CEQ *v* CER
[2020] SGHC 192

Case Number : Originating Summons No 1412 of 2019

Decision Date : 14 September 2020

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : Ng Hweelon and Valliappan Subramaniam (Veritas Law Corporation) for the applicant; Chong Chi Chuin Christopher, Kelvin Teo and Josh Samuel Tan Wensu (Drew & Napier LLC) for the respondent.

Parties : CEQ — CER

Building And Construction Law – Building and construction contracts

Building And Construction Law – Appeal – Pending stay of execution

14 September 2020

Lee Seiu Kin J:

Introduction

1 The present application flows from my previous decision in *CEQ v CER* [2020] SGHC 70 ("*CEQ v CER*") involving the same parties. In that decision, I dismissed the application to set aside an adjudication determination made pursuant to the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) (the "Act").

2 The Applicant subsequently applied for a stay of enforcement pending the appeal of my decision and the disposal of proceedings in the Singapore International Arbitration Centre ("SIAC") arbitration SIAC ARB 429/19. This further application provided me with an excellent opportunity to examine the situations in which a stay of enforcement of an adjudication determination should be granted, as set forth in *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 ("*W Y Steel Construction*").

3 Having heard the parties, I granted the stay of enforcement. I also ordered a sum of S$500,000 to be released to the Applicant's solicitors, to be utilised towards the Respondent's legal fees and disbursements in both the appeal and arbitration. My reasons are as follows.

Background to the application

4 The facts resulting in the dispute are canvassed in detail in *CEQ v CER* at [2]–[7]. In essence, the Applicant was the owner and developer of a residential flat development, for which the Respondent was engaged as the main contractor. This employment relationship was terminated by the Applicant on 2 March 2017.

5 Over two years later, from 7 March 2019, the Respondent began serving payment claims on a monthly basis. Of particular relevance to this application is Payment Claim 25, lodged on 5 August 2019 for the sum of S$3,262,740.23. This was subject to adjudication determination SOP/AA

318/2019, and was awarded in part to the Respondent, of a sum of S$1,981,579.50. Following this, as mentioned at [1]–[2] above, the Applicant then applied to have the adjudication determination set aside. I dismissed this attempt on 6 April 2020, and the Applicant has filed an appeal against my decision.

Issues to be determined

6 Two issues arise to be determined in this application:

(a) whether a stay of execution of the adjudication determination should be granted pending appeal and the disposal of proceedings in the arbitration (the "Stay Issue"); and

(b) if a stay is granted, whether it should be on terms that the Respondent is granted a partial release of the monies held in court (the "Partial Release Issue").

7 I deal with the issues in turn.

The Stay Issue

8 Ordinarily, where an application to set aside an adjudication determination is refused, that determination will be enforced. The successful claimant will also be entitled to the adjudication amount that was paid into court pursuant to s 27(5) of the Act: *Lau Fook Hoong Adam v GTH Engineering & Construction Pte Ltd* [2015] 4 SLR 615 at [26]. Notwithstanding this, the court clearly retains the power to stay the enforcement of such an adjudication determination. This power flows from the *provisional* nature of the adjudication determination, which only provides *temporary finality* until the rights of parties are fully and finally determined: *W Y Steel Construction* at [60]–[69].

9 In *W Y Steel Construction* at [70], the Court of Appeal identified that a stay of an adjudication determination "may ordinarily be justified" where:

(a) there is clear and objective evidence of the successful claimant's actual present insolvency; or

(b) the court is satisfied on a balance of probabilities that if the stay were not granted, the money paid to the claimant would not ultimately be recovered if the dispute were resolved in the respondent's favour.

10 I pause to note that the above are alternative situations where a stay should be granted. In the course of arguments, the Respondent sought to argue that these situations were two limbs of a test that are "not entirely disjunctive" – in that the first limb of the test was a "useful *indicator*" of whether the second has been fulfilled. I am unable to agree with this interpretation. I accept that the inquiry under the second situation is broader in nature and will necessarily encompass instances where the successful claimant's actual present insolvency is established. However, where a party seeking a stay of enforcement is able to produce clear, objective evidence of the other party's *actual present* insolvency, that suffices to give pause to the enforcement process of the adjudication determination. There is no need to produce further evidence of the possibility of non-recovery, as the term "useful indicator" would suggest. Conversely, even where actual present insolvency is not established, it should remain open to a party seeking a stay to produce some other evidence to convince the court of its case in accordance with the second situation above. To hold otherwise would unduly tip the balance in favour of a successful claimant far beyond what was envisioned by the Court of Appeal in *W Y Steel Construction*.

11 To be specific, I do not consider that the second situation espoused by the Court of Appeal in *W Y Steel Construction* requires a closed category of specific *financial* events to occur or be present before the court grants the relief of a stay. It ought to be more properly recognised as a guiding principle that is to be applied in every case that comes before the court: the court must countenance and ameliorate *any* potential for impossibility of recovery by a successful appellant, *ie*, a respondent who loses at first instance but succeeds on appeal. This principle must be applied flexibly. Thus, if a successful claimant is found, at the enforcement stage, to be in circumstances indicating, for example, a real risk of dissipation of the disputed funds awarded to it, the court must intervene. The same may be said if there is any *prima facie* evidence or suspicion that the claimant had been using its claim as an abuse of process. A failure to grant a stay in such circumstances may lead to a miscarriage of justice if the appellant is subsequently successful on appeal.

12 In this vein, it bears emphasising that these situations are not the only considerations that the court may have regard to in deciding whether to grant a stay. Indeed, as the Court of Appeal observed in *W Y Steel Construction* at [70]:

> … Further, we agree … that a court may properly consider whether the claimant's financial distress was, to a significant degree, caused by the respondent's failure to pay the adjudicated amount and, also, whether the claimant was already in a similar state of financial strength or weakness (as the case may be) at the time the parties entered into their contract.

13 In my view, it is also crucial for the court to take into account whether a successful claimant requires the adjudicated amounts to sustain its operations at present. This is an inquiry which centres on the *parties' commercial/financial requirements*. This is in line with the purpose of the Act. As stated by Mr Cedric Foo Chee Keng, then Minister of State for National Development (*Singapore Parliamentary Debates, Official Report* (16 November 2004), vol 78 at col 1112):

> The SOP Bill 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…

14 This point was similarly emphasized by the Court of Appeal in *W Y Steel Construction* at [22] as follows:

> Statutory adjudication of building and construction disputes takes the concept one step further. Interim payment claims *per se* are not granted temporary finality under the adjudication scheme. Instead, the parties enter into an expedited and, indeed, an abbreviated process of dispute resolution in which payment claims and payment responses must be made within the stipulated deadlines to an adjudicator, who is himself constrained to render a quick decision. As a species of justice, it is admittedly somewhat roughshod, but it is fast; and any shortcomings in the process are offset by the fact that the resultant decision only has temporary finality. The party found to be in default has to pay the amount which the adjudicator holds to be due (referred to in the Act as the "adjudicated amount"), but the dispute can be reopened at a later time and ventilated in another more thorough and deliberate forum.

15 Given that cash is the life blood of those in the building and construction industry, such practical considerations must come to the fore where successful claimants are in more urgent need of the claimed sums. Conversely, in instances where a successful claimant no longer has any operations, or does not require the adjudicated amounts to keep its operations running, there is a greater likelihood that the court may grant a stay of enforcement.

16 Turning to the present facts, the Applicant sought to argue that the Respondents were, at present, insolvent and a shell company. It highlighted the following in support of its submission:

(a) The Respondent's directors shared a common address with the main contractors allegedly awarded the Respondent's projects.

(b) The registered address of the Respondent was the residential address of a bankrupt, [name redacted], who had submitted the adjudication application on behalf of the Respondent.

(c) The Respondent had failed to file any annual returns since 2014.

(d) There have been multiple changes of directors and shareholders in the Respondent.

(e) The Respondent has only filed one financial statement in court, purportedly for the financial year ending June 2019.

(f) The contracts exhibited by the Respondent as proof of projects awarded to them have not in fact been performed by the Respondent. In particular, the Applicant pointed to the following projects:

(i) Three subcontracts in relation to the [name redacted] Project awarded by [name redacted] ("Project A"). Recent images of Project A indicate that the building works are all but completed, and that the slated Temporary Occupation Permit date of the project was in April 2020.

(ii) A project at [address redacted] ("Project B"). Recent images of Project B, taken in March 2020, indicate that no works have been carried out since March 2019.

(iii) A project at [address redacted] ("Project C"). Photographs over a three period of Project C show that no work was carried out, with photographs in March 2020 showing that the work site is abandoned. Further, the Respondents only exhibited invoices that were allegedly digitally signed together, with cheques purportedly issued as payment. The issuer of the cheques, however, filed an affidavit that the cheques were never encashed but returned, with cash paid in exchange.

(iv) A project at [address redacted] ("Project D"). Again, photographs taken in March 2020 show that no work has been carried out.

17 In response, the Respondent argued that it is a going concern, with ongoing work and receivables. In support of this submission, it chose to focus on Project A, highlighting the following:

(a) The employer of the project, a joint venture comprising [names redacted], has agreed to make direct payments to the Respondent. One such payment had already been received in May 2020, as shown from a bank credit advice and notification dated 25 May 2020.

(b) The photographs exhibited by the Applicant do not prove that the works have been substantially completed, or that these are even photographs of the correct site.

(c) The document upon which the Applicant relies to show that the completion date was in April 2020 is insufficient. The document is merely a schedule, indicating that completion was intended to be achieved by April 2020. Further, it is unclear whether April 2020 was the

contractual completion date or an actual completion date, taking into account scheduling revisions and extensions of time.

18 I agree with the Respondent that the evidence adduced is insufficient to establish its actual present insolvency, as required at [9(a)] above. Nevertheless, I find that Applicant has satisfied the threshold required for a stay to be granted.

19 The Respondent has, at every turn, acted evasively in proving its viability as a company. This in turn affects its ability to prove that money paid out to it will be recoverable in the event that the Applicant succeeds on appeal. It is notable that the Respondent has chosen to largely remain silent in the face of the numerous, serious allegations levelled against it by the Applicant. As can be seen at [17] above, even when given the opportunity to respond, it chose to focus its response solely on Project A, ignoring the rest. Its reason for doing so is that, in its view, the works carried out in Project A and the value therein are sufficient to show that the Respondent is a going concern. With respect, however, the existence of a contract or correspondence with the main contract do not go that far in meeting the Applicant's assertion that work has not been done on the project. The bank credit advice and notification that the Respondent has adduced is similarly insufficient to convince me of its ongoing business, for it does not reveal anything about the work that has been done or when the work was done.

20 Critically, even in its response on Project A, the Respondent did not produce a shred of positive evidence in its favour. Instead, it elected to go about arguing that the Applicant's documents and photographs were insufficient. This begs the question of why it has chosen to do so, given that it can easily clear up any confusion by adducing recent photographs of the site and/or documents showing the accurate completion date.

21 The simplest way in which the Respondent can prove that it has ongoing work and receivables would be to adduce evidence of its bank account and the relevant transactions before the court. In the event that it is unable to do so for valid reasons, the Respondent could simply state those reasons on affidavit. Not only was this a point that I had made repeatedly to the Respondent, I had given ample opportunity to it to provide the evidence or explanation. Despite this, it stubbornly maintains its position and repeatedly refuses to either disclose the information or to even explain its refusal to do so.

22 Instead, the Respondent sought to rely on the English case of *Farrelly (M & E) Building Services Ltd v Byrne Bros (Formwork) Ltd* [2013] Bus LR 1413 ("*Farrelly*"), for the proposition that "there is no general obligation on a party when seeking enforcement to disclose to the other party confidential information of its financial and business position so that the other party can consider whether there are grounds for applying for a stay of any judgement" (see *Farrelly* at [91]). This argument, however, quite simply misses the point. The issue is not whether the Respondent has any obligation to disclose the information. Rather, if it chooses not to do so, or indeed provide any explanation as to why it does not disclose, then it fails to convince the court that it has any ongoing business or receivables. Further, the proposition in *Farrelly* relates to disclosure to *another party* in the proceedings. In such instances, it is understandable that one may desire to keep information confidential *vis-à-vis* others in the industry. Such considerations do not apply here.

23 The absence of evidence of the Respondent's ongoing business also goes towards the observation I made at [13]–[15] above. That is, without any ongoing business or the need for cash, the purpose of ensuring timely payments of adjudication sums under Act is no longer engaged. There is no pressing need in this case for the Respondent to be paid the adjudication sums, and granting a stay of enforcement will not in any way detrimentally affect it.

The Partial Release Issue

24 Finally, having found that a stay of enforcement should be granted, I was urged by the Respondent to grant it on terms that the Respondent should receive a partial release of the sums held in court. In its submission, this is necessary to fund the SIAC arbitration against the Applicant and the appeal against my decision in *CEQ v CER*.

25 Although this is the second time the Respondent has made such an application, I accept that that previous tranche of money released had already been utilised. In such circumstances, to prevent the Respondent from unlocking a further part of its fruits of adjudication in order to pursue the arbitration connected to the monies and the appeal will be highly unjust.

26 Accordingly, I grant the stay with a partial release of S$500,000 of the sums held in court solely for the purpose of legal fees in pursuing the arbitration and the appeal.

Conclusion

27 For the reasons given, I allowed the application and granted the stay of enforcement of the adjudication determination. I also ordered a sum of $500,000 to be released to the Applicant's solicitors, to be utilised towards the Respondent's legal fees and disbursements in both the appeal and arbitration.