

Chew Pin Pin v AGF Insurance (Singapore) Pte Ltd
[2001] SGHC 40

Case Number : DC Suit 51183/1999
Decision Date : 01 March 2001
Tribunal/Court : High Court
Coram : Choo Han Teck JC
Counsel Name(s) : Monica Neo Kim Cheng (Chan Tan & Partners) for the plaintiff;; Florence Koh (Florence Koh & Partners) for the defendant
Parties : Chew Pin Pin — AGF Insurance (Singapore) Pte Ltd

Banking – Performance bonds – Call on bond – Whether bondsman seeking to resist call has recourse to underlying contract between employer and contractor where contractor not party to suit

: This is an unusual case in which the bondsman, an insurance company, sought to resist a call on the performance bond issued by it. The plaintiff employed TDS Construction Pte Ltd (`TDS`) (by a contract dated 9 September 1997) to construct and build three houses at Robin Road. Pursuant to the contract between them TDS procured a performance bond issued by the defendant in the plaintiff`s favour. The relevant provisions of the (undated) bond provide as follows:

1 In consideration of [the plaintiff] not insisting on [TDS] paying Singapore Dollars Two Hundred and Five Thousand only (S\$205,000) as a security deposit for the Contract, we hereby irrevocably and unconditionally undertake, covenant and firmly bind ourselves to pay you on demand any sum or sums which from time to time be demanded by you up to a maximum aggregate of Singapore Dollars Two Hundred and Five Thousand only (S\$205,000) (`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 for 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 [TDS] and notwithstanding any dispute or difference which may have arisen under the Contract or any instruction which may be given to us by [TDS] not to pay the same.

The said bond expired on 31 December 1999. The plaintiff called upon the bond through her solicitor`s letter dated 25 October 1999. The defendant failed to pay and the plaintiff commenced action against it on 19 November 1999. There is no evidence that the contractor or the defendant had offered to extend the period of the bond. The plaintiff obtained summary judgment on 29 February 2000. District Judge Tan Puay Boon dismissed the defendant`s appeal on 8 May 2000. The defendant appealed against that decision to the High Court and the appeal came before me.

Miss Koh argued on behalf of the defendant that there are triable issues for the matter to proceed to trial. Essentially, the defendant`s case was that the plaintiff`s call on the bond was not made in good faith, and that it was therefore fraudulently or unconscionably made. Counsel argued that the plaintiff owed TDS a sum of \$420,976.53. This was the amount which TDS has submitted to the Official Receiver as a debt owing to them by the plaintiff. TDS had agreed to \$102,500 as the retention sum

in the construction contract. The plaintiff, on the other hand is claiming liquidated damages for 155 days at \$2,500 a day, amounting to \$387,500; \$133,797 as damages for rectification of defective work; and \$22,000 being consultant fees payable in respect of the calling of a fresh tender. There is no doubt that there was a dispute between the plaintiff and TDS over these moneys. It is also obvious that that dispute can only be resolved at trial. The problem here is that these present proceedings do not involve TDS. This was an action taken by the plaintiff against the bondsman.

Miss Koh submitted that the bondsman is entitled to refer this court to the underlying contract between the employer and the contractor in order to uncover the fraud and unconscionable conduct that the defendant bondsman is relying on. Counsel cited **GHL v Unitrack Building Construction [1999] 4 SLR 604** (among several other cases) as the authority for laying down the principles for judicial intervention when a performance bond is being called upon, and in her submission, the present facts fall within those principles.

The authorities cited, are clearly binding on this court if the facts and issues in dispute here are similar to those in the cases cited. With respect, however, the present case is significantly different. In this case, the contractor is not a party to the suit. The foremost question therefore, is whether the bondsman is entitled to refer to the underlying contract and the alleged unconscionable conduct on the part of the plaintiff in these circumstances. I agree entirely with the district judge, that the defendant as bondsman has no recourse to the underlying contract between the employer and the contractor. The judge held at p 6 of his judgment that:

... the bondsman is a stranger to the underlying contract, and the rights and liabilities inter se between him and the beneficiary under the performance bond are governed entirely by the terms of that instrument. So long as the conditions for calling on the bond are met, the bondsman has to pay. As between him and the beneficiary, there is no reason to postpone the realisation of the security, as there is nothing between them which requires investigation. His recourse after paying the beneficiary is to the party who procured the issue of the bond.

In the usual case, the contractor would be the party seeking an injunction against the employer from calling on the bond. In that context, the reference to the underlying contract would be the contract of employment, that is, the contract underlying the issue of the bond. The reference to the underlying contract in this instance is misleading. The only relevant contract is that made between the plaintiff and the defendant bondsman wherein in consideration of the plaintiff not seeking a security deposit from the contractor (TDS), the defendant warrant that it will pay the plaintiff the bond amount upon demand without question. I think that this is the only conclusion one can reach if any meaning is to be given to the defendant's contractual declaration that it had 'hereby irrevocably and unconditionally undertake, covenant and firmly bind ourselves to pay you on demand any sum or sums which from time to time be demanded by you ... without further reference to the contractor and notwithstanding any dispute or difference which may have arisen under the contract or any instruction by the contractor not to pay'. Miss Koh submitted that the contractor had been wound up. But that does not prevent the Official Receiver from pursuing the cause.

The defendant was somewhat harshly described by the district judge as 'a lightning rod in attracting controversies in the bonds in which they have issued, having featured in at least two cases, **GHL v Unitrack Building Construction [1999] 4 SLR 604** and **Raymond Construction v Low Yang Tong** (Unreported) , where payments under the bonds they issued were restrained'. The circumstances in this case are different, but nonetheless there is no merit, in my view, in the defence they sought to

raise. They had contracted to pay upon demand irrespective of any dispute between the plaintiff and TDS, and they must do so. Accordingly, the appeal is dismissed.

Outcome:

Appeal dismissed.

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