another allegation made against the Defendant was that he wrongfully failed to certify variations.

10 On 24 December 2004, the Defendant joined the Third Party to the action by issuing a Third Party Notice against the Third Party. On 3 February 2005, the Third Party applied by way of Summons in Chambers No 600 of 2005 ("the Application") for the following orders:

(a) that the Third Party Notice be set aside and/or struck out as disclosing no reasonable cause of action, being frivolous or vexatious and/or was otherwise an abuse of the process of the court;

(b) that all further proceedings in the Defendant's action commenced against the Third Party by way of the third party proceedings ("the Third Party Proceedings") be stayed pursuant to s 6 of the Arbitration Act (Cap 10, 2002 Rev Ed);

(c) in the alternative, that further proceedings in the Plaintiff's action in this suit and/or the subject matter and issues in this suit in so far as they affected or sought to affect or determine the rights and liabilities between the Plaintiff and the Third Party under the main contract be set aside and/or struck out as being frivolous or vexatious, or were otherwise an abuse of the process of the court, and/or be stayed and referred to arbitration; and

(d) that the costs of and occasioned by the Third Party Proceedings, including the costs of the Application, be paid by the Defendant to the Third Party.

The ground for the Application was that the Third Party in the contracts which it had entered into separately with the Plaintiff and the Defendant, had agreed to refer to arbitration the matters in respect of which both this action and the Third Party Proceedings were brought.

11 The Application was heard and dismissed with costs by the assistant registrar on 15 April 2005. The Third Party appealed against the assistant registrar's decision in Registrar's Appeal No 99 of 2005 ("the Appeal"). I heard and allowed the appeal as follows:

(a) these proceedings would be stayed and would be referred to arbitration together with the stayed proceedings in Suit No 1094 of 2001;

(b) costs of $2,500 would be paid by the Plaintiff to the Third Party and costs below of $5,000 awarded to the Plaintiff against the Third Party would be reversed in the Third Party's favour.

12 The Plaintiff has now filed a Notice of Appeal (in Civil Appeal No 75 of 2005) against my decision.

13 Before I deal with the submissions raised at the appeal, I will refer briefly to Suit No 1094 of 2001 ("the earlier suit"). The Plaintiff was also the plaintiff in the earlier suit and sued the Third Party as the defendant for the balance moneys outstanding under interim certificates nos 39 and 40 issued by the architect (the Defendant). The action was stayed by the assistant registrar on 28 November 2001 on an application by the defendant (the Third Party). The Plaintiff's appeal to a judge in chambers against the stay order was dismissed on 8 January 2002. The earlier suit was discontinued on 8 March 2002. As at the date of hearing of this appeal, apart from a notice of arbitration issued by the Third Party to the Plaintiff and dated 14 February 2005, no steps have been taken to bring the dispute between them to arbitration. The inaction on the part of the Plaintiff is indicative of its reluctance to proceed to arbitration on its claim against the Third Party.

The submissions

14 At the outset, counsel for the Third Party informed the court that he would not be pursuing the first limb of the appeal praying that the Third Party Notice be struck out. Rather, the Third Party would argue on the second and third prayers of the appeal, *viz* that all further proceedings in this action be stayed and referred to arbitration.

15 Counsel for the Third Party pointed out that it did not make sense for the Plaintiff's claim against the employer (the Third Party) in the earlier suit to be referred to arbitration and not the Plaintiff's claim against the architect (the Defendant). Counsel for the Defendant aligned herself with the Third Party's stand and confirmed that her client had "no problem" in being added to the arbitration proceedings between the Plaintiff and the Third Party.

16 Counsel for the Plaintiff, on the other hand, argued against the stay, pointing out that no arbitration clause governed the dispute between the Plaintiff and the Defendant; in any case the Plaintiff's claim against the Defendant was founded in tort, not in contract.

17 I rejected the Plaintiff's submissions and made the orders in [11] above. Subsequently, the Plaintiff wrote in for further arguments by its counsel's letter dated 26 May 2005, pursuant to s 34(1)*(c)* of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed). Essentially, the Plaintiff contended that contrary to the arguments canvassed at the appeal on behalf of the Third Party, the court had no jurisdiction to make the orders that I did, in compelling the Plaintiff and the Defendant to proceed to a tri-partite arbitration with the Third Party. The Plaintiff submitted that a stay of court proceedings could only be ordered where parties had an arbitration agreement. The earlier suit concerned the main contract between the Plaintiff and the Third Party in which there was an arbitration clause. The Defendant and the Third Party had a separate contract that also contained an arbitration clause. However, there was no arbitration agreement between the Plaintiff and the Defendant.

18 The Plaintiff submitted that forcing the parties to go for a tri-partite arbitration would not be feasible but would be extremely confusing for the following reasons:

(a) Between the Plaintiff and the Third Party, the arbitration clause in the main contract provided for the arbitrator to be nominated by the SIA.

(b) Between the Defendant and the Third Party, the arbitration clause in the service agreement (dated 23 August 1993) was silent on the appointee, which meant that the arbitrator would be nominated by the Singapore International Arbitration Centre in the event the parties failed to agree.

(c) Additionally, the Third Party had no *locus standi* to advance an application on the Defendant's behalf. Only the Defendant could apply for a stay but he was precluded from doing so as he had taken numerous steps in these proceedings which had been ongoing for two years.

19 I rejected the Plaintiff's request for further arguments, hence its appeal to the Court of Appeal.

The decision

20 I had accepted the submission of counsel for the Third Party that it was highly unsatisfactory for one dispute (between the Plaintiff and the Third Party) to be referred to arbitration and for another (between the Plaintiff and the Defendant) to be litigated separately, when both disputes arose out of the same project. Such a state of affairs would not determine the whole dispute among all three parties. Who would ultimately decide the dispute concerning extensions of time and whether the delay certificate was properly issued? What if the trial judge for this suit was to reach a finding on these issues different from or inconsistent with, the arbitrator in the arbitration between the Plaintiff and the Third Party?

21 I had inquired of counsel for the Plaintiff as to the reason why his client wanted to have two separate forums to adjudicate disputes arising out of the same project. I received no satisfactory answers other than the argument that there was no arbitration agreement that applied and it was a claim in tort which the Plaintiff was making against the Defendant.

22 It would be appropriate at this juncture to look at the arbitration provisions in the agreements that govern the relationship between two of the three parties. The arbitration clause (cl 37(1)) in the main contract reads as follows:

> Any dispute between the [Third Party] and the [plaintiff] as to any matter arising under or out of or in connection with this Contract or under or out of or in connection with the carrying out of the Works and whether in contract or tort, or as to any direction or instruction or certificate of the Architect or as to the contents of or granting or refusal or reasons for any such direction, instruction or certificate shall be referred to the arbitration and final decision of a person to be agreed by the parties or, failing agreement within 28 days of either party by or on behalf of the President or Vice-President for the time being of the SIA or, failing such appointment within the 28 days of receipt of such written request, such person as may be appointed by the Courts.

23 The arbitration clause (cl 10) in the service agreement between the Third Party and the defendant is differently worded and reads:

> Any difference or dispute arising out of or in connection with this Agreement between the [Third Party] and the [defendant] shall be referred to arbitration by a person to be agreed

upon between the parties or failing agreement within fourteen days after either party has given to the other a written request to agree to the appointment of an Arbitrator, a person to be nominated by the President of the Singapore Institute of Architects at the request of either party and all arbitration proceedings shall be in accordance with and subject to the provisions of the Arbitration Act Cap 10 of the Singapore Statutes, 1988 Revised edition or any statutory modification or re-enactment thereto for the time being in force.

24 Section 6(1) of the Arbitration Act reads:

> Where any party to an arbitration agreement institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.

25 I shall deal first with the argument by counsel for the Plaintiff that the court had no jurisdiction to force the Plaintiff to arbitrate on its dispute with the Defendant, in the absence of an arbitration provision. It is my view that the power of the court to do so is contained in s 6(5) of the Arbitration Act. It states:

> For the purposes of this section, a reference to a party includes a reference to *any person claiming through or under such party*. [emphasis added]

26 I read the italicised of the above subsection to include the Defendant who by the Third Party Proceedings was making a claim for an indemnity or contribution through or under the Third Party (who had an arbitration agreement with the Plaintiff). Moreover, the wording of cl 37 in the main contract (see [22] above) was very wide. It encompassed claims in contract as well as in tort and any direction or instruction or certificate of the Defendant.

27 I should also point out that counsel for the Third Party had informed the court that the Plaintiff had in the earlier suit raised the same allegations it had made against the Defendant in this suit – it had alleged interference by the Third Party in the Defendant's functions as an architect, even though the claim there was in contract and related to the withholding of the balance due under interim certificates nos 39 and 40. Having checked the file, I can confirm that the Third Party's submission is correct. I noted therefrom that the second affidavit, filed (on 9 November 2001) by the Plaintiffs' general manager, Tan Eng Siong, to support the Plaintiff's (unsuccessful) O 14 application, raised the same allegations that are pleaded in the Statement of Claim in this suit. Consequently, the arbitration proceedings between the Plaintiff and the Third Party would cover the same issues as this suit. This was not a desirable situation in terms of saving time and costs.

28 In arriving at her decision to refuse a stay of the Third Party Proceedings, the assistant registrar below had opined that granting a stay would result in multiplicity of proceedings as the very same issues would be decided by three different tribunals, *viz*:

(a) as between the Plaintiff and the Defendant in the courts;

(b) as between the Plaintiff and the Third Party in arbitration; and

(c) as between the Defendant and the Third Party in a separate arbitration.

In the light of the orders I made, the fear of multiplicity of proceedings would appear to be unfounded.

29 Counsel for the Plaintiff had submitted that his client had an arguable case against the Defendant for (numerous) breaches of duty of care as an architect. Counsel for the Third Party on the other hand cast doubts on the merits of the Plaintiff's claim, pointing out that the Plaintiff's basis for this argument was very tenuous; in fact, it was based on a one-liner from the judgment of Woo Bih Li JC (as he then was) in *Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Pte Ltd* [2000] SGHC 131 ("the *Hiap Hong* case") at [193] which decision went on appeal (see *Hiap Hong & Co Pte Ltd v Hong Huat Development Co (Pte) Ltd* [2001] 2 SLR 458).

30 I was puzzled by the Plaintiff's submission. I did not strike out the claim under O 18 r 19(1)(a), r 19(1)(b) or r 19(1)(c) of the Rules of Court (Cap 322, R 5, 2001 Rev Ed) as prayed for in the Application, I merely directed a stay of the entire proceedings. Ordering the Plaintiff to arbitrate its claim against the Defendant (who agreed to be bound thereby) was not tantamount to saying that the Plaintiff's claim had no merits. Far from it. It only meant that there was another, and in my view more suitable, forum for the three parties involved to have all their disputes relating to one project determined.

31 As for the Plaintiff's other argument that this suit was commenced two years ago whilst the Third Party only came into the picture lately, the Plaintiff's lack of action in proceeding with the arbitration ordered for the dispute in the earlier suit, belied its anxiety to have that and this claim adjudicated.

32 I turn next to the case cited by the Third Party, *viz* the *Hiap Hong* case ([29] *supra*). There, Woo JC had ruled that where an architect was employed on a standard form building contract with a procedure for the issuing of certificates of payment, there was an implied term between the employer and the architect that the architect would exercise his certification functions according to the terms of the contract.

33 The Court of Appeal was tasked with determining the question posed to Woo JC:

> What is the nature or extent of the term to be implied as regards the duties of [an employer] in relation to the certifying functions of [an] architect under the SIA Conditions?

34 Chao Hick Tin JA (who delivered the judgment of the Court of Appeal) held that an architect performed dual functions under a building contract. First, he acts on the instructions of his employer. Second, he evaluates and certifies the work done by the contractor. In his second function as certifier, the architect must act fairly and independently and is not subject to the directions or instructions of either party although he must listen to both parties before he arrives at his decision.

35 The Third Party next referred to *Man B&W Diesel S E Asia Ltd v PT Bumi International Tankers* [2004] 2 SLR 300 ("*Man B&W*") for its submission that the Defendant did not owe a duty of care to the Plaintiff, with whom he had no contractual relationship. I should point out that the Court of Appeal held that on the special facts of that case, it was unnecessary to indicate whether the duty of care should or should not have been extended at all to a claim for economic losses in respect of chattels. There, the appellant company had sold and serviced engines manufactured by its UK parent company and which it supplied to the builder of the respondent's ship. Neither the appellant nor its parent company had a contract with the respondent shipowner.

36 Chao Hick Tin JA in *Man B&W* cautioned that the principles in *RSP Architects Planners & Engineers v Ocean Front Pte Ltd* [1996] 1 SLR 113 ("*Ocean Front*") and in *RSP Architects Planners & Engineers v MCST Plan No 1075* [1999] 2 SLR 449 ("the 1999 case") should not be extended to new situations, save where the facts were identical.

37 In *Ocean Front*, the Court of Appeal allowed the plaintiffs' claim for economic loss because there was a sufficient degree of proximity between the developers and the management corporation ("the MC") to give rise to a duty on the part of the developers to take care to avoid causing the MC the kind of damage (spalling of concrete and water ponding in common areas) the latter had sustained.

38 In the 1999 case, the MC of a condominium sued the architects of the development for the cost of repair and rectification to damage to the roof and walls, alleging the architects had been negligent in their design and/or their supervision of the construction of the development. The architects then joined the main contractor as a third party alleging that the walls had failed because the main contractor had been negligent in their construction. The trial judge allowed the claim of the MC but dismissed the third party claim. The architects appealed.

39 In dismissing the architects' appeal, L P Thean JA (who delivered the judgment of the Court of Appeal) held that there was a sufficient degree of proximity in the relationship between the MC and the architects as would give rise to a duty on the part of the architects to avoid the loss sustained by the MC in the case. The element of reliance was present. The MC depended on the developer, *inter alia*, to unite resources and to co-ordinate the execution of the project, and on the architects, *inter alia*, to get the design of the building right.

40 I have taken pains to review *Ocean Front* and the 1999 case as neither would appear to support the Plaintiff's contention that the Defendant as an architect *per se* owed it a duty which counsel for the Plaintiff said had been breached 11 times over. I believe counsel for the Plaintiff had in this regard relied on the following extract from Woo JC's decision in the *Hiap Hong* case in which, after reviewing *Ocean Front* and the 1999 case, Woo JC said at [193]:

> I think that a strong argument can be made that an architect/certifier does owe a duty of care not only to the owner but also to the contractor to avoid pure economic loss. An architect must know that both intend to rely on his fairness as well as his skill and judgment as a certifier … The architect must also know that if he is negligent in issuing certificates he might cause loss to one of these parties.

41 However, what counsel may have overlooked is that in a later paragraph, at [195], Woo JC said:

> I need say no more on this point as it is not necessary for me to decide whether an architect, as certifier, owes a duty of care to the contractor.

Consequently, it would be wrong for the Plaintiff to rely on Woo JC's decision as authority for the proposition that the Plaintiff could sue the Third Party's architect for economic loss. I noted from the lengthy Statement of Claim filed by the Plaintiff, that its claims against the Defendant were essentially for the contractual sums owed to the Plaintiff (and withheld) by the Third Party under the main contract.

42 A case relied on by the Plaintiff where a stay of proceedings was refused was *Taunton-Collins*

v Cromie [1964] 2 All ER 332. Counsel for the Third Party, however, distinguished that case on its facts. The headnotes of the case read as follows:

> The plaintiff employed an architect and contractors to build him a house. The building contract was in the R.I.B.A. form and contained an arbitration clause. The plaintiff found the house unsatisfactory; he sued the architect who in his defence partly blamed the contractors. The action was referred to an official referee. The plaintiff joined the contractors as co-defendants. The contractors applied for a stay of proceedings under s 4 of the Arbitration Act, 1950; a stay was refused. On appeal,
>
> Held: it was undesirable that there should be two proceedings before two different tribunals (the official referee and an arbitrator) who might e.g., reach inconsistent findings; accordingly there were special reasons for the exercise of the discretion to refuse a stay of execution.

It is clear from the headnotes why the court refused a stay. On the flipside of the same coin, a stay should be ordered where, as in this case, it would otherwise result in a multiplicity of proceedings before different tribunals.

43 For the reasons set out earlier, it seemed to me that justice would be best served if the three parties proceeded to arbitration to determine their respective claims, defences and counterclaims if any. Accordingly, I stayed these proceedings.

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