Panwah Steel Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd [2006] SGCA 35

Case Number : CA 8/2006

Decision Date : 18 September 2006

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; Tan Lee Meng J

Counsel Name(s) : Alvin Yeo Khirn Hai SC, Chua Sui Tong (Wong Partnership) and Chong Siew Nyuk Josephine and Aqbal Singh A/L Kuldip Singh (UniLegal LLC) for the appellant; Giam Chin Toon SC (Wee Swee Teow & Co) and Richard Lai (Lai Mun Onn & Co) for the respondent

Parties : Panwah Steel Pte Ltd — Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd

Civil Procedure – Appeals – New argument canvassed on appeal – Principles for allowing new argument on appeal – Order 57 r 13(4) Rules of Court (Cap 332, R 5, 2004 Rev Ed)

Contract – Contractual terms – Rules of construction – Whether contract "project specific" based on purposive interpretation of terms of contract

18 September 2006 *Judgment reserved.*

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 The appellant, Panwah Steel Pte Ltd ("Panwah"), is a stockist and trader who buys steel reinforcing bars used in construction ("rebars") from suppliers and resells the same to building contractors like the respondent, Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd ("Koh Brothers"). Panwah entered into an agreement, Contract No KBCE/084/RT/2002 to supply rebars to Koh Brothers dated 26 April 2002 and signed by Panwah on 31 May 2002 ("the KB Agreement"). Under the KB Agreement, Panwah agreed to supply rebars to Koh Brothers for a two-year period (30 June 2002 to 30 June 2004). The quantity involved was stated in the contract as "Actual 39,000 Tons (-10% tolerance or actual)". Koh Brothers was at that time the main contractor for a proposed Changi Water Reclamation Plant C3A at Tanah Merah Coast ("the C3A project").

2 Panwah's supplier was Burwill Trading Pte Ltd ("Burwill"). On 23 May 2002, Burwill had contracted with Panwah to supply 39,000mt (metric tonnes) of rebars to it ("the Changi Agreement"). Panwah intended to then re-supply those rebars to Koh Brothers under the KB Agreement. However, the supply of rebars under the Changi Agreement was for the duration of one and a half years from 1 June 2002 to 31 December 2003, which was six months shorter than the supply duration of the KB Agreement.

3 In order to make the durations of the two contracts the same, Panwah asked Burwill for a six-month extension to the Changi Agreement up to 30 June 2004. This request was granted by Burwill in December 2003, but with the additional stipulation that the supply "shall be as per the progress requirement of the project" ("the Condition"). This Condition was included because Burwill wanted to ensure that all the rebars ordered by Panwah would be used in the C3A project and that Panwah could not take advantage of the soaring prices of steel and resell the rebars for a profit on the open market.

4 As it turned out, Koh Brothers did not use all of the rebars obtained from Panwah for the C3A project, and the ordered rebars began to pile up at the worksite. When Burwill's representatives visited the C3A site, they noticed that unused rebars were being stored. Burwill began to suspect that Panwah was attempting to stockpile the rebars in contravention of the Condition and consequently ceased delivery of the rebars on 25 June 2004. This was followed by a formal notification of cessation dated 1 July 2004. At that time, Panwah had delivered 30,874mt of rebars, and the undelivered balance was about 8,100mt ("the Shortfall"). Panwah's suit against Burwill and Burwill's counterclaim for non-payment under the Changi Agreement was the subject of the appeal in *Panwah Steel Pte Ltd v Burwill Trading Pte Ltd* [2006] SGCA 34 against the decision rendered in *Burwill Trading Pte Ltd v Panwah Steel Pte Ltd* [2005] SGHC 234.

5 Koh Brothers nonetheless continued to demand that Panwah deliver the Shortfall despite Burwill's cessation of delivery. The Shortfall was, however, not required for the C3A project itself, because Koh Brothers had earlier redeployed a surplus of 11,000mt of rebars from another site to the C3A project. Koh Brothers still wanted Panwah to deliver the Shortfall under the KB Agreement because it wanted to replenish its own stocks. As a result, Koh Brothers withheld payment of about $1.4m for the rebars already delivered and claimed damages of $3m against Panwah. Panwah's claim for the withheld payment was not disputed.

6 The learned trial judge ("the judge") held, in *Panwah Steel Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2006] 1 SLR 788 (hereafter referred to as "GD"), both that Panwah was entitled to succeed in its claim and that Koh Brothers was entitled to succeed in its counterclaim under the KB Agreement. Indeed, Panwah's claim was not disputed and the issues at first instance centred on the counterclaim by Koh Brothers against Panwah.

7 There was only one issue canvassed before the present court. This centred around the judge's rejection of Panwah's argument to the effect that it was not liable to Koh Brothers for the Shortfall by virtue of the fact that the contract concerned was "project-specific" – in other words, that the rebars were to be used for the C3A project *only* and that as it was clear on the evidence that Koh Brothers did *not* require this balance of the rebars for the C3A project (see [5] above), Panwah was not liable to Koh Brothers for the Shortfall.

New point on appeal

8 Counsel for Panwah, Mr Alvin Yeo SC, stated clearly at the outset that he was *not* relying on the argument proffered at first instance, which centred on an *implied term* to the effect that the contract was "project-specific". This is not surprising as that particular argument was rejected by the judge. This result is itself also not surprising in view of the fact that an argument centring on an implied term is frequently, as R E Megarry aptly put it, "so often the last desperate resort of counsel in distress" (see R E Megarry, *Miscellany-at-Law* (Stevens & Sons Limited, 1955) at p 210). By its very nature, an implied term is, in contrast to an express term, one that is allowed by the court based on the presumed – as opposed to the actual – intention of the contracting parties. Given the fact that court will not rewrite the contract for the parties based on *its* own sense of what ought to be just and fair, the test for an implied term is strict. It is based on the criterion of *necessity*.

9 There are at least two broad categories of implied terms – "terms implied in fact" and "terms implied in law", respectively. The latter is of relatively recent vintage and is based, in the final analysis, on considerations of public policy (see generally *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] SGCA 20 at [90]). Terms under this particular category are of a broader cast:

> In other words, the decision of the court concerned to imply a contract "in law" in a particular case *establishes a precedent* for similar cases in the future for *all* contracts of *that particular type*, unless of course a higher court overrules this specific decision. [emphasis in original]

(See *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR 927 ("*Forefront Medical Technology*") at [44].)

10 The former category (relating to "terms implied in fact") is the traditional category. It is narrower in nature. Unlike "terms implied in law", the implication of a term does not create a precedent for future cases. As was stated in *Forefront Medical Technology* (at [41]):

> In other words, the court is only concerned about arriving at a just and fair result via implication of the term or terms in question in that case – *and that case alone*. The court is only concerned about the presumed intention of the particular contracting parties – *and those particular parties alone*. [emphasis in original]

11 The tests for "terms implied in fact" are embodied in the oft-cited "business efficacy" and "officious bystander" tests, respectively – both of which are complementary in nature (see generally *Forefront Medical Technology* at [29]–[40]).

12 The focus by Panwah at first instance in the present proceedings was on the narrower category of "terms implied in fact". As already mentioned, Panwah is no longer relying on this particular argument. Instead, Mr Yeo argued that a purposive construction of the contract between the parties should be adopted instead and that such an approach would establish that the contract was indeed "project-specific". However, before this court could even begin to consider this argument, Panwah had to surmount major procedural hurdles.

13 Put simply, was the argument the *same* (in substance, at least) as the argument centring on the implied term? It will be recalled that Mr Yeo had expressly disavowed any reliance on this argument (based on an implied term) which had failed at first instance. Although, as we shall see, there was an overlap between this particular argument and the argument Mr Yeo was seeking to tender now before this court, it is our view that they are not the same. The argument centring on an implied term must be based on the criteria mentioned above, whereas the argument that Mr Yeo presently seeks to rely upon (which, for convenience, we shall term "the purposive argument") is based on *a purposive interpretation* of the *express* terms of the contract. In this regard, the "business efficacy" and "officious bystander" tests, for example, are completely irrelevant.

14 If, however, the argument presently proffered is a *new* one, could it now be raised before this court (pursuant to O 57 r 13(4) of the Rules of Court (Cap 322, R 5, 2004 Rev Ed))? In this regard, Prof Jeffrey Pinsler, in a leading local work in the field, *Singapore Court Practice 2006* (LexisNexis, 2006), observes thus (at para 57/13/10):

> Consistent with the principle of finality in litigation is the requirement that the parties should raise at trial all matters which have a bearing on the outcome of the case. The Court of Appeal will generally refrain from entertaining a new point on appeal, particularly if the circumstances are such that the court is not in as advantageous a position as the court below (with regard to the evidence as well as other matters which may have arisen if the point had been brought up in the court below), to adjudicate upon the issue.

15 The classic statement of principle is, of course, that of Lord Herschell in the House of Lords decision of *The Owners of the Ship "Tasmania" and the Owners of the Freight v Smith and others,*

The Owners of the Ship "City of Corinth" (*The "Tasmania"*) (1890) 15 App Cas 223, as follows (at 225):

> My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal, ought to be most jealously scrutinised. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them.
>
> *It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box.*
>
> [emphasis added]

The principles embodied in the above quotation have been cited and applied on a number of occasions in the local context (see, for example, the decisions of this court in *Cheong Kim Hock v Lin Securities (Pte)* [1992] 2 SLR 349 at 357, [30]; *MCST No 473 v De Beers Jewellery Pte Ltd* [2002] 2 SLR 1 at [38]; and *Riduan bin Yusof v Khng Thian Huat (No 2)* [2005] 4 SLR 234 at [35]).

16 The following observations by Lord Watson in the Canadian Privy Council decision of *Connecticut Fire Insurance Company v Kavanagh* [1892] AC 473 at 480 are, especially (as we shall see) in the context of the present proceedings, also apposite:

> When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or *upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea*. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea. [emphasis added]

17 Returning to the facts of the present proceedings, it is clear, in our view, that the purposive argument is one, relating as it does to the interpretation of the material terms of the contract between the parties, primarily of law. More importantly, this court is in just as advantageous a position as the court below (with regard to the evidence as well as other matters which may have arisen if the point had been raised in the court below) to adjudicate upon this particular issue. As Mr Yeo correctly pointed out, no new evidence needs to be adduced simply because, as we have just mentioned, the issue at hand relates to a point of interpretation or construction. And it bears emphasising that cases such as the present, which involve pure questions of construction, are especially appropriate for the exercise of the court's exceptional jurisdiction to consider new points on appeal (see, in particular, the observations of Lord Watson in *Connecticut Fire Insurance Company v Kavanagh* quoted in the preceding paragraph).

18 There is another reason why it would not, in our view, be prejudicial or unfair to Koh Brothers if the purposive argument is considered by this court. We hasten to add that this particular reason is

premised on the precise factual context of the present proceedings. Indeed, in situations of this nature, the precise factual context is invariably of the utmost importance. To that extent, the allowance or disallowance of a new point by this court is fact-specific and should not generally be taken as a precedent for future cases.

19 It will be noticed at once that the judge did in fact consider many of the matters presently raised by Mr Yeo with respect to the purposive argument. To elaborate, the purposive argument necessarily entails consideration of the material terms of the contract between the parties. A close perusal of the judgment of the court below reveals that a few of the terms of the contract were also argued before (and, more importantly, considered by) the judge (see, in particular, GD at [17]–[19]). However, it is true that the judge's analysis in this regard was *applied* in the quite different context of the argument centring on *an implied term*. However, the important point, in the present context, is this: The *interpretation* of the *material terms* of the contract *was* considered in the court below – albeit applied in a different context and, in view of that particular context, in an extremely brief manner. What Panwah is now seeking to do is to apply the arguments relating to the interpretation of the material terms of the contract in a somewhat different context. In the circumstances, we do not see how this could possibly cause injustice or prejudice to Koh Brothers. Indeed, the purposive argument was canvassed in detail by Panwah both in its written submissions and in oral argument before this court. On a more general level, it is important to emphasise that *substance* must always prevail over form, save where the latter interacts and actually impacts on the former in a significant manner (*cf* also the Malaysian Court of Appeal decision of *Chor Phaik Har v Choong Lye Hock Estates Sdn Bhd* [1996] 2 MLJ 206, especially at 215–216).

20 It is important to reiterate that our holding is of course confined (in the nature of things) to the facts of the present proceedings. As we have seen, this court will not readily entertain a new point on appeal. The circumstances here, however, were sufficient to justify entertaining the new point (the purposive argument) but must not in any way be seen as signalling a liberal approach that would undermine the desideratum of certainty that is also a cornerstone of our legal system. Indeed, even where a new point is entertained by this court in exceptional circumstances, there will need to be a sanction which will more often than not take the form of an appropriate order of costs (as is the case here: see [33] below).

21 We turn now, therefore, to consider the purposive argument.

The purposive argument considered

22 In essence, Panwah's case in this particular regard was straightforward: Looking at the relevant terms of the contract between the parties, it was, Mr Yeo argued, clear that it was "project-specific".

23 In particular, Mr Yeo pointed, first, to the heading entitled "Total Quantities", which read "Actual 39,000 Tons (- 10% tolerance or actual)". He argued that the word "actual" was a clear indication that the contract was "project-specific". This argument appeared to focus on the first time the word "actual" appeared. In point of fact, the same word appears a second time and buttresses the point sought to be made by Mr Yeo in the following manner. The reference in this last-mentioned regard reinforces the point that the contract was focused on an actual amount arising from a "project-specific" contract, with a specific provision with respect to tolerance (here, of 10%). Indeed, the reference to the word "actual" appears once more in the contract, where it is stated that the prices stated and accepted were based on "[t]he 39,000 metric tons of rebars with quantity variation of – 10% *or actual*" [emphasis added]. Even accepting that this particular factor is not conclusive, there are a number of other important factors, to which our attention now turns.

24 Mr Yeo also pointed to the headings "Lead time for or" as well as "Delivery". It is true that the details under these headings also supported the conclusion that the contract was "project-specific".

25 There was also a reference to the price being "[i]nclusive of deliveries at designation location". We agree with Mr Yeo that the reference to a specific "designation location" supports the view that the contract was "project-specific". The judge did refer in the briefest of fashions to this particular clause, *ie*, cl 2 (see GD at [18]), but did not elaborate upon it – at least not in the manner in which it was now being argued. This is not surprising in view of the fact that the purposive argument was not before the judge.

26 There was a further term (cl 5) to the effect that Panwah "[m]ust be able to meet … our [*viz*, Koh Brothers's] deliveries, failing which Panwah Steel will be liable for the difference in the costs of rebars purchased by us [*viz*, Koh Brothers]". Mr Yeo argued that this term also supported the view that the contract was "project-specific" inasmuch as it could not be a term at large. This argument is by no means conclusive but does tend, in our view, to support the overall thrust of the purposive argument proffered by Panwah.

27 Mr Yeo referred, next, to the term (cl 6) to the effect that:

> If rebars rejected [*sic*] by PUB, Panwah shall replace the bars within 2 working days. In the event that rejected rebars do not supply [*sic*] on time, KBCE [*viz*, Koh Brothers] shall purchase the rebars from other source and charge the difference in the cost to Panwah Steel.

We agree with Mr Yeo that if the contract were not "project-specific", this clause would have been included in the contract inappropriately. The judge did refer to this particular clause as well, but concluded (GD at [20]) that "it did not mean that Koh Brothers could not deploy the rebars to other projects"; he proceeded to observe that, "All it meant was that if the rebars were deployed to other projects and rejected by other developers, Koh Brothers could not rely on cl 6 to seek recourse against Panwah." (see *ibid*). With respect, this interpretation does not accord with the general language and (especially) the context of the clause itself. It was perhaps because the judge was not being addressed *directly* on the purposive argument and was, instead, considering the *quite different* argument centring on an implied term that he adopted the interpretation he did.

28 Finally, Mr Yeo also referred to the term (cl 9) to the effect that, "No claim … whatsoever will be entertained for price fluctuation in labour, material, and transport, etc, within the project duration stated above." We agree with him that this particular term supported the view that the contract was "project-specific".

29 It is important to note that Mr Yeo was not arguing that any single term in the contract mandated the conclusion that the contract was "project-specific". His argument was that, adopting a purposive approach, the *overall conclusion* to be drawn from a reading of *all* the relevant terms of the contract in an *integrated fashion* in the *context* it was made led to the conclusion that the contract was "project-specific".

30 We note, further, that the very title of the contract refers to "Changi Water Reclamation Plant on Lot 3569 PT MK 31 at Tanah Merah Coast Road Contract 3A Supply and Delivery of Reinforcement Bars", whilst the (related) heading entitled "Project Title" refers to "Changi Water Reclamation Plant C3A". It is true that the judge did consider this point briefly (see GD at [17]), but this was not, with respect, considered in relation to (and in the context of) the overall purpose of the contract itself.

31 We find the arguments raised by Mr Yeo to be persuasive. It is clear, in our view, that, adopting a purposive approach, the contract was indeed "project-specific".

Conclusion

32 In the circumstances, we allow the appeal. However, we hasten to add that the basis upon which we have based our decision was not before the judge and, hence, not addressed by him. Indeed, Panwah had itself abandoned the point (centring on an implied term) that it had raised before the judge and which had in fact been rejected by him.

33 However, in so far as costs of this appeal are concerned, we hold that, in the circumstances in which the present appeal was raised and argued, each party ought to bear its own costs.