

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 249

Originating Summons No 1031 of 2018

In the matter of No. 60 and 62 Nemesu Avenue (Ang Mo Kio Planning Area)
Singapore

Between

Hup Seng Lee Pte Ltd

... Plaintiff

And

Jaclyn Patrina Reutens

... Defendant

FOUNDATIONS OF DECISION

[Credit and Security] — [Performance bond]

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Hup Seng Lee Pte Ltd
v
Jaclyn Patrina Reutens

[2018] SGHC 249

High Court — Originating Summons No 1031 of 2018
Chan Seng Onn J
27 September 2018

16 November 2018

Chan Seng Onn J:

1 This was the plaintiff's application for an injunction to restrain the defendant from receiving the sum of \$146,300 from AXA Insurance Pte Ltd ("AXA") under a performance bond, which was procured by the plaintiff and issued in favour of the defendant. Having heard the submissions made by parties, I dismissed the application. The plaintiff has filed an appeal against my decision and I now give my reasons.

Facts

2 The defendant, Ms Jaclyn Patrina Reutens, was the owner of No 60 and 62 Nemesu Avenue (the "Premises"). The plaintiff, Hup Seng Lee Pte Ltd, was the contractor engaged by the defendant to build a terrace house at the Premises.

3 The terms of the plaintiff's engagement were set out in three documents, namely (a) a letter of award dated 11 July 2016 (the "Letter of Award"), (b) a

tender document dated 24 June 2016, and (c) the Singapore Institute of Architects Articles and Conditions of Building Contract – 9th Edition.¹

4 Clause 3.6.3 of the Letter of Award provided that prior to the commencement of work on the Premises, the plaintiff was to procure a performance bond or guarantee equivalent to 10% of the contract sum to be issued in favour of the defendant.² The plaintiff duly complied and procured the issuance of a performance bond dated 28 July 2016 for \$146,300, issued by AXA in favour of the defendant (the “Performance Bond”).³

5 The relevant portions of the Performance Bond state as follows:

PERFORMANCE GUARANTEE/BOND

This GUARANTEE/BOND is made ... BETWEEN [AXA] ... on the one part, AND [the defendant] of the other part: -

...

3. [AXA] shall pay to the [defendant] the full and just amount of Singapore Dollars One Hundred Forty Six Thousand and Three Hundred Only (S\$146,300.00) *only on the [defendant’s] first written demand without having to show proof of default and/or breach by the [plaintiff] and/or notwithstanding the existence of any disputes between the [defendant] and the [plaintiff].*

[emphasis added]

6 The plaintiff commenced work on the Premises as agreed. However, the parties eventually got into a dispute over alleged defects in the works on the Premises. The plaintiff maintained that it had rectified most of the alleged defects,⁴ and that it was prevented from rectifying further defects following the

¹ Affidavit of Reutens Jaclyn Patrina dated 4 September 2018 (“RJP’s Affidavit”), para 5.

² RJP’s Affidavit, p 32.

³ Affidavit of Ong Chin Hwa dated 20 August 2018 (“OCH’s Affidavit”), p 18.

⁴ OCH’s Affidavit, paras 10, 11, 13.

issuance of the Temporary Occupation Permit because the defendant denied it access to the Premises.⁵ The defendant, however, denied this and stated that she had to incur additional costs to procure an inspection report detailing the list of defects (the “Inspection Report”)⁶, and to engage third party contractors to rectify the defects.⁷

7 On 26 July 2018, solicitors for the defendant, M/s Bih Li & Lee LLP (“BLL”) sent a letter to AXA demanding payment of \$146,300 pursuant to the Performance Bond.⁸ On 31 July 2018, AXA sent a letter to the plaintiff stating that it was obligated to make payment to the defendant unconditionally upon receipt of a demand made in accordance with the Performance Bond.⁹ AXA subsequently sent an email to BLL on 2 August 2018 acknowledging receipt of the letter of demand, and stating that it would update BLL in due course after looking into the matter.¹⁰

8 On 14 August 2018, BLL once again wrote to AXA stating that the defendant had not yet received the payment pursuant to the Performance Bond.¹¹ Solicitors for AXA, M/s Gurbani & Co LLC (“Gurbani”), replied with a letter dated 17 August 2018, stating that it was taking instructions on the matter and requesting BLL to hold its hands in the meanwhile. The letter further stated that “[the plaintiff] will be applying for an injunction. As such, it is only appropriate that the [plaintiff] be given an opportunity to respond to [BLL’s] letter.”¹²

⁵ OCH’s Affidavit, paras 15, 19.

⁶ RJP’s Affidavit, Tab 4.

⁷ RJP’s Affidavit, para 27.

⁸ RJP’s Affidavit, p 311.

⁹ OCH’s Affidavit, p 20.

¹⁰ RJP’s Affidavit, p 313.

¹¹ RJP’s Affidavit, p 314.

9 On 21 August 2018, the plaintiff filed Originating Summons 1031 of 2018 for an injunction to restrain the defendant from receiving \$146,300 pursuant to the Performance Bond. It should be noted that as at the date of the hearing before me on 27 September 2018, AXA had not made payment to the defendant pursuant to the Performance Bond.

The law

10 As a preliminary point, parties did not dispute that the Performance Bond was an unconditional, on-demand performance bond. Indeed, the terms of the Performance Bond (see [5] above) made it clear that AXA was obligated to pay the defendant a sum of \$146,300 upon written demand from the defendant. There was no requirement for the defendant to show breach or default on the part of the plaintiff before AXA would release payment. Therefore, the only way for the plaintiff to restrain a call on the Performance Bond was to apply to court for an injunction: see *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 (“*BS Mount Sophia*”) at [3].

11 It is settled law that the two distinct grounds upon which a court may grant an injunction restraining a beneficiary of an on-demand performance bond from calling on the bond are fraud and unconscionability: *Bocotra Construction Pte Ltd and others v Attorney-General* [1995] 2 SLR(R) 262 at [53]; *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 at [6]. The elements of unconscionability have been variously stated to include elements of abuse, unfairness and dishonesty: *BS Mount Sophia* at [19]. The threshold of unconscionability that has to be established before the court will exercise its discretion to grant an injunction is a high one, and the burden that the applicant

¹² RJP’s Affidavit, p 315.

has to discharge is to demonstrate a strong *prima facie* case of unconscionability: *BS Mount Sophia* at [20].

My decision

12 I noted that the plaintiff did not file any written submissions in support of its application for the injunction. At the hearing before me, counsel for the plaintiff, Mr Zaminder Singh Gill (“Mr Gill”), also did not make substantive submissions on either fraud or unconscionability. He suggested briefly that some of the works were done by other subcontractors which were appointed directly by the architects and therefore that the defects could be attributed to them, but did not produce any evidence in this regard. The affidavit of Ong Chin Hwa, the plaintiff’s Managing Director, which was filed in support of OS 1031/2018, merely stated that the plaintiff would be prejudiced if the sum under the Performance Bond was released by AXA to the defendant, given that the defendant still owed the plaintiff monies being the outstanding balance for the works done on the Premises.¹³ Additionally, as I have alluded to at [6] above, the plaintiff stated that it was willing to rectify any defects but could not do so because it was denied access to the Premises.

13 In response to Mr Gill’s assertion that the defects should be attributed to third party subcontractors hired by the architects, counsel for the defendant, Ms Gan Kam Yui (“Ms Gan”), stated that the defendant had not directly hired any other subcontractors apart from the plaintiff, except for those that were subsequently engaged to rectify the defects caused by the plaintiff. Therefore, all the alleged defects should be attributed to the plaintiff and there was no issue of causation. Mr Gill did not challenge this. Further, although the defendant was not required to provide any reasons for calling on the Performance Bond, Ms

¹³ OCH’s Affidavit, para 23.

Gan brought me through some of the alleged defects as set out in the Inspection Report, such as water leakages in the roof and ceiling,¹⁴ and certain poorly installed switches.¹⁵

14 Having looked at the photographs contained in the Inspection Report, I was satisfied that there was credible *prima facie* evidence of defects in the works. The defendant was not simply inventing defects, nor was she making bare assertions in her affidavit. There was no evidence of abuse, unfairness or dishonesty in the defendant's call on the Performance Bond. Considering the high threshold that needed to be crossed before a finding of unconscionability could be made, I was of the view that the plaintiff had failed to establish even a *prima facie* case of unconscionability. In the circumstances, I dismissed the plaintiff's application.

15 At the hearing, Mr Gill also suggested that an alternative way of resolving this issue would be for the money under the Performance Bond to be paid into BLL's solicitor's account to hold as stakeholders pending the resolution of the substantive dispute between the parties, instead of payment being made directly to the defendant. His client would then be amenable to such an arrangement. Ms Gan objected to this. I found this to be an unusual arrangement which would, in any event, offend the terms of the Performance Bond. Therefore, Mr Gill's request was not granted.

Costs against non-party

16 A final issue which I will briefly touch on is in relation to the costs of the injunction application. It should be noted that AXA was represented at the

¹⁴ RJP's Affidavit, paras 19 and 20, pp 216 to 236.

¹⁵ RJP's Affidavit, p 195, S/N 186.

hearing and appeared as a non-party. Upon my dismissal of the plaintiff's application, I invited parties to make submissions on costs. Additionally, Ms Gan applied for the non-party, AXA, to be jointly and severally liable for any costs awarded.

17 O 59 r 2(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) states:

Subject to the express provisions of any written law and of these Rules, the costs of and incidental to proceedings in the Supreme Court or the State Courts, including the administration of estates and trusts, shall be in the discretion of the Court, and the Court shall have full power to determine by whom and to what extent the costs are to be paid.

18 There is no rule that states that the court's power to award costs does not extend to awarding costs in favour of or against a non-party, and no reason why the court should be precluded from awarding costs in favour of or against a non-party: *DB Trustees (Hong Kong) Ltd v Consult Asia Pte Ltd and another appeal* [2010] 3 SLR 542 ("*DB Trustees*") at [23]. The overarching rule with regard to ordering costs against a non-party in court proceedings is that it must, in the circumstances of the case, be just to do so: *DB Trustees* at [29]. Two factors that the court should consider in determining whether it is just to award costs against a non-party are: (a) whether there is a close connection between the non-party and the proceedings, and (b) whether there is a causal link between the non-party and the incurring of costs: *DB Trustees* at [36].

19 As I have alluded to above at [7], the defendant had called on the Performance Bond by way of a written demand to AXA on 26 July 2018. However, up until the date of this hearing on 27 September 2018, AXA still had not paid out the monies pursuant to the Performance Bond. Counsel for AXA, Mr Lennon Wu ("Mr Wu"), stated that they had received instructions from the plaintiff not to pay because the plaintiff would be taking out an injunction

application. Therefore, on this basis, AXA held back on payment. It was puzzling that AXA would have taken this course of action, when it was clearly cognisant of the fact that the Performance Bond was an unconditional, on-demand bond (see [7] above) and that it would be obligated to pay once a written demand was made. The Performance Bond clearly stated that it was between the defendant and AXA. There was no reason why AXA should have heeded the instructions of the plaintiff, nor was there any basis for Gurbani to have stated in its letter (at [8] above) that the plaintiff would be applying for an injunction and should therefore be given an opportunity to respond to the defendant's call on the Performance Bond. By failing to make payment to the defendant within a reasonable time after the demand was made, and further by taking the instructions of the plaintiff who was not a party to the Performance Bond, AXA had clearly breached the terms of the Performance Bond.

20 Mr Wu attempted to justify AXA's actions by stating that AXA was concerned about the plaintiff going after AXA if it had paid out the money and the court subsequently found that there was unconscionability and granted the injunction. Therefore, it wanted to wait until the outcome of the present application before deciding whether or not to make payment. I saw little merit in this explanation. By that logic, it would mean that an issuer of an on-demand performance bond would be allowed to wait until the court makes a pronouncement on whether there was unconscionability and whether or not an injunction would be granted before it makes payment under the performance bond. This could take weeks or even months, and would defeat the very purpose of having an on-demand performance bond.

21 I found there to be a close connection between AXA and the present proceedings, although costs would have been incurred even without its involvement. However, given the substantial delay of two months in paying out

the monies under the Performance Bond, coupled with the fact that it had inexplicably aligned itself with the interests of the plaintiff, I was of the view that it would be just to order costs against AXA. Therefore, I ordered costs and disbursements fixed at \$4,000 to be paid by the plaintiff and AXA jointly and severally. I note that AXA has not appealed against this order.

Chan Seng Onn
Judge

Zaminder Singh Gill (Hilborne Law LLC) for the plaintiff;
Gan Kam Yui and Toh Key Boon Kelvin (Bih Li & Lee LLP) for
the defendant;
Lennon Wu Leong Chong (Gurbani & Co LLC) for the non-party.
