Bintai Kindenko Pte Ltd
v
Samsung C&T Corp

[2017] SGHC 321

High Court — Originating Summons No 975 of 2017 (Summons No 4276 of 2017)
Foo Chee Hock JC
14 November 2017

Building and Construction Law — Dispute resolution — Adjudication — Setting aside adjudication determination

19 December 2017

Foo Chee Hock JC:

1 Summons No 4276 of 2017 was an application to set aside the adjudication determination dated 15 August 2017 ("Adjudication Determination") made by the adjudicator ("Adjudicator") under the Building and Construction Industry Security of Payment Act (Cap

30B, 2006 Rev Ed).[1] The party applying to set aside the Adjudication Determination was Samsung C&T Corp ("Samsung"), the main contractor for alteration and addition works at the Suntec City Convention Centre and retail podium.[2] Samsung was the respondent in the present Originating Summons No 975 of 2017, which was commenced by Bintai Kindenko Pte Ltd ("Bintai") to enforce the Adjudication Determination. Bintai was engaged by Samsung as subcontractor for the supply and installation of mechanical, electrical and plumbing works.[3]

2 On 19 May 2017, Bintai submitted Payment Claim No 59, claiming for $13,479,366.43 against Samsung.[4] Samsung then submitted Payment Response No 59, stating a negative response amount of $2,190,963.62 which it claimed was due from Bintai.[5]

3 On 7 July 2017, Bintai served its notice of intention to apply for adjudication and lodged the adjudication application on the same day. In contrast to the claimed sum of $13,479,366.43 in Payment

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1 Zhang's affidavit dated 18 Sep 2017 ("Zhang's affidavit") at pp 18–36.

2 Zhang's affidavit at para 6.

3 Zhang's affidavit at para 8.

4 Zhang's affidavit at paras 12–14, p 120.

5 Zhang's affidavit at paras 15–16, p 187.

Claim No 59, in its adjudication application, Bintai only claimed for the release of the first half of the retention monies under the subcontract, the amount being $2,146,250.[6]

4 In the adjudication proceedings, both parties dealt with two particular issues in their written submissions: backcharges for scaffolding and variation works.[7] It was apparent that the negative response of $2,190,963.62 submitted by Samsung was a figure reached only by taking into consideration the two issues of backcharges and variation works. This was evinced by Bintai's own submissions for the adjudication application dated 7 July 2017 at [17] where Bintai set out the differences in the parties' positions in tabular form.[8] At [18] of the same set of submissions, Bintai summarised "the issues in dispute" in the following table:[9]

No	**Description**	**[Payment Claim No] 59 ($)**	**[Payment Response No] 59 ($)**	**Difference ($)**
1	Retention	(2,146,250.00)	(4,292,000.00)	2,146,250.00

6 Zhang's affidavit at para 21.

7 Zhang's affidavit at pp 1631, 1643, 1682–1683, 1706.

8 Zhang's affidavit at p 1630.

9 Zhang's affidavit at p 1631.

2	Backcharges	-	(585,252.20)	585,252.20
3	Variation works certified and paid in earlier payment responses, now reversed in [Payment Response No] 59	-	- [*sic*]	1,605,711.42

5 At the oral conference on 25 July 2017, the Adjudicator heard the submissions made by the respective counsel for Samsung and Bintai. All the issues highlighted in the written submissions were

presented before the Adjudicator.[10] Before me, Mr Kelvin Aw, lead counsel for Samsung, confirmed that no one had intimated to the Adjudicator that the Adjudication Determination should only be limited to the issue of the retention monies.[11]

6 The Adjudication Determination was rendered on 15 August 2017.[12] The Adjudicator determined that Samsung was to pay Bintai the first half of the retention monies, which amounted to $2,146,250. However, the two issues of backcharges and variation works were not dealt with. Instead, the Adjudicator stated expressly at [50] of the Adjudication Determination (and in similar terms at [28]) that the dispute "centered solely on the release of the first retention monies, and not the variations or backcharges".

7 Mr Aw confirmed that the sole ground for making the present application to set aside the Adjudication Determination was that the Adjudicator had not considered the two issues of backcharges and variation works in his Adjudication Determination and that this amounted to a breach of natural justice.[13]

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10 Zhang's affidavit at para 30; Bintai's Written Submissions at para 10.

11 Notes of Proceedings dated 14 Nov 2017 ("NE"), p 2.

12 Zhang's affidavit at p 18.

13 NE, p 2.

8 At the end of the hearing, I agreed with Mr Aw that the Adjudicator had not considered these two issues. Mr Chong Kuan Keong, who represented Bintai, submitted that the Adjudicator did in fact have regard to the issues of backcharges and variations in his Adjudication Determination. At [32] of Bintai's Written Submissions, Bintai quoted paragraphs 16, 20, 22 and 50 of the Adjudication Determination.

9 The relevant portions of the Adjudication Determination read:

> [16] In the Payment Response, the Respondent certified the nett value of the completed works at $89,130,698-77, after deduction of a backcharge of $585,252-20 and retention of $4,292,500-00 … This gives rise to the negative response of ($2,190,963-62) after deducting $91,321,662-39 for the amounts previously certified …
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> [20] The adjudication application consists of nine (9) arch-lever files including written submissions.
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> [22] On 17 July 2017, the Respondent lodged its adjudication response. It consists of two (2) arch-lever files also including written submissions.

10 Bintai's conclusion was that these paragraphs "must mean and be read to mean the Adjudicator has considered the issues – amount certified as work done which includes the value of revised [variation orders], and back charges of $585,252-20 – raised by the Respondents."[14] I did not accept this submission. The paragraph

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14 Bintai's Written Submissions at para 32.1.

references that I have reproduced at [9] above were preliminary remarks about the adjudication proceedings that were inconsequential to the argument Bintai was making. There was also nothing to Bintai's reference to paragraph 50 of the Adjudication Determination; on the contrary, the same paragraph made it abundantly clear what the Adjudicator's mind was directed to.

11 The tenor of the Adjudication Determination was also revealing. It should be noted that the Adjudicator had carefully set out the reasons for his decision to release the first half of the retention monies to Bintai in considerable detail; in contrast, he did not substantively address or make a finding on the backcharges and variations in the entire Adjudication Determination. Having in view the Adjudicator's express statements of his intent in paragraphs 28 and 50 of the Adjudication Determination, it seemed inconceivable on an objective analysis that he had considered and rejected the two issues of backcharges and variation works. I was also mindful of Bintai's reliance on Vinodh Coomaraswamy J's holding in *Metropole Pte Ltd v Designshop Pte Ltd* [2017] 4 SLR 277 ("*Metropole*") at [112] that there was no need for an adjudicator to expressly set out all the findings that he had made.[15] However, this holding must be read in context. Coomaraswamy J was referring to

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15 Bintai's Written Submissions at para 17.3.

a finding that, even if not expressly stated, was nevertheless "implicit beyond doubt" in the adjudicator's determination (see *Metropole* at [112]).

12 This leads me to another of Mr Chong's submissions. Mr Chong tried to persuade me that the Adjudicator had "impliedly" made findings that the issues of backcharges and variation works "were dismissed or were not determinative of his decision on the release of retention monies".[16] As alluded to at [11] above, I had found that this could not be so. Furthermore, an issue would be implicitly resolved if its outcome flowed from the conclusion of a specific logically prior issue (for instance, it would follow from a finding that there was no duty of care that there could be no breach of that duty of care): see *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM Division*") at [77]. But the entitlement to the retention monies as analysed by the Adjudicator[17] was not a logically prior issue that would implicitly resolve the other two issues or render them moot; the only effect was that the different amounts for the three issues had to be taken into account in the final outcome. There was no basis to infer that the Adjudicator had made the implied findings Mr Chong argued for.

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16 NE, p 1.

17 Zhang's affidavit at pp 30–35.

13 Mr Chong went on to submit that the Adjudicator was "entitled to say that the backcharges/variations could be considered in the second half of the retention monies or when Bintai makes a claim for the variation works".[18] But neither party had raised the issue of the "second half of the retention monies" in the adjudication proceedings.[19] Nor had the Adjudicator asked the parties to address the point.[20] While there was explicit reference to the second half of the retention monies at [80] of the Adjudication Determination, that related to a wholly different context: the compensation for any loss stemming from the making of unapproved penetrations in the brick walls.[21]

14 The upshot of the above was that the Adjudicator had not considered the two issues of backcharges and variation works. He made a deliberate decision not to deal with these issues.

15 Was the Adjudicator's decision not to consider these issues a breach of natural justice? Bintai submitted that it was not. Bintai's argument was that this decision concerned the merits of the dispute,

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18 NE, p 1.

19 NE, p 2.

20 NE, p 2.

21 Zhang's affidavit at p 35.

and that even if the Adjudicator had made an error, this court should not interfere and the Adjudication Determination should not be set aside.[22] That there should not be a review of the merits of the adjudicator's determination was incontrovertible: see *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 ("*SEF Construction*") at [41]–[42] and *Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal* [2013] 1 SLR 401 at [66].

16 In support of its position, Bintai cited *Brookhollow Pty Ltd v R&R Consultants Pty Ltd & Anor* [2006] NSWSC 1 ("*Brookhollow*") at [57]–[58] (which was relied upon in *SEF Construction* at [59]):[23]

> [57] … Where both claimant and respondent participate in an adjudication and issues are joined in the parties' submissions, the failure by an adjudicator to mention in the reasons for determination a critical issue (as distinct from a subsidiary or non-determinative issue) may give rise to the inference that the adjudicator has overlooked it and that he or she has therefore failed to give consideration to the parties' submissions … Even so, the adjudicator's oversight might not be fatal to the validity of the determination: what must appear is that the adjudicator's oversight results from a failure

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22 NE, p 3; Bintai's Written Submissions at para 36.

23 Bintai's Written Submissions at para 24.

> overall to address in good faith the issues raised by the parties.
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> [58] … If the adjudicator has dealt carefully in the reasons with most of those issues, it might well be a possibility that he or she has erroneously, but in good faith, omitted to deal with another major issue because he or she did not believe it to be determinative of the result. ***Error in identifying or addressing issues, as distinct from lack of good faith in attempting to do so, is not a ground of invalidity of the adjudication determination.*** [emphasis added]

17 However, Bintai omitted the following statement from the first part of [58] of *Brookhollow*:

> [58] In some cases, it may be possible to say that ***the issue overlooked was of such major consequence and so much to the forefront of the parties' submissions*** that no adjudicator attempting to address the issues in good faith could conceivably have regarded it as requiring no specific examination in the reasons for determination. …
> [emphasis added]

18 In my view, this was one such case. As Samsung showed, the two issues of backcharges and variation works had been flagged out repeatedly in the parties' submissions to the Adjudicator as important issues in dispute. They were also issues of major consequence. The sum of the backcharges and the disputed adjustments to payment for the variation works amounted to

$2,190,963.62, which was greater than Bintai's claim in the adjudication proceedings of $2,146,250.[24]

19 The courts had consistently affirmed the position that natural justice required the *essential issues* to be dealt with, not that *every argument* canvassed had to be addressed: see *TMM Division* at [73]; *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN v ALC*") at [46] (that the failure to consider an "important issue that has been pleaded" was a breach of natural justice). In *AKN v ALC*, the Court of Appeal drew an "important distinction between, on the one hand, an arbitral tribunal's decision to reject an argument (whether implicitly or otherwise, whether rightly or wrongly, and whether or not as a result of its failure to comprehend the argument and so to appreciate its merits), and, on the other hand, the arbitral tribunal's failure to even consider that argument" (at [47]).

20 The Court of Appeal in *AKN v ALC* also raised the case of *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 ("*Front Row*") as a useful demonstration of the latter situation: see *AKN v ALC* at [46]. In *Front Row*, Front Row Investment Holdings (Singapore) Pte Ltd ("Front Row") and Daimler South East Asia Pte Ltd ("Daimler") had entered into an agreement to organise a series of races. A dispute arose and

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[24] Samsung's Written Submissions at paras 107–108.

Daimler commenced arbitration against Front Row. Front Row mounted a counterclaim for misrepresentation. Its pleaded case included purported representations by Daimler that 20 races would be organised and that the cars to be used in these races were appropriate for racing or competitive events. The arbitrator, while under the misapprehension that Front Row was only pursuing its case on the representation relating to the race-worthiness of the cars and had abandoned its arguments on the other representations, found that there was no misrepresentation.

21 Andrew Ang J held at [45]–[46] of *Front Row* that the ineluctable conclusion to be drawn from the arbitrator's explicit disregard for the other representations that Front Row had continued to rely on was that the arbitrator had failed to accord Front Row natural justice. He was of the view that *Front Row* "was not a case where [the arbitrator] had had regard to Front Row's submissions on the issue but accidentally omitted to state his reasons for rejecting the same or had found the same to be so unconvincing as to render it unnecessary to explicitly state his findings on it …".

22 The same analysis applied to the Adjudicator's decision to explicitly circumscribe the issue to be determined to just the "first retention monies". This was, in substance and effect, a decision to exclude the two issues of backcharges and variation works from his

scope of consideration, as opposed to a decision to reject these arguments (see *AKN v ALC* at [47]). The Adjudicator had thereby failed to accord natural justice to Samsung. For completeness, although *AKN v ALC*, *TMM Division* and *Front Row* were arbitration cases, the principles on natural justice espoused in these cases applied equally to adjudication determinations: see *TMM Division* at [76].

23 Finally, the Adjudicator's breach of natural justice was material and caused Samsung prejudice. The requirement of materiality was recently endorsed in *Metropole* at [63] in the context of the setting aside of adjudication determinations. The test of materiality was whether the breach "*could reasonably* have made a difference … rather than whether it *would necessarily* have done so": see *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 ("*L W Infrastructure*") at [54]. Similarly, Lee Seiu Kin J in *Aik Heng Contracts and Services Pte Ltd v Deshin Engineering & Construction Pte Ltd* [2015] SGHC 293 at [26], which case was referred to in *Metropole* at [63], positively cited *Watpac Constructions v Austin Corp* [2010] NSWSC 168 for the proposition that a material breach of natural justice required something which otherwise "might have had some prospect of changing the adjudicator's mind on the point" [emphasis omitted]. In my view, a proper consideration of the two issues of

backcharges and variation works certainly could have changed the Adjudicator's mind as to the final outcome, since the sum disputed in relation to these two issues amounted to $2,190,963.62, which exceeded Bintai's claim in the adjudication of $2,146,250.[25] There was therefore real and serious prejudice occasioned to Samsung (see *L W Infrastructure* at [54]; *Metropole* at [62] and [66]).

24 For the foregoing reasons, I allowed Samsung's application to set aside the Adjudication Determination, with costs fixed at $10,000 (all-inclusive) to be paid by Bintai to Samsung.

Foo Chee Hock
Judicial Commissioner

Chong Kuan Keong and Ernest Sia (Chong Chia & Lim LLC) for the applicant in OS 975/2017;
Kelvin Aw, Leonard Chew and Eugene Lee (Morgan Lewis Stamford LLC) for the respondent in OS 975/2017.

[25] Samsung's Written Submissions at paras 107–108.