IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 163

Originating Summons No 1245 of 2017

Between

AES Façade Pte Ltd

… *Plaintiff*

And

(1) Wyse Private Limited
(2) Liberty Insurance Pte Ltd

… *Defendants*

GROUNDS OF DECISION

[Building and Construction Law] — [building and construction related contracts] — [guarantees and bonds]

[Credit and security] — [performance bond] — [whether call on performance bond was unconscionable]

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v
Wyse Pte Ltd and another

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Lee Seiu Kin J

1 The plaintiff filed the originating summons in this case to seek an injunction restraining the first defendant from demanding payment under a performance bond issued by the second defendant, until the conclusion of the ongoing arbitration proceedings between the plaintiff and the first defendant. The main issue for determination was whether the first defendant had acted unconscionably in making the call. After hearing submissions from both parties, I found that the plaintiff had failed to discharge its burden of proving that the first defendant had acted unconscionably, and I accordingly dismissed the application. I now give the reasons for my decision.

Background facts

2 The first defendant was engaged by WyWy Development Pte Ltd ("the employer") as the main contractor for the proposed erection of a block of 19-storey commercial development at 140 Robinson Road ("the Project").

3 On 28 November 2014, the plaintiff and the first defendant entered into a subcontract wherein the plaintiff agreed to carry out the design, supply, installation and maintenance of the building façade works to the Project.

4 In compliance with cl 4.8 of the subcontract, the plaintiff procured from the second defendant, an insurance company, a performance bond in favour of the first defendant, amounting to 10% of the subcontract sum ("the Performance Bond"). The validity of the Performance Bond was extended twice, and was at the time of the hearing due to expire on 12 April 2018.

5 The date of completion stipulated in the main contract for the Project was 12 April 2016, but the works were only certified by the architect to be completed on 15 November 2016. The plaintiff took the position that the works under the subcontract were substantially completed by 12 April 2016, save for some minor defects.[1]

6 On 25 November 2016, the plaintiff submitted a payment claim ("PC20") in the sum of $1,280,179.92 to the first defendant, for which the first defendant failed to serve a payment response until 28 December 2016. It was determined via adjudication with the Singapore Mediation Centre (AA495/2016) that the payment response purportedly served on

[1] Affidavit of evidence-in-chief of Tan Yvonne ("YAEIC") dated 1 November 2017 at para 8.

28 December 2016 was out of time and as such was invalid under s 11 of the Building and Construction Industry Security of Payment Act ("SOPA") (Cap 30B, 2006 Rev Ed). The adjudicator found for the plaintiff in the total sum of $1,077,151.37 including costs but excluding interests. The adjudication determination was dated 17 February 2017 and served on the parties on the same day.

7 The plaintiff's solicitors wrote to the first defendant on 21 February 2017 to demand payment of the adjudication amount. The first defendant refused to pay on the ground that it was entitled to set-off certain sums owed. The plaintiff's solicitors issued another letter on 24 February 2017 demanding payment, following which they applied for and obtained an enforcement order for the first defendant to pay the sums awarded under the adjudication determination ("the enforcement order"). The enforcement order was obtained on 28 February 2017 and served on the first defendant on 3 March 2017.

8 The first defendant commenced arbitration proceedings against the plaintiff on 3 March 2017 by filing a notice of arbitration for the sum of $1.55m in liquidated damages for late completion of the subcontract. The arbitration proceedings were still pending at the time of the hearing.

9 The first defendant also filed an application on 17 March 2017 to set aside the enforcement order. The application was dismissed after the hearing on 24 May 2017, and on 8 June 2017 the plaintiff received $1,072,519.20 which was the sum that the first defendant had paid into court. There was further correspondence after this point as to whether the first defendant was liable for further payments of interest.[2]

10 On 2 October 2017, by way of a letter to the second defendant, the first defendant made a demand for immediate payment under the Performance Bond for the full guaranteed sum of $496,500.00. Taking the position that the first defendant was not entitled to make a call on the Performance Bond, the plaintiff applied for and obtained an interim injunction on an *ex parte* basis pending the disposal of this present application for an injunction. It is the legitimacy of this call on the Performance Bond that forms the crux of the present dispute.

Parties' cases

The plaintiff's case

11 The plaintiff's position was essentially that the circumstances leading to the first defendant's call on the Performance Bond were such that the call was unfair and oppressive, and as such it should be restrained on grounds of unconscionability.[3]

12 The plaintiff argued that the call on the Performance Bond was an unfair attempt to "claw back" the monies paid out following the adjudication determination, and relied on the abruptness of the first defendant's call on the Performance Bond some 19 months after the contractual completion date of 12 April 2016,[4] and the fact that the first defendant had resisted payment of the amount in PC20 until all avenues were exhausted.[5] The plaintiff also submitted that the first defendant's conduct was premised on the improper purpose of limiting the plaintiff's cash flow, and as such undermined the purpose behind

[2] YAEIC at para 25.

[3] Plaintiff's written submissions ("PWS") at para 10.

[4] PWS at paras 31–32.

[5] PWS at paras 35–40.

the SOPA.[6] Further, the plaintiff also characterised the first defendant's call as an attempt to circumvent the pending arbitration proceedings by recovering approximately one-third of the arbitration claim amount prior to the hearing.[7] Lastly, the plaintiff also argued that the first defendant's call was unconscionable as the first defendant had failed to give evidence of it having suffered genuine loss.[8]

The first defendant's case

13 Unsurprisingly, the first defendant took the opposite stance that the circumstances were not sufficient to justify a finding of unconscionability. It relied on case law stating that the threshold for a finding of unconscionability is a high one, since the performance bond represents a contractually bargained allocation of risk that courts should be slow to disturb.[9]

14 In counter to the plaintiff's arguments, the first defendant submitted that it is not necessary for a party to prove its claim before calling on a performance bond, as the nature of an unconditional bond was such that it was a substitute for cash security deposit.[10] The first defendant pointed to the fact that it has consistently asserted its claim for liquidated damages since August 2016, such as via set-off against prior progress payments to the plaintiff, to show that its claim for liquidated damages was a *bona fide* one. According to the first defendant, it had chosen to make the call on the Performance Bond after having

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[6] PWS at paras 41–42.

[7] PWS at paras 43–47.

[8] PWS at paras 48–53.

[9] First defendant's writing submissions ("DWS") at paras 16–21.

[10] DWS at paras 37–38.

considered the plaintiff's defence and counterclaim filed on 22 September 2017 in the arbitration proceedings, and that it is not obliged to explain its legal strategy for doing so.[11]

15 The first defendant also denied that it had behaved in an unfair or oppressive manner, and argued that what the plaintiff characterised as obstructionist conduct in avoiding payment of the adjudication amount was merely an assertion of the first defendant's contractual right of set-off.[12] In any case, the adjudication determination pertained to the narrow issue of the first defendant's failure to submit a payment response to PC20 in time, and should not affect the rights and obligations of parties on other issues not adjudicated upon.[13] In fact, the first defendant suggested that it was the plaintiff who behaved unfairly in seizing upon the first defendant's inadvertent failure to submit a timely payment response to PC20 over the Christmas period in 2016, and that the plaintiff had not challenged the first defendant's claim for liquidated damages in its earlier payment responses.[14]

The legal principles

16 It is now settled law in Singapore, and parties did not dispute this, that a call on a performance bond can be restrained on the basis that it was unconscionable. In the case of *BS Mount Sophia Pte Ltd v Join-Am Pte Ltd* [2012] 3 SLR 352 ("*Mount Sophia*"), the Court of Appeal established various guiding principles on the circumstances under which a finding of

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[11] DWS at para 44.

[12] DWS at para 50.

[13] DWS at paras 47–48.

[14] DWS at paras 54–55.

unconscionability can be made, which principles shall be summarised here briefly. *Mount Sophia* similarly involved the call on an on-demand performance bond in advance of an arbitration hearing on liquidated damages for late completion of construction works.

17 Whereas the boundaries of unconscionability cannot and should not be precisely delineated (*Mount Sophia* at [35]–[38]), it is generally uncontroversial that the concept covers acts involving abuse, unfairness and dishonesty (*Mount Sophia* at [19], *GHL Pte Ltd v Unitrack Building Construction Pte Ltd* [1999] 3 SLR(R) 44). It has also been said that unconscionable conduct is "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" (*Raymond Construction Pte Ltd v Low Yang Tong* [1996] SGHC 136 at [5]). It is clear that unconscionability would extend to facts not amounting to a finding of fraud, and as such is broader than the notion of fraud (*Mount Sophia* at [23]). That being said, it has also been cautioned that whilst unfairness is an important consideration in establishing whether there is unconscionability, not every instance of unfairness would amount to unconscionability (*Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 3 SLR(R) 198 ("*Eltraco*") at [30]). Further, the existence of genuine disputes between the parties is not sufficient *per se* to constitute unconscionability *(Mount Sophia* at [42], *Eltraco* at [32], *LQS Construction Pte Ltd v Mencast Marine Pte Ltd and another* [2018] 3 SLR 404 at [32]).

18 Apart from the factors that might justify a finding of unconscionability, it is also important to keep in mind the threshold for establishing its existence. It is undeniable on the one hand that abusive and oppressive calls may result not only in the beneficiary (in this case the first defendant) gaining an undeserved

windfall but also severely curtail the liquidity of the obligor (here the plaintiff), and that this would have considerable adverse consequences for players in the construction industry (*Mount Sophia* at [27], *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 ("*JBE"*) at [11]). On the other hand, courts should also be slow to disturb the allocation of risk bargained for by commercially-minded parties, particularly since the nature of the performance bond might have been reflected in the bid price or other contractual terms (*Mount Sophia* at [25], *Eltraco* at [30]). The settled law, having regard to these competing interests, is one that strikes the necessary balance by requiring a strong *prima facie* case of unconscionability before the threshold for curial intervention is met. In this regard, the Court of Appeal's observations in *Mount Sophia* at [20]–[21] bear repeating:

> Simply put, the threshold is a high one, and the burden that the applicant has to discharge is to demonstrate a strong *prima facie* case of unconscionability […] When determining if a strong *prima facie* case has been made out, the entire context of the case must be thoroughly considered, and it is only if the entire context of the case is particularly malodorous that such an injunction should be granted. We must emphasise that the courts' discretion to grant such injunctions must be sparingly exercised and it should not be an easy thing for an applicant to establish a strong *prima facie* case.

19 Lastly, it should be kept in mind that a court hearing an application to restrain the call on a performance bond is not obliged to undertake a protracted examination of the merits of the case or to decide on substantive entitlements of the parties to enforce their rights, but rather that it should consider whether the overall tenor and context of the parties' conduct point to a strong *prima facie* case of unconscionability (*Mount Sophia* at [40]).

My decision

Nature of the Performance Bond

20 Although the parties appear to be largely in agreement as to the nature of the Performance Bond, I propose nonetheless to deal with this issue briefly, as a proper evaluation of the parties' rights and obligations thereunder would assist in the assessment of whether the first defendant had acted unconscionably.

21 In this regard, it is clear that the construction of the terms and nature of an instrument such as the Performance Bond depends not on the label adopted by the parties but the substance of the rights and obligations established by its terms. The following quote from *JBE* at [17], cited with approval by the Court of Appeal in *Mount Sophia* (at [3]), is instructive:

> The threshold question for the purposes of ascertaining the nature of the Bond is whether, on a true construction of that instrument, the Bank was liable to pay on demand, or only later, upon proof of breach by [the contractor-obligor] and loss by [the employer-beneficiary]. The construction process looks to the substance of the parties' rights and obligations under the Bond; the label adopted by the parties is inconclusive.

22 In the present case, the relevant terms of the Performance Bond,[15] which was addressed from the second defendant to the first defendant, are as follows:

> In consideration of the Main Contractor insisting [*sic*] on the Sub-Contractor paying ten (10) percent of the total commission award under the Sub-contract as a guarantee for the said Sub-contract, we (at the request of the Sub-Contractor) hereby agree as follows:
>
> 1. *We unconditionally and irrevocably undertake, covenant and firmly bind ourselves to pay in full forthwith upon demand in writing to pay any sum without any reason or sums that may from time to time as demanded by the Main Contractor* up to a

[15] YAEIC at [TAB 3].

> maximum aggregate sum of SINGAPORE DOLLARS FOUR HUNDRED NINETY SIX THOUSAND AND FIVE HUNDRED ONLY (S$496,500.00) ("the Guaranteed Sum")
>
> 2. This guarantee is conditional upon a claim or direction as specified herein being made by you by way of a notice in writing addressed to us via 'AR Registered Post' at […]
>
> […]
>
> 6. We shall be obliged to effect payment required under such a claim or direction immediately upon receipt thereof. We shall be under no duty to inquire into the reasons, circumstances or authenticity of the grounds for such claim or direction.
>
> [emphasis added]

23 It is patently clear from the terms above that the Performance Bond was intended to be unconditional, in that the first defendant is entitled to payment upon demand, and the second defendant is not obliged to inquire into the circumstances underlying the demand. Even though there is a reference in the recital portion of the Performance Bond to the underlying subcontract between the first defendant and the plaintiff, this clearly does not suffice to incorporate any conditions that may exist in that subcontract into the present Performance Bond (see *Bocotra Construction Pte Ltd and others v Attorney-General* [1995] 2 SLR(R) 262 at [22]–[26]). Hence, the first defendant is not expressly required to establish any breach on the part of the plaintiff before calling on the Performance Bond, although this does not preclude the court from restraining the call if it is unconscionable (*Eltraco* at [16]).

Was the call on the Performance Bond unconscionable?

24 Having considered the submissions of both parties, I found that the plaintiff has not proven a strong *prima facie* case of unconscionability on the first defendant's part.

25 Whereas the plaintiff took pains to emphasise that the call was made almost two years after the completion of the contracted works and that this showed the call to be "radical and drastic", it is clear that the first defendant had consistently asserted its right to liquidated damages for late completion during this period, and that the call on the Performance Bond was merely the latest step taken in a series of conduct aimed at recuperating in part the losses that the first defendant might have incurred from the late completion. Given the unconditional nature of the Performance Bond, the fact that the plaintiff denied having been in breach of its stipulated contractual completion date amounts at most to a genuine dispute between parties which cannot justify a finding of unconscionability *per se*.

26 The plaintiff argued that the call was abusive as it was a retaliatory attempt by the first defendant to "claw back" the amount paid to the plaintiff pursuant to the adjudication determination, after the first defendant failed to set aside the enforcement order on 24 May 2017. I was not convinced that the first defendant's decision to make the call some five months after the court order of 24 May 2017 lends much support to the plaintiff's argument. Whereas the plaintiff painted a picture of the first defendant consistently withholding payment of sums owed and acting in an uncooperative manner, I did not think that the totality of the evidence presented before me supported this depiction.

27 The first defendant's explanation for the timing of the call was that it had chosen to call after assessing the plaintiff's defence filed in the arbitration proceedings. It is not for this court to assess whether or not this was a prudent or reasonable legal strategy – I was convinced that this was a plausible reason for the timing of the call which would go towards debunking the plaintiff's allegation that the call could only have been made in bad faith.

28 The plaintiff's argument that the first defendant's untimely call would effectively circumvent the existing arbitration proceedings is similarly untenable. Given the nature of the Performance Bond, there is no obligation for the first defendant to stay its hands until the dispute is disposed of via arbitration – in fact doing so would very much defeat the purpose of the Performance Bond, which was presumably contracted for so that the first defendant had the option of having some cash in hand without first having to prove its case for damages before a court or tribunal. As such, the mere fact that the call took place prior to any arbitral award cannot constitute unfairness. Whereas the plaintiff had asserted repeatedly during the course of the hearing that it is an under-capitalised "small player" in the construction industry, there was no evidence that it would be prevented from mounting a defence in the ongoing arbitration proceedings by virtue of the call.

29 The plaintiff had also argued that the first defendant's call was unconscionable as it has not shown that it has suffered loss, citing *Eltraco* as authority.[16] The plaintiff's argument and reliance on *Eltraco* however is flawed. In *Eltraco*, the Court of Appeal faced an appeal against a partial restraint of a call on a performance bond, and further reduced the amount of the bond called such that the amount was not unconscionable, having regard to progress payments already made and losses actually suffered. Hence, *Eltraco* stands for the proposition that a court in exercising its equitable jurisdiction of restraining a call on a performance bond on the ground of unconscionability is entitled to limit the restraint to only that part of the call that was clearly excessive. In other words, the nature of the equitable jurisdiction is not such that the court must either restrain the call completely or not at all, and the quantum of loss is a

[16] PWS at paras 19–21.

relevant factor in the assessment of whether a call should be restrained. The plaintiff however erroneously extrapolated from this proposition to argue that a beneficiary must first provide evidence of actual loss suffered before being entitled to call a performance bond in the first place, which is clearly an entirely different proposition. The mere fact that parties are in disagreement as to losses suffered cannot mean that the call was unconscionable (see above at [25]). In the present case, I have also considered the fact that the plaintiff had received full payment for sums owed under the subcontract, as well as the fact that an independent architect had certified the date of completion of the works and that the first defendant is liable to the employer for liquidated damages. All of these pointed to the fact that the first defendant made the call in order to recuperate liquidated damages which it legitimately believed to be owing, and was not motivated by any improper purpose or bad faith.

Conclusion

30 Having regard to the foregoing factors, I found that the plaintiff failed to discharge its burden to prove a strong *prima facie* case that the first defendant had made the call on the Performance Bond unconscionably. As such, I declined to exercise my jurisdiction to restrain the call, and thus dismissed the plaintiff's application and discharged the interim injunction.

31 Costs here and before were fixed at $12,000 including disbursements.

Lee Seiu Kin
Judge

De Vaz Ian Marc Rosario, Tay Bing Wei and Chek Xinwei Liana (WongPartnership LLP) for the plaintiff;
Philip Antony Jeyaretnam SC, Melissa Thng Huilin and Amogh Nallan Chakravarti (Dentons Rodyk & Davidson LLP) for the first defendant;
The second defendant unrepresented
