IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1999] SGHC 73

Suit 1913/1998, SIC 9146/1998

Between

Unitrack Building
Construction Pte Ltd

… Plaintiff

And

GHL Pte Ltd
another

… Defendant

GROUNDS OF DECISION

Contract — Remedies — Injunctions

Version No 1: 20 Nov 2026 (01:16 hrs)

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Unitrack Building Construction Pte Ltd v GHL Pte Ltd and Another

[1999] SGHC 73

Suit 1913/1998, SIC 9146/1998
MPH Rubin J
31 March 1999

1 This appeal arises from my declining to set aside an interim injunction obtained by the plaintiffs on 13 January 1999 restraining the first defendants, GHL Pte Ltd (`GHL`) from seeking or claiming any payment on a performance bond issued by the second defendants, AGF Insurance (Singapore) Pte Ltd (`AGF`), until further order upon the plaintiffs` usual undertaking by its counsel as to damages.

2 On 26 January 1999, I heard GHL`s application to set aside the injunction order. At the conclusion of the hearing, I disallowed GHL`s application and ordered that the costs of the application be costs in the cause. GHL wrote in for further arguments and even after hearing further arguments from counsel on 23 February 1999, the earlier orders made remained unaltered.

3 ***Background***

4 The plaintiffs, a company whose main business is that of building contractors, was awarded a building contract by GHL on or about 24 April 1997 for the construction of a five-storey boarding house at Lorong 17, Geylang,

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Singapore for a contract sum of $5,781,400. Under the terms of the award, the plaintiffs were required to furnish a performance bond to GHL for $578,140 which is equivalent to 10% of the contract sum in order to guarantee due performance of the plaintiffs` obligations under the award. In the event, the plaintiffs requested and arranged with AGF for the issue of a performance bond for the stated amount. Curiously, however, neither the original bond nor the duplicate thereof issued by AGF on or about 26 June 1997 was ever handed over to GHL.

5 Why the original bond or even a copy thereof was not handed over to GHL was explained by the plaintiffs` director, Mr Seah Yit Sim in his first affidavit filed on 27 November 1998. He said at paras 5 to 10 of his affidavit:

> *5 After securing the said performance bond, the plaintiffs did not give or deliver it to the first defendants as the plaintiffs were waiting for the architect`s nomination instructions of the nominated sub-contractors and suppliers for the said project and for the contracts documents to be prepared by the architect and to be signed between the plaintiffs and the nominated sub-contractors that may be appointed. This was a requirement under art 29(1) of the Articles and Conditions of the Building Contract signed by the plaintiffs ... 6 However, the first defendants` architect failed to give any nomination instructions to the plaintiffs and he did not prepare any contract documents for the plaintiffs to sign with the nominated sub-contractors or suppliers although the following sub-contractors and suppliers had been appointed by the first defendants: ... 7 Consequently, the performance bond of the second defendants was never delivered or given to the first defendants. 8 On or about 30 April 1998, it was agreed between the plaintiffs and the first defendants that the plaintiffs` contract sum be revised to $1,961,400 to exclude the sub-contractors work and that the sub-contractors shall deal directly with the first defendants. A copy of the letter dated 30 April 1998 signed by the parties is now produced ... 9 On 6 October 1998, the plaintiffs wrote to the first defendants that since the contract sum has been revised to $1,961,400, the original performance bond (Ref No 9700004577) was not valid and should be cancelled and replaced by a fresh performance bond for $196,140 being 10% of the revised contract sum. The plaintiffs also advised the first defendants that the original performance bond (which was in the plaintiffs`*

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> *possession all the time) would be returned to the second defendants for cancellation in exchange for a fresh performance bond for $196,140. A copy of the plaintiffs` said letter dated 6 October 1998 is now produced and marked as `SYS-5`. 10 The original performance bond of the second defendants (Ref No 9700004577) was subsequently returned to the second defendants for cancellation on 13 October 1998.*

6 In order to support the averment that the contract sum was indeed revised to S$1,961,400, the plaintiffs produced their letter dated 30 April 1998 which reads:

> *Date: 30 April 1998*
>
> *GHL Pte Ltd*
>
> *...*
>
> *Attn: Mr Tjia Eng Soei*
>
> *Proposed erection of five-storey boarding house (total 86 units) on lots 331-17 to 331-26 Mk 24 at Lorong 17 Geylang Singapore*
>
> *With reference to our letter Ref Uni/Lor17/060 dated 30 April 1998.*
>
> *Since the said Services/Supplies on the above said letter would claim from you directly. We would like to request to revise our Contract Sum to S$1,961,400 before Goods and Services Tax.*
>
> *We trust that the above request is acceptable to you and we are looking forward to your confirmation.*
>
> *Kindly acknowledge your confirmation by signing with company stamp on this letter.*
>
> *Thank you.*
>
> *Yours faithfully, Agreed and Signed By*
>
> *Unitrack Building Construction Pte Ltd (GHL)*
>
> *(signed) Date 30/4/98*
>
> *Wun Chew Wun*
>
> *Managing Director*

Signed Sealed And Delivered	)
on behalf of the Surety AGF	)
Insurance (Singapore) Pte Limited	)

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by its Attorney ...	)

7 Before I proceed to summarise GHL`s version of the events and the stand adopted by AGF, it would be useful to make reference to the bond issued. The relevant parts thereof read as follows:

> *Performance Bond*
>
> *Ref No 9700004577*
>
> *To: GHL Pte Ltd*
>
> *255 Jervois Road*
>
> *Singapore 249072*
>
> *...*
>
> *Now this deed witnessth:-*
>
> *1 In consideration of you not insisting on the Contractor paying Singapore Dollars Five Hundred And Seventy Eight Thousand One Hundred And Forty Only (S$578,140.00) as a security deposit for the Contract, we hereby irrevocably and unconditionally undertake convenant and firmly bind ourselves to pay to you on demand any sum or sums which from time to time may be demanded by you up to a maximum aggregate of Singapore Dollars Five Hundred Seventy Eight Thousand One Hundred And Forty Only (S$578,140.00) (`the said sum`). 2 Should you notify us in writing, at any time prior to the expiry of this Bond, by notice purporting to be signed for and on behalf that you require payment to be made of the whole or any part of the said sum, we irrevocably and unconditionally agree to pay the same to you immediately on demand without further reference to the Contractor and notwithstanding any dispute or difference which may have arisen under the Contract or any instruction which may be given to us by the Contractor not to pay the same. ... 5 We agree that our liability hereunder shall not be discharged, affected or impaired in any way by reason of any modification, amendment or variation in or to any of the conditions or provisions of the Contract or the Works or by reason of any breach or breaches of the Contract by the Contractor, whether the same are made with or without our knowledge or consent. We further agree that no invalidity in the Contract nor its avoidance, suspension or termination shall discharge, affect or impair our liability hereunder and that no waiver, compromise, indulgence, or forbearance, whether as to time, payment, performance or any other matter afforded by you to the Contractor under the Contract, shall discharge, affect or impair*

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> *our liability hereunder. 6 We confirm that our liability hereunder shall be a continuing liability and that this bond shall remain in full force and effect until the first to happen of the following events:- (a) the original of this bond is returned by you to us at our address aforesaid, or (b) expiry of this bond as hereinafter provided. ...*

8 GHL`s position, as affirmed by its director Welly Tjia, was that under the bond, AGF irrevocably and unconditionally undertook to pay the plaintiffs on demand, any sum up to a maximum of $578,140 and consequently GHL gave written notice to AGF on 6 October 1998 demanding payment of the said sum. He said that the demand was made as a result of the plaintiffs` failure to complete the project by the revised completion date of 4 September 1998 as well as on account of the plaintiffs suspending work at the project sometime at the end of September 1998. In this regard, references were made first to the project architects` delay certificate certifying that the plaintiffs were in default in not having completed the works in time and second, a certificate from the architects dated 6 October 1998 recording the plaintiffs` suspension of work.

9 Welly Tjia averred that GHL was, in the circumstances, entitled to claim from the plaintiffs a sum of $5,000 per day in liquidated damages for each day of delay in completing the project. He stated further that as a result of the plaintiffs` abandonment of the project, GHL had no alternative but to accept the repudiation of the contract and that the contract was in fact terminated on 6 November 1998. According to GHL, at the time of termination, it was entitled to claim from the plaintiffs a sum of $155,000 in liquidated damages and a further unquantified sum as damages for the plaintiffs` wrongful repudiation.

10 Welly Tjia further said that on 7 October 1998, the plaintiffs wrote to the architects claiming that the bond was invalid. He said that the plaintiffs had

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backdated this letter by one day to 6 October 1998 and that the said letter was forwarded to GHL only on 10 October 1998. He contended that at any rate, the allegation in the plaintiffs` said letter claiming that the bond was invalid on grounds the contract had been revised from $5,781,400 to $1,961,400 and that a fresh bond shall be issued for $196,140, was invalid.

11 He then proceeded to explain the rationale why GHL acknowledged and confirmed its agreement to the plaintiffs` letter dated 30 April 1998 (see para 5 of the grounds herein). He averred that it was because the plaintiffs had cashflow problems and a history of withholding payment due to nominated sub-contractors. He asserted that, in any event, GHL did not at any stage agree to reduce the quantum of the performance bond.

12 Insofar as AGF was concerned, its position as stated in its two affidavits was that the issued bond which was in the hands of the plaintiffs was never handed over to GHL because of the reduction in the contract value and scope of work. AGF also raised a host of legal issues, such as misrepresentation and unconscionability on the part of GHL which, in my view, needs no elaboration here.

13 Counsel for GHL in urging the court to discharge the order made by Lim Teong Qwee JC contended that the bond under reference was an unconditional one and therefore the guarantor in this case on whom demand was made on 6 September 1998 (sic) [6 October 98] was obliged to pay GHL without investigation of the contractual position as between GHL and the plaintiffs. Counsel submitted that the enforceability of the bond depended upon a demand or call, irrespective of its accuracy or justification, provided that the call itself complied with the precise terms contemplated by the bond. Reliance in this

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regard was placed on a passage from Hudson`s Building Contracts (11th Ed), paras 17-006 and 17-067.

14 My attention was also invited to the lead principles enunciated by the Singapore Court of Appeal in **Bocotra Construction Pte Ltd v A-G (No 2)** [1995] 2 SLR 733 at 744 in the following terms:

> *... Of the various propositions of law suggested ... 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).*

15 After contending that the phraseology of cll 1, 2, 4 and 5 of the bond made it explicit that it was an unconditional one, counsel for GHL submitted that the principle that can be distilled from ***Bocotra*** as well as another Singapore High Court decision in **New Civilbuild Pte Ltd v Guobena Sdn Bhd & Anor** [1999] 1 SLR 374 per Lee Seiu Kin JC) was that fraud could be the only basis on which an injunction could be granted in respect of a performance bond and that the word `unconscionability` used alongside the word `fraud` did not import a separate element. Counsel further argued that the mere assertion of fraud would not suffice and at any rate the matters raised by the plaintiffs as well as AGF could not possibly constitute fraud.

16 As regards the plaintiffs` averments pertaining to the reduction in the contract sum and their contention that as a consequence there was an agreement

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for the reduction in the performance bond, counsel for GHL submitted as follows:

> *...Notwithstanding that the contract sum has been theoretically reduced, it has only been reduced by the quantum in respect of the nominated sub-contractor`s works. In other words, the plaintiffs would still receive the original quantum of $1,900,000 in respect of the plaintiffs` portion of the works plus a sum of $61,400 in respect of profit and attendance earned by the plaintiffs in respect of the nominated sub-contractors` works. The only difference is that the first defendants are paying the nominated sub-contractors directly rather than indirectly through the plaintiffs.*
>
> *The SIA Conditions envisage that the scenario where the employer will make payment directly to the nominated sub-contractors in the event the main contractor fails to pay the nominated sub-contractors. There is no stipulation that when this happens, the performance bond is reduced in quantum.*

17 I find it unnecessary to deal in any great length with the arguments advanced by counsel for the plaintiffs and AGF. It would suffice if I adverted only to their main contentions. The first was that inasmuch as the bond had never been handed over to GHL, the question of its enforceability did not arise. Secondly, the bond which was initially held up and not handed over to GHL, due to the project architects` delay in the nomination of sub-contractors, was, in the event, never handed over to GHL because of the reduction in the contract sum and the consequent demand by the plaintiffs for the reduction in the bond amount.

18 In my opinion, having regard to the affidavits filed and arguments advanced, it was an undisputed fact that the bond under reference which was issued in June 1997 was not handed over at all to GHL. There was absolutely no explanation in the affidavits filed on behalf of GHL as to why it did not demand its delivery especially when the significance of the original bond had been highlighted in cl 6 therein. The excuse offered by GHL`s counsel that it

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was due to an oversight, sounded feeble and lacked conviction. In my view, the probabilities were that there was a reluctance on the part of GHL to demand delivery of the bond as issued on account of the substantial reduction of the contract sum. Whilst I was prepared to accept the submissions advanced on behalf of GHL, that the allegations of fraud had no substance, GHL`s inexplicable inactivity and indifference for more than a year to demand and take possession of the bond, led me to conclude that there was substance in the plaintiffs` argument that the parties were content in keeping the bond issued in abeyance and that there was an expectation to have the bond amount revised. Given this scenario and GHL`s noticeable failure to explain why there was no demand issued by them requiring the plaintiffs to deliver the bond since June 1997, I was persuaded that principles of fairness warranted the continuation of the injunction order. As a result, I dismissed GHL`s application and allowed the interim injunction granted by Lim Teong Qwee JC to continue until further order and in the meantime prohibited AGF from cancelling the bond.

19 GHL wrote in for further arguments and I heard parties again on 23 February 1999. The thrust of the submission by GHL`s counsel this time was on the aspect of `delivery`. Citing passages from textbooks and a number of decisions from England, counsel argued that it was not necessary that the deed be actually delivered to the intended beneficiary. The learning referred to me included a passage from para 1329 of 12 ***Halsbury`s Laws of England*** (4th Ed) which reads:

> *In order to be effective a deed must be delivered as the act and deed of the party expressed to be bound by it, as well as sealed. No special form or observance is necessary for the delivery of a deed, and it may be made in words or by conduct. The usual form of delivering a deed by words is for the executing party to say, while putting his finger on the seal, `I deliver this as my act and deed`. It is not necessary, however, to follow this form of execution; nor is it necessary that the deed should actually be delivered over into the possession or custody either of the person*

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> *intended to take the benefit of the deed, or to a third person to the use of the party taking the benefit of the deed; though if the party to be bound so hands over the deed, that is sufficient delivery without any words.*
>
> *What is essential to delivery of the document as a deed is that the party whose deed the document is expressed to be (having first sealed it) shall by words or conduct expressly or impliedly acknowledge his intention to be immediately and unconditionally bound by the provisions contained in it. Thus, where a deed has been executed by an attorney in excess of his power, a subsequent acknowledgement by the principal, whether oral or in writing, that the deed expresses his intentions amounts to a delivery or re-delivery of the deed.*

20 Similarly in ***Chitty on Contracts*** (27th Ed) para 1-031, it is stated:

> *`Where a contract is to be by deed, there must be a delivery to perfect it.` `Delivered,` however, in this connection does not mean `handed over` to the other party. It means delivered in the old legal sense, namely, an act done so as to evince an intention to be bound. Any act of the party which shows that he intended to deliver the deed as an instrument binding on him is enough. He must make it his deed and recognise it as presently binding on him. Delivery is effective even though the grantor retains the deed in his own possession. There need be no actual transfer of possession to the other party: `the efficacy of a deed depends on its being sealed and delivered by the maker of it, not on his ceasing to retain possession of it.` Where a solicitor or licensed conveyancer in the course of a transaction involving the disposition or creation of an interest in land, purports to deliver an instrument as a deed on behalf of a party to the instrument, it shall be conclusively presumed in favour of a purchaser that he is authorised so to deliver the instrument.*

21 In **Vincent & Anor v Premo Enterprises (Voucher Sales) Ltd & Ors** [1969] 2 QB 609 at 619 (CA), a case concerning a lease document, Lord Denning MR observed:

> *The law as to `delivery` of a deed is of ancient date. But it is reasonably clear. A deed is very different from a contract. On a contract for the sale of land, the contract is not binding on the parties until they have exchanged their parts. But with a deed it is different. A deed is binding on the maker of it, even though the parts have not been exchanged, as long as it has been signed, sealed and delivered. `Delivery` in this connection does not mean `handed over` to the other side. It means delivered in the old legal*

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> *sense, namely, an act done so as to evince an intention to be bound. Even though the deed remains in the possession of the maker, or of his solicitor, he is bound by it if he has done some act evincing an intention to be bound, as by saying: `I deliver this my act and deed.` He may, however, make the `delivery` conditional: in which case the deed is called an `escrow` which becomes binding when the condition is fulfilled.*

22 The authorities referred to above cannot be second-guessed. However, in the case at hand, the performance bond issued by AGF was allowed to remain in the hands of the plaintiffs for more than a year after its execution. There was no evidence of any demand being made by GHL for it to be despatched or handed over to them. In the meantime, parties had admittedly agreed to revise the contract sum from the original $5,781,400 to $1,961,400 - a reduction by almost two-thirds of the original sum. Under condition 40 of the Conditions of the Contract, the plaintiffs were required to provide a performance bond for an amount equal to only 10% of the contract sum. A reasonable inference therefore was that the parties had contemplated revision of the performance bond accordingly.

23 In ***Bocotra*** (supra), the Singapore Court of Appeal formulated the following broad principles:

24 (a) The mere fact that the validity of the guarantee was substantially challenged in other proceedings would not automatically provide a basis for an injunction to be obtained restraining an intended call for payment.

25 (b) The balance of convenience test propounded in American Cyanamid was not applicable in cases involving performance bonds or bank guarantees.

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26 (c) Whether there was fraud or unconscionability was the sole consideration in applications for injunctions restraining payment or calls on bonds or guarantees to be granted.

27 (d) The applicant would be required to establish a clear case of fraud or unconscionability in interlocutory proceedings. Mere allegations were insufficient.

28 In a recent High Court decision in

29 **Min Thai Holdings Pte Ltd v Sunlabel Pte Ltd**

30 [1999] 2 SLR 368

31 , Lai Kew Chai J observed at [para] 20:

> *... 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.*

32 Bearing in mind the foregoing principles and having considered the averments contained in the parties` respective affidavits, I concluded that the present endeavour by GHL to enforce a bond which it did not even bother to take possession of, was unjustifiable as well as unconscionable. In the circumstances, I dismissed GHL`s application to set aside the interim injunction granted by Lim Teong Qwee JC on 13 January 1999 with costs in the cause.

33 **Outcome:**

34 Order accordingly.

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Unitrack Building Construction Pte Ltd v GHL Pte Ltd and Another [1999] SGHC 73

MPH Rubin J

Tang King Kai (Tang & Partners) for the plaintiffs
Chong Yee Leong and Eileen Tay (Rajah & Tann) for the first defendants
Florence Koh (Tan & Koh Partnership) for the second defendants

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