

Econ Piling Pte Ltd v Aviva General Insurance Pte Ltd and Another
[2006] SGCA 32

Case Number : CA 44/2006
Decision Date : 12 September 2006
Tribunal/Court : Court of Appeal
Coram : Chan Sek Keong CJ; Lai Siu Chiu J; Andrew Phang Boon Leong JA
Counsel Name(s) : Chia Chor Leong and V Rajasekharan (Citilegal) for the appellant; Michael Eu (United Legal Alliance LLC) for the first respondent; Andre Maniam and Melvin See (Wong Partnership) for the second respondent
Parties : Econ Piling Pte Ltd — Aviva General Insurance Pte Ltd; Jurong Town Corp

Credit and Security – Performance bond – Calls on default bond – Claims on underlying contract time-barred – Whether insurer may be restrained from paying under bond

Credit and Security – Performance bond – Construction of terms of bond – Whether performance bond default or on-demand bond

12 September 2006

Judgment reserved.

Lai Siu Chiu J (delivering the judgment of the court):

Introduction

1 This was an appeal against the decision of the judge in Originating Summons No 326 of 2005 (“the OS”) in setting aside an injunction which the District Court had granted to the appellant, Econ Piling Pte Ltd (“Econ”), to restrain the first respondent, Aviva General Insurance Pte Ltd (“Aviva”), from making payment to the second respondent, Jurong Town Corporation (“JTC”), under a performance bond.

2 On JTC’s appeal against the granting of the injunction, the High Court set aside the injunction. Econ appealed against the decision of the High Court ([2006] SGHC 76).

3 Aviva, although named as the defendant in the OS and the first respondent here, was not a key party to either of the proceedings. Neither did it file a case in this appeal. Aviva’s counsel informed the court that his client would abide by the court’s decision.

The facts

4 JTC engaged Econ, a piling contractor, to install bored piles at the International Business Park located in Jurong (“the Project”) under a contract dated 6 July 1992 (“the Contract”). The Insurance Corporation of Singapore Ltd (“ICS”) and Econ jointly furnished a performance bond numbered DJIS 9290018 dated 25 May 1992 (“the Bond”) to JTC as security for the due performance of the Contract. The Bond was for a maximum sum of \$173,400.

5 Econ started work on the Project on 20 June 1992. The last working pile was installed by Econ on 25 November 1992. Tests were conducted on the installed piles and all the tested piles passed the load test. The pile eccentricities were also tested and found to be within the permissible tolerance levels. The final progress claim was submitted by Econ to JTC on 31 December 1992.

6 JTC had engaged Teow Aik Realty (S) Pte Ltd ("TAR") to carry out excavation works for the Project. After the installation of the last working pile, TAR commenced excavations as part of the superstructure works.

7 Econ wrote to JTC on 6 April 1993 to warn the latter that TAR's excavation works might cause pile movements and damage. This was followed by Econ's second letter dated 23 June 1993 to JTC, giving notice of pile and earth movements as well as damage to the piles. On 28 June 1993, Econ submitted a report to JTC on the piles that had been damaged and pushed out of position.

8 JTC terminated its contract with TAR and commenced arbitration proceedings ("the arbitration") against TAR. Econ was not a party to the arbitration.

9 On 31 March 2003, the arbitrator decided that it was Econ and not TAR which was responsible for the damaged piles. JTC was ordered to pay TAR a sum in excess of \$850,000. Econ was not given a copy of the arbitration award.

10 On 29 April 2003, Econ wrote to JTC Consultants Pte Ltd, who was the consultant appointed for the Project, requesting the release of the retention sum of \$136,782.77 held by JTC. On 6 May 2003, JTC wrote to inform Econ of the outcome of the arbitration and indicated it would not release the retention sum. Econ did not pursue its claim for the retention sum.

11 On 1 December 2003, JTC called on the Bond. In correspondence between their solicitors, Econ argued there was no proof that it was in breach of the Contract and even if it was in breach, JTC's claim was time-barred. JTC contended that the Bond was payable on demand, without proof or conditions.

12 On 15 December 2003, ICS informed JTC's solicitors that it would not be making payment under the Bond. A second demand for payment on the Bond was made by JTC's solicitors on 29 December 2003.

13 On 1 March 2005, ICS changed its name to Aviva Ltd, which subsequently transferred its general insurance business to Aviva.

14 On 6 May 2005, JTC wrote to the superintending officer ("the SO") of the Project for a determination as to whether Econ had breached the Contract.

15 On 20 June 2005, the SO determined that Econ was in breach of the Contract. Econ did not appeal against the SO's decision by taking it before an arbitrator, as provided for under cl 43 of the Contract.

16 On 20 July 2005, JTC again demanded payment on the Bond from Aviva.

17 On 5 August 2005, Econ applied *ex parte* in the OS for an interim injunction to restrain Aviva from paying under the Bond. JTC was initially not a party to the OS but was joined later on its application. The District Court granted the injunction and JTC appealed to a judge in chambers in the High Court.

The High Court's findings

18 The judge, *inter alia*, found that:

- (a) The SO's determination established Econ's default. The SO had based her determination primarily, if not entirely, on the outcome of the arbitration. Although Econ was not a party to the arbitration, the SO had adequately considered its position.
- (b) Econ had neither argued that JTC was precluded from seeking the SO's determination because of the time bar nor raised the limitation point with the SO. Econ also did not challenge the SO's decision.
- (c) The lack of commencement of legal action by JTC against Econ during the Contract's limitation period and the fact that Econ was not joined as a defendant in the arbitration did not mean that Econ had fully performed the Contract.
- (d) The Bond was a default bond. For both on-demand and a default bonds, a demand had to be made. But default bonds also required a default to be established. The SO's determination had established the requisite default.
- (e) Expiry of the limitation period for claims under the Contract did not preclude JTC from making a call under the Bond. The Bond was a separate contract from the Contract.
- (f) There was no unconscionability in JTC's conduct.

The judge allowed JTC's appeal and set aside the injunction granted to Econ.

The issue

19 The only issue which arose in this appeal was whether JTC could make a valid call on the Bond when its claim against Econ under the Contract was time-barred. It was not disputed by JTC that any claim for breach of contract it may have had against Econ was time-barred after six years (pursuant to s 6(1)(a) of the Limitation Act (Cap 163, 1985 Rev Ed)) viz, by 28 June 1999, counting from the date when JTC had sight of the report confirming that the piles were defective.

20 Counsel for Econ had argued that the Bond was a default bond whereas counsel for JTC submitted that the Bond should be construed as an on-demand bond. In the court below (at [25] of his grounds of decision) the judge accepted that the Bond was a default bond basing his decision on the following clause in the Bond:

NOW THE CONDITION of the above-written Bond is such that it shall be void only in either of the following cases namely:

- (1) if [Econ] or [its] successors or assigns shall well and truly perform, fulfil and keep all and every of the terms, covenants, conditions, clauses, provisos and stipulations of the Contract on the part of [Econ] or [its] successors or assigns to be observed, performed, fulfilled and kept according to the true purport, intent and meaning thereof; or
- (2) if, on failure or default by [Econ] or [its] successors or assigns so to do, [Aviva] shall, without proof or conditions, pay to [JTC] the full amount of the above-written Bond.

21 We do not disagree with the judge's reasoning that the Bond was a default bond. He was of the view that under sub-cl (2), "default" on the part of Econ had to be established before a demand could be made on the Bond. We agree and would add that under sub-cl (1), the Bond would become null and void on Econ's full performance of the Contract. The discharge of the obligations under the

Contract would therefore extinguish the obligations under the Bond. That meant that the Bond did not give rise to independent primary obligations which are the hallmark of an on-demand bond. Such secondary obligations are characteristic of default bonds.

22 We would however depart from the judge's view (set out in [18(e)] above) that JTC's call on the Bond was valid because the Bond was a separate contract from the Contract, even though its claims under the Contract were time-barred.

23 Granted, there was no express provision in the Bond releasing Econ from liability in the event of the expiry of the limitation period for claims, but neither was there any clause that extended the time-bar period. What is important to bear in mind is that the purpose of the Bond (as with all performance bonds) was to secure the performance of the building contract by the contractor. Econ had furnished the Bond jointly with ICS/Aviva as security for any claims JTC might have had under the Contract. As the underlying claim was time-barred by 28 June 1999, Econ was entitled to restrain JTC from calling on the Bond in the same way it could have pleaded limitation as a defence had JTC sued on the Contract. JTC's only recourse for its claim would be to the retention sum that it still held, and for which a similar time bar precluded Econ from recovery.

24 The outcome would not be any different, even if the Bond was construed as a demand bond (and therefore treated as an indemnity) rather than as a default bond or guarantee. The SO's certification was irrelevant in this regard – it did not touch on whether Econ was still *liable* to pay JTC under the Contract. The SO's duty, which she discharged, was to certify Econ's default under the Contract.

25 As the appeal can be disposed of on the above basis, it would not be necessary to consider the other issues raised by Econ at the appeal, touching on whether the Bond terminated on expiry of the defects liability period under the Contract and/or whether JTC's call on the Bond was unconscionable.

Conclusion

26 We therefore allow Econ's appeal with costs. The costs ordered below shall be reversed in favour of Econ while the security for costs is to be returned to Econ.

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