Marinteknik Shipbuilders (S) Pte Ltd v SNC Passion
[2001] SGHC 140

Case Number : OS 1203/2000, SIC 600673/2001

Decision Date : 20 June 2001

Tribunal/Court : High Court

Coram : Lee Seiu Kin JC

Counsel Name(s) : John Wang (Robert W H Wang & Woo) for the plaintiffs; R Govintharasah (Gurbani & Co) for the defendants

Parties : Marinteknik Shipbuilders (S) Pte Ltd — SNC Passion

JUDGMENT:

Grounds of Decision

1. The Plaintiffs, a company registered in Singapore, are shipbuilders. The Defendants are a French company and the owners of the catamaran "Passion" ("the Passion"), which is the subject of this dispute. On 27 April 1999 the Plaintiffs entered into an agreement with the Defendants and a third party to design, build and deliver the Passion for the price of EUR 6,666,600. This agreement was subsequently amended by the parties and the amended agreement is hereafter referred to as "the Agreement".

2. Pursuant to the Agreement, the Plaintiffs furnished the Defendants with a Banker's Guarantee ("the BG") which provides as follows:

> "In consideration of your entering into the above Shipbuilding Contract with MARINTEKNIK SHIPBUILDERS (S) PTE LTD (hereinafter called "the Builder") whose registered address is at LEVEL 19, UIC BUILDING NO 5 SHENTON WAY SINGAPORE 068808 and office address at 31 TUAS ROAD SINGAPORE 638493, we THE DEVELOPMENT BANK OF SINGAPORE LTD, a company incorporated in Singapore and having its registered office at 6 Shenton Way DBS Building Singapore 068809, hereby irrevocably undertake, as security for the fulfilment of the obligations of the Builder under Clauses 10.2(b), 14.7, 15.1 and 19 of the Shipbuilding Contract, to pay to you an amount not exceeding EUROPEAN UNION EUROS SIX HUNDRED SIXTY SIX THOUSAND SIX HUNDRED SIXTY ONLY (EUR666,660-00) equal to 10% of the Basic Purchase Price as defined under the Shipbuilding Contract ie. EUR6,666,600-00 upon receipt of your first demand in writing that the Builder has failed to perform any of its obligations under clauses 10.2(b), 14.7, 15.1 and 19 of the Shipbuilding Contract.
>
> Such a demand from you in writing shall be conclusive evidence that such sum as stated therein is payable to you under this performance guarantee.
>
> The Guarantee will be subject however to the following:
>
> 1. Our total liability herein shall not exceed the sum in principal of EUROPEAN UNION EUROS SIX HUNDRED SIXTY SIX THOUSAND SIX HUNDRED SIXTY ONLY (EUR666,660-00); and
>
> 2. The Guarantee is effective from 25 June 1999 to the earliest of the following dates (hereinafter called the "Expiry Date"): - twelve (12) months from the date

the vessel commences service, - eighteen (18) months from the delivery date of the vessel in Singapore, - 15 July 2001 and after the aforesaid date, our liability hereunder shall automatically cease and your rights hereunder shall be extinguished and this Guarantee shall be null and void notwithstanding that the Guarantee is not returned to us for cancellation. All demands, if any, must be made in writing and received by us at our Banker's Guarantee Section at 6 SHENTON WAY, DBS BUILDING TOWER TWO #03-08, SINGAPORE 068809 on or before the Expiry Date.

3. The guaranteed amount shall bear interest at 10% per annum from the date when the demanded sum is to be paid by us until its actual date of payment; provided that the interest sum shall not exceed EUR66,666-00.

4. This Guarantee shall be governed by and construed in accordance with the English Law and is subject to the jurisdiction of the High Courts of England.

5. This Guarantee is non-assignable."

3. The Plaintiffs do not dispute that the BG is an on-demand guarantee subject only to the limitation that it is solely for the purpose of providing security against breaches of their obligations under clauses 10.2(b), 14.7, 15.1 and 19 of the Agreement as provided in the preamble to the BG. The Defendants concede that the BG applies only to breaches of those clauses.

4. On 9 August 2000, the Defendants threatened to make a demand on the BG in respect of alleged breaches of the Agreement. Fearing that they would carry out that threat, the Plaintiffs took out this Originating Summons on 11 August for the following orders:

"1. An injunction that the Defendants whether acting by themselves, their officers, servants or agents or any of them or otherwise howsoever be restrained until after a final award in an arbitration between the abovenamed parties pursuant to the terms of the Shipbuilding Contract for a High Speed Catamaran (Yard No. H162) dated 27 April 1999 (the "Shipbuilding Contract") has been made and published to the parties, from doing any of the following acts:

(a) give, furnish or make any written demand pursuant to the Banker's Guarantee No. 0016LT0222499 for EUR 666,660.00 (the "guaranteed sum") dated 26 June 1999 issued by the Development Bank of Singapore Ltd (the "Guarantee") in favour of the 1st Defendants;

(b) claim, collect, obtain, acquire or receive the guaranteed sum or any part thereof from the Development Bank of Singapore Ltd, its officers, servants or agents or otherwise howsoever;

(c) if they have so received the guaranteed sum or any part thereof, from removing out of the jurisdiction or disposing or parting with or dealing with, within the jurisdiction such monies paid.

2. A declaration that on the true construction of the Guarantee and in the circumstances, the guaranteed sum or any part thereof is payable only on proof by the Defendants of the Plaintiffs' default under Clauses 10.2(b), 14.7, 15.1 and 19 of the Shipbuilding Contract for a High Speed Catamaran (Yard No. H162)

dated 27 April 1999 made between the Plaintiffs and the Defendants;

3 The return of all sums that may or have been paid to Defendants by the Development Bank of Singapore Ltd under the Guarantee;

4 Costs;

5 Interest; and

6 Such further and other reliefs as this Honourable Court deems fit."

5. Plaintiffs also applied ex parte for an interim injunction pending final determination of the OS. On 12 August 2000 Prakash, J granted an interim injunction subject to the usual undertakings. On 30 March 2001 the Defendants took out this Summons-in-Chambers to discharge the ex parte injunction. After hearing counsel for the parties, I discharged the injunction on 1 June 2001 on the grounds that:

(i) there was no fraud;

(ii) there was no unconscionability on the part of the Defendants; and further

(iii) there was material non-disclosure on the part of the Plaintiffs in their application for the ex parte injunction.

Consequently, I ordered the Plaintiffs to pay to the Defendants damages to be assessed as well as costs. Counsel for the Plaintiffs then applied for a stay of the discharge order pending an appeal. I granted the stay, subject to the condition that the Plaintiffs procure adequate extensions of the BG which was due to expire on 15 June 2001.

6. is not disputed that the Passion was built and delivered to the agreed place of delivery, viz. Pointe-a-Pitre in Guadeloupe. The Defendants allege that the Plaintiffs have breached various terms of the Agreement and their intention to make a demand under the BG is based on their claims for:

(i) liquidated damages for late delivery;

(ii) liquidated damages for the failure of the vessel to attain the specified speed;

(iii) damages for miscellaneous defects; and

(iv) failure to deliver a fifth engine.

(i) Late delivery

7. There are 2 aspects to the issue of late delivery. Firstly, the parties had originally agreed on delivery by 30 March 2000, failing which liquidated damages would be imposed. The Plaintiffs agree that this deadline was not met and that pursuant to this provision they are liable for the sum of EUR 33,333. However this only comprises a small part of the total that the Defendants are claiming under the BG.

8. The dispute lies in the second aspect of this matter. The new deadline for delivery was 30 April 2000. Should the Plaintiffs fail to achieve this, liquidated damages at a rate of 2.5% per month (pro rated daily) would be payable. The Defendants allege that delivery was effected only on 6 May 2001 and that the liquidated damages for this amounts to EUR 32,876. The Plaintiffs do not disagree with

the arithmetic, but allege that they had complied with the delivery provision by 30 April 2000.

9. The Plaintiffs' case is as follows. The delivery provision in the amended contract, clause 10.2(b), reads as follows:

> "Subject to this Agreement if the Vessel is not completed by the Builder as evidenced by the execution by the parties of the Protocol of Completion on or before 29 February 2000 at the Port of Delivery, or the Vessel does not arrive in Pointe-a-Pitre on or before 30 April 2000, the Operator shall have the right to rescind the sale of the Vessel by notice to the Builder and upon doing so title to the Vessel shall revert to and revest in the Builder. The Builder shall pay to the Purchaser as liquidated damages an amount equal to ten percent (10%) of the Basic Purchase Price."

The Plaintiffs say that the Passion arrived at Point-a-Pitre before 20 April 2000 and therefore they had satisfied this provision.

10. The Defendants contend that delivery was only completed at the earliest on 6 May. They said that while the Passion may have arrived at Guadeloupe on 23 April, she was not offloaded from the cargo vessel; instead the Plaintiffs' sub-contractors began work on the required modifications. The Passion was unloaded on 25 April and the sub-contractors continued with the modification works. It was not until 5 May that the Plaintiffs requested the Defendants to sign the Protocol of Completion. The Defendants refused to sign it on various grounds, some of which are dealt with below. At the hearing before me, they were prepared to accept that delivery was made on 6 May as they took over the Passion on that date.

11. The Plaintiffs point out that the Passion did "arrive" at Pointe-a-Pitre before 30 April 2000, even if she was not operational by then. The Defendants contend that this provision required that she be operational by then. This question is one for the arbitrator to determine but it cannot be said that the Defendants' position is untenable. This is because the Plaintiffs' position, taken to the extreme, would mean that so long as all the components of the Passion are at Pointe-a-Pitre, they are not under any obligation to get her to be operational by a stipulated date. In my view, it cannot be said that the Defendants were unreasonable in holding the view that because the Plaintiffs only requested them to sign the Protocol of Completion on 5 May, liquidated damages for late delivery is payable up to that date.

(ii) Failure to attain specified speed

12. Clause 15.1 of the Agreement provides as follows:

> "15 PERFORMANCE
>
> 15.1 Speed (a) The Builder hereby warrants that the continuous speed of the Vessel shall be 40 knots at 5816 kw corresponding to 100% of maximum continuous power with a load of 41.5 tons, in calm weather, wind and sea not exceeding Beaufort 3 and 2 respectively, with clean hull.
>
> (b) If the actual continuous speed of the Vessel during sea trials varies from the guaranteed value of 40 knots, the Basic Purchase Price shall be adjusted as follows -

Actual continuous speed Reduction in Speed (knots) Basic Purchase Price (percent) up to 39.5 knots 0 below 39.5 knots USD 10,000 per 0.1 knot

Should the actual continuous speed as measured on sea trials fall below 37.50 knots the Operator shall have the right to reject the Vessel and terminate this Agreement."

13. Sea trials were conducted on 27 and 28 January 2000 at which the Passion attained a maximum continuous speed of 41.9 knots and an average of 41.35 knots. The Plaintiffs argue that the vessel was therefore in conformity with clause 15.1(a) and there was no basis for the Defendants' complaint in this respect.

14. The Defendants say that the sea trial was defective in that the engines of the vessel were overloaded to achieve that speed. In support of this, the Defendants exhibited a letter from the engine supplier which stated that the engines were overloaded by about 8.3% to 13.9% during the sea trials and warned that the warranty for those engines would be affected unless corrective action was taken in respect of the overloading problem. By the time the engine supplier sent this letter, the vessel was already being transported to Point-a-Pitre. Therefore a further sea trial in Singapore was impossible.

15. The Defendants engaged a surveyor to conduct sea trials at Guadeloupe on 26 and 27 June 2000. The surveyor reported a speed of between 37 and 38 knots. Based on an average of 37.5 knots, the Defendants say that the formula in clause 15.1(b) entitles them to make a claim for US$250,000 which is equivalent to approximately EUR285,000.

16. The Plaintiffs allege that this sea trial was not done in their presence as required under the Agreement. This is not disputed by the Defendants. However this does not detract from the fact that there is a claim by the Defendants against the Plaintiffs in respect of the speed performance of the Passion. It would be necessary for the arbitrator determine whether the Plaintiffs have satisfied this provision. Whether this is done by a further sea trial or by some other means would be a matter for the arbitrator to decide. For the present, the Defendants have this claim, and so far as they have been capable of determining it, the Passion could only reach 37.5 knots and their claim rested on that basis. I cannot see anything unreasonable in that position.

(iii) Miscellaneous defects

17. The Defendants alleged that there were various defects to the Passion that were not rectified by the time they took over the vessel and that they either had repaired or would have to do so. However at the hearing before me the Defendants had not provided any quantification of these repair costs. Therefore I would have to disregard them in relation to this application.

(iv) Fifth engine

18. The Passion was designed as a vessel with 4 engines. However the Agreement, as modified, obliges the Plaintiffs to supply a fifth engine which is to be used as a spare. This obligation is not denied by the Plaintiffs. Neither do they deny that the Passion was supplied without the fifth engine. However the Plaintiffs raised issues as to whether they were liable to the Defendants for this engine rather than to a third party. The Plaintiffs also submit that the BG states that it is for the purposes of securing their obligations pursuant to clauses 10.2(b), 14.7, 15.1 and 19 of the Agreement and only to those clauses. Therefore even if they were in breach of their obligations to supply the fifth engine, this was outside the scope of the BG.

19. The Defendants contend that this breach did fall within one of those provisions, namely clause 10.2(b) which is set out in paragraph 9 above. This relates to the completion or arrival of the "Vessel". The Defendants say that the Passion was not in conformity with the specifications and therefore did not fall within the definition of "Vessel" in the Agreement. That term is defined in clause 1.1 as meaning (emphasis added):

> " a 43 metre Catamaran vessel with all its components which is the subject of this Agreement having the Yard Number H162 allocated to it by the Builder to be, or being constructed, awaiting delivery or delivered as the case may be."

Thus, the Defendants argue, if the Passion did not have all its components, she was not the "Vessel" as defined. The term "components" is defined in the same clause as meaning:

> " everything which forms or is intended to form part of the Vessel or to be placed in or on the Vessel and, without limiting the generality of the foregoing, includes the hull, engines, machinery, appliances, appurtenances, equipment, gear, fittings, furniture and stores;"

Since she did not have the fifth engine which is one of the "components" of the "Vessel", it would follow that the Passion was not the "Vessel" as defined in the Agreement. Therefore the Plaintiffs were in breach of their delivery obligation under clause 10.2(b).

20. Although the Defendants' argument appears to be a technical one, nevertheless it is not untenable and one which ought to be dealt with by the arbitrator. Accordingly, I am satisfied that the Defendants' claim in this respect is perfectly reasonable. It is for a sum of EUR 278,000 and the Plaintiffs do not deny that this is the price of an engine.

Unconscionability and fraud

21. The Defendants' claims appear to be entirely reasonable. In any event, there is clearly no fraud. The only question is whether it is unconscionable for them to make the demand. In Eltraco International Pte Ltd v CGH Development Pte Ltd [2000] 4 SLR 290 the Court of Appeal stated that in considering unconscionability, the entire picture must be viewed, taking into account all the relevant factors. In the matter before them the court found that it was not unconscionable for a beneficiary to make a call on a demand bond where there was a genuine dispute between the parties on liability. The court said at para 32:

> "32. 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."

22. In the present case, the BG was issued for the purpose of providing "security for the fulfilment of the obligations" of the Plaintiffs under the Agreement. It is an undertaking by the bank to pay upon receipt of the Defendants' written demand. It is an ordinary on-demand bond clearly intended to entitle the Defendants the right to receive such sum from the bank as they, in their bona fide view, determine that the Plaintiffs are liable to them under the relevant provisions of the Agreement. A demand made by the Plaintiffs on the grounds described above would fall within what is contemplated in the Agreement. In those circumstances, I cannot see how such a demand would be unconscionable as would move the court to continue the injunction. Accordingly I discharged it.

Material non-disclosure

23. The Defendants also point out that the Plaintiffs had, in their application for the ex parte injunction, failed to make full and frank disclosure of all material facts. They submit that the nature of the non-disclosure of itself justifies discharging the injunction.

24. The ex parte application was supported by an affidavit filed by Priscilla Lim, a director of the Plaintiffs. After citing the relevant provisions of the Agreement, Lim said in paragraph 9 that: "9. The Plaintiffs delivered the Vessel to the Port of Final Delivery on 23 April 2000. The Defendants, however, wrongfully refused to take delivery of the Vessel until 5 May 2000 and wrongfully refused to sign the Protocol of Transit."

Lim then continued by saying that the Defendants unilaterally declared that the Vessel only arrived on 15 May 2000 and claimed liquidated damages on that basis. No mention was made of the basis of the Defendants' claim as I had set out above, i.e. that the Passion was not unloaded from the carrier vessel until 25 April, that the Plaintiffs' sub-contractors were working on her thereafter and that it was not until 5 May that the Plaintiffs requested the Defendants to sign the Protocol of Completion. The impression given by Lim is that the Defendants had absolutely no basis for their claim of late delivery and therefore their behaviour was fraudulent.

25. The affidavit then turns to the Defendants' claim in relation to the speed of the vessel. Lim said that it was made fraudulently because:

> (i) sea trials conducted jointly in Singapore recorded a speed of 41.7 knots which was above the 40 knots specified;
>
> (ii) the Defendants' allegation that the Vessel was not up to speed was based on sea trials conducted by them in the absence of the Plaintiffs' representatives;
>
> (iii) the conditions of the Defendants' unilateral sea trials were suspect because the weather conditions were not recorded; and
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> (iv) the modification works carried out would at most have reduced the speed by 0.5 to 1.0 knots.

26. Lim thus gave the impression that a proper sea trial had been done in Singapore and that it was witnessed by both parties. At that sea trial the Passion had recorded a speed of 41.7 knots, well in excess of the specified speed of 40 knots. Therefore it was fraudulent of the Defendants to go on to conduct a further speed trial under spurious conditions in which the Plaintiffs' representatives were not present and then claim that the Passion did not attain the speed specified. Lim did not disclose in her affidavit that the sea trial in Singapore was unacceptable because the engines were overloaded when the speeds of 41.7 knots was achieved.

27. A party applying ex parte for an injunction on an urgent basis owes a duty to the court to set out all the relevant facts, in particular any possible defence that would weaken his case for an injunction. But even if there has been material non-disclosure, the court nevertheless has the discretion to continue an injunction if the justice of the case requires it: see Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khalifa bin Zayed Al Nahyan [2000] 1 SLR 657 at para 48. In the present case, not only did Lim fail to disclose those matters which she was aware of and highlight the relevant correspondence in her affidavit, she had gone out of the way to paint a wholly different picture in order to attach fraud on the Defendants and in so doing had misled the court. The Plaintiffs had presented such a distorted view of the facts that to ignore their non-disclosure would be to reward such behaviour and encourage similar acts by other parties. Therefore, on this basis alone, the injunction ought to be discharged.

English law

28. The foregoing are sufficient grounds for my decision to discharge the injunction. However in the course of writing this judgment, I discovered an interesting point which deserves ventilation.

29. Both the Agreement and BG are expressed to be governed by English law. It was held in New Civilbuild Pte Ltd v Guobena Snd Bhd [1999] 1 SLR 374 that there was no concept of unconscionability in English law in relation to on-demand bonds and that fraud was the sole exception. The court went on to find that the Court of Appeal in Bocotra Construction Pte Ltd v A-G (No 2) [1995] 2 SLR 733 did not rule otherwise, notwithstanding that the term unconscionability was used in that judgment. However in GHL Pte Ltd v Unitrack Building Construction Pte Ltd [1999] 4 SLR 604 the Court of Appeal disagreed with that view and held that the court in Bocotra had made a conscious departure from English law in that unconscionability was another exception under Singapore law. The court held (at para 16):

> "It is abundantly clear from the judgment that the court expressly held that `fraud or unconscionability` was a ground on which the court would interfere and restrain the enforcement of a performance bond. It is significant that in that judgment the court on no less than three occasions referred consistently to `fraud or unconscionability` as a ground for the grant of an injunction. We should add that the concept of `unconscionability` was adopted after deliberation, and was not inadvertently inserted as a result of a slip; nor was it intended to be used synonymously or interchangeably with `fraud`. There is nothing in that judgment which can be said to indicate or suggest that the court did not decide that `unconscionability` alone is not a separate ground as distinct from fraud. We accept that to that extent, Bocotra is a departure, and if we may respectfully say so, a conscious departure, from the English position."

30. This position is reinforced in the recent decision of the Court of Appeal in Eltraco International Pte Ltd v CGH Development Pte Ltd [2000] 4 SLR 290. In that judgment, the court referred to the English decision of Cargill International SA & Anor v Bangladesh Sugar & Food Industries Corp [1996] 4 All ER 563 and observed as follows (at para 38):

> "38 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."

31. As unconscionability is not an exception in English law, there is the question as to whether the Plaintiffs may rely upon this ground in addition to fraud because the relevant contracts, i.e. the Agreement and the BG, are governed by English law. However this issue is not necessary for my decision and I did not have the benefit of submissions from counsel. Therefore I will be content to merely raise it here and leave this question to be decided elsewhere.

Sgd:

LEE SEIU KIN
JUDICIAL COMMISSIONER