IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 03

Originating Summons No 14 of 2016

In the matter of Order 29 of the Rules of Court

And

In the matter of Performance Bond No BPBSN0006711300

Between

Sin Herh Construction Pte Ltd

… *Plaintiff*

And

(1) Hyundai Engineering & Construction Co Ltd
(2) China Taiping Insurance (Singapore) Pte Ltd

… *Defendants*

GROUNDS OF DECISION

[Civil procedure] — [Injunctions] — [Interim injunctions]
[Civil procedure] — [Judgments and orders] — [Erinford Orders]
[Credit and security] — [Bonds] — [Performance bonds]

CONTENTS

Sin Herh Construction Pte Ltd
v
Hyundai Engineering & Construction Co Ltd and another

[2017] SGHC 03

High Court — Originating Summons No 14 of 2016
Kan Ting Chiu SJ
11 January; 30 June; 1 July 2016

9 January 2017

Kan Ting Chiu SJ:

1 An appeal has been filed against my decision to refuse to restrain the holder of a performance bond from making a call on it, and to refuse to grant an Erinford Order.

The parties

2 The party applying for the restraining order is Sin Herh Construction Pte Ltd ("the Plaintiff"). The holder of the performance bond is Hyundai Engineering & Construction Co Ltd ("the 1st Defendant"). The bond is issued by China Taiping Insurance (Singapore) Pte Ltd ("the 2nd Defendant"), which did not play any part in the proceedings.

The underlying facts

3 The Plaintiff and the 1st Defendant were parties to an agreement dated 8 April 2013 ("the Agreement"), whereby the Plaintiff was engaged by the 1st Defendant to carry out reinforced concrete works in a construction project known as "Punggol Central/Punggol Walk – Waterway Point 2 Watertown".

4 Under the terms of the Agreement, the Plaintiff provided a performance bond ("the Bond") as security for due performance of the contracted works. The Bond was issued by the 2nd Defendant in the sum of $404,035.01, initially to expire on 9 July 2015, and subsequently extended to 9 October 2015. The Bond allowed demand to be made at any time up to 90 days after the expiration of the Bond, which worked out to be 7 January 2016.

5 The proceedings were set off when the 1st Defendant made a demand on the Bond on 5 January 2016, and the Plaintiff applied for an interim injunction on 8 January 2016 to, *inter alia*, restrain the 1st Defendant from receiving payment and the 2nd Defendant from making payment. The Plaintiff made its application on the ground that the 1st Defendant's demand was unconscionable.

6 The Plaintiff contended that the 1st Defendant's call on the Bond was unconscionable as the 1st Defendant had: (a) breached an understanding between the Plaintiff and itself to not call on the Bond; and (b) imposed back-charges on the Plaintiff which it was not entitled to, or which were grossly inflated.

The alleged understanding

7 It is common ground that the contracted works were not carried out by the Plaintiff in compliance with the Agreement. The Plaintiff did not meet the set deadlines for the contracted works and withdrew a substantial number of its workers from the worksite.

8 This caused concern to the 1st Defendant and led eventually to two meetings between senior officials from the companies on 29 and 30 June 2015, which resulted in a written Supplementary Sub-Contract Agreement dated 30 June 2015 ("the Supplementary Agreement"). Several terms of this agreement bear setting out:

> 3. Pursuant to the Meetings, parties have reached an agreement on the following:
>
> a. [The Plaintiff] will complete the remaining works under the Sub-Contract, including but not limited to the dismantling of formwork, material clearance and defect clearance, in accordance with the "RC Works Completion Schedule and Manpower Mobilization Plan" at Annex A hereto;
>
> b. [The Plaintiff] will mobilize its workers to complete the works pursuant to paragraph 3(a) above, in accordance with the "RC Works Completion Schedule and Manpower Mobilization Plan" at Annex A hereto;
>
> c. Upon [the Plaintiff] signing of this Supplementary Sub-Contract Agreement, [the 1st Defendant] will make payment of the sum of S$550,000 (inclusive of GST) which was certified under Payment Certificate No. 21 (Revised) issued for the month of April 2015 work done by [the Plaintiff]. Subsequently, [the 1st Defendant] will issue a Payment certificate on 20 July 2015 for another amount of S$300,000 (inclusive of GST) for work done by [the Plaintiff] for the whole of remaining RC

> Works. This subsequent payment will be made within the period of 10 August 2015 to 20 August 2015;
>
> d. Upon the issuance of the $300,000 amount payment certificate as above-mentioned in paragraph 3(c), the previous Payment Certificate No. 22 that was issued by [the 1st Defendant] to [the Plaintiff] for the sum of S$73,326.97 (inclusive of GST) for the month of May 2015 work done shall be withdrawn by mutual consent of [the 1st Defendant] and [the Plaintiff];
>
> e. Apart from the payment under paragraph 3(c) and 3(d) above, [the 1st Defendant] will not be obliged to make any further payment to [the Plaintiff], and [the Plaintiff] will not be entitled to make any further claims against [the 1st Defendant], until the Final Payment Certificate is issued in accordance with the Sub-Contract after the Final Account Agreement;
>
> f. [The Plaintiff] will extend the validity period of Performance Bond No. BPBSN0006711300 ("**Performance Bond**") to 09 October 2015 as per [the 1st Defendant's] previous letter (ref. no. HD/SGAWA/D/SLE/2015-149 dated on 09 June 2015) and all other terms of the Performance Bond will remain the same;

9 The Plaintiff expanded on the circumstances leading up to the alleged understanding in two affidavits deposed by its director, Pan Zhengwen ("Pan"). Pan deposed that while the Plaintiff submitted progress claims in the course of the works, the 1st Defendant consistently under-valued the works done and this led to the meetings of 29 and 30 June 2015 and the Supplementary Agreement. In his first affidavit, Pan stated that:

> 20. … it was the understanding that pending the finalisation of the accounts for the Final Accounts Agreement, there shall be no call on the Performance Bond.

And in his second affidavit, he further stated that:

> 13. It was on 29.06.2016 or 30.06.2016 that the Understanding was reached between myself and the 1st Defendant's Mr J.H. Park, that the 1st Defendant would not call on the Bond. I would certainly have refused to renew the Bond if the 1st Defendant did not agree to the Understanding. In any case, the existence of the Understanding can be gleaned from the circumstances, and is clearly implicit in the arrangement reached between the parties. I would not be so foolish as to, on the one hand, agree to sit down with the 1st Defendant to discuss and agree on the Final Account, while on the other hand allow the 1st Defendant to have the liberty of calling on the Bond in the meantime. At that time, I had no reason to distrust Mr J.H. Park's words, and therefore did not query the 1st Defendant as to why the Understanding was not reflected in the 1st Defendant's letter dated 30.06.2015 …

10 The 1st Defendant responded in an affidavit by its Project Manager, Park Ji Hong ("Park"). He deposed that:

> 52. … the main purpose of the meetings was to address the fact that the Plaintiff was behind schedule in carrying out the Sub-Contract Works, the Plaintiff's threats to stop the Sub-Contract Works, as well as the Plaintiff's request for more payment.
>
> 53. On 29 and 30 June 2015, Pan and Zhang met with Kim and me at the 1st Defendant's office to discuss the Construction Program for the remaining Sub-Contract Works, the Manpower Mobilization Plan as well as the payment schedule. The Plaintiff reiterated their request for more payment and stated that they would stop the Sub-Contract Works if they did not receive monies from the 1st Defendant. After much discussion, parties eventually reached an agreement on the payment schedule, the Construction Program as well as the amount of manpower that was required to be mobilized. This agreement was embodied in the Supplementary Sub-Contract Agreement dated 30 June 2015 …
>
> 54. It is clear from the terms of the Supplementary Sub-Contract Agreement that the main purpose of the agreement was to give the Plaintiff more time to carry out the works. In the Supplementary Sub-Contract Agreement, new target dates to complete the

> outstanding works were set as the Plaintiff was unable to meet the original dates. …
>
> …
>
> 86. It is significant to note that the Plaintiff had never even written to the 1st Defendant to record this alleged "*Understanding*" or to put on record their objection that the "*Understanding*" was not embodied in the Supplementary Sub-Contract Agreement.

11 The Plaintiff's use of the word "understanding" is noteworthy. It did not indicate whether it was a unilateral or bilateral understanding, or whether it was binding, although Pan in his second affidavit stated that it was reached between him and Park. On that basis, there would be an express, oral and binding agreement. If the suspension of demands on the Bond was important enough for parties to have expressly agreed to it, it ought to have been recorded amongst the agreed matters in the Supplementary Agreement. It suffices to state that the "understanding" description, the absence of the understanding in the Supplementary Agreement and the subsequent correspondence between the parties undermine the Plaintiff's assertion and reliance on the understanding.

The back-charges

12 The Plaintiff's complaint of unconscionability with regard to the back-charges arose out of the 1st Defendant's quantification of back-charges due from the Plaintiff to the 1st Defendant.

13 In its written submissions, the Plaintiff contended that:

> The 1st Defendant's unreasonable and/or inflated backcharges
>
> 11. The 1st Defendant had been imposing and/or inflating backcharges unjustifiably towards the tail end of the

> sub-contract works. Within a period of a short few months from July to December 2015, the alleged backcharges spiked from $413,601.96 in June 2015 to $4,241,305.93 in December 2015.
>
> 12. The alleged backcharges included the following:-
>
> 12.1. Concrete Wastage of $707,499.44;
>
> 12.2. Rebar Wastage of $1,223,100.99;
>
> 12.3. Labour Backcharge for Blocks 61 and 63 of $794,174.25;
>
> 12.4. Material Supply of $182,377.85.
>
> …
>
> 17. It is simply untenable that the 1st Defendant would have, in June 2015, agreed to pay the Plaintiff a further $850,000.00 when the backcharges would amount to a staggering $4,241,305.93. Clearly, there is unconscionable conduct on the part of the 1st Defendant in imposing and/or inflating the alleged backcharges.

14 The Plaintiff's case was that the 1st Defendant's high back-charges had put the Plaintiff in the negative in the final account, and had created the basis for the 1st Defendant to make a demand on the Bond.

15 The Plaintiff's assertion of the 1st Defendant's unconscionable conduct in *imposing* and/or inflating the back-charges is ambiguous. It can mean that the 1st Defendant had no right to impose any back-charges, or that it had put up false back-charges. There was no direct assertion in Pan's affidavits or the Plaintiff's written submissions that no back-charges could be made. To the contrary, Pan, in his affidavits, referred repeatedly to *unjustifiable* back-charges in connection with the quantum of back-charges.

16 The Agreement provided for back-charges in Clause 21.3 as follows:

> [The 1st Defendant] may, in lieu of giving a notice of termination under this Clause, take whole or a part of the Sub-Contract Works out of the hands of the [Plaintiff] and may by himself, his servants or agents execute, complete and maintain such part and in such event the [1st Defendant] may recover his reasonable costs of so doing from the [Plaintiff], or deduct such costs from monies otherwise becoming due to the [Plaintiff].

17 The dispute is whether the $4,241,305.93 back-charges made in the 1st Defendant's Final Claim Assessment dated 23 December 2015 which the Plaintiff received on 29 December 2015 (that resulted in $2,574,856.17 being due from the Plaintiff to the 1st Defendant) was unconscionable. The issue is not about the imposition, but about the inflation, of the back-charges.

18 The Plaintiff has identified the nature of the unconscionability in para 17 of its written submissions (see [13] above). It is that the 1st Defendant, having agreed to pay the $850,000 to the Plaintiff under the Supplementary Agreement, went on to impose the back-charges of $4,241,305.93.

19 Pan deposed that the Plaintiff attempted in vain to meet the 1st Defendant to talk over the back-charges. Park, in para 81 of his affidavit, denied that there were any attempts to meet until 12 January 2016 (after the present application was made) when the Plaintiff sent an e-mail to have a meeting for "quantity reconciliation". In his affidavits, Pan stated that the Plaintiff attempted to meet the 1st Defendant on its evaluation of the Plaintiff's works and back-charges but there was no mention of any protest or outrage over the back-charges nor any written record of any protest or outrage at that time.

20 The documents produced by the parties show that there were continuous communication and discussion on the state of the works and

payments. The contractual documents show that there was no requirement that back-charges be quantified and made known as they arose (so long as that was done at the time of the final assessment). Against this backdrop, while the Plaintiff could seek a quantity reconciliation on the back-charges, it was quite unclear whether the 1st Defendant's imposition and quantification of the back-charges (and the call on the Bond) was unconscionable conduct.

The law on unconscionability

21 The law on unconscionability as a basis for restraining the calling on a performance bond is settled, and is set out in the Court of Appeal's decision in *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 ("*Mount Sophia*") in the following paragraphs:

> 18 It is settled law that unconscionability, as distinct from fraud, is a ground upon which the court can grant an injunction restraining a beneficiary of a performance bond from calling on the bond …
>
> 19 The elements of unconscionability are also fairly uncontroversial, and have been variously stated to include elements of abuse, unfairness and dishonesty …
>
> *The high threshold for establishing unconscionability*
>
> 20 Of greater significance in the context of the present appeal is the necessary threshold of unconscionability that has to be established before the court will exercise its discretion to grant an injunction. … It is important to note, at the outset, that the law in this regard is settled. Simply put, the threshold is a high one, and the burden that the applicant has to discharge is to demonstrate a strong *prima facie* case of unconscionability …
>
> 21 When determining if a strong *prima facie* case has been made out, the entire context of the case must be thoroughly considered, and it is only if the entire context of the case is particularly malodorous that such an injunction should be granted. We must emphasise that the courts' discretion to grant such injunctions must be sparingly exercised and it

> should not be an easy thing for an applicant to establish a strong *prima facie* case.
>
> …
>
> 25 … the courts should be slow to upset the status quo and disrupt the allocation of risk which the parties had decided upon for themselves in a building contract …

22 The Court did not lay down a definition of "unconscionability" because it had explained in *Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khalifa bin Zayed Al Nahyan* [2000] 1 SLR 117 (at [42]) that:

> 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.

My decision

23 Keeping in mind the principles set out in *Mount Sophia*, I find on the evidence before me that there was no recorded express undertaking/agreement not to call on the Bond.

24 Secondly, I find on the evidence that the parties are in dispute over the quantum of the back-charges. However, the Plaintiff has not established a strong *prima facie* case of unconscionability taking into consideration that it did not complain of unethical conduct in going against the understanding and putting up trumped-up back-charges when it received the Final Claim Assessment, and had requested quantity reconciliation instead.

25 An applicant seeking an order against payment under a performance bond has to show circumstances in which a Court finds that it has to intervene to restrain a party because the demand made is unconscionable. The Plaintiff has not established such a case against the 1st Defendant.

26 Consequently, the Plaintiff's application was dismissed.

The Erinford application

27 After the Plaintiff's application for the restraining order was dismissed, its counsel wrote to court on 12 July 2016 for an Erinford Order. The basis for the order is set out in the letter:

> 12. If an Erinford Order is not granted, the 2nd Defendant would proceed to pay the 1st Defendant the sum of $404,035.01, and the 1st Defendant would receive the said sum. Clearly, the Plaintiff would be denied its primary remedy in the event that its appeal is successful.
>
> 13. Further, the Plaintiff has placed with our firm an amount of $416,035.01, being the sum of the performance bond amount of $404,035.01 and the costs of $12,000 awarded to the 1st Defendant on 1 July 2016. We have by letter dated 8 July 2016 to the 1st Defendant's solicitors (and copied to the 2nd Defendant), informed that:-
>
> 13.1. We are prepared to furnish our firm's undertaking to release the sum of $416,035.01 to the 1st Defendant in the event the Plaintiff's appeal is unsuccessful;
>
> 13.2. If required by the 1st Defendant, the sum could be placed in an interest-earning fixed deposit account;
>
> 13.3. The 1st Defendant would therefore be assured of receiving payment in the event the appeal is unsuccessful; and

> 13.4. Pending the disposal of the appeal, the 1st Defendant would therefore not require payment from the 2nd Defendant on the performance bond.
>
> …
>
> 17. On the other hand, the Plaintiff will suffer substantial prejudice if an Erinford Order is not granted, and the Plaintiff is eventually successful in its appeal. We are instructed that it is common practice in the building and construction industry that parties tendering for projects will be asked to disclose if any performance bonds furnished by them had been called and paid on previously. A response in the affirmative will most certainly prejudice a party's chances of securing the project tendered for. Any loss suffered by the Plaintiff in this regard cannot be compensated in any way.

28 The Erinford Order takes its name from *Erinford Properties Ltd and Another v Cheshire County Council* [1974] 1 Ch 261. The plaintiff in that case had applied for an interlocutory injunction to restrain the defendant from hearing the plaintiff's planning application before another planning application was to be heard. After Megarry J dismissed the primary application, the plaintiff applied for an order that the defendant be restrained from hearing the planning application for six days while the plaintiff considered whether to appeal against the decision. The secondary application was also dismissed on the facts. The judgment's significance is in Megarry J's declaration of the applicable law (at 267-268) that:

> … where the application is for an injunction pending an appeal, the question is whether the judgment that has been given is one upon which the successful party ought to be free to act despite the pendency of an appeal. One of the important factors in making such a decision, of course, is the possibility that the judgment may be reversed or varied. Judges must decide cases even if they are hesitant in their conclusions; and at the other extreme a judge may be very clear in his conclusions and yet on appeal be held to be wrong. No human being is infallible, and for none are there more public and authoritative explanations of their errors than for judges. A

> judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognise that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the status quo pending the appeal. I cannot see that a decision that no injunction should be granted pending the trial is inconsistent, either logically or otherwise, with holding that an injunction should be granted pending an appeal against the decision not to grant the injunction, or that by refusing an injunction pending the trial the judge becomes functus officio quoad granting any injunction at all.
>
> There will, of course, be many cases where it would be wrong to grant an injunction pending appeal, as where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid, and so on. But subject to that, the principle is to be found in the leading judgment of Cotton L.J. in *Wilson* v. *Church (No. 2)*, 12 Ch.D. 454, where, speaking of an appeal from the Court of Appeal to the House of Lords, he said at p. 458, "*… when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory*."
>
> [emphasis added]

This has been accepted as good law in Singapore: see, for example, *Tan Soo Leng David v Wee, Satku & Kumar Pte Ltd and another* [1993] 2 SLR(R) 741.

29 Counsel for the Plaintiff submitted, firstly, that "the Plaintiff would be denied its primary remedy in the event that its appeal is successful". However, this is not correct because in the event that the appeal is successful, an interim injunction would be granted and any sum received pursuant to demand will have to be paid back.

30 Secondly, counsel for the Plaintiff submitted that "the Plaintiff will suffer substantial prejudice if an Erinford Order is not granted" because the disclosure of a successful call on the Bond would prejudice its chances of securing other projects. However, this does not justify an application for an

Erinford Order. The purpose of an Erinford Order is to ensure that an appellant will not end up with a pyrrhic victory if it succeeds in an appeal. A good example of that would be when a disputed building is scheduled for demolition before the appeal can be heard. For an Erinford Order to be granted, the risk of negation must relate to the appeal or the dispute between the parties. The potential prejudice to the Plaintiff in securing other projects is not related to either.

31 Consequently, the application for an Erinford Order was also dismissed.

Kan Ting Chiu
Senior Judge

Lee Mun Hooi, Goh Teck Wee and Wong Tze Roy (Lee Mun Hooi & Co) for the Plaintiff;
Chan Kah Keen Melvin and Tan Pei Qian Rachel (TSMP Law Corporation) for the First Defendant.