Fujitec Singapore Corp Ltd *v* GS Engineering & Construction Corp [2015] SGHC 318

Case Number	: Originating Summons No 665 of 2015 (Summons No 3658 of 2015)
Decision Date	: 17 December 2015
Tribunal/Court	: High Court
Coram	: Lee Seiu Kin J
Counsel Name(s)	: Tan Beng Swee (CTLC Law Corporation) for the applicant; Melvin Chan and Kishan Pillay (TSMP Law Corporation) for the respondent.
Parties	: FUJITEC SINGAPORE CORPORATION LTD — GS ENGINEERING & CONSTRUCTION CORPORATION

Building and Construction Law – Statutes and regulations

17 December 2015

Lee Seiu Kin J:

1 In an adjudication determination dated 25 June 2015, as amended on 29 June 2015 ("the AD"), the adjudicator determined that the respondent was liable to pay the claimant a sum of $1,540,331.70 pursuant to a payment claim under a construction sub-contract ("the Contract"). On 14 July 2015 the applicant obtained leave of court to enforce the AD pursuant to s 27(1) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the Act"). On 28 July 2015, the respondent filed this summons no 3658 of 2015 ("SUM 3658/2015") to set aside the AD. On 2 October 2015, after hearing counsel for the parties, I dismissed the respondent's application. I now give the grounds for my decision.

2 The respondent's application was made on the following grounds:

(a) The adjudication application was filed prematurely.

(b) The application was invalid as it did not contain all the information prescribed.

I shall deal with each ground in turn.

Adjudication application filed prematurely

3 Under the first ground the issue turns on whether the expression "calendar day" used in the Contract includes or excludes public holidays. 3 April 2015 was the Good Friday public holiday in Singapore and this fell between the service of the payment claim and provision of the payment response. A determination one way or another would determine the issue in favour of the applicant or the respondent.

4 The following are the relevant facts. The applicant (as claimant) served the payment claim on 1 April 2015, in accordance with the Contract. The respondent provided its payment response on 21 April 2015. On 28 April 2015, the applicant filed a notice of intention to apply for adjudication pursuant to s 13(2) of the Act. And on 30 April 2015, the applicant filed the adjudication application pursuant to s 13(1) of the Act.

5 The respondent submitted that the adjudication application was filed prematurely on 30 April 2015 because the earliest that it could be filed was the following day, 1 May 2015. The respondent's argument was as follows. Clause 2.3 of the Contract makes the following provision in relation to the period within which the payment response is to be provided:

> Within 21 calendar days of receipt of the progress claim, the [respondent] will issue to the [applicant], a Payment Response Certificate.

6 The respondent submitted that the term "calendar days" in this clause excludes public holidays. If that were the case, then the deadline to provide the payment response would be 23 April as 3 April was a public holiday. Under s 12(2) of the Act, the applicant is entitled to make an adjudication application after the end of the dispute settlement period ("DSP"). The DSP is defined in s 12(5) as "the period of 7 days after the date on which or the period within which the payment response is required to be provided under section 11(1)". Following the holding in *Tienrui Design & Construction Pte Ltd v G & Y Trading and Manufacturing Pte Ltd* [2015] 5 SLR 852 ("*Tienrui*") that the DSP runs from the date on which the payment response is required to be provided (and not on the date that the payment response is actually provided), this means that the earliest date that the applicant was entitled to make a payment claim is 1 May 2015, after the 7-day period between this date and 23 April 2015.

7 The applicant, on the other hand, contended that the expression "calendar days" is not affected by any public holiday that may fall within that period. Accordingly the deadline for the payment response was 22 April 2015 and, after the 7-day DSP, the earliest date on which the applicant was entitled to file an adjudication application was 30 April 2015, which was the actual date that it was filed.

8 "Day" is defined in s 2 of the Act as "any day other than a public holiday within the meaning of the Holidays Act (Cap 126)". However the Contract used the term "calendar days" and the question is whether this bears the same meaning as the word "day" in the Act. The term "calendar day" is not defined in the Contract; instead it contains the following definition of "day":

> Unless specifically stated otherwise, "day(s)" mean(s) Gregorian calendar day(s) and "month(s)" mean(s) Gregorian calendar month(s).

9 The respondent also pointed out that Black's Law Dictionary (6th Ed,1990) defines "calendar days" in the following manner:

> A calendar day contains 24 hours; but "calendar days" may be synonymous with "working days". *Sherwood v American Sugar Refining Co, C.C. A.N.Y., 8 F.2d 586, 588*. The time from midnight to midnight. *LANNI v Grimes, 173 Misc. 614, 18 N.Y.S.2d 322, 327*. So many days reckoned according to the course of the calendar.

10 It is clear that none of these definitions is of any help in this matter. While the word "day" is defined in the Act, that definition is meant to apply to that word wherever it is found in the Act. There is nothing in the Act compelling the use of that definition in any construction contract although parties are free to adopt such definitions by express provision. In appropriate circumstances, in interpreting a construction (or supply) contract the payment terms of which falls within the purview of the Act, it could be possible to hold that the same interpretation was meant in the contract. But this depends on the circumstances. The respondent submitted that it was appropriate to do it in the present case. If the term concerned was "day", I would have little hesitation to do so. Unfortunately for the respondent it is not. Instead, the Contract uses "calendar day". The counter-submission

advanced by the applicant was that there must have been a reason for the use of a different term in the Contract. The applicant submitted that the reason was because the Contract intended a different concept for "calendar day" compared to "day" *simpliciter*, and this was that public holidays would also be counted.

11 *Woo Kah Wai and another v Chew Ai Hua Sandra* [2014] 4 SLR 166 concerned an option for the purchase of property in which the deadline was expressed to be "3 days". The Court of Appeal considered that this could mean either "three calendar days or three working days". Implicit in this statement is that the expression "calendar days" included public holidays and weekends as this was used in comparison with "working days".

12 In my opinion, the applicant's position is the correct one. The expression "calendar day" contains the notion that it includes every day of the calendar as opposed to, say "working day" or "weekday". The drafter of the Contract may be presumed to have used this term in order to denote a different way of measuring time from how it is contemplated in the Act which uses the word "day" and contains a definition for it. If he had intended to do it in the same manner then there would not be any need to add an extra word, "calendar", to qualify "day".

13 Even if I had any doubt on the intention behind "calendar day" and were to hold that the term is ambiguous, the outcome would be the same. In *Tienrui*, it was held that in an appropriate case, the court would interpret any provision *contra proferentem* – see *Tienrui* at [54]. In the present case the Contract was drafted by the respondent. There is no reason in the circumstances of this case to prefer the respondent's position to that of the applicant.

Adjudication application invalid

14 Under s 13(3)(*c*) of the Act, an adjudication application "shall contain such information or be accompanied by such documents as may be prescribed". This prescription is found in the Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed)("the Regulations") in which reg 7(2) provides as follows:

> (2) Every adjudication application shall —
>
> (*a*) contain the names and service addresses of the claimant, the respondent, the principal (if known) and the owner concerned;
>
> (*b*) state whether the relevant contract is a construction contract or a supply contract;
>
> (*c*) contain the particulars of the relevant contract, comprising –
>
> (i) the project title or reference, or a brief description of the project;
>
> (ii) the contract number or a brief description of the contract; and
>
> (iii) the date the contract was made;
>
> (*d*) contain an extract of the terms or conditions of the contract that are relevant to the payment claim dispute; and
>
> (*e*) be accompanied by a copy of the relevant notice of intention to apply for adjudication, a copy of the relevant payment claim and a copy of the payment response (if any) hereto.

15 The respondent's complaint pertains to reg 7(2)(*d*). The respondent submitted that the applicant's adjudication application ("the AA") did not contain an extract of *all* the terms and conditions of the contract that are relevant to the payment claim dispute. In particular, the respondent asserted that the AA should have included the following documents which were missing from it:

(a) The Standard Conditions of Nominated Sub-Contractor 2008 for use in conjunction with the Public Sector Standard Conditions of Contract for Construction Works 2008.

(b) CPF General Specifications.

(c) Schedule of Rates.

(d) Preliminaries.

(e) Method Statement.

16 According to the respondent the AA was therefore invalid as it was in breach of s 13(3)(*c*) of the Act.

17 The applicant asserted that it had complied with the requirement in reg 7(2)(*d*) of the Regulations as it had included in the AA the complete contract (which is entitled "Subcontract Agreement") which, it claimed, had more than met the prescribed requirement.

18 The respondent had made the same objection to the adjudicator who was not impressed. The adjudicator stated in the AD that "the inquiry must be whether the document is relevant to the approach taken by the Claimant in making the payment claim" and he felt that the documents provided were adequate for this purpose. It should be noted that the respondent did not allege that it had been prejudiced or embarrassed in any way on account of the breach. The only basis for complaint was that s 13(3)(*c*) was a mandatory requirement and the applicant had failed to comply with it.

19 In Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis 2nd Ed, 2013) the learned author observed at [9.68]:

> There have been several instances where the validity of an adjudication application has been challenged on the ground that the application fails to include all the relevant terms and conditions of the underlying contract as required by regulation 7(2)(d). Adjudicators have generally considered such an objection to be unduly technical, particularly where it is considered that, notwithstanding the omission of certain terms from the extracts, the respondent has not been prejudiced. It has been suggested that the test is whether, on the extracts of the documents as furnished, the respondent understands the case he has to meet and is afforded a basis to formulate his case.

20 I would endorse the pragmatic approach taken by those adjudicators. Not all provisions are of such fundamental importance that a breach would invalidate the process – see *Australian Timber Products Pte Ltd v A Pacific Construction & Development Pte Ltd* [2013] 2 SLR 776 at [29]-[32]. The present provision is certainly not a requirement of such importance that any breach would render the application invalid. If I were to hold otherwise, the potentially large quantities of documents and other information that the general words in the regulation could encompass would engender endless applications for invalidation and cripple the operation of the Act. It must be borne in mind that this

pertains to a claimant's application. If the respondent is prejudiced because the claimant has failed to provide any document, the respondent may make an application to the adjudicator for that document. This will invariably delay the process, which is to the claimant's detriment. Any additional costs incurred by the respondent due to delay caused by the claimant can be compensated by way of an appropriate costs order. I see no reason why any claimant would not be diligent in this regard.

21 There is therefore absolutely no reason for the view that breach of reg 7(2)(d) is fundamental and goes to the validity of the adjudication application. If, on a respondent's application, the adjudicator considers that that any prescribed document or information is not provided, he may order the claimant to provide it. If he feels that the respondent is entitled to costs or to an adjournment or both, he may make the necessary orders. In this manner the adjudication process can proceed without undue delay from unnecessary challenges on validity.

Conclusion

22 For the reasons given above, I dismissed the respondent's application to set aside the AD.

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