C & P Holdings Pte Ltd v Witco Industries Pte Ltd
[2006] SGHC 8

Case Number : Suit 292/2005

Decision Date : 20 January 2006

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Bevin Netto (Netto and Magin LLC) and Pang Xiang Zhong Peter (Peter Pang and Co) for the plaintiff; Mahmood Gaznavi (Mahmood Gaznavi and Partners) for the defendant

Parties : C & P Holdings Pte Ltd — Witco Industries Pte Ltd

Contract – Breach – Plaintiff failing to make payment – Whether defendant failed to honour the contractual delivery and installation date

20 January 2006 *Judgment reserved.*

Choo Han Teck J:

1 This is a claim by the plaintiff for breach of a written contract dated 16 August 2004. By that contract, the plaintiff commissioned the defendant to design and build "ISO Tank Cleaning and Wastewater Treatment Facilities" and have them delivered and installed at 46 Penjuru Lane by 30 November 2004. These facilities were intended to be used to clean storage tanks of residue chemical waste. The total contract sum was agreed at $584,850 (inclusive of goods and services tax). There was no dispute as to this sum or the schedule of payment agreed in the contract as follows:

(a) 35.9% down payment (approximately $200,000): $50,000 cash on delivery, and $150,000 cheque (seven days post-dated) upon submission of shelter structure drawing, technical data, catalogue and consumption data;

(b) 44.1% progressive claims upon delivery of equipment as per breakdown prices of individual equipment;

(c) 10% progressive claim upon installation as per breakdown prices of individual equipment;

(d) 5% upon commissioning of equipment; and

(e) 5% retention upon expiry of the defects liability period (one year from the date of commissioning).

2 It was also not disputed that the initial down payment amounting to $200,000 had been paid. The defendant did not deliver and install the facilities by 30 November 2004 and claimed that although the defendant was willing and able to do so the plaintiff did not wish to make the corresponding payment. Between 12 November and 23 December 2004, the parties appeared to have varied the contract in order to get around the impasse – the plaintiff not paying and the defendant not installing. It would be convenient to note at this point that Kwek Chiew Aik ("Kwek"), the representative of the plaintiff's project manager, SMP Electrical Pte Ltd, was not able to work harmoniously with the defendant's representative, Richard Seow Kok Hwee ("Seow"). Part of the reason seems to me to be the commercial envy that the plaintiff awarded the contract to the

defendant instead of to SMP Electrical Pte Ltd, which eventually took over and completed the installation after the plaintiff terminated its contract with the defendant. Kwek was not convinced that the defendant was doing or able to do its job satisfactorily and his adverse reports made the plaintiff lose confidence in the defendant and, consequently, reluctant to make any more payment. The defendant maintained that it was able and willing to complete the next stage of the job (delivery of the equipment at site) but would not do so until the plaintiff indicated clearly that payment of $257,918.85 under the contract would be made. On 12 November 2004, the plaintiff was invited to inspect the equipment then lying in the Defendant's warehouse at 37 Penjuru Lane. The defendant then raised the invoice for the full amount due at that stage ($257,918.85). However, Kwek told Seow that the plaintiff would only make a payment of $100,000. The two men then agreed that the defendant would deliver part of the equipment in exchange for part payment ($100,000 instead of the full 44.1% of the contract sum). They agreed to make the exchange on 24 November 2004. The outstanding equipment that was not delivered consisted of a set of boilers, two sets of heat exchangers, two sets of cleaning nozzles, and 11 sets of air compressors complete with receiver tanks.

3 The defendant delivered as agreed on 24 November 2004, and Seow asked Kwek when the rest of the equipment could be delivered and payment (rounded off to $150,000) made, emphasising that the rest of the equipment was necessary to complete the work on the project. According to Seow, on 9 December 2004, he agreed with Kwek for delivery of the rest of the equipment to be made on 17 December 2004. He wrote a letter[note: 1] on the same day to the plaintiff setting out the situation and the agreement with Kwek. The date of 17 December 2004 was not mentioned in the letter but the rest of the letter supported Seow's testimony. According to Seow's testimony, which I accept as more probable, he arrived at the plaintiff's premises on 17 December 2004 with the equipment but left without unloading because the plaintiff did not give him the cheque he wanted. On the next day, Kwek and Seow wrote letters to the defendant and plaintiff respectively, accusing the other of breach. Prior to this date, the plaintiff had not expressed any fear that the defendant would be unable to complete its part of the contract. I would not place much weight on the oral testimony of Kwek on this score. Reverting to the event, it was subsequently agreed that the exchange should resume and take place on 21 December 2004. The defendant delivered the remaining equipment on 21 December 2004 and was given a cheque dated 9 December 2004 for $150,000. The defendant unloaded its equipment and proceeded to bank the plaintiff's cheque. On 22 December 2004, the defendant was notified by its bank that the plaintiff's cheque was dishonoured because it lacked one of two requisite signatories.

4 The plaintiff's explanation for giving an incomplete and unbankable cheque was that it did not trust the defendant and therefore gave, deliberately as it were, a cheque that could not be cashed. Jeremy Fong, the plaintiff's sales executive testified that he had told Seow not to cash the cheque until the equipment had been inspected and accepted by the plaintiff. He said that Seow agreed to this direction. Seow denied this and I believe that his version was probably closer to the truth. Jeremy Fong further explained that had the plaintiff found the equipment in good order it would have made a telephone call to its bank to clear the cheque. This seems to me too fanciful a procedure. If the parties had agreed to payment only after the plaintiff had inspected and approved the equipment, there would have been no need to hand over the cheque much as Seow might have demanded for it as the plaintiff's witnesses claimed.

5 Seow then demanded to know why the cheque was dishonoured and a meeting was set up on 23 December 2004. He was surprised to be handed a letter of that date terminating the contract. The short letter from the plaintiff read as follows:

> With no response from you and your failure to comply with your contract obligation – we hereby

terminate our above contract.

You are to remove all personnel from site any further access to the site by your sub-contractor is consider[ed] trespassing and appropriate measure will be taken.

You are warned against any attempt to remove any material from site.

For your immediate compliance.

The letter was signed by Kwek. The plaintiff also averred that on 21 December 2004, the defendant, contrary to agreement, did not unload or unpack any of the equipment for inspection. Whatever little evidence of what occurred at the site that day came from Seow, whose photographs show some heavy equipment being unloaded. Furthermore, the plaintiff's witness, Andrew Ann, acknowledged receipt of the delivery of the equipment under delivery order 9120. The plaintiff, whose burden it was to show that nothing was delivered nor was any inspection carried out, failed to persuade me of their allegations. I am thus inclined to accept that the defendant's evidence is more reliable. Given the events that took place between 9 December 2004 and 23 December 2004, there was no basis for the plaintiff to say that the defendant failed to honour the contractual delivery and installation date of 30 November 2004. If I needed to make a finding as to the events on 24 November 2004, I would be inclined to hold that it was the plaintiff who did not comply with the contract on that date. I find that many of the letters written by Kwek were self-serving and contrary to the more incontrovertible evidence that the plaintiff was obliged to make payment on the dates that the defendant delivered the equipment. The assertions that there were missing equipment and poor quality equipment were not supported by any evidence that I can comfortably rely on. Since Kwek and his own company were in a sort of conflicted situation, they having competed (and lost) in the bid for the project, and subsequently took over and completed the unfinished work after the plaintiff terminated the contract with the defendant (relying extensively on the advice of Kwek that the equipment was not up to standard and was incomplete, and that the defendant was unlikely to complete the contract on time), I expected some independent corroboration. But there was none. There was no evidence showing that the plaintiff had to repurchase new component parts or that the equipment supplied was of poor quality or badly constructed. On the whole, I am of the view that Seow gave a more accurate and correct account of what transpired.

6 I find, therefore, that it was the plaintiff, and not the defendant, that was in breach of contract. The plaintiff's claim is therefore dismissed. I will allow the defendant's counterclaim in so far as the balance due under the contract amounting to $250,000 be paid by the plaintiff to the defendant. This amount is derived after deducting $34,850 for the resources that were left to idle by reason of the plaintiff's breach. The plaintiff had no alternative evidence or submission as to why this sum was unreasonable. The sum of $34,850 is, in my view, a fair figure given the circumstances. Costs are to follow the event and be taxed, if not agreed, and paid by the plaintiff to the defendant.

[note: 1]AB 130.