IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1999] SGHC 196

Suit 460/1999, SIC 1836/1999

Between

Sin Kian Contractor Pte Ltd

… *Plaintiff*

And

Lian Kok Hong
another

… *Defendant*

GROUNDS OF DECISION

Civil Procedure — Injunctions; Contract — Contractual terms

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

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Sin Kian Contractor Pte Ltd v Lian Kok Hong and Another

[1999] SGHC 196

Suit 460/1999, SIC 1836/1999
Lim Teong Qwee JC
31 July 1999

Judgment:

LIM TEONG QWEE JC

This is an application by the plaintiff for an interim injunction to restrain the first defendant from receiving $277,000 or any part of it under a guarantee dated 4 September 1997 given by the second defendant and for other orders. It is an ex parte application but it was heard as an opposed application between the plaintiff and the first defendant. At the conclusion of the hearing on 15 April 1999 I made no order save as to costs. The plaintiff has given notice of appeal and these are my written grounds.

2.By a contract contained in or evidenced by articles of contract dated 29 August 1997 incorporating among other documents a letter of award dated 29 August 1997 issued by the first defendant`s architect and acknowledged by the plaintiff (which I shall refer to as the `contractor`) the contractor agreed with the first defendant (whom I shall refer to as the `employer`) to carry out, bring to completion and maintain for the employer the building and other works comprising the proposed erection of a two-storey detached house with

swimming pool at 809 Holland Rd/Wilby Rd for $2,770,000. Paragraph 7 of the letter of award provides:

> *Performance Bond*
>
> *The contractor shall within 14 days from the date of award, furnish the employer, an approved banker`s guarantee or insurance bond in accordance with the format in the contract as a security deposit for the due performance and observance of the contract works.*

3.On 4 September 1997 the second defendant (which I shall refer to as the `guarantor`) issued a guarantee and it is not disputed that this guarantee was furnished by the contractor in accordance with para 7 of the letter of award. On or about 14 September 1997 the contractor commenced the construction of the works but before completion two events occurred: (a). on 15 March 1999 the employer wrote to the guarantor to demand payment of $277,000 under the guarantee; and

(b). the architect issued a termination certificate on 17 March 1999. This was served on the contractor on 18 March 1999 and the employer terminated the employment of the contractor on 19 March 1999.

4.The contractor learned of the demand made on the guarantor and on 19 March 1999 an action was commenced and this application was made. The contractor relies on these two grounds stated in the summons: (a). the employer has breached the conditions of the guarantee; and

(b). the employer has acted unconscionably in demanding payment.

5.The material terms of the guarantee are:

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> 1 In consideration of the employer not insisting on the contractor paying ten percent of the total value of the contract as a security deposit for the contract, the guarantor hereby guarantees the due and faithful performance of the contract by the contractor.
>
> 2 In the event of the contractor failing to fulfil any of the terms and conditions of the contract, the guarantor shall indemnify the employer against all losses, damages, costs, expenses or otherwise sustained by the employer thereby up to the sum of Dollars Two Hundred And Seventy Seven Thousand only ($277,000.00) (hereinafter called `the guaranteed sum`). The guaranteed sum shall be paid to the employer in full immediately upon demand for payment in writing and notwithstanding the existence of any dispute between the employer and the contractor in relation to the contract or any amount payable thereunder.

6.Mr Cheng submitted that to call on the guarantee the employer must: (a). state in writing that a default has occurred;

(b). identify the default by reference to the particular terms or conditions of the contract; and

(c). prove the `factual existence of a default` but not necessarily the `validity or nature of the default`.

The material part of the employer`s letter dated 15 March 1999 addressed to the guarantor states:

> *... under cl 2 of the guarantee, we demand immediate payment of the outstanding amount SGD 277,000 (exclude GST 3%) under the building works due to defaults by the contractor, M/s Sin Kian Contractor Pte Ltd within seven (07) days.*

He submitted that this was an insufficient demand. As I understand it his argument is that the employer has breached the conditions of the guarantee by making such a demand.

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7.I think it may be helpful to bear in mind that in the arrangements among the parties there are three distinct contracts. There is the building contract between the employer and the contractor. Next there is the guarantee between the guarantor and the employer. The terms of the underlying building contract may be relevant in construing the terms of the guarantee but the rights and obligations are between the employer and the guarantor only. Where payment is received by the employer under the guarantee it must be brought into account between the employer and the contractor. See **Cargill International SA & Anor v Bangladesh Sugar & Food Industries Corp** [1998] 2 All ER 406[1998] 1 WLR 461. Finally there is the contract between the contractor and the guarantor. If the guarantor pays under the guarantee otherwise than in accordance with its terms it does so at its own peril and may be unable to recover under its contract with the contractor.

8.The contractor`s case under the first ground of the application is really directed at the guarantor but the guarantor is not represented by counsel before me and I have not had the benefit of any submission on its behalf. Nevertheless one of the orders sought in the contractor`s application is to restrain the guarantor from paying any money under the guarantee and the writ in this action has been served on it.

9.The first sentence of cl 2 of the guarantee obliges the guarantor to indemnify the employer `in the event of the contractor failing to fulfil any of the terms and conditions of the contract`. The obligation to indemnify only arises upon the contractor`s default. Unless there is something else in the guarantee that points to some other construction I agree that default has to be proved before the guarantor is obliged to pay. I think there is something else in the guarantee.

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10.The second sentence of cl 2 provides that the guaranteed sum shall be paid immediately upon demand in writing. It then goes on to provide that payment shall be made `notwithstanding the existence of any dispute between the employer and the contractor`. This part of cl 2 does not merely provide for the time for payment. There is only one obligation to be performed by the guarantor and that is to pay the guaranteed sum. Payment is to be made notwithstanding any dispute.

11.I do not see how a default can have or can be proved to have any `factual existence` if it has no `validity` or the `nature` of the default cannot be proved. If it exists as a fact it must be valid. If it is not valid then it does not exist. If the contractor has done or omitted to do some act and this act or omission does not amount to a default then there is no default in existence. If it does then a default exists. If it exists it must have a nature that can be defined and proved.

12.A default can be alleged and it can be disputed. The dispute can be as to whether it has occurred and as to its effect on the `losses, damages, costs, expenses or otherwise sustained by the employer`. The event of a dispute is what the concluding words of cl 2 provide for. The second sentence of this clause does not merely provide for the time for payment. It provides for the condition that has to be satisfied before the guarantor`s obligation arises. That condition is satisfied `upon demand for payment in writing`. In my judgment the employer is not obliged to allege or to prove any default to satisfy the requirements of the guarantee although in his written demand of 15 March 1999 he did say that he demanded payment `due to defaults by the contractor`. The written demand was sufficient for the purpose of demanding payment under the guarantee.

13.The second ground relied upon by the contractor is that the employer has acted unconscionably. Ms Gan submitted that the application must fail as there

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is no allegation of fraud. It was not sufficient to allege that the employer had acted unconscionably. She referred to **New Civilbuild Pte Ltd v Guobena Sdn Bhd & Anor** [1999] 1 SLR 374 where Lee Seiu Kin JC said at [para] 33:

> *... the [Court of Appeal] [in **Bocotra Construction Pte Ltd & Ors v A-G (No 2)** [1995] 2 SLR 733] first stated (at p 744) that the weight of authority suggested that the sole exception permitting injunctive relief was fraud and held that there was no difference between the principles to be applied in dealing with attempts to restrain banks from paying and callers from calling for or receiving payment. It is well established that banks cannot be restrained other than for fraud.*

and later at [para] 43:

> *I can only conclude that the Court of Appeal had used the term `unconscionability` interchangeably with `fraud`.*

14.In ***Bocotra Construction (No 2)*** Karthigesu JA (delivering the judgment of the Court of Appeal) said at p 744:

> *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. The appellants are not privy to the guarantee.
>
> (b) The `cash in hand` principle - reflecting the importance of promoting commercial efficacy and certainty in the use of letters, 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. This permits injunctive relief.
>
> (d) There is no distinction between cases where an injunction is to restrain a bank (on payment) or the beneficiary under the guarantee (on calling for payment).

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His Honour then said at p 745:

> *We turn now to consider the statements of Eveleigh LJ in [* ***Potton Homes Ltd v Coleman Contractors (Overseas) Ltd*** *[1984] 28 Build LR 24] (at p 28) which were relied upon by LP Thean J (as he then was) in [* ***Royal Design Studio Pte Ltd v Chang Development Pte Ltd*** *[1991] 2 MLJ 229] (at p 234). Eveleigh LJ said:*
>
> *`... in principle I do not think it possible to say that in no circumstances whatsoever, apart from fraud, will the court restrain the buyer. The facts of each case must be considered. If the contract is avoided or if there is a failure of consideration between buyer and seller for which the seller undertook to procure the issue of the performance bond, I do not see why, as between seller and buyer, the seller should not be unable (italics added) to prevent a call upon the bond by the mere assertion that the bond is to be treated as cash in hand.`*
>
> *Essentially, Eveleigh LJ opined that he did not think the `fraud` exception was the sole basis for an injunction to be granted.*

(I think there was probably a printing error in this passage of the judgment of Eveleigh LJ. I have read it with the care it deserves and I think the word in italics should be `able`.)

15.In ***Royal Design Studio*** the contract was for the plaintiff to construct nine units of terrace houses on the defendant`s land and on completion the defendant was to convey 31/2 units to the plaintiff. A performance bond in the sum of $120,000 issued by an insurance company and a personal guarantee of a director of the plaintiff in the sum of $1m were given to secure the due completion of the construction by the plaintiff. Owing to disputes between the parties the contract was terminated by the defendant and the plaintiff applied ex parte for and was granted an injunction to restrain the defendant from calling on the performance bond. The defendant applied for an order to discharge the injunction. LP Thean J (as he then was) said at p 234:

> *We are not concerned with the `irrevocable nature of the obligation assumed by the relevant bank`; we are concerned with*

> *the relationship between the parties under the main or underlying contract they made and the dispute arising from such relationship ... The dispute is only between the plaintiff and the defendant and relates solely to the main or underlying contract made between them. In such case, I do not see why the court should be inhibited from exercising its equitable jurisdiction and restraining the defendant from calling on the bond, if the facts warrant it, merely because the bond is like a letter of credit ... All the relevant facts of the case must be considered. Having considered them, in my judgment, the status quo ought to be preserved ...*

The defendant`s application was dismissed.

16.This passage in the judgment of LP Thean J was cited by the Court of Appeal in ***Bocotra Construction (No 2)*** . Karthigesu JA said at p 746:

> *On the evidence, however, there was no allegation or finding that the circumstances were such as to establish fraud on the defendant`s part. In this connection, there was a conscious departure from principle (c) outlined earlier - that the sole exception to the general rule denying injunctions in such circumstances is where fraud is established.*

17.In ***Potton Homes*** the main or underlying contract was for the supply of prefabricated buildings by the plaintiff to the defendant for the due performance of which the plaintiff provided a performance bond. The plaintiff claimed about 90,000 for balance of the price due and this was admitted. It also claimed a further 140,000 for extras and variations which was disputed except as regards 3,300 which was conceded. The defendant counterclaimed about 230,000 for defects. It made a call on the performance bond and received about 68,000 under that. The court below ordered that the 68,000 be paid into a joint account in the names of the solicitors for both parties and this order was discharged on appeal. No fraud was alleged but there was also nothing unconscionable about the defendant being entitled to call on the performance bond.

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18.In **Edward Owen Engineering Ltd v Barclays Bank International Ltd & Anor** [1978] QB 159 the underlying contract which was governed by Libyan law was for the supply of green houses by the plaintiff to a buyer in Libya. The contract provided for a confirmed irrevocable letter of credit to be opened in favour of the plaintiff for payment of the price. It also provided for a performance bond to be furnished by the plaintiff. The English bank gave a performance bond to the Libyan bank and the Libyan bank in turn gave a performance bond to the buyer. The letter of credit for the price was not opened and the plaintiff informed the buyer that it accepted the buyer`s conduct as repudiation of the contract. At the buyer`s request the Libyan bank called on the performance bond given by the English bank. The plaintiff failed in its application to stop that. Lord Denning said that the performance bond stood on a similar footing as a letter of credit and the bank issuing it must honour it according to its terms and the only exception was clear fraud of which the bank had notice. See at p 171.

19.In the same case Browne LJ said at p 173:

> *Mr Ross-Munro`s `basic submission` (as he described it) was that there had been in this case no default on the part of the plaintiffs nor even any suggestion of default; both the [buyer] and the [Libyan bank] knew that there had been no default by the plaintiffs, and there could not therefore have been any honest demand by the [buyer] on the [Libyan bank] or by the [Libyan bank] on [the English bank] ... Like Kerr J [in the court below], I am prepared to assume (a) that the plaintiffs are right in saying that the [buyer] failed to comply with their contractual obligation as to the letter of credit; and (b) that as a result the plaintiffs were entitled to treat the contract as repudiated by the [buyer] and to cancel it ... But in my view, even if these assumptions are right, this does not come anywhere near establishing fraud on the part of the [buyer] or the [Libyan bank].*

Even a demand by the buyer which was dishonest in these circumstances was not sufficient to prevent a payment under the performance bond.

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20.In **Kvaerner Singapore Pte Ltd v UDL Shipbuilding (Singapore) Pte Ltd** [1993] 3 SLR 350 GP Selvam JC (as he then was) distinguished ***Edward Owen Engineering*** on the ground that in the case before him the injunction was sought against the buyer to prevent it from making a call on the performance guarantee and not against the party giving it. See at p 353. This does not appear to be consistent with principle (d) referred to in ***Bocotra Construction (No 2)*** . See also **Brody, White & Co Inc v Chemet Handel Trading (S) Pte Ltd** [1993] 1 SLR 65 , a decision of the Court of Appeal. I think in ***Kvaerner*** there was again a `conscious departure from principle (c)` that fraud is the sole exception.

21.In Bocotra Construction (No 2) Karthigesu JA said at p 746:

> *GP Selvam JC (as he then was) in* ***Kvaerner Singapore Ltd v UDL Shipbuilding (Singapore) Ltd****, opined that the `fraud` exception is not `an immutable principle of universal application`. Relying mainly on Eveleigh LJ`s dicta in* ***Potton Homes****, GP Selvam JC found the defendant`s conduct in calling for payment to be `utterly lacking in bona fides` (at p 354B). He opined that the injunction should not be discharged as the defendant had sought `to take advantage of the performance guarantee where by his own volition he (had failed) to perform a condition precedent ...`*

The material circumstances were not different from those in ***Edward Owen Engineering*** .

22.In **Raymond Construction Pte Ltd v Low Yang Tong & Anor** (Unreported) the underlying contract was for the plaintiff to construct a detached dwelling house for the first defendant. A performance bond in the sum of about $40,000 issued by the second defendant, an insurance company, was given to secure due performance of the plaintiff`s obligations. Lai Kew Chai J said at [para] 5:

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> *At the conclusion of the adjourned hearing on 26 Jan 96, this court observed as follows:*
>
> *` **Bocotra Construction Pte Ltd v AG (No 2)** [1995] lays down the rule of law that there must be compelling evidence capable of proving fraud or unconscionability before an injunction may be granted restraining payment under instruments which contain unconditional and irrevocable obligations to pay on demand. The concept of "unconscionability" to me involves unfairness, as distinct from dishonesty or fraud, or conduct of a kind so reprehensible or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party.`*

Later at [para] 35 he said:

> *... the conduct of the first defendant from first to last was most unfair and it was against the court`s conscience to have allowed him to insist on his pound of flesh.*

23.I respectfully agree that following ***Bocotra Construction (No 2)*** the rule in this jurisdiction is that the courts will not interfere with the machinery of obligations assumed by the issuer of a performance bond except in cases of fraud and also in cases where it is unconscionable for the issuer to pay or the beneficiary to call on or to receive payment under the performance bond. I think it is clear that the Court of Appeal approved both ***Royal Design Studio*** and ***Kvaerner*** and added unconscionability to fraud as exceptions and did not use these terms interchangeably. In ***Potton Homes*** Eveleigh LJ said that in principle he did not think it was possible to say that in no circumstances whatsoever apart from fraud would the court restrain the buyer. I respectfully agree and I think ***Bocotra Construction (No 2)*** , ***Royal Design Studio*** and ***Kvaerner*** represent a welcome development of this branch of the law.

24.I am accordingly unable to agree with counsel for the employer in the case before me. The contractor`s application does not fail by reason only that there is no allegation of fraud. Its case is that the employer has acted unconscionably in demanding payment under the guarantee.

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25.Mr Ng Hu Yong, the project manager of the contractor, said in his affidavit:

> *... from as early as 10 January 1999, the [employer and his wife] have had on various occasions assumed the initiative in taking on the architect`s job of highlighting alleged defective tiling works to the [contractor].*

He also said that `the [employer and his wife] have purported to substantively reject the tiling works`. The completion date under the contract was 12 months after the commencement of the construction works which would be 14 September 1998 but in January 1999 the construction works were not completed yet. The completion date was extended to 28 April 1999 by the architect in accordance with the provisions of the contract.

26.There was a site meeting on 22 January 1999 at which Mr Ng, the employer and the architect were present. The minutes recorded:

> 3.15 Defects and Outstanding Works
>
> 3.15.1 All defects and outstanding works as noted during the site inspections on the 20/01/99 and 22/01/99 and other works are to be rectified to the satisfaction of the [employer] and [the architect]. [The contractor] were to submit the schedule of defects no later than noon of 27/01/99.

The contractor was to submit a schedule of defects which were noted during site inspections. Mr Ng himself also said that the architect gave written notices of these defects and directed that they be rectified. It appears that if the contractor was dissatisfied with the employer`s conduct in `highlighting alleged defective tiling works` or any other defects he was afforded an opportunity to submit a schedule to the architect for action to be taken. It is also apparent that the architect did give notice of defects.

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27.The contractor did not submit the schedule of defects. On 1 February 1999 the architect issued a written notice drawing attention to the contractor`s failure to do so `despite several reminders`. The notice also stated:

> *In view of the above and your poor progress on the rectification of defects works, you are required to submit a schedule of works to be carried out daily, commencing on Monday 1 February 1999 …*

Both schedules were to be submitted not later than noon of 2 February 1999.

28.There were other occasions when the architect gave written directions or notices and I will only refer to these. On 22 January 1999 and 22 February 1999 the architect issued written directions requiring the removal and replacement of defective tiling works. On 5 February 1999 the architect issued a written notice to comply with his written direction. The contractor did not respond to these notices and directions and on 17 March 1999 the architect issued the termination certificate I have referred to.

29.Clause 32 of the articles of contract provides:

> (2) Without prejudice to any right of the employer in an appropriate case to treat the contract as repudiated by the contractor under the general law, the employer may at any time within one month of the receipt of a certificate of the architect (in this contract called a `Termination Certificate`) give Notice of Termination of the employment of the contractor, which Notice shall take immediate effect …
>
> (3) The architect may issue a Termination Certificate on any one of the following grounds: …
>
> (d) If the contractor has wholly suspended work without justification or is failing to proceed with diligence and due expedition, and following expiry of one month`s written notice from the architect to that effect has failed to take effective steps to recommence work or is continuing to proceed without due diligence or expedition, as the case may be.

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> (e) If the contractor has failed or unreasonably delayed in complying with a written direction of the architect requiring the removal and replacement of any work, materials or goods under sub-cl 11(1) or (3) of these Conditions, or with any written direction or instruction of the architect under cl 11(2) of these Conditions, and following receipt of 14 days notice in writing from the architect has failed to take any effective steps to do so.
>
> (h) If the contractor has refused or failed following one month`s written notice by the architect to comply with any written direction or instruction of the architect which he is empowered to give under any clause of these Conditions.

The termination certificate referred to the relevant provisions of this clause and to the notices and directions which the contractor had not responded to.

30.The employer terminated the employment of the contractor as he was entitled to. On 15 March 1999 shortly before the employment was terminated the architect issued a certificate for progress claim 17. The certificate stated that $143,256.72 was payable to the employer. This took into account an estimated sum of $146,735 for defective works. Even allowing for the retention sum of $138,500 there would still be a shortfall. The works were not completed and the employer may well have a claim for damages.

31.I have taken into consideration these matters including the fact that the employer made the call on the guarantee a few days before the termination certificate was issued and other matters raised in the affidavits and the pleadings as well as submissions made on behalf of the parties and I have come to the conclusion that the contractor has fallen far short of establishing that it would be unconscionable for the employer to call on the guarantee or to receive payment under it or that for any reason at all this court ought to restrain the employer from exercising his rights under the guarantee.

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Lim Teong Qwee JC

Glenn Cheng (Myint Soe Mohamed Yang & Selvaraj) for the plaintiff
Gan Kam Yuin and Rodney Keong (Bih Li & Lee) for the first defendant

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