Newtech Engineering Construction Pte Ltd v BKB Engineering Construction Pte Ltd and Others
[2004] SGHC 61

Case Number : Suit 42/2003/N

Decision Date : 27 March 2004

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Lawrence Lim, Chong Kuan Keong and Michael Chong (Chong Chia and Lim LLC) for plaintiff; Josephine Chong (UniLegal LLC) for defendant

Parties : Newtech Engineering Construction Pte Ltd — BKB Engineering Construction Pte Ltd; The Asia Insurance Company Ltd; Cosmic Insurance Corporation Limited

Contract – Remedies – Claim for work done under two sub-contracts – Whether plaintiff successful in proving claim.

Contract – Remedies – Liquidated damages – Defendant counterclaimed for liquidated damages arising from delays under sub-contracts – Whether delays attributable to plaintiff – Whether defendant successful in proving counterclaim.

27 March
2004
reserved.

Kan Ting Chiu J:

1 The action is between the plaintiff, Newtech Engineering Construction Pte Ltd, and BKB Engineering Constructions Pte Ltd which I shall refer to as "the defendant". The other two defendants are insurance companies and were made defendants because the plaintiff sought to restrain them from making payment under performance bonds issued by them in favour of the defendant. As that issue was dealt with in a separate hearing, these two defendants were not involved in the trial before me.

2 The parties are contractors in the construction industry. The defendant was a main contractor of the Ministry of Defence (hereinafter referred to as "the employer") for the construction of Phase 1 of the development of the Sembawang Camp.

3 The defendant in turn entered into two contracts with the plaintiff to carry out parts of the works that it had been awarded. These two sub-contracts were dated 31 January 2000 and 18 April 2000. The first sub-contract was for the construction of a box culvert. The second sub-contract was for external works, essentially road works.

4 The plaintiff claimed that after it had carried out the sub-contract works, as well as other variation/additional works requested by the defendant, there was a sum of $376,944.99 inclusive of goods and services tax ("GST") (or $365,966 without GST) owing by the defendant to the plaintiff under the statements of account between them.

5 In the course of the trial, the parties were able to agree on two figures for the main items of the claim. They are (a) the amount payable for the road works at $739,649.18 (a reduction of $104,851.94 from the plaintiff's figure) and (b) $275,500.00 paid by the defendant for material used by the plaintiff (an increase of $57,500.00 over the plaintiff's figure).

The first sub-contract

6 The box culvert works were completed by the plaintiff. The work was originally scheduled to be completed by 31 May 2000. The date of completion was revised to 10 November 2000 and the work was completed on 9 November 2000. There were no complaints from the defendant of the late completion until two years later, on 3 January 2003, when the defendant attempted to call on the performance bonds furnished under the sub-contracts. (The plaintiff restrained the defendant from doing that, see *Newtech Engineering Construction Pte Ltd v BKB Engineering Constructions Pte Ltd* [2003] 4 SLR 73 which was affirmed on appeal.)

7 There was a dispute over piling works for the culvert. This was not specifically provided for in the sub-contract. The defendant offered the works to the plaintiff as provisional variation works but the plaintiff declined to take on the works. It is not the defendant's case that the plaintiff was obliged to accept the works or that the plaintiff was in breach of contract in refusing them. The piling works were eventually done by another sub-contractor, Leong Seng Hin Pte Ltd ("LSH").

The second sub-contract

8 The second sub-contract was for the execution of road and kerb works. Some parts of the works were subsequently omitted from the sub-contract.

9 The dispute between the parties is the cause of the delay in the works which were done. The plaintiff's case is that the works can be completed only after mechanical and electrical and drainage works which were outside its scope of works have been completed, and that delays in those works delayed its road and kerb works.

10 The defendant on the other hand blamed the plaintiff for delaying the works. It also claimed that it had actually overpaid the plaintiff, and that it had substantial claims for liquidated damages arising from the delays under both the sub-contracts.

Breakdown of the plaintiff's claim

11 The defendant put up a "Breakdown of Plaintiff's Claim" in its closing submissions at pp 4–13. The breakdown was divided into five parts:

I. Box Culvert (First Sub-contract)

II. External Works (Second sub-contract)

III. Additional Works

IV. Abortive Works, and

V. Day Works.

The parties agreed on some items in the breakdown, and on the items on which they cannot agree, they set out their reasons. I shall deal with each item where there is an agreed variation in the amount claimed, or where there is a dispute.

I. Box Culvert

The agreed sum for the first sub-contract is $437,328, representing an *increase* of $7,512.61 over the plaintiff's original claim.

II. External Works

The sum agreed is $718,106, a reduction of $101,798 from the plaintiff's claim.

III. Additional Works

Item 2 – a retaining wall, for which the plaintiff claimed $175,050, and which the defendant assessed at $144,540. The sub-contract provided a rate for walls of 2m to 5m. The defendant claimed that was a mistake, and the rate should be for walls above 2.5m, and unilaterally applied a reduced rate. The defendant should seek a rectification of that term. As it did not, the full claim of the plaintiff is allowed.

Item 4 – the plaintiff's claim for $26,840 for an additional layer of weephole and hardcore along the sides of a drain. The defendant asserted that the employer's contract drawings have referred to the "Code of Practice on Surface Water Drainage" and "The Surface Water Drainage Regulations 1976" which specify the weepholes and that the plaintiff's own tender drawings had provided for them. There is some uncertainty whether the claim was for work over and above the requirements of the Code and Regulations, or whether they were done to comply with them. As the onus is on the plaintiff to prove its claims, I find that it has failed to do so.

Item 5 – there was a dispute for the construction of weepholes for retaining walls. This dispute was over the rate to be charged. The plaintiff claimed a rate of $22 per metre, as stated in its variation claim, but there was no evidence that the defendant agreed to the rate. The defendant put forward a rate of $12.65 based on the Fixed Schedule of Rates. I find that reasonable and reduced this claim by $4,446.09.

Item 6 – the claim for raising the level of a drain. The plaintiff used the rate of $43.65 per metre. The defendant asserted that the parties had agreed that it should be subject to a 3% discount. The plaintiff explained the 3% discount had been given on the initial rate of $45 and I accept the explanation. There was also a dispute over the measurement of the works. The plaintiff claimed 190m, whereas the defendant and its expert put it as 130m without comment from the plaintiff. On the evidence, I accept the defendant's figure. This means a reduction of $2,619 to the plaintiff's claim.

Item 8 – 1.5m box drain. The parties could not agree on the rate. The plaintiff claimed $7,000 at the rate of $700 x 10m. The defendant halved the rate on the basis that no rate was agreed. The plaintiff pointed out that the parties have agreed to $555 for a narrower 1m drain. There is no basis for the defendant's figure and I accept the plaintiff's rate of $700. Having done that, I am unable to understand the claim for $7,900. That must be a mistake, and it should be reduced to $7,000.

Item 12 – drain with mild steel grating. There is a dispute over the rate. The plaintiff used $275 without giving the agreed 3% discount. The plaintiff also conceded that no mild steel grating was installed. I accept the defendant's quantification and deduct $16,445.87 from this claim.

Item 14 – drain at car park. The parties have agreed to a reduction of $3,485.00.

Item 15 – culvert drain with grating. There was a dispute whether the grating was installed. The

plaintiff did not show any proof it was installed. I allow a reduction of $2,054.35.

Item 16 – drain with grating at car park. I accept that the 3% discount was already given by the plaintiff, and there is no cause for a further reduction.

Items 17 and 18 – drain and reinforced concrete pipe. The difference here was over the measurement of the drain and the pipe. By the plaintiff's measurement, the total price is $62,675 whereas it is $59,000 by the defendant's measurement. The plaintiff has not objected to the defendant's measurements. The price for these two items is to be reduced by $3,675.

Item 19 – manhole cover. The defendant contends that this forms part of the original contract, but adduced no evidence to support that through its witnesses. No reduction is to be made.

Item 20 – road kerb. The defendant reduced the plaintiff's claim from $3,333.08 to $1,618.00. The plaintiff did not object, so the claim is reduced by $1,715.08.

Item 21 – reinforced concrete wall. The defendant reduced the plaintiff's claim from $200 to $100. The plaintiff did not object, so the claim is reduced by $100.

Item 22 – scupper pipe. The defendant reduced the plaintiff's claim from $1,142.40 to $571.20. The plaintiff did not object, so the claim is reduced to $571.20.

Item 23 – topping up of drain. The defendant disputed the plaintiff's entitlement to make this claim on the basis that it was caused by the plaintiff's own failure in construction but the defendant did not produce any basis for its assertion. The plaintiff's witness Ong Hin Leong had denied that. I accept his explanation. No reduction is to be made on this claim.

IV. Abortive Works

Item 1 – Retaining wall. There is no dispute that the works were aborted on the defendant's instructions. The plaintiff conceded at the hearing that some of the material can be re-used and valued that at $8,137.00. This sum should be reduced from the claim.

Item 2 – extra pipes and manhole cover. The plaintiff explained that the materials were of special dimensions and cannot be re-used. This claim for $1,456.42 will stand.

Item 3 – change of kerb position. The defendant submitted that this was not accepted by the employer, but without adducing evidence of the rejection or the reason therefor. This claim for $1,656.00 will stand.

V. Day Works

There is a difference in the plaintiff's figure of $12,739.38 and the defendant's figure of $10,739.38. The defendant disputed four items for which the plaintiff produced delivery orders signed and stamped by the defendant. The plaintiff's claim is to stand.

After going through the foregoing items, the total amount to be deducted is $138,433.95.

Reductions from the plaintiff's claim

12 With that reduction there were three reductions to the amount claimed by the plaintiff, that is:

(a) road works $104,851.94

(b) cost of material paid by defendant $57,500.00

(c) final account $138,433.95

$300,785.89

These readjustments bring the plaintiff's claim down to $65,180.11 before GST or $67,135.13 with GST. There is a further reduction, which is dealt with in [31].

The defendant's counterclaim

13 The defendant's counterclaim at para 23 of the Amended Defence and Counterclaim is for:

(a) $360,000 as liquidated damages that the plaintiff caused the defendant to suffer under the first sub-contract;

(b) $976,000 as liquidated damages under the second sub-contract;

(c) I do not understand this head of claim for:

> [T]he replacement costs to engage a third party to carryout the abovesaid External works had caused the Superintending Officer (S.O.) to deduct a sum of $1,696,531.15 from the Defendants' project account against the independent Quantity Surveyor's assessment of the External Works, which is based on the contract schedule of rate, amounting to about $600,000.00, that is, the loss and damages due to the Plaintiffs' non-performance amounting to more than $1,095,531.15 ($1,696,531.15 – $601,000.00).

This particular counterclaim was not followed up on; and

(d) $153,294.48 being the estimated sum the defendant incurred to engage other sub-contractors to complete the external works left over by the plaintiff.

13 In the defendant's closing submissions,[1] the counterclaim was recast to include:

(a) Cost of removal of surplus earth generated by the Plaintiff's works;

(b) Cost of materials purchased by the 1st Defendant on the Plaintiff's behalf;

(c) Cost of shoring work at box culvert;

(d) Cost of construction of transitional trapezoidal drain base at the box culvert;

(e) Cost of desilting works to comply with enforcement action by the Ministry of Environment [MOE];

(f) MOE fine due to Plaintiff's damage to the existing silt trap;

(g) Cost of construction of temporary access at box culvert and [Land Transport Authority] application for road opening due to late construction of Plaintiff's works;

(h) Damages for delay in construction and completion of Box Culvert Works; and

(i) Damages for delay in construction and completion of the External Works.

Items (c) to (g) were not within the pleaded counterclaim, but they may be considered as reductions to the plaintiff's final statement of account. Items (e) and (f) were not dealt with in the submissions after they were listed.

Item (a) – Cost of removal of surplus earth

14 The parties agreed that the plaintiff's work would generate 16,537.96m³ of surplus earth, which would cost $237,180.17 to remove from the site, but they could not agree whether the plaintiff or the defendant removed the earth, each claiming that it did.

15 The evidence adduced did not clearly support either parties' case. The problem was that earth works were carried out at different areas and times by various parties. The records produced to show the removal of earth lacked particulars as to the party which generated the earth and the location at which it was generated. The parties exchanged letters between September 2000 and January 2001, each requesting the other to remove surplus earth from the site while denying having generated the surplus earth.

16 The project architect, Alfred Wong Partnership Pte Ltd ("AWP") produced some letters the defendant wrote in January–May 2001[2] to AWP and another contractor, Sembcorp Construction Pte Ltd, to complain that the contractors engaged in Phase 2 of the project were leaving excavated earth on the worksite.

17 It was evident that the plaintiff was not the only party which generated surplus earth, and that other parties have been blamed for it. Both parties produced evidence from the parties they claimed to have engaged to remove the surplus earth. Each complained that the evidence and documents presented by the other were unsatisfactory and lacking in particulars. That was correct in so far as the documents were inconclusive. There were unresolved doubts over where the earth was removed from, which party had left it there and which party had removed it.

18 In the absence of clear records and evidence, I find that the defendant has failed to prove that it had paid for removing the plaintiff's surplus earth.

Item (b) – Costs of materials purchased on behalf of the plaintiff

19 This has been agreed to and taken into consideration in my finding on the final statement of account.

Items (c) to (g)

20 The defendant dealt with these items under item (h).[3]

Item (h) – Damages for delay in construction and completion of box culvert works

21 Under the first sub-contract of 31 January 2000, the plaintiff was to take possession of the site on 1 February 2000 and to complete the works by 31 May 2000. The work was in fact completed in November 2000.

22 The sub-contract provided that in the event of delay by the plaintiff, it will pay liquidated damages of $2,000 a day to the defendant. The claim was quantified at $360,000 in the Amended Defence and Counterclaim and changed to $356,000 in the closing submissions, to cover 178 days between 30 May and 9 November 2000.[4] (The defendant did not explain why the period of delay was taken to commence one day before the contractual completion date.)

23 However, the claim for liquidated damages for these works as pleaded in para 13(j) of the Amended Defence and Counterclaim was that "the Plaintiffs failed to complete within their 18 weeks' schedule and caused the Defendants to suffer LAD penalty cost of 6 months".

24 As pleaded, this is not a claim for liquidated damages that the plaintiff was liable to pay, but is a claim for compensation for liquidated damages the defendant had to pay. Taken in this light, the defendant failed to prove the claim because it did not show (a) that it had paid liquidated damages to the employer, and (b) that the payment was caused by the plaintiff's delay.

25 There are other issues beyond this pleading point. There was no dispute that the work was not completed by 31 May 2000. The dispute was whether the plaintiff or the defendant caused the delay.

26 The plaintiff's case is that it was caused by the defendant's delay in doing the shoring and piling works. There was evidence that the plaintiff had written on 4 April 2000 to complain that although the site was ready on 1 March the defendant's sub-contractor delayed the shoring work and only started work on 10 March, and that the piling work had not commenced.

27 In the closing submissions, the defendant asserted that the shoring work was carried out late by the plaintiff.[5] However this ran counter to the position it took in the Amended Defence and Counterclaim[6] and its opening statement[7] that the defendant had to pay another sub-contractor to do the works.

28 The defendant made the argument that the shoring and piling works were within the scope of the first sub-contract, which included the ancillary and related works necessary for the completion of the box culvert works. If that argument is correct, then the defendant was inconsistent when it claimed for the shoring works but not for the cost of the piling.

29 A further difficulty with the claim is that once the defendant had appointed other sub-contractors to do the works, it cannot blame the plaintiff for the delay, unless the plaintiff had so delayed the works that the defendant could not get new sub-contractors to complete the works in time. But that was not the case. In fact LSH was contracted to do the piling works on or before the 15 February, barely two weeks after the first sub-contract was signed on 31 January 2000. For the reasons stated, the claim for liquidated damages fails.

30 The defendant also claimed under the first sub-contract:

(a) $11,745.34 which was incurred by the defendant for temporary shoring works;

(b) $20,000 for the construction of temporary access due to late completion of the box culvert; and

(c) $12,052.70 for the plaintiff's failure to construct a trapezoidal drain base and transition curve.[8]

31 In respect of claim (a), the plaintiff's quotations of 19 and 21 January 2000 specifically excluded shoring from the scope of works. When the sub-contract was awarded by the defendant to the plaintiff in its letter of 31 January 2000 the price for the box culvert was specifically stated to include all ancillary and related works necessary for the completion of the works. Shoring work came within that category of ancillary and related works. Furthermore, the unit rate in the plaintiff's quotation of 21 January was $9,000, whereas the rate in the award was increased to $9,400. On the basis of this evidence, I find that the shoring work was part of the scope of works of the sub-contract. The defendant's independent quantity surveyor had assessed the costs incurred for the shoring works at $11,745.34,[9] and I accept it. This sum is to be deducted from the sum due to the plaintiff under the first sub-contract, reducing it to $53,437.77 without GST or $55,037.18 with GST.

32 Claim (b) was quantified at $20,000 in the closing submissions. No explanation was given by any witness to support the figure, so this claim fails.

33 With regard to claim (c), the plaintiff did not produce any evidence that it or its sub-contractors had carried out the work and why it was brought down from the original figure of $18,540.[10] The plaintiff cannot in these circumstances seek to recover the $12,052.70 it claimed to have incurred.

Item (j) – Damages for delay in the construction and completion of the external works

34 The defendant claimed liquidated damages for 488 days from 1 October 2000 to 31 January 2002. This period ran from the five and a half months for completion from the date of the second sub-contract up to the date of the handover of the works. The liquidated damages payable under this sub-contract is also fixed at $2,000 a day.

35 The sub-contract did not provide any procedure for measuring and determining delay. There was no process of certification or verification by anyone in authority over the works.

36 In a large construction project like the Sembawang Camp project involving multiple contractors, trades and stages of work, it is normal and appropriate for there to be provisions for extensions of time. This was in fact applied to the defendant which was given extensions of 171 days[11] by the employer, assuming that there are no further extensions.

37 The defendant also impliedly agreed that the plaintiff was not responsible for all the delays. It complained that other contractors were delaying the mechanical and electrical works,[12] and that would have delayed the plaintiff's road works.

38 It was also established that the plaintiff had held back on completing the final wearing course to the roads to avoid damage by other parties while their works were ongoing, and to enable the final course for the roads to be completed together to achieve uniformity of colour. That period cannot be considered as delay because the plaintiff was instructed to hold back.

39 In the circumstances, delay cannot be measured simply in the way the defendant did, and it should be construed to mean delay attributable to the plaintiff.

40 Each party pointed to instances in parts of the works to support its case, that there was delay, or no delay. Neither of them presented a case in respect of all the works for the whole period of construction.

41 At the trial, the defendant called as an expert witness, chartered surveyor H D Hansen. He

took a different approach on the liquidated damages and arrived at a figure of $303,000. He dealt with the road works in two parts and worked out the defendant's minimum entitlement to liquidated damages for the road works as:[13]

> Contract 2 – Road Works
>
> Zone A1-A3 - 74 days (2½ months rate by their own admission)
>
> Other Areas - 400 days (Total delay of 474 days less 74 days)
>
> Extension of Time - (171) days
>
> Period of Delay - 229 days
>
> Ascertainment - 74 days @ $2,000.00 per day + $148,000.00
> 155 days @ 2,000.00 x 50% per day + $155,000.00
> Total = $303,000.00

42 He did not explain how the "total delay of 474 days" for the "Other Areas" was arrived at (in his report he stated that the road works were delayed from 1 October 2000 to 31 January 2002), or why it is necessary to deduct from the 474 days the 74 days for Zone A1-A3. If there are two periods of delay for two zones of work under the same sub-contract, the period of delay to the works should be the longer of the two periods, not the difference between them.

43 No explanation was offered for setting damages at $2,000 a day for 74 days' delay, but half that much for the other 155 days.

44 Counsel attempted to explain in the closing submissions, without the benefit of further evidence, that:

> In allowing a 50% reduction of the liquidated damages figure in the other Zones, the 1st Defendant's expert had in his assessment given the Plaintiff the benefit of the doubt by assuming contributions to the delay by other sub-contractors but had expressed the view that the Plaintiff's contractual obligations to co-ordinate their works with the Plaintiff's progress made them still liable for the delay.[14]

45 The surveyor did not give any reason for coming to the 50% reduction. If in fact parts of the delay were caused by other contractors' activities, he should identify those activities and work out how much they contributed to the total delay. Applying a general figure of 50% and giving "the benefit of the doubt" do not add clarity to the matter.

46 I also do not understand the reduction of the 171 days from the 400 days to arrive at 229 days. It shows that the surveyor accepts that extensions of time apply to the sub-contract. But that has to be properly worked out. The 171-day extension was given by the employer to the defendant under the main contract. The extension to be given by the defendant to the plaintiff under the sub-contract must be assessed separately because an extending circumstance that operates between employer and main contractor may not operate between main contractor and sub-contractor (and the converse also applies).

47 I find that the surveyor did not help the defendant in its claim for liquidated damages.

48 In the circumstances, I find the defendant has failed to prove its claim for liquidated damages

under this head and that the defendant has failed in all the counterclaims against the plaintiff.

Conclusion

49 The plaintiff is to have judgment for $55,037.18 on its claim with costs. Although the judgment sum is within the jurisdiction of the Subordinate Courts, the action would have been transferred to the High Court even if it was filed in the Subordinate Courts because of the counterclaim. Therefore these costs are to be High Court costs.

50 The defendant's counterclaim is dismissed with costs.

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[1] At page 17

[2] Goh Peng Thong's Statement, pages 595, 603, 609, 612 and 614

[3] Defendant's Closing Submissions, para 111.2

[4] Defendant's Closing Submissions, page 38 para 37

[5] Defendant's Closing Submissions, page 29 paras 7 and 8

[6] Annexure A, item (vi)

[7] Page 12, para 19

[8] Defendant's Closing Submissions, page 38 para 37

[9] Defendant's Opening Statement page 12 para 19

[10] Annexure A

[11] see eg DB1236

[12] see Goh Peng Thong's Statement, "GPT-4"

[13] Affidavit of evidence-in-chief of H D Hansen p 29

[14] Defendant's Closing Submissions, page 58 para 68