

Anwar Siraj & Another v Teo Hee Lai Building Construction Pte Ltd
[2002] SGCA 51

Case Number : CA No 53 of 2002
Decision Date : 25 November 2002
Tribunal/Court : Court of Appeal
Coram : Chao Hick Tin JA; Tan Lee Meng J
Counsel Name(s) : G Raman and V Suriamurthi (G Raman & Partners) for the appellants; S Thulasidas (Ling Das & Partners) for the respondent
Parties : —

Banking – Performance bonds – Building contract – Whether call on performance bond unconscionable – Setting aside interim injunction restraining call on performance bond

Judgment

GROUNDS OF DECISION

1. The appellants, Mr Anwar Siraj and Madam Norma Khoo Cheng Neo, engaged the respondent building contractors, Teo Hee Lai Building Construction Pte Ltd ("THL"), to construct a house for them. They lodged this appeal in order to set aside an injunction restraining them from making a demand under a performance bond issued by Tai Ping Insurance in their favour pursuant to the terms of the building contract. We allowed the appeal and now give the reasons for our decision.

Background

2. The appellants, the owners of No 2 Siglap Valley, entered into a contract with THL on 30 December 1999 for the demolition of the house then standing on the property and the construction of a new house. The cost of the construction work was \$1,200,000 and the agreed date for the completion of the new house was 9 January 2001.

3. THL was required by the building contract to procure a performance bond in the appellants' favour for 10% of the cost of construction. As such, they arranged for Tai Ping Insurance Co ("Tai Ping") to furnish a performance bond for the sum of \$120,000 on 12 January 2001. The bond provided that the insurance company would pay the appellants the sum of \$120,000 "unconditionally and immediately on demand and without any reference to the contractor and notwithstanding any dispute or difference which may have arisen under or in connection with the contract".

4. The construction of the house was not completed by 9 January 2001 and the house was handed over to the appellants on 5 April 2001. As such, liquidated damages at the rate of \$1,000 per day was payable by THL to the appellants. At the date of handing over of the house, a number of defects listed by the appellants' architect, Mr Tan Hock Beng of Maps Design Studio, had not been rectified. The architect then wrote to THL to request for an undertaking that the latter would rectify all the stated defects.

5. THL complained that that they were denied access to the appellants' premises to carry out the rectification work. In August 2001, they gave the appellants notice of arbitration. THL said that they would bear the cost of rectification work pending the arbitrator's finding as to who should be responsible for the cost.

6. On 20 September 2001, the appellants, who contended that THL breached their contractual obligation to rectify the defects noted by the architect, made a demand under the performance bond for \$120,000. When Tai Ping did not pay the amount claimed, the appellants issued a writ against them. THL then sought an interim injunction to restrain the appellants from obtaining any payment from Tai Ping under the performance bond. An ex-parte interim injunction was granted by the District Court but it was set aside on 14 January 2002. THL appealed to the High Court and persuaded the judicial commissioner who heard the appeal to restore the interim injunction. The appellants sought and obtained leave to appeal to the Court of Appeal against the decision of the judicial commissioner.

The decision of the judicial commissioner

7. The judicial commissioner noted that THL had alleged that the first appellant had been an extremely difficult client and that he had interfered with the architect's duties. He also noted that THL had alleged that some of the problems in relation to the construction of the house were caused by design error and he thought that they had put up a reasonable case.

8. The judicial commissioner pointed out that THL had alleged that they had been denied the opportunity to carry out remedial work during the maintenance period. There was a dispute as to whether THL's expert, one Mr Donald Payne ("Payne"), should have been allowed to attend meetings with the architect. The judicial commissioner, who pointed out that a contractor is entitled to be assisted by any person in his attempt to keep a proper record of the works to be completed before and after rectification work has been carried out, was satisfied that the architect and the first appellant had acted oppressively by denying THL the assistance which Payne could have rendered them. After taking all the circumstances into account, he ruled that there was sufficient evidence of unconscionability on the part of the appellants. As such, he agreed that the appellants should be restrained from making a demand or receiving any payment under the performance bond until their dispute with THL has been resolved through arbitration.

The appeal

9. This court has stated on numerous occasions that fraud and unconscionability are grounds for restraining a beneficiary of a performance bond from insisting on his right to demand payment under the bond. (See, for instance, *Bocotra Construction Pte Ltd v Attorney-General* [1995] 2 SLR 523.) As there is no allegation of fraud in this case, the only issue which arises is whether or not the appellants have acted unconscionably when they made a demand for payment under the performance bond issued by Tai Ping

10. As for what constitutes unconscionable conduct, in *Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 4 SLR 290, 298-299, this court stated as follows:

In *Dauphine Offshore* this court did not think it possible to define what would constitute 'unconscionability'. Lack of bona fide would in most instances indicate such 'unconscionability'. The situation in each case would naturally differ from another. Thus, there we stated (at p 668):

What kind of situation would constitute unconscionability would have to depend on the facts of each case.... There is no pre-determined categorisation....

The appellants would appear to suggest that ... unfairness, per se, could constitute 'unconscionability'. We do not think it necessarily follows.... In every instance of unconscionability there would be an element of unfairness. But the reverse is not necessarily true. It does not mean that in every instance where there is unfairness it would amount to 'unconscionability'.

11. As for the standard of proof required to establish unconscionability on the part of a person who is making a call on a performance bond, the position was made very clear in *Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Sheikh Sultan Khalifa bin Zayed Al Nahyan* [2000] 1 SLR 657, 672, where this court stated as follows:

In [*Bocotra's case*] this court stated that 'a high degree of strictness applies, as the applicant will be required to establish a clear case of fraud or unconscionability in the interlocutory proceedings. It is clear that mere allegations are insufficient.... In

our opinion, what must be shown is a strong prima facie case of unconscionability.

12. THL's counsel, Mr S Thulasidas, asserted at the hearing of the appeal that the appellants had acted unconscionably by making a demand for payment under the performance bond for a number of reasons. First, the appellants ought not have made a demand for payment under the performance bond because they had sufficient security for their claims. Secondly, a major complaint of the appellants, namely the flooding of the basement and the debonding of the basement tiles would not have occurred if the architect's design had not been defective. Thirdly, THL had been denied access into the appellants' premises to carry out rectification work.

13. The contention that the appellants ought not have made a demand for payment under the performance bond as they had sufficient security in their hands will first be considered. It was pointed out that the appellants held \$290,000 of THL's money because the latter's claim for a progress payment, which amounted to \$265,190.17, had not been certified by the architect. Furthermore, there was a retention sum of \$24,010.86. However, the appellants contended that it should not be overlooked that the quantity surveyor had estimated the cost of rectification work required by the architect to be more than \$500,000. They submitted that if their claim for liquidated damages for delayed completion, which amounted to \$84,000, was taken into account together with the estimated cost of rectification work, their demand for \$120,000 under the performance bond was not unreasonable. It is not our task to determine whether the appellants' or THL's estimated cost for the rectification of defects is more realistic. Neither is it our task to determine whether or not the architect should have certified THL's claim for \$265,190.17. In the circumstances, it was not established that it was unconscionable for the appellants to make a demand under the terms of the performance because they had sufficient security for the cost of rectification work.

14. As for THL's assertion that some of the appellants' complaints, including the flooding of the basement, were due to a defect in the architect's design, the appellants retorted that the flooding and the damage to the basement tiles resulted from THL's failure to build in accordance with the architect's plans, which had been approved by the relevant authorities. We were in no position to conclude that there has been defective designing by the architect. As such, it could not be said that the appellants' call on the performance bond was unconscionable on the ground that the architect's plans were defective.

15. Finally, the question of access to the appellants' premises will be considered. THL complained that their expert, Payne, was not allowed into the premises to look into the alleged defects. We agree with the judicial commissioner that THL should not be obstructed in their attempt to get an expert to help them evaluate the position. The appellants asserted that they were not unwilling to allow Payne to enter their premises and the impasse arose because THL failed to respond to their request for particulars of Payne's credentials. Evidently, the dispute concerning the entry into the appellants' house by Payne has been blown out of proportion. Admittedly, the appellants could have been more co-operative but THL could have provided the requested particulars with the greatest of ease. Consequently, months passed because of the intransigence of both parties. We were unable to conclude from the voluminous correspondence between the parties on this matter that the appellants were clearly at fault and that they were guilty of unconscionable conduct in relation to the entry of Payne into their premises.

16. We are mindful of the fact that in *Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 4 SLR 290, 299, this court noted that it "is important that the courts guard against unnecessarily interfering with contractual arrangements freely entered into by the parties". The terms of the performance bond are crystal clear and they are that the insurers shall "unconditionally and immediately on demand without any reference to the contractor and notwithstanding any dispute or difference which may have arisen under or in connection with the contract" make a payment under the performance bond. As a case of unconscionability on the part of the appellants was not made out, we allowed the appeal with costs and set aside the injunction restraining the appellants from making a demand under the performance bond issued in their favour. The appellants are entitled to costs.

Sgd:

CHAO HICK TIN
Judge of Appeal

TAN LEE MENG
Judge

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