Quanta Industries Pte Ltd *v* Strategic Construction Pte Ltd
[2015] SGHC 2

Case Number : Originating Summons No 913 of 2014
Decision Date : 06 January 2015
Tribunal/Court : High Court
Coram : Chan Seng Onn J
Counsel Name(s) : Daniel Koh Choon Guan and Poonaam Bai (Eldan Law LLP) for the plaintiff; Loy Wee Sun (Loy & Company) for the defendant.
Parties : Quanta Industries Pte Ltd — Strategic Construction Pte Ltd

Building and Construction Law – Statutes and Regulations

6 January 2015

Chan Seng Onn J:

Introduction

1 This was an application by the plaintiff to set aside the adjudication determination dated 11 September 2014 ("the AD") in SOP/AA 240 of 2014 under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the SOPA"). An unusual feature of the case was that the defendant did not deny that the adjudicator had acted outside his powers when he determined that the plaintiff, who was the *claimant* in the adjudication, shall pay the defendant, who was the *respondent*, a sum of $141,508.56. Nevertheless, the defendant argued that the AD should not be set aside.

2 After hearing the arguments of the parties, I set aside the AD. The defendant has appealed against my decision. I now give my reasons.

Background

3 The plaintiff was engaged as a sub-contractor by the defendant for a project. On 7 July 2014, the plaintiff submitted a progress claim for the sum of $561,693.14. [note: 1] On 25 July 2014, the defendant issued a payment response for the amount of negative $155,891.63. [note: 2] As the defendant was not making the payments that the plaintiff felt that it was entitled to, the plaintiff lodged an Adjudication Application on 12 August 2014. The defendant lodged the Adjudication Response on 20 August 2014. [note: 3]

4 On 11 September 2014, the adjudicator rendered the AD and made the following determinations:

(a) The plaintiff shall pay the defendant the adjudicated sum of $141,508.56 ("the Sum"). [note: 4]

(b) The cost of the adjudication, being the adjudication application fee of $642.00 and the adjudicator's fee of $14,124.00, to be borne by the plaintiff and the defendant in the proportion

of 80:20 respectively. [note: 5]

(c) A simple interest of 1% shall run from 29 August 2014 at the rate of 1% per annum on any part of the Sum which remains unpaid until the same is paid. [note: 6]

5 On 12 September 2014, the plaintiff asked the defendant to consent to the setting aside of the AD. [note: 7] On 16 September 2014, the defendant replied in a letter ("the 16 Sep Letter") to state that it will not ask the plaintiff to make payment of the Sum, but added that it would also not consent to any application by the plaintiff to set aside the AD. [note: 8] These correspondences were made *via* letters between the parties' solicitors.

6 On 29 September 2014, the plaintiff filed the present originating summons to set aside the AD.

7 The plaintiff and the defendant were in the midst of arbitration proceedings when the adjudication application was lodged. [note: 9]

Whether the adjudicator had acted *ultra vires*

8 I begin by disposing of the first issue. It was clear that the adjudicator had exceeded his jurisdiction in determining that the plaintiff (the sub-contractor) had to pay the defendant (the main contractor) the Sum and that interest was payable on any part of the Sum which remained unpaid.

9 Section 17 of the SOPA sets out the adjudicator's powers in relation to determining an adjudication application. In particular, s 17(2) of the SOPA states:

(2) An adjudicator shall, in relation to an adjudication application, determine —

(*a*) the adjudicated amount (if any) to be paid *by the respondent to the claimant*;

(*b*) the date on which the adjudicated amount is payable;

(*c*) the interest payable on the adjudicated amount; and

(*d*) the proportion of the costs of the adjudication payable by each party to the adjudication,

and shall include, in the determination, the reasons therefor.

[emphasis added]

10 Under s 17(2)(*a*), the adjudicator may determine the amount to be paid by the *respondent* to the *claimant*. The plaintiff was the claimant in the adjudication while the defendant was the respondent. By determining that the plaintiff should make payment to the defendant, the adjudicator had acted in excess of the powers conferred upon him by the SOPA.

11 Quite rightly, the defendant's solicitors did not dispute this. They candidly admitted that the adjudicator fell into error in this respect. They accepted that under the SOPA, the claimant either gets a nil amount or he gets paid. The adjudicator has no power to determine that the plaintiff is to *refund* the defendant for the amount that the latter allegedly overpaid the former. [note: 10] As stated in Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) at

para 16.63:

> … upon the construction of section 17(2) of the Singapore SOP Act, an adjudicator can either dismiss a claim or award a sum in favour of the claimant in an adjudication determination. This arises clearly from the stipulation that the adjudicated amount is to be determined by the adjudicator. This is described in section 17(2)(a) as 'the adjudicated amount (if any) to be paid by the respondent to the claimant'. Thus, while an adjudicator may determine the entitlement of the respondent to counterclaims and set-offs – such as deductions for liquidated damages, back charges and sums expended for rectifying defects – and set these off against the amount to which the claimant is otherwise entitled, *he has no mandate to order any amount to be paid to a respondent by the claimant*. It follows that, under the Singapore SOP Act, even if the adjudicator determines that the aggregate of a respondent's set-offs and counterclaims exceeds the amount determined in favour of the claimant, *the best result for a respondent in an adjudication is a determination by the adjudicator that the claimant is not entitled to be paid any part of the subject payment claim.*
>
> [emphasis added]

Whether there were "live issues" between the parties

12 Notwithstanding this concession, the defendant nevertheless argued that the AD should not be set aside. Its first argument was that there were no live issues between the parties. The defendant relied on the 16 Sep Letter wherein the defendant had stated that the plaintiff would not be asked to make payment of the Sum, which meant that the adjudicator's error had no adverse financial effect on the plaintiff. It would not have mattered one iota whether the outcome was in the plaintiff's favour or otherwise. [note: 11]

13 The defendant referred to *Attorney-General v Joo Yee Construction Pte Ltd (in liquidation)* [1992] 2 SLR(R) 165 ("*Joo Yee Construction*") where it was held at [14] that:

> … a court will not undertake to decide on issues, which if decided in the appellant's favour, will not gain him "something which he would not gain if he lost", and will not decide on issues simply to have a decision that will be useful for similar cases in the future.

14 The facts of *Joo Yee Construction* were somewhat unusual. The appellant in that case was the Attorney-General, who was representing the Ministry of Health ("MOH"). The respondent had entered into a building contract with MOH to construct a hospital building. After the respondent went into liquidation, MOH made direct payments to four nominated subcontractors pursuant to the terms of the building contract. An issue arose as to whether direct payments to the four nominated subcontractors by MOH would contravene the combined operation of ss 280(1) and 327(2) of the Companies Act (Cap 50, 1988 Rev Ed). The High Court held that the payments were indeed in contravention of the Companies Act and held that such payments would be void as against the respondent's liquidators. The Attorney-General appealed, but the four nominated subcontractors either did not appeal or withdrew their appeals. On appeal, the Court of Appeal held that there were no longer any live issues (*Joo Yee Construction* at [10] and [15]):

> 10 … The real issue in this case was not whether the contractual obligations survived following the liquidation of the respondents but whether, firstly, the parties could contract out of the insolvency laws and secondly, whether in the instant case payments direct to the nominated subcontractors would contravene the insolvency laws. That issue was no longer an issue when the court ruled that a direct payment to the nominated subcontractors would contravene ss

280(1) and 327(2) of the Act *and* the four nominated subcontractors accepted the court's ruling by withdrawing or not proceeding with their appeals. In so far as the Ministry of Health was concerned, its interest in this issue ceased to exist once the court had ruled on the issue *and* the four nominated subcontractors had accepted the court's ruling by withdrawing or not proceeding with their appeals. The Ministry of Health could not thereafter be prejudiced or be exposed to the risk of litigation at either the instance of the respondents or the four nominated subcontractors if it acted in accordance with the ruling of the court. Accordingly in our view there was no live issue in this appeal.

…

15 … Applying these principles to this appeal the Ministry of Health's liability to pay the amounts certified under the building contract would not be affected one bit whether the Ministry of Health succeeded in the appeal or not. If the Ministry of Health succeeds in the appeal it would be able to pay the amounts certified under the building contract direct to the four nominated subcontractors but what does the Ministry of Health gain by it? Nothing in our view. The parties who are in actual controversy, namely, the four nominated subcontractors, and who would gain something if the respondents lost are not before this court, they having accepted the judgment of the court of first instance.

15 It is useful now to set out the contents the 16 Sep Letter. The defendant's solicitors had written as follows:

…

We confirm that our clients do not intend to ask your clients to make payment under paragraph 3(a) of Mr Leong's Adjudication Determination. As confirmed by Mr Leong's Adjudication Determination, your clients have been overpaid. At the conclusion of the arbitration in SIAC Arb 87 of 2014, our clients will be collecting the amount overpaid, together with interest at 5.33% per annum from commencement of arbitration.

If your clients choose to proceed with an application to set aside the adjudication determination, our clients will not stop your clients, neither will our clients consent to the application. We will make the necessary arguments at the setting aside forum if indeed there is going to be such an application.

16 The facts of the present case were hardly on par with those of *Joo Yee Construction*. For one, both parties with a real financial interest in the matter were before the court. Nor was this a case where the party seeking a remedy was protected against further litigation by the effect of an order of court. Until the AD was set aside, the potential for the plaintiff to be sued on it remained a real prospect. It was not at all unreasonable for the plaintiff to seek recourse in a court of law rather than to rely on the assurance of the defendant that it did not "intend to ask [the plaintiff] to make payment" of the Sum. Whatever the legal effect of the representations made in the 16 Sep Letter, it certainly did not render the legality of the AD *purely academic*. Indeed, the plaintiff had argued that it was the defendant which had a collateral purpose in objecting to set aside the AD which was clearly wrong, *ie*, to prevent the plaintiff from applying for further adjudication. It was therefore plain that there were live issues to be adjudicated upon.

The court's jurisdiction

17 The plaintiff relied on s 27(5) of the SOPA and/or the inherent jurisdiction of the court as the

basis for it to apply to set aside the AD. [note: 12] In this regard, the defendant argued that s 27(5) of the SOPA did not permit the plaintiff to make the present application. Section 27 of the SOPA provides as follows:

> **Enforcement of adjudication determination as judgment debt, etc.**
>
> 27. — (1) An adjudication determination made under this Act may, with leave of the court, be enforced in the same manner as a judgment or an order of the court to the same effect.
>
> (2) Where leave of the court is so granted, judgment may be entered in the terms of the adjudication determination.
>
> (3) An application for leave to enforce an adjudication determination may not be filed in court under this section unless it is accompanied by an affidavit by the applicant stating that the whole or part of the adjudicated amount has not been paid at the time the application is filed.
>
> (4) If the affidavit referred to in subsection (3) indicates that part of the adjudicated amount has been paid, the judgment shall be for the unpaid part of the adjudicated amount.
>
> (5) Where any party to an adjudication commences proceedings to set aside the adjudication determination or the judgment obtained pursuant to this section, he shall pay into the court as security the unpaid portion of the adjudicated amount that he is required to pay, in such manner as the court directs or as provided in the Rules of Court (Cap. 322, R 5), pending the final determination of those proceedings.

18 The defendant submitted that it is only a *respondent* in an adjudication application who can avail himself of s 27(5) of the SOPA to file an application to set aside an adjudication determination. Its arguments may be summed up as follows:

> (a) Section 27(5) makes it mandatory for anyone who wishes to set aside an adjudication determination to pay the adjudicated amount into court.
>
> (b) The purpose for such payment is to deter ingenious respondents who have unmeritorious complaints from launching setting aside applications with the dominant purpose of dragging out the time to make payment.
>
> (c) Accordingly, the plaintiff, being the claimant in the adjudication application, cannot avail himself of s 27(5) to make the present application.

19 As it turned out, this facet of the dispute is now moot as the Court of Appeal has held in *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2014] SGCA 61 ("*Citiwall*"), a judgment that was handed down on 27 November 2014 *after* I heard the parties, that a court exercises its supervisory jurisdiction in hearing and determining an application to set aside an adjudication determination (*Citiwall* at [41]). It is unthinkable that this jurisdiction is only exercisable when the respondent makes the application, and in any event, it is plain from s 27(5) that "*any party to an adjudication*" may apply to set aside an adjudication determination.

20 For completeness, I will also deal with the question whether the plaintiff has to make payment into court as security for the unpaid portion of the Sum pursuant to s 27(5) of the SOPA. The plaintiff had taken the view that it did not need to do so as the "adjudicated amount" refers to an amount payable by the *respondent* to the *claimant* in an adjudication. [note: 13]

21 I have partially dealt with the meaning of "adjudicated amount" at [8] to [11] above, but I will add to the analysis here. Section 27(5) of the SOPA imposes a requirement for an applicant seeking to set aside an adjudication determination to "pay into the court as security the unpaid portion of the *adjudicated amount* that he is required to pay". Under s 2 of the SOPA, the words "adjudicated amount" is defined as "the amount of a progress payment that is determined to be payable under section 17 or 19, as the case may be". It is clear from ss 17(2)(*a*) and 19(5)(*a*) that the "adjudicated amount" can only be referring to payments determined to be made by the respondent *to* the claimant. A claimant is defined under s 2 as "a person who is or claims to be entitled to a progress payment under section 5", and s 5 in turn states that "Any person who has carried out any construction work, or supplied any goods or services, under a contract is entitled to a progress payment". Finally, a respondent is defined under s 2 as "a person who is or may be liable to make a progress payment under a contract to a claimant".

22 So any sums that had to be paid by the *claimant* to the *respondent* would not constitute the "adjudicated amount" that is referred to in s 27(5) of the SOPA. As a result, if a claimant, such as the plaintiff, applies to set aside an adjudication determination, there is no need for him to pay into court any security pursuant to s 27(5). Such was the case here.

23 For the reasons above, I set aside the AD. I made no order as to costs.

[note: 1] Chin Voon Leong's Affidavit dated 29 Sep 2014 ("Chin's Affidavit"), para 9.

[note: 2] Chin's Affidavit, para 10.

[note: 3] Chin's Affidavit, para 101.

[note: 4] The AD, para 3(a).

[note: 5] The AD, para 3(b).

[note: 6] The AD, para 104.

[note: 7] Tang Hun Chong's Affidavit dated 14 Oct 2014 ("Tang's Affidavit"), para 10 and p 17.

[note: 8] Tang's Affidavit, para 11 and p 18.

[note: 9] Tang's Affidavit, paras 3 to 8.

[note: 10] Defendants' Written Submissions dated 5 Nov 2014 ("DWS"), para 12.

[note: 11] DWS, paras 19, 23 and 24.

[note: 12] Chin's Affidavit, para 7.

[note: 13] Chin's Affidavit, para 14.

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