Hong Cheng Air-Conditioning Engineering Pte Ltd v Wee Siong Engineering Services Pte Ltd [2003] SGHC 51

Case Number : Suit 712/2002

Decision Date : 07 March 2003

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Ronnie Tan (Central Chambers Law Corporation) for the Plaintiffs; Michael S. Chia and Jonathan K.C. Ow (Sankar Ow & Partners) for the Defendants

Parties : Hong Cheng Air-Conditioning Engineering Pte Ltd — Wee Siong Engineering Services Pte Ltd

Contract – Variation – Parties entering into lump sum contract – Later agreement varying terms of contract – Interpretation of variation agreement – Whether plaintiff entitled to claim balance of original contract.

1 This is a construction claim in respect of materials supplied and services rendered by the plaintiff against the defendant in a Housing and Development Board building project at Yishun Industrial Park B. The Housing and Development Board is not involved in this litigation.

2 The plaintiff was engaged by the defendant to provide labour as well as materials for the complete mechanical ventilation work. The main contractors were Koh Brothers Building and C.E. Contractor Pte Ltd. They are also not involved in this litigation. The defendant was their subcontractor who, in turn, engaged the plaintiff as its subcontractor.

3 The plaintiff's claim against the defendant was for a sum of $538,568.52 being the balance of $730,000 which was the original contract sum. The defendant demurred that the plaintiff had not performed the contract and was therefore not entitled to payment. It further asserted that by reason of the plaintiff's failure to perform the contract the defendant had to carry out the work itself. This resulted in the additional costs of $37,140.64 which the defendant counterclaimed against the plaintiff. In addition to this sum, the defendant also claimed liquidated damages at $100 a day from 16 June 2001 to 7 February 2002. The defendant also claimed a sum of $1,861.42 being "administrative charges".

4 When the trial commenced before me, the pleadings from both parties were totally inconsistent with the opening statements of counsel. The statement of claim then was a mere two-paragraph statement to the effect that the plaintiff was claiming money due from the defendant for services rendered at the defendant's request. The case that the plaintiff's counsel, Mr Tan, sought to make out at trial was more complicated than that. The defence and counterclaim complicated issues because of its reference to a contract made up of several documents of various dates. There was, in short, no consensus as to what was in fact the contract in question. Counsel then applied to amend their respective pleadings and the trial resumed after they had amended their respective cases.

5 The cases for the plaintiff and defendant respectively were nonetheless presented more complicatedly than they should. In order that the true issues can be appreciated, it is important to first ascertain what the original contract was. Following oral negotiations between Mr Ho, the managing director of the plaintiff and Mr Ng Chee Wee, the managing director of the defendant, the plaintiff submitted a quotation dated 19 September 2000 to the defendant. This quotation was signed by Madam Wee Bee Hua, a director of the defendant. She is also the wife of Mr Ng Chee Wee. After her signature she added the following words in her own hand:

> "We accept this quotation S$730,000 exclude 3% GST as a lump sum contract based on the

drawing No. 85, 86, 87, 88. We will temporarily sign on your quotation & kindly wait for our work, contract agreement & work schedule." (sic)

6 After that, the defendant sent a works order dated 1 November 2000 to the plaintiff incorporating all that was set out in the plaintiff's quotation. This became known as the "first works order". In addition to that works order the defendant attached a set of its own terms and conditions of contract. The defendant maintained at the trial that the contract between the plaintiff and defendant "included" the defendant's terms and conditions. In my view, it does not. The plaintiff's quotation of 19 September 2000 was a document capable of forming a valid and complete contract if accepted. That was done by Madam Wee's signature in affirmation. The defendant disputed such a contract because it was written by Madam Wee that it only "signed temporarily", but I see no commercial meaning in such a phrase and cannot impute any from the circumstances. All that was required to seal the contract was the signature of the defendant in acceptance and its purchase or works order to commence work. The plaintiff, however, had unnecessarily muddied the case from the outset by its failure to identify the contract. Even after the pleadings were amended, it continues to believe that the contract was an oral one made between Mr Ho and Mr Ng "just after they had finished works for the defendant at another project". This was borne out in paragraph 6 of the Amended Statement of Claim.

7 The plaintiff then averred that it was prevented from proceeding to complete the work because the work of other subcontractors employed by the main contractors were still in progress. On 11 June 2001 the defendant issued a second works order for work not originally contracted for. This averment was disputed by the defendant who contended that the second works order covered, work originally set out in the plaintiff's quotation. Its witnesses testified that the second works order was issued to raise the morale of the plaintiff.

8 But prior to the second works order, that is, on 8 June 2001, there was a meeting between Mr Ho of the plaintiff and Mr Ng of the defendant. What actually transpired is not clear. The only consensus from counsel before me was that the agreement reached at this meeting was that the defendant would take over the balance of the work that had not been completed as at 8 June 2001. Although the plaintiff had been paid various progress payments till date, there were complaints by the defendant regarding the quality and speed of the plaintiff's work. There was no mention of payment. In the absence of any indication to the contrary, the only conclusion arising from the 8 June 2001 agreement, in the specific circumstances, is that the plaintiff would not be entitled to any payment unless it is for work requested after 8 June 2001. It will be noted that there was no reservation of rights of either party arising from the 8 June 2001 agreement.

9 Following from this event, the plaintiff says that it had done work that justified its claim for $538,568.52 which included work specified under the second works order as well as some further variation work. On the other hand, the defendant says that the plaintiff had already been paid for all work done by it till date that is, 8 June 2001, and that came to $298,468.64. It further alleged that pursuant to the 8 June 2001 agreement the defendant had completed the rest of the work at its own cost, and that impliedly meant that it should be entitled to claim any amount in excess of the contract sum. The defendant then claimed that that excess came to $37,140.64.

10 The meeting of 8 June 2001 was a crucial event in this case. It is obvious that whatever contract preceded it, the parties had orally agreed to vary their agreement and had subsequently acted largely in accordance with that variation. The quarrel between them that led them all to court arose from the interpretation of the true import of that variation. The persons involved in this oral agreement were Mr Ho Ah Kow the managing director of the plaintiff and Mr Ng Chee Wee, the managing director of the defendant. Mr Ho's affidavit of evidence-in-chief stated that –

"earlier on 8 June 2001, there had been an agreement between the plaintiffs and the

> defendants that the defendants would finish the installation of 20 riser ducts themselves. Originally the plaintiffs were supposed to do the installation of 22 riser ducts but there was a change in circumstances."

Further on, he continued (at [12]) as follows:

> "it was agreed at the meeting that due to the time constraints caused by the circumstances, the defendants would finish the works as described earlier. The plaintiffs would complete 2 nos. of the riser ducts and the rest of the other works which they were committed to completing. As for the completed date of 15 July 2001, it was agreed that we should try our best to meet that date as I had already explained that given the circumstances, the completion date must be realistic."

11 The circumstances referred to were delays caused by the main contractors and other subcontractors. The other person to the oral agreement, Mr Ng Chee Wee, significantly, did not give evidence. There was therefore no one from the defendant who could give evidence to the contrary. In fact, Mr Teo Chye Huat, the defendant's general manager acknowledged that there was an agreement made on 8 January 2001 to vary the contract and under cross-examination stated that the situation was forced upon them, in the sense that it was inevitable given the circumstances.

12 What the parties had agreed to do thereafter was clear. What was not expressed was the revision of price. This is not a case in which price, being central to a commercial agreement, had not been reached and therefore no contract can be said to have formed. In this case, the parties revised the scope of work of a partially performed contract. There are two contending arguments. The plaintiff's counsel Mr Tan submitted that the variation agreement envisaged that the plaintiff be paid for the work it had done. That, he says, came to $538,56.52 less what they had already been paid ($298,468.64). Mr Chia argued on behalf of the defendant that the variation agreement was evidenced in writing in the form of AB144. That was a letter dated 9 June 2001 from the defendant to the plaintiff referring to the meeting of 8 June 2001. The letter sets out the items which the plaintiff was to continue and complete. Mr Chia's submission at [74] contended that "it was understood and agreed that the defendant would deduct the costs of works not carried out by the plaintiff from the lump sum figure of $730,000. Parties proceed (sic) with the common intention of completing the works as soon as possible".

13 On the evidence available, and equally important, the lack of critical evidence, I form the view that the oral variation of the contract on 8 June 2001 had the following effect. The plaintiff was to carry out the work specified in AB144 and the defendant was to complete the rest. That much was clear and expressed. In the absence of any agreement as to further payment, the circumstances do not justify an implication of terms that the plaintiff would be paid pro rata with the original contract price of $730,000 as the basis. It had been paid a substantial amount on progress payments due and submitted. Neither, in my view, would the defendant be entitled to claim for costs incurred by them in carrying out their part of the varied agreement. It is important that the 8 June 2001 variation be considered in context and the circumstances forced upon both sides. There were delays, some of which were of no fault of the plaintiff, but because of the delays the plaintiff was unable to complete the work on schedule. The parties thus agreed to make the best of the situation and that resulted in the agreement of 8 June 2001 whereby the defendant, in effect, cancelled the subcontract with the plaintiff in respect of the rest of the work in order to perform the work itself.

14 I am of the view that additional work had been requested by the defendant after the 8 June 2001 meeting in the form of the second works order (issued on 15 July 2001). It was a request for additional work and not for work already stipulated under the first works order as the defendant contended. Its only basis for saying so was that it issued the second works order merely to "motivate the plaintiff". From the items specified in the two works orders and the evidence of the

plaintiff's witnesses, especially that of Cheong Yeong Soon, a witness whom I regard as the most reliable from either side, I conclude that the defendant's contention cannot be accepted. However, Mr Cheong admitted that only 50% of this work was completed. The work involved in the second works order appear to be requested because the defendant was a little too optimistic that it could take back the remaining work entirely from the plaintiff after 8 June 2001. In my view, the variation agreement on 8 June 2001 formed a separate contract and cannot be considered as a lump sum contract to which the doctrine of substantial performance can be applied. There will be judgment for the plaintiff for half the sum of $69,525.00. The plaintiff's claim for work outside the first and second works orders had not been sufficiently proved and that part of the claim is disallowed.

15 For the reasons above, and in particular, the absence of evidence from Ng Chee Wee, the defendant's counterclaim, including the claim for liquidated damages and administrative charges, which were not proved, is dismissed.

16 Costs of the action and the counterclaim shall be taxed if not agreed, and paid by defendant to plaintiff to the extent of one-third of the taxed costs. Costs in respect of amendment of pleadings shall be costs thrown away to defendant and fixed at $5,500.