

PRO-BUILDER SDN BHD

AND

ONG TIONG OH

**Court of Appeal of Brunei Darussalam
(Civil Appeal No. 3 of 2020)**

Before: Burrell P., Seagroatt and Lunn JJ A.

7 July 2021

Headnote: Construction contract – arbitration clause – appeal allowed on the basis that there is no “dispute” as defined by the arbitration clause – stay for arbitration refused.

Ms. Nadeeya Salleh of of m/s YC Lee & Lee for the Appellant.

Mr. Kelvin Lim of of m/s Rizlan Lim for Respondent.

Burrell, P.:

The sole issue in this appeal is whether or not an arbitration clause in a construction contract between the plaintiff and defendant should operate so as to stay or strike out the proceedings commenced by the plaintiff by writ in favour of arbitration.

The plaintiff (appellant) is a construction company who was engaged by the defendant to build a pedestrian bridge in Bandar Seri Begawan in 2014. The provisional contract sum was \$769,746. The works were duly carried out and practical completion was certified on 9th September 2015. There were several variations during the contract and the final sum submitted by the Superintending Officer was \$1,261,316. The defendant paid \$1,000,000. The Writ and Statement of Claim dated 13th March 2019 claims \$213,916 being difference between the \$1 million paid and the sum of \$1,213,916 being the Superintending Officer’s final statement of account dated 16th November 2018.

Subsequently the defendant purported to invoke Clause 39 of contract, the “arbitration clause”, the material parts of which state that:-

“Arbitration:

Provided always that in case any dispute of difference.....shall arise.....

---Superintending Officer shall determine such dispute of difference by a written decision given to the Contractor. The said decision shall be final and binding on the parties unless the Contractor within 14 days after a written request to him by the Contractor fails to give a decision as aforesaid, such dispute or difference shall be referred to the arbitration."

The matter first came before Senior Registrar Zelda Skinner who, on 19th February 2020 ordered that the defendant's application to stay the proceedings be dismissed with costs to the plaintiff.

The defendant appealed. The appeal was heard by Judge Masni in the Intermediate Court who gave her decision on 4th July 2020. Her findings at paragraphs 38-43 of the judgment state as follows:

- "38. The issue before me is whether there is a dispute.*
- 39. After reading the submission by both the Plaintiff and the Defendant, I am satisfied that there is a dispute as to the determination of accounts prepared by the Superintending Officer.*
- 40. The Superintending Officer prepared two Statement of Final Account. The first being on the 25th August 2018 and the second Statement dated the 16th of November 2018.*
- 41. The amount in the Statement of Accounts prepared by the Superintending Officers on both dates differs, which is the subject matter of this dispute.*
- 42. This give rise to a cause of action and it satisfied the first conditions of Clause 39. Therefore, I disagree with the Plaintiff's solicitor that there is no dispute to be arbitrate. It is for the Superintending Officer to explain the difference in the two Statement of Account.*
- 43. By virtue of Clause 39, it provides that if there is a dispute, this matter shall be referred to an arbitrator. Therefore, I am satisfied that this matter shall be referred to an arbitrator."*

Accordingly, she ordered that "the Writ of Summons endorsed with the Statement of Claims dated 25th March 2019 in this action be struck out and this dispute be referred to arbitration" with costs to the defendant.

Background

An outline of the facts leading up to the filing of the writ is as follows:

Following the Superintending Officer's ("S.O.") assessment of the contract sum, dated 21st July 2016, which accounted for all variations to the contract, in the sum of \$1,261,316 the parties

had a meeting on 6th December 2016. Following that meeting the defendant paid a sum of \$1,000,000. It is not accepted by the plaintiff, that this sum was an agreed final payment. They say it was an arbitrary figure selected by the defendant. The plaintiff continue to claim that the outstanding balance of \$261,316 was due.

In order to decide whether or not the arbitration clause should operate, two issues need to be resolved. First, whether or not a dispute exists, namely whether the judge was correct to determine that “the S.O. prepared two statements of Final Account. The first being on 25th August 2018 and the second dated the 16th of November 2018. The amountin the two accounts differ.....”

Secondly, whether or not the 14 days limitation in Clause 39 was complied with or not. If it was not complied with there is no valid final determination by the S.O. and the matter must go to arbitration.

1. Were there two different final accounts by the S.O.?

Firstly, there is no documentary evidence to support the defendant’s contention, which is crucial to his submissions in this appeal, that the \$1,000,000 paid following the meeting on 6 December 2016 was an agreed final sum. On the contrary, such documentary evidence as there is clearly points the other way. By a letter of the same date the plaintiff wrote to the defendant, following the meeting stating:-

*“However upon updating our project account, there is still balance outstanding amount of B\$261,316.42 from the Revised Final Contract Sum as certified by the Consultant and therefore **Pro-Builder Sdn Bhd’s Official Receipt No. 0810** and **Ong Tiong Oh’s Payment Voucher No. 2016/0175** dated 6th December 2016 respectively, should read as partial payment instead of Final Payment and we shall reserve our right to claim the said balance amount from yourself”*

At the hearing of the appeal, Mr Lim representing the defendant, informed the court that he had only seen this letter on the morning of the appeal. Whilst this is very surprising it merely demonstrates that his reliance on the \$1,000,000 payment as an agreed sum is plainly flawed. It, further, wholly undermines paragraphs 12-23 of his supplemental written submission. Mr Lim being unaware of this most important letter is all the more surprising because on 21 December 2016 the S.O. wrote to his client as follows:-

“In the 1st para of the letter it would appears that the final payment of BND228,800.00 making a total of BND1,000,000.00 (Brunei Dollars One Million Only) as the agreed final account value. However, in the 2nd para of the same letter, contractor contended otherwise and stipulated that it was not to be treated as final payment.

In view of the above, we would be grateful to receive your clarification and advise to the status of the project final account as we are not privy to the meeting between the contractor and your goodself."

As Mr Lim had not seen these letters until recently it is obvious that they had not been brought to the judge's attention either.

Moreover, the voucher for the payment of \$228,000 (the sum required to make up the \$1,000,000) describes it as *"proposed pedestrian bridge final payment"* In view of the above letter the word *"proposed"* must refer to the nature of the payment.

Secondly, we are persuaded that the judge fell into error when she determined that there were two different final accounts from the S.O. in 2018. Her judgment refers to a final account dated 25th August 2018. We can find no correspondence in support. There is a letter from the S.O. dated 25th August 2018. However, it is in reply to the plaintiff's solicitor's letters dated 2nd and 14th August requesting the S.O. to make a final determination.

The 25th August letter states:

"Subject to the establishment that there was no agreement reached between the two disputing parties on 6th December, 2016 and if no objections are received from both Parties within three (3) weeks from the date of this letter, we will proceed to prepare a Statement of Final Account for the said project contract.

Since the preparation involves a lot of works inclusive of retrieving and studying of drawing and documents, we hereby advise that we will take about two (2) months to complete the said task. Based on this, we hereby ask that the period of two (2) months as requested us is reasonable and that it be accorded to us."

It is interesting to note, in passing, that the S.O. regards the preparation of a final account as involving *"a lot of work"*. No such exercise involving *"a lot of work"* had hitherto been embarked upon.

As evidence of an earlier agreement the judge may have intended to refer to two letters dated 4th April 2018 and 25th May 2018. These are the only two letters which refer to this issue. Both are from the S.O.

However, any reliance on these letters as evidence of an 'agreement' on 6th December 2016 which conflicts with the later final account of the S.O. is plainly misconceived as a simple analysis of the wording of the letters demonstrates.

The plaintiff first asked the S.O. for a "final determination" by letter dated 26th march 2018. The S.O.'s reply of 4th April 2018 states:-

“We refer to your reference LYC/NS/fde/1492/18 dated 26th March 2018 and would advise that we have been informed by our client YB Ong Tiong Oh that the last payment in the amount of BND228,800 made on 6/12/2016 was the final payment due under the contract. As such the contract Final Account Value is BND1,000,000.00 (Brunei Dollars One Million Only).”

At its highest this merely re-iterates the S.O.’s understanding based on information from the defendant, that there had been an agreement. As earlier stated this is not supported by evidence.

The S.O.’s next letter of 25th May 2018 adds nothing. It states:-

“We have mentioned in our earlier letter that we have been advised by client Yang Berhormat Ong Tioh Oh that there was indeed an agreement reached between himself and Pro Builder on the Final Account Figure on 6th December 2016. We were shown the payment voucher and the official receipt. We therefore reckon that a Final Account amount has been determined between the two (2) contracting parties. The issue is one where both contracting parties had agreed amongst themselves the amount offered to be paid and accepted by the other party.”

Once again the S.O. “has been advised by (the defendant)” The “payment voucher” is not evidence of an agreement, it is only evidence of payment. Moreover, at its highest it is a “reckoning” that the parties have agreed, not a determination by the S.O., clearly neither letter was preceded by “a lot of work”.

Thus, we are satisfied that, contrary to the judge’s finding, there was but one final determination dated 16 November 2018 which requires the defendant to pay the plaintiff \$213,916.13.

2. Has there been a breach of the “14 days” requirement in Clause 39?

By the letter of 25th August 2018 the S.O. requested an extension of 2 months to complete the task of preparation. The letter also states the S.O.’s agreement to commence the preparation of the final account provided there were no objections from either party within 3 weeks from the date of the letter.

The plaintiff replied saying they had no objection to either the preparation of account or to the 2 months’ time as requested. The defendant made no reply. Thus, the S.O. would have commenced the report on 16th September (3 weeks after his letter) and the report is dated 16th November.

Clearly, the defendant's silence cannot be construed as an objection. The 14 days requirement was, by implication, waived and a final determination within the meaning of Clause 39 was completed. It binds the parties and bars arbitration.

For the sake of completeness we refer to four final matters.

First, the Respondent's second written submission (which is undated but received by the court a few days before the hearing) raises, for the first time, the contention that at the time of the November final account by the S.O., the S.O. was "*functus*". This is a surprising and flawed contention. The only oblique reference to it in the respondent's first written submission, dated 5 March 2021, as at paragraph 31 which is based, as we now know, on a false premise. Paragraph 31 stated:-

"The fact is that a settlement in 2016 was confirmed by the Appellant in writing through its own Official Receipt and is termed as final, which means that there was nothing else to pay. This made the certification of the Superintending Officer of November 2018 redundant."

The revised contention in the recent submission is that:-

"The Appellant claimed that the latest Statement of Final Account from the Superintending Officer is a determination that is final and binding on the parties. This contention is flawed.....The circumstances leading to this certification make this certification unsafe and invalid. It is not endorsed by the Respondent. The Superintending Officer was at the time functus as the issue of what the final contract sum was in issue in the arbitration.....He had no authority to make this latest certification."

This contention is wrong for the following reasons:-

There is no contractual requirement for the Respondent to "*endorse*" the final certification. He agreed to be bound by it.

The S.O. pursuant to clause 37(a) of the contract, is under a continuing obligations to certify the work to enable payments to be made. There is no legal support for the argument that obligations, for some reason, ends with a Notice of Arbitration which thereby makes the certification "*unsafe and invalid*". On the contrary Clause 39 triggers a reference to arbitration on the failure by the S.O. to make a final determination.

The Respondent made no objection to the preparations of the final account and made no claim that the S.O. was "*functus*", other than his continuing submission, now dead in the water, that the matter had been "*agreed*" in December 2016.

Secondly, if as contended by the Respondent they believed the matter was proceeding via the arbitral process and therefore the final account was invalid, the appellant is correct to observe that the Respondent has taken no steps, incumbent upon it, consistent with such a belief. The reality is that they have only been prompted into action after the S.O.'s final account because they think it is too much.

Thirdly, the judge said "I am unable to comprehend as to why the plaintiff did not stay and/or withdraw the Notice of Arbitration (when) filing this Writ....." We agree with the plaintiff's submission that there is no procedural requirement to do so.

Finally, the judge, on finding that a dispute existed ordered that the Writ and Statement of Claim be "struck out". Had there been a dispute the proceedings should have been stayed, not struck out, so that the action would be merely continued in the unlikely event of the arbitration not going ahead for whatever reason.

The appeal is allowed, Senior Registrar Zelda Skinner's order is restored with cost of the appeal and below to the appellant.

Burrell, P.

Seagroatt, J.A.

Lunn, J.A.