MEA Environment (Asia Pacific) Pte Ltd v 800 Super Waste Management Pte Ltd [2008] SGHC 157

Case Number : Suit 468/2007

Decision Date : 22 September 2008

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : Leo Cheng Suan and Teh Ee-Von (Infinitus Law Corporation) for the plaintiff; Foo Maw Shen and Koh Kia Jeng (Rodyk & Davidson LLP) for the defendant

Parties : MEA Environment (Asia Pacific) Pte Ltd — 800 Super Waste Management Pte Ltd

Contract – liquidated damages and penalty clauses

22 September 2008

Lee Seiu Kin J:

1 The plaintiff is a company in the business of supplying waste disposal equipment. The defendant is a company providing waste disposal services. In September 2005 the National Environment Agency ("NEA") awarded the defendant a contract ("the NEA Contract") for refuse collection in the Ang Mo Kio/Toa Payoh sector for the period 1 July 2006 to 31 December 2013. Following this, the defendant invited suppliers to quote for the supply of various equipment. The plaintiff was one of these suppliers and after discussions and negotiations between their representatives, the plaintiff and defendant entered into two contracts as follows:

(i) A contract executed around 5 December 2005 ("first Contract") for the supply of 106 units of mobile refuse compactors ("MRC") for the sum of $2,226,000 and nine units of rear end loaders ("REL") for the sum of $556,800.

(ii) A contract executed around 15 March 2006 ("second Contract") for the supply of around 17,000 units of mobile garbage bins ("MGB") in various sizes, with the sum of the confirmed quantities amounting to $583,840 and the optional quantities amounting to $129,645.

2 Pursuant to the first Contract, the plaintiff supplied the 106 units of MRC and nine units of REL and received full payment from the defendant. Pursuant to the second Contract, the plaintiff supplied MGB worth $562,486.05 and, up to the date of the trial, was paid $102,172 by the defendant. In this suit the plaintiff claimed the balance of $460,314.05 under the second Contract, plus interest and costs.

3 The defendant admitted taking delivery of the MGB under the second Contract. However the defendant claimed that the plaintiff had failed to deliver a large number of the MGB in accordance with the delivery schedule provided in the contract, as a result of which the plaintiff was liable for liquidated damages ("LD") in the sum of $8,500, which the defendant counterclaimed. In addition, the defendant claimed that the plaintiff had also failed to deliver many of the MRC and REL in accordance with the contractual delivery schedule under the first Contract, in consequent of which the plaintiff was also liable for LD under that contract. Such LD amounted to $371,000 in respect of the MRC and $174,500 in respect of the REL. The defendant counterclaimed these amounts against the plaintiff, plus interest and costs.

4 In its defence to the counterclaim, the plaintiff pleaded, *inter alia*, that the LD clauses in both contracts amounted to a penalty and were therefore not enforceable. Further the plaintiff pleaded that, in relation to the second Contract, the defendant was in breach by its failure to make payment in accordance with the terms of the contract, which called for payment in 12 instalments. The defendant had only paid two instalments and did not pay the remaining ten instalments. The plaintiff also pleaded that there was an oral agreement by the defendant that it would not impose LD upon certain conditions[note: 1]. As those conditions were met, the defendant was not entitled to impose LD.

5 At the end of the trial and after counsel had delivered their oral submissions, I made the following findings:

(i) On a proper construction of the two contracts, the delivery dates were:

(a) in relation to the 106 units of MRC in the first Contract, in five lots in end January, and the beginning of March, April, May and June 2006;

(b) in relation to the nine units of REL in the first Contract, in three lots of three units each at the end of February, March and April 2006; and

(c) in relation to the MGB in the second Contract, 15 May 2006.

(ii) The plaintiff had failed to deliver some of the MRC, REL and MGB within the dates stipulated for their delivery under the two contracts.

(iii) The LD clause was a requirement imposed by the defendant and it was its general manager William Lee who proposed the quantum of $500 per day.

(iv) In relation to the first contract, I found that the plaintiff was not liable to the defendant for LD as it amounted to a penalty and dismissed the counterclaims for the sums of $371,000 and $174,500.

(v) In relation to the second Contract for the MGB, I found that the defendant's counterclaim for LD was made out. However the defendant had no defence to the plaintiff's claim for payment of the balance outstanding and therefore I gave judgment to the plaintiff in the sum of $451,814.05 (being the difference of $460,314.05 and $8,500.00).

(vi) I also held that the defendant had committed acts of prevention in relation to the delivery of the MRC and REL and that the time for delivery had thereby been set at large. In those circumstances the plaintiff would only be obliged to deliver within a reasonable time thereafter.

6 The defendant filed a notice of appeal against such part only of my decision disallowing its counterclaim for set off of the LD in the first Contract for the sums of $371,000 and $174,500 on the basis that the LD clause is a penalty and thus unenforceable. I now give the reasons for holding that the LD clause is a penalty.

7 Counsel for the plaintiff referred me to Andrew Phang, *Cheshire, Fifoot and Furmston's Law of Contract* (1998) at p 671:

"… whether a conventional sum is liquidated damages or a penalty .. is a question of construction 'to be decided upon the terms and inherent circumstances of each particular contract, judged of

as at the time of making the contract, not as at the time of the breach".

The last part of that passage came from the speech of Lord Dunedin in the House of Lords in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 at pp 86-87. His Lordship, after stating that the essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party whereas the essence of LD is a genuine pre-estimate of damage, suggested the following considerations in deciding whether an LD clause would be deemed a penalty (at p 87):

(a) if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach;

(b) if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid;

(c) there is a presumption (but no more) that it is penalty when a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage; and

(d) it is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties.

8 Turning to the facts of the present case, the LD clause in the first Contract is found under the heading "Delivery on Site" and provides as follows:

"Liquidated damage of S$500.00 per day per equipment may be imposed for late delivery after 1 week from stipulated schedule"

Now this same provision applies in respect of every single unit ("per equipment") of the 106 units of MRC (the average cost of each one being $21,000) and every one of the nine units of REL (the average cost of each ranging from $58,000 to $66,700). This was irrespective of the cost of each item and also irrespective of whether the delay was in relation to the units of the earlier batches or the later batches. It is common ground that the defendant was able to perform the NEA Contract at its commencement on 1 July 2006 and no LD was imposed by NEA under the LD clause in that contract. There is evidence to show that, in relation to the MRC that had been delivered in the earlier part of the year, i.e. January to May 2006, they were not used by the defendant until just prior to 1 July 2006. Indeed the plaintiff had to store some of them due to the inability of the defendant to receive them for lack of space. The plaintiff also had to carry out maintenance greasing of the moving parts of the MRC to ensure that they remained in working order at the time they were deployed. There is also evidence that in relation to the REL, the defendant had some technical problems due to incompatibility with parts supplied by the defendant.

9 The nub of the matter was that the defendant did not require the MRC until shortly before commencement of the NEA Contract on 1 July 2006, which was when they could be deployed on site. As for the REL, they were only required a few weeks before that date. Yet the LD of $500 per equipment per day was applied without reference to cost of the equipment and to the impact to the defendant of the delay of each item of equipment. Based on the formula of $500 per equipment per day that each equipment was delivered outside the schedule, the defendant was able to put up a claim for LD of $371,000 in respect of the MRC and $174,500 in respect of the REL, amounting to 17% and 31% of the respective contract sums. It was clear that the LD clause was not a genuine pre-

estimate of the loss that would be suffered by the defendant due to any delay in the delivery of the equipment that fell behind the delivery schedule, but a provision held *in terrorem* against the plaintiff. Indeed the defendant was not so dissatisfied with the actual dates of delivery as to withhold payment and had made full payment for them. It was only when the plaintiff claimed for payment of the outstanding sum under the second Contract for the MGB that the defendant made a claim for LD in respect of the MRC and REL under the first Contract.

10 For these reasons I held that the LD clause was a penalty and therefore unenforceable.

[note: 1]Reply para 4A: if "start off date of the project of 1 July 2006 is met", and para 4B, congratulatory messages in media costing $14,700 placed.

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