IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1998] SGHC 395

Suit 1631/1998

Between

Min Thai Holdings Pte Ltd

… *Plaintiff*

And

Sunlabel Pte Ltd
Another

… *Defendant*

GROUNDS OF DECISION

Civil Procedure — Injunctions

Version No 1: 20 Nov 2026 (00:35 hrs)

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Min Thai Holdings Pte Ltd v Sunlabel Pte Ltd and Another

[1998] SGHC 395

Suit 1631/1998
Lai Kew Chai J
30 November 1998

Judgment:

LAI KEW CHAI J

This appeal arises out of my refusal to set aside an injunction order. On 16 September 1998 the plaintiff (`Min Thai`) obtained an interim injunction from Rajendran J restraining the first defendant (`Sunlabel`) from calling on and/or receiving any sum whatsoever under a performance guarantee dated 26 June 1998 issued by the Allied Irish Banks plc until trial or further order. Broadly speaking, the injunction was obtained on the ground that it would have been unconscionable for Sunlabel to have enforced the performance guarantee.

2.On 12 October 1998 I heard Sunlabel`s application to set aside the injunction orders. At the conclusion of the hearing, I dismissed the application and ordered that the costs of the application be reserved.

3. ***The background***

The plaintiff (`Min Thai`), the first defendant (`Sunlabel`) and the second defendant (`Finorgan`) are all traders in, amongst other commodities, China origin white rice. The quantity with which we are concerned is 50,000 metric tons. Min Thai has its own sources in the Peoples` Republic of China who would sell and deliver to it or to its order the white rice. Sunlabel has his own importers of the white rice to Indonesia to whom it intended to sell the white rice. Finorgan may be described in the two interfacing transactions, in one sense, as the intermediate party.

4.According to Min Thai, the transactions relevant to these proceedings are not the usual sales of goods contracts involving three parties but basically giving rise to two contracts for the sale of goods. The typical case is where A sells goods to B and B in turn under a separate contract sells those goods to C; in such cases there is no privity of contract between A and C. However, Min Thai, the plaintiff, alleges in this case a collateral contract with Sunlabel, the first defendant, in addition to the one it has with Finorgan, the second defendant; and more of the details later.

5. ***The contract between Sunlabel and Finorgan***

The managing director of Min Thai, Mr Chew Ching Khim (`Mr Chew`), affirmed and filed an affidavit in support of its application for the injunction. He affirmed that Min Thai `was involved` in the contract dated 9 June 1998 which was entered into between Finorgan and Sunlabel. Under the contract written on Sunlabel`s stationery, Sunlabel agreed to buy and Finorgan agreed to sell the white rice. The contractual specification to note is that broken rice shall be `25% max.` Half of the quantity shall be shipped `within 25 days after receipt of acceptable L/C` and the remaining 25,000 MT has to be shipped within 25 days after the shipment. The unit price was US$255 per MT CFR FO Indonesian

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Main Port, Jakarta or Surabaya or Semarang or Medan (Pelawan). The loading ports were Dandong and/or Shanghai Ports, PRC.

6.For present purposes, the contents of three relevant clauses have to be set out for their full import.

7.The first clause pertains to the `performance bond`. It states:

> *Ultimate seller is requested to post 2% (two percent) of contract value performance bond to buyer bank to activate the letter of credit, such performance bond is payable to buyer upon default of seller to deliver the rice contracted within the agreed delivery schedule. (Attached is a bank guarantee format under Annex A which will form part of the L/C to be issued to Min Thai Holdings as our supplier.)*

7.1.It was common ground before me that the expression `Ultimate Seller` in the clause refers to Min Thai and that the amount of the performance guarantee which Min Thai caused the Allied Irish Banks plc to issue amounted to US$255,000.

8.The second clause provides for the payment of the 50,000 metric tons of rice. It was to be `(b)y 100% irrevocable letter of credit negotiable at any bank-payable 100% at sight favour of Min Thai Holdings Pte Ltd, Singapore`. The beneficiary of the L/C was Min Thai, which was another nexus. The L/C was to remain valid at least 30 days after the last shipment. The advising bank was Allied Irish Banks plc (Singapore).

9. ***The force majeure provisions***

The third clause incorporates the `Force Majeure` conditions under the ICC rules and regulations. The construction of these rules have to take into account

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the nature of the contract, its terms and the company of words and expressions in which these rules are found. The relevant parts of those rules read:

> (1) Grounds of relief from liability
>
> A party it not liable for a failure to perform any of his obligations in so far as he proves:
>
> - that the failure was due to an impediment beyond his control; and
>
> - that he could not reasonably be expected to have taken the impediment and its effects upon his ability to perform into account at the time; and
>
> - that he could not reasonably have avoided or overcome it or at least its effects.
>
> (2) An impediment within paragraph (1) above, may result from events such as the following, this enumeration not being exhaustive:
>
> …
>
> (b) natural disasters such as violent storms, cyclones, earthquakes, tidal waves, floods, destruction by lightning;
>
> …
>
> (4) Duty to notify
>
> A party seeking relief shall as soon as practicable after the impediment and its effects upon his ability to perform became known to him give notice to the other party of such impediment and its effects on his ability to perform. Notice shall also be given when the ground of relief ceases.
>
> (5) The ground of relief takes effect from the time of the impediment or, if notice is not timely given, from the time of the notice. Failure to give notice makes the failing party liable in damages for loss which otherwise could have been avoided.
>
> (6) Effects of grounds of relief
>
> A ground of relief under this clause relieves the failing party from damages, penalties and other contractual sanctions, except from duty to pay interest on money owing as long as and to the extent that the ground subsists.
>
> (7) Further, it postpones the time for performance, for such period as may be reasonable, thereby excluding the other

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> party`s right, if any, to terminate or rescind the contract. In determination what is reasonable period, regard shall be had to the failing party`s ability to resume performance, and the other party`s interest in receiving performance despite the delay. Pending resumption of performance by the failing party the other party may suspend his own performance.
>
> (8) If the grounds of relief subsist for more than such period as the parties provide (the applicable period to be specified here by the parties), or in the absence of such provision for longer than a reasonable period, either party shall be entitled to terminate the contract with notice.
>
> (9) Each party may retain what he has received from the performance of the contract carried out prior to the termination. Each party must account to the other for any unjust enrichment resulting from such performance. The payment of the final balance shall be made without delay.

10.1. ***The alleged collateral contract between Min Thai and Sunlabel***

Mr Chew in his affidavit narrated his version alleging the collateral contract between Min Thai and Sunlabel, in addition to the contract between Min Thai and Finorgan. Mr Chew deposed to the fact that Min Thai worked in co-operation with Finorgan to source the white rice from suppliers in the PRC. It was to comprise no more than 25% of broken rice. The contract price was below the market price because the Chinese government would subsidise such commodities for export. His counsel referred to the fact that Min Thai had through its agent signed and had applied its stamp on every one of the three paged contract dated 9 June 1998 between Sunlabel and Finorgan. He said that it was orally agreed between Min Thai and Finorgan that Min Thai would source for Finorgan the white rice and was in that sense the ultimate supplier.

10.2.Mr Chew affirmed that prior to the contract, he had made it known to both defendants, Sunlabel being represented by Mr James Koh and Finorgan being represented by Mr Mohammed Maideen, that the 50,000 metric tons of white rice would come from the Heilong Jiang province in the North East of the PRC

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as well as the Jiang Xi province in Central China (West of Shanghai). According to him, the Jiangxi rice would be exported from the port of Shanghai, after they were collected in Jiu Jiang City and transported by road, rail or barges to Shanghai for shipment. Jiu Jiang City is beside the Yangtze River.

10.3.Mr Chew further claimed that when the contract was signed, the 50,000 metric tons of white rice were in existence and most of them were stored principally in Jiu Jiang City and some in Qiqi Har and Har Bin. He alleged that in fact on 4 to 7 July 1998 he personally took Mr James Koh and Mr Mohammed Maideen to inspect the rice at Qiqi Har and Har Bin. Both gentlemen denied these allegations in their affidavits. I was obviously not in a position to make a finding on this subsidiary issue of fact. At the same time, it would be an issue for trial and it will have a bearing on the existence and, if so, the extent and terms of the alleged contractual nexus between Min Thai on the one hand and Sunlabel on the other.

10.4.Counsel for Min Thai submitted that by virtue of the oral agreement between the agents of Min Thai, Sunlabel and Finorgan, it was agreed that Min Thai was to source and supply the white rice under the contract. It followed that, in the light of all the connecting factors specifically referred to above, it must be implied that all the terms of the contract shall apply to and bind Min Thai and Sunlabel with the necessary changes.

10.5.Further and in the alternative, I understood Mr Yuen, counsel for Min Thai, as contending that Min Thai, having assumed the obligation to indemnify the Allied Irish Banks plc under the performance guarantee would have a sufficient interest to seek a declaration that the contract between Sunlabel and Finorgan, in any event, was no longer binding by reason of the operation of the force majeure conditions.

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11.1.Pursuant to the contract, Sunlabel applied for a letter of credit from Banque Paribas who issued it on 26 June 1998 in favour of Min Thai as the beneficiary.

11.2.Min Thai requested Allied Irish Banks plc to issue the performance guarantee in favour of Sunlabel pursuant to the contract between Finorgan and Sunlabel. In doing so, it must be the case that Min Thai would have to keep the bank fully indemnified if and when the bank had to pay under the guarantee. The guarantee stated:

> *At the request of the supplier (ie Min Thai) we Allied Irish Banks plc ... hereby issued our letter of guarantee No LC/S0117/98 and irrevocably undertake to pay you any sum or sums not exceeding in total an amount of US$255,000 ... upon receipt by us of your first demand in writing issued by tested telex stating that the Supplier has failed to ship or make the full shipment as per his obligation(s) under the terms of the L/C No IL24111 dated 26 June 1998.*
>
> *This guarantee is effective from date hereof and shall expire on 15 September in full and automatically on this date and any demand for payment must be received by us at this office on or before that date.*
>
> *This guarantee shall be governed and construed in accordance with the Law of Singapore. [Clarification is added.]*

12.1. ***The force majeure - the floods***

Subsequent to the issue of the performance guarantee of 26 June 1998, the PRC was subject to severe floods. Flooding is one of the exceptions specified in the ICC Force Majeure Conditions, cl 2(b).

12.2.In July 1998, China was subject to exceptional rainfall. The situations were exacerbated by typhoons. The widely known floods in the PRC at the material times, and the consequences of the same, were elaborated in some detail by Mr Chew in his affidavit. Those allegations were disputed by both Mr James Koh and Mr Maideen who asserted that the due performance of the contract was not

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in any way excused by the floods and typhoons. They said that the areas concerned were not affected and that Min Thai`s conduct at all material times demonstrated that it was able to source for the white rice. Again, this is another important issue of fact to be tried.

13.According to Mr Chew, Min Thai promptly informed both Finorgan and Sunlabel of the impediment of flooding immediately upon its occurrence. Since 27 July 1998 Min Thai had kept both defendants informed of the effects of the floods. Min Thai complied with cl 4 of the ICC Force Majeure Conditions.

14.Min Thai even offered an alternative performance, even if it was not strictly an act in mitigation. They offered a supply of rice with maximum 30% broken rice. If accepted, there would have been a variation of a term in the contract.

15.On 2 September 1998 Sunlabel and Finorgan called for a meeting and met Mr Chew of Min Thai to explore practical solutions to the flood problems.

16.However, unknown to Min Thai, Sunlabel had on 31 August 1998 and even on 2 September 1998, before the meeting initiated by Mr Koh of Sunlabel, made a demand in writing on the Allied Irish Banks plc to pay under the performance guarantee.

17.On 15 September 1998, Min Thai commenced this action against both Sunlabel and Finorgan. Its claim is for a declaration that the contract dated 9 June 1998 between Sunlabel and Finorgan under which Finorgan agreed to sell 50,000 metric tons of white rice to Sunlabel is no longer binding and valid by reason of force majeure and that Sunlabel is consequently not entitled to call upon or receive money under the performance guarantee established by Min Thai in favour of Sunlabel for due performance of the contract.

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18.On the following day, Min Thai applied for an injunction. It was heard by S Rajendran J on 16 September 1998. It was an opposed ex parte application. Sunlabel was represented by counsel. Mr Mohammed Maideen, the managing director, was allowed to speak on behalf of Finorgan. It appeared that Finorgan was adopting a neutral stance and did not want to get into the dispute between Min Thai and Sunlabel.

19.Counsel for Min Thai contended that Sunlabel`s conduct was unconscionable and he referred S Rajendran J to **Royal Design Studio Pte Ltd v Chang Development Pte Ltd** [1990] SLR 1116 [1991] 2 MLJ 229 , **Kvaerner Singapore Pte Ltd v UDL Shipbuilding (S) Pte Ltd** [1993] 3 SLR 350 , **Raymond Construction v Low Yang Tong** (Unreported) judgment of mine in Suit No 1715 of 1995) and **Bocotra Construction Pte Ltd & Ors v A-G (No 2)** [1995] 2 SLR 733 . In the last-named authority, the Court of Appeal ruled that an applicant is required to establish a clear case of fraud or unconscionability to obtain an injunction restraining any payment under an unconditional bond or performance guarantee.

20.In my judgment referred to above (***Raymond Construction v Low Yang Tong***), I ventured to elaborate on the parameters of the notion of `unconscionability`. I said: `The concept of `unconscionability` to me involves unfairness, as distinct from dishonesty or fraud, or conduct so reprehensible or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party`.

21.As stated earlier, S Rajendran J granted the injunction and Sunlabel`s application to set it aside was dismissed by me.

22. ***Sunlabels` grounds***

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Both Mr Koh and Mr Maideen in their affidavits alleged that Min Thai had failed to disclose material facts and had misled the court when applying for the injunction from Rajendran J. In the main, Sunlabel referred to Min Thai`s failure to disclose Finorgan`s letter dated 14 September 1998. However, this letter was placed before the learned judge. In any case, the letter did not support Sunlabel`s assertion that between them and Finorgan there was no dispute and that Finorgan had not delivered the white rice. An examination of the contents revealed to a reasonable reader that they were capable of indicating that there was an on-going dispute since it talked of an `amicable settlement`. If there was no dispute, what was there to be amicably settled?

23.In their affidavits, both Mr Koh and Mr Maideen said that they did accompany Mr Chew to view the stock of rice at Qiqi Har but they said it was not in Har Bin. Mr Chew in reply admitted that they met the suppliers of Har Bin when they were on their way to inspect the rice in Qiqi Har in the Heilong Jiang province. Mr Koh also referred to the correspondence between Sunlabel and Min Thai, particularly to Mr Chew`s handwritten statement that he had `fixed` the shipment on 15 to 20 August 1998 for the first 15,000 metric tons and then follow up with the rest. Sunlabel relied on this to say that Min Thai was ready, willing and able to ship the white rice. But Mr Chew in his first affidavit had explained in para 26 that he attempted to procure substitute white rice but the percentage of broken rice was higher. Those were rejected by Sunlabel. There are other allegations and counter-allegations in the respective affidavits.

24.It was plain that from the three affidavits there were disputes and they raised the basic question whether there was any breach of the contract for failure to ship the white rice. More specifically, the question did arise whether the ICC Force Majeure Conditions applied.

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25.The next complaint of Sunlabel was its contention that Min Thai was contractually a stranger and had no right whatsoever to restrain the payment under the performance guarantee. However, Min Thai had referred to the oral agreement and the matters referred to above to support their assertion that there was collateral between Min Thai and Sunlabel. Plainly again this serious issue had to be tried.

26.The overall position was this. The white rice was to be supplied from the Heilong Jiang province in North East China as well as the Jiang Xi province in Central China (West of Shanghai). There took place for a fact severe flooding which China had not experienced in the last 100 years. The media, both video and written, gave extensive coverage to the disaster. Admittedly, whether Min Thai`s performance of the collateral contract was affected by the force majeure was raised as an issue. There was also a question whether truly as between Finorgan and Sunlabel there was a dispute over the applicability of the ICC Force Majeure Conditions.

27.There was evidence that Min Thai, who had caused the issue of the performance guarantee, attempted to find alternative sources but could only manage to find some white rice of lower grade which, admittedly, Sunlabel could reject.

28.In those circumstances, I concluded that it was unconscionable for Sunlabel to attempt to receive payment under the performance guarantee. They were perfectly entitled to make a call on the guarantee, seeing that there was an expiry date, but they should have in all good conscience offered to let the money remain, say, in the Allied Irish Banks plc to be held to the orders of Sunlabel and Min Thai pending the resolution of disputes between Min Thai and Sunlabel and the disputes, if any, between Finorgan and Sunlabel.

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Lai Kew Chai J

Simon Yuen and Gerald Khor (Chong Yeo & Partners) for the plaintiffs
Lum Pak Meng (Leong & Lum) for the first defendants

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