

Liang Huat Aluminium Industries Pte Ltd v Hi-Tek Construction Pte Ltd
[2001] SGHC 334

Case Number : OS 601411/2001, SIC 602171/2001
Decision Date : 08 November 2001
Tribunal/Court : High Court
Coram : Woo Bih Li JC
Counsel Name(s) : Goh Phai Cheng SC and Cheah Kok Lim (Ang & Partners) for the plaintiff/applicant; Choy Chee Yean and Leo Tan (Rajah & Tann) for the defendant
Parties : Liang Huat Aluminium Industries Pte Ltd — Hi-Tek Construction Pte Ltd

Judgment

GROUND OF DECISION

BACKGROUND

1. The Defendant Hi-Tek Construction Pte Ltd (Hi-Tek) was the main contractor for a proposed office extension at Amara Hotel and Shopping Centre (the Project).
2. The Plaintiff Liang Huat Aluminium Industries Pte Ltd (Liang Huat) was the nominated sub-contractor for the design, supply and installation of aluminium cladding, aluminium windows and glazing (the Sub-Contract Works).
3. Pursuant to the sub-contract, Liang Huat procured the issuance of a Performance Bond by The Nanyang Insurance Company Limited on 20 August 1998 in favour of Hi-Tek (the Bond). The Bond was for \$538,000.
4. It was common ground that the Bond was payable on demand and nothing material turns on the actual wording of the Bond.
5. The owner was Amara Hotel Properties Pte Ltd (the Owner).
6. Timothy Seow Group Architects were the architects (the Architects).
7. KPK Quantity Surveyors were the quantity surveyors for the main contract (the QS).
8. Disputes arose between Liang Huat and Hi-Tek as a result of which Hi-Tek made a call on the Bond on 20 September 2001. Consequently, Liang Huat applied by way of Originating Summons for a declaration that Hi-Tek shall not be entitled to call on or demand payment under the Bond or to receive monies thereunder until the determination of Suit No 932 of 2001 or, if the matter was referred to arbitration, until the final outcome of arbitration proceedings.
9. Liang Huat also sought an injunction to restrain Hi-Tek from calling or demanding payment or otherwise receiving monies under the Bond.
10. On 24 September 2001, I granted an interim injunction order pending the filing of some more affidavits and arguments. Arguments were presented on 11 October 2001.
11. On 17 October 2001, I dismissed the application and discharged the interim injunction order with

consequential orders.

12. Liang Huat is appealing against my decision.

LIANG HUATS ALLEGATIONS

Interim Certificates

13. Mr Goh Phai Cheng SC for Liang Huat pointed out that the call on the Bond was made on 20 September 2001, after Liang Huat had commenced a Writ action on 25 July 2001 and applied for summary judgment on 17 September 2001 for payment on the interim certificates in question (see para 12(a) to (c) of Submissions of the Plaintiffs). This was supposed to illustrate that the call was not made bona fide.

14. In my view, the timing of the call does not necessarily mean that it was not made bona fide.

15. Liang Huat also took the point that because the completion certificate for the main contract had been issued, there was no basis for Hi-Tek to call on the Bond.

16. I did not agree with such an argument.

17. A completion certificate in a building contract is issued usually for various reasons, eg:

- (a) to stop damages or liquidated damages for delay from running,
- (b) to start the commencement of the maintenance period or, as it is sometimes called, the defects liability period.

18. The issuance of the completion certificate does not mean that there can be no further claims or that no call should be made on an on-demand bond thereafter.

19. I would add that Liang Huat had also asserted that Hi-Tek should not assume that its claims have been proven and that it is entitled to call on the Bond.

20. I was of the view that this assertion went against the very nature of a performance bond payable on demand. The beneficiary need not prove its entitlement to the monies before making the call or demand on such a bond. Liang Huat had confused a default bond, under which the default has to be established, with an on-demand bond.

Sums due on interim certificates

21. On figures, Mr Goh said that Hi-Tek had refused to pay \$822,081.47 due to Liang Huat under interim certificates Nos 8, 11, 14 to 16, 18 to 22, 25 to 30.

Half of retention monies

22. Secondly, Hi-Tek had refused to release \$134,500 being half of the retention monies attributable to the Sub-Contract Works even though the Completion Certificate for the main contract had been issued.

Further work not certified yet

23. Thirdly, Liang Huat had a claim of about \$700,000 for further works which had not been certified yet. He derived this figure as follows.

24. The total value of work done by Liang Huat was \$5.56m. The last certification based on the QSs assessment was \$4.85m. The difference was about \$700,000.

25. Mr Goh referred me to an Application for Payment No 35 dated 22 March 2001 from Liang Huat (AP 35) which showed that the total work done, as claimed by Liang Huat, was about \$5.56m. However I noted that the payment applied for by Liang Huat under AP 35 was \$941,878.49 and not \$700,000 or thereabouts. Mr Goh was unable to explain why the \$941,878.49 did not tally with his figure of \$700,000.

26. Mr Goh submitted that if Hi-Tek were not restrained from receiving the monies under the Bond, Hi-Tek would be holding about \$2.2m:

- (a) \$ 822,081.47 (on interim certificates)
- (b) \$ 134,500.00 (half of retention monies)
- (c) \$ 700,000.00 (approximate sum for further work not yet certified)
- (d) \$ 538,000.00 (under the Bond)

\$2,194,581.47

27. He submitted that, accordingly, it would be unconscionable for Hi-Tek to receive monies under the Bond.

HI-TEKS ALLEGATIONS

Delay by Liang Huat

28. Mr Choy Chee Yean for Hi-Tek made the following submissions.

29. Under the terms of the sub-contract, Liang Huat was liable to indemnify Hi-Tek for damages for any delay in or caused by the Sub-Contract Works. The damages would include any liquidated damages that Hi-Tek was liable to pay the Owner as well as additional preliminaries during the duration of the delay.

30. A delay certificate dated 22 December 2000 had been issued in respect of Phase 4 of the main contract. The completion certificate for the main contract was issued on 22 March 2001. A sub-contract delay certificate dated 8 August 2001 was issued to Liang Huat in respect of Phase 4.

31. There was no need for a sub-contract delay certificate to be issued before Hi-Tek was entitled to claim damages for delay in view of certain provisions in the sub-contract, but, in any event, the Architects had issued a sub-contract delay certificate for Phase 4, as I have mentioned above.

32. Although the sub-contract delay certificate was issued some months after the completion certificate for the main contract, this was because of Liang Huats failure to substantiate their request for extension of time to the Architects (see para 22 of Ng Lay Guats 2nd affidavit and the

correspondence referred to).

33. I noted that, in any event, there was no suggestion that Hi-Tek was in a position to influence the Architects.

34. Mr Choy submitted that from the sub-contract delay certificate, the delay attributed to Liang Huat was 97 days. As Hi-Tek managed to accelerate its work, the overall delay to the main contract was reduced to 89 days.

35. Liquidated damages payable by Hi-Tek to the Owner was \$10,000 per day. Accordingly, Hi-Tek was liable to pay \$890,000 to the Owner as liquidated damages. It was entitled to set-off this liability against the \$827,081.47 claimed by Liang Huat under the interim certificates in question.

36. As for the retention monies, Mr Choy submitted that the Owner had retained \$334,900 for the entire works when the completion certificate was issued for the main contract (although the completion certificate states that \$335,700 was withheld by the Owner).

37. More importantly, Mr Choy referred to the valuation of the QS as at 21 May 2001 which showed that \$269,000 (out of the \$334,900) was the retention sum attributable to the Sub-Contract Works and was not to be released yet. In other words, while other sub-contractors were to receive half of the retention sums for their works, none was to be released for the Sub-Contract Works for the time being.

38. This was reinforced by a Certificate of Payment of Main Contractor dated 12 September 2001 by the Architects which specifically identifies \$269,000 as being retained in respect of the Sub-Contract Works.

39. Accordingly, Hi-Tek had not received from the Owner half of the retention sum attributable to the Sub-Contract Works which was supposed to have been paid upon issuance of the completion certificate.

40. As regards the allegation that another \$700,000 (or about \$900,000) is claimable by Liang Huat, Mr Choy submitted that AP 35 (on which Mr Goh relied) was dated 22 March 2001. This claim had already been taken into account because an Interim Certificate No 9512-C-30 for the main contract dated 5 June 2001 (Interim Certificate No 30) had been issued. The date of valuation stated therein was 21 May 2001 i.e about two months after AP 35 dated 22 March 2001.

41. Mr Choy again referred to the QSs valuation for Interim Certificate No 30 which showed that the balance amount payable to Liang Huat thereunder was \$233,404 and not \$700,000 (or about \$900,000). Furthermore, this sum was already part of the \$827,081.47 payable to Liang Huat under the first head of claim by Liang Huat pursuant to various interim certificates.

42. In fact, another interim certificate, No 31, dated 31 August 2001 was issued thereafter but neither side had exhibited it because Liang Huat had been paid under that certificate.

43. Mr Choy submitted that aside from the claim for delay, Hi-Tek had three more heads of claims against Liang Huat.

Preliminaries

44. The second head of claim was for preliminaries during the period of delay for which no further extension of time was granted. The claim was for \$415,000.

45. This item was based on a formula which Liang Huat had worked out by taking all the preliminaries, dividing it over the contract period, including the extension of time given, and apportioning the same among the four phases to derive the preliminaries for one month for Phase 4. After deriving that figure, Liang Huat then applied it to the 89 days of delay.

46. Under this head of claim was a claim for \$40,000 being the alleged cost for accelerating the main contract works, but there was no supporting evidence for this sub-item.

Debit Notes

47. Hi-Teks third head of claim was under various debit notes issued to Liang Huat by Hi-Tek over a period of time. This amounted to \$380,211.47. Mr Choys colleague, Mr Leo Tan, submitted that about \$250,000 thereof was indisputable but as he went through the items, it was clear to me that a large part of the \$250,000 was also disputed.

48. Also, under the debit notes, some additional preliminaries of \$130,000 were claimed. This was for part of the period for which extension of time had been granted to Hi-Tek. However the Owner had refused to pay the preliminaries claimed on the basis that they were not incurred by the reason which gave rise to the extension of time in the first place. Accordingly, Hi-Tek was claiming the same against Liang Huat.

49. Hence, Hi-Tek was claiming these preliminaries against Liang Huat but for a period different from the preliminaries claimed under the second head.

Defaults

50. Hi-Teks fourth head of claim was for alleged defaults by Liang Huat. The amount claimed was \$637,265.30.

51. This also included a claim for preliminaries for the same reason as mentioned for the third head of claim but for periods different from those under the third head of claim.

Total of claims by Hi-Tek

52. The total of Hi-Teks claims was:

- (a) \$ 890,000.00 (liquidated damages)
- (b) \$ 415,000.00 (preliminaries during delay period)
- (c) \$ 380,211.47 (debit notes)
- (d) \$ 637,265.30 (defaults)

\$2,322,476.77

LIANG HUATS RESPONSE

53. For the purpose of the hearing before me only, Mr Goh did not dispute that Hi-Tek was entitled to set-off \$890,000 against Liang Huat as part of Hi-Teks damages for delay.

54. Mr Goh also did not dispute that AP 35 had already been taken into account by the time Interim Certificate No 30 was issued.

55. Neither did he dispute that the Owner had withheld the entire retention sum attributable to the Sub-Contract Works. His response was only that this was not fair as other sub-contractors apparently received half of their retention sums.

56. As for the preliminaries claimed, Mr Goh pointed out that this was based on a formula worked out by Hi-Tek itself and there was no real evidence of the preliminaries incurred. He submitted that at most, Hi-Tek would be entitled to only one-quarter of what it claimed but he had no basis for asserting this.

57. As for the debit notes, Mr Goh pointed out that in AP 35, Liang Huat had already provided for \$380,211.47 for back-charges levied by Hi-Tek, even though Liang Huat disagreed with the same.

58. Mr Goh then went through some of the debit notes to dispute them and he submitted that there was no earlier claim on the debit notes.

59. As for Hi-Teks claim for defaults, these were really for preliminaries during the period for which extension of time had been given. Accordingly, Liang Huat should not be liable for the same and also, there was no reason why it should be lumped with the entire preliminaries claimed during this period.

MY CONCLUSION

60. The legal principles applicable to Liang Huats application are not in dispute. It is common ground that even though a performance bond is payable on demand by the beneficiary thereof, the beneficiary may be restrained from calling for payment and/or receiving payment thereunder if it would be unconscionable for the beneficiary to do so.

61. However, the applicant seeking such relief must establish a strong prima facie case of unconscionability, see the Dauphin case [2000] 1 SLR 657 at para 57.

62. Liang Huats claim for \$822,081.47 under various interim certificates was more than matched by Hi-Teks claim for \$890,000 as part of the damages for delay, excluding preliminaries during the period of delay.

63. As for Liang Huats claim for half the retention monies, it is true that Clause 4.7 of the letter of acceptance provided that upon issue of the Main Contract Completion Certificate, one-half of the retention monies would be released.

64. However, Clause 13.1 of the Conditions of Sub-Contract, provided that Liang Huat would be paid within 14 days after payment or deemed payment of Hi-Tek by the Owner. This was a pay when paid clause.

65. As the first half of the retention monies had not been paid or deemed to be paid to Hi-Tek, it was arguable that Hi-Tek was not obliged to pay the first half of the retention monies to Liang Huat yet.

66. As for Liang Huats claim for another \$700,000 (or about \$900,000), this had already been taken into account by the time the subsequent interim certificate No 30 was issued, or so it seemed.

67. The difference between Hi-Teks claim of \$890,000 as part of the damages for delay and Liang Huats claim for \$822,081 was about \$68,000 in favour of Hi-Tek. The total of the remaining three heads of claim by Hi-Tek was more than \$1.4m.

68. The claim for preliminaries during the delay period appeared excessive because the formula used was based on all the items included in the preliminaries initially claimed. This included items which would only apply at the beginning, and not at the end, of the job, eg possession of site and commencement of work, and pre-commencement inspection, survey and sorting out.

69. Secondly, not all the items would necessarily apply to the same extent for the end of the job as opposed to the beginning.

70. Thirdly, it was true that no other evidence had yet been adduced by Hi-Tek as to the quantum of the preliminaries it had actually incurred during the delay period, beyond the use of its formula.

71. On the other hand, some preliminaries appeared payable for the delay period . The uncertainty was how much.

72. The third head of claim included \$120,000 as preliminaries for different periods. While I had doubts as to whether they were claimable against Liang Huat, I could not rule them out at this stage.

73. Other equally questionable items in the debit notes included \$46,850 for housekeeping and administration costs and \$30,000 for failure to provide a project manager (see 3rd affidavit of Diong Chea Kok at para 15). However, again at this stage, I could not rule them out completely.

74. It is true that AP 35 provided for \$380,211.47 as disagreed back-charges leaving a balance of \$941,878.49 to be claimed by Liang Huat.

75. However, the problem for Liang Huat was that AP 35 was simply exhibited to the affidavit of Mr Cheah Kok Lim, a solicitor for Liang Huat, without elaboration. Furthermore, as I have mentioned, Mr Goh did not dispute that AP 35 had already been taken into account by the time Interim Certificate No 30 was issued.

76. Although Hi-Tek had not yet filed an action to claim the sums under the debit notes, this was not to say that the debit notes had been recently issued. They had been issued over a period of time.

77. The fourth head of claim included some more preliminaries which I could not rule out at this stage.

78. In the circumstances, while the claims for Hi-Tek under the second, third and fourth heads appeared excessive, I was unable to ascertain the extent of the excess and, hence, unable to conclude that its demand was unconscionable. It was just not possible, at this stage, to determine whether each and every item claimed against Liang Huat was justifiable in principle, and if so, how much was justifiable.

79. Indeed, a court should not be expected to delve into such details at this stage.

80. In the circumstances, Liang Huat had failed to discharge its burden and its application failed.

Sgd:

WOO BIH LI
JUDICIAL COMMISSIONER

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