Progen Engineering Pte Ltd v Winter Engineering (S) Pte Ltd
[2006] SGHC 224

Case Number : OM 17/2005, SUM 1652/2006

Decision Date : 08 December 2006

Tribunal/Court : High Court

Coram : V K Rajah J

Counsel Name(s) : Philip Fong, Lynette Chew and Navin Lobo (Harry Elias Partnership) for the plaintiff; Leslie Phua (Phua Wai Partnership) for the defendant

Parties : Progen Engineering Pte Ltd — Winter Engineering (S) Pte Ltd

Arbitration – Arbitral tribunal – Fees – Whether arbitrator can unilaterally fix own fees – Whether fixing of own fees by arbitrator constituted proper reason for plaintiff's delay in appealing award

Civil Procedure – Appeals – Leave – Whether leave should be given to appeal judge's decision not to allow reconsideration of remaining issues by arbitrator despite plaintiff's delay

Civil Procedure – Extension of time – Whether extension of time should be granted to file and serve originating motion to appeal against arbitrator's decision

8 December 2006

V K Rajah J:

1 The plaintiff was the subcontractor for the air-conditioning and mechanical ventilation works in the construction of the Tuas Checkpoint Project ("the Project"). In September 1996, the plaintiff in turn further sub-contracted to the defendant the supply and installation of the entire ductwork system for the Project ("the sub-contract"). Disputes in the implementation of the sub-contract surfaced and as a result the defendant terminated the sub-contract on 27 February 1998.

2 In January 1999 the plaintiff and the defendant referred their disputes to arbitration in accordance with the Arbitration Act (Cap 10, 1985 Rev Ed) ("the Arbitration Act"). The arbitration hearing commenced in October 1999 and only concluded some five years later. In the course of these protracted proceedings, a copious amount of documents, plans, technical drawings and correspondence was tendered and scrutinised by the arbitrator. The plaintiff was dissatisfied with the arbitration award dated 26 November 2004 ("the First Award") and duly filed an application on 6 April 2005 seeking leave to appeal on numerous purported questions of law arising out of the First Award.

3 In support of its application seeking leave to appeal against the First Award, the plaintiff relied on a montage of variegated arguments. This included various purported failures by the arbitrator to consider relevant facts in addition to his alleged misapplication of certain legal principles. The plaintiff even went as far as to charge the arbitrator with professional misconduct for his purported omission to consider relevant evidence.

4 After a careful consideration of the parties' submissions, I remitted only three issues ("the remitted issues") to the arbitrator for further consideration. The arbitrator was directed to respond by way of a reasoned award. I had meticulously assessed the plaintiff's arguments in relation to the remaining issues ("the remaining issues") and concluded that they were unmeritorious and entirely undeserving of further reconsideration. I nevertheless directed that the remaining issues be deferred for further directions until such time as the arbitrator was able to deliver his decision on the remitted

issues. Such a provision was intended to embrace (as a precaution) any potential impact on the remaining issues that might arise from the reconsideration of the remitted issues. It is noteworthy that paragraph 5 of the terms of the remission to the arbitrator required him to consider whether any aspect of the First Award "need … be re-addressed as a consequence of the remission" of the remitted issues to him. This particular term was inserted into the terms of remission at the insistence of the plaintiff. The plaintiff did not appeal against my order and both parties duly made submissions to the arbitrator on the remitted issues.

5 The arbitrator issued his decision on the remitted issues on 28 September 2005 ("the Second Award"). In the Second Award, he reaffirmed his original decision on each of the remitted issues. As a condition for releasing the Second Award, he directed that each of the parties pay a half share of his additional professional fees. The defendant paid its half share of the fees and obtained a copy of the Second Award on 22 December 2005. The plaintiff however took the view that s 23(3) of the Arbitration Act precluded the arbitrator from unilaterally fixing his fees and refused to make any payment in order to procure a copy of the Second Award. Notwithstanding such a stance, the plaintiff nonetheless neither referred the matter to the court for directions nor sought a hearing before the arbitrator for a ruling on either the appropriateness of such a condition or the quantum of his professional fees. It is noteworthy that s 36(1) of the Arbitration Act expressly provides:

> 36. — (1) If in any case an arbitrator or umpire refuses to deliver his award except on payment of the fees demanded by him, the court may, on an application for the purpose, order that the arbitrator or umpire shall deliver the award to the applicant on payment into court by the applicant of the fees demanded, and further that the fees demanded shall be taxed by the taxing officer and that out of the money paid into court there shall be paid out to the arbitrator or umpire by way of fees such sum as may be found reasonable on taxation and that the balance of the money, if any, shall be paid out to the applicant.

In short, despite a provision expressly dictating the procedure, the plaintiff plainly evinced no real desire or intention to resolve the impasse. It appeared to me that the plaintiff was quite content to have "stumbled" onto what it deemed unilaterally to be a procedural *cul-de-sac*.

6 It was the defendant who subsequently took the initiative and referred the matter to court for further directions. On 3 February 2006, I directed that the arbitrator file a Bill of Costs to justify his remuneration and further provided that neither party was obliged to pay any further sums to the arbitrator pending taxation. The defendant was also directed to immediately furnish a copy of the Second Award to the plaintiff. The defendant promptly complied.

7 On 13 April 2006, some 70 days later, the plaintiff filed an application seeking: (a) leave to appeal from my decision not to reconsider or allow reconsideration of the remaining issues; and (b) a one-month extension of time to file and serve an originating motion to appeal against the arbitrator's decision in respect of the Second Award.

8 I find the plaintiff's reluctance to clarify the issue of fees with any degree of diligence with either the arbitrator or the court troubling. No plausible explanation has been offered by either the plaintiff or its solicitors as to why no reasonable steps were duly taken to resolve the impasse on the fees. Was this just another passive attempt to further delay the resolution of the matter? It was not disputed by either party that an application to set aside an award under both the Arbitration Act and the applicable Rules of Court (Cap 322, R 5, 1999 Rev Ed) ("the Rules of Court") must be filed within 21 days of the award being made and published to the parties: see *Hong Huat Development Co (Pte) Ltd v Hiap Hong Co Pte Ltd* [2000] 2 SLR 609 ("*Hong Huat*") at [20]. Even assuming *arguendo* that the arbitrator was not entitled to demand the payment of his additional fees as a pre-requisite to the

release of the Second Award, the plaintiff should not have stood by silently. It could have paid the requisite fee under protest, contested the issue with the arbitrator, or immediately sought directions from the court. It appears to me that the plaintiff was entirely apathetic and failed to diligently resolve the procedural "impasse" with the arbitrator.

9 I am inclined to the view that even the plaintiff's categorical refusal to settle the arbitrator's fees is entirely misconceived. Section 25(3) of the Arbitration Act requires an arbitrator to whom a matter is 'referred' by a judge to have his remuneration in respect of *that* matter determined solely by the court. This power to *refer* is expressly conferred by s 22 of the Arbitration Act in certain very limited instances such as the examination of documents, scientific investigations and the settling of accounts. On the other hand, the remitted issues in the instant scenario were *remitted* (not *referred*) to the arbitrator for reconsideration under an altogether different scheme and judicial power pursuant to s 28(2) of the Arbitration Act. An arbitrator in such a situation is not, in my view, constrained by s 25(3) of the Arbitration Act.

10 In *Hong Huat*, the Court of Appeal determined that an award was made and published to the parties pursuant to O 69 r 4(2) of the Rules of Court as soon as the parties were notified by the arbitrator that the award was ready for collection and not when the parties had actual sight of the contents of the award. This principle, if applied literally, would mean that the 21-day period stipulated by O 69 r 4 of the Rules of Court expired on 19 October 2005, some three months before the plaintiff had actual sight of the Second Award. This, the plaintiff now asserts, is neither right nor fair. I am not inclined to show any sympathy to the plaintiff's plea as it could quite easily have redressed the situation by taking one or more of several measures as outlined in [8]. It appears to me that the plaintiff's conduct leaves much to be desired, both in substance and in spirit. I can do no better than to adopt the observations of the Court of Appeal in *Hong Huat* (([8] *supra*) at [25]) when it expanded on the pragmatic policy reasons underpinning the notice rule:

> … In our opinion, *the notice rule is to be preferred as it ensures prompt action and does not depend on the will of the parties. To hold otherwise would be inconsistent with the legislative policy underlying the reference to arbitration, namely, the expeditious resolution of arbitrated disputes and the need for finality*. In a case where extenuating circumstances exist, the parties are at liberty to apply for an extension of time. Obviously, whether extension should be granted in a particular case would have to depend on how meritorious the grounds are. [emphasis added]

11 In *Hong Huat*, the Court of Appeal further held that the same discretionary considerations ought to be applied in assessing the merits of granting leave whether it is in respect of an application appealing against an award made outside the stipulated period or in respect of the filing of a notice of appeal out of time. These considerations have been aptly summarised in the following passage in *Pearson v Chan Chien Wen Edwin* [1991] SLR 212 at [2]:

> (2) The extension of time was a question of discretion. The factors the court would consider were: (a) the length of the delay; (b) the reasons for the delay; (c) the chances of the appeal succeeding if time for appealing was extended; and (d) the degree of prejudice to the would-be respondent if the application was granted. It was *particularly important to* consider the chances of the appeal succeeding as it would be a waste of time for all concerned if time was extended when the appeal was utterly hopeless. [emphasis added]

More recently in *Lai Swee Lin Linda v Attorney-General* [2006] 2 SLR 565, the Court of Appeal noted (at [45]):

> ***… When applying these factors, the overriding consideration is that the Rules of Court***

must prima facie be obeyed, with reasonable diligence being exercised: see the Privy Council decision of *Thamboo Ratnam v Thamboo Cumarasamy and Cumarasamy Ariamany d/o Kumarasa* [1965] 1 WLR 8 ("*Ratnam v Cumarasamy*") at 12 and the Singapore High Court decision of *Tan Chai Heng v Yeo Seng Choon* [1980-1981] SLR 381 at 382, [5]. ***This court has also pointed out, in The Melati [2004] 4 SLR 7 at [37] that the "paramount consideration" is the need for finality***. It should be borne in mind, in this regard, that the would-be appellant has already "had a trial and lost": see *Ratnam v Cumarasamy*, *supra* at 12. Hence, if no appeal is filed and served within the prescribed period (here, of one month), the successful party is justly entitled to assume that the judgment concerned is final: see *Ong Cheng Aik v Dayco Products Singapore Pte Ltd*, *supra* at [8]. [emphasis added in bold italics]

12 In its written submissions to the court, the plaintiff gave only the following bare reason for the delay in seeking leave:

> The circumstances surrounding the publication of the Second Award was not caused by the Applicant as it is clear under s 23(3) of the Arbitration Act (Cap 10) 1985 Revised Edition that the Judge had the power to determine the remuneration of the Arbitrator where issues were remitted to the Arbitrator and the Arbitrator was wrong to demand payment of his fees for the Second Award as a condition to extending a copy of the Second Award to the parties.

It further insisted adamantly in its submissions that:

> The delay was not attributable to [the] Applicant as it was the Arbitrator who insisted on payment of his fees before extending a copy of the Second Award to the parties.

In his oral submissions, counsel for the plaintiff diffidently submitted for the first time that the delay between 3 February 2006 and 13 April 2006 (see above at [6] and [7]) was attributable to the time needed to review the Second Award. I find this an astonishing submission given that the Second Award is a rather sparsely worded 15-page document.

13 If one were to consider the date of the publication of the Second Award as 28 September 2005, the present application filed by the plaintiff would then be some six months out of time. I am constrained to observe that the excuses tendered by the plaintiff's solicitors for refusing to resolve the arbitrator's fees are entirely unconvincing. Even if a charitable view of the plaintiff's intransigent conduct is taken and one assumes for the sake of argument that the plaintiff was entitled to have sat back nonchalantly and to have refused point-blank to pay the arbitrator his fees, the fact remains that it has offered no plausible explanation whatsoever why it failed to promptly file this application seeking an extension of time even after it received the Second Award on 3 February 2006. The plaintiff only filed the application on 13 April 2006, some 70 days later (see above at [7]). This translates into a delay of 49 days. Why did the plaintiff take such an unduly and inordinately long period of time to determine which course of action it intended to pursue to preserve its rights? I have no choice but to construe plaintiff's counsel's attempt to attribute the delay to the time needed to review the Second Award as an afterthought and an entirely implausible excuse. Moreover, it was an excuse neither mentioned nor particularised in the plaintiff's supporting affidavit. In *AD v AE* [2004] 2 SLR 505 ("*AD v AE*"), the Court of Appeal described a delay of 49 days in serving a notice of appeal as "a very substantial delay". I respectfully agree with such an observation.

14 Turning now to the remaining discretionary factors adverted to above (at [12]), it appears that none of them really assists the plaintiff to any extent. As the Court of Appeal in *AD v AE* observed (at [13]), these factors are, in reality, merely "qualifying factors". While I cannot say that the plaintiff's application for leave to appeal is entirely hopeless, I can say without diffidence that the

plaintiff has not made out a *prima facie* case for leave on the merits. It should also be pointed out that in matters where the merits of the application for leave to appeal, *ie*, here, the remaining issues, have been reviewed by a court, then the 'right' to appeal to the Court of Appeal has been severely circumscribed by s 28(7) of the Arbitration Act. All said and done, while the prospects of an appeal succeeding on the remaining issues are not hopeless they are nevertheless somewhat remote. I accept that the question of prejudice in the circumstances of this case is not in issue since the defendant has not adduced any positive evidence pointing to prejudice having accrued. This factor must nevertheless be evaluated against the backdrop of arbitration proceedings that both parties had consented to from the very outset. Hobhouse J observed in *International Petroleum Refining & Supply Sdad Ltd v Elpis Finance S.A.* [1993] 2 Lloyds Rep 408 ("*The Faith*") at 411:

> *… But all this was to be viewed against the fundamental principle that the parties have chosen their tribunal, that is to say, the arbitral tribunal, and have agreed to be bound by the decision of that tribunal. They have agreed that the award is to be final, subject always to any question of jurisdiction.*
>
> *Courts will only interfere with the decision of arbitrators within very carefully controlled limits. One of those limits is the time within which the matter may be brought before the Court. If it is not brought before the Court within the 21 days then an award made with jurisdiction becomes effectively final for all purposes*. This applies both ways, it applies to both parties. So, following the publication of an award, each party has to make up its mind whether it wishes to take up the award within 21 days. In making that choice they no doubt have regard to both their own position and that of the opposite party. It must be always borne in mind that the purpose of an application to the Court is that the party so applying may obtain at the end of the exercise a different award from that which has originally been made by the arbitrators.
>
> [emphasis added]

These observations were heartily endorsed by the Court of Appeal in *Hong Huat.* It stands to reason that any power of the court, including that to extend timelines, should always be exercised in the context of the relevant factual matrix.

15 I am inclined to surmise based on a holistic consideration of all the factors that there is an insufficient basis to exercise any discretion to extend time in favour of the plaintiff. This is a matter that has dragged on tediously for a considerable period of time. There must be finality in bringing closure to this long and drawn out saga.

Conclusion

16 While the courts have an unfettered discretion to extend time in cases where it is just to do so, this discretion must be exercised in accordance with the principles and policies underpinning the concept of arbitration: see, for example, *The Faith* ([14] *supra*) at 411; *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724. It must also be emphasised that where parties voluntarily allow the time limit to expire not marginally but *very substantially*, a party should not be allowed, save in exceptional circumstances, to challenge the finality of the award. The fundamental agreement of the parties is the same as the policy of the law, *ie*, that an award made with jurisdiction should be final: see *The Faith* ([14] *supra*) at 412.

17 It is evident that the plaintiff was quite content not to prosecute this matter diligently as it had incurred a liability to pay a substantial sum to the defendant pursuant to the First Award. In its attempt to challenge the First Award it sought to raise several unmeritorious issues, *ie,* the remaining

issues. I can only infer from the plaintiff's conduct that it has, since the issuance of the Second Award, employed every legal strategy available either by omission and/or commission to deprive the defendant of the fruits of litigation. This should no longer be tolerated or permitted. Extensions for time to file applications for leave to appeal against an arbitration award should be scrupulously assessed so as never to detract from the parliamentary policy of promoting finality in arbitration awards. The longer and more inappropriate the delay the more reluctant the courts should be in acceding to such applications.