Wishing Star Ltd v Jurong Town Corp
[2007] SGHC 128

Case Number : Suit 31/2003

Decision Date : 14 August 2007

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Tan Liam Beng and Eugene Tan Kon Yeng (Drew & Napier LLC) for the plaintiff; Ho Chien Mien and Jagateesan Sathiaseelan (Allen & Gledhill) for the defendant

Parties : Wishing Star Ltd — Jurong Town Corp

14 August 2007 Judgment reserved.

Choo Han Teck J:

Introduction

1 The issue of liability was determined previously and the facts concerning that issue are found in the previous judgment of this court in *Wishing Star Ltd v Jurong Town Corporation* [2005] 1 SLR 339 and the Court of Appeal's decision is reported in [2005] 3 SLR 283. Pursuant to the latter decision, the defendant proceeded to have damages assessed in respect of its counterclaim. The plaintiff was awarded the contract on 14 June 2002 for façade work for the project commonly referred to as "The Biopolis Project" which comprised seven tower blocks. The contract was terminated by the defendant on 9 September 2002 on the ground of various misrepresentations made by the plaintiff to it. Consequently, the defendant engaged a new contractor, Bovis Lend Lease ("BLL") to take over and complete the job. The damages claimed by the defendant were set out in counsel's written closing submissions at paragraph 6.1 as follows –

(a) The sum of S$7,810,000.00 being the difference in the value of the WSL Contract and the value of contract between JTC and Bovis Lend Lease ("BLL"), being the sub-contractor engaged by JTC to carry out the Façade Works subsequent to WSL's termination (the "BLL Contract");

(b) The sum of S$2,437,120.00 [amended to S$1,036,983.00 at paragraph 55.3] being the expenses incurred by JTC as a result of JCPL administering the BLL Contract;

(c) The sum of S$18,223.97 being the expenses for the 3 inspection trips to China which took place in the course of the WSL Contract;

(d) The sum of S$313,600.00 being the expenses incurred by JTC as a result of JCPL having to attend to WSL in the course of the WSL Contract;

(e) The sum of S$8,000.00 being the costs of engaging a surveyor for JTC's inspection visit to WSL's facilities in China on 3 September 2002; and

(f) The sum of S$7,700.00 [amended to S$3,003.00 at paragraph 63.1] being the abortive costs for Site Occupational Licenses.

2 The plaintiff's first challenge was to the defendant's counterclaim on the ground that it had

failed to mitigate its loss. The failure to mitigate was evidenced, in counsel's opinion, in five areas. First, the defendant did not appoint Compact Integrate Marketing Pte Ltd ("Compact") or Rotol Singapore ("Rotol") as third party sub-contractors. Secondly, the defendant failed to novate the contract to a company under the defendant's control or influence, for example, Jurong Consultants Pte Ltd ("JCPL"). Thirdly, the plaintiff failed to engage SB Façade as replacement contractors. Fourthly, the defendant overpaid BLL by $4,309,992.00 because it did not engage BLL on the latter's first quotation of $57,500,008.00 and accepted its later quotation of $61,810,000.00. Fifthly, the defendant's agent, JCPL failed to negotiate for lower prices for the granite materials used. There was merit in the defendant's complaint that the allegation of a failure to mitigate was made very late. The plaintiff's reply and defence to counter-claim were filed on 7 March 2003 and the assessment of damages scheduled to be heard from 10 April 2006. The application to amend the statement of claim to include the allegation of failure to mitigate was made on 7 April 2006. In the event, leave was granted to amend and so the defendant's complaint that this defence was an afterthought is not significant if the plaintiff can show that the defendant did not mitigate. I therefore turn to the plaintiff's grounds.

3 It appeared that Compact and Rotol were established companies that had the ability to complete the job, but what was disputed was the capacity of either company to do so at the time. The burden was on the plaintiff to show that either of them was prepared and ready to take over if offered the job as a sub-contractor or a direct contractor, but no evidence had been adduced other than the claim by the plaintiff itself. On that score, I am not satisfied that the burden was discharged. The plaintiff alleged that the defendant ought to have appointed Synergy or PrimeWide to take over the façade work. The evidence showed that during the crisis of confidence, the defendant considered various companies as alternatives and Synergy and PrimeWide were among those considered, but were not appointed because the defendant lacked the confidence in appointing any of them. The same applied in respect of the allegation that the defendant ought to have appointed SB Façade to take over because the latter had submitted the second lowest tender, and was pipped by the plaintiff with the lowest. The evidence, however, showed that the defendant was not confident of the ability of SB Façade to do the work, and given the circumstances in which the plaintiff's appointment was terminated, it was not unreasonable for the defendant to be careful as to who should take over. Price is not the sole criterion in such circumstances.

4 The plaintiff's next complaint was that the defendant contracted with BLL at $61,810,000 when its initial inquiry drew a quotation from BLL for $57,500,008. The initial quote was not a finalised offer and it would be wrong to hold that either party was bound by that figure when no contract was made. Until then, either side could have withdrawn its interest in the other, or resumed negotiations and contracted on different terms, as was the case. There was no evidence to show that the pricing of BLL's granite material was so untenable that the contract should not have been signed with them on that account. The defendant was entitled to consider the overall cost as it is accepted that prices for individual items will differ from party to party in construction contracts. The plaintiff also made various vague allegations of impropriety in the appointment of BLL, but none of them had been pleaded or proved, and I shall not dwell on such matters (as ulterior motives for the appointment, calculated to harm the plaintiff) because that would be a speculative and futile exercise.

5 The second broad challenge was that the work done by BLL was different from that contracted between the plaintiff and the defendant. One such item was alleged to have been a sum of $1,021,800 for aluminium cladding to Block 3 when there was no such provision in the plaintiff's contract with the defendant. The evidence of the defendant's witnesses and even the plaintiff's expert, Leslie Pearce, did not support this allegation. I do not see evidence that the contract with BLL was different from that with the plaintiff, other than the difference in price. The allegation that there was no provision for aluminium cladding for Block 3 was not proved. In this regard, it appeared

to me that Mr C H Tong might have been a little confused. Unfortunately for the plaintiff, Carol Wen, the person who might have a clearer recollection, suffered head injuries in an accident in China and was unable to testify at the assessment inquiry. A similar allegation was made in respect of the image screen. This item was included in the plaintiff's contract as a provisional item only and it did not quote a price whereas BLL did. I am of the view that the defendant was entitled to proceed to construct this item and the plaintiff's omission in setting its price cannot be used to its advantage now to deny the defendant's costs of installing it. The plaintiff itself would ultimately have had to set the price in the event that it was the one to construct the image screen. On the whole, I found no difference in the scope of work between the plaintiff's contract and BLL's contract. I am satisfied with the evidence of Nick Chang and the defendant's expert that the drawings and tender documents of the plaintiff's contract were no different from those of BLL's.

6 The third broad challenge was made against various disbursements and expenses incurred, namely, first, JCPL's administration expenses, secondly, the defendant's expenses for the three trips to China, thirdly, JCPL's staff expenses for attending to the plaintiff. The defendant being the party entitled to damages need only prove that the costs of these expenses were reasonably occasioned by the breach. The trips to China were made to verify the plaintiff's capacity to perform its part of the contract and to see if the job could be saved by employing additional third party help in China. In the event, discoveries made during those trips convinced the defendant that the plaintiff could not manage. That no alternative or additional contractor from China was engaged eventually did not mean that the trips themselves were unnecessary or were not reasonably consequential upon the plaintiff's breach. In this regard, I accept Mr Tan's submission on behalf of the plaintiff that this claim was made on the assumption that Samsung, the main contractor would have taken the plaintiff as a nominated subcontractor. If it did not, JCPL would still have to manage the contract for the defendant. One fact that was clearly established was the tenacity with which Samsung resisted accepting the plaintiff as its nominal subcontractor. Even when the misrepresentations became obvious and all efforts to salvage the contract were made, the final factor that determined the contract was Samsung's refusal to take the plaintiff as its nominated subcontractor. Consequently, I do not think that the defendant was entitled to claim the administration charges of JCPL as expenses occasioned by the misrepresentations.

7 Fourthly, the costs of the surveyor for the defendant's China trip. These were Mr Bruce Wymond's fees to evaluate the discoveries and findings made from the defendant's trip to China. I am of the view that this was a necessary and consequential expense. It was reasonable to have expert opinion in respect of the many technical questions especially the adequacy of the plaintiff's facilities in China. Those were matters that the defendant had to assimilate before making its decision to terminate.

8 Fifthly, the defendant's abortive costs for site occupational licence. This was a sum of $3,003 claimed by the defendant for space for the plaintiff's use at site as determined by the Land Authority. This was a vague claim and I am not able to conclude that this item was proved. Furthermore, it cannot be said that there was a total loss to the defendant in respect of the site use just because the plaintiff was in breach. The burden was on the defendant to prove and it did not discharge the onus of proving it. This claim was vague if not speculative and the defendant had to rely on the assumption of use, as well as an assumption of loss.

9 The plaintiff had two counterclaims in the assessment. The first was for the sum of $333,750 being the amount claimed for work done and services rendered. It also claimed damages for breach of copyright. There were a number of applications by the plaintiff in respect of these claims prior to and at the assessment proceedings, including whether or not certain evidence ought to be led in respect of these two issues. I had generally allowed the plaintiff's applications (notwithstanding the

defendant's objections that these claims were *res judicata* since the Court of Appeal's decision provided only for the assessment of the defendant's damages) so that the assessment could proceed without inadvertently excluding evidence that might subsequently prove relevant if correctly adduced. This was an unusual step but given the nature of the claim I was of the view that this was the fairest and most expedient approach. In considering the final submissions in their entirety, both on law and fact, I have come to the conclusion that the plaintiff's claims for *quantum meruit* and breach of copyright were substantive claims which must be specifically proved at the trial and not during the assessment of damages in respect of the defendant's damages for misrepresentation. Such claims are part of the main action and thus should not be heard in the assessment of damages which is a proceeding arising from a determination of substantive claims. *Quantum meruit* and breach of copyright are substantive claims to be litigated at trial and not as claims during assessment proceedings because that would have meant that a right and breach of that right had been proved. In the circumstances, I am of the view that both claims must be dismissed.

10 For the reasons above, the defendant's claims except for the claims for S$1,036,983.00 (administration of contract fee to JCPL) and $3,003.00 (costs for use of site) are allowed. The plaintiff's claims for work done and services rendered as well as for breach of copyright are dismissed. I will hear the question of costs at a later date if parties are unable to agree costs.

Order accordingly.