IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 55

Originating Summons No 1568 of 2018

Between

Chuang Long Engineering Pte Ltd

… *Applicant*

And

Nan Huat Aluminium & Glass Pte Ltd

… *Respondent*

JUDGMENT

[Building and Construction Law] — [Statutes and regulations] — [Building and Construction Industry Security of Payment Act] — [Valuation of materials]

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Chuang Long Engineering Pte Ltd
v
Nan Huat Aluminium & Glass Pte Ltd

[2019] SGHC 55

High Court — Originating Summons No 1568 of 2018
Chan Seng Onn J
11 February 2019

5 March 2019 Judgment reserved.

Chan Seng Onn J:

Introduction

1 This is an application by the applicant, Chuang Long Engineering Pte Ltd, to set aside the Adjudication Determination dated 30 November 2018, which was amended and re-dated 18 December 2018 ("the AD").[1]

2 The application turns on the interpretation of s 7(2)(*c*) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOPA").[2] Having considered the parties' arguments, I dismiss the application.

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1 Applicant's Skeletal Submissions ("ASS") at para 1.

2 ASS at para 5.

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Facts

3 The applicant is the main contractor for a project for the "Proposed new erection of a 2-storey envelope control detached dwelling house with an attic and a basement" ("the Project").[3] Pursuant to a sub-contract agreement worth $323,282.50 (excluding GST), the applicant appointed the respondent, Nan Huat Aluminium & Glass Pte Ltd, as the sub-contractor for the Project ("the Contract").[4]

4 On 3 September 2018, owing to an alleged breach of completion deadlines and schedule of the works, the applicant terminated the Contract.[5]

5 On 24 September 2018, the respondent filed a payment claim for unpaid works, claiming the sum of $237,421.35.[6] On 8 October 2018, the applicant served its payment response.[7]

6 Dissatisfied with the payment response, the respondent submitted the matter for adjudication via SOP/AA 385/2018.[8]

7 The adjudicator, after considering the works completed by the respondent and deducting the retention sum and previous payments made by the applicant, determined that $165,683.91 (inclusive of GST) was payable by the applicant to the respondent ("the Sum").[9]

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3 ASS at para 6; Applicant's Bundle of Affidavits ("ABA") (Vol 1) at p 21 (header).

4 ABA (Vol 1) at pp 18–19.

5 ABA (Vol 1) at pp 51–52.

6 ABA (Vol 1) at pp 150–152.

7 ABA (Vol 1) at pp 173–209.

8 ABA (Vol 1) at p 60.

9 ABA (Vol 3) at p 1396.

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The uninstalled materials

8 In arriving at the Sum, the adjudicator had determined that the respondent was entitled to $75,651.00, being the value of materials which, while fabricated by the respondent for the purposes of the Project,[10] had not been delivered nor installed by the respondent ("the uninstalled materials").[11] The value of the uninstalled materials comprised the sum of $45,831.00 (for aluminium fins) and $29,820.00 (for cladding).[12]

9 The adjudicator had found that he could include the value of the uninstalled materials as s 7(2)(*c*) SOPA entitled him to include, for the purposes of the valuation exercise, the value of "materials or components that are to form part of any building, structure or works arising from the construction work … that … *on payment, will become the property of the party* for whom the construction work is being carried out" [13] [emphasis added].

10 The applicant then applied to set aside the AD on the ground that the adjudicator did not have jurisdiction to award the Sum (in particular, the amount of $75,651.00, being the value of the uninstalled materials) as he had wrongly applied s 7(2)(*c*) SOPA in coming to his determination.[14]

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10 ABA (Vol 3) at p 1368, para 91: "It is not in dispute that the materials claimed 'are to form part of any building, structure or works arising from the construction work'".

11 ABA (Vol 3) at p 1370, para 95; For The Record 11 January 2019 (Chamber 4C) at 10:38 ("FTR 11 Jan").

12 ABA (Vol 3) at p 1370, para 96.

13 ABA (Vol 3) at p 1369, para 94.

14 ASS at para 18.

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The issue

11 Before me, the sole issue is whether the adjudicator had properly interpreted s 7(2)(*c*) SOPA.

12 For ease of reference, the material portions of s 7 SOPA are as follows:

> **Valuation of construction work, goods and services**
>
> **7.**—(1) Construction work carried out, or goods or services supplied, under a contract are to be valued —
>
> (a) in accordance with the terms of the contract; or
>
> (b) if the contract does not contain such provision, having regard to the matters specified in subsection (2).
>
> (2) For the purpose of subsection (1)(*b*), construction work carried out, or goods or services supplied, under a contract are to be valued —
>
> …
>
> (c) in the case of materials or components that are to form part of any building, structure or works arising from the construction work, having regard to the basis that *the only materials or components to be included* in the valuation are those that *have become or,* ***on payment, will become*** *the property of the party for whom the construction work is being carried out.*
>
> [emphasis added in italics and bold italics]

13 In this case, it was agreed that the contract was silent on how the works were to be valued, and hence s 7(2) SOPA applied for the valuation exercise.[15]

14 As can be seen, s 7(2)(*c*) SOPA allows the adjudicator to value two types of materials "that are to form part of any building, structure or works arising from the construction work":

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15 FTR (11 Jan) at 10:42:40–10:42:50.

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(a) first, materials that *have become the property* of the party for whom the construction work is being carried out ("the first limb"); or

(b) second, materials that *on payment, will become the property* of the party for whom the construction work is being carried out ("the second limb").

The parties' arguments

15 Preliminarily, the parties were in agreement that the proper interpretation of s 7(2)(*c*) had not been raised before the courts.[16]

The Property Passing Test

16 Given the unsettled state of the law, the applicant argued that, under s 7(2)(*c*) SOPA, the test ought to be whether property to the materials have passed or will pass to the party for whom the construction work is being carried out ("the Property Passing Test").[17] This, the applicant submitted, was supported by the plain reading of the phrase "those that have become or, on payment, will become the property of the party for whom the construction work is being carried out" in s 7(2)(*c*) SOPA.[18]

17 To determine whether the property to the materials have passed or will pass for the purposes of the Property Passing Test, the applicant urged me to adopt the common law position as set out in *Hudson's Building and Engineering Contracts* (Nicholas Dennys, Mark Raeside & Robert Clay gen eds) (Sweet and Maxwell, 12th Ed, 2010) at p 1142, para 8-080: "[t]he well-known rule is that

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16 ASS at para 5; ABA (Vol 3) at p 1362, para 77.

17 ASS at para 30.

18 ASS at para 30.

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the property in all materials and fittings, once incorporated in or affixed to a building, will pass to the freeholder".[19]

18 Hence, under the applicant's proposed test, only materials that have been incorporated or affixed to a building ought to be valued under s 7(2)(*c*) SOPA.[20]

19 The applicant submitted that under their proposed test, the second limb (at [14(b)] above) would continue to remain relevant in cases when there is a retention of title clause in the construction contract.[21] To explain, when the contract includes a retention of title clause, such a clause may stipulate that full legal ownership in the materials is to remain with the sub-contractor or supplier until payment is made, notwithstanding that property may have passed under the common law once the materials had been affixed to a building.[22] When such a retention of title clause exists, the words "on payment, will become the property" in s 7(2)(*c*) SOPA would entitle the sub-contractor or supplier to cause the materials that had been affixed (but which remain unpaid) to be valued during adjudication even though property would not have passed by virtue of the retention of title clause.[23]

The adjudicator's test

20 In contrast, the respondent proposed the test adopted by the adjudicator,[24] whereby under s 7(2)(*c*) SOPA, a party may claim for materials under two scenarios:

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19 ASS at para 31 r/w para 49; Applicant's Bundle of Authorities Tab 3.

20 ASS at paras 30–31 r/w para 49.

21 ASS at para 65.

22 ASS at para 65.

23 ASS at para 66.

24 Defendant's Skeletal Submissions ("DSS") at para 45; ABA (Vol 3) at p 1367.

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(a) first, where the materials or components have become the property of the party for whom the construction work is carried out; ("Situation A"); or

(b) second, where the material or components have yet to become the property of the party for whom the construction work is carried out, but will become so once payment is made. ("Situation B")

21 Situation A incorporated the common law position of when property passes (see [17] above). Hence, under Situation A, affixed or incorporated materials may be the subject of valuation, for they would have become the property of the main contractor for whom the construction work is carried out.

22 On the other hand, Situation B went beyond the common law affixation test. Instead, the materials could be subject to valuation even if they have neither been delivered nor affixed to the building/structure, as long as they were fabricated for the construction contract.[25]

23 Applying this interpretation of s 7(2)(*c*) SOPA, the adjudicator concluded that Situation B applied in relation to the undelivered materials, which were fabricated to form part of the building/structure in the Contract.[26] Hence, the respondent was entitled to claim for the undelivered materials.[27]

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25 DSS at para 47.

26 ABA (Vol 3) at p 1368, para 91.

27 ABA (Vol 3) at p 1370, para 95.

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Section 7(2)(*c*) SOPA extended beyond affixed or incorporated materials

24 I agree with the respondent's and adjudicator's interpretation of s 7(2)(*c*) SOPA, and accordingly reject the applicant's constrained interpretation of the provision.

Section 7(2)(c) SOPA is not constrained by s 36(4) SOPA

25 In this regard, the applicant submitted that Situation B as proposed by the respondent (at [20(b)] above) was against Parliamentary intention,[28] as s 36(4) SOPA provides that "[n]othing in this Act shall, except as provided in subsection (1), limit or otherwise affect the operation of any other law in relation to any right, title, interest … or liability of a person arising under or by virtue of a contract or an agreement."

26 Thus, in enacting s 7(2)(*c*) SOPA, Parliament intended simply to incorporate the existing body of common law whereby property only passes upon affixation or incorporation of the material.[29] Since property passes upon payment under Situation B (see "have yet to become the property … but will become so once payment is made"), Situation B went beyond the common law, and was therefore against Parliamentary intention for it would "drastically affect the law in relation to passing of property".[30]

27 I do not agree with the applicant's contention.

28 First, s 36(4) SOPA must be read in its proper context. Herein, s 36(1) SOPA prohibits parties from contracting out of the terms in SOPA, such

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28 ASS at para 37.

29 ASS at paras 34–37.

30 ASS at para 36.

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as a payee's right to progress payments or adjudication (see Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) ("Chow") at para 4.26). Section 36(4) SOPA is then a qualifier to s 36(1) SOPA, and provides that "except as provided in subsection (1)", SOPA does not "limit or otherwise affect the operation of any other law in relation to any right, title, interest … of a person arising under or by virtue of a contract or an agreement."

29 It is therefore immediately apparent that the operation and effect of s 7(2)(*c*) SOPA is not to be constrained by s 36(4) SOPA. As Chow observed, reading ss 36(1) and 36(4) SOPA together, "except where a contract provision excludes, modifies, restricts or in any way prejudices the operation of the regime, the Singapore SOP Act does not seek to reconfigure, alter or amend the effect of the terms of the underlying contract" (Chow at para 4.24).

30 Hence, s 36(4) SOPA does not affect the interpretation of other SOPA provisions, nor does it dictate, as the applicant submits, that they can only "incorporate the existing body of common law".[31]

Situation B accords with SOPA's intention of facilitating cash flow for downstream players in the construction industry

31 More crucially, I find that the respondent's interpretation of s 7(2)(*c*) SOPA better accords with Parliamentary intention. In this regard, the overriding Parliamentary intention in enacting SOPA is to preserve the right to payment for works done and goods supplied for all parties in the construction industry (*Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1113 (Cedric Foo Chee Keng, Minister of State for National Development)[32] ("the Debates").

[31] ASS at para 36.

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32 Hence, it would certainly run counter to the legislative intent to adopt the applicant's interpretation of s 7(2)(*c*) SOPA, whereby materials fabricated for the construction contract would only be valued when such materials have been affixed onto the building/structure. This interpretation would place the sub-contractors and suppliers at the mercy of the main contractor, as the main contractor could avoid having to make payment for any of such materials simply by refusing delivery and/or affixation of such materials. Yet, this is precisely the problem that SOPA sought to mitigate (the Debates at col 1112–1113):

> The financial problems affecting some construction firms have in turn affected sub-contractors and suppliers further downstream along the construction value chain. They face delays or non-payments for work done or materials supplied …
>
> Progress payments are made periodically throughout the project's duration. Parties lower down the value chain usually fund their work in advance and collect payments thereafter. *These downstream players will therefore be adversely affected if those upstream fail to make prompt payment for work done or materials supplied.* Contractual terms also tend to favour those higher up the chain. …[33]
>
> [emphasis added]

33 As a result, I prefer the respondent's interpretation of s 7(2)(*c*) SOPA. Under their interpretation, Situation B unequivocally allows the sub-contractor or supplier to be able to receive payment for materials fabricated for the construction contract, thereby facilitating cash flow and enabling the construction project to move along. Alternatively, in cases such as the present whereby the construction contract has been terminated, Situation B ensures that the sub-contractor or supplier may nonetheless be paid for fabricated materials which it produced for the project, and which can be costly and would be of little use to them outside the project. This mitigates the significant cash flow issues

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[32] Applicant's Bundle of Authorities Tab 1.

[33] Applicant's Bundle of Authorities Tab 1.

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that may flow from non-payment of such fabricated materials simply due to a (possibly wrongful) termination.

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Conclusion

34 In conclusion, I rejected the applicant's constrained interpretation of s 7(2)(*c*) SOPA, and find that the adjudicator had correctly interpreted the provision. Accordingly, I dismiss the application to set aside the AD.

35 For the avoidance of doubt, I stress that my decision does not seek to amend the common law position as to when property passes. Rather, it merely interprets the scope of s 7(2)(*c*) SOPA, and the materials which may be valued by the adjudicator under the provision. Valuation by the adjudicator under SOPA is a totally different and separate question from when property in fact passes under the common law for the undelivered materials purchased and/or fabricated by the sub-contractor for the project, which remains unpaid by the main contractor at the time of the adjudicator's determination.

36 I will hear the parties on costs, if not agreed.

Chan Seng Onn
Judge

Lim Ker Sheon and Zeng Hanyi (Characterist LLC)
for the applicant;
Satinder Pal Singh (Selvam LLC)
for the respondent.

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