Newtech Engineering Construction Pte Ltd v BKB Engineering Constructions Pte Ltd and Others
[2003] SGHC 141

Case Number : Suit 42/2003, SIC 379/2003, 380/2003

Decision Date : 26 June 2003

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Lawrence Lim and Chong Kuan Keong (Chong Chia & Lim LLC) for the Plaintiffs; Lai Swee Fung (UniLegal LLC) for the First Defendants

Parties : Newtech Engineering Construction Pte Ltd — BKB Engineering Constructions Pte Ltd; The Asia Insurance Company Ltd; Cosmic Insurance Corporation Limited

Building and Construction Law – Building and construction related contracts – Performance bonds – Nature of performance bonds

Injunctions – Purposes for grant – Grounds for restraining receipt of payment under performance bonds

1 The Plaintiffs were the First Defendants' sub-contractors in respect of the building construction project at the Sembawang Camp. Two sub-contracts were entered into on 31 January 2000 and on 18 April 2000. The Plaintiffs claimed to have performed and completed their scope of works but have not been paid by the First Defendants an outstanding sum of $376,944.99 (inclusive of 3% GST). The Second Defendants issued a performance bond pursuant to the first sub-contract and the Third Defendants issued a performance bond for the second sub-contract.

2 In these two summonses in chambers, the Plaintiffs sought to restrain the First Defendants from receiving payment of $43,150 from the Second Defendants and from receiving payment of $200,000 from the Third Defendants under the respective performance bonds. The basis of the applications was that the call on the two bonds was made in bad faith and unconscionably as the First Defendants had no honest belief that the Plaintiffs had failed to perform their contractual obligations.

THE PLAINTIFFS' CASE

3 The First Defendants' main contract with the Ministry of Defence for the project had a value of $23.5 million. The First Defendants engaged the Plaintiffs to construct a three cell box culvert for a total of $423,000 based on unit rate measurement and to carry out temporary access works for $8,500. These works were independent of the other works in the project. A performance bond for 10% of the contract sum amounting to $43,150 was obtained.

4 Under the first sub-contract, the Plaintiffs were to take possession of the site by 1 February 2000 and complete the works by 31 May 2000. However, the First Defendants encountered delay in their own works, particularly the piling works undertaken by other sub-contractors which had to be completed before the Plaintiffs could carry out the box culvert works. The Plaintiffs, in a letter dated 4 April 2000, informed the First Defendants they had completed the excavation works and were waiting for the First Defendants to complete the piling works. They also wrote to the First Defendants on 23 August 2000 to state that they had stopped their culvert works since 29 July 2000 due to the stoppage of piling works by the relevant sub-contractor. The First Defendants wrote to that sub-contractor the next day to note that piling works had ceased since 15 July 2000 and to instruct that the remaining 99 piles be completed before 11 September 2000. The letter also stated that they had received a complaint from the Plaintiffs on this matter.

5 On 22 August 2000, the project's architect granted the Plaintiffs an extension of 6 weeks after the completion of piling works to complete the box culvert works. The revised Master Programme dated 11 October 2000 showed the revised completion date for the box culvert works as 10 November 2000.

6 The piling works were completed on 22 September 2000 and the box culvert works were completed satisfactorily in November 2000, within the time frame stipulated. There was no complaint by the First Defendants, MINDEF or the project's consultants until the first performance bond was called upon on 3 January 2003, about 26 months later.

7 The second sub-contract pertained to road/road kerb works at the project for an estimated sum of $2 million. The performance bond in question was for 10% of this amount, that is $200,000. The Plaintiffs were to take possession of the site forthwith and complete the works within five and a half months. Here again, there was delay in the First Defendants' works – five to nine months at the various zones for their mechanical and electrical (M & E) works and three to four months at the various zones for the drainage works. Many parts of the Plaintiffs' road works could only commence after each stage of the First Defendants' said works was completed or substantially completed. Due to such delay, the Master Programme was revised four times and the completion date for the Plaintiffs' road works was re-scheduled to May 2001.

8 The correspondence between the project's architect, the First Defendants and their external electrical sub-contractor (Nylect Engineering Pte Ltd) showed that as at 25 July 2000, the external M & E works were only 15% completed and as at 18 October 2000, 60% completed. In late December 2000, the First Defendants were still chasing Nylect and demanding that they proceed with their external electrical works so as not to delay the other works. In July 2001, changes were still being made to the external electrical works which disrupted the Plaintiffs' completed road works. The project's architect confirmed in a letter dated 7 February 2003 to the Plaintiffs' solicitors that the liquidated damages deducted by MINDEF were in respect of the overall delay by the First Defendants and not in respect of specific items and that MINDEF took out works (such as the drainage and M & E works) from the First Defendants as a result of the First Defendants' delay in commencing works in accordance with the contract.

9 Despite the constraints on site, the Plaintiffs completed substantially all of the road works in June 2001. The laying of the last layer of premix could only be done upon the instructions of the First Defendants or their consultant. The other works were completed in December 2001 and the Plaintiffs laid the last layer of premix accordingly. This was evidenced by the Plaintiffs' progress claims for July 2001 to January 2002 which showed that the only substantial difference between the claims for July 2001 and for January 2002 was in respect of work done for the laying of the last layer of premix. The external works were handed over by the First Defendants to MINDEF on 15 November 2001 and on 24 December 2001.

10 The Plaintiffs' final statement of account showed a sum of $376,944.99 as due and owing by the First Defendants to the Plaintiffs. The First Defendants' account on 22 August 2002 showed an alleged overpayment of $3,371.08 to the Plaintiffs. This was due to some $137,265 having been deducted as costs of removal of surplus earth. The overpayment ballooned to $238,980 in the First Defendants' account rendered five months later on 23 January 2003. This was due in part to the costs of removal of surplus earth having been increased to $287,838. In addition, another $81,532 was deducted by the First Defendants for new items such as shoring work and late completion of box culvert works.

11 The Plaintiffs argued that this exercise of increasing the costs of removal of surplus earth and of including additional items was an after-thought and was 'simply conjured up in (an) attempt to establish over-payment of $238,980 (which is suspiciously close to the total bond sum of $243,150

that was called)'. The correspondence from the Plaintiffs to the First Defendants complaining about the piles of earth on the site hindering their works showed that they were not responsible for the costs of removal of surplus earth deposited by the other sub-contractors.

12 The First Defendants called on the first performance bond on 3 January 2003. The Plaintiffs were informed a week later by the Second Defendants. This call was made some eleven months into the defects liability period which expired on 15 February 2003. This was also more than two years after the completion of the box culvert works. The call on the second bond was made on 4 January 2003 with the Plaintiffs being informed by the Third Defendants on 10 January 2003. Again, this call was made some eleven months into the defects liability period and one year after completion of road/road kerb works.

13 The calls on the bonds were made in bad faith as the First Defendants were in serious financial difficulties. They had also called on the performance bond procured by Nylect Engineering Pte Ltd, their electrical sub-contractor in the same project, for payment of $310,000. On 17 March 2003, Nylect obtained an injunction against the First Defendants in Suit 124 of 2003. The calls were made with the intention of using the money payable under the bonds to pay their creditors.

14 There were thirty seven actions commenced in the High Court and in the Subordinate Courts against the First Defendants in 2001 and in 2002. At least ten sub-contractors involved in the project in question have commenced action against the First Defendants, resulting in a winding-up petition which was subsequently withdrawn. Garnishee proceedings taken out by a creditor resulted in the recovery of only $3,900 from the First Defendants' bank account. In the said ten suits, the First Defendants counterclaimed a total of $4.3 million in liquidated damages from their sub-contractors while the actual deduction made by MINDEF was only about $977,000. No details were given on how the liquidated damages were apportioned among the various sub-contractors.

15 The First Defendants were inconsistent in the amount of liquidated damages that they sought to impose on the Plaintiffs. At first, it was $792,000 for purported delay from 1 October 2000 to 31 October 2001 in the second sub-contract. Now, in their Counterclaim, they sought to impose $976,000 for purported delay from 1 October 2000 to 31 January 2002.

16 Similarly, the First Defendants did not explain how they computed their alleged costs of removal of surplus earth. They continued to allege that piling works were within the Plaintiffs' scope of works in spite of the overwhelming evidence to the contrary. They first alleged this on 9 December 2002, one month before calling on the performance bonds.

17 M & E works were also not within the scope of works of the Plaintiffs. The project's architect, in a reply dated 7 February 2003 to the Plaintiffs' solicitors, stated that 'the employer has taken out other works from BKB such as the drainage works and M & E works owing to BKB's delay in commencing works in accordance with the contract'. For better co-ordination, MINDEF also took back the Plaintiffs' road works in some zones. While that was done for six zones on 7 August 2000, the commencement date for the Plaintiffs' road works was 21 September 2000. When MINDEF took back the road works in three other zones on 14 December 2000, the areas in issue were not even ready for the Plaintiffs to commence their road and kerb works. It was therefore clear that MINDEF's actions were not due to any default of the Plaintiffs.

18 The First Defendants were in the midst of arbitration proceedings against MINDEF when they called on the bonds here. The trial of this action has been scheduled to commence on 1 September 2003. There was a high risk that the Plaintiffs would not be able to recover the money paid out under the performance bonds should they succeed at the trial. On the other hand, there would be no prejudice at all to the First Defendants if the injunction was granted. They would not suffer any additional damages as the project had long been completed and the defects liability period had

expired. The balance of convenience was clearly in the Plaintiffs' favour.

THE FIRST DEFENDANTS' CASE

19 The performance bonds were unconditional and irrevocable in nature. The Plaintiffs' action was directly contrary to the express terms of the sub-contract as well as the bonds.

20 The Plaintiffs had not only failed to produce sufficient evidence to show any alleged fraud or unconscionable conduct, they were in fact the party in breach of the two sub-contracts. The first sub-contract clearly stated that it was to commence on 1 February 2000 and that the works were to be completed by 31 May 2000. The Plaintiffs admitted the works were completed only on 30 November 2000 and were therefore liable for liquidated damages. The second sub-contract stipulated the completion date of 18 September 2000 but the Plaintiffs completed the external works in January 2002. Liquidated damages were imposed for the period 1 October 2000 to 31 October 2002 and they amounted to $360,000 and $792,000 respectively.

21 Among the many things that the Plaintiffs had failed to do under the sub-contracts were the failure to do shoring works for the box culvert as required contractually and to have enough financial resources to pay the asphalt suppliers. As a result, there were substantial delays. The Plaintiffs' omissions also caused MINDEF to take back $1.7 million worth of works, out of which at least some $300,000 to $400,000 was attributable to the default of the Plaintiffs. The First Defendants had to spend more than $287,000 to remove the earth dumped by the Plaintiffs. Piling works had to stop due to the Plaintiffs' ineffective silt control measures.

22 The First Defendants lost $977,156 imposed as liquidated damages by MINDEF and also suffered losses in devoting a huge amount of resources to mitigate their losses. They also had to pay higher rates in order to get new sub-contractors. The project's consultants lost confidence in the Plaintiffs' commitment to complete the works entrusted and therefore omitted works amounting to $1,696,000. A new sub-contractor was appointed by the consultants.

23 The First Defendants denied that they were on the brink of financial collapse and that there was late handing over. The First Defendants, being the main contractors, were aware which of the 25 sub-contractors were in default. They had also acquired a good reputation in the past 13 years and their character and integrity were beyond question.

THE DECISION OF THE COURT

24 In *Bocotra Construction Pte Ltd v Attorney General (No. 2)* [1995] 2 SLR 733, the Court of Appeal held that the balance of convenience test propounded in *American Cyanamid Co v Ethicon* [1975] AC 396 was not applicable in cases involving performance bonds and that the sole consideration in applications for injunctions restraining payment or calls on bonds was whether there was fraud or unconscionability. The Court of Appeal also held that the applicant was required to establish a clear case of fraud or unconscionability in interlocutory proceedings and that mere allegations were not enough. In *Dauphin Offshore Engineering & Trading Pte Ltd* [2000] 1 SLR 657, the Court of Appeal stated that "what must be shown is a strong *prima facie* case of unconscionability". Fraud and unconscionability are separate grounds for restraining a beneficiary of a performance bond from enforcing it (*GHL Pte Ltd v Unitrack Building Construction Pte Ltd* [1999] 4 SLR 604).

25 I said in the unreported case of *Four Seas Construction Co Pte Ltd v Tai Ping Insurance Co Ltd and another* (Suit No. 2118 of 1997) that a commercial dispute arising out of a building contract should not be unjustifiably elevated to the level of fraud or unconscionability. However, in the present case, I accepted that the Plaintiffs' arguments showed a strong *prima facie* case of

unconscionability on the part of the First Defendants in calling on the two performance bonds in issue.

26 The First Defendants failed to explain the discrepancies in their final statements of account over the five months between 22 August 2002 and 23 January 2003. The costs of removal of surplus earth and the additional items included in the later set of accounts were in respect of works completed some time back. It was difficult to see how the First Defendants could have made such a blunder in their accounts. If they had failed to quantify some items of costs initially, they could not produce any documents to support their contention. In particular, they failed to show how the costs of removal of surplus earth ballooned from some $137,000 in August 2002 to about $287,000 in January 2003. The changes to the final accounts appeared to have been arbitrarily made and buttressed the Plaintiffs' contention that they were done to show overpayment of an amount suspiciously close to the total amount payable under the bonds.

27 The Plaintiffs have also produced cogent evidence to support their contention that they were not in default of their contractual obligations and that there was therefore no reason to call on the bonds. The entire circumstances of the case suggested strongly that the First Defendants had an ulterior motive in calling on the bonds. It did not appear to be based on any *bona fide* claim they had against the Plaintiffs. Although they staved off the attempt to wind them up and were not on the brink of financial ruin, they could not be said to be in good financial health either. The calls on the bonds appeared to have been made to ameliorate their cash flow problems.

28 For these reasons, I granted the Plaintiffs the injunctions sought against the First Defendants.

Plaintiffs' applications for injunctions granted.

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