IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 92

District Court Appeal No 31 of 2021

Between

LBE Engineering Pte Ltd

… *Appellant*

And

Double S Construction Pte Ltd

… *Respondent*

GROUNDS OF DECISION

[Building and Construction Law — Termination]

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LBE Engineering Pte Ltd
v
Double S Construction Pte Ltd

[2022] SGHC 92

General Division of the High Court — DCA 31 of 2021
Lee Seiu Kin J
19 January 2022

27 April 2022

Lee Seiu Kin J:

Introduction

1 Payment disputes are common in the building industry. The Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("SOPA") was enacted to ensure the speedy resolution of such dispute while allowing projects to carry on to completion. However, parties may sometimes be tempted to take matters into their own hands by stopping work for non-payment. The danger of course, is that one may not be entitled to do so which would expose one to liability for wrongfully terminating the contract. The present case is one such example.

Background

2 Both the plaintiff,[1] Double S Construction Pte Ltd, and the defendant, LBE Engineering Pte Ltd, are Singapore registered companies providing civil construction services. The defendant requested a quotation from the plaintiff for a project to carry out some construction work for the Jalan Besar Town Council. After negotiations, the defendant issued the plaintiff a Letter of Award ("LOA") to carry out the following three sets of work for a lump sum of $243,811:[2]

(a) Upgrading of open space at Block 5 and 6 at St Georges Road and other related works ($162,104.00).

(b) Upgrading of existing community garden at Block 12 Upper Boon Keng Road and other related works ($65,504.00).

(c) Construction of new low linkway from Block 15 to community hall at Upper Boon Keng Road and other related works ($16,203.00).

3 Parties agreed that payment would be made according to cl 5 of the LOA[3] which provides as follows:

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1 The defendant is the appellant before me. To avoid confusion in this judgment, I shall continue to refer to the appellant as defendant and the respondent as plaintiff.

2 Record of Appeal, Vol 6, p 2.

3 Record of Appeal Vol 7, p 5.

> **5.0 <u>Payment Terms</u>**
>
> a) You shall submit on the 25_{th} month an itemised Progress Claim for the portion of works done up to the date of claim.
>
> b) [The defendant] shall issue a valuation within 15 days and the subsequent.
>
> c) All progress payment will be subject to 10% retention accumulating up to maximum limit of 5% of the awarded Sub-Contract Sum.

4 While the clause was badly drafted, it was clear to the parties that the plaintiff would make progress claims by the 25th of each month, which the defendant would then certify, *ie*, issue a valuation under term (b), before proceeding to make payment. The plaintiff submitted the first claim for the sum of $32,445.00 on 23 January 2018. This was certified by the defendant on 8 February 2018.[4] The second claim for the sum of $34,592.20 was filed by the plaintiff on 24 February 2018, and certified by the defendant on 19 March 2018.[5] The plaintiff filed the third claim for the sum of $20,589.84 on 26 March 2018.[6] The defendant certified the claim for a reduced sum of $15,604 on 15 May 2018.[7]

5 Problems, however, cropped up when it came to the fourth and fifth progress payments. The plaintiff filed the fourth progress payment for the sum of $82,487.10 on 24 April 2018.[8] When the fifth progress payment for the sum of $68,640.67 was filed on 26 May 2018,[9] the plaintiff requested that the

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4 Record of Appeal, Vol 8, Part A, p 35; Record of Appeal, Vol 3, p 9.

5 Record of Appeal, Vol 8, Part A, p 49.

6 Record of Appeal, Vol 8, Part A, p 63.

7 Record of Appeal, Vol 8, Part A, p 70; Record of Appeal, Vol 6, p 14.

8 Record of Appeal, Vol 8, Part A, p 75; Record of Appeal, Vol 3, p 10.

9 Record of Appeal, Vol 8, Part A, p 81.

defendant ignore the fourth progress payment claim.[10] The defendant, however, did not certify the fifth progress payment claim on the ground that it was submitted a day late, and informed the plaintiff that they would consider this claim for June 2018.[11]

6 This was where the dispute between the parties arose. The plaintiff alleged that because the defendant did not certify these sums and make payment, they were unable to continue work. They therefore notified the defendant on 12 June 2018 of their intention to stop work within seven days if the outstanding payments were not received. When no payment was forthcoming, the plaintiff stopped work on 18 June 2018.

7 Thereafter, following a meeting with the parties' lawyers, the plaintiff sent a final progress claim to the defendant for the final sum of $90,845.35 on 10 August 2018.[12] The defendant refused to pay the amount claimed. The plaintiff therefore brought the present action against the defendant, claiming the outstanding amount of $90,845.35. In response, the defendant filed a counterclaim for damages on the ground that they had to engage an alternative sub-contractor to complete the works as a result of the plaintiff's wrongful termination of the contract.

8 At trial, the main issue was whether the plaintiff was entitled to hold the defendant in breach, and halt all work thereafter: *Double S Construction Pte Ltd v LBE Engineering Pte Ltd* [2021] SGDC 242 at [10]. The district judge held that the plaintiff was entitled to do so, and that they were entitled to the total

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10 Record of Appeal, Vol 6, p 4, [8].

11 Record of Appeal, Vol 6, p 4, [9].

12 Record of Appeal, Vol 1, p 8, [9].

sum, based on their unpaid progress claims, of $90,845.35. The defendant appealed against the judgment below.

9 There were two issues before me:

(a) Whether the district judge erred in allowing the plaintiff to stop work in June 2018 and hold the defendant in breach for non-payment of sums due under the progress payment claims.[13]

(b) Whether the district judge erred in allowing the plaintiff's claim purely on liability on 15 July 2020, and in requiring parties to submit further on the measure of damages that the plaintiff was entitled to before rendering his decision on quantum.[14]

10 On 19 January 2022, after having heard submissions from the parties, I allowed the appeal as well as the defendant's counterclaim. These are the reasons for my decision.

Whether the plaintiff was entitled to stop work in June 2018 and hold the defendant in breach for non-payment of sums due

11 The main issue in this appeal was essentially whether the plaintiff was entitled to treat the defendant's non-payment of sums owed under the progress claims as a repudiation of the contract which would entitle them to stop work in June 2018. If the plaintiff was not entitled to treat the contract as being repudiated, they would have wrongfully terminated the contract, and the defendant's counterclaim would succeed.

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13 Appellant's Skeletal Submissions, p 2.

14 Appellant's Skeletal Submissions, p 9.

12 In both their written, and oral submissions before me,[15] the defendant relied on the case of *Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* [2004] SGHC 107 ("*Jia Min*") for the proposition that the plaintiff was not entitled to stop work in June 2018. That case also concerned a dispute over the non-payment of progress payment claims. The defendant, who was the main contractor for a construction project, subcontracted structural works of the project to the plaintiff. Certain clauses provided that monthly interim payments were to be made to the plaintiff, and that the defendant was entitled to terminate the contract. The contract also provided that the plaintiff was obliged to supply the necessary labour and materials, but this term was varied by agreement, with the defendant purchasing the requisite building materials on behalf of the plaintiff. In return, the defendant would deduct, from the progress payments, amounts payable for materials supplied during the previous month.

13 Disputes arose when the defendant used the plaintiff's slow pace of work as a pretext to stop further progress payments. The defendant also wiped out the plaintiff's entire progress claim for the following month by deducting the outstanding costs of materials. The plaintiff responded by stopping work, claiming that because no progress payments were made, it could no longer ensure the regular progress of works. The defendant eventually terminated the contract, and the plaintiff brought a claim for the outstanding sums under their progress payment claims.

14 VK Rajah JC, as he then was, noted (at [55] – [57]):

> 55 It appears to be settled law that **a contractor/sub-contractor has no general right at common law to suspend work unless this is expressly agreed upon**. This is so even if payment is wrongly withheld: see *Lubenham Fidelities and*

[15] Appellant's Skeletal Submissions, p 2, [2].

> *Investments Co Ltd v South Pembrokeshire District Council* (1986) 33 BLR 46, *per* May LJ at 55:
>
> > Whatever be the cause of the under-valuation, the proper remedy available to the contractor is, in our opinion, to request the architect to make the appropriate adjustment in another certificate, or if he declines to do so, to *take the dispute to arbitration* … [emphasis added]
>
> 56 This view is echoed in *Halsbury's Laws of Singapore*, vol 2, (LexisNexis Singapore, 2003 Reissue) at [30.321] (see also *Keating on Building Contracts*, (7th Ed, 2001) at para 6-96). *Hudson's Building and Engineering Contracts*, vol 1, (11th Ed, 1995) at para 4-223 states:
>
> > [I]t seems clear that in England and the Commonwealth *there is recognised right to suspend work*, or indeed of payment otherwise due upon a breach by the other party (although in the case of payment, as has been seen … legitimate deduction for damage previously suffered or other valid set-offs will, in the absence of express provision, be permitted from sums otherwise due). [emphasis added]
>
> This passage appears to support, at first blush, the contrary position. It is, however, amply evident that this passage has endured an editorial mishap, for at para 4-224, it is stated:
>
> > [I]t is no accident that the English and Commonwealth courts have consistently refused to imply a right to suspend work (or of non-payment by the owner) upon a breach of contract.
>
> 57 There appear to be strong grounds for denying such a right. **The existence of such a right could create chaos within the building industry if contractors were to muscle their way through disputes with threats or actual acts of suspension instead of having their disputes adjudicated.** Projects could be held to ransom with severe consequences. Furthermore, it would be incorrect in principle to imply in what is commonly viewed as "an entire contract for the sale of goods and work and labour for a lump sum payable by instalments", a right to break up performance into segments in the absence of any specific and express contractual agreement.
>
> [emphasis in original in italics; emphasis added in bold]

15 These observations were cited with approval by the Court of Appeal in *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2021] 2 SLR 510 at [96]. There, the Court of Appeal further noted that while there

may be instances where a persistent course of payment delays, or a protracted delay in payment of a substantial sum could amount to repudiation of the contract, not every instance of non-payment by a contracting party would amount to repudiation.

16 The observations in *Jia Min* have also been applied in the context of summary judgment proceedings. In *Republic Airconditioning (S) Pte Ltd v Shinsung Eng Co Ltd (Singapore Branch)* [2012] 2 SLR 601 ("*Republic Airconditioning*"), the plaintiff had removed their workers from the construction site and stopped work when the defendant failed to pay on some of the invoices. An audit confirmation sent by the defendant acknowledged that the defendant owed money to the plaintiff, and that nothing was owed by the plaintiff to the defendant. The plaintiff brought a claim for money owed and obtained summary judgment against the defendant. On appeal, the defendant argued that it was entitled to the defence of set-off by virtue of its cross-claim on the basis that the plaintiff had wrongfully repudiated the contract by withdrawing its workers from the project site and ceasing work.

17 This argument did not carry any weight with Lai Siu Chiu J who noted (at [20] – [21]):

> 20 The defendant's argument here illustrated starkly the evil the court must guard against when dealing with applications for summary judgment (see [11] above): *ie*, the desperate defendant who slings as many arguments as he/she can, no matter how frivolous, hoping that one sticks. The defendant cited two authorities which supposedly supported its argument that in construction and building contracts, failure to make payment was not a valid reason to abandon works and such abandonment amounted to wrongful repudiation: *Halsbury's Laws of Singapore* vol 2 (LexisNexis 2003) ("Halsbury's Laws of Singapore") at para 30.310 and *Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* [2004] 3 SLR(R) 288 ("Jia Min").

> 21 Both authorities, however, state clearly that while there was no general right to suspend works, this was subject to the parties expressly providing for such a right in their contract (see *Halsbury's Laws of Singapore* at para 30.310] and *Jia Min* at [55]). Under the heading "Invoicing and Payment" in the contract, it was stated:
>
> > … In the event that our claims to you are not fully settled on time, we reserve our rights to claim all dues through legal means and remove all our workers from your site immediately without any further notice to your company. We will not be responsible, in any way, for any delays to your work schedule and losses suffered as a result of our cessation of work due to your non-payment.
>
> It suffices to say that, in the light of the above, the defendant's claim here simply did not hold water.

18 While it was clear in *Republic Airconditioning* that the subcontractor had the right to suspend work for non-payment, the present case was quite different as the contract between parties did not provide for such a right.

19 Finally, I would note that prior to *Jia* Min, support for the proposition that a subcontractor generally has no right to suspend work at common law for non-payment could be found in *Chan Hong Seng Engrg & Const Pte Ltd v Vatten International Pte Ltd* [2002] SGHC 124 ("*Chan Hong Seng*"). There, the defendant, Vatten International Pte Ltd ("Vatten"), was engaged by Hyundai as a subcontractor. Vatten engaged the plaintiff, Chan Hong Seng Engrg ("CHS") as the sub-subcontractor. Two related issues in that case were: a) could Vatten terminate the subcontract on the basis that CHS had already repudiated it by stopping work, and b) if CHS had indeed stopped work, were they justified in doing so?

20 Judith Prakash J, as she then was, found that CHS was not justified in stopping work, pointing out (at [66]) that difficulties "in settling ones suppliers and workers bills would not justify breaching the subcontract by stopping work

unless that difficulty was caused by a pre-existing breach" in its payment obligations by Vatten. CHS accepted that one or two failures on Vatten's part to make payments of amounts due did not justify a work stoppage, and instead submitted that there had been persistent underpayment, the cumulative effect of which was a breach on Vatten's part which indicated their intention to repudiate the subcontract. However, because Prakash J had earlier found that persistent underpayment by Vatten had not been established, CHS could not show that Vatten had intended to repudiate the contract, and thus had no excuse for stopping work.

21 It is therefore clear that, as a matter of law, a sub-contractor has no right to suspend work for non-payment unless this is expressly provided for. In the same vein, I would respectfully agree with the observations in *Jia Min*. If sub-contractors could suspend work for non-payment of progress payment sums, instead of attempting to have the dispute adjudicated under the SOPA, it would allow them to hold the main contractor to ransom whenever a dispute over payment claims arose by simply stopping work until their payment demands were met. The proper thing to do, if there was a dispute between the main contractor and sub-contractor over payment, would be to have the disputed sums adjudicated under the SOPA which provides a legislative framework to expedite the process by which a contractor may receive payment, without altering the substantive rights of the parties under the contract: *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [30] – [31].

22 I would further hold that, in the present case, there was also no persistent course of delays or protracted delays in the payment of a substantial sum that could amount to repudiation of the contract. In *Zhong Kai Construction Co Pte Ltd v Diamond Glass Enterprise Pte Ltd* [2021] SGHC 277 at [70] – [77], the reason for the court's finding that there was no persistent course of payment

delays which justified the defendant's repudiation of the contract was because prior progress claims were not fully rejected, but certified for lower sums. It was also undisputed between parties that the plaintiff had substantially paid the amounts that were certified. A similar situation was clearly present on the facts before me. The only difference was that the fifth progress claim was not assessed on the ground that the plaintiff had submitted it a day later than what parties had agreed upon in cl 5 of the LOA.

23 It is therefore clear that the plaintiff in the present suit did not have the right to stop work in June 2018, and hold the defendant in breach. As the plaintiff had wrongfully terminated the contract, the defendant's counterclaim for damages arising from the plaintiff's wrongful termination must succeed.

24 Given my findings above, there was no need to deal with the second ground of appeal as to whether the district judge erred in allowing the plaintiff's claim purely on liability on 15 July 2020, and in requiring parties to submit further on the measure of damages that the plaintiff was entitled to before rendering his decision on quantum.

25 I now turn to consider the quantification of damages for the defendant's counterclaim. Counsel for the defendant submitted that the cost incurred by the defendant in engaging another contractor to complete the plaintiff's works came up to approximately $225,055 ("Quoted Sum"). The defendant had paid the plaintiff $82,641. The additional amount incurred by the defendant beyond the contractual sum of $243,811 was $63,885:

		$
(a)	Quoted Sum	225,055
(b)	Amount paid to the plaintiff	82,641

(c)	(Less) Contractual sum	243,811
	Total	63,885

26 Counsel for the plaintiff argued that this figure of $63,885 should be adjusted downwards to reflect the fact that the contractor hired to complete the works was a friend of the project manager. In my view, the more pertinent consideration was the fact that only one quotation was obtained in the defendant's endeavour to engage a replacement contractor. Despite the delays to the project, I did not see any compelling reason as to why a second quotation could not be quickly obtained. I therefore gave a 5% reduction to the Quoted Sum which reduced it to $213,802. Therefore, the total amount that the defendant was entitled to be reimbursed by the plaintiff was $52,632:

		$
(a)	Quoted Sum	213,802
(b)	Amount paid to the plaintiff	82,641
(c)	(Less) Contractual sum	243,811
	Total	52,632

Conclusion

27 I therefore allowed the appeal and dismissed the plaintiff's claim. The defendant's counterclaim is allowed, and there shall be judgment for the defendant in the sum of $52,632 including interest at 5.33% from the date of the counterclaim.

28 As for costs here and below, they shall be fixed at $22,000 including reasonable disbursements to be agreed or taxed at the State Courts. The plaintiff shall return the $45,000 that the defendant had paid to the plaintiff pursuant to

the Order of Court ("ORC") in DC/SUM 3484/2021. Finally, the plaintiff solicitors shall pay the defendant the sum of $15,000 in costs that the defendant had paid pursuant to the same ORC.

29 Finally, I would like to remark that I derived little assistance from the written submissions of counsel as they were badly drafted. I must emphasise the importance of good writing on the part of counsel as words are the tools of our trade. Lawyers should constantly strive for clarity, both in their advocacy and written submissions: Lord Denning, *The Discipline of Law* (Butterworths, 1979) at pp 5 – 8, see also Justice Choo Han Teck, "Legal Writing" [2019] SAL Prac 3.

Lee Seiu Kin
Judge of the High Court

Allagarsamy s/o Palaniyappan (Allagarsamy & Co) for the plaintiff.
Oh Kim Heoh Mimi (Ethos Law Corporation) for the defendant.