Eltraco International Pte Ltd v CGH Development Pte Ltd
[2000] SGCA 51

Case Number : CA 67/2000

Decision Date : 18 September 2000

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA

Counsel Name(s) : Christopher Chuah and Lawrence Tan (Drew & Napier) for the appellants; Stanley Wong Hoong Hooi (Jing Quee & Chin Joo) for the respondents

Parties : Eltraco International Pte Ltd — CGH Development Pte Ltd

Banking – Performance bonds – Main contractor calling on performance bond in building contract – Whether breach to be established before calling on bond – Whether calling on bond unconscionable – Whether restraint of call on performance bond can be limited to excessive part

(delivering the judgment of the court): This is an appeal against a decision of the High Court refusing the appellants` application for an injunction to restrain the respondents from receiving payment under a performance bond for a sum of $2,438,800 (the bond) issued by an insurer, the QBE International Insurance (`QBE`), pursuant to a building contract entered into between the appellants and the respondents.

Facts

The essential facts giving rise to the problem in hand are largely undisputed. The appellants were the main contractors for the super-structure works of a proposed service apartment cum shops development (`the project`) on lots 30-1, 30-2 and 31 of TS 20, at the junction of Killiney Road/Lloyd Road. The contract sum is $24,388,000 (`contract sum`). The contract between the parties incorporated the 1990 Singapore Institute of Architects Conditions (`SIA Conditions`).

The project was completed on 29 August 1998 and a completion certificate was issued by the architect. Clause 27 of the building contract provides for a maintenance period of 12 months. On this basis the maintenance period would expire on 29 August 1999. However, the contract also provides for an extension of the maintenance period in the following situation:

> *For defects which occurred at more than two complaints of the same trade over at different place (sic), such liability to extend for a further period of 6 months.*

Thus, if the extended maintenance period were to apply, it would only expire on 29 February 2000.

Clause 27(2) provides that within 14 days of the expiry of the maintenance period, the architect would deliver a schedule of defects specifying all remaining defects or faults and the contractors were to make good the same. Under cl 27(4), the architect is empowered, in lieu of rectification works being carried out by the contractors, to direct that there be a reduction in the contract sum. Once all defects have been attended to (or a reduction was directed to be made) the architect would, under cl 27(2), issue a maintenance certificate.

Under the building contract the respondents as employers are entitled to retain up to 5% of the contract sum as retention moneys. On the completion date, the amount so retained by the

respondents amounted to $1,219,400. Upon the issue of the completion certificate, half of the retention sum is required to be released to the contractors. Thus, after 29 August 1998, the respondents only retained half the retention sum, ie $609,700.

In the meantime, on 28 August 1998, the appellants submitted progress claim No 32 for $1,605,574.43 being the value of the work done up to completion. Included in this sum is a figure of $200,000, being the value of the balance of variation works assessed by the quantity surveyor (`QS`) to be due to the appellants. However, the architect did not certify progress claim No 32. This was because the QS was of the view that claim No 32 could not be recommended because the defective works had not been fully rectified and the final accounts had yet to be finalised. The QS confirmed this view in his letter to the architect of 21 March 2000. The appellants replied to state that claim No 32 was a claim for interim payment, it being for work carried out before the issue of the completion certificate, and it had nothing to do with the final accounts.

There was further correspondence between the architect, the appellants and the QS on the question of defects, during the period September 1999 to February 2000, on which more will be said later.

In the meantime on 18 February 2000 the respondents, through their solicitors, made a written demand on QBE for the full amount of the bond, namely, $2,438,800. The appellants, through their then solicitors` letters of 21 and 25 February 2000, objected to the respondents` call on the bond. As QBE did not pay on the bond as demanded by the respondents, on 7 April 2000, the latter instituted Suit 129/2000 against QBE to claim for the sum under the bond. In turn on 27 April 2000 the appellants instituted the present action (Suit 214/2000) against the respondents seeking an injunction to restrain the respondents from receiving the $2,438,800 under the bond. The appellants also sought a stay of the action taken by the respondents against QBE. On the same day the appellants sought an ex parte interim injunction. The hearing of that application was adjourned to be heard inter partes. In the meantime the court ordered that no payment out on the bond should be made until the inter partes hearing.

At the hearing, the court granted the injunction sought for by the appellants but limited it to that portion of the demand exceeding $1.6m. In other words, the respondents were allowed to receive only $1.6m under the bond. The appellants are dissatisfied with the partial restrain and have thus appealed against that order. They felt that the respondents should be completely restrained from receiving any sums under the bond.

Terms of the bond

The performance bond issued by QBE to the respondents is clearly a demand bond, as can be seen from the terms thereof, which read:

> *1 In consideration of you not insisting on the Contractor paying Singapore Dollars Two Million Four Hundred And Thirty Eight Thousand and Eight Hundred Only (S$2,438,800) as a security deposit for the Contract, we hereby irrevocably and unconditionally undertake, covenant and firmly bind ourselves to pay to you on demand any sum or sums which from time to time may be demanded by you up to a maximum aggregate of Singapore Dollars Two Million Four Hundred And Thirty Eight Thousand and Eight Hundred Only (S$2,438,800 [`the said sum`]).*
>
> *2 Should you notify us in writing at any time prior to the expiry of this Bond, by*

notice purporting to be signed for and on your behalf or by notice from your solicitors that you require payment to be made of the whole or any part of the said sum, we irrevocably and unconditionally agree to pay the same to you immediately on demand without further reference to the Contractor and notwithstanding any dispute or difference which may have arisen under the Contract or any instruction which may be given to us by the Contractor not to pay the same.

3 We hereby confirm and agree that we shall be under no duty or responsibility to inquire into:

(a) the reason or circumstances of any demand hereunder,

(b) the respective rights, obligations and/or liabilities of yourselves and the Contractor under the Contract or otherwise, or whether there is any dispute between yourselves and the Contractor, or

(c) ...

but that we shall be entitled to and shall rely upon any written demand by you hereunder.

5 We agree that our liability hereunder shall not be discharged, affected or impaired in any way by reason of any modification, amendment or variation in or to any of the conditions or provisions of the Contract or the Contract Works or by reason of any breach or breaches of the Contract by the Contractor, whether the same are made with or without our knowledge or consent. ...

Decision below

The learned judge below held that whether the beneficiary under a performance bond is required to establish a breach before making a call on it must depend on the terms thereof. As far as the terms of the subject bond are concerned, he ruled that they do not require the respondents to establish a breach by the appellants before being entitled to call on the bond. It is a straightforward demand bond.

References were also made by counsel for the appellants to cll 42 and 43 of the contract to contend that the respondents were not entitled to call on the bond as yet. Again, the learned judge did not think that these clauses were applicable; nor should they be construed to modify the terms of the bond.

The trial judge also rejected the argument that the demand on the bond was unconscionable. The court below applied the decision of this court in **GHL Pte Ltd v Unitrack Building Construction Pte Ltd** [1999] 4 SLR 604 which held that unconscionability is a separate ground, apart from fraud, to restrain a beneficiary from calling or receiving moneys under such a bond. But on the facts he did not think there was anything unconscionable in the appellants calling on the bond, although he was of the view that the call should not exceed $1.6m.

Issues on appeal

Before us, counsel for the appellants repeated the same three main arguments he made to the court below. He contended that the court should have issued an injunction to restrain the respondents from receiving any sum under the bond for the following reasons:

(i) the respondents` right to claim for damages for defects under the contract has not accrued;

(ii) the right to have recourse to the bond for meeting any claim for defects has not accrued; and,

(iii) the respondents` call on the bond was not made in good faith. It is an unconscionable demand.

We shall now consider each of these grounds in turn.

No accrued rights to damages

On this ground, the argument of the appellants is that whether a piece of work is defective, or otherwise, only the architect could decide that. The architect has the power to issue directions/instructions requiring the contractor to make good the defects or, in lieu of rectification, to effect a reduction in the contract sum taking into account the defective works. Reference was made to cll 1(7) and 27(4) of the contract. But most importantly, the appellants contended that the pre-conditions specified in those two clauses permitting deduction from the amounts due to the contractor are not satisfied.

It seems to us that this argument, by itself, is not really a sufficient ground to challenge the propriety of the demand on the bond. The terms of the bond, which we have quoted above, are quite clear. As the learned judge held, this is a demand bond. It does not expressly require the beneficiary to establish any breach on the part of the contractor before the bond may be called. But, as we will discuss later, this does not necessarily preclude the court from restraining the call if it is shown to be unconscionable or amount to fraud. In that context, whether the respondents were in breach of any of the obligations under the building contract is very much a relevant consideration.

Premature to call on the bond

The second ground contended by the appellants is that by virtue of cl 42 of the contract, the respondents were not, as yet, entitled to call on the bond. It is necessary, at this juncture, for us to set out cl 42:

> *If, at any time during the currency of the Contract, the Architect determines that any remedial, protective, repair or other like works is urgently necessary to prevent loss of or damage to the Works or to any property or to prevent personal injury to or the death of any person the Architect shall, as soon as practicable thereafter, notify the Contractor of that determination and the Contractor shall carry out the work immediately on receipt of that notice and if the Contractor is unable to (sic) unwilling at once to do the work the Employer may, by his own or other workmen, do such work as the Architect may determine to be necessary. If the work so done by the Employer is work which the Architect determines to be work which the Contractor was liable to do at his own expense under the Contract then all costs and charges properly incurred by the Employer in doing the work shall be repaid to it by the*

Contractor and may be recovered by the Employer as a debt due to the Employer by the Contractor, or may be deducted by the Employer from any moneys which may then be or thereafter become payable to the Contractor by the Employer, including any retention moneys then held by the Employer and, if such moneys are insufficient for this purpose, from the Contractor`s Performance bond under the Contract.

Response time for defects (sic) works is as follows:

	Nature of Defects	Response Time
1	Emergency Works	Within 1 day
2	Nuisance Defects	Within 2 days
3	Poor Workmanship	Within 1 week
4	Poor Materials	Within 2 weeks
Note: Nature of defects to be determined by the architect.		

The appellants argued that for the right to deduct any sum obtained from the performance bond to arise, remedial work of the nature specified in cl 42 must have been so determined by the architect, and carried out, and only if the retention sum held is not sufficient for that purpose may recourse be had to the bond.

We agree with the learned judge that the scope and application of cl 42 is of a limited and specific nature. It only concerns works that are `urgently necessary to prevent loss of or damage to the Works or to any property or to prevent personal injury to or the death of any person.` It obviously can have no application to remedial works not of the nature specified therein.

The question of unconscionability

We now turn to the third ground, which is the main point of this appeal. Does the demand on the bond, in the circumstances of this case, constitute an unconscionable act so as to justify the court in granting an injunctive relief. For this purpose it is necessary to refer to certain essential facts.

The dispute between the appellants and the respondents relates to defective works. On 10 November 1999, the architect issued a letter to the appellants enclosing a schedule of defects (November 1999 schedule). Some two months later, the appellants replied to say that they had attended to and made good most of the defects. This was stated in the appellants` letter of 24 January 2000 to the architects in these terms:

Kindly be informed you (sic) that the (sic) most of items on your schedule have been made good up to date. However, we do not consider some items are our responsibility and will elaborate the details in our attachment. We also wish to highlight that some items (eg varnishing to doors) has been rectified several times, although we believe the acceptable standard has been reached to these items, the Employer still refuse to endorse the rectification works. We shall be pleased if you would carry out your own inspection and adjudicate on the

standard and acceptability of these works that we had rectified since the dispute arises out now. For the other outstanding items, we wish to offer monetary compensation to resolve the problem.

Annexed to that letter of 24 January 2000 was an attachment where the appellants sought to explain the status in relation to each of the items of defect listed in the November 1999 schedule. Against some items the following explanations were given: `subjective` or `user defects` or `not true`. Accordingly, a joint inspection was carried out on 2 February 2000 at which the architect and the parties were present. At the inspection only major defects were viewed. In a letter of 10 February 2000 addressed to the QS the architects listed out twenty major items of defects. In respect of five of the twenty items, the appellants had suggested that those items of defect be resolved by monetary compensation and the architect had requested the QS to evaluate those defects.

On 17 March 2000, having received no valuation of the five defects, the appellants wrote a chaser to the architect. On 22 March 2000, the QS gave a valuation on eight items of defects amounting to $627,600. In making the estimates, the QS adopted the unit rates set out in the building contract. Because of that, he, therefore, qualified the estimates by stating: `the estimated costs are only the guide for negotiation and not final.` On 31 March 2000 the appellants suggested (on a without prejudice basis) that five of the eight items valued by the QS be settled at $61,716.80 (these same five items were valued by the QS to be at $335,600).

We ought to mention that earlier on 23 September 1999, before the November 1999 schedule was forwarded, the architect did forward to the appellants a schedule of defects. This schedule was disputed by the appellants. And because of the respondents` concern of the defects they had, on 20 August 1999, obtained a quotation from WTK Builders Pte Ltd (`WTK) to effect the rectification of all the defective works. It amounted to $2,528.986. On 13 September 1999, a second quotation was obtained by the respondents from Shan Construction Pte Ltd and the quote amounted to $2,523,407.80.

The bases upon which the appellants contend that the call upon the bond by the respondents is unconscionable may be put broadly as follows:

(i) At the time of the demand the respondents were holding the sum of $609,700 as retention sum;

(ii) The appellants` progress claim No 32 for $1,605,574.43 was still uncertified for payment by the architect. Bearing in mind the contract sum and the sums previously certified, there is at least a sum of $1,453,240 which the appellants should be entitled to under progress claim No 32;

(iii) The respondents were then withholding $200,000, being the balance of the variation works and this sum is not disputed;

(iv) The claim of the respondents for $2.5m, being the estimated costs of the rectification works (based on the quotation of WTK) was wholly unilateral and unreasonable. Furthermore, the items of defect forming the basis of the quotation of WTK were not identical with those set out in the November 1999 schedule and thus should not be relied upon as a basis;

(v) The QS estimated that the costs of rectification of the eight items of works to be only $627,600.

The overall contention of the appellants is that the call on the bond for the full sum is manifestly unjust having regard to the foregoing.

We will now quote parts of the grounds of decision of the learned judge below where he dealt with some of these arguments:

> *65 I asked Mr Wong if he could match the items in the quotation from WTK to the Schedule of Defects. Notwithstanding an attempt by him, he was not able to do so to my satisfaction. However, I had to bear in mind that the Schedule of Defects was issued by the architect after the quotation. Therefore, WTK would not have intended to try and match the works in its quotation with those in the Schedule of Defects. Neither was it suggested that the Schedule of Defects was intended to match the works mentioned in the quotation. Besides, the words used in each document may be different although they refer to the same thing. In any event the quotation had not yet been revised after the Schedule of Defects had been issued or after the list of twenty items of major defects had been stated arising from the joint inspection on 2 February 2000.*
>
> *...*
>
> *70 It will also be re-called that the quantity surveyor had written a letter dated 21 March 2000 to the architect stating that the plaintiffs` claim No 32 could not be recommended because, inter alia, the defective works had not been fully rectified.*
>
> *...*
>
> *73 As regards the estimate of costs by the quantity surveyor for eight items of defects, he executed an affidavit to say that they were based on rates in the contract between the plaintiffs and the defendants and refuted any notion that they could be used as a guage of the cost of another contractor to perform the rectification works.*
>
> *...*
>
> *75 As for progress claim No 32, too much should not be made out of the architect`s omission to certify payment of the same. It will be recalled that this progress claim was dated 28 August 1998, one day before the certified completion date of 29 August 1998. The progress claim may have been more in the nature of a final claim. Indeed it appeared that if the plaintiffs were paid the entire $1,605,574.43 under this claim, there might not be a final claim from them.*
>
> *76 It is clear to me that there are genuine disputes between the plaintiffs and the defendants. However, the extent of the disputes and the cost of rectification works are not clear to me. This is not surprising bearing in mind the nature of the application before me and that the nature of disputes regarding building defects are among the most technical and complex. Accordingly, it was not unconscionable for the defendants to receive moneys under the bond.*
>
> *77 77. However, I did consider the quantum claimed under the bond. The call on the bond was for about $2.43m. The quotation from WTK was for about $2.5m.*

> *I also took into account the fact that the defendants were still holding about $600,000 as part of the retention sum and there was about $200,000 worth of variation works which was not really disputed by them. Although the plaintiffs still had a substantial claim under claim No 32, besides the claim for the $200,000 variation works, it was uncertain how much of the claim would be allowed.*
>
> *78 Using a broad-brush approach, I deducted $800,000 (being the $600,000 retained and the $200,000 undisputed variation works) from $2.4m and hence restrained the defendants from receiving more than $1.6m. I considered that it was unconscionable for the defendants to receive more than $1.6m but that they should be entitled to receive up to that sum pending final resolution of the disputes.*

The law

The courts in Singapore have in several cases in recent years ruled that, apart from fraud, unconscionability would be a separate ground to restrain a beneficiary of a performance bond from enforcing it. The authorities were reviewed and considered by this court in **GHL Pte Ltd v Unitrack Building Construction Pte Ltd** [1999] 4 SLR 604 , which affirmed those High Court decisions and held that `unconscionability` is a distinct ground upon which a call on a performance bond may be restrained. The decision in ***GHL*** was considered and followed by this court in the later case **Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khalifa** [2000] 1 SLR 657 (***Dauphin Offshore***).

In ***Dauphin 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 one 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.*

In **Raymond Construction Pte Ltd v Low Yang Tong & Anor** (Unreported) Lai Kew Chai J opined that:

> *The concept of `unconscionability` to me involves unfairness, as distinct from dishonesty or fraud, or conduct of a kind so reprehensive or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party. Mere breaches of contract by the party in question would not by themselves be unconscionable.*

The appellants would appear to suggest that based on this opinion, unfairness, per se, could constitute `unconscionability`. We do not think it necessarily follows. Lai Kew Chai J said the concept of `unconscionability` involves unfairness. We agree. That would be so. 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`. That is a factor, an important factor no doubt in the consideration. It is important that the courts guard against unnecessarily interfering with contractual arrangements freely entered into by the parties. The parties must abide by the deal they have struck.

Our decision

In determining whether a call on a bond is unconscionable, the entire picture must be viewed, taking into account all the relevant factors. In the present case, what is clear is that by the time of the issue of the completion certificate there were a whole host of defective works, both major and minor ones, which had to be attended to. The defects were so substantial that the QS refused to certify the payment of progress claim No 32. The quotations of WTK and Shan Construction, referred to earlier, are also evidence of the substantial and extensive nature of the defects. Eventually, the architect forwarded to the appellants the November 1999 schedule. Then on 24 January 2000 the appellants informed the architect that most of the items in the schedule had been made good. Yet, on the joint inspection on 2 February 2000, on major defects alone, 20 items had been noted. On 10 February 2000, the QS was asked to give a valuation on five of the 20 items (items which the appellants indicated they were willing to compensate instead of remedying the defects). It was only on 22 March 2000 that the QS was able to assess the cost of the five items, plus three others, to be at $627,600. Even then the QS qualified his assessment by stating that he had merely adopted the unit rates of the contract in working out the figure of $627,600. The QS obviously recognised that that rate might not be correct; it should have been the market rate. Thus, he further explained that `the estimated costs are only the guide for negotiation and not final.`

At the time the respondents called on the bond on 18 February 2000, the appellants had clearly not rectified all the defects listed in the November 2000 schedule. The earlier joint inspection of 2 February 2000 is evidence of that. Furthermore, the appellants also disputed that they were liable for all the defects. Quite clearly, there were genuine disputes between the parties - both as to the extent of the defect liability and the cost of the rectification works. In the circumstances, the learned judge was entitled to find that as regards both matters, the extent of the defect liability and the cost for rectifying the same, were unclear to him. In the light of the foregoing, we do not see how the call on the bond by the respondents can be termed to be abusive. The respondents are entitled to protect their own interest. In our opinion, there is nothing improper on the part of the respondents in calling on the bond. The defendants` concern was further aggravated by the fact that there was some evidence then that the appellants were in financial difficulties.

What remains is the issue of the quantum of the call made by the respondents. Here, the learned judge seems to think that the call upon the entire sum of the bond of $2.43m was excessive. Using a broad brush approach, he deducted $800,000 from the amount of the call and allowed only $1.6m. The deduction of $800,000 was made because there is still the retention sum of about $600,000 with the respondents and furthermore the appellants were entitled to another $200,000, being the value of variation works which are not in dispute.

Under cl 1 of the performance bond, it is clearly permissible to make a partial demand or several demands, as the circumstances may require from time to time, so long as the aggregate of all sums demanded does not exceed $2.43m. The contention of the appellants is that as the trial judge found that the respondents are only entitled to call for no more than $1.6m and as they had called for the full sum under the bond, the entire call is tainted. On this point, reliance is placed by the appellants on ***GHL*** where this court held that the call for the whole sum of the bond was unconscionable. There, the bond was issued based on 10% of the original contract sum of $5,781,400, which sum was subsequently reduced to only $1,961,400 because certain aspects of the works were taken out of the

contract. Instead of only demanding for that portion of the bond in the light of the reduced contract sum the employer called in the bond based on the original contract sum.

We would observe that the operative part of cl 1 of the bond in ***GHL*** is the same as that in the present bond. But we must point out that the question of the court permitting part of the call which was not unconscionable to remain was not addressed by the parties in ***GHL*** . The court was not asked to determine that. The parties in ***GHL*** would appear to proceed on the basis of either all or nothing.

It must be borne in mind that the court in restraining a beneficiary from calling on a bond on the ground of unconscionability is exercising an equitable jurisdiction. We are unable to see why in the exercise of this jurisdiction the court may not limit the restraint to only that part which was clearly excessive and allow the other part which would not be unconscionable to remain, bearing in mind that under the terms of the bond, the beneficiary is entitled to make calls from time to time and for such sums as may be appropriate. To restrain the entire call when part of it is clearly not unconscionable would be inconsistent with the object of the jurisdiction which is to ensure that there is no injustice or abuse. To say that the restraint must be on the entire call would surely cause injustice to the beneficiary. The object of this jurisdiction is not to punish the beneficiary for making an excessive call but to achieve equity and justice.

Indeed, if the terms of the present bond were to be the same as that in **Cargill International SA & Anor v Bangladesh Sugar & Food Industries Corp** [1996] 4 All ER 563, then the call for the entire sum would have been in order. In ***Cargill International*** , the plaintiffs sought to restrain the defendant from drawing on a performance bond on the ground that the defendant was not entitled to make any call on the bond or to retain any money so received as it had suffered no loss since the market for sugar had fallen and the defendant had obtained replacement at a cheaper price. On a trial of certain preliminary issues, Morison J held that the defendant was entitled to make a call for the full amount of the bond even if the breach of contract by the plaintiffs had caused it no loss as the bond was not intended to represent an `estimate` of the amount of damages to which it might be entitled for such breach but was a `guarantee` of due performance. There was an implied term that the defendants would account to the plaintiffs for the proceeds received under the bond and would only retain the amount of any actual loss. It seems to us clear that the beneficiary there had to demand for the full sum because there the clause did not permit part demand or more than one demand. There, the operative part of the clause was `unconditionally and absolutely bind ourselves: (i) to make payment of US$526,273.15 ... to the (defendant) or as directed by (the defendant) in writing without any question whatsoever ... (ii) the guarantee is unconditional and it is expressly understood that the sole judge for deciding whether the suppliers have the contract ... will be the (defendant) ...`

There is one other observation on ***Cargill International*** which we should make. If the fact situation in that case were to recur in a Singapore case, the court here might well have issued a restraint on the call since unconscionability is a ground on which a Singapore court would grant restraint, unlike the position in England.

The final point of the appellants is that the learned judge, besides taking into account the retention sum and the balance of the value of the variation works should also have brought into consideration the amount claimed in progress claim No 32. His reason for declining to take that into account was that `it is uncertain how much of the claim would be allowed`, though he recognised that progress claim No 32 is a substantial one.

In relation to progress claim No 32 the appellants argued that, apart from the $200,000 for variations,

they would be entitled to at least $1,253,240. They worked it out as follows. The adjusted contract sum is $22,351,700. Payment already made up to progress claim No. 31 was $21,098,460. The difference is $1,253,240.

We note that the reason given by the QS for not certifying progress claim No 32 is not that the appellants had not done the works which formed the basis of that claim. His reason was only because of the defective works. While we recognise that the quotes given by WTK and Shan Construction were only estimates, the actual costs could, having regard to time lapse, be either higher or lower. But in all probability, bearing in mind that the appellants did carry out some rectification of the defective works, the actual cost would likely to be lower. Still there is an element of uncertainty there. Notwithstanding this uncertainty, progress claim No 32 is a factor which ought to have been taken into account. Bearing in mind that we are not here involved in an exercise in quantifying damages but only in ensuring that the amount of the bond called for is not unconscionable and taking a broad approach, we think there should be a reduction of $1m from the sum which the court below had directed that the respondents should be entitled to call. That should give the respondents ample security, without being that inordinate as to be unconscionable.

Judgment

In the result, we would allow the appeal to the extent that the amount which the appellants be permitted to call and receive from the bond should be reduced from $1.6m to $600,000.

As regards costs, as they have only partially succeeded, we would award the appellants only 50% of the costs of the appeal. The security for costs (with any accrued interest) shall be refunded to the appellants or their solicitors.

Outcome:

Appeal allowed in part.