Tech-System Design & Contract (S) Pte Ltd *v* WYWY Investments Pte Ltd [2014] SGHC 57

Case Number : Originating Summons No 785 of 2013

Decision Date : 31 March 2014

Tribunal/Court : High Court

Coram : Edmund Leow JC

Counsel Name(s) : Lee Chay Pin Victor (Chambers Law LLP) for the plaintiff; Tay Wei Heng Terence (Terence Tay) for the defendant.

Parties : Tech-System Design & Contract (S) Pte Ltd — WYWY Investments Pte Ltd

Banking – Performance Bonds

31 March 2014

Edmund Leow JC:

Introduction

1 The defendant is a property developer. On 29 October 2009 it engaged the plaintiff as its main contractor for the development of three blocks of apartments at Oei Tiong Ham Park. Under the main contract, the plaintiff was required to and did provide two performance bonds for the sum of $988,888.80 (10% of the total contract price) in lieu of a deposit as security for performance of its obligations.

2 A dispute arose between the parties, which was subsequently referred to arbitration. Arbitration had not yet begun when on 14 August 2013 the defendant issued demands to the insurer for the total amount of the performance bonds. The plaintiff claimed the calls were unconscionable and filed this application for an injunction to restrain the defendant from calling on the performance bonds "until the determination or outcome of the arbitration hereto".

3 I heard the application on 1 November 2013 and dismissed it the same day with costs of $10,000 to the defendant. On 5 November 2013 the plaintiff wrote in to request for further arguments to be made. I agreed and heard the plaintiff's further arguments on 20 January 2014 but saw no reason to disturb my earlier decision.

4 I thereupon dismissed the application and awarded costs of the hearing of $4,000 to the defendant. The plaintiff has now appealed and these are the grounds for my decision.

Background to the dispute

5 Under cl 41 of the main contract, the plaintiff was required to pay 10% of the contract price to the defendant as security deposit for the due performance and observation of its obligations under the contract. In lieu of the security deposit, the plaintiff procured two performance bonds from EQ Insurance Company ("the insurer"): the first, for the sum of $542,128.80 was dated 16 November 2009; and the second dated 4 February 2010 was for the remaining sum of $446,760, for a total of $988,888.80.

6 The plaintiff commenced work under the main contract in November 2009. The original completion date was set for 3 July 2011. However, in the course of excavation works, there was an incident of soil slippage which resulted in the Building and Construction Authority ("the BCA") issuing a stop work order on 15 January 2010. On 14 September 2010, the stop work order was lifted and work was recommenced and completed in January 2012.

7 Following two inspections by the BCA, a temporary occupation permit was finally issued on 13 August 2012.

8 There were two main areas of dispute between the parties.

9 The first involved the defendant's entitlement to liquidated damages under the main contract. This was stated to run at a rate of $6,000 a day beyond the original completion date unless an extension of time was granted. The plaintiff made a first application for extension of time on 8 May 2011 and continued to make further applications as work progressed.

10 In the event, on 10 July 2013, the architect informed the plaintiff that he was unable to assess several of the plaintiff's applications for extension of time. An extension of only 56 days was granted in the end. This meant a total of 351 days of delay not covered by extensions of time and according to the defendant, this rendered the plaintiff liable to about $2.1m in liquidated damages. The plaintiff claimed that the architect had wrongly failed to consider its applications for extensions of time.

11 The second source of dispute was the plaintiff's obligations under the main contract to remedy defects that arose during the one-year defects liability period. This period expired on 13 August 2013. The architect arranged for a site inspection on 2 August 2013 for the purpose of ascertaining the defects that had to be rectified.

12 The plaintiff claimed that on that day no inspection was carried out and it was presented with a *fait accompli* in the form of a list of 567 items of allegedly defective works. The plaintiff's main complaint was that in failing to carry out the site inspection the architect had compromised his professional independence; in any case, the list of defects would have cost only $14,676 to rectify. The defendant on the other hand claimed the defects would cost $22,000 and further that this was a gross underestimation based only on an incomplete survey.

13 These two disputes were to be referred to arbitration pursuant to cl 37(1) of the main contract. However the defendant said it was still entitled to call on the performance bonds because it was claiming from the plaintiff more than the sum secured by the bonds. The relevant clauses (cll 5) in the terms of the two performance bonds were materially the same and stated that the insurer was:

> … obliged to effect the payment in full forthwith or the direction within 30 business days of our receipt thereof [of a demand on the bond], without requiring any proof that your entitlement to such sum or sums under the Contract or that the Contractor has failed to execute the Contract or is otherwise in breach of the Contract, and notwithstanding the existence of any differences or disputes between yourself and the Contractor arising under or out of or in connection with the Contract or the carrying out of work thereunder or as to any amount or amounts payable thereunder and notwithstanding that such differences or disputes have been referred to arbitration or are the subject of proceedings in Court or is in the midst of any other means of dispute resolution or any request or instruction which may have been given to us by the Contractor not to effect the payment.

14 It was not disputed that pursuant to cl 5 the defendant was entitled to call on the bonds and

the insurer had the corresponding obligation to pay on them "without requiring any proof" as to the defendant's entitlement to such sums.

Issues before the court and parties' arguments

15 The sole issue in this case was whether the defendant's call on the performance bonds was unconscionable. Unconscionability has been held to include the elements of abuse, unfairness and dishonesty and the applicant for equitable relief has to establish this to the high threshold of a strong *prima facie* case: *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 ("*BS Mount Sophia*") at [19]–[21].

16 The plaintiff said the call was unconscionable for the following three broad reasons:

(a) The architect had wrongly failed to grant extension of time because:

(i) he had been unduly pressured by the defendant; if extensions had been given as was clearly warranted, the plaintiff was owed about $1.4m being the final contract price less the sums already paid out;

(ii) The plaintiff was under the impression that extensions of time would be granted because the defendant had consistently deducted 10% of the liquidated damages they were entitled to at each progress payment which induced the plaintiff to complete the works and which had given the plaintiff the impression that the defendant would not be insisting on the full amount of liquidated damages or would accept or approve extensions of time in regard thereof;

(iii) The plaintiff completed variation works even after the original date of completion and without a formal order or agreement on extension of time which had resulted in further delays, in the expectation that the extensions of time would be forthcoming;

(b) The defendant's conduct in claiming for over 500 defects to be rectified in the defect liability period was unconscionable because:

(i) The defendant had not come up with any evidence to support its claim that it was due more than $22,000 as the cost of rectifying the defects that arose during the one-year defects liability period;

(ii) Further the architect had wrongly failed to carry out site inspections to ascertain the extent of the alleged defects.

(c) The plaintiff further said that if the defendant was not enjoined from calling on the performance bonds it would meet financial ruin and be penalised for acting on good faith, so that it would be unable to make a claim for the sum of $1.4m which it said was owed by the defendant.

17 The defendant said the call could not be unconscionable because:

(a) It claimed to be owed more than the amount secured by the performance bonds and it was therefore entitled to call on them;

(b) The defendant said that the final contract sum after variations amounted to $10,322,371.54; a total of $9,200,159.11 had already been paid to the plaintiff but this had to be

set off against liquidated damages of $2,106,000 and cost of rectification of at least $22,000. The net result was that the defendant was owed $983,787.57 and this was not inclusive of rectification costs which, the defendant said, had yet to be finally ascertained;

(c) The performance bonds were contractual documents that represented obligations as between the issuer and the defendant and could not be affected by any dispute under the main contract;

(d) While the plaintiff has disputed the amount owed to the defendant, this dispute was to be arbitrated which would result in a final reckoning between the parties and the plaintiff was in any case not serious about proceeding to arbitration;

(e) There was a bare allegation of unconscionability that was not made out by the plaintiff.

My decision

18 As I have stated the parties did not dispute that under the terms of the bonds the defendant could call on them on demand. The sole issue was whether the plaintiff was able to make out a strong *prima facie* case that there was unconscionable conduct such that an injunction should be granted. In this regard, I was bound to consider thoroughly the entire context of the case, "and it is only if the entire context of the case is particularly malodorous that such an injunction should be granted": *BS Mount Sophia* at [21].

19 Having thoroughly considered the entire context of the plaintiff's case, I was unable to come to the conclusion that the defendant's conduct was in bad faith, abusive, dishonest or in any way unconscionable.

The failure to grant extension of time

20 On the first disputed issue, the architect's failure to grant extension of time, Mr Soh Chee Chye ("Mr Soh"), project director of the plaintiff, averred that under the architect's instructions he had carried out a substantial amount of variation works even before he received written instructions or an extension of time to carry out those works, and that he had trusted the architect to "do the right thing" when he came to apply eventually for an extension of time. [note: 1] Mr Soh said that he had provided the necessary supporting documents in his applications for extension of time and that the architect was wrong in stating that he was unable to assess the application for deficiencies in the information provided. Mr Soh further claimed that the architect subsequently confided to him that he, the architect, had been pressured by the defendant not to grant any extension of time. [note: 2]

21 I was not satisfied that the plaintiff had made out a strong *prima facie* case that there was anything unconscionable with regard to the extension of time issue. The architect's letter to Mr Soh dated 10 July 2013 explained in detail why extension of time was not granted:

> We had advised you that the information submitted in your claims [for extension of time] has been insufficient to demonstrate critical delay. Further, you have been advised on the necessary information required to assist us in Mr Timmons' email dated 27 May 2013.
>
> Your latest submission does not contain the required information as set out in points 1 to 3 of Mr Timmons' email.
>
> Despite several opportunities given to you, you are still unable to demonstrate how the events

have caused critical delay to the Contract Completion Date. We regret to inform you that we are unable to assess your [extension of time] application. [note: 3]

22 Taking this at face value, I was unable to see how the letter demonstrated unconscionable or dishonest or abusive conduct. Mr Soh's claims that the architect told him that he was being pressured not to grant extension of time were entirely hearsay and could not go towards making out a *strong prima facie* case. The Court of Appeal's guidance in *BS Mount Sophia* at [47] should be recalled here:

> In this regard, it would be preferable if the entire context had been considered in the proceedings below. As mentioned above, the examination is merely a *prima facie* one, and a consideration of the disputes between the parties does not necessitate a substantive determination of them.

23 There was therefore no call on me to go into a substantive determination of the issues between the parties which would be better left to the pending arbitration, or failing which a proper trial where the witnesses may be called and their evidence tested.

24 In *BS Mount Sophia* the Court of Appeal found unconscionable conduct on the basis that on the evidence before it the beneficiary of the bond had failed to allege any delay that would have entitled it to liquidated damages and further there was some evidence that there was backdating of the completion date so as to entitle the beneficiary to liquidated damages that formed the basis for the call.

25 In the present case I was shown a number of architect's directions [note: 4] that attested, at least on a *prima facie* level, to the fact that the delay had been brought to the plaintiff's attention numerous times even before the actual completion of the works. The plaintiff also claimed that one Mr Kevin Timmons had been improperly appointed to assist the architect to evaluate the extension of time. I could not agree. As I have said the plaintiff was required to show a strong *prima facie* case of abuse or dishonesty. All that was before me was a bare allegation that Mr Timmons' appointment was improper and this could never be sufficient.

26 Therefore, on a *prima facie* examination of all the evidence that the plaintiff relied on to prove his case on this point, I was quite unable to make out any unconscionable conduct on the part of the defendant. I was satisfied that the defendant's claim for liquidated damages was not so obviously abusive or dishonest as to be unconscionable but I should add that my comments in this regard should not be taken as having any bearing on the merits of the parties' cases on this, which, as I have said, should be finally determined in another and more suitable forum.

The alleged defects

27 On the second issue, the defects liability period, the plaintiff's case was that the defects were minor but that (a) no site inspection had been carried to ascertain the defects and (b) the defendant was attempting to show that the plaintiff's work was so unacceptable as to have over 500 items of defects. I was unable to see why either could be regarded as unconscionable.

28 On the first point, the bulk of the defendant's claim against the plaintiff was for liquidated damages. True it was that it had reserved its right to claim a larger amount for the defects but even without this, the amount claimed would have been around the sum total assured under the performance bonds. Even if the defendant's conduct in this regard was unconscionable, it would not in my judgment have had the effect of rendering the calls unconscionable or justifying limiting the call to a partial call (see *Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 3 SLR(R) 198).

29 On the second point, I noted that the defendant had never in the present proceedings ever made the claim that the long list of defects showed that the plaintiff's work was seriously unacceptable. The defendant's case, which I agreed with, was that the extent of the defects and the cost of their rectification were issues that would be finally determined at the arbitration between the parties.

30 At the present stage, based on a *prima facie* examination of the evidence, I was unable to find that there was anything unconscionable or any sign of any dishonest or abusive conduct in the way the claim for defects was brought about. It did not seem that there was a site inspection on the date in question but this by itself without more could not constitute abusive or dishonest behaviour. I emphasise that the totality of the evidence should be reviewed and on doing so I was unable to agree with the plaintiff.

The plaintiff's claim for $1.4m

31 Finally, the plaintiff claimed that contrary to the defendant's assertion that it was owed about $1m by the plaintiff, it was the plaintiff that was owed $1.4m. The plaintiff's calculations were as follows: the adjusted final contract sum was for $10,369,130.70 and from this was to be deducted the sum of $9,115,419.19 already paid by the defendant to the plaintiff. But to this was to be added the sum of $174,000 that, the plaintiff claimed, was wrongly deducted by the defendant from interim payments on account of the liquidated damages due to late completion.

32 The defendant had a competing account which showed that it was instead owed $983,787.57. The defendant said the adjusted final contract sum was $10,322,371.54, and less net payments already made to the plaintiff of $9,200,159.11 and total liquidated damages owing of $2,106,000, there was a deficit of $983,787.57 due to the defendant from the plaintiff. The defendant said further that this was not even taking into account rectification costs for the defects which it said could be significant.

33 There was some documentary evidence for each of their accounts but it was apparent to me that the main source of the discrepancy between the two was the issue of the liquidated damages. I have said that the plaintiff was unable to make out a case that the defendant's claims on this point were unconscionable. Therefore, on balance, I was not able to find that the defendant's accounts were false or fraudulent or so obviously wrong on a surface examination as to constitute unconscionable conduct.

34 In further arguments, the plaintiff said that even accepting the defendant's accounts, there should have been a further deduction of $174,000 on the basis that the defendant's account above did not take this into account; therefore the total amount claimed by the defendant should be limited to $725,047.65 instead of $983,787.57.

35 In my judgment, there was no apparent evidence before me, let alone to the level of a strong *prima facie* case, that there was in fact double counting that would justify limiting the call to a partial call on the performance bonds. This was because the defendant exhibited a letter from the quantity surveyor stating that there was a deduction of $174,000 made from payments to the plaintiff for the liquidated damages. Therefore the fact of the deduction was acknowledged by the defendant. It was not clear to me whether the net payments of $9,200,159.11 (see [25] above) included this sum of $174,000 but on balance I was not persuaded that there was a strong *prima facie* case that the defendant had not taken it into account.

36 I would add that a situation such as the present would be precisely the kind of situation

envisaged when the parties contracted for performance bonds to be provided. A performance bond is "security for the secondary obligation of the obligor to pay damages if it breaches its primary contractual obligations to the beneficiary": per Chan Sek Keong CJ in *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 at [10]. If there were disputes arising, the beneficiary of a performance bond would have security for its claim. It would generally be entitled, of course subject to the terms of the performance bond, to call on the bond to assure itself of the sum that it was claiming. Save for unconscionable conduct on the part of the beneficiary, its entitlement should generally be respected and enforced and indeed the parties had contracted for that entitlement to be protected. When the dispute was finally determined either in arbitration or litigation, the obligor might be entitled to compensation for its losses if it was found that in the result the beneficiary of the bond was not entitled to the amount that it had received.

37 I should add that even if the beneficiary was mistaken in adopting the position that it was entitled to a certain sum thus justifying a call on a performance bond, the call would still be legitimate so long as the position was genuinely adopted and the beneficiary honestly believed that the obligor was in breach of its obligations: *BS Mount Sophia* at [52]. As the Court of Appeal noted, "It is not the court's role in such proceedings to appraise the merits of the parties' decisions; but, rather, it is the court's role to be alive to the lack of bona fides in those decisions." In the present case, even if I was wrong in my assessment of the evidence above, I would add that I did not find any evidence that went to showing a lack of *bona fides* on the part of the defendant.

38 The plaintiff also protested long and hard that the calls by the defendants put it into a very difficult financial position such that it would be unable to prosecute a claim for $1.4m which it said was owed to it by the defendant. Mr Soh averred that:

> This is the biggest project which the Plaintiffs have undertaken so far. All their financial resources are thrown into the Works. The Defendants are well aware that by calling on the Performance Bonds, totalling $988,888.80, the Plaintiffs would be ruined and they would not then have the means to recover the balance sum of S$1,427,711.51, which the Defendants clearly owes to the Plaintiffs. [note: 5]

39 In my judgment the financial hardship alleged by the plaintiff could not be relevant. No doubt an obligor might be put to liquidity issues by a call on a bond, as the plaintiff in this case was claiming. That was why a court would enjoin calls made in bad faith or which were in any case unconscionable. But, as the Court of Appeal noted in *BS Mount Sophia* at [39], "it is a fact of commercial life that the tide of liquidity needs to wash both ways, and financial droughts can be equally detrimental to both the beneficiary and the obligor." A beneficiary should not be prevented from calling on a bond simply because this resulted in hardship to the obligor.

40 As I have said, if in the final analysis the beneficiary was not entitled to that full amount, the obligor might depending on its arrangements with the insurer be able to claim for the overpayment; however a performance bond was sought precisely because there was a chance that the obligor would not be good for its secondary obligation to pay damages for breach of contract.

41 Whether a party was actually entitled to those damages, that decision would come only after the dispute was finally determined in arbitration or litigation. In the interim, hardship claimed by the obligor could not be used as a ground to prevent a beneficiary who was otherwise entitled to call on a performance bond from doing so. The inquiry focused on the *beneficiary's* alleged unconscionable conduct rather than the effect on the *obligor*.

42 For completeness I should add that the defendant argued that the plaintiff had brought this

action in bad faith because it had stalled the progress of the pending arbitration between the same parties and therefore demonstrated no real intention to proceed to arbitration. The defendant said that the plaintiff had filed the notice of arbitration merely to found a basis for commencing this action and therefore this application was an abuse of process.

43 The doctrine of unclean hands is of course a ground to deny equitable relief but I was not persuaded that the plaintiff had brought this application in bad faith. On 29 August 2013, the plaintiff sent a notice of arbitration to the defendant. On 26 September 2013, the defendant replied to propose two arbitrators to the plaintiff and requested a response within 28 days. The plaintiff has not replied but counsel for the plaintiff assured me during the hearings that it was proceeding on the arbitration with all due despatch. Based simply on this evidence before me I was unable to conclude that the plaintiff was abusing the court's process and I therefore declined to make any finding on the issue.

Conclusion

44 For the reasons above I found that the defendant was entitled to call on the performance bonds and that the plaintiff was not entitled to an injunction because it was unable to show that the defendant's conduct was unconscionable.

45 I awarded the defendant fixed costs at each hearing: $10,000 for the first hearing and $4,000 for the hearing on further arguments.

[note: 1] Para 16 of Soh Chee Chye's 1st affidavit of 29 August 2013

[note: 2] Para 43–45 of Soh Chee Chye's 1st affidavit of 29 August 2013

[note: 3] P 246 of Soh Chee Chye's 1st affidavit of 29 August 2013

[note: 4] Para 44–49 of Tan Puay Leng's 1st affidavit dated 23 September 2013

[note: 5] Para 72 of Soh Chee Chye's 1st affidavit of 29 August 2013