

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1992] SGHC 182

OS 206/1992

Between

Sembawang Engineering Pte
Ltd

... Applicant

And

Priser Asia Engineering Pte
Ltd

... Respondent

GROUND OF DECISION

Arbitration — Costs; Civil Procedure — Costs — Security

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Sembawang Engineering Pte Ltd v Priser Asia Engineering Pte Ltd

[1992] SGHC 182

OS 206/1992
Lim Teong Qwee JC
03 July 1992

1 By a contract dated 12 August 1989 (‘the contract’) and made between the above-named Sembawang Engineering Pte Ltd (‘Sembawang’) and Priser Asia Engineering Pte Ltd (‘Priser’), Priser agreed, subject to the conditions of contract attached to the contract, to execute and complete the design, supply, installation, testing and commissioning of the electrical system (‘the works’) for the Qatar General Petroleum Corp Living Quarters Platform (‘the platform’) for \$800,000. The platform was under construction by Sembawang at its yard in Singapore for delivery in the Gulf. The completion date for the works was 6 November 1989.

2 Priser commenced execution of the works in August 1989. Variations were ordered from time to time. Serious delay was encountered and on 6 November 1989 the works were not completed. The platform was originally scheduled to leave Singapore in January 1990 but eventually left on 28 February 1990. Priser did not complete the works by that date.

3 Paragraph 21 of the conditions of contract provide:

Terms of payment

Payment shall be made to [Priser] by progress payment 30 days after the receipt of invoice of work completed for the month, but subject to the percentage of work completed as certified by the engineer less 10% of the amount being retention fee, which shall be deemed payable after 12 (twelve) months from the date of issue of acceptance certificate and the provision of paras 6, 7 and 8 of standard conditions of contract and contract document Pt A.

4 I was informed from the Bar that no engineer was appointed for the purpose of the contract and no certificates were issued. Priser has issued six invoices, four of which Sembawang has paid. The particulars are:

Date Invoice No Amount Date of payment

28 August 1989 438/89 \$81,144.90 31 October 1989

30 September 1989 441/89 \$138,344.40 22 December 1989

31 October 1989 444/89 \$192,537.00 13 January 1990

30 November 1989 448/89 \$135,476.10 (Not paid)

30 December 1989 449/89 \$71,551.80 8 March 1990

31 January 1990 452/89 \$88,913.30 (Not paid)

5 It will be seen that the first progress payment was made more than 30 days after the invoice date. On 25 October 1989 Keppel Finance Ltd ('Keppel') gave notice to Sembawang that Priser had assigned to it 'all moneys owing by [Sembawang] in respect of all present and future jobs' and requested that all future payments for the account of Priser be made to Keppel. Following this, Sembawang made payment to Keppel in respect of invoice Nos 441/89, 444/89 and 449/89. Invoice No 438/89 was paid direct to Priser. Invoice No 448/89 was indorsed by Sembawang without any qualification but has not been paid. Invoice No 452/89 has not been indorsed by Sembawang.

6 By writ issued on 30 April 1990, Priser sued for the amount claimed to be payable under invoice No 448/89 but the action was stayed in view of a

provision for arbitration in the contract. In December 1990 arbitration proceedings were commenced. Priser's points of claim run into 50 paragraphs and a two-page appendix. Sembawang's defence and counterclaim run into 51 paragraphs and 28 pages of annexures. The reply and defence to counterclaim run into 42 paragraphs. By a direction made by the arbitrator on 28 February 1992, the hearing will begin on 12 October 1992 and will continue until completion.

7 On 9 March 1992 Sembawang applied to court for an order for Priser to provide security for costs. The application was heard on 19 June 1992, and at the conclusion, I dismissed it with costs. I intimated to counsel that I would give my reasons later.

8 **Jurisdiction**

9 The application was made pursuant to s 27 of the Arbitration Act (Cap 10) and s 388 of the Companies Act (Cap 50, 1990 Ed). Section 27(1) of the Arbitration Act provides:

The Court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of and in relation to an action or matter in the court:

10 One of the matters set out in the Second Schedule is security for costs.

11 Section 338(1) of the Companies Act provides:

Where a corporation is plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs

12 Mr Latiff, counsel for Sembawang, submitted that on the evidence there was sufficient reason to believe that Priser would be unable to pay the costs of Sembawang if Sembawang were successful in its defence in the arbitration proceedings and accordingly, there was jurisdiction to make an order for security for costs. He referred to **Gateway Land Pte Ltd v Turner (East Asia) Pte Ltd** [1988] 1 MLJ 416 and **Bilcon Ltd v Fegmay Investments Ltd.** [1966] 2 All ER 513

13 In **Gateway Land v Turner** [1988] 1 MLJ 416 there was an application for security for costs in relation to arbitration proceedings. But the question of jurisdiction was not raised and the application was dealt with on its merits. In **Bilcon v Fegmay Investments** [1966] 2 All ER 513 Fegmay Investments were respondents in arbitration proceedings and applied for an order for security for costs against Bilcon, the claimant, on the ground that it was insolvent. Nield J, at p 514, said:

I deal first with the question of the court's jurisdiction. The two special circumstances which together produce the problem in this regard are that the proceedings here are an arbitration under the Arbitration Act 1950, and that the claimants are a limited company with a special position under s 447 of the Companies Act 1948.

14 He then considered O 23 of the English Rules of the Supreme Court (which is in pari materia with O 23 of the Rules of the Supreme Court 1970) and s 12(6) of the English Arbitration Act 1950 (which is in pari materia with s 27(1) of the Arbitration Act) and then proceeded [at p 517]:

Thus and so far I find that the High Court has power to order security for costs in relation to an arbitration, such power being that contained in RSC O 23 r 1. It follows from what I have said, however, that if the matter ended there, the court would not make such an order, since the ground for asking for it is that the respondents are insolvent.

15 Thus I turn to consider s 447 of the Companies Act 1948, and that section reads:

‘Where a limited company is plaintiff or pursuer in any action or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.’

In my opinion the effect of this section is that since a judge of the High Court may by virtue of s 12(6)(a) of the Arbitration Act 1950, order security for costs in an arbitration, he is empowered by s 447 of the Companies Act 1948, to go outside the conditions laid down by RSC O 23 r 1, and exercise his discretion to make an order in the circumstances set forth in s 447, namely, where a limited company is insolvent.

16 Mr Yang, counsel for Priser, did not oppose the application on the ground of jurisdiction but it is right that I briefly express my views on this question.

17 I respectfully agree with Nield J. In relation to an action or matter in court, there is clearly power to make an order for security for costs and the exercise of this power is regulated under O 23. Order 23 r 3 provides: ‘This Order is without prejudice to the provisions of any written law which empowers the court to require security [to be] given for the costs of any proceedings.’

18 This power is extended in its application to a plaintiff which is a corporation under s 388 of the Companies Act. If Priser were plaintiff in an action in court, then there would be jurisdiction to make an order for security for costs if the condition in s 388(1) of the Companies Act is satisfied. It follows that by reason of s 27(1) of the Arbitration Act, there would be jurisdiction to make an order for security for costs for the purpose of and in relation to a reference to arbitration where the condition is satisfied.

19 **Discretion**

20 Mr Yang conceded (and, in my view, quite properly) that on the evidence there was reason to believe that Priser would be unable to pay the costs of Sembawang if Sembawang were successful in its defence in the arbitration proceedings. Both counsel also agreed that once the condition in s 388(1) of the Companies Act was satisfied, there was a discretion to make the order for security for costs. The word used is `may` and there is no reason to suggest that the Companies Act is intended to deprive a corporation of its undoubted right to bring legal proceedings or to render such right illusory by reason only of its impecuniosity.

21 Mr Latiff submitted that the exercise of discretion must be consistent with the legislative intent of that section, and he referred to **Pearson & Anor v Naydler & Ors** [1977] 3 All ER 531 where Megarry VC said, at p 535:

In relation to security for costs, there seems to me to be an essential distinction between natural persons and limited companies as plaintiffs. For a natural person, the basic rule is that he will not be ordered to give security for costs, however poor he is. To that basic rule there are certain exceptions, originally evolved in case law but now set forth in the rules of court. ...

22 In the case of a limited company, there is no basic rule conferring immunity from any liability to give security for costs. The basic rule is the opposite; s 447 applies to all limited companies, and subjects them all to the liability to give security for costs. The whole concept of the section is contrary to the rule developed by the cases that poverty is not to be made a bar to bringing an action. There is nothing in the statutory language (the substance of which goes back at least as far as the Companies Act 1862, s 69) to indicate that there are any exceptions to what is laid down as a broad and general rule for all limited companies. Nor is it surprising that there should be such a rule. A man may

bring into being as many limited companies as he wishes, with the privilege of limited liability; and s 447 provides some protection for the community against litigious abuses by artificial persons manipulated by natural persons. One should be as slow to whittle away this protection as one should be to whittle away a natural person's right to litigate despite poverty.

23 Later, at p 536, he said:

It seems plain enough that the inability of the plaintiff company to pay the defendants' costs is a matter which not only opens the jurisdiction but also provides a substantial factor in the decision whether to exercise it. It is inherent in the whole concept of the section that the court is to have power to do what the company is likely to find difficulty in doing, namely, to order the company to provide security for the costs which ex hypothesi it is likely to be unable to pay. At the same time, the court must not allow the section to be used as an instrument of oppression, as by shutting out a small company from making a genuine claim against a large company.

24 Not unnaturally, the first circumstance Mr Latiff invited me to take into consideration was the inability of Priser to pay the costs of Sembawang if Sembawang should be successful in the arbitration proceedings.

25 In **Sir Lindsay Parkinson & Co Ltd v Triplan Ltd** [1973] 2 All ER 273 Cairns LJ said, at p 286:

*So far as concerns the question whether when a company is the claimant and it is shown that the company would be unlikely to meet an order for costs if such order were made against it, the respondent to the claim is then entitled as a matter of right to an order for security, I agree that there is, or at least may be, a discretion in the court in relation to the matter. In my view the highest at which it can be put in favour of the applicants for security is the way in which it was put in the Irish case to which Lord Denning MR has referred, **Peppard & Co Ltd v Bogoff**, where it was said that there remains a discretion in the court which may be exercised in special circumstances; and, assuming that that is a correct statement of the law, I am quite satisfied that there were special circumstances here.*

26 However, that was not the view of the majority. Lord Denning MR reviewed the authorities and said, at p 285:

Turning now to the words of the statute, the important word is 'may'. That gives the judge a discretion whether to order security or not. There is no burden one way or the other. It is a discretion to be exercised in all the circumstances of the case.

27 Lawton LJ said, at p 287:

There being a difference of emphasis between the two judgments already given, doubt may continue as to the construction of s 447 unless something is said by me. I agree with Lord Denning MR that the effect of s 447 is that once it is established by credible evidence that there is reason to believe that the plaintiff company will be unable to pay the costs of the defendants if they are successful in their defence, the court has a discretion, and that discretion ought not to be hampered by any special rules or regulations, nor ought it to be put into a straitjacket by considerations of burden of proof. It is a discretion which the court will exercise having regard to all the circumstances of the case.

28 Section 388 of the Companies Act gives to the court a discretion in the matter where the condition as regards inability to pay costs is satisfied. The discretion has to be exercised upon a consideration of all the relevant circumstances. Admittedly, one of these circumstances is the inability itself. The language of s 388 does not lend itself to a construction that in any way fetters the discretion of the court. I respectfully agree with the majority view in **Lindsay Parkinson v Triplan** [1973] 2 All ER 273 There is no burden of proof one way or another.

29 Mr Yang submitted that Priser had made a bona fide claim in the arbitration. It is neither convenient nor necessary to give a complete summary of the 50 paragraphs in the points of claim, but substantially there is a claim for the cost of the works and variations less what has been paid (which includes invoice No 448/89 which has still not been paid), and damages for disruption

caused by the variations and delay in the delivery of drawings and materials to be supplied by Sembawang. The defence is substantially a denial of the disruption and delay and of damages for any resulting loss or expense and there is a counterclaim for damages for delay and for repudiation. It would not be right to attempt to come to any conclusion on the merits of the claim and the defence and counterclaim. But two matters stand out on the pleadings and the evidence before me. Firstly, there does not appear to be an adequate explanation as to why invoice No 448/89 indorsed by Sembawang and assigned to Keppel has not been paid notwithstanding para 21 of the conditions of contract; and secondly, Sembawang admits that it extended time to 28 February 1990 which was immediately before the platform left Singapore on its way to the Gulf. I am satisfied that on the materials before me, Priser has a bona fide claim and in respect of at least part of the claim there is a reasonable prospect of success.

30 Mr Yang also submitted that the other circumstances to be considered were lateness of the application, oppression having regard to the financial condition of Priser caused by the matters complained of in the arbitration, and prejudice to creditors including Keppel awaiting the result of the arbitration. I can deal with these circumstances quite briefly. The hearing of the arbitration will commence on 12 October 1992. That is three months away or seven months from the time the application for security was made. If security could be found should it be ordered, there would be enough time to do so. Put it another way; if security could not be found in three months there was no reason to suppose that it could be found in four, five or six months or any longer period of time. Creditors might be prejudiced if security was ordered and Priser could not find it, but the short answer is for the creditors to find it themselves and, if necessary, to put Priser in liquidation to protect their position. Mr Latiff submitted that Priser's financial position was not caused by Sembawang and that it was already

in financial difficulties before entering into the contract. I did not agree with this entirely. Priser depended on the progress payments to pay the expenses of executing the works. All the progress payments were very late and I found that to some extent, the financial condition of Priser was caused by the matters complained of in the arbitration.

31 I found that the claim of Priser was a bona fide claim and had a reasonable prospect of success at least in part. I took into account the other circumstances to which my attention had been directed. On the whole, I came to the conclusion that this was not a case in which it would be right to make an order for security for costs and I accordingly dismissed the application with costs.

32 **Outcome:**

Lim Teong Qwee JC

Latiff Ibrahim and Tan Lay Pheng (Khattar Wong & Partners) for the
applicants
YC Yang (Murphy & Dunbar) for the respondents
