Liew Ter Kwang v Hurry General Contractor Pte Ltd
[2004] SGHC 97

Case Number : OM 30/2003

Decision Date : 11 May 2004

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : George Tan (ChanTan LLC) for applicant; Winston Quek (B T Tan and Company) for respondent

Parties : Liew Ter Kwang — Hurry General Contractor Pte Ltd

Arbitration – Award – Recourse against award – Whether leave to appeal on questions of law arising from standard form contract should be granted – Whether resolution of questions of law would add to certainty and comprehensiveness of law

Arbitration – Award – Recourse against award – Whether leave to appeal should be granted where determination of questions of law could substantially affect rights of one or more parties to arbitration agreement

11 May 2004

Judith Prakash J:

Introduction

1 Mr Liew Ter Kwang is the owner of a semi-detached house in Mayflower Rise, Singapore. By a contract dated 30 June 1999, he employed Hurry General Contractor Pte Ltd ("the contractor") to reconstruct his house ("the works"). The contract incorporated the Articles and Conditions of Building Contract (Lump Sum Contract) 5th Ed, 1997, published by the Singapore Institute of Architects ("the Conditions"). The architect named in the contract was one Mr Wong Sai Heng of M/s Prodecon Architects.

2 The contractor commenced the works on 2 July 1999 and the original completion date was fixed as being 7 January 2000. Subsequently, the contractor requested, and was granted, various extensions of time. In September 2000, the architect certified that the works had been completed on 26 July 2000. The certificate of statutory completion was issued on 24 October 2000.

3 Disputes arose between Mr Liew and the contractor in relation to the works and, in particular, to the extensions of time given by the architect. On 3 January 2002, the contractor gave notice of arbitration to Mr Liew. On 10 July 2002, the Singapore International Arbitration Centre appointed Mr Yang Yung Chong as the sole arbitrator to adjudicate on the dispute. In the arbitration, the contractor was the claimant and Mr Liew both defended the contractor's claim and put in a counterclaim. The parties agreed that the arbitration be conducted and the award be made only on the basis of the evidence filed and the written submissions made. On 20 November 2003, the Arbitration Award dated 6 November 2003 ("the Award") was published.

4 On 10 December 2003, this originating motion was filed on behalf of Mr Liew. It prayed for an order granting Mr Liew leave to appeal on three questions of law arising out of the Award. I heard the motion on 9 February 2004 and granted Mr Liew the leave sought. The contractor has appealed against this decision and I now give my reasons for it.

The applicable principles

5 As the arbitration was commenced by a notice of arbitration given before 1 March 2002, it was governed by the Arbitration Act (Cap 10, 1985 Rev Ed) ("the Act") rather than the legislation that is presently in force *viz* the Arbitration Act 2001 (Cap 10, 2002 Rev Ed). The relevant provisions of the Act which govern appeals to the court against an arbitration award are ss 28(2), 28(3) and 28(4). They provide that the appeal can only lie on a question of law arising out of the award, that leave of the court is required for an appeal to be brought, and that leave shall not be granted unless the court considers that the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement. It has also been established by cases in England and Singapore that the principles by which a court will allow or disallow leave to appeal are:

(a) The discretion to grant leave would be exercised differently according to whether the question of law arises in the context of a one-off contract or clause or relates to a standard form contract.

(b) Where the issue concerns a one-off contract or clause, the discretion would be strictly exercised and leave to appeal would normally be refused unless the judge hearing the matter was satisfied that the construction given by the arbitrator was "obviously wrong".

(c) Where the question of law arises from a standard form contract a less restrictive approach is adopted and leave is granted when the court is satisfied that the resolution of the question of law would add significantly to the clarity, certainty and comprehensiveness of the law and also considers that a strong *prima facie* case had been made out that the arbitrator has been wrong in his construction.

(see *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724, *American Home Assurance Co v Hong Lam Marine Pte Ltd* [1999] 3 SLR 682 and *Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Pte Ltd* [2000] 2 SLR 609).

6 Mr Liew asked for leave to appeal on three questions of law. In the originating motion, these questions were formulated as follows:

(a) Whether the arbitrator erred in agreeing with the architect that extensions of time could be granted on grounds not provided for in cl 23 of the Conditions.

(b) Whether the arbitrator erred in law in agreeing that an architect can properly assess an extension of time without carrying out a detailed or logical or methodical analysis of the extension of time granted based on supporting documents, but by simply making an empirical assessment or estimate.

(c) Whether the arbitrator has power under cl 37(3) of the Conditions to review the architect's or consultants' decisions and/or certificates only if there is clear evidence of the architect or consultant not acting professionally, independently or fairly, or whether the arbitrator may do so on other grounds.

It can be seen that all three questions dealt with the interpretation of clauses in the Conditions relating to the grant of extension of time to the contractor by the architect. The Conditions are standard contractual clauses used in building contracts in Singapore. I took the view, therefore, that

as they were not one-off clauses in one-off contracts, the correct test to be applied was that set out in [5(c)] above. It would be convenient to take each question in turn.

The first question

7 The first question of law as to whether an extension of time could be granted on a ground not contained in cl 23 of the Conditions was, in my judgment, a question which had to be answered in order to add to the certainty and comprehensiveness of the law. It was important for this question to be answered in view of the wide use of the Conditions by persons in the building industry in Singapore, and the fact that architects are continually being applied to by contractors to extend the completion time for various contractual works.

8 The second point is whether there is strong *prima facie* evidence that the arbitrator had gone wrong in his construction of cl 23. The first question of law arose out of paras 197 to 209 of the Award. These dealt with the delay caused by the late delivery of roof tiles. Originally, a type of roof tile called "CEIPO" had been specified under the contract. The contractor discovered that these tiles were not available ex-stock in Singapore and that the earlier shipment would arrive on 23 November 1999. The contractor therefore proposed that a different type of tile be substituted and the architect agreed to the use of "Huguenot Fenal" tiles instead. There was some delay in delivery of those tiles also, however, and the contractor then decided to wait for the arrival of the shipment of the "CEIPO" roof tiles. When these came, the contractor learnt that the tile supplier would not give a ten-year warranty for the tiles as required by the contract. The contractor then ordered the "Huguenot Fenal" tiles which came with the required warranty. The delays in supply of the tiles caused delays in completion of the works. On these facts, the arbitrator's finding at para 208 was:

> From the evidence that I have cited, my finding is that the delay arising from the Roof Tiles was not entirely caused by the Claimants [the contractor], as part of it was caused by the decision to wait for the arrival of Hua Khian's shipment, only to discover subsequently that no warranty would be provided. This appears to have been considered by the Architect when he allowed an extension of 6 weeks, half of the 12 weeks asked for by the Claimants.

9 From the above, it appeared that the arbitrator found the architect's grant of an extension of time of six weeks to be in order because he thought the architect must have considered that the delay arising from the late supply of the roof tiles was not solely caused by the contractor. Counsel for Mr Liew challenged that finding on the basis that that reason did not fall within cl 23(1) of the Conditions.

10 Clause 23(1) of the Conditions contains 16 sub-paragraphs setting out the circumstances in which an extension of time can be granted by the architect. In this case, two of those sub-paragraphs were deleted but that still left numerous grounds for an extension of time. It was submitted that awaiting the arrival of roof tiles or building materials generally was not one of the grounds set out in the 14 applicable sub-paragraphs of cl 23(1). The arbitrator should not have accepted that the architect had the power to decide whether that event was "caused" by the contractor or Mr Liew when it was not a ground that could be relied on at all.

11 It was pointed out that cl 23 of the Conditions is broadly similar to cl 23 of the Malaysian Standard Form of Building Contract (1969). In a commentary on that form, *The Malaysian Standard Form of Building Contract* (Malayan Law Journal, 1990) by Vincent Powell-Smith, the author stated (at 88):

> Clause 23 provides for the architect to grant an extension of time on specified grounds and an extension of time is grantable on those grounds and no other. The architect has no inherent power to extend the period for completion and in the absence of an express provision such as clause 23 he would have no power to do so.

Counsel also pointed to case authority establishing that an architect can consider an extension of time only within the confines of the contract (see *Super Keen Investments Ltd v Global Time Investments Ltd v Grand Million Development Ltd* [1998] 2316 HKCU 1 and *Token Construction Co Ltd v Charlton Estates Ltd* (1973) 1 BLR 48).

12 Counsel for the contractor did not deny that the architect's powers to extend time had to be determined by reference only to cl 23. His argument was that the extension of time granted in this case was based on a justification contained in cl 23, *ie* it was due to a delaying factor caused by an architect's instruction. Under cl 23(1)(f) an extension of time can be given when the delay arises from an architect's instruction given pursuant to cll 1(4)(a), (b) or (c), 7(1), 11(2) and 14 of the Conditions. Counsel submitted that the architect had issued five instructions and that these instructions had been considered by the arbitrator. It was submitted that the instructions were grounds on which an extension of time could have been granted and, although not expressly stated in the Award, these issues must have been considered by the arbitrator when he made the finding of fact that the architect had rightly granted the first extension of time to the contractor.

13 I agreed with the submission that the power to extend time for performance of building works under a construction contract is entirely a contractual matter for the parties to determine. It is the contract that decides what power, if any, to extend time the architect will have. He can only extend time if the contract gives him this power and he can only exercise this power in the manner specified by the contract. The contract may give him a wide power to extend time or it may specify limited circumstances within which this power may be issued. In each case, the extent of the architect's power will depend on the proper construction of the terms of the contract. In this case, it was clear that the architect's powers were derived from and circumscribed by the language of cl 23. Thus, he could only grant an extension of time if the event justifying the extension fell within one of the applicable sub-paragraphs of cl 23(1).

14 It appeared to me that *prima facie* the arbitrator had gone wrong in his approach as he had not looked at cl 23(1) to determine whether the delaying event referred to fell within any of the applicable sub-paragraphs of the clause. Nor did he consider whether the architect had done this. He did not refer to the architect's instructions in his Award as a justification for the extension of time. His language indicated that he thought the architect considered the decision to wait for the arrival of the shipment of "CEIPO" tiles to be a reasonable one justifying an extension of time and that he, himself, agreed with that approach. The grounds do not disclose any consideration by the arbitrator as to how, if at all, the extension asked for could be fitted within the bounds of one of the sub-paragraphs of cl 23(1).

15 As far as the first question of law was concerned, I was satisfied that the requirements which I have spelt out in [5(c)] above had been satisfied.

The second question

16 The second question was whether the arbitrator erred in law in agreeing that an architect can properly assess an extension of time without carrying out a detailed or logical or methodical

analysis of the extension of time granted based on supporting documents, but by simply making an empirical assessment or estimate. This question arose out of the eight-week extension of time granted by the architect in respect of the tiling works. The matter is dealt with in paras 194 and 196 of the Award. These read:

> In criticising the Architect's "*preliminary quick computation*" of the 8-week extension of time for "Tiling Works", Chng [Chng Heng Chong, a chartered quantity surveyor and Mr Liew's expert witness] has given his Extension of Time Analysis based on the percentage of tiled areas "*subject to weather condition*", average number of "wet days" and meteorological station rainfall records, and having made certain assumptions, concluded that no extension of time should be given to the Claimants.
>
> As attractive as Chng's said Analysis seems to be, he does not appear to have considered the Claimants' reasons in support of their request for extension of time for the Tiling Works. Chng has not convinced me that the Architect had failed to exercise his professional discretion properly and/or to make a proper determination of extension of time. The Architect's "*decision and estimate*" of the first extension of time appears to be rightly based on an empirical assessment as opposed to any detailed analysis of extension of time.

17 The proposition enunciated in para 196 was that an architect can properly assess a time extension by simply making an empirical estimate or assessment. To me this did not seem to be a legally sound proposition. In making any determination under a building contract, an architect has a duty to act fairly and on a rational basis. Any assessment he makes must be based on reasons that can stand up to scrutiny. It has been held that in order for an architect to make a fair and reasonable assessment of the time extension to be granted, he must:

> (a) carry out a logical analysis in a methodical way of the impact that the relevant matters the contractors put forward had had on the delay to the project;
>
> (b) make a calculated assessment of time which he thought was reasonable for the various items individually and overall, rather than an impressionistic assessment;
>
> (c) apply the contractual provisions correctly; and
>
> (d) in allowing time based on the grounds listed in the contract provisions, ensure that the allowance made bears a logical and reasonable relation to the delay caused;

(see *John Barker Construction Ltd v London Portman Hotel Ltd* (1996) 50 Con LR 43). As pointed out in that case, whilst the assessment of a fair and reasonable extension involves an exercise of judgment, that judgment must be fairly and rationally based.

18 In this case, therefore, the architect should have carried out a detailed, logical and methodical analysis of the documents and other evidence submitted in support of the application for an extension of time. Such an analysis would have enabled him to correctly assess how much time should be given. The architect, as the arbitrator found, based his ground of extension of time simply on estimates. *Prima facie*, therefore, the arbitrator erred in agreeing that estimates would be sufficient and that detailed analysis was not required. Again, this legal issue is of importance due to the frequent applications that contractors make for extensions of time.

The third question

19 The third question was whether cl 37(3) of the Conditions permits the arbitrator to review the decisions of the architect only if there is clear evidence that the architect had failed to act professionally, independently or fairly in reaching such decision. Clause 37(3) reads:

> Such arbitrator shall not in making his final award be bound by any certificate, refusal of certificate, ruling or decision of the Architect under any of the terms of this Contract, but may disregard the same and substitute his own decision on the basis of the evidence before and facts found by him and in accordance with the true meaning and terms of the Contract, provided that …

The arbitrator, having reminded himself in para 54 of the Award of his powers under cl 37(3), went on to state in para 55 that:

> In carrying out their respective functions under the contract, both the Architect and FSinn [the quantity surveyor for the works] have to act professionally, independently and fairly as between the parties. Unless there is clear evidence to the contrary, it would be wrong for me to interfere with such "*certificate, refusal of certificate, ruling or decision of the Architect*" or valuation and/or other acts of FSinn.

He then went on to uphold a particular assessment of extension of time on the ground that there was no evidence to show that the architect and the engineers had acted unprofessionally or unfairly.

20 Clause 37(3) grants an arbitrator wide powers in the making of his final award. He is not bound by any ruling or decision of the architect. He is free to discard that decision and substitute his own on the basis of the evidence adduced in the arbitration and the findings of fact he has made thereon and in accordance with the true meaning of the contract. Nothing in cl 37(3) indicates that the arbitrator has to accept the architect's decision as long as he is satisfied that the architect had not acted unprofessionally or unfairly. On the contrary, the wording seems to indicate that the arbitrator should review the decision of the architect and if it does not accord with the facts as found by him or the true meaning of the contract as determined by him, then the arbitrator can disregard that decision even though the architect might not have acted unprofessionally or unfairly.

21 By taking the approach that he did in this case, the arbitrator failed to make a considered decision on the basis of the evidence before him and the facts found by him and the true meaning of the contract. He did not appear to have carried out a proper evaluation or review of the architect's decision. Instead, there was a presumption that the architect was right unless it could be proven that he did not act professionally, independently and fairly. This put an onerous burden on Mr Liew which was not required by cl 37(3).

22 I considered that the arbitrator had erred in his approach and that this question of law should be the subject of an appeal. The requirements set out in [5(c)] had been met in respect of this question as well.

Final requirement

23 As stated above, an additional requirement for the grant of leave to appeal is that the determination of the questions of law would have a substantial effect on the rights of one or more parties to the arbitration. This requirement was clearly met in this case. Each of the questions of law affected the number of days which the contractor had to complete the works. If the extensions of time granted by the architect were set aside or varied, there would be a financial consequence in the

form of liquidated damages payable by the contractor to Mr Liew.

Leave to appeal against arbitration award granted.