

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1999] SGHC 168

Suit 2033/1997

Between

The Ngee Ann Kongsi

... Plaintiff

And

The Tai Ping Insurance
Company Limited

... Defendant

GROUND OF DECISION

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**The Ngee Ann Kongsı v The Tai Ping Insurance Company
Limited**

[1999] SGHC 168

Suit 2033/1997
Goh Joon Seng J
28 June 1999

1 JUDGMENT:

2 GROUNDS OF

JUDGMENT

3 1 This was a claim by the Plaintiff under a performance bond dated 28
August 1995 ('the Bond') issued by the Defendant. By the Bond, the Defendant
guaranteed the due performance by the contractor Inte'con Pte Ltd ('the
Contractor') of the terms and conditions of its contract with the Plaintiff for the
additions and alterations to the building at No. 97, Tank Road, Singapore ('the

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Building’). After hearing arguments, I held the Bond to be an unconditional one under

which the full sum of \$1,369,500.00 (‘the guaranteed sum’) was payable on

demand. Accordingly, I entered judgment for the Plaintiff for the guaranteed sum with

interest at 6% per annum from 16 October 1997 and costs. The Defendant has appealed to the

Court of Appeal. I now give my reasons.

4 The parties

5 2 The Plaintiff is a body corporate incorporated under the Ngee Ann

Kongsi (Incorporation) Ordinance (Cap 307). Its objects and general purposes are the

promotion of charitable causes for the benefit of the Teochew community in Singapore. A

large portion of its income now goes toward financing the running of the Ngee Ann

Polytechnic.

6 3 The Defendant is a company incorporated in the People's Republic
of China and are carrying on business as an underwriter in Singapore.

7

8 The facts

9 4 The Plaintiff is the owner of the 6-storey Building. It used to house
the Tuan Mong High School. The Plaintiff then decided to convert the Building
to a
cultural centre and institution for commercial studies.

10 5 For the conversion, the Contractor was invited to tender for the
additions and alterations ('the works') to the Building in accordance with the
tender documents. One of the items of Preliminaries in the tender documents
stated:

"On the acceptance of his tender, the Contractor shall deposit
with the Employer an amount equal to 10% of the Tender sum
in cash or provided[sic] by an
approved Banker's/Insurer's Guarantee in strict accordance
with the sample in
Appendix C."

"Within ten (10) days from the date of this Letter of Award, you shall deposit with the Employer a Performance Bond by way of a Banker's Insurance Guarantee in an amount equals[sic] to ten percent (10%) of the Contract Sum in strict accordance with the form of Performance Guarantee annexed to the Tender Documents."

"WHEREAS This Deed is supplemental to an agreement
(hereinafter called
"Contract") made between MESSRS. INTE'CON PTE LTD of
24A Sam Leong Road
Singapore 0820 (hereinafter called "the Contractor") of the one
part and the
Employer of the other part, whereby the Contractor agreed to
carry out the works included
in the contract for PROPOSED ADDITIONS AND
ALTERATIONS TO THE EXISTING 6 STOREY TUAN MONG
HIGH SCHOOL AT 97 TANK ROAD FOR NGEE ANN KONGSI

– FOR The MAIN BUILDING CONTRACT for
the sum of Singapore Dollars Thirteen Million Six Hundred
And Ninety Five Thousand Only

(S\$13,695,000.00) AND WHEREAS THE Guarantor has
agreed to guarantee the due performance of

the Contract in the manner specified therein. NOW THE
GUARANTOR HEREBY AGREES with the Employer as follows:-

1. In consideration of the Employer not insisting on the
Contractor

paying ten (10) per cent of the total value of the Contract
including Prime Cost and

Provisional Sums as a security deposit for the said Contract,
the Guarantor hereby

guarantees the Employer the sum of SINGAPORE DOLLARS
ONE MILLION THREE HUNDRED AND SIXTY

NINE THOUSAND AND FIVE HUNDRED ONLY
(S\$1,369,500.00) being the total value of the Security

Deposit required for the due and faithful performance of the
said Contract. 2. In the event of the Contractor failing to fulfil
any of the terms

and conditions of the said Contract, the Guarantor shall
indemnify the Employer against

all losses, damages, costs, expenses or otherwise sustained by
the Employer thereby up to

the aforementioned sum. The Guaranteed Sum shall be
payable to the Employer immediately

upon demand for payment in writing notwithstanding the
existence of any dispute between

the Employer and the Contractor in relation to the Contract or
any amount payable

thereunder.... 5. This guarantee is conditional upon a claim
being made by the

Employer by notice in writing to us and a claim hereunder
must be made within six (6)

months from the expiry of this guarantee. "

14 9 On 22 November 1995, the formal contract incorporating the current SIA Articles and Conditions of Contract was entered into between the Plaintiff and the Contractor.

15 10 By the Appendix to Condition 25 of the Conditions of Contract, the works were to be completed in four phases as follows:

"

(a) Phase I – Renovation Works 21 March 1996

(b) Phase II – PUB Substation 21 November 1996

(c) Phase III – Lift Shafts and Motor Room 5 January 1997

(d) Phase IV – All Remaining Works 21 May 1997"

16 11 Phase I was completed on time. Phase II was completed on 26 March 1997. Phase III was completed on 20 March 1997. Phase IV which comprised the bulk of the works saw substantial delay. On 6 February 1998, the Architect issued the Delay

Certificate under cl 24(1) of the Conditions of Contract giving an extension of
80 days.

13 September 1997 was thus the extended date of completion. The Architect accordingly

certified that the Contractor had been in default in not having completed the
works by the

said date.

17 12 On 16 October 1997, as the works had still not been completed, the

Plaintiff, by letter, made a call on the Bond demanding from the Defendant
payment of the

guaranteed sum. The letter read:

"As the Contractor, M/s Inte'con Pte Ltd, has failed to
complete the works by the Contract completion date/extended
completion date, we hereby
demand payment by you of the guaranteed amount of
S\$1,369,500.00 under the above
mentioned Bond No. DGBPSP0027929500 issued by you."

18 13 A reminder dated 21 October 1997 was sent by the Plaintiff to the

Defendant.

19 14 The Defendant refused to comply with the demand unless there was

proof of default and the amount of loss. Its letter of 28 October 1997 stated:

" ...the first sentence of clause 2 of the bond, clearly
contemplates a situation where the contractor fails to fulfil the
terms of the contract
and our obligation is to indemnify you against 'all losses,
damage, costs, expenses
or otherwise sustained by the Employer thereby upto the
aforementioned sum'.
... "

20 The proceedings

21 15 On 2 December 1997, the Plaintiff commenced these proceedings for

the guaranteed sum on the ground that it was payable on demand under cl 2 of
the Bond.

22 16 On 13 March 1998, a winding-up order was made against the

Contractor. By cl 32(7) of the Conditions of Contract, the employment of the

Contractor

was automatically terminated. The outstanding works were eventually completed and defects

rectified by another contractor at additional costs to the Plaintiff.

23 17 On 14 April 1999, the Plaintiff by its Amended Statement of Claim

included an alternative claim with particulars of its losses due to the default of the

Contractor as follows:

24 **"Losses, Damages, Costs and Expenses**

25 18 When the matter came before me for hearing on 26 April 1999, counsel

for the Defendant applied for the dates of hearing to be vacated on the ground that they

required time to look into the Plaintiff's alternative claim. As the action might be

deposed of purely on the construction of the Bond, I proceeded with the hearing on the

Plaintiff's original claim deferring the hearing, if necessary, on the alternative

claim to a later date.

26 My decision

27 19 The Bond, as appears from cl 1 thereof, was furnished in

consideration of the Plaintiff not insisting on the Contractor paying a cash
deposit of

10% of the contract sum. It must therefore have been clear that the Plaintiff
required a

bond which was as good as cash in hand. The 'cash in hand principle' is

consistent with the desire for commercial efficacy and certainty in the use of
performance

bond. See *Bocotra Construction Pte Ltd v A-G (No. 2)* [1995] 2 SLR 733 at 744
where

the Court of Appeal stated:

" The respondent undertook a comprehensive and judicious
survey of

the relevant case law on restraint of calls or payment on bonds
from a variety of common

law jurisdictions. Of the various propositions of law suggested
by the respondent, four

principles may be extracted:

(a) *The 'autonomy' principle* – the guarantee constitutes a separate contract from the underlying transaction. ...

(b) *The 'cash in hand' principle* – reflecting the importance of promoting commercial efficacy and certainty in the use of letters [of credit], guarantees and bonds. This ties in with the 'autonomy'

principle. (c) *The 'fraud' exception* – the sole exception to the 'autonomy' and 'cash in hand' principles arises where the plaintiff can establish fraud in the circumstances of the call or payment... (d) ...

Principles (a) to (c) were all alluded to and supported by the judge

below. The weight of authority suggests that these principles are well entrenched. "

28 20 The Defendant however contended that by virtue of cl 2 of the Bond,

its liability was established only upon proof of the Contractor's 'failing to

fulfil any of the terms and conditions of the said Contract' ('words relied on

by Defendant') which by the recital the Bond was said to be supplemental to. In other

words, there must be proof of failure of due performance by the Contractor and that the

Plaintiff had suffered loss before the Defendant's liability to pay under the Bond could arise. It is clear in my view that the recital read with words relied on by the

Defendant only serve to identify the contract, the due performance of which was guaranteed

by the Bond. It did not require proof of failure of due performance and loss as a condition precedent to liability. See Hudson's Building and Engineering Contracts,

11th Ed Vol 2 para 17-056:

"(b) Nature of unconditional or 'on demand' undertakingThe essence of an on demand bond or guarantee derives from express

wording which "triggers" the surety's liability upon some event, document or

certificate, or more often a mere demand or "call" by the creditor (provided the

call is expressed in accordance with any requirements of form which are to be inferred

from the wording of the bond). In such cases the occurrences of the event or document or

the making of the demand in appropriate form will override any need to establish the

accuracy or justification of any facts or alleged facts, such as failure of due

performance, under the principal contract on which the bond
or guarantee may have been
nominally conditioned. In the case of construction contracts
the nominal or cosmetic basis
for the creditor's calling of such an unconditional bond is
usually stated to be
failure of "due performance" of the contractor's obligations
(although
"guarantees" or bonds for *due payment* by construction
owners, where the
contractor is in a position to require them, are now not
infrequently required to be
expressed unconditionally as well)..."

29 21 In *Bocotra Construction Pte Ltd v A-G* (No. 2) *supra*, the
recital to the bond stated '...whereas by cl 9 of the conditions of contract, the
contractor must provide a bank guarantee for a sum equal to ten per cent (10%)
of the
contract sum, for the due performance of the contract.' It was similarly
contended
there that proof of default was a pre-condition for a call to be made on the bond.
The

Court of Appeal at 740 dismissed the contention:

30 22 Cl 2 of the Bond also did not support the Defendant's position.

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It stated that the 'Guaranteed Sum shall be payable to the Employer immediately upon

demand for payment in writing notwithstanding the existence of any dispute between the

Employer and the Contractor in relation to the contract or any amount payable

thereunder.' This quite clearly embodied the 'autonomy' principle of the Bond.

31 23 Accordingly the Defendant's liability to pay arose upon demand being

made, save in the case of fraud (see *Bocotra Construction Pte Ltd v A-G (No. 2)* supra).

32 24 That the Bond so worded is a demand bond is consistent with banking practice, otherwise banks will have the unenviable task of deciding whether payment when

demand has to be made. See *Esal (Commodities) Ltd & Anor v Oriental Credit Ltd &*

Anor [1985] Lloyd's Report 546. The performance bond there stated:

"We undertake to pay the said amount on your written demand in the

event that the supplier fails to execute the contract in perfect performance..."In holding it to be a demand bond, Ackner LJ said at 549:"OCL contend that on the true construction of the performance

bond, either: (a) There was no liability under the performance bond unless and until there

had been a breach of the underlying contract of sale, and this was never established.

Alternatively (b) that the beneficiary of the performance bond not only had to make a

written demand for payment under and pursuant to the performance bond, but he must in the

making of the demand assert that the demand was made because the supplier had failed

properly to execute the contract.Mr Tugendhat supports both constructions by relying upon the words in

the undertaking immediately following 'written demand' –' ... in the event that the supplier fails to execute the

contract in perfect performance.'As regards the first interpretation, Mr Tugendhat is obliged to accept

that if he is right, the bank, by entering into the performance bond, is taking upon

itself the obligation of deciding the merits of a dispute under a contract of sale, a

function for which it is virtually common ground the bank is wholly unfitted and which the

parties could not sensibly have intended. ... If the performance bond was so

conditional, then unless there was clear evidence that the seller admitted that he was in

breach of the contract of sale, payment could never safely be made by the bank except on a

judgment of a competent court of jurisdiction and this result

would be wholly inconsistent
with the entire object of the transaction, namely, to enable the
beneficiary to obtain
prompt and certain payment."

33 25 It must have been to spare themselves the unenviable task of having

to decide on the merits of a dispute between the Plaintiff and the Contractor that
the

Defendant obtained an indemnity from the Contractor which provided as
follows:

"I/we INTE'CON PTE LTD and the undermentioned guarantors,
jointly and severally agree and undertake to keep you
indemnified in respect of any sums
up to the limit of your liability under the Bond paid by you to
NGEE ANN KONGSI on demand
appearing or purporting to be made by or on behalf of NGEE
ANN KONGSI under the Bond,
which payments may be made by you without reference to or
any necessity for confirmation
or verification on my/our part. ...It is hereby expressly
DECLARED and AGREED that any demand as aforesaid
shall, as between me/us and you, be conclusive evidence that
the sum stated herein is
properly due and payable. I/We hereby further agree that you
may at your absolute
discretion compromise any demand as aforesaid and/or any
consequent proceedings and to
accept the receipts, vouchers or other evidence of payment(s)
made by you as conclusive

evidence against me/us of the fact and extent of our liability
herein to you."

34 26 I was therefore of the view that the Bond is a demand bond. The

Defendant's liability was 'triggered' by the Plaintiff's call thereon. The

amount of the Bond demanded must be paid in full. It will then be left to the
Contractor

(or the Liquidator) and the Plaintiff to do an 'accounting' thereafter. If the

Plaintiff has suffered no loss, the money received by it must be paid over to the

Contractor (or the Liquidator). See *Cargill International SA and Anor v*
Bangladesh Sugar

& Food Industries Corp [1996] 4 All ER 563.

35 In that case, the plaintiff companies successfully tendered for the

supply of sugar to the defendant governmental organisation. The tender was
accepted

subject to the receipt of a banker's performance bond covering 10% of the total
cost

and freight value and was subsequently confirmed in writing by a contract dated
16 June

1994. The contract stipulated that the cargo would be transported in a vessel which was

not more than 20 years old and would be delivered before 15 September 1994. Clause 13

provided that the plaintiffs' performance bond was liable to be forfeited if they failed to fulfil any of the terms and conditions of the contract and also if they were

responsible for any loss or damage suffered by the defendant. In the event, the vessel

used was over 20 years old and arrived some days late. The defendant therefore rejected

the shipment and made a call on the bond under cl 13. The plaintiffs thereafter applied to

the Commercial Court for, inter alia, an injunction restraining the defendants from

drawing on the bond and a declaration that the defendant was not entitled to make any call

on the bond or to retain any money so received on the ground that it had suffered

no loss

since the market for sugar had fallen, and the defendants had replaced the rejected sugar

at less than the contract price. Further, the plaintiffs themselves had paid the extra

insurance required for the over-age vessel.

36 It was held that the defendant was entitled to make a call for the full amount of the performance bond, even if the breach of contract had caused it no loss,

since the bond was not intended to represent an 'estimate' of the amount of damages to which it might be entitled for such breach but was a 'guarantee' of due performance. However, it was implicit in the nature of a bond that, in the absence of

clear words to a different effect, when the bond was called there would at some stage in

the future be an 'accounting' between the parties to determine their rights and obligations. Accordingly, if the defendant had suffered no damage as a result of

the

plaintiffs' breach, any money received by it under the bond was recoverable by the

plaintiffs.

37 At 569-570, Morison J stated:

"Support may also be found in two Australian cases. In the first, *Australasian*

Conference Association Ltd v Mainline Constructions Pty Ltd (in liq) (1978) 141 CLR

335, the question before the court was whether the employer under a building contract made

with a builder (Mainline) which subsequently went into liquidation was entitled to pay

sub-contractors out of the performance bond moneys which it had called, and been paid by

the builder's bank. It was the bank's position, inter alia, that the employer

was obliged to account to it for any surplus after the sub-contractors had been paid off.

The employer conceded that it was not entitled to retain any surplus, and the court

clearly believed that to be correct, as did the other two parties. The court's

conclusion was that the issue had to be determined by reference to the contract between

the employer and Mainline; it concluded that the surplus should be released to Mainline

and not to the bank. In a subsequent building case (an injunction case), *Wood Hall Ltd*

v Pipeline Authority (1979) 141 CLR 443, the court held that the beneficiary was entitled to call the bond but that once paid, the 'money must be held as security for the contractor's due and faithful performance of the work' (see 141 CLR 443 at 454 per Gibbs J). Both these cases lend (limited) support for the proposition that moneys paid under a performance bond are designed to be used in accordance with the provisions of the contract and that any surplus is for the account of the party which provided the bond."

38 27 Accordingly, I entered judgment for the Plaintiff for the full amount of the guaranteed sum, that is \$1,369,500.00 with interest at 6% per annum from 16

October 1997 when the Plaintiff made the demand for payment under the Bond. I also awarded

Plaintiff costs.

39 GOH JOON SENG

40 JUDGE

The Ngee Ann Kongsi v The Tai Ping Insurance Company Limited [1999] SGHC 168

Goh Joon Seng J

Ho Chien Mien / Earl Allan Trevor (Allen & Gledhill) for the
plaintiff
Brij Raj Rai / Gavin Khoo / Nagaraja Maniam (Rajah & Tann) for
the defendant
