Leighton Contractors (Singapore) Pte Ltd v J-Power Systems Corp and Another [2009] SGHC 7

Case Number : OS 1125/2008

Decision Date : 12 January 2009

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Andrew Ang (PK Wong & Associates LLC) for the plaintiff; Joseph Chai (Lee Chai & Boon) for the defendant

Parties : Leighton Contractors (Singapore) Pte Ltd — J-Power Systems Corp; The Hongkong and Shanghai Banking Corporation Limited

Banking

Civil Procedure

12 January 2009 Judgment reserved

Choo Han Teck J:

Introduction

1 This is Leighton Contractors (Singapore) Pte Ltd's ("LCS") application to restrain the defendants, J-Power Systems Corporation ("JPS") and The Hongkong and Shanghai Banking Corporation Limited ("HSBC"), from receiving and making payment respectively pursuant to a performance bond. Earlier, JPS was awarded a contract to install undersea pipelines. JPS in turn sub-contracted part of the works to LCS. Pursuant to this sub-contract, LCS agreed and undertook to provide, through HSBC, a performance bond equivalent to 5% of the sub-contract price ("the Performance Bond"). Notably, the bond, for the sum of $956.395.00, was an unconditional or "on-demand" one, and HSBC was obliged to make payment "upon receipt of your demand in writing and your written statement that the Principal is in breach of his obligations under the underlying contract". On 25 August 2008, JPS made a call on the said Performance Bond through a demand to HSBC dated that same day.

2 The law in relation to performance bonds in Singapore is not in dispute. For an unconditional performance bond, the issuing bank is generally not concerned with the underlying contract on which the bond is based and has no duty to ascertain whether there had in fact been a breach of the underlying contract. Actual proof of default is also not required when calling upon the bond. A summary can be read in Poh Chu Chai, *Law of Pledges, Guarantees and Letters of Credit*, (LexisNexis, 5th ed, 2003) at pp 855–863 and 876–881. The aforementioned is however subject to the fraud and unconscionability exceptions: see *GHL Pte Ltd v Unitrack Building Construction Pte Ltd* [1999] 4 SLR 604 ("*GHL*"). As the present case revolves around the latter exception, it would be useful to first briefly examine the law in that respect. In *GHL*, the Court of Appeal, in approving the unconscionability as a sufficient ground to restrain a call on a performance bond, said (at [24]):

> … We are concerned with abusive calls on the bonds. It should not be forgotten that a performance bond can operate as an oppressive instrument, and in the event that a beneficiary calls on the bond in circumstances, where there is prima facie evidence of fraud or unconscionability, the court should step in to intervene at the interlocutory stage until the whole

of the circumstances of the case has been investigated. It should also not be forgotten that a performance bond is basically a security for the performance of the main contract, and as such we see no reason, in principle, why it should be so sacrosanct and inviolate as not to be subject to the court's intervention except on the ground of fraud. We agree that a beneficiary under a performance bond should be protected as to the integrity of the security he has in case of non-performance by the party on whose account the performance bond was issued, but a temporary restraining order does not prejudice or adversely affect the security; it merely postpones the realisation of the security until the party concerned is given an opportunity to prove his case.

3 As to what constitutes unconscionable conduct, Chao Hick Tin JA in *Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khalifa bin Zayed Al Nahyan* [2000] 1 SLR 657 ("*Dauphin*") said:

> 42 We do not think it is possible to define "unconscionability" other than to give some very broad indications such as lack of bona fides. What kind of situation would constitute unconscionability would have to depend on the facts of each case. This is a question which the court has to consider on each occasion where its jurisdiction is invoked. There is no pre-determined categorisation.
>
> …
>
> 46 Other instances where unconscionability was held to apply are: (i) in *Kvaerner Singapore Pte Ltd v UDL Shipbuilding (Singapore) Pte Ltd* (supra), the beneficiary made a call based on a breach induced by their own default and was not permitted to do so; (ii) in *Royal Design Studios v Chang Development Pte Ltd* (supra), an injunction was granted where the beneficiary's call on the bond was based on delays in construction that were caused by the beneficiary's own default in failing to make timely payments on the interim certificates issued by the architect and a considerable sum due to the account party under the joint venture agreement was retained by the beneficiary; (iii) in *Min Thai Holdings Pte Ltd v Sunlabel Pte Ltd* (supra), the defendant-buyer was restrained from calling on the performance guarantee when the non-delivery of rice was due to floods caused by typhoon and there was a "force-majeure" clause in the contract, as the court felt that it was unconscionable, in the circumstances, for the defendant-buyer to receive payment under the performance guarantee.

4 The following passage from *Raymond Construction Pte Ltd v Low Yang Tong* (Suit 1715/95, 11 July 1996, unreported) was also cited with approval in *Dauphin*:

> The concept of 'unconscionability' to me involves unfairness, as distinct from dishonesty or fraud, or *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. *Mere breaches of contract by the party in question would not by themselves be unconscionable.*

5 As for the requisite standard of proof, "it is important that the courts guard against unnecessarily interfering with contractual arrangements freely entered into by the parties" and that "the parties must abide by the deal they have struck": *Eltraco International v CDH Development* [2000] 4 SLR 290 at [29]–[30]. Thus, mere allegations of unconscionability would not suffice and it is incumbent on the plaintiff to demonstrate a strong *prima facie* case of unconscionability: see *Dauphin* at [57].

> In coming to this view we have borne in mind the standard of proof required of the alleged unconscionability. In *Bocotra* [1995] 2 SLR 733 this court stated that 'a high degree of strictness

applies, as the applicant will be required to establish a clear case of fraud or unconscionability in the interlocutory proceedings. It is clear that mere allegations are insufficient.' In *GHL v Unitrack* [1999] 4 SLR 604 this court implicitly endorsed the strong prima facie standard propounded by the High Court in *Chartered Electronics Industries v Development Bank of Singapore Ltd* [1999] 4 SLR 655. In our opinion, what must be shown is a strong prima facie case of unconscionability.

6 LCS contended that JPS's conduct as a whole was unconscionable and that the latter was "not a fair and honest contractor". First, LCS argued that JPS had to apply for adjudication on three separate occasions under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) for payment from the latter. In this respect, awards in LCS's favour were made in all of the said adjudications. LCS also stated that the amount of loss quantified by JPS was only $850,706 but yet a call was made on the full Performance Bond quantum of $956,395. In its view, that was "evidence of opportunism at its most blatant". Further, LCS rebutted each and every of the breaches alleged by JPS and took the position that "the instances cited [by JPS] did not constitute breaches". LCS also said that although there were outstanding works, they were "minor" and would be resolved during the defects liability period. Furthermore, as the certificate of substantial completion had been issued, LCS could not then be said to have breached its contractual obligations. Pertinently, LCS averred that "since there was no material breach, there is no basis to call on the Performance Bond".

7 JPS, on the other hand, complained of multiple breaches on LCS's end and claimed that it had expended monies on works which LCS had failed to do. These alleged breaches, 15 in all and amounting to $850,706 in total, ranged from a fence rectification claim of a few hundred dollars to a $460,000 claim for additional gravel and stones. In addition, JPS asserts that it has a valid claim for liquidated damages against LCS as a result of the latter's failure to complete its contractual obligations on time. It emphasised that even if there was a valid prolongation from 31 August 2007 to 26 October 2007 – as per the adjudication determination in SOP/AA05 of 2008 dated 3 March 2008 – LCS was not able to justify the period of delay from 26 October 2007 to 4 January 2008.

8 After hearing counsel and having perused through the documentary evidence, I am of the view that there was no strong *prima facie* evidence of unconscionability on the part of JPS. First, the fact that LCS had obtained three adjudication awards in its favour did not amount to evidence of unfairness. There was no finding of unconscionable conduct on the part of JPS by the adjudicators and it would imprudent for the court to hold that a party had acted unfairly simply because it had three adjudication awards made against it. In any event, I note that LCS had claimed for $2,528,007 in SOP/AA05 of 2008 and was awarded only $1,454,725. In SOP/AA11 of 2008, LCS claimed for $1,090,288 and was awarded only $73,376. It was only in SOP/AA 02 of 2008 that LCS had fully succeeded. This bears out my point that the said adjudication determinations should not be held against JPS.

9 As for the 15 or so alleged breaches, I am mindful of the fact that the Performance Bond was an "on-demand" one and no actual proof of breach was required on the part of JPS. Nonetheless, if LCS were able to demonstrate conclusively that there had in fact been no breach, then that would lend weight to its assertions that JPS had acted unconscionably. That said, having perused through the documentary evidence, I am however not able to arrive at the conclusion that JPS's assertions against LCS were not *bona fide*. In the present case, both parties have a consistent and plausible story to tell and it is difficult, on the basis of affidavit evidence alone, to reach a firm conclusion on any of the alleged breaches.

10 As for the liquidated damages claim – which would bring JPS's claims above the Performance Bond quantum – I note that in SOP/AA05 of 2008, the adjudicator agreed with LCS that "[the]

outstanding works are minor works and should not prevent substantial completion from being attained", and that the adjudicator had found that substantial completion was achieved by 4 January 2008. There was however no finding of when precisely substantial completion was attained. In any event, such a finding would not be necessary for our present purposes. This is because cl 17 of the sub-contract provided as follows:

> If the Subcontractor fails to meet the Date for Completion, or any Extension of the Date for Completion, the Subcontractor shall pay to the Contractor an amount equal to 0.1% of the total amount of the Subcontract price per day of delay as liquidated damage. However the Subcontractor's total liability for the liquidated damage shall not in any case exceed ten percent (10%) of the actual price of the Subcontract as calculated in Clause 6.1 and such reimbursement shall be in full satisfaction to the Subcontractor's liabilities for the said failure or delay.

11 "Date for Completion" was defined under cl 1 as "that date set out herein for the completion of the Works", while "Works" is defined as "*all works* as set forth in this Subcontract and includes the Technical Specifications and the optional works and other work to be performed relating to and as set forth in this Subcontractor" (emphasis added). On the face of it, LCS's liability under cl 17 is not contingent upon substantial completion but upon the completion of "all works". This in turn meant that JPS's claim that liquidated damages are payable was not *mala fide*.

12 In the premises, I am of the view that LCS fell short of demonstrating a strong *prima facie* case of unconscionability on JPS's part. Accordingly, the application to restrain JPS and HSBC from receiving and making payment respectively under the Performance Bond is dismissed and the interim injunction granted earlier is to be lifted. My opinion here was made on the limited evidence and the nature of the application before me, my views expressed herein are neither final nor conclusive in respect of a actual dispute of the performance of the contract. I will hear the parties on costs at a later date.