Join-Aim Pte Ltd *v* BS Mount Sophia Pte Ltd and another
[2012] SGHC 3

Case Number	: OS 643 of 2011
Decision Date	: 09 January 2012
Tribunal/Court	: High Court
Coram	: Tay Yong Kwang J
Counsel Name(s)	: Tan Chee Meng, SC and Quek Kian Teck (WongPartnership LLP) for the plaintiff; Teh Kee Wee Lawrence and Melvin See Hsien Huei (Rodyk & Davidson LLP) for the first defendant; The second defendant unrepresented.
Parties	: Join-Aim Pte Ltd — BS Mount Sophia Pte Ltd and another

Banking – Performance Bonds – Unconscionability

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 143 of 2011 was dismissed by the Court of Appeal on 7 February 2012. See [2012] SGCA 28.]

9 January 2012

Tay Yong Kwang J:

Introduction

1 The plaintiff (the main contractor in a building project) sought an injunction to restrain the 1st defendant (the employer in the building project) from calling on a Performance Bond for the amount of S$360,084.62. [note: 1] This Performance Bond was issued by the 2nd defendant. [note: 2]

2 Having heard arguments by both parties, I decided that the interim injunction granted earlier by Andrew Ang J should stand, pending arbitration between the plaintiff and the 1st defendant. I now set out my reasons.

Facts

Parties to the dispute

3 The plaintiff is a Singapore incorporated company, having its address at Block 201E Tampines Street 23 #04-94, Singapore 527201. [note: 3] It is the main contractor under the Contract (see [6]). [note: 4]

4 The 1st defendant is also a Singapore incorporated company. Its address is at 2 Mistri Road #01-03, Singapore 079624. [note: 5] It is the employer under the Contract. [note: 6]

5 The 2nd defendant issued the Performance Bond in favour of the 1st defendant. [note: 7]

Background to the dispute

The call on the Performance Bond

The call on the Performance Bond

6 The plaintiff, as main contractor, entered into a contract with the 1st defendant, as developer, on 28 February 2008 ("**the Contract**") for the erection of a 5-storey residential development comprising 50 units with swimming pool and basement carparks at 95 Sophia Road, Singapore 228163 ("**the Project**"). [note: 8] The contract was valued at over S$9 million. [note: 9] Its terms were in accordance with the SIA Articles and Conditions of Contract. [note: 10] Pursuant to Clause 41 of the Conditions of Contract (as amended by the Additions to Conditions of Contract), the plaintiff submitted Performance Bond No. SD08B04687 ("**the Performance Bond**") to the 1st defendant for the amount of S$484,440.00. [note: 11]

7 The architect under the Contract was M/s Ronny Chin & Associates of 147B Selegie Road, Singapore 188313 ("**the Architect**"). [note: 12] The quantity surveyor was M/s 1MH & Associates of 10 Lorong 19 Geylang #02-02, Singapore 388492 ("**the QS**"). [note: 13] Other consultants included Portwood & Associates ("**the Structural Engineer**") and Elead Associates ("**the Services Engineer**"). [note: 14]

8 On 4 March 2011, the Architect issued the Completion Certificate which certified that works under the Contract were completed on 27 August 2010. [note: 15] Goh Tong Chuan ("**Goh**"), the Managing Director of the plaintiff, stated in his affidavit that the plaintiff completed the works on 19 May 2010 even though the plaintiff was entitled to an extension of time till 27 October 2010 to complete the works. [note: 16]

9 The director of the Architect, Chin Hong Onn, also known as Ronny Chin ("**Chin**"), stated in his affidavit that the original date for completion under the Contract was 1 January 2010. The extended Completion date was 4 April 2010 after the Architect certified that the plaintiff was entitled to 93 days extension of time by way of the Delay Certificate. As stated earlier (see [8]), the works under the Contract were certified completed as at 27 August 2010. [note: 17]

10 On 30 March 2011, the Architect sent the Completion Certificate to the parties by fax. The following day, the Architect informed the parties by letter of the Completion Date of 27 August 2010. [note: 18]

11 On 24 May 2011, the plaintiff submitted its request for an extension of time of 298 days. The granting of this extension would bring the plaintiff's work in line with the Completion Date of 27 August 2010. [note: 19]

12 On 22 June 2011, the Architect recommended that an extension of time of 24 days be granted to the plaintiff and this brought the total extension of time to 93 days. [note: 20]

13 In an email dated 24 June 2011, the Architect sent the plaintiff a Delay Certificate dated 4 March 2011 which confirmed that:

(a) the plaintiff was granted 93 days extension of time,

(b) the revised completion date was to be 4 April 2010 based on the 93 days extension granted,

(c) the plaintiff was in delay. [note: 21]

14 Goh, in his affidavit, stressed the point that the Delay Certificate was issued only on 4 March 2011, some 6 months after the certified completion of 27 August 2010. [note: 22]

15 On 15 July 2011, and pursuant to Clause 37(1) of the Conditions of Contract, the plaintiff commenced arbitration proceedings against the 1st defendant under the Singapore Institute of Architects ("SIA") Arbitration Rules by way of a Request for Arbitration served on the 1st defendant. [note: 23] The reliefs sought in the arbitration were [note: 24]:

(a) A determination from the Arbitrator to award or otherwise declare an extension of time for the total of 298 days

(b) Prolongation costs and related losses and expense amounting to S$253,339.37 to be paid by 1st defendant to the plaintiff

(c) A determination from the Arbitrator to declare that the plaintiff completed the works under the Contract on 19 May 2010

(d) A determination by the Arbitrator that the plaintiff is entitled to the amount of S$1,197,669.68 claimed under Progress Claim No. 30 (Revision 4) and the said sum of S$1,197,669.68 is rightfully due and payable to the Plaintiff under the Contract

(e) Interest

(f) Costs

(g) Such further or other direction as the Arbitrator deems fit.

16 On 20 July 2011, the plaintiff sent the 1st defendant's solicitors a list of proposed arbitrators. Goh's affidavit stated that the 1st defendant completely disregarded the Request for Arbitration and the system for dispute resolution and instead made an unconscionable demand on the Performance Bond without any prior notice to the plaintiff. [note: 25] The 1st defendant replied in its written submissions that this assertion was mischievous and misleading, that the SIA Rules provided that a response was optional and that the 1st defendant did not need to file any response. [note: 26]

17 On 27 July 2011, the 1st defendant made a demand for the amount of S$360,084.62 under the Performance Bond shortly after being served with the Request for Arbitration. [note: 27]

18 On 2 August 2011, the plaintiff obtained an interim injunction restraining the 1st defendant from calling on the Performance Bond. [note: 28]

19 In the light of Clause 2 of the Performance Bond and the 1st defendant's demand, the 2nd defendant informed the plaintiff that unless an injunction was obtained, payment would be made as demanded by 29 July 2011. [note: 29]

Plaintiff's progress claims

20 On 16 May 2011, the plaintiff submitted Progress Claim No. 30 (Revision 4) pursuant to clause 31(2) (a) of the Conditions of Contract for the amount of S$1,197,669.68, in respect of (i) variation works carried out by the plaintiff after completion of the Contract works under Architect's Instructions No. 38-56, and (ii) variation works carried out by the Plaintiff under several Variation Orders issued by the Architect. In Goh's affidavit, it stated that the 1st defendant and the Architect did not dispute Progress Claim No. 30 (Revision 4) but they also did not provide any payment response. On 14 June 2011, Progress Claim No. 30 (Revision 4) was resubmitted by the plaintiff to the Architect and the 1st defendant. According to Goh, this amount remains due and outstanding from the 1st defendant to the plaintiff.

Summary of Pleadings

21 The plaintiff submitted that the injunction ought to be continued on the ground on unconscionability. [note: 30]

22 The 1st defendant, unsurprisingly, opposed the plaintiff's application for the injunction restraining the 1st defendant from calling on the Performance Bond to be continued.

Plaintiff's Case

23 The plaintiff, in support of its case, essentially stated that [note: 31] :

(a) The amount called for by the 1st defendant under the performance bond was incorrect,

(b) The 1st defendant was not entitled to any liquidated damages, as:

(i) Any delays were caused by the 1st defendant and/or the 1st defendant's consultants

(ii) The Delay Certificate was not issued in accordance with clause 24(1) of the Conditions of Contract.

(c) The call on the Performance Bond was made for a collateral purpose, in retaliation to the Request for Arbitration and was a call made in bad faith.

24 In Goh's affidavit, he stated that it would be "patently unfair" for the 1st defendant to receive payment under the Performance Bond when prolongation costs of S$253,339.37 and the amount of S$1,197,669.68 under Progress Claim No. 30 (Revision 4) remained due and outstanding from 1st defendant to the plaintiff. He also stated that there was no conceivable loss on the part of the 1st defendant that entitled it to make a demand on S$360,084.62. [note: 32]

Respondent's Case

25 The 1st defendant painted the background to the case as such [note: 33] :

(a) By a Delay Certificate dated 4 March 2011, the Architect certified that the plaintiff was granted a total of 93 days extension of time under the Contract. The Completion Date was then extended to 4 April 2010.

(b) By a Completion Certificate dated 4 March 2011, the Architect certified that the works under the Contract were completed on 27 August 2010. The plaintiff was therefore 145 days in delay. [note: 34] Pursuant to the provision on liquidated damages for delay under the Contract, the 1st defendant was entitled to damages of (145 days * $6,000/day [note: 35]) = S$870,000.00.

(c) On 22 July 2011, the quantity surveyor for the Contract advised the 1st defendant that based on the draft final accounts as of 8 July 2011, the value of works carried out by the plaintiff that remained uncertified was S$29,782.90. [note: 36] The 1st defendant also withheld S$480,132.48 as retention money. Accordingly, the balance sum due to the 1st defendant was (S$870,000.00- S$29,782.90 - S$480,132.48) = S$360,048.62

(d) Accordingly, the 1st defendant's case was that it was entitled to call on the Performance Bond on 27 July 2011 for the sum of S$360,084.62, being a partial call on the Bond's full value of S$484,400.00.

26 The 1st defendant argued that:

(a) It was entitled to be paid liquidated damages as compensation for its loss;

(b) The Architect's replies to the extension of time requests were based on the considered views of the consultants;

(c) Allegations of conspiracy or interference regarding the Architect's certifications on the extensions of time were baseless;

(d) The extended completion date was 27 August 2010 and could not have been 19 May 2010;

(e) The plaintiff's delay in clearing Powergrid testing was not material in considering whether the Performance Bond could be called on;

(f) There were valid reasons for the time lapse in the issuance of the Completion Certificate;

(g) The Contract provided the date when the Delay Certificate was to be issued;

(h) The plaintiff could not have implemented "catch up" measures after receiving the Delay Certificate;

(i) Disputes over the plaintiff's progress claims were to be arbitrated and was not material in considering whether the Performance Bond could be called on;

(j) The Performance Bond could be called on even though claims between parties were to be referred to arbitration;

(k) There was no need for the 1st defendant to respond to the Request for Arbitration;

(l) There was no agreement between the 1st defendant and the plaintiff to not call on the Performance Bond if its validity was extended;

(m) The 1st defendant was entitled to the full sum claimed under the Performance Bond.

The decision of the court

27 The main issue in the case was whether the plaintiff had shown that there was unconscionable conduct on the 1st defendant's part which would warrant a restraint on the call on the Performance Bond.

28 As can be seen from the facts, the parties also raised a myriad of other matters during the hearing. Such matters included, *inter alia*, disputes over extensions of time, who was to blame for the delay in clearing Powergrid testing [note: 37] and disputes over which party was liable to pay the other and how much each had to pay.

29 In my opinion, these concerned run of the mill construction disputes which were properly the subject of the arbitration. I held that these issues were not for the determination of this court in an application of this nature. Accordingly, I decided the case on the one issue which was sufficient to dispose of the matter before me and I turn to address that now.

Was there unconscionable conduct on the part of the 1st defendant which required the call on the Performance Bond to be restrained by injunction?

Applicable law

30 The law as to when the court may restrain a call on a performance bond was set out in the case of *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47, where the Court of Appeal stated:

> *It is now well established that, under our law, apart from fraud (which is the traditional ground for restraining a call on a performance bond), unconscionability is a separate and independent ground for the court to grant an interim injunction restraining a beneficiary from making a call on a performance bond* (see, inter alia, *Bocotra Construction Pte Ltd v AG* [1995] 2 SLR(R) 262 at [53] and *GHL Pte Ltd v Unitrack Building Construction Pte Ltd* [1999] 3 SLR(R) 44 at [16] and [20]; see also the GD at [6]-[7]). This is wider than the English position, which requires fraud to be clearly proved before a call on a performance bond can be restrained.
>
> [emphasis added]

31 In the recent case of *Astrata (Singapore) Pte Ltd v Tridex Technologies Pte Ltd* [2011] 1 SLR 449, Philip Pillai J surveyed the leading cases on the law on applications to restrain calls on performance bonds. The judge distilled the following principles from the cases (at [73]):

(a) Whether there is unconscionability depends on the facts of each case. There is no pre-determined categorisation.

(b) In determining whether a call on a bond is unconscionable, the entire picture must be looked at, taking into account all the relevant factors.

(c) The concept of unconscionability 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.

(d) While in every instance of unconscionability there would be an element of unfairness, the reverse is not necessarily true. Unfairness *per se* does not constitute unconscionability.

(e) In intervening in a call on an on-demand bond/guarantee, the court is concerned with abusive calls on the bonds.

(f) Mere breaches of contract by the party in question would not by themselves be unconscionable.

(g) It is important that the courts guard against unnecessarily interfering with contractual arrangements freely entered into by the parties. The parties must abide by the deal they have struck.

The Performance Bond

32 The relevant clauses in the Performance Bond were:

1. In consideration of you not insisting on the Contractor paying **SINGAPORE DOLLARS FOUR HUNDRED EIGHTY FOUR THOUSAND FOUR HUNDRED AND FORTY ONLY (S$484,440/-)** as a security deposit for the Contract, we hereby irrevocably and unconditionally undertake, covenant 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 FOUR HUNDRED EIGHTY FOUR THOUSAND FOUR HUNDRED AND FORTY ONLY (S484,440/-) ("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.

3. We hereby confirm and agree that we shall be under no duty or responsibility to inquire into:

a. The reason or circumstances of any demand hereunder, or

b. The respective rights, obligations and/or liabilities of yourselves and the Contractor under the Contract, or

c. The authenticity of your notice or the authority or entitlement of persons signing such notice, but that we shall be entitled to and shall rely upon any written demand by you hereunder.

33 The nature of the Performance Bond was not disputed.

The email setting out the "practical completion date"

34 During the hearing, my attention was drawn to an email sent by one Elfren Turiano, an "Architectural Associate" of the Architect. The email was sent on 4 October 2011, from Turiano to, *inter alia*, Richard Goh and Selvin Teo, who were the Managing Director and the Project Manager of the plaintiff respectively. The email is in the following terms:

Dear All,

We are currently preparing the Completion Cert and we came up to finalised the date on **July 19th** as the practical completion date.

Please revert back to us if you have any comment or objections before 8th October.

Regards,

Elfren Turiano

Architectural Associate

RONNY CHIN ARCHITECTS PTE LTD

35 Ronny Chin, the director of the Architect, took pains in his affidavit to state that "the Architect was not influenced by or interfered with in its decisions on EOT, the Delay Certificate and the Completion Certificate" [note: 38] and that the "Architect's decisions on time were all based on the recommendations of the consultants in the Project" [note: 39].

36 These statements arose because the Architect had sent letters to the 1st defendant seeking "concurrence" on the Architect's recommendation of extensions of time. In his affidavit, Ronny Chin stated that it was his personal style to use a softer approach rather than dictate his decision to the 1st defendant and stated that upon hindsight, this might not have been an appropriate phrase to use. [note: 40] Here it was evident that the Architect was attempting to stave off allegations that the Architect's certificates were not issued in a *bona fide* manner. [note: 41]

37 However, there was still no acceptable explanation presented as to why the completion date appeared to have been changed from 19 July 2010 to 4 April 2010. This, in essence, was a backdating of the completion date. Counsel for the 1st defendant, in the hearing before me, admitted that the 1st defendant had no real answer on why the date was changed. The materiality of the change in date was evident; the change of date from 19 July to 4 April resulted in the plaintiff incurring $700,000 worth of liquidated damages. This amount of liquidated damages formed the substantial basis of a call on the Performance Bond. This exhibited a strong *prima facie* case of unconscionability and I was concerned that this was an abusive call on the bond. As I stated above (in [27]-[29]), the cross allegations of breaches of contract fell to be dealt with in the arbitration proceedings and so I did not consider them in coming to the conclusion that the 1st defendant acted unconscionably.

38 I also kept in mind the oft repeated warning that the courts should guard against unnecessarily interfering with contractual arrangements freely entered into by the parties: *Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 3 SLR(R) 198, *Anwar Siraj and anor v Teo Hee Lai Building Construction Pte Ltd* [2003] 1 SLR(R) 394 at [16]. Having considered this, I was of the view that the parties did not enter into a contract where the completion date could be, without good reason, unexpectedly pushed back by the Architect after having been previously confirmed by him.

39 Despite the other allusions to collusion between the Architect and the 1st Defendant, it was the unexplained reference to 19 July as the practical completion date by the Architect in the email and the subsequent use of 4 April as the completion date that was decisive in my decision that the

conduct of the 1st defendant evidenced unconscionability.

Conclusion

40 I therefore ordered the interim injunction to stand. Costs fixed at $18,000 plus reasonable disbursements were awarded to the plaintiff, such costs to be paid by the 1st defendant.

[note: 1] Plaintiff's Skeletal Submissions ("PS") at para 1

[note: 2] Affidavit of Goh Tong Chuan ("Goh") at para 12, DS at para 7

[note: 3] Goh at para 6

[note: 4] 1st Defendant's Written Submissions ("DS") at para 5

[note: 5] Goh at para 6

[note: 6] DS at para 5

[note: 7] Affidavit of Ang Song Lim, Project Manager of the 1st Defendant ("ASL") at para 6

[note: 8] DS at para 4, PS at para 3, ASL at Para 5

[note: 9] Goh at para 9

[note: 10] Goh at para 9

[note: 11] Goh at para 12, PS, para 3-4, DS at para 7

[note: 12] Goh at para 10

[note: 13] Goh at para 10

[note: 14] Chin at para 9

[note: 15] Goh at para 38

[note: 16] Goh at para 46

[note: 17] Chin at para 6

[note: 18] Chin at para 16(e)

[note: 19] Chin at para 16(f)

[note: 20] Chin at para 16(g)

[note: 21] Goh at para 39

[note: 22] Goh at para 40

[note: 23] Goh at para 15(d)

[note: 24] Goh at 27

[note: 25] Goh at para 29

[note: 26] DS at paras 93-94

[note: 27] PS, para 6

[note: 28] PS, para 7

[note: 29] Goh at 14

[note: 30] PS, para 7

[note: 31] PS, paras 11-25

[note: 32] Goh at paras 45-46

[note: 33] DS, para 8-13

[note: 34] ASL at para 7

[note: 35] ASL at para 13

[note: 36] ASL at para 7

[note: 37] Affidavit of Teo Will Chye, Project Manager of the Plaintiff ("Teo") at paras 17-58

[note: 38] Chin at para 17

[note: 39] Chin at para 17

[note: 40] Chin at para 11

[note: 41] Chin at para 7

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