IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 234

Originating Summons No 603 of 2020

In the matter of Performance Bond No LBP/P1821315 dated 25 July 2016 issued by AXA Insurance Singapore Pte Ltd in favour of Chiu Teng Construction Co Pte Ltd

Between

Chiu Teng Construction Co Pte Ltd

… *Plaintiff*

And

AXA Insurance Pte Ltd

… *Defendant*

GROUNDS OF DECISION

[Credit And Security] — [Performance bond]

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v
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Lee Seiu Kin J:

Introduction

1 This was an application in which the plaintiff sought to trigger the defendant's liability to pay under a performance bond. While not factually complicated, this required a re-examination of the propositions relating to indemnity bonds set forth in *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 ("*JBE*") and *York International Pte Ltd v Voltas Ltd* [2013] 3 SLR 1142 ("*York International*"). It also required a consideration of exactly *how* a party calling on such a bond ought to prove its losses. I allowed the application and the defendant has since appealed. I now give my grounds of decision.

Background facts

2 The plaintiff is a company incorporated in Singapore, in the business of building construction. It was employed as the main contractor in a project for

refurbishment and upgrading works at Hall of Residence 4, Nanyang Technological University (the "Project"). On 1 August 2016, the plaintiff appointed QBH Pte Ltd ("QBH"), a Singapore company also in the business of building construction, as a sub-contractor for the Project. Under this sub-contract, QBH was responsible for a large part of the works in the Project.

3 In connection with the sub-contract, the defendant, an insurance company, issued Performance Bond No. LBP/P1821315 dated 25 July 2016 (the "Bond") in favour of the plaintiff. This was done at the request of QBH, who was the account party under the Bond. The amount secured under the bond is S$397,687.50.

4 Disputes subsequently arose regarding the plaintiff's certification of QBH's payment claim. The plaintiff also contended that QBH had breached various obligations under the sub-contract and sought payment of monies from QBH. The dispute was then submitted for an Adjudication Determination SOP/AA 342/2018, pursuant to the Building and Construction Industry Security of Payments Act (Cap 30B, 2006 Rev Ed). On 5 October 2018, the adjudicator determined that the plaintiff owed QBH a sum of S$386,859.21.

5 Notwithstanding this, the plaintiff proceeded to call on the Bond on 14 December 2018 (the "First Call"). In response, QBH commenced originating summons no 1239 of 2018 ("OS 1239/2018) in an attempt to restrain the defendant from paying, and the plaintiff from receiving, any payments under the Bond.

6 I heard OS 1239/2018 on 3 July 2018 and held that the Bond is in *pari materia* with the bond in *JBE* ([1] *supra*). The Court of Appeal in *JBE* had held

that the bond was an indemnity bond, rather than an on-demand bond. As the plaintiff had, at that time, failed to provide substantive evidence of an actual loss, the First Call was defective, and the defendant had no obligation to make any payments under the Bond.

7 For completeness, I note that during the course of OS 1239/2018, QBH's subcontractors had made an application to wind-up QBH. This was granted by Choo Han Teck J in companies winding up no 318 of 2018, who ordered on 23 April 2019 that QBH be placed under liquidation.

8 Following these events, the plaintiff wrote to QBH's liquidators on 18 February 2020, setting out various heads of claim purportedly for QBH's alleged breaches of the sub-contract (the "18 February 2020 Letter").[1] No reply was received from QBH's liquidators.

9 The plaintiff then wrote to the defendant on 13 March 2020 to call on the Bond for a second time (the "Second Call"). In this letter, the plaintiff informed the defendant that it had written to QBH's liquidators to put them on notice of its claim, attaching the 18 February 2020 Letter. On the basis that almost a month had passed since the 18 February 2020 letter, the plaintiff indicated that it was "of the view that [QBH's liquidators] accepted [the plaintiff's] claims against [the defendant] and our claims against [the defendant] have been proven".[2]

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1 Poon Boon Wai's first affidavit on 19 June 2020, pp 60–35.

2 Poon Boon Wai's first affidavit on 19 June 2020, pp 638–640.

10 The defendant responded on 31 March 2020 indicating that the demand for payment was defective and that they were not obliged to make payment.[3] In the defendant's view, this was because beneficiaries under indemnity bonds were entitled to make a demand for payment "only upon proving" that it had suffered losses, damages, costs and expenses as a result of the account party's breach. Referring to the sub-contract, the defendant noted that the plaintiff had to refer the claim to arbitration and obtain an award thereunder.

11 The Second Call was also made outside of the range of dates specified within the Bond. On this basis, the defendant also contended that the Second Call on the bond was defective.

12 Two broad issues thus arise here:

(a) whether the plaintiff is entitled to payment of the Bond monies; and

(b) whether the Second Call fell within the specified time limits for a demand for payment of the bond monies.

Whether the plaintiff is entitled to payment of the Bond monies

13 To recapitulate, I held on 3 July 2018 that the Bond is in *pari materia* with the bond in *JBE* ([1] *supra*). This is material because the Court of Appeal in *JBE* held that the bond there was an indemnity bond, instead of an on-demand bond. An identical bond was also considered in *York International* ([1] *supra*),

[3] Poon Boon Wai's 1st Affidavit on 19 June 2020, pp 641–643.

with Andrew Ang J agreeing with the conclusions in *JBE*. Ang J also summarised the reasoning in *JBE* as follows at [21]:

> (a) Clause 1 of the guarantee in *JBE* stated that BNP Paribas Singapore ("BNP") was obliged to indemnify JBE Properties Pte Ltd ("JBE") only against "all losses, damages, costs, expenses or [*sic*] otherwise *sustained* by [JBE]" [emphasis in original]. The corresponding provision in the underlying contract stated that JBE could use the guarantee to make good "any loss or damage sustained or likely to be sustained as a result of any breach of contract whatsoever by [Gammon]". The omission of the phrase "likely to be sustained" indicated that the obligation of BNP under the guarantee was limited to indemnifying JBE against actual losses which it sustained due to Gammon Pte Ltd's ("Gammon") breach of the underlying contract (at [19] of *JBE*).
>
> (b) Arguably, cl 5 of the guarantee would not affect the requirement that JBE could only call on the bond *if and when it actually suffered loss arising from any breach* by Gammon of its obligations under the underlying contract (at [19] of *JBE*).
>
> (c) Where the wording of a performance bond was ambiguous, the court was entitled to interpret the performance bond as being conditioned upon facts rather than upon documents or upon a mere demand (at [10] of *JBE*, analysed further below at [28]–[38] [of *York International*]).

14 The words in cl 1 of the Bond are *identical* in all material particulars to cl 1 of the bonds in *JBE* and *York International*. It can therefore hardly be argued that the situation here is distinguishable from *JBE* as regards the nature of the bond. This was accepted by both parties at the hearing for the present application.

15 The specific contention of the defendant in this instance is that a beneficiary to an indemnity bond must *establish actual losses* arising from any breach *as a fact* before it is entitled to call on the bond. It therefore argued that the provision of documentation is insufficient as such proof of losses must result from any independent determination, arbitral award or admission.

16 The previous cases have indeed left open the question of exactly *how* a party calling on a bond ought to prove its losses. For instance, it was stated in *JBE* at [19] that: "the Bond could be said to be ambiguous as to whether payment under it was conditioned upon demand or upon proof of actual loss arising from [the] breach of contract".

17 In my view, the defendant was correct that an independent determination, arbitral award or admission is necessary for the plaintiff to definitively prove its losses. This flows from the nature of the Bond as an indemnity bond. In *York International* ([1] *supra*), Ang J considered at [24] that a similar bond was susceptible to four possible interpretations:

(a) First, that nothing more than a written claim is required.

(b) Secondly, that the written claim must assert a breach of the underlying contract.

(c) Thirdly, that the written claim must assert a breach of the underlying contract *and* sustained losses.

(d) Finally, that there must *in fact* have been a breach of the underlying contract *and* sustained losses.

18 Ang J then went on to conclude that:

> … The distinction between the first three interpretations on the one hand, and the fourth interpretation on the other, is that the former was conditioned on documents (and would mean that the bond is of the on demand type) while the latter is conditioned on extant facts (and would mean that the bond is conditional in nature). …

19 A similar point was made in *JBE* ([1] *supra*) at [10] that the court would be "entitled to interpret the performance bond as being conditioned upon facts rather than upon documents or upon a mere demand". I respectfully agree with the observations made in the extracts above. A beneficiary under an indemnity bond must prove that it has suffered actual losses *as a matter of fact*. However, this can only be definitively done after an independent determination, arbitral award or admission from a relevant party. The provision of documents, regardless of the volume and specificity, is insufficient to conclusively prove the matter.

20 The plaintiff contended that such an interpretation would place too onerous a requirement on the calling of the Bond, "chang[ing] the entire practice relating to bonds in Singapore".[4] With respect, that might be an exaggeration of the situation at hand. A beneficiary under such a bond is always entitled to call on the bond if, in its opinion, it has suffered actual losses. Accompanying such a call will naturally be the provision of sufficient documents and evidence adduced to prove the breach of the underlying contract and the consequential losses suffered. If the guarantor under the bond accepts such documentation and pays the amount secured under the bond, that is the end of the matter. If the documents are not accepted as proof, the parties would inevitably have to proceed to an independent determination, as in the present instance. In any case, the consequences on the building and construction industry should not be overstated. As observed in *JBE* at [10]:

> … a performance bond is merely security for the *secondary* obligation of the obligor to pay damages *if* it breaches its primary contractual obligations to the beneficiary. ***A performance bond is not the lifeblood of commerce,***

[4] Plaintiff's Written Submissions, para 17.

> ***whether generally or in the context of the construction industry specifically***. …
>
> [emphasis in original; emphasis added in bold italics]

21 The defendant, however, went on to argue that this court is in no position to undertake an independent determination of whether actual losses had been suffered. It says this is because:[5] (a) as a recipient of a call on a performance bond, it may only avail itself of the documents comprising the call; (b) the parties to the underlying dispute are not all present before the court; and (c) the parties to the underlying dispute have chosen to govern their relationship by way of an arbitration agreement.

22 None of these indicated that the court was unable to independently determine the issue. In *JBE*, after determining that the relevant bond was an indemnity bond, the Court of Appeal then dealt with whether the injunction restraining the appellant from receiving money under the bond had been correctly granted. In so doing, the Court of Appeal examined, in great detail, the evidence adduced by the appellant to prove its actual loss (see *JBE* at [20]–[29]). It was only after going through the evidence that the court concluded that the appellant had failed to show that it had suffered actual loss at the date of the call on the bond (see *JBE* at [30]). I acknowledged that in *JBE*, both parties to the underlying construction contract were present before the court. However, that should not matter in the present case. The plaintiff, as the party alleging the breach, is before the court and still bears the burden of proving that it has suffered losses. The court is hence in a position to determine whether the plaintiff has adduced sufficient evidence to definitively prove its case.

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5 Defendant's Written Submissions paras 49–54.

23 I note that such a determination had not been undertaken on the facts of *York International* ([1] *supra*). The reason for this was that in that case, the plaintiff was merely seeking an injunction to restrain the defendant from receiving payment on the performance bond "*until (and unless) the plaintiff* [was] *adjudged to be liable in the arbitration proceedings between the plaintiff and the defendant*": *York International* at [1]. Arbitration proceedings were already underway between the plaintiff and defendant there: *York International* at [11]. That is quite distinct from the present situation where no arbitration proceedings have been commenced, and the plaintiff is seeking an order directing the payment pursuant to the Bond.

24 As to the final point made by the defendant, above at [21], it is essentially seeking to eat its cake and have its as well. The defendant cannot ask for the plaintiff to seek an independent determination but then insist on only proceeding by way of an arbitration. Parties to the underlying contract may have agreed to govern their relationship using an arbitration agreement. However, neither party has opted to exercise its right to commence arbitral proceedings and cannot be compelled to do so. In this situation, the court is in a position to deal with the matter.

25 Turning to the present facts, the specific losses claimed by the plaintiff included, amongst others:

(a) Payment made to Aim Fire Systems & Engineering Pte Ltd for the fire alarm system that QBH was required to install, amounting to $72,100.00 in total.[6]

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6 PBW's 1st Affidavit p 94.

(b) Payment to Tan Ah Lee Enterprise Pte Ltd for electrical works due to defective plastering installed by QBH, amounting to $34,276.13 in total.[7]

(c) Payment due to Aston Air Control Pte Ltd to repair the air-conditioning that was initially installed by QBH, amounting to $1,648.00 in total.[8]

(d) Payments due to Poh Meng Engineering Pte Ltd for the maintenance of air-conditioning, provision of as-built drawings, operating manuals, defect rectification and repairs that QBH had failed to carry out, amounting to $41,200.00 in total.[9]

(e) Labour costs incurred to rectify QBH's defective works, amounting to $36,365.07 in total.[10]

(f) Payments due to Meng Hung Seng Sanitary & Plumbing Pte Ltd for the maintenance of water tank and booster pump that QBH had failed to do during the defects liability period, amounting to $20,600.00 in total.[11]

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7 PBW's 1st Affidavit p 95.

8 PBW's 1st Affidavit pp 96.

9 PBW's 1st Affidavit pp 96–97.

10 PBW's 1st Affidavit pp 97.

11 PBW's 1st Affidavit pp 98.

26 In total, the eventual quantum of losses tabulated by the Plaintiff amounted to $475,940.74, with an additional $8,167.54 due to administrative charges under the sub-contract.[12]

27 I note that the defendant's counsel was, quite understandably, unable to make any submission as to the accuracy of the plaintiff's claim. Nevertheless, having assessed the evidence before me, I am satisfied that the plaintiff has shown sufficient evidence of loss, of such amount that would justify the call on the bond in the amount of $397,687.50.

Whether the Second Call fell within the specified time limits for a demand for payment of the bond monies

28 As stated above at [8], the Second Call was made on 13 March 2020. The Bond, however, contains cl 3 that provides for the relevant time period for liability as follows:

> Our liability under this guarantee shall continue and this guarantee shall remain in full force and effect from **25/07/2016** until **24/06/2019** provided always that the expiry date of this guarantee and our liability thereunder shall be **automatically extended for successive periods of 6 months** unless we give you 90 days' written notice prior to the expiry of our liability of our intention not to extend this guarantee **in respect of any future extension** and provided further that you shall be entitled, upon receiving such notice of our intention (and within the period specified in Clause 4 hereof), either to:
>
> (a) make a claim under this guarantee; or
>
> (b) direct us to extend the validity of this guarantee for a further period not exceeding 6 months (and this guarantee shall then expire at the end of such further period)

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12 PBW's 1st Affidavit pp 110.

> [emphasis added]

29 The starting position is therefore, that the Bond was valid from 25 June 2016 until 24 June 2019. However, it provides that the expiry date is *automatically* extended for successive periods of six months, unless the defendant provides a written notice (within certain time limits) of its intention not to extend in respect of future extensions (the "Notice to Terminate"). If the defendant does so, the plaintiff is entitled under cl 3(b) of the Bond to direct a further extension of six months (the "Final Extension Direction").

30 In this case, the defendant had provided such a Notice to Terminate, by way of a letter dated 23 September 2019.[13] The plaintiff then responded with a Final Extension Direction on 12 December 2019 stating as follows (at para 8):[14]

> Given the above, and in compliance with Clause 4 of the [Bond], we write this letter to **direct you to extend the validity of this guarantee for a further period of 6 months** from the current expiry date of the Performance Bond, 24 December 2019. The new expiry date of the Performance Bond will therefore be 24 June 2020. [emphasis in original]

31 Notwithstanding its own position stated in the extract above, the plaintiff, attempted to extend it even further, arguing that the validity of the Bond should be up to 24 December 2020. On its interpretation of cl 3 of the Bond, a direction to "extend the validity of this guarantee" was intended to renew the entirety of the Bond, including provisions for automatic extensions under cl 3 itself. Thus, the plaintiff submitted, at the date of expiry of the period immediately following its Final Extension Direction, the Bond will again

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13 PBW's 1st Affidavit pp 47–48.

14 PBW's 1st Affidavit pp 49–52.

automatically begin renewing itself. The plaintiff argued that this interpretation was supported by the fact that under cl 6 of the Bond, it was entitled to make "more than one claim on, or direction under" the Bond.

32 With respect, this is an extremely strained interpretation of cl 3 of the Bond. The provisions are sufficiently clear in this regard. Following the defendant's Notice to Terminate on 23 September 2019, the Bond should have expired on 24 December 2019, but for the plaintiff's Final Extension Direction on 12 December 2019. The plaintiff's Final Extension Direction, however, only extended the expiry to 24 June 2020, with no further extensions possible. To accept the plaintiff's reasoning would lead to a ludicrous never-ending cycle between parties, rendering the original Notice to Terminate for naught.

33 The defendant accepted that 24 June 2020 would be the final expiry date of the Bond. That should be the end of the matter since the Second Call was made before this date and would therefore be valid.

Conclusion

34 For completeness, I note that the defendant's counsel had initially sought a stay of execution of this judgment pending appeal. I refused to grant this stay as there was no evidence that the plaintiff would be unable to return the funds paid should the defendant succeed on appeal.

35 For the reasons given, I found that the plaintiff's Second Call was valid. The defendant is therefore liable to the plaintiff under the Bond in the sum of $397,687.50 plus interests at the rate of 5.33% per annum from the commencement of the present application on 19 June 2020. I granted costs to the plaintiff, fixed at $9,000.00 all inclusive.

Lee Seiu Kin
Judge

Lee Peng Khoon Edwin and Sanjana Jayaraman
(Eldan Law LLP) for the plaintiff;
Ganesh Bharath Ratnam (Gurbani & Co LLC) for the defendant.

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Supreme Court