Beijing Construction Engineering Group Co Ltd (Singapore Branch) *v* EQ Insurance Co Ltd [2015] SGHC 254

Case Number : Suit No 692 of 2014 (Registrar's Appeal No 185 of 2015)

Decision Date : 01 October 2015

Tribunal/Court : High Court

Coram : Chua Lee Ming JC

Counsel Name(s) : Ang Wee Tiong and Kong Li Ye, Kevin (Jiang Liye) (Chris Chong & C T Ho Partnership) for the plaintiff/respondent; Ramasamy s/o Karuppan Chettiar (Acies Law Corporation) for defendant/applicant.

Parties : BEIJING CONSTRUCTION ENGINEERING GROUP CO LTD (SINGAPORE BRANCH) — EQ INSURANCE CO LTD

Civil Procedure – Summary judgment

1 October 2015

Chua Lee Ming JC:

1 This was a claim by the plaintiff, Beijing Construction Engineering Group Co Ltd (Singapore Branch), for payment of $1m under a first demand performance bond dated 4 April 2012 issued by the defendant, EQ Insurance Company Ltd ("the Performance Bond"). Registrar's Appeal No 185 of 2015 ("RA 185/2015") was an appeal by the defendant against an order by the learned Assistant Registrar ("AR") granting summary judgment against the defendant. Summons No 2633 of 2015 ("SUM 2633/2015") was an application by the defendant to amend its Defence.

2 I dismissed the application in SUM 2633/2015 and the appeal in RA 185/2015 with costs fixed at $5,000 (inclusive of disbursements) for both. The defendant has appealed against my decisions.

3 The plaintiff was the main contractor for public housing building works at Jurong West Street 41 ("the Project"). One of the plaintiff's sub-contractors was Ji Sheng Construction Pte Ltd ("Ji Sheng"). A performance bond for $1m was required under Ji Sheng's sub-contract with the plaintiff. Ji Sheng procured the issuance of the Performance Bond from the defendant.

4 Clause 1 of the Performance Bond provided as follows:

> The [defendant] unconditionally and irrevocably undertakes and covenants to pay in full forthwith upon demand in writing any sum or sums that may from time to time be demanded by the [plaintiff] up to a maximum aggregate sum of Singapore Dollars One Million Only (S$1,000,000.00) without requiring any proof that the [plaintiff] is entitled to such sum or sums under the Contract or that [Ji Sheng] has failed to execute the Contract or is otherwise in breach of the Contract. Any sum or sums so demanded shall be paid forthwith by the [defendant] unconditionally, without any deductions whatsoever and notwithstanding the existence of any differences or disputes between the [plaintiff] and [Ji Sheng] arising under or out of or in connection with the Contract or the carrying out of work thereunder or as to any amount or amounts payable thereunder and notwithstanding that such differences or disputes have been referred to arbitration or are the subject of proceedings in Court or is in the midst of any other means of dispute resolution.

5 The plaintiff alleged that Ji Sheng failed to perform its obligations. On 17 June 2014, the plaintiff made a formal demand in writing for payment of the full amount of $1m under the Performance Bond. As the defendant failed to pay, the plaintiff commenced this action.

6 In its Defence, the defendant pleaded two defences. The first was unconscionability based on the allegation that the plaintiff owed Ji Sheng a sum exceeding the plaintiff's claim. The second defence was based on an alleged conspiracy between the plaintiff and Ji Sheng to suppress relevant material facts in order to induce the defendant to issue the Performance Bond.

7 Before me (and before the AR), the defendant did not pursue its defence of unconscionability. The reason was that Ji Sheng had earlier obtained an *ex parte* interim injunction restraining the plaintiff from making a call on the Performance Bond. However, the interim injunction was set aside during the subsequent *inter partes* hearing on 3 October 2014. During the *inter partes* hearing, Ji Sheng had argued that the plaintiff's call on the Performance Bond was unconscionable. The court rejected Ji Sheng's argument and held that there was no strong *prima facie* case of unconscionability.

8 As for the alleged conspiracy, the defendant's case was based on, among others, the following allegations:

(a) The value of the plaintiff's contract for the Project was $18,225,820.

(b) The plaintiff had signed a sub-contract with Ji Sheng dated 17 February 2012 for a contract value of $13,334,658.10 ("the 1st Sub-Contract"). Ji Sheng had tendered this sub-contract in its application to the defendant for the issuance of the Performance Bond.

(c) Unknown to the defendant, the plaintiff and Ji Sheng entered into a second sub-contract dated 2 March 2012 for a lower contract value of $9,820,158.06 ("the 2nd Sub-Contract").

(d) The circumstances behind the two sub-contracts were unclear and the drastic change in the contract values was unusual and suggested that the plaintiff and Ji Sheng "can create any documents to suit their scheme".

The defendant's application in SUM 2633/2015 was to amend para 6(e) of its Defence to add the allegations in (b) to (d) above. I proceeded with the hearing of RA 185/2015 on the basis of the proposed amended Defence. As the defendant noted, if it failed in its appeal based on the proposed amended Defence, the application to amend the Defence would become irrelevant.

9 It was not disputed that the only defences available to the defendant were unconscionability and fraud. The defendant submitted that the 1st Sub-Contract was a sham and that it was entered into to defraud the defendant into issuing the Performance Bond. The defendant asserted, without elaborating, that its risk assessment of Ji Sheng's application for the Performance Bond would have been different if it had known the value of the sub-contract was $9,820,158.06 instead of $13,334,658.10.

10 The plaintiff denied any collusion with Ji Sheng or anything sinister in the fact that the 1st Sub-Contract was replaced by the 2nd Sub-Contract. The plaintiff was also not involved in Ji Sheng's dealings with the defendant. In any event, the plaintiff explained that the value of the 2nd Sub-Contract was lower because the scope of works was reduced. In the affidavit of Mr Oh Boon Chye ("Mr Oh") filed on 13 May 2015 on the plaintiff's behalf, Mr Oh explained that the precast components were removed from the scope of works in the 1st Sub-Contract and were given to another sub-contractor, CAA Technologies Pte Ltd ("CAA").

11 Before me, the defendant confirmed that it was raising only one point, *viz*, that the plaintiff's explanation for the reduced value of the 2nd Sub-Contract could not be true and that this was evidence that the 1st Sub-Contract was a sham. The defendant gave two reasons why the reduction in the value of the 2nd Sub-Contract could not have been due to the CAA Sub-Contract:

(a) First, the plaintiff's sub-contract with CAA ("the CAA Sub-Contract") was entered into on 5 January 2012, *ie*, before either the 1st or 2nd Sub-Contracts were entered into with Ji Sheng. The 1st and 2nd Sub-Contracts were entered into on 17 February 2012 and 2 March 2012 respectively. Therefore, the precast components could not have been removed from the 1st Sub-Contract and given to CAA, as alleged by the plaintiff.

(b) Second, the 1st Sub-Contract was for $13,334,658.10 whereas the 2nd Sub-Contract was for $9,820,158.06. The difference was $3,514,500.04. However, the CAA Sub-Contract was for $3,380,000. The defendant submitted that if the works under the CAA Sub-Contract were removed from the 1st Sub-Contract, then the value of the 2nd Sub-Contract should have been $9,954,658.10 (*ie*, $13,334,658.10 less $3,380,000.00) instead of $9,820,158.06.

12 In response, the plaintiff explained as follows:

(a) The plaintiff and Ji Sheng started negotiations for the Project in early to mid-2011. The initial understanding was that the plaintiff would sub-contract the whole of the Project to Ji Sheng on a back-to-back basis. However, the Housing and Development Board did not permit the whole of the Project to be sub-contracted to Ji Sheng. The plaintiff then agreed with Ji Sheng that the Project would be divided among several sub-contractors including Ji Sheng. The sub-contract with Ji Sheng would be for the works for the Project excluding the works sub-contracted to the other sub-contractors.

(b) Thereafter, the plaintiff entered into negotiations with the other sub-contractors. One of the other sub-contractors was CAA. CAA gave a quotation dated 10 November 2011 for precast components. The quotation was for a total sum of $3,514,500.04, and comprised two parts. The first part was for various precast items at $3,380,000.04 ("the Precast Items"). The second part was for *additional items* (one precast suction tank and seven precast water tanks) at $134,500 ("the Additional Precast Items").

(c) The CAA Sub-Contract was entered into on 5 January 2012 for the Precast Items. The plaintiff was to subsequently issue variation orders if it wanted CAA to fabricate and install either or both of the Additional Precast Items. As the sub-contract was confirmed for only the Precast Items, the value of the contract was $3,380,000 (rounded down from the figure in CAA's quotation).

(d) In February 2012, the plaintiff agreed with Ji Sheng that the Precast Items under the CAA Sub-Contract would form part of Ji Sheng's sub-contract and CAA would be Ji Sheng's sub-contractor instead. Consequently, the scope of works for the 1st Sub-Contract did *not* exclude the Precast Items under the CAA Sub-Contract. As the Additional Precast Items had not been subcontracted to anyone else, this meant that the 1st Sub-Contract included both the Precast Items and the Additional Precast Items. Ji Sheng was to enter into a sub-contract with CAA after which the CAA Sub-Contract would be terminated.

(e) Around the end of February 2012, the plaintiff learned that Ji Sheng had not yet signed any sub-contract with CAA. It was then decided that the Precast Items and the Additional Precast Items would be removed from the scope of works sub-contracted to Ji Sheng. Pursuant

to this decision, the 2nd Sub-Contract was entered into on 2 March 2012 to replace the 1st Sub-Contract. The Project then proceeded on the basis that CAA remained the plaintiff's sub-contractor under the CAA Sub-Contract (which had not yet been terminated). This explained why the date of the CAA Sub-Contract was earlier than the date of the 1st and 2nd Sub-Contracts.

(f) As the Precast Items and Additional Precast Items were removed from the scope of works, it followed then that value of the 2nd Sub-Contract was the value of the 1st Sub-Contract less the amount quoted by CAA for the Precast Items and the Additional Precast Items, *ie*, $3,514,500.04. This explained why the value of the 2nd Sub-Contract was $9,820,158.06 (*ie*, $13,334,658.10 less $3,514,500.04).

(g) The Additional Precast Items originally comprised one suction tank and seven water tanks. The Housing and Development Board subsequently reduced the number of water tanks to five. Eventually, the plaintiff sub-contracted the suction tank to CAA who further sub-contracted it to another sub-contractor, Qingjian Precast Pte Ltd ("Qingjian"). Subsequently, the plaintiff sub-contracted the water tanks to Qingjian.

13 I noted that the precast components excluded from the scope of works under the 2nd Sub-Contract were described as "CAA Technologies Pte Ltd: Precast Components". This description could have been more clearly worded since the confirmed works under the CAA Sub-Contract were only the Precast Items. Nevertheless, I was satisfied that both the Precast Items and Additional Precast Items had been excluded from the 2nd Sub-Contract as alleged by the plaintiff. The difference in value between the 1st and 2nd Sub-Contracts was the exact amount (down to the cent) quoted by CAA for both the Precast Items and Additional Precast Items. This could not have been a mere coincidence. Further, the Additional Precast Items were in fact handled subsequently by the plaintiff and not Ji Sheng. It was the plaintiff who sub-contracted the suction tank to CAA and the water tanks to Qingjian.

14 In my view, the plaintiff had satisfactorily explained the circumstances leading to the 2nd Sub-Contract, and why the CAA Sub-Contract was dated earlier than the 1st and 2nd Sub-Contracts. The plaintiff had also shown that the difference in value between the 1st and 2nd Sub-Contracts was due to the removal of the Precast Items and Additional Precast Items from the scope of works. The contemporaneous documentary evidence clearly supported the plaintiff's case. The plaintiff's evidence left the defendant's case with no leg to stand on. As a parting shot, the defendant submitted that the plaintiff's explanations were one-sided versions and pointed out that there was no affidavit from either Ji Sheng or CAA to corroborate the plaintiff's case. The plaintiff explained that this was due to the fact that the plaintiff was having disputes with both Ji Sheng and CAA. In my view, the plaintiff had proven its case even without affidavits from Ji Sheng and CAA. In any event, it was also open to the defendant to obtain affidavits from Ji Sheng or CAA; the defendant did not do so.

15 I should add that the plaintiff had also submitted that the conspiracy pleaded by the defendant in its Defence (see [6] above) was not a defence against a call on the Performance Bond. As stated earlier, it was not disputed that the only defences available to the defendant were unconscionability and fraud. The defendant submitted that the 1st Sub-Contract was a sham and that it was entered into to defraud the defendant into issuing the Performance Bond. It was questionable whether fraud had been adequately pleaded in the Defence. However, it was not necessary to decide that question since it was clear to me that there were no triable issues in any event. Neither was there any other reason for a trial of the plaintiff's claim.

16 In conclusion, I had no doubt that the defendant had no defence to the plaintiff's claim and that the plaintiff was entitled to judgment. I therefore dismissed the defendant's application to amend

its Defence in SUM 2633/2015 and its appeal against summary judgment in RA 185/2015.