

CCM Industrial Pte Ltd v 70 Shenton Pte Ltd and another
[2014] SGHC 75

Case Number : Originating Summons No 269 of 2014, Summons No 1465 of 2014
Decision Date : 16 April 2014
Tribunal/Court : High Court
Coram : Woo Bih Li J
Counsel Name(s) : Paul Tan and Thea Sonya Raman (Rajah & Tann LLP) for the plaintiff; Daniel Tay and Patrick Wong (Rodyk & Davidson LLP) for the first defendant.
Parties : CCM Industrial Pte Ltd — 70 Shenton Pte Ltd and another

Civil Procedure – Injunctions

Banking – Performance Bonds

16 April 2014

Woo Bih Li J :

1 The plaintiff, CCM Industrial Pte Ltd (“CCM”) is a building contractor. It was engaged by the first defendant, 70 Shenton Pte Ltd (“70 Shenton”) as the main contractor to erect a 32-storey commercial building at 70 Shenton Way, Singapore on 26 July 2012.

2 CCM filed the present Originating Summons (“the Action”) on 21 March 2014 to seek various reliefs including:

(a) a declaration that 70 Shenton is not entitled to receive \$4,728,250 (“the Sum”) under Performance Bond Policy No 2012-A0414201-GPB dated 7 September 2012 (“the PB”) issued by the second defendant, The Overseas Assurance Corporation Limited (“OAC”); and

(b) an injunction to restrain 70 Shenton from receiving the Sum or any other sum under the PB.

3 CCM also filed *ex parte* Summons No 1465 of 2014 (“the Summons”) on 21 March 2014 for various reliefs including an interim injunction to restrain 70 Shenton from receiving the Sum or any other sum under the PB until further order. The purpose of the Summons was to obtain the interim injunction against 70 Shenton until the hearing of the Action.

4 I heard the Summons on 25 March 2014 and dismissed it with costs.

The issue

5 The issue before me was whether there was a strong *prima facie* case of unconscionability when 70 Shenton made a demand dated 17 March 2014 on OAC for payment of the Sum under the PB.

The court’s reasons

6 By a letter dated 5 February 2014 from 70 Shenton’s architect, Ronny Chin Architects (“the

Architect”) to CCM, the Architect informed CCM that the targeted completion date for micro-piling in a master programme was 16 January 2014 and was then three weeks in delay. Based on a progress report and a targeted piling rate of six micro-piles per day, the Architect was of the opinion that another seven months would be needed to complete the micro-piling, resulting in an overall delay of eight months.

7 Accordingly, the Architect was of the opinion that CCM had failed to proceed with the contractual works with due diligence and progress. As an example, the Architect’s letter mentioned that only two to three, instead of six, micro-piles were effected per day and there was no piling between 28 December 2013 to 24 January 2014. The Architect’s letter also informed CCM that unless CCM took effective steps to catch up with the site progress, 70 Shenton reserved the right to terminate the contract with CCM. The letter was stated to serve as a written notice required under cl 32.(3)(d) of the Conditions of Contract (“the Conditions”) which applied to the contract between the parties.

8 Subsequently, the Architect issued a Termination Certificate (“TC”) dated 14 March 2014 under cl 32.(4) of the Conditions to certify that 70 Shenton was entitled to terminate the employment of CCM under cl 32.(3)(d) of the Conditions.

9 Acting on the TC, 70 Shenton wrote on 17 March 2014 to terminate the employment of CCM under cl 32.(1) of the Conditions.

10 As mentioned at [5] above, 70 Shenton also made a demand dated 17 March 2014 on OAC for payment of the Sum.

11 CCM then filed the Action on 21 March 2014 and also filed the Summons on the same day. Liew Sen Keong (“Mr Liew”), the managing director of CCM, executed his first affidavit on 21 March 2014 to support the Action. He alleged the following:

- (a) The piling rate was an average of six piles per day and not three piles per day.
- (b) There was still plenty of time for CCM to “eventually catch up on its progress of works even though there may be delays now”. Using Micro-Programme Revision 4 dated 24 February 2014, Mr Liew believed that the entire works could be completed by the completion date for the entire works (as opposed to the completion date for the micro-piling).
- (c) CCM was entitled to extensions of time.

12 Mr Liew was therefore of the view that 70 Shenton’s termination of the contract was unlawful and premature and its call on the PB was unconscionable.

13 Mr Liew also executed a second affidavit on 21 March 2014. This was to support the Summons. His second affidavit adopted what was said in the first affidavit. The second affidavit also said that CCM was instructing delay analysis experts BK Burns Pte Ltd to provide their expert opinion on whether there was a reasonable prospect of meeting the completion date for the entire works.

14 Paragraph 6 of Mr Liew’s second affidavit stated that CCM was in the process of further gathering and documenting the full facts. This was similar to para 5 of his first affidavit in which he said that a more detailed affidavit with supporting documents would follow to supplement his first affidavit.

15 In *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352, the Court of Appeal set out the principles on the granting of an injunction to restrain a beneficiary from calling on a performance bond. I do not propose to reiterate the principles here except to say that it is for an applicant like CCM to establish a strong *prima facie* case of unconscionability on the part of the beneficiary of a performance bond in order to obtain an injunction of the nature as sought by CCM.

16 The short point was that CCM did not even respond to the Architect's letter dated 5 February 2014 to dispute the allegation of delay in the micro-piling works or to assert that it would be able to catch up. Neither did it claim an extension of time then. Therefore, it appeared that at the material time it had accepted that there was delay in the micro-piling works. Yet, it did not provide concrete information to the Architect as to how it was going to catch up. Even by the time it filed the Action and the Summons and the two affidavits of Mr Liew, such information was not forthcoming. Indeed, Mr Liew's affidavits also suggested that CCM accepted that there was delay in the micro-piling works. The allegation that CCM was gathering evidence was inadequate to show unconscionability on the part of 70 Shenton.

17 Accordingly, CCM had failed to discharge its burden to establish a *prima facie* case of unconscionability.

18 For completeness, I mention that after I decided to dismiss the Summons, CCM orally applied for a similar injunction pending an appeal to the Court of Appeal on the ground that if such an injunction was not granted, it would render its appeal nugatory. I did not agree that an appeal to the Court of Appeal would be rendered nugatory in the absence of such an injunction. If payment of the Sum is made by OAC to 70 Shenton Way before the appeal is heard, and if CCM were successful in the appeal, the Court of Appeal may order 70 Shenton to repay the Sum to OAC or to pay it to CCM (or any other party). There was no suggestion that 70 Shenton Way would be unable to repay or pay the Sum.

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