Sharon Global Solutions Pte Ltd v LG International (Singapore) Pte Ltd [2001] SGHC 139

Case Number : Suit 815/2000

Decision Date : 20 June 2001

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : P Suppiah and K Elangovan (P Suppiah & Co) for the plaintiff; Vinodh Coomaraswamy and Chua Sui Tong (Shook Lin & Bok) for the defendant

Parties : Sharon Global Solutions Pte Ltd — LG International (Singapore) Pte Ltd

Contract – Consideration – Performance of existing duty – Whether good and sufficient consideration provided

Contract – Duress – Economic – Defence in formative stages of development – Threat to break contract – Whether threat amounts to economic duress – Whether plaintiff's declaration amounts to legitimate notice of its inability to perform or an illegitimate threat

JUDGMENT:

Grounds of Decision

1. This is a case of a venture which started in hope and ended in acrimony. The plaintiff is a small Singapore company with no significant record or assets. The defendant which is also incorporated in Singapore, is a wholly owned subsidiary of a substantial conglomerate, LG International Corporation ("LG Group") of Korea.

2 The two parties had not engaged in business with one another before. They came together after the defendant rented part of its office premises to a company Oberthur Card Systems Pte Ltd run by Cheong Chung Chin, whose wife is a shareholder of the plaintiff company. Cheong represented to the defendant that someone in the plaintiff company was experienced in the trade of Indian steel products.

3. The person in question is Kamalraj Johnson, the plaintiff's managing director. He knew of a Venezuelan steel mill Venezolana de Prerreducidos Caroni CA ("Venprecar") which produces Hot Briquette Iron ("HBI"). Eventually Johnson and the plaintiff's general manager Kim Young Jin agreed to co-operate to purchase HBI from Venprecar and to supply it to Pohang Iron and Steel Company Co Ltd ("POSCO") of Korea. POSCO is a large steel mill and an important customer LG Group. LG Group and POSCO have a long trading relationship and substantial amounts of coal and finished steel products are transacted between them.

4. The defendant was looking to expand its business with POSCO to cover HBI. Both the plaintiff and the defendant were anxious that the transaction with POSCO succeeded. The defendant informed the plaintiff that the performance of the agreement was of great commercial importance to it. The plaintiff in turn informed the defendant that the most important consideration was to secure the order from POSCO and obtain an opening into Korea for HBI, and that it was proceeding with the deal although it was not going to make any money from it.

5. The scheme was that when POSCO confirmed its interest, the plaintiff would purchase the HBI from Venprecar. The plaintiff would then sell the HBI to the defendant which would in turn enter into a back-to-back agreement to sell the HBI on to POSCO.

6. In these proceedings, we are concerned with the agreement of 17 July 2000 between the plaintiff and the defendant, the agreement of 24 July between the defendant and POSCO and most crucially an agreement of 12 August which the plaintiff and the defendant signed to prevent the whole venture from collapse.

7. The salient terms of the agreement of 17 July are

Article :01: Product, Quantity, Price and Packing

Product : Hot Briquette Iron

…

Quantity : 35,000 metric tonnes max.

…

Price : US$112.00 per MT and freight (free out)

Port Pohang/Kwangyang, South Korea

Contract Value: US$3,920,000.00 (United States Dollars Three Millions Nine Hundred And Twenty Thousand only)

Shipment : By 15th August 2000

and

> Article :20: Penalty/Claims:
>
> In the event of non-delivery, seller is deemed to have defaulted on the Contract. In that case, the seller will compensate the buyer with an amount not exceeding 2% of the contract value for which a performance bond will be issued. If the shipment is not effected by 15th August 2000 the seller agrees to pay a penalty to the extent of 0.25% of the invoice value per day of delay from 16th August 2000 subject to a maximum of 5% of the invoice value.

8. In the agreement with POSCO, the defendant sold the same HBI to POSCO at US$114 per metric ton. The goods were to be shipped in the first half of August. Clause 4.1 of the General Provisions of the agreement provided that the defendant was to furnish POSCO with the particulars of the vessel at least 7 days before the scheduled time of shipment.

9. I shall refer to the terms of the agreement of 12 August and the circumstances in which it was executed later.

10. Before these agreements were signed, the parties had discussions on the project, and the cost of shipment and chartering of vessels were discussed early and regularly.

11. On 20 June, when sale to another Korean company was being considered, the plaintiff informed the defendant that there were offers of US$18 per metric ton. In subsequent communications Johnson regularly updated Kim on the securing a vessel. On 12 July he informed the defendant that "vessel particulars are available with me which we propose to confirm in a day or two", naming the vessel Felicity I. On 17 July he informed Kim that he had decided to go for a vessel of less than 20 years and will finalise the details of the vessel (the Felicity I was older than 20 years).

12. After the execution of the agreement of 17 July Johnson assured Kim on 18 July that he was

confident to have the vessel within 2 days and on 20 July he promised to supply the defendant with the particulars of the vessel.

13. Johnson had in fact not secured any vessel and had been less than candid when he made those assurances. He was not conversant in chartering vessels. He relied on shipbrokers he had not used before, but did not instruct them to take firm steps to get a commitment on any vessel. On 21 July he admitted that he had made no progress on a newer vessel, and was turning his attention back to the Felicity I, but by 26 July the Felicity I was still not secured.

14. On his own evidence serious questions arose over Johnson's competence in handling the matters. However the evidence fell short of bad faith, and in any event, bad faith did not form any part of the defendant's pleaded case.

15. As time went on, the defendant became anxious over its ability to fulfill its obligation to POSCO to confirm a vessel at least 7 days before the scheduled shipment in the first half of August.

16. By 28 July Kim suspected that the plaintiff was not able to secure a vessel at US$18 a metric ton, and informed Johnson the defendant was not in a position to terminate the transaction because LG Group had a lot of other business with POSCO, "(w)e have mind to share freight with you."

17. On the following day at a meeting between Kim, Mr Huh Yeon Soo the defendant's managing director and Cheong, Kim told Cheong that "the defendant was willing to assist and was even willing to consider sharing in the cost of increased freight."

18. No progress was made despite the offer. By 3 August, Johnson was still trying in vain to secure a vessel and the defendant despaired at losing credibility with POSCO and at not being allowed to participate in future tenders.

19. By 8 August when the time to nominate a vessel to POSCO was running out, the plaintiff had still not secured a vessel. The parties met twice on that day to find a solution. The first meeting at the plaintiff's office in the afternoon ended in acrimony without result.

20. A second meeting took place at the plaintiff's office that night. Kim recounted the events of that meeting in his affidavit of evidence-in-chief -

> 85. The meeting lasted between 3 to 4 hours. I recall that it was past midnight when an agreement was finally reached. At the meeting, Cheong and Johnson informed us that the Plaintiff had finally managed to locate a vessel for charter but

that the cost of freight was US$27.50 per MT. This represented a substantial increase of US$9.50 per MT from the original cost of US$18.00 per MT.

86. We were then told by Cheong and Johnson that, unless the Defendant agreed to compensate the Plaintiff by sharing the increased cost of freight, the Plaintiff would refuse to confirm the charter of the vessel. They stated clearly that the Plaintiff was ready to default on its obligations under the Agreement.

87. Mr Cheong and Johnson both stated explicitly that they were willing for us to penalise them under the Performance Bond. This was despite us informing them repeatedly that we could not, in light of our existing relationship with POSCO, breach our obligations to POSCO.

…

89. In addition, Cheong and Johnson unreasonably insisted that the Defendant's share of the increased freight cost should be US$5.50 per MT. This meant that the Plaintiff would only have to bear US$4.00 per MT notwithstanding the fact that the present difficulties were purely of the Plaintiff's own making.

…

93. It gradually became clear that the only way the Defendant could ensure the Plaintiff's performance of the Agreement was to agree to t h e Plaintiff's demands for compensation, however unreasonable. There was simply n o reasonable alternative open to the Defendant. Given that loading had to be completed by the 1st half of August 2000 (i.e. by 15 August 2000), there was not

enough time for the Defendant to secure an alternative vessel. There was also not enough time for the Defendant to seek alternative suppliers of the HBI given the relative scarcity of HBI in the open market and the fact that the Defendant was new to the trade in HBI.

94. Further, any failure on the part of the Defendant to perform its obligations under the POSCO consequences *(sic)* would have serious commercial consequences. It would also have affected the Defendant's reputation and standing with its parent company in South Korea, LG Corp. I verily believe that Cheong and Johnson were well aware of the pressure faced by the Defendant to successfully perform the POSCO Agreement and that they used this to their advantage by demanding for

> compensation from the Defendant.
>
> …
>
> 98. It was only after Mr Huh had agreed to the Plaintiff's demands that steps were taken by Johnson to confirm the vessel. …

21. A little more of the meeting came out during the cross-examination of Johnson when he was referred to Kim's affidavit

> Q: Para 86 – did you and Cheong inform the Defendants that?
>
> A: Yes. It was the Defendants from 28/7 advising us that they had the mind to share the freight. They are a big company and *the Plaintiffs cannot absorb the gap. I cannot bear the $27.50 alone.* I wanted to fix the Felicity.
>
> Q: You said you intended to honour your obligations regardless the amount of freight?
>
> A: I have to consider how much the Plaintiffs can pay. $21 is my limit.
>
> Q: Para 86 – last sentence – you told them that?

A: No, we told them if I don't perform they can encash the performance bond.

… …

Q: Para 89 – you insisted Defendants have to pay $5.50?

A: It was decided together.

Q: Who suggested the figure of $5.50?

A: The Plaintiffs.

… …

Q: If they wanted to fix the vessel at any cost why did not you tell them to bear the costs?

A : *I told them I will bear the costs according to my abilities*.

(Emphasis added)

22. The parties recorded the terms in an agreement they signed on 12 August that

> As agreed upon on 09th August 2000 in the presence of Mr Huh Managing Director of LG International and Mr Cheong Chung Chin President, Oberthur Card Systems that LG International will pay the following:
>
> To enhance the LC value by US$2.00 per MT C&F Free Out;
>
> To pay an amount of US$3.50 per MT for a total loaded quantity up to 35000 MTs with a maximum loaded quantity of 35000 MTs;

> In case, the LC is not enhanced by US$2.00 then the compensation amount will be increased to US$5.50 per MT;
>
> The payment is to be effected in two parts:
>
> > 1) 25% of the payment at the rate of US$5.50 per MT will be p a i d immediately on signing of the CP;
> >
> > 2) 75% of the payment at the rate of US$5.50 per MT will be paid on completion of the loading;
> >
> > 3) The difference in the despatch by US$1000 will be paid by SG.
>
> The total amount to be paid is on the total agreed maximum quantity of 35000 MTs.

23. After the agreement was reached, a vessel, the Drake, was chartered and the HBI was delivered to POSCO. The defendant made the first 25% payment of US$48,125 to the plaintiff but refused to pay the second 75% payment. Instead it demanded for, then commenced proceedings to recover the payment made.

24. The plaintiff responded by instituting these proceedings for the outstanding US$144,375. Subsequently the defendant's claim was incorporated into the proceedings as a counterclaim.

25. The plaintiff based its claim on two undisputed facts, firstly that the parties had entered into the agreement of 12 August and secondly that the defendant had not made the second payment when it became due.

26. The defendant had the more difficult case to assert that the agreement was not enforceable and that the payment made should be refunded. It raised two lines of defence.

27. The first ground of defence was economic duress. In para 8 of the defence it was pleaded that

> The Defendant avers that the Plaintiff was contractually bound to bear the cost of freight pursuant to the express terms of the Agreement (of 17 July). As such, the Defendant avers that the matters pleaded hereinabove at paragraph 7 amounted to wrongful and/or illegitimate

threats by the Plaintiff to breach the terms of the Agreement.

28. Paragraph 7 of the defence alleged that –

> On or around 8 August 2000, the Plaintiff orally informed the Defendant that it had significantly underestimated the cost of freight and that it would not perform its delivery obligations under the Agreement if the loss arising from the higher cost of freight was not shared by the Defendant.
>
> Particulars
>
> i. On or around 8 August 2000, a meeting was held at the Plaintiff's offices and attended by Johnson Kamalraj (a director of the Plaintiff) and Cheong on behalf of the Plaintiff and Kim Young Jin (the Defendant's General Manager) and Y S Huh (the Defendant's Managing Director) on behalf of the Defendant.
>
> ii. At the said meeting, Johnson orally informed the Defendant's representatives that the cost of freight was significantly higher than the Plaintiff had estimated.
>
> iii. As such, Johnson expressly informed the Defendant's representatives that the Plaintiff would not be able to procure the charter of a vessel unless the Defendant agreed to compensate the Plaintiff for the increased cost of freight.
>
> iv. At no time prior to the meeting on 8 August 2000 had the Plaintiff informed the Defendant that it had miscalculated the cost of freight and that it was not intending and/or would not be able to perform its contractual obligations under the Agreement unless the Defendant agreed to share the increased cost of freight.
>
> v. The Defendant further avers that the Plaintiff, through Johnson, had repeatedly assured the Defendant on a number of occasions prior to the said meeting on 8 August 2000 that the Plaintiff was arranging for the charter of a vessel.

29. The second defence pleaded is that the agreement is not supported by consideration. The defendant pleaded in para 12 of the defence that

> Further and/or in the alternative, the Defendant avers that no consideration was given by the Plaintiff to support the Compensation Agreement and to render the Compensation Agreement an agreement binding in law as the Plaintiff's obligations under the Compensation Agreement was to do

no more than it was already contractually obliged to do under the contract. In the further alternative, the Defendant avers that even if consideration was given by the Plaintiff (which is denied), such consideration was past consideration and was not sufficient in law to support the Compensation Agreement and to render the Compensation Agreement an agreement binding in law.

30. Economic duress as a ground for avoiding contractual obligations is in its formative stage of development. The acts that constitute economic duress and the effect they must have on the receiving party have not been defined with certainty or finality.

31. A threat to break a contract, e.g. a refusal to supply goods sold under a contract, may be economic duress. In a useful discussion on this area of the law, *Chitty's on Contracts* (28th Edn) states at paras 7-023 and 7-024 that

Threat to commit an unlawful act

. As already indicated, it is clear that not all threats can be regarded as improper or illegitimate, and it is necessary in the law of duress to distinguish between legitimate and other forms of pressure or threats. Prima facie it is thought to be clear that a threat to commit an unlawful act will constitute an improper threat for the purposes of the law of duress. Certainly a threat to commit a crime or a tort as a means of inducing the coerced party to enter into some contract must prima facie be improper.

Threat to break a contract

. It is now recognised that in cases of economic duress, the question is not whether the victim's will is overborne but whether the other party had used illegitimate pressure, the practical effect of which is that the victim had no choice. It does not seem, however, that the victim will necessarily be entitled to relief because his decision was influenced by a threatened breach of contract and was the only way to avoid the threatened action. The decisions in *Occidental Worldwide Investment Corpn v. Skibs A/S Avanti* [1976] 1 Lloyd's Rep. 293 and *Pao On v. Lau Liu Long* [1980] A.C. 614 suggest that something more than this is required. In *B. & S. Contracts & Design Ltd v. Victor Green Publications Ltd* [1984] I.C.R. 419 the Court of Appeal stressed that it is not "on every occasion when one party unwillingly agrees to a variation of a contract, that the law would consider that he had acted by reason of duress." There are at least two types of situation in which it would seem inappropriate to treat a threat to break a contract as amounting to unlawful pressure or duress. First, there are circumstances in which the party claiming relief was not in fact coerced by the threat. Here the claim will fail on causal grounds. Secondly, the cases just cited suggest that claim of economic duress may fail even though the threat and pressure clearly had some influence. If it is correct (as submitted earlier) that the decisions should not be explained on the ground that the threat must have been the overwhelming cause of the victim's agreement, they suggest that not every threatened

> breach of contract, even if it has had some "significant effect", will amount to duress. A possible explanation is that some threats of breach of contract may be regarded as not illegitimate. … There are a number of ways in which this result could be explained.

32. *Chitty* concluded at para 7-029 that

> It is … difficult to state with confidence whether a threat of a breach of contract will ever be regarded as legitimate and, if so, in what circumstances. It is submitted that deliberate exploitation of the victim's position with a view to gaining some advantage unrelated to the contract and to which the threatening party knows he is not entitled is clearly illegitimate. Conversely, an apparent threat should not be treated as illegitimate if it was really no more than a true statement that, unless the demand is met, the party making it will be unable to perform; nor if the party has a genuine belief that he is legally entitled to the amount demanded. It is suggested that a demand made in good faith, in the sense that the party demanding has a genuine belief in the moral strength of his claim – for example, because he has encountered serious and unexpected difficulties in performing and will suffer considerable hardship if his demand is not met; or to correct an acknowledged imbalance in the existing contract --might in some circumstances also be treated as legitimate. Here the behaviour of the victim, for example whether he protests, will be relevant. First, it will go to causation: if the victim pays without protest, that may be evidence that he was not influenced by the threat. But secondly, payment without protest may leave the demanding party believing that the justice of his demand is admitted, whereas it will be harder for him to prove that he was acting in good faith if he ignores the victim's protests.

33. In my view, it is necessary to consider all the circumstances, including the states of mind of the parties before coming to a conclusion on whether a case for avoidance on the ground of economic duress is made out.

34. In the present case, the spirit of the venture must be taken into account. From the start, both parties intended to co-operate to gain entry into the HBI business. The co-operative nature of the venture is reflected in the consultations over the chartering of the vessel and Johnson and Kim's trip together to Venezuela to supervise the loading of the HBI. The defendant's willingness to contribute towards the additional freight costs prior to 8 August was another reflection of this.

35. The second relevant factor is the cause for the plaintiff's demand that the defendant shared the additional costs. The plaintiff through its inexperience, misjudged the freight costs badly. As Johnson had testified, the plaintiff was unable to bear the additional costs alone, and if the defendant did not come to its assistance, it was prepared to forfeit the performance bond. Counsel for the plaintiff pointed out that the plaintiff bore a greater burden under the agreement of 12 August by paying its share of the additional freight than it would have under the performance bond.

36. On the evidence before me, there was little to contradict Johnson's evidence. In the course of the trial, it came out that the plaintiff had to borrow from Cheong or his wife and another party by the name of Sekhar to meet its share of the freight.

37. Against this background it cannot be said that the plaintiff was seeking to exploit the situation to increase its profits when it informed the defendant that it would not charter the vessel unless the defendant agreed to share the additional costs.

38. This then brings us back to the issue whether a party which truthfully states that it cannot perform without extra payment is making an illegitimate threat. As *Chitty* noted, it is not easy to demarcate between a legitimate notice and an illegitimate threat.

39. In this case, two matters stood out for consideration. First, the plaintiff was not seeking to improve its financial position by seeking the contribution instead of forfeiting the performance bond. Second, the plaintiff was not seeking to shift the burden of the additional costs entirely to the defendant, and had agreed to bear a share of it even when it did not have the funds for that purpose.

40. The matter should also be considered from the defendant's standpoint. For the defendant, this inaugural HBI deal with POSCO was important as it would add another commodity to the trade between LG and POSCO, and enhance the goodwill and relationship between the two companies.

41. When the deal ran into difficulties, the defendant could not abandon it because as Kim explained, "any failure on the part of the Defendant to perform its obligations under the POSCO (contract) would have serious commercial consequences. It would also have affected the Defendant's reputation and standing with its parent company in South Korea." (The defendant referred to the commercial consequences in its defence, but not to the potential effect on its reputation and standing with its parent company. It also did not inform the plaintiff of the latter on the night of 8 August – see para 87 of Kim's affidavit.)

42. Without elucidation from the defendant, I do not understand what the serious commercial consequences alluded to were. Questions which should be addressed were not. Was the defendant concerned over its ability to meet POSCO's claim for damages for non-performance? Was it concerned with the loss of its credibility with POSCO? How severely would the relationship with POSCO be damaged? How strong were those concerns, and how much did they influence the defendant's decision to agree to contribute to the additional freight costs?

43. When a defence of economic duress is raised, it is incumbent on the party raising it to show that the duress placed it in a position where it was compelled to accede to the other party's demands.

44. I accept that the defendant was concerned over the prospect of breaking the contract with POSCO. However, it did not say that it could not bear the financial repercussions of non-performance, or the nature of the damage non-performance would inflict on the relationship with POSCO. There was something else that the defendant should explain. It was prepared to contribute towards the additional freight costs even before the meeting of 8 August. As it was already contemplating making a contribution towards the increased cost before the threat, the question arose whether the eventual agreement was the result of commercial negotiation e.g. how the additional costs were to be apportioned, or the result of a capitulation to the plaintiff's threat.

45. After considering the evidence, I came to the conclusion that the plaintiff's declaration that it would not perform unless the defendant shared the additional freight should be regarded as a

legitimate notice of its inability to perform rather than an illegitimate threat. On the part of the defendant, I did not have a clear picture that it had no alternative but to accept the plaintiff's terms because it had to fulfill its obligations to POSCO under any circumstances.

46. That left the consideration defence to be dealt with. In the closing submissions, the same assertions in para 12 of the defence were repeated without explanation or amplification.

47. There is not a lot in this defence. This area of the law has been clarified in *Williams v Roffey Bros and Nicholls (Contractors) Ltd* [1990] 1 All ER 512. The facts are broadly similar to the facts in the present case. The plaintiff entered into a sub-contract with the defendant, who were the main contractors, to carry out some work in the refurbishment of some flats. After completing a portion of the works the plaintiff went into financial difficulties because he had quoted too low a price. The defendant needed the work to be completed on time to avoid liability under the main contract. The parties agreed that the defendant would make additional payments to the plaintiff if he completed the sub-contracted work on time. The plaintiff carried out his end of the bargain, but the defendant refused to make the promised payments on the ground that the agreement was not supported by any consideration.

48. The plaintiff sued for the outstanding payments and succeeded at the trial. When the defendant appealed to the Court of Appeal Glidewell LJ stated at pages 520-1

> (F)ollowing the view of the majority in *Ward v Byham* [1956] 2 All ER 318 and of the whole court in *Williams v Williams* [1957] 1 All ER 305 and that of the Privy Council in *Pao On v Lau Yiu* [1979] 3 All ER 65 the present state of the law on this subject can be expressed in the following proposition: (i) if A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B and (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain and (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time and (iv) as a result of giving his promise B obtains in practice a benefit, or obviates a disbenefit, and (v) B's promise is not given as a result of economic duress or fraud on the part of A, then (vi) the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding.

As there was no finding or suggestion that the promise was given as a result of fraud or duress, the appeal was dismissed.

49. Just as the defendant in *Williams v. Roffey* had the sub-contracted work completed in time, the HBI was delivered in time to POSCO and the negative commercial consequences were avoided. The defendant did not allege fraud, and failed to prove duress. The second line of defence thus failed.

50. I therefore gave judgment to the plaintiff on the claim and dismissed the defendant's counterclaim. However, as the difficulties the parties encountered arose from the plaintiff's inaptitude in making a proper provision for the freight costs and in securing a vessel, I awarded the plaintiff half the costs of the actions.

Choo Han Teck

Judicial Commissioner

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