

Samwoh Asphalt Premix Pte Ltd v Sum Cheong Piling Private Limited and Another
[2001] SGCA 79

Case Number : CA 600052/2001
Decision Date : 05 December 2001
Tribunal/Court : Court of Appeal
Coram : Chao Hick Tin JA; L P Thean JA
Counsel Name(s) : Sundaresh Menon and Choy Chee Yean (Rajah & Tann) for the appellants;
Suresh Damodara and K Sureshan (Colin Ng & Partners) for the first respondents;
Andre Maniam and Daniel Chia (Wong Partnership) for the second respondents
Parties : Samwoh Asphalt Premix Pte Ltd — Sum Cheong Piling Private Limited; Anor
*Contract – Unconscionability – Performance guarantee – Call on performance guarantee
– Whether beneficiary's conduct in calling for payment unconscionable – Whether court should
intervene and grant injunctive relief*

Judgment

GROUND OF DECISION

1. This is an appeal from the decision of the High Court allowing the application by the first respondents, Sum Cheong Piling Private Ltd (SC Piling), for an order discharging the interim injunction, which was earlier granted ex parte to the appellants, Samwoh Asphalt Premix Pte Ltd (Samwoh), restraining SC Piling from calling on the performance guarantee dated 30 September 1999 issued by the second respondents, ECICS-COFACE Guarantee Company (Singapore) Ltd (ECICS) for the account of Samwoh.

The background facts

2. The relevant facts giving rise to the appeal are briefly these. SC Piling were the main contractors for the construction of a runway, associated taxiways and drainage at Changi East (the project). The Ministry of Defence (Mindef) is the employer of the project. PWD Consultants (Airport Development Division) (PWD Consultants) are the consultants on site for the employer and are responsible for, among other things, the pavement design in the project. SC Piling entered into a sub-contract with Gim Chuan Contractor Pte Ltd (Gim Chuan), whereby the latter undertook the carrying out of the following works:

- (i) runway pavement
- (ii) CAAS taxiway fillets
- (iii) MINDEF taxiway fillets up to 75 m from east of the runway centre line
- (iv) Three reinforced concrete box culverts and U-drains including outfall structures
- (v) All drainage works west of the runway
- (vi) All drainage works across the runway
- (vii) All drainage works east of the runway until western edge of taxiway
- (viii) Turfing works until western edge of parallel taxiway

(the principal sub-contract).

3. Gim Chuan in turn sub-contracted to Samwoh, who were the nominated sub-contractors, the

following works:

- (i) runway pavement
- (ii) CAAS taxiway fillets
- (iii) MINDEF taxiway fillets up to 75m from east of the runway centre line

(the subsidiary sub-contract).

4. Under the terms of the subsidiary sub-contract, for the purpose of securing the performance of that sub-contract, Samwoh were required to furnish a performance guarantee in favour of SC Piling for the sum of S\$500,000, being about 5% of the subsidiary sub-contract sum. In compliance with this requirement, Samwoh procured ECICS to issue a performance guarantee dated 30 September 1999 (the performance guarantee) in favour of SC Piling.

5 . Paragraph (2) of the recital of the performance guarantee stated that ECICS agreed to guarantee the due performance of the [subsidiary sub-contract] in the manner set out therein. The performance guarantee was therefore intended to guarantee the due performance by Samwoh of the subsidiary sub-contract, and not the performance of any other obligation of Samwoh to SC Piling. Nor was it a performance guarantee to secure the due performance by Gim Chuan of the principal sub-contract. For the purpose of this appeal, the key provision is Clause 1 which is as follows:

The Guarantor 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 Main Contractor up to a maximum aggregate sum of **S\$500,000-00 (Singapore Dollars Five Hundred Thousand Only)** without requiring any proof that the Main Contractor is entitled to such sum or sums under the Contract or that the Nominated Subcontractor 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 Guarantor unconditionally, without any deductions whatsoever and notwithstanding the existence of any differences or disputes between the Main Contractor and the Nominated Subcontractor arising under or out of or in connection with the Contractor 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.

Wetness problem at site

6. In October 2000, the runway was flooded and Samwoh was unable to carry out their works. The runway continued to have excessive water content in the sub-soil. Samwoh raised the problem with SC Piling and Gim Chuan in November, and informed them that their experts were of the opinion that the problem could have been due to two causes: a high water table and inadequate drainage systems at the site. Neither SC Piling nor Gim Chuan really accepted that the excessive moisture or water in the subsoil was due to or occasioned by the inadequate drainage. At a site discussion between the representatives of SC Piling, Gim Chuan and Samwoh held on 20 December 2000, SC Piling's representative stated that owing to the wet weather there was apparently a problem of discharge of surface run-off at the site, resulting in stagnation and ponding of water, and suggested to Gim Chuan to provide sufficient temporary site drainage to facilitate discharge of the surface run-off so as to alleviate the wetness problem. Apparently, the problem excessive moisture or water in the sub-soil

remained and Samwoh investigated further and raised the problem again with Gim Chuan and SC Piling. However, the problem was not addressed.

7. It is Samwoh's claim that Gim Chuan were obliged to rectify this problem, which Gim Chuan had failed to do, and that the excessive water content in the sub-soil had rendered it impossible for them to proceed with the pavement works, which they had contracted to carry out. On 7 February 2001, Samwoh by a written notice accepted what they considered was Gim Chuan's repudiation of the subsidiary sub-contract and terminated that sub-contract.

8. After the termination of the subsidiary sub-contract, SC Piling and Samwoh entered into negotiations with a view to having a contract made directly between them. While the negotiations were in progress, Samwoh at the request of SC Piling carried out certain works at the site for a few days. However, the negotiations subsequently broke down, as the parties could not agree on certain terms on which Samwoh would take over the contract. On 28 February 2000, Samwoh stopped working at the site which they had started under the temporary arrangement made with SC Piling.

9. On 1 March 2001, SC Piling made a demand on ECICS for payment of S\$500,000 under the performance guarantee. Samwoh immediately initiated proceedings, and on 5 March 2001 applied *ex parte* and obtained an interim injunction, restraining ECICS from paying the sum to SC Piling, and SC Piling from receiving it. SC Piling soon thereafter applied for the interim injunction to be discharged. On 11 April 2001, the application was heard before a judge in chambers, and the judge allowed the application and set aside the interim injunction. Following that, the sum of S\$500,000 was paid by ECICS to SC Piling pursuant to the performance guarantee.

Decision below

10. The judge construed the performance guarantee as a demand guarantee and opined that the purposes of a demand guarantee were two-fold: to deter parties from evading their contractual obligations, and to afford the beneficiary a speedy remedy. He felt that the court should uphold the contract, and that an application for interlocutory restraint was improper. He held that the court must lean in favour of giving effect to the demand under it rather than nullifying it. He considered that the performance guarantee was a sort of indemnity or insurance to SC Piling.

The appeal

11. The main issue in this appeal is whether SC Piling had acted unconscionably in calling on the performance guarantee. In Singapore, unconscionability on the part of the beneficiary in calling for payment on a performance guarantee is a separate and distinct ground from fraud for seeking injunctive relief: see *Bocotra Construction Pte Ltd and Ors v A-G (No 2)* [1995] 2 SLR 733; *Raymond Construction Pte Ltd v Low Yang Tong & Anor* (11 July 1996, unreported); *Min Thai Holdings Pte Ltd v Sunlabel Pte Ltd & Anor* [1999] 2 SLR 368; *Sin Kian Contractor Pte Ltd v Lian Kok Hong* (31 July 1999, unreported); *GHL Pte Ltd v Unitrack Building Construction Pte Ltd & Anor* [1999] 4 SLR 604; and *Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khalifa bin Zayed Al Nahyan* [2000] 1 SLR 657. In determining this issue it is necessary to examine all the relevant facts and circumstances of the case including the facts leading up to the demand for payment under the performance guarantee.

Relevant circumstances

12. From the documentary evidence adduced, Samwoh at the material time certainly had a serious concern about the excessive water content in the sub-soil, which impeded the pavement works to be carried out by them under the subsidiary sub-contract. They had raised this problem repeatedly with Gim Chuan and SC Piling. Samwoh's own experts had also investigated the problem and they had written detailed reports on the causes of the excessive water content in the sub-soil, and copies of these reports were subsequently furnished by Samwoh to Gim Chuan and SC Piling respectively. SC Piling were certainly aware of this problem. On 10 January 2001, they wrote to PWD Consultants highlighting their concern of the problem. In their letter they adopted in part the position taken by Samwoh as to the causes of the excessive water content in the sub-soil. PWD Consultants responded on 16 January 2001. The consultants did not accept that the cause for the excessive water in the ground was the high water table; they attributed the problem largely to the unusually wet weather. They expressed no opinion on the question whether the cause was the inadequate drainage systems. Samwoh did not know of the exchange of correspondence between SC Piling and PWD Consultants until after the proceedings had commenced.

13. It is not disputed that Samwoh on or about 7 January 2001 terminated the subsidiary sub-contract with Gim Chuan, and stopped work at the site. Whether this termination was lawful or otherwise is not in issue before us. SC Piling were fully aware that Samwoh terminated the subsidiary sub-contract with Gim Chuan and stopped work at the site. They made no complaint against Samwoh for stopping work. In fact, they also regarded that the subsidiary sub-contract was at an end, for they commenced negotiations with Samwoh with a view to having a new contract between them and Samwoh. While the negotiations were in progress, Samwoh at the request of SC Piling mobilized their workforce and carried out some pavement works at the site.

14. It is helpful to set out these events in greater detail. Their respective representatives met at the office of SC Piling on 13 February 2001. On 14 February 2001, Samwoh wrote to SC Piling as follows:

Thank you for the invitation to an informal meeting with your senior management at your kind office.

We hope that the information provided on the existing site drainage problems, the status of Gim Chuans repudiation of our contract and the seriousness of the existing site condition and the inherent long-term effects is useful to you.

For your information and necessary actions, please.

SC Piling also wrote to Samwoh on 15 February 2001 thus:

We refer to our meeting with you on 13th February, 2001 at SCPs main office with regards to the above.

As discussed and agreed, please mobilize one paving team immediately to site by 19th February, 2001.

Terms and conditions of this temporary arrangement will be settled in due course.

For your immediate action, please.

15. Arising from these letters there was a further meeting between the representatives of Samwoh

and SC Piling at the latter's office on 16 February 2001. Following that meeting, Samwoh wrote to SC Piling on 17 February 2001 a letter, in which they said, among other things:

As discussed and agreed, the following conditions shall prevail upon mobilization of one Paving Team to your site on the 19 February 2001.

- a) That you shall ensure proper drainage and ensure that the area is fit for paving.
- b) That we shall not be liable for any defects caused by the pre-existing conditions on site, and in this regard of the performance of the sub-grade or sub-base.
- c) That we shall pave solely on your instructions only.
- d) That all plant and machinery remain our property and where required, we will be at liberty to demobilize and withdraw all such property from site.

In this respect, we shall mobilize One Paving Team, with all other terms and conditions not herein included to be finalized at our next meeting.

16. Pursuant to what was then agreed, Samwoh proceeded to carry out some works at the site. On 28 February 2001, Samwoh wrote a further letter to SC Piling, the material part of which was as follows:

As previously confirmed by your kind office prior to our mobilization, the conditions set out in our letter ref: SWAP/2001/0136_sy are fundamental to our continued presence at your site.

As explained to you earlier, our investigations into the drainage situation and construction problems had never been seriously looked into nor addressed. It would therefore be unreasonable to expect us to accept that the pavement is already in a condition that is fit for paving, even though you have indicated that you would ensure that it is so.

We would therefore clarify that the conditions set out aforesaid are also to be retained if we are to continue with the paving. The price quoted was therefore put forward on the basis that these conditions are retained.

17. Unfortunately, the parties could not agree on the terms on which Samwoh would take over the contract. As a result, Samwoh discontinued their work at the site. It was at that point in time that SC Piling decided to call on the performance guarantee. They made their call on 1 March 2001. It is significant that at the time when the performance guarantee was called, SC Piling had not made any claim against Samwoh for any damage or loss occasioned by either any breach of the principal sub-contract or any breach of the subsidiary sub-contract. They then took steps to prevent Samwoh from removing their plant and equipment from the site. They also refused to pay Samwoh the sum due for work done under the temporary arrangement.

18. In our judgment, on the basis of the facts we have examined, the call for payment by SC Piling under the performance guarantee was not based on any bona fide claim they had against Samwoh.

The clear inference is that they invoked the performance guarantee as a bargaining chip to compel Samwoh to agree to their terms. It was an abusive call on the performance guarantee. In our judgment, in all the circumstances, SC Piling had acted unconscionably in calling for payment under the performance guarantee and should have been restrained from so doing.

19. The judge below did not consider at all these relevant circumstances. He said:

12. The purpose of the demand guarantee is first to serve as a deterrent that is to say to subject the instructing party to act with a sense of reason and responsibility vis--vis the beneficiary. Next, the purpose of a demand guarantee is to serve as an expeditious remedy. If there are disputes they must be settled between the instructing party and the beneficiary at a later date. In this respect, it shifts the onus of establishing a wrongful demand to the instructing party at a convenient time. An application for interlocutory restrain is improper.

13. In this case there was a demand guarantee, though called a performance guarantee. The Courts should be slow to interfere or tinker with that contractual arrangement.

14. The Court must lean in favour of giving effect to a document and a demand under it than nullifying it. Given that learning of the law, one of the purposes of the PG was to be deterrent against the plaintiffs walking out of the contractual obligations. In other words the PG is a sort of indemnity or insurance to SC Piling the main-contractor. Without such a performance guarantee the main contract will be at the mercy of the plaintiffs.

20. With respect, we are unable to agree with him. Paragraph 2 of the recital of the performance guarantee expressly stated that it was to secure the performance by Samwoh of the subsidiary sub-contract. It is obvious to us that the purpose of this guarantee was to secure the performance of that contract. It was not intended or meant to be a deterrent as the judge held. Whether this guarantee is called a performance guarantee or demand guarantee is wholly immaterial and has no significance whatsoever. Where a call is made for payment under such guarantee and it is shown that there was fraud or unconscionability on the part of the beneficiary in making the call, the court would intervene and grant injunctive relief. We therefore do not agree with the judge that an application for interlocutory relief is improper. Whether the court would or would not intervene depends on the circumstances of the case, and it is of course for the applicant to make out a case of fraud or unconscionability in support of the application for injunctive relief.

21. The judge then concluded thus:

15. The plaintiffs argued that the demand was unconscionable. In my view it was the conduct of the plaintiffs [Samwoh] that was unconscionable. It was unconscionable because in order to procure the contract they arranged for the PG without the PG they would not have been awarded the contract. Having procured the contract they acted in a manner that would have left SC Piling in a lurch in a situation where time was very important.

The judge, with respect, was wrong in these findings. Reverting to the case at hand, we find that there was no evidence that Samwoh had failed to discharge their obligations under the subsidiary sub-contract and the demand made by SC Piling was utterly lacking in bona fides. In our judgment, SC Piling acted unconscionably in calling on the performance guarantee. On this point, we find helpful

the following part of the judgment of Selvam JC (as he then was) in *Kvaerner Singapore Pte Ltd v UDL Shipbuilding (Singapore) Pte Ltd* [1993] 3 SLR 350 at 354:

a demand under the performance guarantee can be made only when the seller has failed or refused to fulfil his obligations under the contract. The seller's failure or refusal is a condition precedent to the buyer making a demand. An assertion to that effect is implied in a demand made by the buyer. In circumstances where it can be said that the buyer had no honest belief that the seller has failed or refused to perform its obligation, a demand by the defendant/buyer in my view is a dishonest act which would justify a restraint order. On the facts of the case a demand made by the buyer was utterly lacking in bona fides.

Conclusion

22. In the result, we allow the appeal and set aside the order below. We now make further orders as follows. After the interim injunction was discharged, ECICS paid the amount of S\$500,000 under the performance guarantee to SC Piling, and in consequence, Samwoh in pursuance of their indemnity to ECICS were and are obliged to reimburse ECICS the amount they had paid with interest, if any. We understand that Samwoh had substantially reimbursed them the amount due. We think that the parties should, as far as practicable, be placed in the same position in which they were before the injunction was discharged. We therefore order that SC Piling repay the amount of S\$500,000 to ECICS forthwith and that ECICS upon receipt thereof repay the amount to Samwoh. This order does not prejudice ECICS in any way, as they only pass on to Samwoh the amount they received from SC Piling. For avoidance of any doubt, we declare that this order is not to affect any right of indemnity ECICS may have against Samwoh in respect of the payment, which they had made under the performance guarantee. We restore the injunction restraining SC Piling from calling for any payment under the performance guarantee and receiving any payment thereunder and ECICS from making any payment thereunder to SC Piling, until the trial of the action or until further order as may be made by the High Court.

23. Next, Samwoh contend that SC Piling should pay interest on the amount of S\$500,000 which the latter are now required to refund to ECICS. On the authority of *Credit Agricole Indosuez v Banque Nationale de Paris (No 2)* [2001] 2 SLR 301, Samwoh are entitled to interest. Instead of ordering SC Piling to pay the interest to ECICS and the latter upon receipt to pay the same to Samwoh, we order that SC Piling pay to Samwoh interest on the amount of S\$500,000 at 4.5% per annum for the period from the date of payment of that amount to them by ECICS to the date of their repayment of the amount of S\$500,000 to ECICS as herein ordered. The rate of 4.5% is certainly not excessive. It is the prime lending rate of The Development of Singapore Ltd, which we understand is the lowest of the prime lending rates prescribed by the local banks in Singapore.

Costs

24. We now come to the question of costs. SC Piling should pay the costs of Samwoh here and below. We so order. The next question is whether Samwoh or SC Piling should pay the costs of ECICS. We think that it is not wrong for Samwoh to join ECICS in these proceedings, as at the time when the application for the ex parte injunction was made, SC Piling had already made the call on the performance guarantee. Samwoh were justified in joining ECICS as a party so that the order they obtained would be binding directly on both SC Piling and ECICS. Similarly, in this appeal, Samwoh were also justified in joining ECICS as a party, otherwise it would be difficult to have an order along the line

of the order made herein. That being so, we think that the costs of ECICS here and below should be paid by SC Piling. We so order. We also make the consequential order for the refund of the security deposit in court, with interest, if any, to Samwoh or their solicitors.

Sgd:
L P THEAN
Judge of Appeal

Sgd:
CHAO HICK TIN
Judge of Appeal

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