CKR Contract Services Pte Ltd *v* Asplenium Land Pte Ltd and another [2014] SGHC 266

Case Number : Originating Summons No 1025 of 2014

Decision Date : 18 December 2014

Tribunal/Court : High Court

Coram : Edmund Leow JC

Counsel Name(s) : Vikram Nair, Seow Wai Peng Amy and Tan Ruo Yu (Rajah & Tann Singapore LLP) for the plaintiff; Chuah Chee Kian Christopher, Kua Lay Theng, Lydia Binte Yahaya, Candy Agnes Sutedja and Lim Qian Wen Amanda (WongPartnership LLP) for the first defendant; Tham Hsu Hsien (Allen & Gledhill LLP) for the second defendant.

Parties : CKR Contract Services Pte Ltd — Asplenium Land Pte Ltd and another

Banking – Performance Bonds

18 December 2014 Judgment reserved.

Edmund Leow JC:

Introduction

1 The first defendant, a property developer, engaged the plaintiff as its main contractor for the development of three blocks of residential flats at Seletar Road, Singapore ("the Project"). Pursuant to the terms of the main contract, the plaintiff provided a performance bond of $8,806,383.80 (*ie*, 10% of the total contract sum) which was issued by the second defendant, a bank.

2 Dissatisfied with the plaintiff's performance under the contract, the first defendant issued a notice of termination and called on the performance bond. In response, the plaintiff brought the present application praying for an injunction to restrain the first defendant from calling on the performance bond on the ground that the call was unconscionable.

3 I heard the application on 11 November 2013 and reserved judgment after hearing the parties.

Background to the dispute

4 The plaintiff began work on the Project on 21 January 2013. Under the main contract, the scheduled completion date was 20 January 2015. The architect named in the main contract was Mr Chan Soo Khian ("the Architect").

5 In September 2014, the Architect issued four notices highlighting the plaintiff's failure to proceed diligently and its non-compliance with certain directions issued by him.

6 On 23 October 2014, the Architect issued two termination certificates which corresponded to the plaintiff's failure to comply with two notices. The next day, the first defendant issued its notice of termination to terminate the plaintiff's employment under the contract on the basis of the termination certificates.

7 On 3 November 2014, the first defendant engaged a replacement contractor to rectify existing defects and complete the outstanding work on the Project. The contract sum was $59,941,539.26.

8 The next day, on 4 November 2014, the first defendant called on the performance bond by issuing a letter of demand to the second defendant.

9 On 5 November 2014, Vinodh Coomaraswamy J heard the plaintiff's *ex parte* application for an interim injunction to restrain payment under the performance bond. After hearing the parties, Coomaraswamy J granted the interim injunction sought.

10 At the hearing before me, counsel for the plaintiff, Mr Vikram Nair, mentioned in the course of his arguments that arbitral proceedings to determine the dispute between the parties have already been commenced.

The parties' arguments

11 The plaintiff argues that the call was unconscionable because:

(a) the first defendant had no genuine need to call on the performance bond at the time of the call;

(i) the term of the performance bond continues until 2016 and therefore the first defendant could have waited until the conclusion of the arbitration before calling on the bond;

(ii) the first defendant has no immediate need for funds, and the purpose of the bond is merely to provide security for the plaintiff's ultimate payment, should the first defendant be successful in the arbitration;

(b) the first defendant was aware that the plaintiff would suffer irreparable harm if the performance bond was called on; and

(c) the first defendant was aware that its purported termination of the contract was invalid and therefore had no genuine basis for the call.

12 The plaintiff also argues that cl 3.5.8 of the preliminaries (which were incorporated into the main contract) which attempted to prohibit the plaintiff from seeking the present injunction on the ground of unconscionability is unenforceable for being an attempt to oust the court's jurisdiction.

13 The first defendant submits there was no unconscionability in its call on the performance bond because:

(a) the performance bond was an unconditional, on-demand bond in which the second defendant was obliged to pay the amount thereunder upon the first defendant's written demand; the call could have been made anytime and it was not dependent on whether the first defendant had an immediate need for the money secured by the bond;

(b) the amount which the first defendant has called under the performance bond represented a reasonable assessment of damages or losses that it had incurred or would likely to incur as a result of the plaintiff's breaches of contract;

(c) the plaintiff's allegations of wrongful termination do not establish unconscionability;

(d) mere contractual breaches are insufficient to prove unconscionability; and

(e) the plaintiff has not come with clean hands and has failed to make full and frank disclosure of material facts in its *ex parte* application.

Issues before this court

14 Two issues arise for my consideration and they are discussed in the following order:

(a) First, is cl 3.5.8 of the preliminaries unenforceable as being an attempt to oust the court's jurisdiction?

(b) Second, assuming cl 3.5.8 is unenforceable, was the first defendant's call on the bond unconscionable?

My decision

Is cl 3.5.8 of the preliminaries unenforceable as being an attempt to oust the court's jurisdiction?

15 Clause 3.5.8 of the preliminaries [note: 1] to the main contract provides:

In keeping with the intent that the performance bond is provided by the [plaintiff] in lieu of a cash deposit, the Contractor agrees that *except in the case of fraud*, the Contractor shall not for any reason whatsoever be entitled to enjoin or restrain:-

(a) the [first defendant] from making any call or demand on the performance bond or receiving any cash proceeds under the performance bond; or

(b) the [second defendant] under the performance bond from paying any cash proceeds under the performance bond

on any ground including the ground of unconscionability.

[emphasis added]

I pause to note that the preliminaries where cl 3.5.8 is found forms part of the contract documents (see paragraph 2(d) of the letter of award) [note: 2] .

16 The first defendant relies on this clause and submits that the plaintiff can only apply for injunctive relief on the ground of fraud. The first defendant also argues that the court should have regard to the parties' intention and cites the District Court decision of *Scan-Bilt Pte Ltd v Umar Abdul Hamid* [2004] SGDC 274 ("*Scan-Bilt*") in support of its contention.

17 In *Scan-Bilt*, the District Court considered a similar clause which was worded in the following manner:

Except only in the clear case of fraud, the Contractor shall not be entitled to enjoin or restrain the Employer from making any call or demand on the performance bond or receiving monies under

the performance bond, on any other ground including the ground of unconscionability.

After reviewing the clause, the District Judge held (at [27]) that there were no grounds to strike down the clause on account of public policy and that the clause was clear and unequivocal in its intent. The District Judge also observed that the parties dealt at arm's length and that there was no reason not to give full effect to the clause. In addition, the District Judge "felt that justice required that the parties be held to the terms of the bargain which they had struck" (at [29]).

18 With respect, I am unable to agree with the reasoning or conclusion of the District Judge in *Scan-Built* for the following reasons.

19 First, giving effect to cl 3.5.8 would severely curtail the court's jurisdiction and discretion to grant an injunction and would therefore be contrary to public policy. In *AV Asia Sdn Bhd v Measat Broadcast Network Systems Sdn Bhd* [2014] 3 MLJ 61 ("*AV Asia*"), cl 15 of a non-disclosure agreement entered into by parties provided that the appropriate remedy for a breach of the respondent's duty of non-disclosure would be injunctive relief instead of monetary damages. The Federal Court of Malaysia held (at [11]) that the existence of cl 15 did not *ipso facto* entitle the appellant to injunctive relief. The court also held that the clause did not fetter the jurisdiction and the discretion of a court of law to decide whether to grant such relief. It was further observed (at [16]) that:

> … A court is free to exercise its jurisdiction and ultimately the discretion whether to grant or to dismiss an application for injunctive relief notwithstanding the attempts by the parties to a contract to oust that jurisdiction and discretion.

20 While I acknowledge that the clause in *AV Asia* is somewhat different from cl 3.5.8, the general principle expressed in *AV Asia* is relevant here because cl 3.5.8 is similarly an attempt to oust the jurisdiction of the court to grant an injunction on the important ground of unconscionability. The importance of unconscionability as a ground to seek an injunction against the call on a performance bond can be seen from a brief survey of the authorities. It is apparent from the authorities that the ground of unconscionability is the primary port of call used by parties seeking an injunction to restrain the calling of a performance bond (see, for a few examples, *Tech-System Design & Contract (S) Pte Ltd v WYWY Investments Pte Ltd* [2014] 2 SLR 1309 ("*Tech-System Design v WYWY Investments*"); *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 ("*BS Mount Sophia v Join-Aim*"); *Anwar Siraj and another v Teo Hee Lai Building Construction Pte Ltd* [2003] 1 SLR(R) 394; *Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 3 SLR(R) 198 ("*Eltraco v CGH Development*")). Therefore, in my judgment, cl 3.5.8 is an attempt to oust the court's jurisdiction on the significant ground of unconscionability and represents a severe incursion on the court's freedom to grant injunctive relief.

21 Second, it should be borne in mind that the court's power to grant injunctions flows from its equitable jurisdiction and this cannot be circumscribed or curtailed by clauses in a contract. Further elaboration on this inherent power of the courts can be found in the following passage from Ian C F Spry, *The Principles of Equitable Remedies* (Sweet & Maxwell, 9th Ed, 2014) at p 333:

> The granting of injunctions has long fallen within the inherent powers of courts of equity. Indeed, it has proved to be the most important of those powers, both because it has enabled the position of courts of equity to be maintained as against courts of law and also because *the concern of equity with the conscionability of particular behaviour of the defendant led to a need for a remedy* consisting in a personal direction to him requiring him to abstain from an unconscionable setting up of rights at law or from the performance of other specified acts. …

> *The powers of the courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited*. …
>
> [emphasis added]

Similar sentiments were expressed by the Court of Appeal in *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 where the equitable nature of an injunction was highlighted at [13]:

> … The juridical basis for adopting unconscionability as a relevant ground (separate from and independent of fraud) lies in the equitable nature of the injunction. Considerations of conscionability are applicable in relation to the use of the injunction in other areas of the law, and there is no reason why these considerations should not be applied for the purposes of determining whether a call on a performance bond should be restrained so as to achieve a fair balance between the interests of the beneficiary and those of the obligor.

22 Third, there are important policy considerations underpinning the doctrine of unconscionability in this area of law which cannot be lightly brushed aside by an agreement made by parties. Although counsel for the plaintiff is correct in arguing that cl 3.5.8 is not a total ouster of jurisdiction and that the effect of this partial ouster seems to bring us back to the English position on this issue, the plaintiff's argument fails to consider the conscious choice made by our courts in moving *away* from the English position and the policy considerations involved in making that decision.

23 In clarifying that fraud was not the sole ground for restraining a call on a performance bond, the Court of Appeal in *GHL Pte Ltd v Unitrack Building Construction Pte Ltd and another* [1999] 3 SLR(R) 44 acknowledged at [24] that performance bonds were frequently used by parties who dealt at arm's length in the construction industry and that the courts should give effect to the intention of parties. However, the court made it clear that it was also concerned with a beneficiary's unconscionable conduct in relation to the calling of the bond:

> … *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. …
>
> [emphasis added]

24 The recognition of the ground of unconscionability was undoubtedly a considered and deliberate decision by our courts in striking a balance between the principle of party autonomy and the court's concern in regulating dishonest and unconscionable behaviour on the part of beneficiaries (see *BS Mount Sophia v Join-Aim* at [30]–[46]).

25 Having regard to the clear statements in *BS Mount Sophia v Join-Aim* and the other authorities cited to me, I reach the inescapable conclusion that the courts are, on policy grounds, concerned with scrutinising possible unconscionable conduct in the context of performance bonds and this supervisory role cannot, in my judgment, be summarily displaced by an agreement between the parties as found in cl 3.5.8.

26 For the above reasons, I think that clause 3.5.8 is an ouster of the jurisdiction of the court and is therefore void and unenforceable as being contradictory to public policy.

Was the first defendant's call on the bond unconscionable?

27 Since cl 3.5.8 is unenforceable, I turn to consider whether the first defendant's call on the performance bond was unconscionable. Before I embark on an analysis of the facts, it is apposite to summarise the key principles that should be applied in determining whether the call was unconscionable:

(a) Unconscionability includes elements of abuse, unfairness and dishonesty and the applicant has to establish a strong *prima facie* case of unconscionability (*BS Mount Sophia v Join-Aim* at [19]–[21]).

(b) Unfairness *per se* does not necessarily amount to unconscionability although in every instance of unconscionability there will be an element of unfairness (*Eltraco v CGH Development* at [30]).

(c) The existence of genuine disputes does not necessarily mean that the call is unconscionable; mere breaches of contract would not by themselves be unconscionable (*Eltraco v CGH Development* at [31]–[32]; *Astrata (Singapore) Pte Ltd v Tridex Technologies Pte Ltd and another and other matters* [2011] 1 SLR 449 at [73]).

28 The plaintiff raises a number of assertions in its attempt to demonstrate that the call was unconscionable. The plaintiff first argues that the first defendant had no genuine lack of funds and that there had been an error in the sum demanded. According to the plaintiff, the replacement contract sum of $59m is also "unbelievable" and should have been about $45m instead.

29 Having considered the evidence before me, I am unable to accept the arguments made on behalf of the plaintiff. The plaintiff is effectively asserting that the first defendant had to show some degree of impecuniosity as a pre-condition to calling on the performance bonds. This assertion is untenable because the bond here is an on-demand performance bond which plainly did not have such a requirement.

30 As for the error in the sum demanded, it appears that the amount demanded at the point of the call should have been $7,697,687.51 as admitted by counsel for the first defendant at the hearing before me. I do not regard this calculation error as an indication of unconscionability or bad faith and the plaintiff does not appear to be taking such a position on this particular point.

31 In relation to the replacement contract price, the first defendant explains that the contract price includes the costs for completing the original contractor's unfinished works and rectification of defects. The replacement contractor, so the explanation goes, also has to work within a shorter time frame as compared to the original contractor. To my mind, I am unable to discern from these explanations any unconscionable conduct on the part of the first defendant in connection with the award and execution of the replacement contract.

32 The plaintiff also contends that the first defendant was aware that the plaintiff would suffer irreparable harm when the performance bond is called. The call would allegedly have a severe impact on the plaintiff's cash flow and asset management. This contention is unmeritorious. It has been held in *Tech-System Design v WYWY Investments* (at [39]) that "[a] beneficiary should not be prevented from calling on a bond simply because this resulted in hardship to the obligor." The focus of the

inquiry here is on the beneficiary's alleged unconscionable conduct and not the purported effect of financial hardship that it may have on the obligor which does not, without more, establish a strong *prima facie* case of unconscionability.

33 The plaintiff's final set of contentions pertains to the termination of the contract and whether the first defendant had validly terminated the contract. In my view, these were genuine disputes over the instances of breach alleged by the first defendant that do not amount to a strong *prima facie* case of unconscionability. In this regard, there had been a number of Architect's Directions issued to the plaintiff for, *inter alia*, defective works and they suggested, on a *prima facie* level at least, that there were possible breaches of the main contract. There is also some dispute over the construction and quality of the brick walls in the Project but these disputes, to my mind, were genuine disputes and I am unable to find any basis for concluding that the first defendant had behaved unconscionably.

34 In the round, I do not think that the plaintiff has managed to establish a strong *prima facie* case of unconscionability. The plaintiff has attempted to impute bad faith, unfairness and ill-will to the first defendant's actions but there is, upon further examination, little substantiation or basis for its assertions.

35 Before I conclude, I should emphasise that I was not concerned with the merits of the parties' dispute which encompasses issues of wrongful termination and the quality of the plaintiff's construction work. These issues will be aired and determined in the arbitration proceedings by the arbitral tribunal. This court is simply not the proper forum for the determination of those issues. Therefore, the arguments canvassed in support of them were irrelevant for the purposes of the present application to the extent that they did not speak to the issue of whether the call was unconscionable.

Conclusion

36 For the foregoing reasons, I find that the first defendant is entitled to call on the performance bond. In view of the first defendant's admission that only $7,697,687.51 is liable to be called on the bond, I hold that the call will be limited to $7,697,687.51.

37 I award the first and second defendants costs to be agreed or taxed.

[note: 1] Sia Wee Long's affidavit dated 10 November 2014, Exhibit SWL-2, p 141.

[note: 2] Sia Wee Long's affidavit dated 10 November 2014, Exhibit SWL-2, p 51.