Highness Electrical Engineering Pte Ltd v Sigma Cable Company (Pte) Ltd [2008] SGHC 95

Case Number : Suit 403/2005, NA 47/2007, RA 58/2008

Decision Date : 24 June 2008

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : Alvin Chang Jit Hua (M & A Law Corporation) for the plaintiff; Gan Kam Yuin (Bih Li & Lee) for the defendant

Parties : Highness Electrical Engineering Pte Ltd — Sigma Cable Company (Pte) Ltd

Contract

24 June 2008

Chan Seng Onn J:

Introduction

1 The plaintiff's claim was for loss and damage suffered as a result of various breaches by the defendant of a supply contract ("the original contract") relating to a purchase order HE/PO/03/0175 from the plaintiff dated 8 December 2003 which the defendant accepted on 16 December 2003. Under the original contract, the defendant would supply to the plaintiff various types of electrical cables for delivery from December 2003 to the end of December 2005.

2 The plaintiff obtained interlocutory judgment against the defendant on 29 June 2006 after a trial before Tan Lee Meng J: see *Highness Electrical Engineering Pte Ltd v Sigma Cable Co (Pte) Ltd* [2006] 3 SLR 640. The defendant's appeal to the Court of Appeal against Tan J's decision was dismissed on 24 January 2007. The Assistant Registrar, Leong Kwang Ian ("the AR"), assessed the damages and awarded the following amounts:

a.	Cables purchased under five Delivery Instructions ("DIs") to complete works (see [4] below)	$51,760.22
b.	Cost of additional manpower and equipment rental	$9,652.05
c.	Cables purchased from February to August 2005	$27,557.49
d.	Cables purchased under the Keystone contract (see [10] below)	$1,212,371.07
	TOTAL	$1,301,340.83
	Plus 5% GST	$65,067.04
	GRAND TOTAL	$1,366,407.87

Interest awarded at 6% p.a. on the sums awarded	$106,458.56
TOTAL AWARD OF DAMAGES	$1,472,866.43

3 The defendant appealed against the amounts awarded by the AR. I dismissed the defendant's appeal with respect to the above items (a), (b) and (c) but allowed the appeal with respect to item (d). For item (d), I ordered the damages to be re-assessed by taking into consideration whether or not the plaintiff would have incurred any additional costs if the plaintiff were to exercise its option to purchase from the defendant all the remaining cables before the expiry of the original contract at the end of 2005, assuming that there was no repudiatory breach by the defendant and assuming that the parties were unable to agree on new terms for the supply of cables after 2005.

Item (a): Cables purchased from third parties under five DIs to complete the works - $51,760.22

4 This head of claim was for the defendant's failure to deliver cables under five DIs – HE/DI/04/0154, 0156, 0217 and HE/DI/05/0008 and 0015 ("the 5 DIs") – issued by the plaintiff to the defendant prior to the plaintiff's termination of the original contract on 3 February 2005. As a result of the defendant's failure to deliver the cables, the plaintiff had no choice but to purchase the same from various other suppliers in order to meet the Temporary Occupation Permit ("TOP") inspection schedule set by the plaintiff's main contractor in the project. However, the defendant claimed that:

(a) the plaintiff failed to show that the materials were needed for the project's TOP deadline scheduled in January 2005;

(b) the items purchased by the plaintiff from third parties did not correlate with the items in the 5 DIs; and

(c) the plaintiff failed to mitigate its loss by buying the items at reasonable prices.

5 Having compared the items in the invoices for the cables that the plaintiff purchased from other suppliers with those items in the 5 DIs, I agreed with the AR that although the descriptions might have varied in some respects, the items purchased to replace those items that the defendant failed to deliver did broadly correlate with those previously ordered by the plaintiff under the 5 DIs. With documentary evidence showing that the TOP inspection for the worksite at Toh Guan Road East had taken place in mid-February 2005, it was reasonable for the AR to accept that the plaintiff needed those cables from October 2004 to February 2005, which was why the plaintiff ordered those cables from the defendant for delivery from October 2004 to February 2005. The AR also accepted the plaintiff's evidence that the cables were needed in a hurry and were purchased after only verbal quotations were sought. It was not wrong for the AR to assume that the prices charged by other suppliers for the cables were the market prices, unless the defendant adduced credible evidence from other suppliers to show that those prices that the plaintiff obtained at that time had been so overly and aggressively marked up for urgent delivery beyond what a reasonable supplier would have charged. I therefore dismissed the appeal on this item and affirmed the AR's award of the full sum claimed in damages of $51,760.22, which was computed on the basis of the difference between the cost of the replacement cables purchased by the plaintiff from third party suppliers and those cables that the defendant ought to have supplied under the original contract had there been no repudiatory breach by the defendant.

Item (b): Cost of additional manpower and equipment rental - $9,652.05

6 The plaintiff claimed that it had to engage additional manpower and rent additional equipment to accelerate and complete the work leading to the deadline for the project and the TOP inspection. The original deadline for completion was on 17 January 2005 so that the TOP inspection could be carried out. The TOP inspection was delayed because the defendant did not deliver the cables on time. This resulted in a postponement of the TOP inspection to February 2005. The Building Control Authority of Singapore eventually issued the TOP on 18 February 2005. The architects issued the certificate of completion on 21 February 2005. Nevertheless the plaintiff's evidence was that it still had to carry out further finishing works from 19 to 25 February 2005 when it handed the works over to the main contractors.

7 I accepted the plaintiff's explanation that the delay in the project works caused the project to run into the Chinese New Year holiday period on 9 and 10 February 2005, which made matters worse as no work could be carried out on those dates. Thereafter, the plaintiff was also not able to carry out any further works between 13 and 18 February 2005 as its alternative suppliers could not deliver any cables due to the holiday period. Given the circumstances, I had no reason to doubt the plaintiff's evidence that it had no choice but to accelerate its work during the available dates between 4 and 25 February 2005 in order to complete its part of the project works.

8 I was satisfied that sufficient credible evidence had been adduced from the person in charge of the day to day operations of the plaintiff, who had testified that the plaintiff had to deploy an additional 10 workers (2 supervisors and 8 skilled workers) to complete the works. Payslips were produced. Invoices for the rental of the additional equipment comprising the cable winch to pull the cables during the installation process and the scaffolding to assist these workers to access the areas where the cables were to be installed were produced. Accordingly, I saw no reason to disturb the AR's award of $9,652.05 under this head of claim.

Item (c): Cables purchased from February to August 2005 - $27,557.49

9 The amount sought by the plaintiff under this head of claim totalled $27,557.49 and comprised the following:

(a)	February 2005	$1,843.96
(b)	March 2005	$3,693.60
(c)	April 2005	$5,325.49
(d)	May 2005	$3,873.02
(e)	June 2005	$5,000.32
(f)	July 2005	$4,277.80
(g)	August 2005	$3,543.30
	TOTAL	$27,557.49

10 This claim related to the piecemeal purchases (supported by relevant invoices and purchase orders) made by the plaintiff between February 2005 and August 2005 from various third party suppliers after the plaintiff accepted the defendant's repudiatory breach in February 2005 but before the plaintiff entered into the long term supply contract with Keystone Cable (S) Pte Ltd ("Keystone Cable") on 29 September 2005 ("the Keystone contract") for the remaining cables. The amounts listed above represented the loss suffered by the plaintiff each month arising from the difference between the prices that the plaintiff would have paid the defendant under the original contract and those eventually paid by the plaintiff to its third party suppliers.

11 The AR agreed with the defendant's submission that the plaintiff should not have waited for some seven months (until September 2005) before "locking in" the price of the cables with Keystone Cable in the face of a rising market trend. The AR therefore held that the plaintiff should have "locked in" the price as soon as was reasonably possible after it terminated the original contract with the defendant on 3 February 2005. The AR thus ordered damages to be awarded based on the prices offered by Keystone Cable in its April 2005 quotation for all cables delivered from May to August 2005. As this re-calculation yielded a higher claim, the plaintiff stood by its original claim of $27,557.49.

12 I saw no reason to disturb the amount of damages awarded under this head of claim and accordingly dismissed the defendant's appeal on this item.

Item (d): Cables purchased under the Keystone contract - $1,212,371.07

13 The plaintiff's loss under item (d) comprised the price difference between the original contract and the Keystone contract for the replacement cables purchased by the plaintiff from Keystone Cable to complete the works under the project from September 2005 until the completion of the project in April 2007. The plaintiff decided to enter into a fixed price long term contract with Keystone Cable on 29 September 2005 for the entire balance of the cables required for the project in order to "lock in" the unit prices so that they would not be subject to further price fluctuations due to market conditions. The quotation from Keystone Cable was the lowest of the quotations obtained from four cable suppliers based on the final quantities of cables that remained to be delivered. I accepted that the plaintiff had taken reasonable steps to mitigate its loss by placing an order for the remaining cables with the lowest cost supplier.

14 The defendant said that they were not liable to deliver cables beyond 31 December 2005 under the original contract, which was only for a fixed term of two years from December 2003 to December 2005. As such, the defendant contended that they were not liable for further losses beyond December 2005.

15 The plaintiff asserted however that the original contract was for the defendant to supply the cables at the same unit prices even after December 2005 until the end of the building project, even if that completion was delayed. The AR disagreed with the plaintiff's submission on this point. The AR correctly found that the original contract was for a fixed term ending on 31 December 2005. If the defendant wanted to raise substantially the unit prices for the cables to be supplied after 31 December 2005, the plaintiff would have the option of ordering the balance of all the cables before the expiry of the original contract so as to "lock in" the purchase at the original prices, provided of course the plaintiff had the financial means to do so at that time or would have been able to obtain the necessary financial assistance if it did not have sufficient financial resources of its own to do so.

16 The AR noted that:

> However, PW1 has also affirmed in his AEIC (24 August 2007) that the Plaintiffs were prepared to

purchase all the balance cables from the Defendants should the need arise. The Defendants have sought to dispute the Plaintiffs' ability to carry this out. They have sought to show that the Plaintiffs would not have been able to do so due to their financial position. The Defendants have pointed out that the Plaintiffs did not pay for their counterclaim of $134,000. In response, PW1 [the plaintiff's witness, Mr Hong Heng Peng] explained, in his own words, that they had held back this amount because they had a valid set-off. That was the reason why they did not pay the Defendants the $134,000. On a balance of probabilities, I accept this reasoning. Given the rise in the price of cables, I find that the Plaintiffs would, in all probability, had the contract not been repudiated, purchased all the outstanding cables due from the Defendants by end 2005. The Defendants have sought to place the burden on the Plaintiffs to show that they (the Plaintiffs) were in a financial position to buy up the remaining cables. I do not think this is correct. If the Defendants wished to assert that the Plaintiffs were, at that time, unable to buy up the remaining cables, they would have the burden to prove it.

That being the case, I find that the Plaintiffs should be permitted to claim for damages for the remaining cables due from the Defendants under the contract. (Emphasis added)

17 Hence, on the issue of whether the plaintiff would have bought up all the remaining cables it needed for the project from the defendant before the end of 2005 should the defendant not agree to extend original contract beyond the end of 2005, the AR had in my view correctly found in the plaintiff's favour that given the rise in the price of cables, the plaintiff would have in all probability purchased all the remaining cables from the defendant by the end of 2005 had the original contract not been repudiated.

18 The plaintiff originally claimed $1,282,576.67 under this item. This was reduced to $1,212,371.07 as the AR felt that the loss should be calculated with reference to the (lower) unit rates in Keystone Cable's quotation of April 2005 instead of the (higher) unit rates in Keystone Cable's September 2005 quotation which the plaintiff eventually accepted. The AR decided that the plaintiff ought not to have delayed firming up the long term supply contract with Keystone Cable until September 2005 in the face of rising cable prices, which was readily apparent to the plaintiff. I had no reason to disagree with this part of the AR's decision.

19 Counsel for the defendant contended that:

(a) it was merely hypothetical that the plaintiff could have purchased the rest of the cables from the defendant by 31 December 2005 under the original contract given its financial position.

(b) the plaintiff's witness, Hong Heng Peng ("Mr Hong"), admitted that the plaintiff was having difficulty collecting payments for the project between October to December 2004.

(c) five cheques issued by the plaintiff for the months of December 2005 and January 2006 were dishonoured by the bank. The plaintiff's bank statement for the month of August 2006 showed that the plaintiff had overdrawn its account and the bank had imposed overdraft interest on the account;

(d) the plaintiff already knew since 2004 that the project would be delayed and yet the plaintiff did not make any overtures to the defendant about extending the validity of the original contract beyond 31 December 2005 nor issue a DI for the remaining cables; and

(e) Mr Hong testified that the plaintiff did not accept the defendant's offer made in early 2005 to deliver the remaining cables because the plaintiff had lost confidence in the defendant.

20 Accordingly, counsel for the defendant submitted that the plaintiff did not and was not likely to have either asked the defendant to extend the original contract or issued a DI for the remaining cables under the original contract.

21 In my view, the real issue was the correct reference baseline to use for assessing and computing the loss arising from the plaintiff having to pay substantially more for the remaining cables that it in fact purchased from its substitute supplier, Keystone Cable (albeit the loss was ordered by the AR to be calculated based on the April 2005 quotation, and not on the September 2005 quotation which formed the basis of the plaintiff's actual supply contract with Keystone Cable). By adopting the lower unit prices in Keystone Cable's April 2005 quotation as the reference baseline, and not the higher unit prices in Keystone Cable's September 2005 quotation, the AR had already penalised the plaintiff for not acting fast enough to mitigate its loss in the face of rising prices for cables.

22 In assessing damages, it would sometimes be unavoidable to make certain reasonable assumptions based on matters that would be reasonably foreseeable. Otherwise, one would not be able to compute the loss. The AR rightly assumed, for the purpose of computing the damages, that if there was no repudiatory breach by the defendant resulting in the original contract being prematurely terminated, the plaintiff would have acted in its own commercial interest to order all the remaining items before the expiry of the original contract in December 2005 in order to "lock in" the supply of cables at lower prices if the plaintiff could not obtain favourable prices from the defendant to continue supplying cables after December 2005. Even if the defendant's allegations that the plaintiff did not have sufficient cash to pay for the pre-order of cables before December 2005 were eventually borne out, it did not necessarily mean that the plaintiff would not be able to obtain external financing to do so. There was no evidence adduced at the hearing before the AR that the plaintiff would be unable to obtain financial assistance from the bank or from other third parties.

23 Be that as it may, whether or not the plaintiff could have used its own resources or borrowed money to finance the purchase of the remaining cables from the defendant before December 2005, the fact remained that the plaintiff might well have to incur additional costs should it pre-order a substantial quantity of cables way in advance and well before the cables were actually needed for the work. This was not considered at all. In my view, these additional costs (if any) ought to be factored into the computation of loss:

(a) the cost of financing the purchase of all the remaining cables before December 2005;

(b) the cost of warehousing the cables;

(c) the cost of insuring and safeguarding the cables; and

(d) any other costs that would have to be incurred for purchasing the cables in advance.

24 Hence, if it could be established that the plaintiff would incur such costs, then the loss suffered by the plaintiff for this item would have to be reduced by the amount of the additional costs the plaintiff would have incurred if it made an advance purchase of all the remaining cables it needed before the expiry of the original contract at the end of December 2005.

25 Consequently, I ordered that item (d) be remitted to the AR for a re-assessment of the damages and both parties would be allowed to adduce fresh evidence in relation to the above additional costs.

Orders made

26 I therefore allowed the defendant's appeal in respect of item (d) with no order as to costs for this part of the appeal, but I dismissed the defendant's appeal pertaining to items (a), (b) and (c) with costs inclusive of disbursements fixed at $1,000 to be paid by the defendant to the plaintiff. I then gave directions for the filing of affidavits for the re-assessment of damages by the AR for item (d) and fixed the matter for pre-trial conference. Consequential adjustments (if any) to the GST and interest awarded would have to be made upon the re-assessment.

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