IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 94

Originating Summons No 177 of 2019

Between

BWN

… *Applicant*

And

BWO

… *Respondent*

GROUNDS OF DECISION

[Building and Construction Law] — [Building and construction related contracts] — [Guarantees and bonds]
[Credit and Security] — [Performance bond]

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BWN
v
BWO

[2019] SGHC 94

High Court — Originating Summons No 177 of 2019
Ang Cheng Hock JC
11 February 2019

12 April 2019

Ang Cheng Hock JC:

Introduction

1 This was an *ex parte* application by the applicant for an interim injunction to restrain the respondent from calling on and/or receiving payment on performance bonds issued by the applicant's bankers in the context of a dispute over a construction project where there is already an ongoing arbitration between the applicant and respondent. After hearing the applicant on an urgent basis, I granted the order sought. The respondent did not apply to set aside the order but instead appealed against it. I set out herein the grounds of my decision.

Background to the application

2 The applicant is a construction company specialising in, amongst other things, interior decoration. The respondent is a building and construction company who was appointed as the main contractor for works pertaining to a

hotel located at [address redacted] ("the Project").

3 The applicant was engaged by the respondent in the capacity of a nominated sub-contractor under two separate sub-contracts ("the Sub-Contracts"):

(a) The Nominated Sub-Contract for Hotel Works; and

(b) The Nominated Sub-Contract for Retail Podium Works.

4 Both Sub-Contracts are governed by the Singapore Institute of Architects Conditions of Sub-Contract for use in conjunction with the Main Contract (4th Ed, 2011) ("the SIA Conditions"). The SIA Conditions contain an arbitration clause.

5 As is usual in the construction industry, the Sub-Contracts required the applicant, as the sub-contractor, to furnish performance bonds from a bank in favour of the respondent of an amount equal to 10% of the Sub-Contract sum. Pursuant to this requirement, the applicant procured its bankers, United Overseas Bank Limited ("UOB"), to issue two performance bonds in favour of the respondent, one for each Sub-Contract ("the performance bonds").[1] The total guaranteed amount by UOB under the performance bonds is $1,054,637.00.

6 Both the performance bonds were "on demand" guarantees, which had terms that are *in pari materia*. It was provided in both performance bonds that:[2]

> [UOB] unconditionally and irrevocably undertakes and

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1 Affidavit of Tan Kin Siong ("TKS affidavit") at pp 2506 – 2508, and pp 2510 – 2512.

2 TKS affidavit, pp 2507, 2511.

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> covenants to pay in full forthwith upon demand in writing any sum or sums that may from time to time be demanded by [the respondent] *up to a maximum aggregate sum of* … without requiring any proof that [the respondent] is entitled to such sum or sums under [the Sub-Contract] or that [the applicant] has failed to execute [the Sub-Contract] or is otherwise in breach of [the Sub-Contract]. [original emphasis omitted; emphasis added in italics]

7 I should add that both performance bonds are valid from 1 April 2016 to 31 August 2019, but will automatically be extended for successive periods of six months each, unless UOB gives the respondent prior notice of its intention not to extend the performance bonds, whereupon the respondent will then be entitled, amongst other things, to call for payment under the bonds: cl 3 of the performance bonds.[3]

8 The commencement date of the Project was 1 April 2016 and the contract completion date was 30 November 2017. However, that completion date was extended several times due to various delays in the Project. At the time of the hearing before me, the Project had been substantially completed and the owner was inspecting the work for defects.

9 Disputes arose between the applicant and respondent in late 2017 over whether the respondent should have granted an extension of time to the applicant for the latter to complete its works. The applicant then commenced arbitration proceedings against the respondent on 25 April 2018, pursuant to the arbitration clauses in the two Sub-Contracts.

10 By September 2018, the parties had filed all their pleadings in the arbitration.

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[3] TKS affidavit, pp 2507, 2511.

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11 In January 2019, the applicant filed an application under s 211B(1) of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act") to seek a moratorium for a period of 90 days to, amongst other things, restrain all proceedings against the applicant while it pursued ongoing plans to propose a scheme of arrangement under s 210 of the Companies Act in relation to the amounts that are owed to its creditors ("s 211B application"). On 7 February 2019, I heard the applicant and several of its creditors on that s 211B application. I granted the moratorium sought save that, amongst other things, the arbitration proceedings between the applicant and respondent was permitted to continue. The reason for this was that the scheme to be proposed by the applicant was premised on the continuing of the arbitration. This was because the applicant was said to have a substantial claim against the respondent in the arbitration. Recovery from a successful outcome in the arbitration would go into the pool of assets for distribution to the applicant's creditors.

12 Three days before the hearing of the s 211B application, on 4 February 2019, the respondent called on *the full amount* in the performance bonds by giving notice in writing to UOB.[4] Both notices simply stated, in its material part, that "[w]e hereby give your office notice that the contractor … is in breach of the contract with our office".

13 The applicant only learnt on Thursday, 7 February 2019 after the hearing of the s 211B application that there had been a call on the performance bonds. The preceding two days, 5 and 6 February 2019, were the Chinese New Year public holidays. The applicant then filed this application and its supporting affidavit on Monday, 11 February 2019. Due to the urgency of the matter, the application was filed on an *ex parte* basis. I acceded to the request of the

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4 TKS affidavit, pp 2504, 2505, 2509.

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applicant to hear the application in the evening of the same day.

The hearing on 11 February 2019

14 Counsel for both the applicant and respondent appeared before me for the hearing of this matter. I was informed by counsel for the applicant, Mr Shankar s/o Angammah Sevasamy ("Mr Shankar"), that the papers for the application had just been served on the respondent's solicitors. Mr Benedict Tan Yixun ("Mr Tan"), who appeared for the respondent, confirmed that.

15 Mr Tan informed me that he had his client's instructions to appear at the hearing and state its objections to the application. Other than that, he had no "detailed instructions" yet. He did not apply for an adjournment nor did he ask for time for the respondent to file an affidavit in reply to the applicant's affidavit in support of the application. As such, the application proceeded before me as an *ex parte* hearing, albeit with opposing counsel present.

16 Mr Shankar's submission on behalf of the applicant was that the respondent had acted unconscionably in calling on the performance bonds. Several points were made. First, it was argued that, while the strict terms of the performance bonds were complied with when the calls on the bonds were made, the respondent had not sufficiently shown that cl 25.1 of the Supplementary Conditions to both of the Sub-Contracts was applicable. The clause in question provides that the respondent can draw on the performance bonds "in pursuance of any Conditions herein where [the respondent] is entitled to deduct any monies from [the applicant]".[5] Mr Shankar argued that the Sub-Contracts thus made it clear that the respondent could call on the performance bonds only when it was entitled to claim a deduction of monies pursuant to a condition of the Sub-

[5] TKS affidavit, pp 130, 1552.

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Contracts from any sums due to the applicant. However, the respondent had not explained or clarified which condition of the Sub-Contracts it was relying on to assert that it was entitled to claim such deductions of monies from the applicant. As already referred to earlier at [12], its notices to UOB simply stated that the applicant had breached the Sub-Contracts. There was also no explanation as to why the full amount of the bonds were being called upon. In other words, the call on the performance bonds were not substantiated.

17 Mr Shankar's second main argument was that, in any event, the issue of whether the respondent is entitled to claim any deduction from the payments due to the applicant is already a matter before the arbitral tribunal in the arbitration, where the respondent has raised a substantial counterclaim. He explained that the reason the applicant had not applied to the arbitral tribunal for an interim injunction in respect of the call on the performance bonds was because it was unclear whether the rules which governed the arbitration granted the tribunal the power to grant such interim relief. Also, and more importantly, because of the urgency of the matter, given that UOB was imminently about to make payment on the bonds to the respondent, there was not enough time to seek interim relief before the tribunal.

18 Finally, Mr Shankar pointed out that the dispute between the parties as to whether the applicant was entitled to an extension of time has been brewing since November 2017. The applicant's solicitors' first letter was sent to the respondent on the issue in February 2018.[6] However, the respondent waited until 4 February 2019 to call on the performance bonds. The timing of the call, on the eve of Chinese New Year, also suggested that the respondent was being "strategic" – it was hoping the applicant would not have time to react and obtain

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6 TKS affidavit, pp 2514-2515.

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injunctive relief. Worse, the respondent had appeared at the s 211B hearing on the morning of 7 February 2019 and did not apprise the court of the call on the bonds. Instead, the respondent did not object to the s 211B application and, in fact, argued that the moratorium should also cover the arbitration proceedings. In other words, the respondent was trying to stymie the applicant's claim against it in the arbitration and delay the arbitral adjudication of its counterclaim, while at the same time calling for immediate payment under the performance bonds.

My decision

19 It is well established under our law that, quite apart from fraud, unconscionability exists as a distinct ground which may be invoked in seeking an order for the court to restrain payment on a demand under a performance bond: *Bocotra Construction Pte Ltd and others v Attorney-General* [1995] 2 SLR(R) 262 at [46], [48] and [53]; *GHL Pte Ltd v Unitrack Building Construction Pte Ltd and another* [1999] 3 SLR(R) 44 at [16] and [20]; *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 at [6], [9]–[11] and [13]; *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 ("*Mount Sophia*") at [18]; and *Arab Banking Corp (B.S.C) v Boustead Singapore Ltd* [2016] 3 SLR 557 ("*Arab Banking*") at [101]–[104]. As the Court of Appeal stated in *Arab Banking* at [104]:

> … Essentially, it seems to us that the unconscionability exception exists because we recognise that in certain circumstances, even where the account party [the party who procured the performance bond to be issued in favour of the beneficiary] cannot show that the beneficiary had been fraudulent in calling on the bond, it would nevertheless be unfair for the beneficiary to realise his security *pending resolution of the substantive dispute*. In other words, on one view, the unconscionability exception serves to protect the account party from unfair demands by the beneficiary to have the secured sum in hand in circumstances where there has not yet been a final determination as to whether he is actually entitled to that sum. … [emphasis in original]

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20 It has been said that unconscionability encompasses elements of abuse, unfairness or dishonesty: *Mount Sophia* at [19]. Unconscionability is broader in scope than fraud, and it acknowledges that conduct exhibited by the beneficiary other than fraud might be sufficiently reprehensible to justify intervention by way of equitable relief: *Mount Sophia* at [23]. Unconscionability is a label applied to describe unsatisfactory conduct tainted by bad faith, and a precise definition of the concept of unconscionability would not be useful because its value is its flexibility in that it can capture a wide range of conduct demonstrating a lack of *bona fides*: *Mount Sophia* at [36]. The Court of Appeal in *Mount Sophia* went on state at [37]:

> Although unconscionability itself may not carry a precise definition, from the beneficiary's point of view, what constitutes unconscionable conduct should be reasonably apparent. ... If the beneficiary's call on the bond is motivated by improper purposes, *or such a call cannot be justified with clear evidence*; or in any other situation where the beneficiary is less than certain about his entitlement to call on the bond and for what amount, the beneficiary ought to take a step back and re-examine its entitlement and conduct prior to calling on the bond. … [emphasis added]

21 The party seeking relief must show a strong *prima facie* case of unconscionability; the court will consider all the relevant facts of the case, taking into account the parties' conduct leading up to the call on the bond: *Mount Sophia* at [20], [44]–[45].

22 In this case, on the basis of the applicant's affidavit evidence, and after hearing the matter on an *ex parte* basis, I find that the applicant has shown a strong *prima facie* case of unconscionability in the call on the performance bonds made on 4 February 2019. This is because it appeared to me that cl 25.1 of the Supplementary Conditions to the Sub-Contracts has not been satisfied. That clause provided the contractual basis for the respondent's entitlement to call on the bonds. It permits the respondent to draw from the performance bonds

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where the respondent is otherwise entitled to deduct any monies from sums due to the applicant *pursuant to a condition of the Sub-Contract*. There was no indication by the respondent in its call on the bonds, or in any of the correspondence before me, which Sub-Contract condition it was relying on to claim payment from the applicant. A mere reference to the applicant being in breach of the Sub-Contract may be sufficient for the purposes of the terms of the bonds, but that is certainly not sufficient as between the applicant and respondent *inter se* in the context of this application for interim relief. When I asked Mr Tan whether he could inform me which condition of the Sub-Contract the respondent was relying on to claim payment from the applicant, his answer was that he would need to take his client's instructions before he could deal with this point.

23 Furthermore, the timing of the call on the performance bonds does call into question the *bona fides* of the respondent. There was no explanation in any of the correspondence placed before me as to the reason the respondent had decided only to call on the performance bonds almost ten months into the arbitration proceedings where it had already raised a substantial counterclaim against the applicant. Neither was there anything in the correspondence as to why the respondent was calling on the full guaranteed sum under the performance bonds, that is, $1,054,637.00. The circumstances were clearly such that some clear explanation of the respondent's conduct and substantiation of its claim was called for. However, as mentioned earlier at [15], there was no indication that the respondent wished to file an affidavit in reply to the application.

24 In this regard, I did not have the benefit of the papers that the parties had filed in the arbitration before me so I could not discern the basis of the respondent's allegation that there were breaches of contract by the applicant and

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what it was claiming via its counterclaim in the arbitration.

25 Mr Tan did, however, inform me that, apart from the applicant's breaches of the Sub-Contract, the respondent was also relying on cl 13.4 of the SIA Conditions (which form part of the Sub-Contracts), which provides, amongst other things, that should the applicant enter into any agreement of composition or deed of arrangement with its creditors, then the Sub-Contract would be automatically terminated with the applicant being liable for damages as if it had wrongfully repudiated the Sub-Contract.

26 I did not see how cl 13.4 could apply to the situation at hand since the applicant had not yet, as at the date of the hearing, entered into any deed of arrangement with its creditors. What had been ordered on 7 February 2019 in the s 211B application was a moratorium for a period of 90 days to enable the applicant to *propose* a scheme of arrangement. Also, when Mr Shankar informed me that the parties were still proceeding with the Sub-Contract on the basis that it was still alive, with some works still being carried out by the applicant, Mr Tan acknowledged that this was in fact the case.

27 For the reasons above, I was of the view that the applicant had, on its affidavit evidence before me, shown that the respondent's call on the performance bonds was not in accordance with cl 25.1 of the Supplementary Conditions to the Sub-Contracts, and that the respondent's conduct was unfair and lacking in *bona fides*. Hence, the applicant had established a strong *prima facie* case, on an *ex parte* basis, that the call on the performance bonds was unconscionable and should be restrained by way of an injunction.

28 The applicant had prayed for the injunction to last until and unless the applicant is adjudged by the arbitral tribunal to be liable for sums due to the

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respondent in the ongoing arbitration. Given that the tribunal would undoubtedly be more familiar with the details of the dispute between the parties and their respective claims against each other, I indicated to the parties that I was minded to order that the interim injunction restraining receipt of monies by the respondent under the performance bonds would last only until such time that the issue can be properly considered by the arbitral tribunal – the issue being whether an injunction should be in place, until a determination by the tribunal of the sums, if any, due from the applicant to the respondent. Such an approach would be consistent with ss 31(1) and (2) of the Arbitration Act (Cap 10, 2002 Rev Ed) ("Arbitration Act") which provides that:

> **Court's powers exercisable in support of arbitral proceedings**
>
> **31.**—(1) The Court shall have the following powers for the purpose of and in relation to an arbitration to which this Act applies:
>
> …
>
> (*d*) an interim injunction or any other interim measure.
>
> (2) An order made by the Court under this section shall cease to have effect in whole or in part (as the case may be) if the arbitral tribunal, or any such arbitral or other institution or person having power to act in relation to the subject-matter of the order, makes an order which expressly relates to the whole or part of that order of the Court.

29 The respondent's counsel, Mr Tan, expressed his agreement to such an approach. He informed me that the respondent would actually prefer to argue this issue *inter partes* before the tribunal at a subsequent date, if the court was going to grant the interim injunction on an *ex parte* basis for the time being. This was a sensible position for the respondent to take.

30 As for Mr Shankar's concern that the rules governing the arbitration did not give the tribunal such powers to grant an interim injunction, I did not agree

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that such a concern should prevent me from making the order. The arbitration clause in this case was the usual one in the SIA Conditions. The arbitration was governed by the Arbitration Rules of the Singapore Institute of Architects for the time being in force.[7] Article 5.1 of these rules provide that the tribunal has the widest discretion allowed by law to ensure a just, expeditious, economical and final determination of the dispute between the parties. In my view, it was for the arbitral tribunal to decide in the first instance, after hearing full arguments from parties, whether it had the power to grant an interim injunction against the respondent. It was also open for parties to agree that the tribunal can exercise such a power if there was any doubt as to its existence: s 28(1) of the Arbitration Act. It appeared to me that the respondent would not be taking the point that the tribunal lacked such a power given that Mr Tan had informed me that the respondent would prefer to argue the issue *inter partes* before the tribunal. In any event, if the tribunal did nonetheless decide that it lacked such a power for whatever reason, it would be open for either party to apply to court to vary my order or set it aside if there was a basis to do so.

31 For the above reasons, I granted the interim injunction sought but on terms that it should subsist only until any further order by the arbitral tribunal to vary, discharge or affirm the injunction. I also reserved the costs of the application to the arbitral tribunal.

32 On 14 February 2019, the respondent's solicitors wrote to court to ask for further arguments to persuade me that the order I made should not have been granted in the first place. Given that the application was heard on an *ex parte* basis, this was a rather puzzling request. I directed the Registry to write to the respondent's solicitors to inform them that, if the respondent wished to set aside

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7 TKS affidavit, p 113.

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the order made on 11 February 2019, it should file an application to set aside the order. I would then hear the parties *inter partes*. In my view, writing in for further arguments was not the proper step to take because the respondent's counsel had not made any substantive arguments at the hearing on 11 February 2019. I thus declined to hear any further arguments.

Ang Cheng Hock
Judicial Commissioner

Shankar s/o Angammah Sevasamy, Partheban s/o Pandiyan and Muralli Rajaram (K&L Gates Straits Law LLC) for the applicant;
Tan Yixun, Benedict (Essex LLC) for the respondent.

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