Teo Hee Lai Building Construction Pte Ltd v Anwar Siraj and Another [2002] SGHC 139

Case Number : DC Suit 4023/2001, RAS 6/2002

Decision Date : 05 July 2002

Tribunal/Court : High Court

Coram : Lee Seiu Kin JC

Counsel Name(s) : S Thulasidass (Ling Das & Partners) for the appellant; Alvin Chang (Khattar Wong & Partners) for the respondents

Parties : Teo Hee Lai Building Construction Pte Ltd — Anwar Siraj; Khoo Cheng Neo, Norma

Judgment:

GROUNDS OF DECISION

1 The Appellant, a building contractor, contracted with the Respondents on 30 December 1999 to build a house at No. 2 Siglap Valley. The contract sum was $1.2 million. The contract adopted the Articles and Conditions of Building Contract of the Singapore Institute of Architects. Pursuant to the terms of the contract the Appellant on 12 January 2000 procured a performance bond from The Tai Ping Insurance Company Ltd ("the Insurer") in favour of the Respondents in the sum of $120,000.

2 On 28 September 2001 the Respondents made a demand to the Insurer for payment under the performance bond. The Appellant took out the writ in this action on 12 October 2001. At the same time it applied *ex parte* in SIC 16350/2001 for an interim injunction to restrain the Respondents from receiving payment pursuant to the demand. This was granted by District Judge Chia Wee Kiat on the same day. On 9 November 2001 the Respondents applied in SIC 18258/2001 to discharge the injunction. District Judge Jeffrey Sim heard the application and set aside the injunction on 14 January 2002. The Appellant appealed against that decision before me. This was heard on 31 January 2002 at the end of which I allowed the appeal and restored the interim injunction. I also set aside the order for costs below and ordered the Respondents to pay the Appellants costs here and below which I fixed at $6,000. On 28 May 2002 the Respondents lodged a notice of appeal against my decision of 31 January 2002. I now give the grounds for my decision.

3 The affidavit of the Appellants director, Teo Hee Lai asserted that that it had substantially completed the works under the contract by 9 January 2001. All that remained was the basement painting, in respect of which it was prevented from carrying out because of the Respondents erroneous belief that the basement waterproofing had failed. The Appellant relied on its experts reports to prove that the waterproofing had not failed. The Appellant also alleged that the last progress claim for work done up to 9 January 2001 amounted to $265,190.17. This remained uncertified and unpaid. There was also a retention sum of $24,010.86. The Appellant contend that the Respondents were therefore more than secured for their claims as they were holding about $290,000 of the Appellants monies. The Appellant had on 15 February 2001 forwarded to the architect a list of defects and outstanding works for the Completion Certificate to be issued. A handover inspection was arranged for 4 April 2001. This was conducted and the Respondents moved in on 5 April 2001. The Appellant estimated that the costs of rectification would amount to only about $17,200 and assert that the rectification could be carried out during the one year maintenance period under the contract. The Appellant claimed that the Respondents had prevented it from carrying out the rectification works although it was prepared to do so, and the architect had wrongfully refused to issue a Completion Certificate. Accordingly, the Appellant gave Notice of Arbitration on 6 August 2001. One relief prayed was for access to be given to carry out the rectification works.

4 The Respondents application to set aside the interim injunction was based on 2 grounds, viz:

> (i) that the Appellant had failed to make full and frank disclosure of all the material facts at the *ex parte* hearing;
>
> (ii) that there is no allegation of fraud and the Respondents had not acted unconscionably.

5 The District Judge below had found that there was material non-disclosure of the fact that there was water leakage and flooding in the basement family room. However he was of the view that the nature of this non-disclosure was not so severe as would justify discharge of the injunction on this ground alone. The judge said this at 13 & 14 of his Grounds of Decision:

> 13. In the present case, I was of the view that there was non-disclosure by the Appellant of at least one material fact, namely the water leakage and flooding in the basement family room. Photographs showing the flooding can be found at page 288 of the First Defendants first affidavit. The architect explained in his affidavit that the flooding was caused by the Appellants failure to construct the sewerage inspection chambers according to the contract drawings. The Appellant on the other hand contend that the flooding was due to poor design by the architect. This dispute was clearly material and ought to have been disclosed by the Appellant at the *ex parte* hearing.
>
> 14. However, the court nevertheless retains a discretion to either continue the *ex parte* injunction or grant a fresh injunction in its place, depending on the nature of non-disclosure and the circumstances of the case. The fact that there had been non-disclosure of a material fact to the first judge who granted the injunction did not prevent the grant of further relief at a subsequent application when that fact was fully before the court (*Tay Long Kee Impex Pte Ltd v. Tan Beng Huwah (t/a Sin Kwang Wah*) [2000] 2 SLR 750). One material factor to consider would be whether there was fraud or unconscionability on the part of the Respondents in calling on the performance bond.

6 The judge went on to consider whether there was fraud or unconscionability and, finding none, discharged the injunction on that ground. I agreed fully with the judge in respect of the non-disclosure point. As for fraud, the Appellant did not make any such allegation. I therefore proceed to consider the question of unconscionability.

7 The Court of Appeal held in *GHL v Unitrack Building Construction* [1999] 4 SLR 604 that, in addition to fraud, unconscionability was also a ground for granting an injunction against a call on a performance bond. However the scope of this concept of unconscionability has not yet been fully staked out. Some guidance can be found in *Raymond Construction Pte Ltd v Low Yang Tong & Anor* (Unreported, Suit No. 1715 of 1995, 11 July 1996), where Lai Kew Chai J said (at 5 & 6):

> 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. Mere breaches of contract by the party in question would not by themselves be unconscionable.
>
> on the authorities considered, the court was elaborating on what would amount to unconscionability sufficiently grave and serious for equity to intervene. That proceeded on the basis that equity would step in to prevent the enforcement of any legal right if such enforcement would have been unjust.

8 As to standard of proof, the Plaintiff must show a strong prima facie case of unconscionability; see *Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Skeikh Sultan bin Khalifa bin Zayed Al Nahyan* [2000] 1 SLR 657 in which the Court of Appeal said at 57:

> In Bocotra this court stated that a high degree of strictness applies, as the applicant will be required to establish a clear case of fraud or unconscionability in the interlocutory proceedings. It is clear that mere allegations are insufficient. In our opinion, what must be shown is a strong prima facie case of unconscionability

9 The judge below discharged the injunction because he had found that the Respondents and their architect were genuinely unhappy with the Appellants work and there was no compelling evidence to suggest that their complaints were not real. In so holding he took into account the fact that the architect had complied a list of defects which were by no means minor. The quantity surveyor had estimated the costs of rectification to be in excess of $500,000. Furthermore the Respondents have a claim against the Appellant for liquidated damages for delay in the sum of $84,000. As for the Appellants claim for $265,190.17, it had yet to be certified and in any event the estimated costs of rectification and liquidated damages far exceeded the total of this sum, the retention sum of $24,010.86 and the sum under the performance bond. The judge said that the Respondents and the architect also denied that the Appellant was denied access or were prevented from carrying out their works.

10 Had the matters been as the judge below had described it, I would have agreed with him that the injunction ought to be discharged. However, in my view, the affidavits revealed that matters were not that straightforward. Firstly, the Appellant alleged that the first Respondent had been an extremely difficult client and had interfered with the architects duties. This is denied by the first Respondent, but he himself had said in his affidavit that:

> I participated directly and actively in the calling of tenders for the Project, the evaluation of tenders received and the subsequent award of the Contract to the Plaintiffs. I attended all site meetings convened by the Architect, participated in all the deliberations and visited the site regularly whilst building works were in progress.

It is understandable that an owner would be very concerned with the progress of the building of his house. However it is too easy to lose objectivity in the process and this is a warning flag. Certainly a court has to bear this in mind and consider it along with all the other circumstances of the case.

11 Secondly, the Appellant had alleged that some of the problems were caused by design error. This

allegation had been made prior to the call, when the Appellant disputed that it was liable for some of the defects. Under the circumstances, it would be natural for the architect to be put on the defensive. I fully accept that it is also natural for a contractor to put the blame on the architect when he is put in a spot. However from the matters in the affidavits, I found that the Appellant has put up a reasonable case. One allegation in particular stands out. This relates to the basement, the floor level of which is close to or below the level of the sewerage pipes. The architect had provided for a toilet there and had instructed the Appellant to install a floor trap which is raised about 400 mm off the floor. The photographs show a bizarre metal pipe protruding 400 mm from the floor which is supposed to drain water off it. But this would mean that the trap would not begin to drain any water until the toilet floods to 400 mm. Counsel for the Respondents was unable to give any explanation for this puzzling design. The plumbing sub-contractor had stated in a well-reasoned letter that in his opinion, there should not have been a toilet provided in the basement as the level of the sewerage line was higher than the basement floor. While this court would not ordinarily venture into such technical areas, it nevertheless has to take common sense into account. At the minimum, this illustrates the difficulties faced by the Appellant in this project.

12 Thirdly, the Appellant had alleged that it was denied the opportunity to carry out the remedial works during the maintenance period. The architect had deposed that he certified 5 April 2001 as the date of completion and handover, had refused to grant extension of time and had given the Appellant a list of defective and outstanding works on 6 April. He deposed that since then the Appellant had refused to attend to the defects nor had it given an undertaking that it would complete all outstanding works. He deposed that access was never denied to the Appellant to carry out the rectification works. However the correspondence shows that when the Appellant wrote to the architect on 20 June 2001 to propose two dates for inspection of the defects, the latter took objection to the inclusion of one Donald Payne, whom the Appellant clarified was an expert to assist it with "contentious issues arising". Payne was obviously a claims consultant who would be assisting the Appellant with a claim against the Respondents. The architect took objection to him entering the premises. Subsequently, the Appellants attempts to get Payne to attend meetings with the architect were frustrated by both the architect and the first Respondent and there were even police reports made by both sides in respect of a rather farcical incident in which Payne was refused admission to the premises. As a result of this, the inspection and subsequent rectification works were held up.

13 A contractor has a right under the contract to make claims and if he succeeds, the employer is obliged to pay him. If he fails, he is liable to costs. He is entitled to be assisted by any person in respect of the prosecution of such rights. Certainly it is important in the preservation of the Appellants rights, for a proper record of the works to be compiled both before and after rectification so that the arbitrator may have available to him the best possible evidence to enable him to arrive at his decision. The architect and the first Respondent, in using pressure to deny the Appellant such assistance, would be acting oppressively and a court would take this into account in this application.

14 There being no progress in the matter, the Appellant gave notice of arbitration on 6 August 2001. Subsequently on 28 September, the Respondents called on the performance bond.

15 In view of all the circumstances of the case, and particularly those set out above, there is sufficient evidence of unconscionability on the part of the Respondents for the court to restrain them from making a demand or receiving any payment under the performance bond until the matter can be determined in arbitration. I need only recite the words of Thean, JA in *GHL v Unitrack Building Construction* (at 24):

> We are concerned with abusive calls on the bonds. It should not be forgotten that a performance bond can operate as an oppressive instrument, and in the event that a beneficiary calls on the bond in circumstances, where there is prima facie

evidence of fraud or unconscionability, the court should step in to intervene at the interlocutory stage until the whole of the circumstances of the case has been investigated. It should also not be forgotten that a performance bond is basically a security for the performance of the main contract, and as such we see no reason, in principle, why it should be so sacrosanct and inviolate as not to be subject to the court`s intervention except on the ground of fraud. We agree that a beneficiary under a performance bond should be protected as to the integrity of the security he has in case of non-performance by the party on whose account the performance bond was issued, but a temporary restraining order does not prejudice or adversely affect the security; it merely postpones the realisation of the security until the party concerned is given an opportunity to prove his case

Sgd:

LEE SEIU KIN

JUDICIAL COMMISSIONER

SUPREME COURT