Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd [2009] SGHC 237

Case Number : OS 894/2008, RA 409/2008

Decision Date : 22 October 2009

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Melvin Chan and Debby Lim (TSMP Law Corporation) for the applicant; Soh Lip San and Sim Chee Siong (Rajah & Tann LLP) for the respondent

Parties : Chip Hup Hup Kee Construction Pte Ltd — Ssangyong Engineering & Construction Co Ltd

Building and Construction Law – Dispute resolution – Alternative dispute resolution procedures

22 October 2009

Judith Prakash J:

Introduction

1 Whilst this matter came before me as an appeal from the decision of an assistant registrar ("the AR"), it had its genesis in an application for an adjudication under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the SOP Act"). There have, so far, been three hearings in relation to the dispute and since my decision which upheld the decision below is, in turn, being appealed against to the Court of Appeal, there will be a fourth hearing in due course. The SOP Act was intended to provide a speedy process for interim settlement of payment claims in the construction industry but this matter provides an example of how in some cases, the process can be prolonged and expensive.

2 The parties to the adjudication application were Chip Hup Hup Kee Construction Pte Ltd ("the claimant") and Ssangyong Engineering & Construction Co Ltd ("the respondent"). The respondent is the main contractor for the construction works for the hotel portion of the Marina Bay Sands Integrated Resort construction project. In September 2007, it appointed the claimant as its subcontractor for the reinforced concrete structural works of the hotel.

Adjudication Application

3 The claimant started work and thereafter from time to time it issued and served progress claims in respect of the work that it had done. On 21 April 2008, the claimant served Progress Claim No 5 for the sum of $1,616,207.149 ("Progress Claim 5") on the respondent. Under s 11 of the SOP Act, the respondent had the option of responding to the payment claim by paying the claimed amount by the due date or (if it objected to payment in full or in part) by providing a payment response within 21 days of service of Progress Claim 5. The respondent did not pay the claim nor did it submit a payment response by the deadline which was 12 May 2008, being 21 days after the service of Progress Claim 5. The seven day period after 12 May 2008 was regarded, under s 12 of the SOP Act, as a dispute settlement period and during this period a payment response could have been served. On 17 May 2008, the claimant reminded the respondent to provide its payment response but none was received by 19 May 2008, the end of the dispute settlement period.

4 On 22 May 2008, the claimant served on the respondent a Notice of Intention to Apply for Adjudication as required by s 13(2) of the SOP Act. On the same day, the claimant submitted its Adjudication Application for Progress Claim 5 under s 13(1) of the SOP Act to the Singapore Mediation Centre ("SMC") as the authorised nominating body. On the next day, two things happened. First, the SMC served a copy of the Adjudication Application on the respondent and informed the latter that a response to the same had to be lodged within seven days. Second, the respondent provided its payment response, a document entitled Payment Certificate No 5.

5 On 29 May 2008, the SMC appointed Mr Goh Phai Cheng as the Adjudicator ("the Adjudicator") for the case. The respondent's Adjudication Response was filed on 30 May 2008. Attached to the same were various documents including Payment Certificate No. 5 and various annexes thereto. Thereafter, various submissions were made and documents furnished to the Adjudicator and there was an adjudication conference on 13 June 2008 at which the parties, represented by their respective solicitors, appeared before the Adjudicator.

6 In the meantime, the parties had continuing disputes over site issues. The subcontract was terminated some time in early May or early June 2008 and there was a dispute over who had repudiated the subcontract.

7 The Adjudicator issued his adjudication determination (the "Determination") on 25 June 2008. He stated that the following issues had arisen in the adjudication:

(a) Whether s 15(3) of the SOP Act precluded the Adjudicator from considering the respondent's payment response to Progress Claim 5 and the reasons given by the respondent for withholding the amounts due to the claimant which were contained in the respondent's Adjudication Response and the documents served with it; and

(b) Whether the Adjudicator had jurisdiction to deal with the adjudication when the subcontract between the parties had been terminated.

8 In relation to the first issue, the Adjudicator cited the provisions of s 15(3) of the SOP Act and also referred to the definition of "payment response" in s 2 thereof.

9 Having considered the arguments, the Adjudicator held as follows:

> 31. I do not accept the Respondent's contention that section 15(3) allows them to include in their Adjudication Response the reasons for withholding payment when those reasons had earlier been communicated to the Claimant. The language of section 15(3)(a) is clear and unambiguous. It refers to "*reason(s) included in a relevant payment response provided by the respondent to the claimant*". The reasons given by a respondent in a payment response to an earlier progress claim do not fall within the meaning of the expression "*reasons(s) included within a relevant payment response"* in section 15(3)(a). In my view, a "relevant payment response" for the purposes of section 15(3)(a) must be a payment response to a payment claim submitted by a claimant which is the subject of an adjudication application. Such a construction is in fact supported by section 11(3) of the Act which requires a payment response provided in relation to a construction contract by a respondent to identify the payment claim to which it relates. In our instant case, the payment claim submitted by the Claimant was their Progress Claim No. 5 and since no payment response was given by the Respondent pursuant to either section 11(1) or 12(4) of the Act to the Claimant's Progress Claim No. 5, I am therefore precluded by section 15(3) of the Act for considering the reasons given by the Respondent in their Adjudication Response.

10 The Adjudicator concluded at para 41 of the Determination that as there was no valid payment response from the respondent and as s 15(3) directed him not to consider any reason for withholding payment included in the respondent's Adjudication Response, where such reason was not included in a valid payment response, he accepted the claimant's valuation of the work done for Progress Claim 5 and the outstanding amount of that claim.

11 In relation to the second issue, the Adjudicator rejected the argument put forward by the respondent that the parties' rights under the SOP Act were premised on the continued subsistence of the construction contract between the parties, and, therefore, if such a contract were to be terminated, there would no longer be any basis for an adjudicator to proceed with an adjudication. He held that under the SOP Act, he had jurisdiction to deal with an adjudication application under the legislation even though the contract between the parties had been terminated because a valid contract had existed and this was not a case where the contract had been rescinded or never existed at all.

12 In the adjudication application, the claimant had claimed an outstanding amount of $1,103,101.49 under Progress Claim 5. The claimant explained to the Adjudicator that this amount had been arrived at after allowing payments and deductions made by the respondent after the submission of Progress Claim 5 (which had been initially for $1,616,207.15). The Adjudicator accepted that the sum of $1,103,101.49 ("the adjudication amount") was due to the claimant under Progress Claim 5 and determined that the adjudication amount was due and payable on 16 June 2008.

The court proceedings

13 The respondent did not pay any part of the adjudicated amount by 16 June 2008. On 3 July 2008, the claimant filed the originating summons herein in order to obtain leave of court to enforce the adjudication determination in the same manner as an order of the court. This application was granted shortly thereafter.

14 On 23 July 2008, the respondent filed summons 3242 of 2008 under s 27 (5) of the SOP Act ("SUM 3242") and paid the unpaid portion of the adjudicated amount into court as security as required by the provision. The summons prayed that:

(a) the Determination be set aside and a fresh adjudication be fixed; and

(b) the order of court granting leave to the claimant to enforce the Determination in the same manner as a judgment or order of court be set aside.

At this stage, the respondent was still represented by the same solicitors who had acted for it in the adjudication application.

15 The basis on which the respondent argued before the AR that the Determination should be set aside was that the Adjudicator had been wrong to interpret s 15(3) of the SOP Act to completely exclude all aspects of the respondent's case, and that such an interpretation constituted a failure to carry out his quasi-judicial responsibilities to ensure that justice was done. In particular, he had failed to comply with his obligations to abide by the rules of natural justice as required under s 16(3) of the SOP Act. In the result, the AR rejected the respondent's arguments. I will summarise his holdings which are set out in his judgment dated 24 September 2008 (the "GD").

16 In relation to the issue of whether the Adjudicator was right not to have considered the respondent's reasons for withholding payment, the AR considered that the respondent was making a two-pronged argument. The first prong was that s 15(3) of the SOP Act ought to be interpreted in such a manner as to oblige the Adjudicator to consider the respondent's reasons for withholding payment. The second prong was an argument that other provisions of the SOP Act, in particular s 16(7), obliged the Adjudicator to consider all the documents and information available to him, which would include Payment Certificate No 5, the Adjudication Response and the submissions made thereon.

17 Following a similar reasoning process as the Adjudicator, the AR first had to consider whether Payment Certificate No 5 constituted a "payment response" within the meaning of s 15(3). As far as material, this section provides:

15 –

(3) The respondent shall not include in the adjudication response, and the adjudicator shall not consider, any reason for withholding any amount, including but not limited to any cross-claim, counterclaim and set-off, unless –

(a) where the adjudication relates to a construction contract, the reason was included in the relevant payment response provided by the respondent to the claimant; or

(b)…

He also noted that a "payment response" is defined in s 2 of the SOP Act as (in relation to a construction contract) "a response to a payment claim made by a respondent under section 11(1) or 12(4)" and that both of these provisions deal with the specific timelines within which a payment response may be provided. Having considered these timelines, the AR held that a payment response would be a response that was made during either of these two periods. In this case, as the Adjudicator himself had noted, Payment Certificate No 5 was only issued after the expiry of both periods. Therefore, it could not be a payment response and a plain reading of s 15(3) supported the Adjudicator's decision not to consider at all any of the respondent's reasons why it withheld payment.

18 The respondent argued before the AR that s 15(3) should not be interpreted in the aforesaid manner because such an interpretation would be inconsistent with natural justice and deprive it of an

opportunity to have its case heard. Instead, the respondent argued, the proper interpretation of s 15(3) would be to confine it to cases where a payment response had been tendered. The AR accepted that there is an obligation to read the SOP Act in accordance with the rules of natural justice, noting that adherence to those rules is prescribed in s 16(3)] of the SOP Act itself. However, the literal reading of s 15(3) clearly supported the Adjudicator's decision. Further, he considered that the purposive interpretation also supported that decision.

19 The AR recognised that the purpose of the SOP Act was to provide a speedy and low cost adjudication process in respect of payment disputes in the construction industry so as to facilitate the cash flow of the parties involved. He also noted that the adjudication process was "an intervening provisional stage in the dispute resolution process" (per Dyson J in *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] CLC 739 at [14]) and that the efficiency of the process placed time pressure on every party involved: the claimant, the respondent and the Adjudicator himself. He considered that it was:

> the very objective of the SOP Act to have strict deadlines which encourage parties to make their respective cases known to the other side as early as possible. Allowing a respondent who has not provided its reasons for withholding payment in a recognised payment response will in effect mean that there is no penalty, perhaps apart from costs, [for] ignoring the deadlines"

(see [55] of the GD). Further if s 15(3) were to apply only to respondents who did tender a payment response, it would result in the unfair situation where such respondents were in a worse position than respondents who did not tender any response at all.

20 The AR also considered that the interpretation given to s 15(3) would not render the adjudication process contrary to natural justice in that it deprived the respondent of a fair opportunity to be heard. He stated at [75] – [76] of the GD:

> 75 … natural justice requires that a respondent be given a fair *opportunity* to be heard. There is no requirement that in every case a party is actually heard and it is entirely possible for a party to forfeit his right to be heard through some procedural default. In the instant case, it is clear that the SOP Act does afford a respondent the opportunity to be heard. In regard to the hearing of a respondent's reasons why payment was withheld, the SOP Act specifies that such hearing is contingent on the reasons being provided in the payment response tendered within certain timelines. What has really happened in this case was that the Respondent chose not to avail itself of the opportunity to be heard on its reasons for withholding payment.
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> 76 But even if a respondent who failed to submit a payment response is not allowed to put forward its reasons why it withheld payment, it does not follow that it would be denied any sort of hearing at all. Quite unlike what the Respondent sought to suggest, it is not the case that the adjudication process becomes a mere rubber-stamping exercise in favour of the claimant. The adjudicator is still obliged to exercise his discretion in a number of matters which a respondent is fully entitled to raise.

21 The next issue was whether other provisions in the SOP Act required the Adjudicator to give consideration to Payment Certificate No 5 and the reasons contained therein. The respondent relied on s 16(7) of the SOP Act which states

16. – …

(7) An adjudicator's power to determine an adjudication application is not affected by the failure of –

(a) the respondent to provide a payment response or lodge an adjudication response; or

(b) any of the parties to comply with the adjudicator's call for a conference of the parties or any other requirement made or direction issued by the adjudicator,

and in the event of any such failure, the adjudicator may determine the application on the basis of the information and documents available to him.

The respondent's argument was that this provision directed the Adjudicator to give his consideration to whatever documents and arguments were before him. In the instant case, even if the respondent was prohibited from raising its reasons for withholding payment, the Adjudicator still ought to have considered Payment Certificate No 5 and the reasons contained therein as well as the arguments raised at the hearing.

22 The AR rejected this submission. His holding at [87] of the GD was as follows:

87 I do not accept this argument. In the first place, the provision is clearly permissive rather than mandatory. Furthermore, its obvious purpose was to enable an adjudicator to continue with the adjudication despite any attempts to hold up the process by any party. It does not compel the adjudicator to give consideration to any matter not contained in s 17(3) of the SOP Act. The learned author of *Security of Payments and Construction Adjudication* (above at [33]) explains at p 370:

> The intent of this subsection, no doubt, is that an adjudicator may proceed with the adjudication in the face of such non-compliance and the adjudication determination may not be impeached merely on the basis that the adjudicator proceeded without the particular submission or information being received by the adjudicator or the attendance of one of the parties at the conference.

23 I have dealt with the AR's reasons for his rejection of the respondent's submissions and his refusal to set aside the Determination at some length since there has not been much judicial consideration to date of the provisions of the SOP Act and therefore the AR's reasoning is useful for parties in the construction industry. Further, having studied the same, I could find no fault with his conclusions on the correct interpretation of the relevant statutory provisions.

The appeal

24 Shortly after the AR rendered his decision, the respondent changed its solicitor. Its new solicitor filed a notice of appeal and, subsequently, a further affidavit on behalf of the respondent. This affidavit was made by the respondent's engineering team manager, Kim Jin Soo, and was filed on 24 October 2008. Mr Kim averred that in addition to the reasons that had been given prior to the AR's decision, the respondent had been advised that the Determination ought to be set aside on the ground that the Adjudicator had no jurisdiction to adjudicate on the application because:

(a) The claimant had failed to serve on the respondent a valid payment claim under the SOP Act; and

(b) The claimant had claimed items which fell outside the scope of the SOP Act and this had rendered the purported payment claim invalid.

When the appeal came on for hearing in April and May this year, the above ground was the main ground of the appeal although the respondent also argued that the Adjudicator had wrongly interpreted s 16(7) of the SOP Act and the AR was incorrect in holding that in instances where there was no payment response, an adjudicator must accept a payment claim at face value without satisfying himself as to the proof of the payment claim.

25 The claimant, apart from making substantive arguments in reply to the respondent, also raised the issue of whether the respondent was entitled to challenge the Determination by disputing the validity of the payment claim and/or the Adjudicator's jurisdiction when these questions had not been previously raised in either the adjudication proceedings or before the AR. As this was a preliminary issue I had to consider it first before proceeding to the substantive issues.

Was the respondent entitled to raise new grounds on the appeal?

26 The respondent submitted that there was no restriction on the ground upon which the court could set aside the Determination. The SOP Act contained no provision which prescribed or limited the bases on which an adjudication determination could be set aside. The only section of the Act dealing with such setting aside was s 27(5) and that provision simply required the applicant to pay into court the unpaid adjudication amount.

27 In this case, the respondent said, the primary thrust of its objections to the Determination related to the Adjudicator's jurisdiction as opposed to objections to his findings in the Determination. Thus, the respondent could rely on authorities where appellants were permitted to raise arguments about jurisdiction at the appeal stage even though such arguments had not been raised at earlier stages of the proceedings. The respondent cited in particular, *Koh Zhan Quan Tony v PP* [2006] 2 SLR 830 ("*Koh Zhan Quan Tony*") and the English case of *Contour Homes Ltd v Rowen* [2007] 1 WLR 2982 which concerned the jurisdiction of a tribunal set up under the UK Housing Act 1988.

28 In the latter case, Arden LJ made the following observations at [25] – [26] of her judgment:

> 25 The jurisdiction of a rent assessment committee is entirely statutory. *As a matter of law, statutory jurisdiction cannot, unless the statue so provides, be reduced or enlarged by parties by consent*. …
>
> 26 We are concerned here of course not with a court but with a tribunal, but by implication Parliament has provided that it is only to have jurisdiction to determine the rent if the landlord has served a notice complying with section 13(2), which can only be done where the tenancy complies with section 13(1). As neither of those requirements was, in my judgment, satisfied, *it was not possible for the parties to agree to confer jurisdiction on the Northern Rent Assessment Panel and likewise Contour could not, in my judgment, by analogy be estopped from denying that it did not have jurisdiction for those reasons*.
>
> [Emphasis added]

29 The respondent submitted that, similarly, the SOP Act had created a scheme in which the jurisdiction of the Adjudicator had been solely created by statute. As a result, an adjudicator appointed under the SOP Act could only have jurisdiction if the requirements of the legislation had been strictly complied with. Such jurisdiction could not be bestowed on the adjudicator by the consent of the parties, nor could the parties be estopped from arguing that jurisdiction did not exist. Accordingly, the respondent submitted, it was entitled to question the Adjudicator's jurisdiction at any stage.

30 The claimant, in responding to the respondent's arguments, drew to my attention various steps that the respondent had taken in the prior proceedings before the Adjudicator and the AR. These were:

(a) Payment Certificate No 5 and the Adjudication Response did not dispute the validity of Progress Claim 5 (the respondent's argument that Progress Claim 5 was an invalid document was the basis of its contention that the Adjudicator had no jurisdiction);

(b) In the adjudication proceedings, the respondent had proceeded on the basis that Progress Claim 5 was valid and the Adjudicator had jurisdiction to adjudicate the matter;

(c) The respondent did not dispute the validity of the Payment Claim or the jurisdiction of the Adjudicator;

(d) The respondent had specifically raised the issue of whether the Adjudicator could proceed with the adjudication in view of the fact that the contract between the parties had been terminated and by this submission, the respondent had accepted that, apart from determination of the contract, the Adjudicator did have jurisdiction;

(e) The respondent had filed a separate application in OS 930 of 2008 to stop the adjudication proceedings on the basis that the contract had been terminated;

(f) In SUM 3242 filed in these proceedings, the respondent had asked for the Determination to be set aside and for the claimant's adjudication application "to be fixed for a fresh adjudication" thus showing that it was not the jurisdiction that was challenged but the findings; and

(g) In the affidavits initially filed in support of SUM 3242, the issue of jurisdiction was not raised at all.

31 The claimant paid particular attention to the positions taken by the respondent in the first affidavit of Ahn Kook Jin which was filed in support of SUM 3242. It asserted that the respondent had taken the following positions in the same:

(a) It acknowledged that the claimant had served its payment claim dated 20 April 2008, which was the subject of the adjudication;

(b) It acknowledged the validity of the payment claim in conceding that it had to serve a payment response to the claimant's payment claim, and explained that its delay in doing so was simply due to "other pressing issues";

(c) It acknowledged the Adjudicator's jurisdiction to hear the matter by stating that the Adjudicator had failed to properly exercise his powers under s 16(3) and s 16(7) of the SOP Act; and

(d) In complying with O 95 r 3(1) of the Rules of Court (Cap 322, R5, 2006 Rev Ed) by stating the grounds on which it was contended that the Determination should be set aside, and not objecting to the validity of the payment claim or the jurisdiction of the Adjudicator, the respondent conceded that the payment claim was valid and the Adjudicator had jurisdiction.

32 I was satisfied on the above facts that the actions of the respondent both before the Adjudicator and before the AR were sufficient to establish a waiver of its right to challenge the Adjudicator's jurisdiction. This was because the facts subsequently raised by the respondent to challenge the jurisdiction (*ie* the alleged inadequacy of Progress Claim 5) must have been known to the respondent and its legal advisers if not at the time Progress Claim 5 was served then shortly thereafter. The question that I had to consider was whether such facts could be relied on in law to constitute a waiver.

33 In this connection, I had to consider *Koh Zhan Quan Tony* and certain authorities cited by the claimant to support its contention that objections to jurisdiction could be waived.

34 *Koh Zhan Quan Tony* was a criminal case. The applicants there had been charged with murder but at the end of the trial had been convicted of the lesser charge of robbery. On appeal by the prosecution, the applicants were convicted of the original charge of murder. The applicants then filed motions arguing that their convictions on the lesser charge had not amounted to acquittals and therefore the prosecution's appeal had fallen outside the language and the scope of s 44(3) of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) ("SCJA"). The prosecution (the respondent in the motions) opposed the motions arguing that the Court of Appeal ("the CA") did not have jurisdiction to hear the same. It was held, *inter alia*, that the CA had the jurisdiction and power to entertain the motions and that since no ruling had been handed down by the CA in so far as the issue of its jurisdiction to hear the prosecution's appeal was concerned, it was not *functus officio* on this particular issue. Although this issue ought to have been taken earlier as a preliminary point of law, such an objection from estoppel could not succeed in circumstances where the issue related to the CA's very jurisdiction itself.

35 In the course of his judgment on behalf of the CA, Andrew Phang Boon Leong JA stated at [13] and [19]:

13 However, the situation in the present proceedings was different in this important respect: this court was *not* being asked to re-open the *substantive merits* of its previous decision as such but, rather, was being asked to rule that this court could not even have considered (in Criminal Appeal No 2 of 2005) the substantive merits in the first instance *as it did not have the jurisdiction to do so*. In this regard, it is of the first importance to emphasise that the concept of *jurisdiction* is a *threshold* one inasmuch as it refers to the court's "authority, however derived, to hear and determine a dispute that is brought before it" …

19 To reiterate, what is involved in the present proceedings are Criminal Motions requesting this court to consider an issue of jurisdiction. These applications *ought, ideally, to have been raised and considered during the hearing of the appeal in Criminal Appeal No 2 of 2005 as a preliminary point of law as they relate to the threshold issue of jurisdiction*. Unfortunately, they were not. This is why the applications are before the court in the present proceedings. *At this juncture, it might be argued that there is no reason in principle why this court should be precluded from considering applications which could clearly have been argued and heard as a preliminary point of law during the hearing of the actual appeal in Criminal Appeal No 2 of 2005*. We find that there is indeed much force in such an argument, unless it could be argued that there was some principle of waiver or estoppel that precluded the applicants from making the present applications. Bearing in mind the fact that the present applications centre on the *jurisdiction* of this court to hear the appeal in Criminal Appeal No 2 of 2005 and *not* the *substantive merits* of the appeal itself, there would appear to be no real reasons of principle as to why the applicants should somehow be estopped or debarred from making the present applications. Indeed, there is clear legal authority that supports the view just proffered. It has been held that a party *cannot be estopped* from arguing that the earlier proceedings were conducted in excess of the jurisdiction of the court concerned …

[Emphasis in original]

36 The respondent also cited various academic texts to support the proposition that a statutory jurisdiction could not be increased or reduced by consent of the parties and that a party's ability to challenge jurisdiction could not be affected by waiver or estoppel. For example, in the text *Estoppel by Conduct and Election* (Thomson Sweet & Maxwell) by K R Handley, a Judge of the Court of Appeal of New South Wales, it is stated at para 15-012:

Statutory jurisdiction, unless the statute so provides, cannot be reduced or enlarged by consent or estoppel. If the facts are clear and the absence of jurisdiction apparent on the face of the proceedings an objection taken for the first time on appeal may be allowed, even in a court of final appeal.

Further, in *Sir William Wade and Christopher Forsyth, Administrative Law* (Oxford University Press 9th Ed, 2004) it is stated at p 237:

The most obvious limitation on the doctrine of estoppel is that it cannot be involved so as to give an authority powers which it does not in law possess … Nor can any kind of estoppel give a tribunal wider jurisdiction than it possesses.

37 The claimant on the other hand cited a number of cases which appear to show that parties can

waive their rights to object to jurisdiction. The first of these is *Parist Holdings Pty Ltd v Wt Partnership Australia Pty Ltd* [2003] NSWSC 365 ("*Parist*"). The claimant considered *Parist* particularly apposite because it was a decision of the New South Wales Supreme Court on the Building Construction Industry Security of Payment Act 1999 ("NSW Act") and the SOP Act is based on the NSW Act which in turn is based on the Housing Grants, Construction and Regeneration Act 1996 of the United Kingdom ("the UK Act").

38 In *Parist*, the defendant sought a declaration that the plaintiff must pay to it an adjudicated amount determined by an adjudicator in adjudication proceedings under the NSW Act. The plaintiff contended, *inter alia*, that the adjudicator had acted *ultra vires* in carrying out the adjudication and in making the determination and that therefore, the determination was a nullity. One ground of its argument was that the defendant's payment claim was invalid because it did not comply with the requirements of the relevant statutory provisions. The plaintiff submitted that as a consequence of the invalidity of the payment claim, the initiation and conduct of the statutory adjudication process was fatally flawed so as to deprive the adjudicator of jurisdiction to determine the amount to be paid. The plaintiff, however, had not put in issue the validity of the statutory payment claim when it appeared before the adjudicator. It only raised this issue when it filed its summons in the subsequent court proceedings.

39 The court held that because the plaintiff had not raised the issue of jurisdiction earlier and had instead participated in the adjudication process, it was no longer entitled to make this argument. Nicholas J said at [35]:

> 35 By its payment schedule dated 23 January 2003 the Plaintiff disputed the payment claim. In the course of the adjudication proceedings it invited the Adjudicator to determine the dispute in its favour by upholding its submissions in relation to the payment claim and accordingly holding that the amount payable to the Defendant was nil. The Plaintiff thereby availed itself of the benefit of the statutory process which enabled the speedy determination of the dispute which, had it been successful, would have relieved it of liability to pay the amount claimed. Its conduct evidences its submission to the jurisdiction of the Adjudicator to determine the amount, if any, payable under the payment claim whether or not it complied with the requirements of s 13(2). (Compare, for example, *Cowlin Construction Limited v CFW Architects (a firm)* [2002] EWHC 2914 (TCC) paras 59-67)

40 The case that Nicholas J referred to, *Cowlin Construction Limited v CFW Architects* [2003] BLR 241 ("*Cowlin*"), was a decision of the High Court of England where the issue was whether the adjudicator who had conducted an adjudication under the provisions of the UK Act had had jurisdiction to do so. The eponymous plaintiff in *Cowlin* had commenced the adjudication in question against the defendant, CFW, who had in turn served a "counter-notice" which addressed points made by the plaintiff in its notice of adjudication. Jurisdiction was challenged on the basis that first, there was no construction contract and, second, there was no dispute capable of being referred to adjudication. In relation to the challenge on jurisdiction, the judge held that by its counter-notice in the adjudication, CFW accepted that the adjudicator had jurisdiction to determine the terms of the contract. By so doing, CFW made its election at a time when it was represented by solicitors. CFW was bound by that election and had waived any right to object to the jurisdiction of the adjudicator. In this respect, the judge observed at [66] and [67]:

66. In *Sea Calm Shipping Co SA v Chantiers Navals de L'Esterel SA* [1986] 2 Lloyd's Rep 294, the court considered a case where a party sought to take a jurisdiction point in an arbitration very late in the day. Hirst J quoted from the judgment of Devlin J (as he then was) in *Westminster Chemicals* where a party had submitted to the jurisdiction of an arbitrator, then he was bound the award. In *Sea Calm*, Hirst J concluded that there had been positive affirmation of a contract and thus of an arbitration clause, and that the defendant was bound by that election. In this case, one of the elements of waiver summarised in *Sea Calm* was present, namely the unequivocal statement by CFW at an early stage that they accepted the adjudicator's jurisdiction. …

67. CFW made their election. At the time they did so, they were represented by solicitors. Hugh James had been acting for CFW for some time before Cowlin served their notice to adjudicate, as the correspondence demonstrates. Whilst the adjudication process is rapid, the questions whether there is a relevant contract between the parties and whether an adjudicator has jurisdiction would normally be at the front of the minds of those acting for parties. Hugh James must be taken to have understood the rapid nature of the adjudication process and that any challenge to jurisdiction must be taken at the earliest possible opportunity. CFW thus had sufficient knowledge to make an election to accept jurisdiction. Hugh James served the counter-notice on behalf of CFW. Hugh James continued to correspond with Lee Crowder and the adjudicator on the assumption that the adjudicator had jurisdiction. Hugh James indicated in the 28 September letter that the adjudicator may not have jurisdiction. They then made their objection to jurisdiction at the first formal opportunity, namely service of their response to Cowlin's notice of referral. Miss Jefford submits that, in circumstances where the adjudication process is rapid and often does not permit much time for a responding party to reflect on its position, it would be a harsh result if CFW were estopped from denying the adjudicator's jurisdiction or were found to have waived altogether their right to object, when they had raised their objection at a comparatively early stage. I accept that such a result might be harsh. However, it seems to me that must be the result: a court will generally conclude that, once a party has made an election, he is bound by it and has waived his right to object. I therefore conclude that having elected to affirm the adjudicator's jurisdiction and expressly sought decisions by the adjudicator, CFW waived its rights to object to the jurisdiction of the adjudicator. CFW could not go back on that election. Accordingly, Mr Harris had jurisdiction to decide the matters which he dealt with.

4 1 *Cowlin* was cited with approval in the subsequent English case of *AC Yule & Son Limited v Speedwell Roofing & Cladding Limited* [2007] BLR 499 where the court noted at [21] that:

… courts have in the past criticised the conduct of a party in adjudication who has failed to bring a fact or issue to the attention of the other side, or to the adjudicator, in circumstances where, much later in enforcement proceedings, that party has sought to rely on that fact or issue to argue that the decision was unenforceable. For example, in *Cowlin* … [it was] held that a party to adjudication who put in a counter-notice thereby accepted that the adjudicator had the necessary jurisdiction and could not later object to his decision on the grounds that he lacked jurisdiction. Similar points can be found in a number of other TCC cases in which the judges have made it plain that, once a party has acknowledged the jurisdictional role of the adjudicator at any early stage, that party cannot seek to go behind that acceptance later on once the adjudicator has produced a decision which they do not like.

42 It is also noteworthy that the passage cited from *Estoppel by Conduct and Election* ([36] supra) by the defendant comprised the last two sentences of a passage from the text which recognised that objections to jurisdiction may be waived. I quote therefore the full contents of para 15-012:

Jurisdiction

> A defendant sued in an inferior Court, who knew he could object to its jurisdiction, but contested on its merits, was refused prohibition after judgment. A defendant, sued in the wrong County Court jurisdiction if he did not object, sought prohibition when the case was part heard, but was held waived the objection. "A party to litigation who has failed to object that a condition attaching to the of jurisdiction has not been satisfied … may, by reason of his subsequent participation in the proc precluded from later raising the defect". If a person entitled to diplomatic immunity commences pro contests proceedings on the merits he waives his immunity and the Court has jurisdiction, but the cannot be enforced while diplomatic immunity subsists. Statutory jurisdiction, unless the statute s cannot be reduced or enlarged by consent or estoppel. If the facts are clear and the absence of apparent on the face of the proceedings an objection taken for the first time on appeal may be all in a court of final appeal.

All the statements about the findings of waiver were fully supported by reference to decided cases listed in the footnotes of the text.

43 Considering the authorities cited by each party, it appeared at first that they could not be reconciled. On the one hand, it was declared by high authority that parties could not be estopped from contesting jurisdiction and, on the other hand, there were numerous cases in which exactly that seemed to have happened. There was, however, an answer to the quandary and it was provided by the claimant. The claimant pointed out that the confusion arose from the way in which the word "jurisdiction" was used by the respondent. Agreeing that parties could not confer or waive "jurisdiction" as explained in the authorities cited by the respondent, the claimant averred that that was the case when "jurisdiction" was used in its narrow meaning of "competence to hear". When "jurisdiction" was used in a wider sense, *ie*, in reference to the manner in which the court's power was exercised then waiver or estoppel could be relied on. The distinction between the two meanings of the word appears clearly from the following passage of the judgment of Deane J in *Then Kang Chu v Tan Kim Hoe* [1925] SSLR 4:

> By the jurisdiction of a Court is meant the authority which the Court has to decide matters litigated before it or to take cognizance of matters presented in a formal way for its decision. Its limits are defined in the Statute, Charter or commission constituting the Court and must be sought for there.
>
> …
>
> The last point to be dealt with is the argument that defendant having appeared in the lower Court and taken no objection to the jurisdiction is thereby estopped from pleading to it. The principles governing the application of estoppel in such cases are well stated in Spencer Bower on "Estoppel by Representation" at page 187, "Even the most plain and express contract or consent, a fortiori, therefore, any mere conduct or inaction or acquiescence, of a party litigant from which a representation may be implied, such as to give rise to an estoppel, cannot confer judicial authority on any of His Majesty's subjects not (18) already invested with such authority by the law of the land, or add to the jurisdiction lawfully exercised by any judicial tribunal". … On the other hand, "where it is merely a question of irregularity of procedure, or of a defect in 'contingent' jurisdiction or non-compliance with statutory conditions precedent to the validity of a step in the litigation, of such a character that, if one of the parties be allowed to waive, or by conduct or inaction to estop himself from setting up such irregularity or want of 'contingent' jurisdiction or noncompliance, no new jurisdiction is thereby impliedly created, and no existing jurisdiction is thereby impliedly extended beyond its existing boundaries, the estoppel will be maintained, and the affirmative answer of illegality will fail".

44 Thus, it seemed that when what was being alleged was an absolute lack of jurisdiction on the part of a particular tribunal or court to hear a particular dispute, "jurisdiction" being used in the strict sense of capacity to hear, then if the tribunal concerned does not have such jurisdiction, any party to the dispute may assert the lack of jurisdiction at any stage and can never be held to be estopped from doing so or to have waived its right of protest. On the contrary, when it is a question of irregularity of procedure or contingent jurisdiction or non-compliance with a statutory condition precedent to the validity of a step in the litigation, such irregularity or non-compliance can be waived because the effect of the waiver would not be to create or confer any jurisdiction that did not previously exist.

45 It therefore appeared to me that I could not answer the preliminary question of whether the respondent was entitled to raise its challenges to jurisdiction until I determined whether or not such challenge related to competence to hear or only to the exercise of the jurisdiction. I therefore had to consider the substantive question in order to determine the preliminary point.

Did the Adjudicator have jurisdiction to adjudicate on the adjudication application?

46 The respondent contended that Progress Claim 5 was not a valid payment claim under the SOP Act and therefore the Adjudicator did not have jurisdiction to adjudicate on the adjudication application. For the sake of the argument, I proceeded on the assumption that Progress Claim 5 was not valid. Before, however, I discuss the arguments, I should summarise the relevant provisions of the SOP Act.

47 First, s 5 states that any person who has carried out any construction work under a contract is entitled to a progress payment. A person who is entitled to a progress payment may make a claim for such payment by serving a payment claim under s 10 of the SOP Act. Section 10(1) provides that a

claimant may serve a payment claim in respect of a progress payment on the other person who, under the contract concerned, is or may be liable to make the payment. The other sub-sections of s 10 provide for the time of service of a payment claim and the particulars which it must include. Once a payment claim has been served, the respondent must respond by providing a payment response in accordance with s 11. Under s 12(2) where the claimant disputes a payment response or the respondent fails to provide a timely payment response, the claimant is entitled to make an adjudication application under s 13 in relation to the payment claim if, by the end of the dispute settlement period, the dispute is not settled or no payment response comes in.

48 Part IV of the SOP Act is entitled "Adjudication of Payment Claim Disputes" and contains the procedure relating to adjudication determinations. Section 13(1) empowers a claimant to apply for the adjudication of a payment claim dispute by lodging the adjudication application with an authorised nominating body and this application must, under sub-s (3)(c) contain such information or be accompanied by such documents as may be prescribed. The authorised nominating body upon receipt of the adjudication application must, pursuant to s 14(1), refer the adjudication application to a person who is on the register of adjudicators and whom the authorised nominating body considers to be appropriate for appointment as the adjudicator. Sub-section (2) entitles the nominee adjudicator to agree or decline to determine the adjudication application. If he accepts, then the authorised nominating body must pursuant to sub-s (3) serve a notice in writing confirming the appointment of the adjudicator on *inter alios* the claimant and the respondent.

49 Section 16 is important. Section 16(1) provides that an adjudication commences immediately upon the expiry of the period of seven days specified in s 15(1) within which the respondent may lodge an adjudication response. Section 16(2) provides that the adjudicator shall reject any adjudication application that is not made in accordance with sub-ss 13(3)(a), (b) or (c) and any adjudication response that is not lodged within the prescribed period. Section 16(3) directs the adjudicator to act in accordance with principles of natural justice and s 16(4) sets out the specific powers of the adjudicator in conducting the adjudication. The other sub-sections of s 16 deal with other procedures relating to the adjudication.

50 The respondent's argument went as follows. The right to adjudication under the SOP Act only arises when a claimant serves a proper payment claim on the respondent. The respondent would, reading sections 10 and 11 of the SOP Act together, only be obliged to serve a payment response when a valid payment claim has been submitted. Section 12(2) of the SOP Act only allows the claimant to make an adjudication application under s 13(3) in relation to a relevant "payment claim" and this must be a payment claim which complies with the definition in s 2. If a payment claim is not a "payment claim" within the meaning of the Act, s 12(2) does not apply and the claimant cannot make an adjudication in relation to that claim. For a party to be entitled to relief by way of an adjudication under the SOP Act, that party must comply with all the requirements therein.

51 The language of s 10(2)(a) of the SOP Act clearly mandates that a payment claim *shall* be served "at such time as specified in or determined in accordance with the terms of the contract". From the strict and mandatory wording of s 10(2)(a), it is evident that prompt submission of the payment claim in accordance with the requirements of the SOP Act is a jurisdictional fact that must be established in order for a valid adjudication determination to be made.

52 Further, under reg 7(2)(d) of the Building and Construction Industry Security of Payment Regulations (Cap 30B, RGI 2006 Rev Ed) read with s 13(3)(c) of the SOP Act, an adjudication application *shall* contain such information or be accompanied by such documents as may be prescribed. This is important because s 16(2) of the SOP Act directs the adjudicator to reject any adjudication application that is not made in accordance with, *inter alia*, s 13(3)(c).

53 In this case, it was submitted, the claimant did not make a valid payment claim falling within the SOP Act. Therefore, by operation of sections 2, 10(2) and 12(2) of the SOP Act, the claimant was not entitled to refer the matter to arbitration and the adjudicator had no jurisdiction to make the Determination.

54 I was unable to accept the respondent's argument that the jurisdiction of the Adjudicator was determined according to whether the claimant had followed the requirements of the SOP Act in connection with the form and content of the payment claim and the time at which it had to be served, or not. I took the view that the Adjudicator's jurisdiction, in the sense of his power to hear and determine the adjudication, could not depend on such adventitious elements. It appeared to me that, as the claimant submitted, the Adjudicator's jurisdiction arose from his appointment by an authorised nominating body under s 14(1) of the SOP Act and from his acceptance of such appointment. Whether the payment claim was in proper order or not would not have an impact on the Adjudicator's jurisdiction, though of course if it was not in order, the Adjudicator would be able to throw out the claim on that basis. Once an appointment had been made and confirmed to the parties by the authorised nominating body under s 14(3), jurisdiction would have been conferred on the Adjudicator in relation to that particular adjudication application.

55 The view that I adopted was supported by the court in *Parist*. While the judge there recognised that the payment claim and the payment schedule (the equivalent under the NSW Act of the payment response under the SOP Act) served to delimit the issues to which the submissions of the claimant and the respondent may refer, the court held that the adjudicator's jurisdiction was not founded on the payment claim. At [31] of his judgment, Nicholas J said:

> Although it may be said that, by service of a payment claim under s 13 on the person who under the contract is liable to make the payment, the claimant has set in train the procedure for recovery of payment established under Pt 3 of the Act, it is not correct to say that the payment claim is the foundation of the jurisdiction of the Adjudicator. By s 19(2), upon acceptance of a claimant's adjudication application under s 17, the Adjudicator is taken to have been appointed to determine the application. The Adjudicator's powers and functions in respect of the adjudication procedures and determination are prescribed in s 21 and s 22. These provisions of the Act are the source of jurisdiction. In my opinion the Plaintiff's submissions on this issue were misconceived.

The subsequent case of *Paynter Dixon Constructions Pty Limited v Jf and Cg Tilston Pty Limited* [2003] NSWSC 869 cited (at [36]) the above passage from Nicholas J's judgment with approval.

56 Similarly, under our legislation, the jurisdiction of an adjudicator stems from his appointment. It does not stem from a properly completed and served payment claim. The powers and functions of the adjudicator come from s 16 of the SOP Act and not from any action on the part of the claimant. The respondent's argument in respect of the Adjudicator's jurisdiction was analogous to an argument that the High Court's jurisdiction to hear any particular dispute depends on whether the writ of summons or other originating process is in proper form when in fact the court's jurisdiction comes from the provisions of the SCJA or other relevant legislation, depending on the nature of the proceedings.

57 As support for this analysis, the purpose of the SOP Act bears repeating. The intention of the legislature in enacting this statute was to provide a fast track procedure for an interim decision in respect of a disputed payment claim. The SOP Act sought to assist in maintaining cash flow in the industry while disputes were settled via arbitration or court proceedings. In this respect I refer, as the AR also did, to the speech of the Minister of State for National Development, Mr Cedric Foo Chee Keng, during the Second Reading of the Building and Construction Industry Security of Payment Bill on

16 November 2004 (Singapore Parliamentary Debates, Official Report (16 November 2004) vol 78 at col 1112), where the Minister explained that the SOP Act:

> will preserve the rights to payment for work done and goods supplied of all the parties in the construction industry. It also facilitates cash flow by establishing a fast and low cost adjudication system to resolve payment disputes. Affected parties will have the right to suspend work or withhold the supply of goods and services, if the adjudicated amount is not paid in full or not paid at all.

Any decision made by the adjudicator in the interim proceeding can, if determined to be wrong after a full investigation of the facts, be set aside by the arbitrator or the court. The essence of the adjudication procedure is speed rather than the essential correctness of the decision. Thus, tight timelines for each step in the adjudication process are laid down by the SOP Act. It would certainly have an impact on the speedy determination of an adjudication proceeding if, in each case, the adjudicator had to satisfy himself as to his jurisdiction by a careful examination of the payment claim and the other requirements of s 12 of the SOP Act before proceeding and even though such jurisdiction had not been challenged by the respondent.

58 The claimant submitted that because of the purpose of the SOP Act, a key feature of the legislation was that the grounds for disputing a progress claim should be made known to the claimant at the outset, in order that the claim can be adjudicated on, and interim finality achieved. It further submitted that it was contrary to the intent and purpose of the SOP Act for the respondent to keep challenging the Determination by relying on new grounds which were not raised during the adjudication process. I accepted this submission which appeared to me to be in complete accord with the intent and purpose of the legislation.

59 In my judgment therefore, the Adjudicator here had jurisdiction to hear and determine the adjudication application filed by the claimant as soon as he accepted the appointment made by the SMC. Since the Adjudicator was properly conferred with jurisdiction over the dispute, any challenges that the respondent subsequently mounted to the manner in which the Adjudicator treated or failed to treat Progress Claim 5 would be challenges to the exercise of the jurisdiction and not challenges to the jurisdiction itself. If the respondent failed to make such challenges but instead participated in the proceedings its conduct could amount to a waiver of the right to challenge.

Did the respondent waive its right to challenge the validity of Progress Claim 5?

60 Accordingly, I found that the claimant was entitled to make an argument that the respondent was estopped at the hearing of the appeal from challenging the validity of Progress Claim 5 because it had waived that right. The principles of *Koh Zhan Quan Tony* did not apply to the contentions of the respondent. I have set out in [30] and [31] above the various steps that the respondent had taken in the prior proceedings and have detailed how the respondent did not challenge the validity of the payment claim or raise the issue of jurisdiction at all at any stage prior to the appeal although it was represented by lawyers at all previous hearings and took an active part in the same. I repeat what I said in [32] above. I found that the claimant could, in law, rely on the matters set out as constituting a waiver by the respondent of its rights to challenge the validity of the payment claim since such challenge would not have had an impact on the essential jurisdiction of the Adjudicator to determine the adjudication. I also found that on the facts relied on such waiver had arisen.

Conclusion

61 To summarise, I dismissed the respondent's appeal for the following reasons:

(a) In respect of the respondent's arguments that the Adjudicator had no jurisdiction, I found that jurisdiction was conferred on him by his appointment by the SMC;

(b) I found that the respondent had by its conduct waived its right to challenge the validity of Progress Claim 5;

(c) I agreed with the way in which the AR and the Adjudicator had interpreted s15(c) of the SOP Act and therefore agreed that the Adjudicator was right not to have considered the respondent's Payment Certification No 5; and

(d) I agreed with the AR's interpretation of s16(7) of the SOP Act and that the respondent had not been denied natural justice during the adjudication proceedings.

I did not find it necessary in all the circumstances to consider the merits of the respondent's arguments on the validity of Progress Claim 5.

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