IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 103

Originating Summons No 1076 of 2016
(Summons No 5633 of 2016)

Between

Tactic Engineering Pte Ltd (in liquidation)

… *Applicant*

And

Sato Kogyo (S) Pte Ltd

… *Respondent*

GROUNDS OF DECISION

[Building and construction law] — [Building and construction related contracts] — [Guarantees and bonds]

Tactic Engineering Pte Ltd (in liquidation)
v
Sato Kogyo (S) Pte Ltd

[2017] SGHC 103

High Court — Originating Summons No 1076 of 2016 (Summons No 5633 of 2016)
Foo Chee Hock JC
30 November 2016, 1 February 2017; 17 February 2017

17 May 2017

Foo Chee Hock JC:

1 This was a dispute involving an on-demand bond dated 18 February 2014 ("Bond")[1] taken out by Tactic Engineering Pte Ltd ("Tactic") in favour of Sato Kogyo (S) Pte Ltd ("Sato Kogyo"). Tactic has appealed against my decision dated 17 February 2017[2] to set aside the injunction[3] restraining Sato Kogyo from *inter alia* calling on the Bond ("Injunction"). I now set out the reasons for

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1 Jaikumar's affidavit dated 18 Oct 2016 at Tab 1, p 3.

2 HC/ORC 1201/2017.

3 HC/ORC 7241/2016.

my decision.

2 Sato Kogyo was the Land Transport Authority's main contractor for the "construction of the Mattar Station and its associated tunnels as part of Downtown Line 3".[4] Under a letter of award, and a subcontract dated 2 February 2012 ("Subcontract"), Sato Kogyo appointed Tactic as its subcontractor.[5] The Subcontract sum was $24,468,800.00,[6] and its clause 25 entitled Sato Kogyo to retain ***up to*** 5% of this figure (*ie*, $1,223,440.00).[7]

3 By the end of 2013, Tactic was experiencing difficulties in completing its outstanding works.[8] To ease Tactic's cash flow, Sato Kogyo agreed to release the monies being retained under clause 25 ("Retention Monies") in exchange for an on-demand bond.[9] On 18 February 2014, Tactic procured the Bond, which was an on-demand bond worth $1,223,440.00 ("Bond Amount"). The salient parts of it read as follows:[10]

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4 Fong's affidavit dated 14 Nov 2016 at para 5.

5 Jaikumar's affidavit dated 18 Oct 2016 at para 8 and Tab 2, pp 6 and 18.

6 Jaikumar's affidavit dated 18 Oct 2016 at para 10.

7 Jaikumar's affidavit dated 18 Oct 2016 at Tab 2, p 32.

8 Fong's affidavit dated 14 Nov 2016 at paras 10–12, pp 154 and 157.

9 Fong's affidavit dated 14 Nov 2016 at paras 13–15.

> 1 In ***consideration of you releasing the retention money to the Subcontractor*** we hereby irrevocably and unconditionally undertake, covenant and firmly bind ourselves to ***pay to you on demand*** any sum or sums which from time to time may be demanded by you up to a maximum aggregate of Singapore Dollars One Million Two Hundred Twenty Three Thousand Four Hundred and Forty Only (S$1,223,440.00) ("the Guaranteed Sum").
>
> 2 Should you notify us in writing at any time prior to the expiry of this Guarantee, by notice purporting to be signed for and on your behalf that you require payment to be made of the whole or any part of the said sum, ***we irrevocably and unconditionally agree to pay the same to you immediately on demand*** without further reference to the Subcontractor and notwithstanding any dispute or difference which may have arisen under the subcontract or any instruction which may be given to us by the Subcontractor not to pay the same.
>
> [emphasis added]

4 The parties discovered that, under another project, "MCE 487", Tactic owed Sato Kogyo $226,960.73 ("MCE Monies").[11] As evidenced in a letter dated 11 March 2014,[12] the parties agreed to set-off the MCE Monies against the Retention Monies.[13] However,

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10 Jaikumar's affidavit dated 18 Oct 2016 at Tab 1, p 3.

11 Fong's affidavit dated 14 Nov 2016 at para 19.

12 Fong's affidavit dated 14 Nov 2016 at p 328; Jaikumar's affidavit dated 18 Oct 2016 at para 25.

13 Fong's affidavit dated 14 Nov 2016 at para 19; Jaikumar's

on 13 March 2014, Tactic sent an invoice to Sato Kogyo seeking the release of $1,183,408.29,[14] which was the amount of Retention Monies at that time.[15] Due to an administrative lapse, Sato Kogyo released the full sum of $1,183,408.29 (without deducting the MCE Monies),[16] and hence the MCE Monies remained unpaid by Tactic.

5 At the relevant time, Tactic's financial woes meant that it could not complete its works, and Sato Kogyo had to make arrangements to complete them, thereby incurring back charges.[17] In this connection, Sato Kogyo indicated that it would call on the Bond on 20 May 2014.[18] Thereafter, on 8 December 2015, Sato Kogyo claimed a sum of $1,351,574.89 from Tactic and stated that it would call on the Bond if Tactic did not make payment.[19] Sato Kogyo subsequently made demands on 28 June 2016[20] and 19

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affidavit dated 25 Nov 2016 at para 23.

14 Fong's affidavit dated 14 Nov 2016 at para 21; Jaikumar's affidavit dated 18 Oct 2016 at Tab 3, p 525.

15 Fong's affidavit dated 14 Nov 2016 at para 16.

16 Fong's affidavit dated 14 Nov 2016 at para 21.

17 Fong's affidavit dated 14 Nov 2016 at paras 10–12.

18 Fong's affidavit dated 14 Nov 2016 at p 227.

19 Jaikumar's affidavit dated 18 Oct 2016 at Tab 6, p 706.

20 Jaikumar's affidavit dated 18 Oct 2016 at para 40 and Tab 7, p 716.

August 2016[21] as well. On 3 October 2016, Sato Kogyo called on the Bond and demanded payment of the Bond Amount.[22] No payment was made, and Sato Kogyo called on the Bond again on 18 October 2016, seeking payment of the Bond Amount by 21 October 2016.[23] On 20 October 2016, Tactic applied for the Injunction,[24] which Andrew Ang SJ granted on the same day.[25]

6 In the proceedings before me to set aside the Injunction (filed by Sato Kogyo), Tactic initially relied on both fraud and unconscionability as grounds for sustaining the Injunction.[26] But it eventually abandoned its case on fraud, focusing instead on showing that Sato Kogyo's call on the Bond was unconscionable.[27] Tactic essentially brought the court through an accounting exercise, deploying various computations to demonstrate that Sato Kogyo's claim fell short of the Bond Amount and thus unconscionability was manifested. In doing so, Tactic relied on three main grounds.[28]

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21 Jaikumar's affidavit dated 18 Oct 2016 at para 40 and Tab 8, p 735.

22 Fong's affidavit dated 14 Nov 2016 at para 41; Jaikumar's affidavit dated 18 Oct 2016 at Tab 1, p 2.

23 Fong's affidavit dated 14 Nov 2016 at para 42.

24 HC/SUM 5098/2016.

25 HC/ORC 7241/2016.

26 NE dated 30 Nov 2016 at p 1; Plaintiff's WS at paras 42–46.

27 NE dated 1 Feb 2017 at p 1.

First, it argued that Sato Kogyo could not include the MCE Monies to justify the call on the Bond. Second, Sato Kogyo was not contractually entitled to impose "Administrative Charges". Third, Sato Kogyo's computation of the back charges was unconscionable.

7 As part of its case, Tactic also highlighted that Sato Kogyo had claimed four different sums from Tactic since December 2015,[29] as follows:

Date of claim	**Sum claimed by Sato Kogyo**
8 December 2015[30]	$1,351,574.89
28 June 2016[31]	$1,109,706.03
19 August 2016[32]	$1,041,015.23
11 November 2016[33]	$1,706,209.29

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28 NE dated 1 Feb 2017 at pp 1 and 4.

29 Plaintiff's WS at paras 13 and 16.

30 Jaikumar's affidavit dated 18 Oct 2016 at Tab 6, pp 706 and 713.

31 Jaikumar's affidavit dated 18 Oct 2016 at Tab 7, p 716.

32 Jaikumar's affidavit dated 18 Oct 2016 at Tab 8, p 735.

33 Fong's affidavit dated 14 Nov 2016 at p 682.

8 According to Sato Kogyo, its claims in June and August 2016 were reduced because the parties were negotiating a settlement,[34] and it "was prepared to offer [goodwill] discounts on condition that the final amount [was] settled amicably".[35] Negotiations between the parties eventually fell through, and Sato Kogyo took the position that it was "entitled to claim the full sum"[36] as represented by its 11 November 2016 claim.[37] However, Sato Kogyo's "bottom line" was its 8 December 2015 claim to justify its call on the Bond.[38] I therefore set out Sato Kogyo's claim as of that date in the context of the following table (which I examine below from [10]):[39]

Claim by Sato Kogyo as of 8 December 2015	
Back Charges (w/o Administrative Charges)	$1,065,141.62
Administrative Charges[40]	$213,028.32

34 NE dated 1 Feb 2017 at p 2; Defendant's WS at para 110.

35 Fong's affidavit dated 14 Nov 2016 at para 96; Jaikumar's affidavit dated 18 Oct 2016 at Tab 7, p 716 and Tab 8, p 735.

36 Defendant's WS at para 111.

37 Fong's affidavit dated 14 Nov 2016 at para 97.

38 NE dated 1 Feb 2017 at p 4.

39 Fong's affidavit dated 14 Nov 2016 at p 587; Jaikumar's affidavit dated 18 Oct 2016 at Tab 6, pp 706 and 713.

40 Fong's affidavit dated 14 Nov 2016 at p 587.

Total (w GST)[41]	**$1,351,574.89**
Total (w/o GST)[42]	**$1,278,169.94**
MCE Monies	$226,960.73
Total plus MCE Monies (w GST)[43]	**$1,578,535.62**
Total plus MCE Monies (w/o GST)[44]	**$1,505,130.67**

9 Before turning to the arguments, I pause to recount some principles in law relating to the issue of unconscionability as canvassed in *Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 3 SLR(R) 198 ("*Eltraco*") and *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 ("*Mount Sophia*"):

> (a) First, parties were expected to "abide by the deal they have struck": see *Eltraco* at [30]. Hence, courts "should be ***slow*** to upset the status quo and disrupt the allocation of risk which the parties had decided upon for themselves" [emphasis added]: see *Mount Sophia* at [25].

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41 Fong's affidavit dated 14 Nov 2016 at p 587.

42 Fong's affidavit dated 14 Nov 2016 at p 587; NE dated 1 Feb 2017 at p 4.

43 Jaikumar's affidavit dated 18 Oct 2016 at Tab 6, p 713; NE dated 1 Feb 2017 at p 4.

44 Jaikumar's affidavit dated 18 Oct 2016 at Tab 6, p 713.

(b) Second, an applicant had to establish a ***strong*** *prima facie* case of unconscionability, and the "threshold is a high one". A finding of unconscionability must be supported by "***the whole context*** of the case" [emphasis in original] and a "*prima facie* strong piece of evidence does not make a strong *prima facie* case": see *Mount Sophia* at [20] and [39]–[40].

(c) Third, the concept of unconscionability imported notions of ***unfairness*** and ***bad faith***: see *Mount Sophia* at [36]–[37]. Where there was a ***genuine dispute***, it could not be said that there was unconscionability because a party was "entitled to protect [its] own interest": see *Eltraco* at [32].

(d) Fourth, it was not necessary for the court to carry out a detailed examination of the minutiae and "engage in a protracted consideration of the merits of the case". In such proceedings, the focus was on "breadth rather than depth" and the court's role was simply to "***be alive to the lack of*** bona fides" [emphasis in original]: see *Mount Sophia* at [40], [45] and [52].

10 I address the salient arguments now. Tactic argued that Sato Kogyo could not utilise the MCE Monies to justify calling on the Bond because these monies were due under a separate contract.[45]

[45] Plaintiff's WS at paras 69–73.

That aside, Tactic did not have persuasive arguments to clinch the point. On the other side, it was undisputed that Tactic owed the MCE Monies to Sato Kogyo. It should be remembered that the Bond was taken out in consideration of Sato Kogyo releasing the Retention Monies (see [3] above), and the parties had agreed to set-off the MCE Monies against the Retention Monies (see [4] above).

11 In any event, as seen in the table above (at [8]), even without the MCE Monies, Sato Kogyo's claim was ***$1,278,169.94*** (***excluding*** GST), which was well in excess of the Bond Amount.

12 Similarly, with regard to the Administrative Charges (which Tactic described as the "crux" of the dispute),[46] Tactic averred that the Subcontract did not give Sato Kogyo the right to impose such charges.[47] However, it was not immediately apparent that this was the case. Clause 22.8 of the Subcontract allowed Sato Kogyo to set-off "such loss or damage" incurred because of Tactic's failure to carry out its works with diligence or due expedition against monies due to Tactic.[48] There was also the possibility that Sato Kogyo could recover any losses caused by Tactic as damages under

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46 NE dated 1 Feb 2017 at p 3.

47 Plaintiff's WS at paras 82–86.

48 Jaikumar's affidavit dated 18 Oct 2016 at Tab 1, p 31; Defendant's WS at para 91.

the law. And according to Sato Kogyo, the Administrative Charges represented the "charges or costs of attendance by [Sato Kogyo] to carry out the complete works that [Tactic] has omitted to carry out".[49] I therefore did not agree that Sato Kogyo was clearly not entitled to impose the Administrative Charges. It was at least arguable that Sato Kogyo could premise the call on the Bond on its losses, regardless of whether they were termed "Administrative Charges" or otherwise.

13 *Per arguendo*, even if we explored the position without the Administrative Charges, Sato Kogyo still had a claim for back charges amounting to ***$1,065,141.62*** (***excluding*** GST and ***excluding*** the MCE Monies) (see [8] above). I acknowledged that this fell below the Bond Amount (of $1,223,440.00), but the shortfall must be seen in the context of the Subcontract's value of $24,468,800.00. That said, the artificiality inherent in Tactic's approach of slicing off parts of Sato Kogyo's claim to depress it below the Bond Amount was not lost on me. In my judgment, the unconscionability that Tactic sought so casually to impute to Sato Kogyo was not supported by the whole context of the case (see [9] above), and looking at matters in the round, I was of the view that the alleged shortfall was contrived and not of such character as to make out a strong *prima facie* case of unconscionability.

[49] Fong's affidavit dated 14 Nov 2016 at para 107.

14 Indeed, I was of the view that the back charges claimed by Sato Kogyo were not so excessive or abusive as to establish that it was unconscionably bloating the numbers to justify the call on the Bond. Tactic contended that Sato Kogyo had inflated the back charges[50] and included items of work falling outside Tactic's scope of works.[51] In my view, the court should not engage in a minute examination of both parties' cases in the present proceedings (see [9(d)] above). Additionally, Tactic could not show that it was "reasonably apparent" that there was unconscionable conduct on Sato Kogyo's part: see *Mount Sophia* at [37].

15 In relation to the alleged inflation of back charges, Tactic relied significantly on a "Statement of Account" dated 30 November 2014.[52] According to Tactic, this statement showed that the "Future Estimated Backcharges" amounted to only $110,082.76 at that time.[53] It was thus "shocked" to learn in December 2015 that Sato Kogyo had "grossly inflat[ed]" the claim to $1,351,574.89.[54] But as Sato Kogyo was quick to point out, Tactic omitted to note that the "Statement of Account" clearly indicated that the total back

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50 Plaintiff's WS at paras 93–107.

51 Plaintiff's WS at para 131.

52 Jaikumar's affidavit dated 18 Oct 2016 at Tab 4, p 608.

53 Plaintiff's WS at para 98.

54 Plaintiff's WS at paras 102–103.

charges already amounted to about $600,000 as of 30 November 2014.[55] Tactic's reliance on the "Statement of Account" was thus misplaced, and it failed to show that Sato Kogyo had "grossly inflat[ed]" [56] the back charges. In this regard, I also took into account Sato Kogyo's submission that its claim would naturally increase as "works are completed and as more backcharges or loss and damages crystalise [*sic*] and become ascertained".[57] The fact that Sato Kogyo had not yet determined the full extent of the back charges could be gleaned from a letter dated 22 July 2015 which indicated that Sato Kogyo was still in the midst of "compil[ing] and finaliz[ing] all the backcharges of materials, labours and other miscellaneous items".[58]

16 Additionally, Sato Kogyo had reasoned responses to Tactic's allegation that some claims were for items falling outside Tactic's scope of works. For instance, Tactic claimed that it was not responsible for the supply of "Compress Oxygen, Acetylene for Gas Cutting Works".[59] In reply, Sato Kogyo highlighted that Tactic was to bear the cost of "Oxygen and Accetylene (used for cutting)"

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55 Defendant's WS at p 47, para (e).

56 Plaintiff's WS at paras 102–103.

57 Defendant's WS at p 47, para (f).

58 Fong's affidavit dated 14 Nov 2016 at p 311.

59 Plaintiff's WS at p 42, item 40.

under the Subcontract.[60] Similarly, Tactic alleged that the "Roughening of the Smooth Surface" was beyond its scope of works,[61] to which Sato Kogyo countered by arguing that Tactic had to "roughen the concrete" as part of its duties under clause 6 of the Subcontract.[62] Thus, as with the purported inflation of the back charges, I was unconvinced that Sato Kogyo had unconscionably included items that clearly fell beyond Tactic's scope of works.

17 In sum, after considering the evidence holistically, it was apparent that Tactic's case fell far short of a strong *prima facie* case of unconscionability. Rather, it appeared to be clutching at straws to make out a case by disputing various components of Sato Kogyo's claim. In my judgment, the overall tenor of the evidence pointed to a ***genuine contractual dispute*** (see [9(c)] above) between the parties.

18 Moreover, as noted in *Mount Sophia* at [37] and [45], the parties' conduct leading up to a call on a bond and the presence of notice were all relevant considerations. And in the present case, the fact that Sato Kogyo had negotiated with Tactic over this entire

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60 Fong's affidavit dated 14 Nov 2016 at para 137, item 40; Jaikumar's affidavit dated 18 Oct 2016 at Tab 2, p 16.

61 Plaintiff's WS at p 43, item 55.

62 Fong's affidavit dated 14 Nov 2016 at para 137, item 55.

period and offered to discount its claim in June 2016 and August 2016 strongly militated against any finding of bad faith (see [8] above). It also could not be said that Tactic was ambushed by Sato Kogyo's demand on 3 October 2016 given that Sato Kogyo had indicated that it might call on the Bond since May 2014 (see [5] above).

19 As a parting point, it ought to be emphasised that the Bond was an ***on-demand*** bond (see [3] above) that Sato Kogyo had the right to call on, subject to limited exceptions like fraud and unconscionability. As noted in *York International Pte Ltd v Voltas Ltd* [2013] 3 SLR 1142 at [32], a performance bond was a mechanism by which parties redistributed the risk of *inter alia* insolvency. Where the parties had agreed on the allocation of risk, the court should not lightly interfere with the parties' agreement (see [9(a)] above). This principle applied here where one of the parties was undergoing liquidation, which was the case for Tactic.

20 Accordingly, I granted Sato Kogyo's application to set aside the Injunction.[63] I decided that costs should follow the event and fixed costs at $15,000 (all-in) to be paid by Tactic to Sato Kogyo.

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63 HC/SUM 5633/2016; HC/ORC 1201/2017.

Foo Chee Hock
Judicial Commissioner

Daniel Tay Yi Ming and Eugene Lee Kok Wee (Morgan Lewis Stamford LLC) for the applicant; Yong Boon On, Amanda Koh Jia Yi, and Linus Lin Zhiyi (Eldan Law LLP) for the respondent.
