Trustee of the estate of Tay Choon Huat, deceased *v* Soon Kiat Construction & Maintenance Pte Ltd
[2020] SGHC 212

Case Number : Originating Summons No 798 of 2020

Decision Date : 06 October 2020

Tribunal/Court : High Court

Coram : Andre Maniam JC

Counsel Name(s) : Tan Jin Yong and Yang Yung Chong (Lee & Lee) for the plaintiff; Ong Lian Min David and Barnabas Cho Jen Wei (David Ong & Co) for the defendant.

Parties : Trustee of the estate of Tay Choon Huat, deceased — Soon Kiat Construction & Maintenance Pte Ltd

Building and Construction Law – Dispute resolution – Adjudication

Building and Construction Law – Statutes and regulations – Building and Construction Industry Security of Payment Act

6 October 2020

Andre Maniam JC:

Introduction

1 What a difference a "day" makes.

2 The sole issue in the present case was whether the defendant's adjudication application ("AA") was lodged one day late. This objection did not find favour with the adjudicator, and the adjudicator proceeded to make an adjudication determination ("AD") against the plaintiff.

3 The plaintiff applied to court to set aside the AD, on the basis that the AA had been made late.

4 I found that the AA was made late, and set aside the AD. These are my grounds of decision.

Background

The Contract

5 The parties' construction contract (the "Contract") incorporated the Articles and Conditions of Building Contract (Lump Sum Contract, 9th Ed) of the Singapore Institute of Architects (the "SIA Conditions"). Clause 31(15)(a) of the SIA Conditions requires the Employer (*ie*, the plaintiff) to respond to an interim payment claim by the Contractor (*ie*, the defendant) by providing a payment response "within 21 days" after the interim payment claim is served on the Employer.

6 The payment claim in the present case was served on the plaintiff on 20 April 2020, and it provided the payment response on 15 May 2020. The AA was lodged on 28 May 2020.

The issue to be determined

7 The plaintiff contended that the word "day" in clause 31(15)(a) of the SIA Conditions *included* public holidays. The defendant disagreed, contending that "day" in that clause had the same meaning as defined in s 2 of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) (the "SOPA"), *ie*, unless the context otherwise requires: "'day' means any day other than a public holiday within the meaning of the Holidays Act (Cap. 126)".

8 On the plaintiff's case, with the contractual 21-day period for the payment response running from 20 April 2020 when the payment claim was served, the payment response was due on ***11*** May 2020. This meant that the dispute settlement period was from 12 to 18 May 2020 (per ss 12(2)(*b*) and 12(5) of the SOPA). After the end of the dispute settlement period, the defendant had to lodge its AA within seven days (under s 13(3)(*a*) read with s 12(2)(*b*) of the SOPA). As 24 and 25 May 2020 were public holidays (Hari Raya Puasa), and the SOPA definition of "day" would apply to that period, the plaintiff submitted that the AA had to be lodged by 27 May 2020.

9 On the defendant's case, however, the public holidays on 1 May 2020 (Labour Day) and 7 May 2020 (Vesak Day) should be excluded from the computation of the due date of the payment response. On that basis, the payment response was only due on ***13*** May 2020, such that the defendant had to submit the AA by 29 May 2020. The defendant was entitled to lodge an AA (per s 12(2)(*b*) of the SOPA) as the plaintiff had failed to provide a payment response on time – whether the payment response was due on 11 or 13 May 2020, the plaintiff failed to meet the deadline and only provided the payment response on 15 May 2020. On the plaintiff's case, the AA had to be lodged by 27 May 2020, but it was lodged one day late on 28 May 2020; on the defendant's case, the AA was lodged in time.

Consequences of a late adjudication application

10 Section 16(2)(*a*) of the SOPA provides that an adjudicator "must reject" any adjudication application that is not made in accordance with s 13(3)(*a*) of the SOPA. It was common ground that if the AA had been made one day late, then the adjudicator was obliged to have rejected it, and that I should now set aside the AD.

11 Section 27(6) of the SOPA states that the grounds on which a party to an adjudication may commence proceedings under s 27(5) of the SOPA (which includes proceedings to set aside an adjudication determination) include, but are not limited to, the following:

> …
>
> (*d*) the adjudication application or the adjudication review application was not made in accordance with the provisions of this Act;
>
> (*e*) the adjudicator failed to comply with the provisions of this Act in making the adjudication determination;
>
> …

12 It is settled law that an adjudication determination can be set aside for the adjudication application being made out of time: see *YTL Construction (S) Pte Ltd v Balanced Engineering & Construction Pte Ltd* [2014] SGHC 142 at [43]–[49], *UES Holdings Pte Ltd v Grouteam Pte Ltd* [2016] 1 SLR 312 at [51], *UES Holdings Pte Ltd v KH Foges Pte Ltd* [2018] 3 SLR 648 ("*Foges*") at [83].

"Day" in the SIA Conditions

13 Article 9 of the SIA Conditions defines "payment claim" and "payment response" as having the same meaning and effect as those terms are used in the SOPA and the regulations thereunder; however, there is no similar express adoption of the definition of "day" as provided for in the SOPA.

14 The plaintiff contended that this reflected a deliberate decision by the drafters of the SIA Conditions not to define "day" the same way it is defined in the SOPA, whereas they did expressly define "payment claim" and "payment response" in accordance with the SOPA. This argument found favour in a previous adjudication matter, *ATY Pte Ltd v ATZ Pte Ltd* [2016] SCAdjR 39 ("*ATY*") at [57]–[65], where the learned adjudicator held that "day" in clause 31(15)(a) of the SIA Conditions, as incorporated into the contract there, *included* public holidays.

15 The defendant sought to distinguish *ATY* on the basis that the letter of award in that case had used the term "calendar day" in relation to liquidated damages, whereas the appendix to the SIA Conditions had used the term "day" (when referring to the same matter). The adjudicator in *ATY* said this pointed to the parties regarding "calendar day" and "day" as synonymous (*ATY* at [68]–[71]). This was, however, only one of five points listed by the adjudicator to support his decision that "day" in that contract included public holidays (*ATY* at [57]–[73]), and it does not appear that the letter of award's reference to "calendar day" tipped the scales.

16 The adjudicator in *ATY* also cited the decision in *AFR Pte Ltd v AFS Pte Ltd* [2011] SCAdjR 70 ("*AFR*") where another learned adjudicator had likewise interpreted "day" in clause 31(15)(a) of the SIA Conditions (albeit the 7th Ed) to include public holidays (see [24]–[28] of *AFR*).

17 The defendant urged me not to follow the decisions in *AFR* and *ATY*. It argued that there was no need for article 9 of the SIA Conditions to expressly incorporate the definition of "day" in the SOPA – by incorporating "payment response", the SIA Conditions incorporated not only *what* a payment response was under the SOPA, but also *when* a payment response had to be provided under the SOPA. I did not agree with this argument. The SIA Conditions made a "payment response" under the SIA Conditions *what* it was under the SOPA, but the SIA Conditions themselves made provision for *when* a payment response was to be provided, in the form of clause 31(15)(a). Article 9(d) of the SIA Conditions only states that "payment response" shall have the same "meaning and effect" as those words in the SOPA, which is a separate matter from when a payment response has to be provided under the SOPA.

18 In this regard, s 11(1) of the SOPA reads as follows:

> **11.**—(1) A respondent named in a payment claim served in relation to a construction contract shall respond to the payment claim by providing, or causing to be provided, a payment response to the claimant —
>
> (*a*) by the date as specified in or determined in accordance with the terms of the construction contract, or within 21 days after the payment claim is served under section 10, whichever is the earlier; or
>
> (*b*) where the construction contract does not contain such provision, within 14 days after the payment claim is served under section 10.

19 Where a contract makes provision for when a payment response is to be provided (as was the case here), s 11(1)(*a*) of the SOPA applies and the payment response is to be provided by that contractual date, or within 21 days after the payment claim is served under s 10 of the SOPA, whichever is the earlier. The statutory "long stop" stipulation is "within 21 days after the payment

claim is served under section 10" (and that 21-day period would exclude public holidays because of the definition of "day" in s 2 of the SOPA), but the SOPA expressly allows the parties to agree on a shorter period, and if they did, that agreed shorter period would then be applicable.

20 The question remains whether the 21-day period in clause 31(15)(a) of the SIA Conditions is the same as the 21-day period in s 11(1)(*a*) of the SOPA. If "day" in the SIA Conditions excluded public holidays, then the two periods would be the same; but if "day" in the SIA Conditions included public holidays (and there were public holidays in the period in question), then the period under the SIA Conditions would be shorter.

21 "Day" was also used elsewhere in the Contract. Paragraph 3 of the letter of award stated that in the event of late completion, liquidated damages would be imposed at a rate of "$500/- per day". [note: 1] The same paragraph expressed the Contract Period as "six (6) calendar months including Sundays, Public Holidays and rest days", but this was more simply stated as "six months" in the appendix. [note: 2] It appears that the parties regarded "calendar months" (including public holidays) and "months" as synonymous. Their agreement on a Contract Period that specifically included public holidays suggests that they also intended other periods of time in the Contract to include public holidays.

22 If the defendant failed to complete the construction works within the Contract Period, it would be liable to liquidated damages. It would not matter whether the first day after the Contract Period were a public holiday: that would not give the defendant an extra day to complete the works; he had already exceeded the Contract Period. Under clause 24(2), liquidated damages would be payable for the period during which the works remained incomplete, and there is no stipulation relieving the defendant from liability for any public holidays in that period.

23 The defendant accepted that, in the Contract, "day" in relation to liquidated damages included public holidays. The defendant submitted that this was commercially justified because the cost of late completion to an Employer would continue day after day, whether any day was a public holiday. However, the defendant argued that the context of reckoning time for provision of a payment response was different, and so the meaning of "day" in relation to liquidated damages should not influence my decision on what "day" in clause 31(15) meant; moreover, the SOPA only addressed the payment mechanism, and not liquidated damages.

24 The defendant's argument would however lead to "day" in relation to liquidated damages having a different meaning from "day" in relation to provision of a payment response within the same contract, whereas consistency of usage would generally be expected.

25 The letter of award contained various other references to periods of time: "1 week" for mobilisation under paragraph 4, "14 days" for provision of a performance bond under paragraph 5, "fourteen (14) days" for submission of a programme of works under paragraph 6, and "twelve (12) months" for the defects liability period under paragraph 9. [note: 3] Did all these periods of time include public holidays (as with the Contract Period, and any period for which liquidated damages might be imposed)? Or did they exclude public holidays in line with the SOPA definition of "day"? Or did the answer to this vary from provision to provision in the same contract, as the defendant seemed to suggest?

26 The same questions may be asked about the various periods of time stipulated in the SIA Conditions, on which the parties contracted. The learned adjudicator in *ATY* ([14] *supra*) referred to various such periods of time at [63] of his decision: "28 days" under clause 23(2) for the Contractor

to give notice as a precursor to seeking an extension of time, "14 days" under clause 1(1) for written confirmation of the Architect's verbal directions or instructions, "7 days" under clause 1(7) for the Contractor to comply with a written notice from the Architect, "14 days" before scheduled commencement of work for the Contractor to submit a programme under clause 4(1), *etc*.

27 The learned adjudicator in *ATY* ([14] *supra*) went on to say at [64]–[65] that "[i]t cannot be that the drafters of the SIA Conditions intended the term "day" in one clause to have a different meaning when used in another clause within the same contract"; and that "[i]t can only lead to confusion and ambiguity if such a "pick and choose" approach were adopted".

28 The issue in the present case concerns clause 31(15)(a) of the SIA Conditions, but other subclauses of the same clause 31 also use the word "day" (or "days").

29 Clause 31(2)(b) of the SIA Conditions reads:

> If the time for the submission of any payment claim under the preceding paragraph falls due on a day which is Saturday, Sunday, Statutory or Public Holiday the Contractor shall submit the payment claim either on the day before or next following that date which itself is not a Saturday, Sunday, Statutory or Public Holiday. [note: 4]

30 If "day" in the SIA Conditions excluded public holidays (in line with the SOPA definition), then the time for submission of any payment claim under clause 31(2) of the SIA Conditions could never fall due "on a day which is [a] … Public Holiday" since such a day would, by definition, have been excluded, and the reference to public holidays in clause 31(2)(b) would thus be meaningless. Clause 31(2)(b) of the SIA Conditions was premised on "day" in clause 31(2)(a) including public holidays, and so it made specific provision for instances where the day on which a payment claim was to be submitted was a public holiday.

31 If a payment claim were due on a Saturday, Sunday, or statutory or public holiday, clause 31(2)(b) gave the Contractor the leeway of submitting the payment claim on the next day which was not itself a Saturday, Sunday, or statutory or public holiday. There is, however, no equivalent of clause 31(2)(b) in relation to clause 31(3) which requires the Architect to issue an Interim Certificate within 14 days after receipt of the interim payment claim, or clause 31(15) which requires the Employer to respond to the interim payment claim within 21 days after the interim payment claim is served. Thus, if the Architect's Interim Certificate, or the Employer's payment response, fell due on a Saturday, Sunday, or statutory or public holiday, the Architect and the Employer could not point to anything like clause 31(2)(b) to justify a later response.

32 If, from the language of clause 31(2)(b), "day" in clause 31(2) includes public holidays (see [29]–[30] above), that points to "day" in clauses 31(3) and 31(15) likewise including public holidays. Generally, the same term should bear the same meaning wherever it is used in the same contract, and especially in the same clause (here, clause 31).

"Day" in the case law

33 As against the adjudication decisions in *AFR* ([16] *supra*) and *ATY* ([14] *supra*), which involved the SIA Conditions, the defendant relied on the High Court decisions in *Fujitec Singapore Corp Ltd v GS Engineering & Construction Corp* [2016] 1 SLR 1307 ("*Fujitec*") and *Foges* ([12] *supra*), both of which however did not involve the SIA Conditions.

34 In *Fujitec*, the court held that the term "calendar day" in the contract included public holidays,

and did not mean the same as "day" in the SOPA. However, the judge commented at [10] that if the word used in that contract had been "day", he would have had little hesitation interpreting "day" the same way it was defined in the SOPA. I pause to observe that from the judgment in *Fujitec*, there is no suggestion that the contract there had expressly adopted only certain SOPA definitions, unlike the Contract in the present case.

35 In *Foges* ([12] *supra*), the court held that "day" in the subcontract there should be interpreted in line with the SOPA definition of "day". The judge accepted that the parties had not expressly agreed that the statutory definition should apply to the word "day" in that contract, but held (at [100]) that "[w]hen parties contract with the provisions of a statute in mind, and when the terms of those statutory provisions are defined by that statute, then generally, if the contract uses the same terms, the terms should be interpreted in accordance with the statutory definitions, unless the context yields a different interpretation".

36 What readily distinguishes *Foges* from the instant case is that the contract in the former had stated that "*the relevant provisions of the SOPA shall apply* to this Sub-Contract *in respect of payment claim(s), payment response(s)* and the date(s) on which progress payment(s) become(s) due and payable" [emphasis added] – the court held that the SOPA definition of "day" was fundamental to the *provisions* of the SOPA relevant to payment claims and payment responses, and the parties had expressly acknowledged that those provisions would apply (see [93] and [101] of the judgment). The contract in *Foges* was therefore worded very differently from the Contract in this case; article 9 of the SIA Conditions was more limited in only providing for "payment claim" and "payment response" to "have the same meaning and effect" as *those words* in the SOPA and the regulations thereunder.

37 Ultimately, the particular contract in each case stands to be construed.

"Day" in the Contract

38 In my opinion, the drafters of the SIA Conditions chose not to incorporate the SOPA definition of "day", while incorporating the SOPA definitions of "payment claim" and "payment response" (see [13]–[17] above).

39 Moreover, the parties agreed on a Contract Period of six calendar months that expressly included public holidays (see [21] above). It was also common ground that "day" in relation to liquidated damages included public holidays (see [22]–[23] above). These points further support an interpretation of "day" in the Contract as including public holidays.

40 Various other periods of time are provided for in the Contract, both in the letter of award and the SIA Conditions. A consistent treatment of them all (in terms of whether public holidays are included or excluded) would avoid confusion and ambiguity, and be preferable (see [25]–[32] above).

41 In particular, clause 31(2)(b) of the SIA Conditions is based on the concept of a "day" including public holidays, and cannot sit with the SOPA definition of "day" as excluding public holidays (see [28]–[32] above). I would avoid interpreting "day" in clause 31(2) in relation to the Contractor, differently than in clause 31(3) in relation to the Architect, or in clause 31(15) in relation to the Employer.

42 For the above reasons, I find that "day" in clause 31(15)(a) of the SIA Conditions, and in the Contract (which incorporates the SIA Conditions), *includes* public holidays. In that regard, it is different from "day" as defined in the SOPA, which *excludes* public holidays.

43 Section 11(1)(*a*) of the SOPA expressly allows the parties to contractually agree on a more stringent deadline for the provision of a payment response than the long stop period under the SOPA (21 days excluding public holidays). That is what the parties did here. From the perspective of a Contractor wishing to get paid quickly, an interpretation of "day" in the SIA Conditions as including public holidays favours the Contractor: the Architect would then have a strict 14-day period to issue an Interim Certificate, and the Employer a strict 21-day period to provide a payment response. It was ironic that the Contractor (*ie*, defendant) in the present case argued that the Employer (*ie*, plaintiff) had *more* time for its payment response on account of public holidays, so as to save itself from the consequences of having made a late AA.

Conclusion

44 I find that the AA was made late, and consequently I set aside the AD. As the plaintiff succeeded in its application, I awarded costs to the plaintiff.

[note: 1] Law Teck On's affidavit dated 31 August 2020 ("Law's affidavit"), pp 15 and 76.

[note: 2] Law's affidavit, pp 15 and 76.

[note: 3] Law's affidavit, pp 15-16

[note: 4] Law's affidavit, p 59.