Johnson Controls (S) Pte Ltd v Ho Air-Conditioning and Engineering Pte Ltd [2004] SGHC 86

Case Number : Suit 1116/2002

Decision Date : 30 April 2004

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Satwant Singh (Sim Mong Teck and Partners) for plaintiffs; Lim Joo Toon (Joo Toon and Co) for defendants

Parties : Johnson Controls (S) Pte Ltd — Ho Air-Conditioning and Engineering Pte Ltd

Contract – Breach – Whether plaintiffs in breach of contract by failing to complete their work on time.

Contract – Waiver – Plaintiffs supplied different models of equipment from those stipulated in contract – Whether defendants' act of accepting newer models and certifying that plaintiffs had completed 100% of the work under the contract amounted to waiver of requirement that plaintiffs adhere to strict terms of contract.

30 April 2004

Judgment reserved.

Tan Lee Meng J:

1 The plaintiffs, Johnson Controls (S) Pte Ltd ("Johnson"), sued the defendants, Ho Air-Conditioning & Engineering Pte Ltd ("Ho Aircon"), for the balance of the contract sum allegedly due to them for the supply of equipment and for testing and commissioning the said equipment. Ho Aircon contended that Johnson were not entitled to the amount claimed because some of the equipment referred to in the latter's quotation had been substituted with other equipment or had not been delivered. They also filed a counterclaim regarding liquidated damages and the cost incurred by them for the purpose of remedying defects, for which Johnson were allegedly responsible.

Background

2 Ho Aircon were appointed by Koh Brothers Building & Civil Engineering Contractors Pte Ltd ("Koh Brothers"), the main contractors for the construction of the Singapore Civil Defence Headquarters Complex at Ubi Avenue 4 ("the building project"), as the nominated sub-contractors for the installation of air-conditioning equipment. Ho Aircon awarded contracts to four companies, including Johnson, with respect to the air-conditioning work in the building project. Johnson's task was to supply some of the equipment required by Ho Aircon and to test and commission the said equipment after it had been installed by the latter's other sub-contractors. It was agreed that Ho Aircon would pay Johnson $1,030,000 for the latter's equipment and services.

3 The building project was completed in phases. Only the second and third phases are relevant to this case. As a result of delayed completion of these two phases, Ho Aircon were required to pay Koh Brothers liquidated damages. For phase 2, the liquidated damages paid by Ho Aircon, which amounted to $159,600, were for the period 20 May 2001 to 16 July 2001. In regard to phase 3, the liquidated damages paid by Ho Aircon, which amounted to $42,000, were for the period 9 January 2002 to 24 January 2002. Ho Aircon claimed that Johnson were liable for the entire sum paid to Koh Brothers as Johnson were late in completing the testing and commissioning work. This allegation was denied by Johnson.

4 Ho Aircon's relationship with Johnson deteriorated further during the defects liability period. Johnson were displeased because they had not been paid a large part of the contract sum by Ho Aircon. On the other hand, Ho Aircon complained about Johnson's slow response to their requests to rectify allegedly defective work. In September 2002, Johnson instituted this action to recover the unpaid amount of the contract sum from Ho Aircon as well as the cost of variation work. Apart from denying that they owed Johnson any money, Ho Aircon filed a counterclaim with respect to the liquidated damages paid by them to Koh Brothers as well as the cost of rectifying defects.

Johnson's claim

5 Johnson, who initially asserted that the unpaid balance of the contract sum was $480,536.20, conceded during the trial that they were only entitled to $395,715.70. Ho Aircon's main defence to this claim was that Johnson had substituted or failed to deliver some of the equipment referred to in the latter's quotation. Johnson pointed out that they supplied Ho Aircon with newer models of the equipment at no extra cost even though these were worth an additional $60,000. Johnson added that some of the equipment referred to in their quotation had to be substituted to meet the requirements of PWD Consultants Pte Ltd ("PWD Consultants"), who oversaw the building project on behalf of the owners.

6 Ho Aircon's position was that regardless of whether or not there were newer models, they ought to have been supplied with the equipment referred to in Johnson's quotation. Their counsel referred to the following passage from *Chitty on Contracts* (28th Ed, 1999) vol 1 at para 22-004:

> **Substituted or vicarious performance.** The promisor, in the absence of waiver or subsequent variation by agreement, cannot substitute for the agreed performance anything different, even though the substituted performance might appear to be better than, or at least equivalent to, the agreed performance.

7 The difficulty with Ho Aircon's line of defence is that they clearly accepted Johnson's varied performance of their contractual obligations. If, as was alleged, Johnson were to supply only the equipment referred to in the quotation, Ho Aircon waived this requirement when they accepted the newer models of equipment delivered by Johnson. In *Hoenig v Isaacs* [1952] 2 All ER 176 at 181, Denning LJ, while referring to waiver in the context of a construction contract, rightly pointed out as follows:

> What amounts to a waiver depends on the circumstances. If this was an entire contract, then, when the plaintiff tendered the work to the defendant as being a fulfilment of the contract, the defendant could have refused to accept it until the defects were made good, in which case he would not have been liable for the balance of the price until they were made good.

8 Although *Hoenig v Isaacs* concerned a lump sum contract, it is relevant for present purposes in so far as the application of the principle of waiver is concerned. In that case, the plaintiff, an interior decorator and designer of furniture, agreed to decorate and furnish the defendant's apartment for £750. The defendant paid £400 by instalments. After the completion of the plaintiff's work, the defendant occupied the apartment and used the furniture but he refused to pay the balance of the contract price on the ground that certain work done and some furniture were defective. It was held by the English Court of Appeal that even if entire performance of the contract was a condition precedent to payment under the contract, the defendant had waived the condition by occupying the apartment and using the furniture. As such, he was liable for the balance of the contract price subject to the appropriate deductions.

9 In the present case, there is even clearer evidence of a waiver on Ho Aircon's part. It cannot be overlooked that the project was completed quite some time ago and PWD Consultants had accepted the air-conditioning work and all the equipment supplied by Johnson. The defects liability period of one year is also over. Ho Aircon did not allege that they were penalised in any way for supplying different equipment for the building project. It is rather telling that Ho Aircon did not attempt to deduct any amount from the contract sum for missing or substituted equipment during the construction stage even though they claimed that around $500,000 worth of equipment had not been delivered to them. More importantly, on 10 July 2002, Ho Aircon certified, in relation to Johnson's progress claim No 11, that the latter had completed 100% of the work. They also certified that the amount payable on progress claim No 11 was $96,133.25, after deducting a retention sum of $51,500.

10 Ho Aircon tried to downplay the effect of their certification on 10 July 2002 that 100% of Johnson's work had been completed. Their managing director, Mr Hoh Soon Lung ("HSL"), claimed that there was no protest earlier on because they found out about the discrepancies only after the project had been completed. This cannot be correct. PWD Consultants and Ho Aircon had their own engineers to monitor the installation of Johnson's equipment by other sub-contractors as well as the testing and commissioning of the same by Johnson. Ho Aircon's engineers, namely their project manager, Mr Mike Loo, and their project supervisor, Mr Chong Wai Wah, must have known that some of the equipment had been substituted with other models. During cross-examination, Mr Loo agreed that Mr Chong would have been at fault if he did not check the equipment delivered by Johnson. In view of this, the deafening silence of Ho Aircon regarding the missing or substituted equipment during the construction stage did not advance their case at all, and especially so when they had categorically certified that Johnson had completed 100% of the work under their contract.

11 After observing the witnesses and studying the documents regarding the supply and installation of the equipment by Johnson, I had no doubt that Ho Aircon accepted Johnson's substitution of the equipment referred to in the latter's quotation with newer models or with other models in order to complete the project. In view of this, Ho Aircon cannot now complain as if they were the victims of a newly discovered scam. According to Johnson, the substituted equipment cost an additional $60,000 while some undelivered items cost only $32,200.30. Although this meant that Ho Aircon benefited by around $28,000, Johnson, as a gesture of goodwill, agreed to deduct $32,200.30 from their claim for $395,715.70. Ho Aircon took the rather unreasonable stand that they should be compensated as much as $500,000, almost half the entire contract sum of $1,030,000, for non-delivery of some of the equipment referred to in Johnson's quotations. No satisfactory explanation was given as to how they computed this figure. I certainly prefer Johnson's figures to those of Ho Aircon. I thus hold that Ho Aircon are to pay Johnson $365,515.40 in so far as the balance of the contract sum was concerned. As for Johnson's claim for the cost of variation work, the parties agreed during the trial that the amount due to Johnson for variation work was $58,865. Ho Aircon are thus also required to pay this sum to Johnson.

Ho Aircon's counterclaim

12 Ho Aircon's counterclaim with respect to the liquidated damages paid by them to Koh Brothers for delayed completion of the air-conditioning work will next be considered. Their counsel repeatedly pointed out that Johnson had pleaded that the delay was caused by the main contractors and that if Johnson could not prove that the main contractors were at fault, his client's claim must succeed. On the other hand, Johnson's counsel retorted that the term "main contractor", as used in the defence to the counterclaim, referred to Ho Aircon and not Koh Brothers. I need not consider this issue simply because Ho Aircon failed to discharge their burden of establishing in the first place that Johnson were in breach of contract by failing to complete their work on the specified dates.

13 Ho Aircon rest their claim for the liquidated damages paid by them to Koh Brothers on the following term in their purchase order issued to Johnson:

> All [jobs] must complete on 1/6/2001. If you fail to complete the above, you shall be liable for liquidated damages at the rate per day by PWD.

14 On the basis of the above clause, Ho Aircon asserted that the entire sum of liquidated damages paid by them to Koh Brothers was payable by Johnson. This argument is unsupportable for a number of reasons. To begin with, this was not the type of liquidated damages clause that was enforced by the House of Lords in *Dunlop Pneumatic Tyre Company, Limited v New Garage and Motor Company, Limited* [1915] AC 79. A liquidated damages clause must be a genuine pre-estimate of the damage which seems likely to be caused if a breach occurs. Otherwise, it may be regarded as an unenforceable penalty clause. In the present case, there is no "PWD rate per day" that is applicable to Johnson. The main contractors, Koh Brothers, apportioned the sum payable by them to PWD Consultants for delayed completion of the building project between Ho Aircon and their many other sub-contractors. Ho Aircon then took the easy way out by demanding from Johnson the entire sum apportioned to them by Koh Brothers even though they had many sub-contractors in the air-conditioning project and their project manager, Mr Mike Loo, accepted during cross-examination that the other sub-contractors had delayed the completion of the testing and commissioning of equipment by Johnson.

15 In regard to phase 2 of the project, the $159,000 paid by Ho Aircon as liquidated damages to Koh Brothers relate to the period 20 May 2001 to 16 July 2001. Ho Aircon's case is that Johnson are liable for the liquidated damages paid to Koh Brothers because they should have completed the testing and commissioning work in phase 2 by 12 May 2001. This is an absurd assertion as their project manager, Mr Loo, accepted that the other sub-contractors' work had not progressed to such a stage that Johnson could have completed their task before mid-July 2001. When questioned by Ho Aircon's counsel, he stated in no uncertain terms as follows:

> Q If Johnson started work on 8 January 2001, when would they have completed the handing over?
>
> A If everything was ready for them to test and commission, they would have completed their work by 8 April 2001. *However, as things were not ready for them, the completion should be around mid-July 2001*.
>
> [emphasis added]

16 Secondly, both Mr Loo and his project supervisor, Mr Ling, testified during cross-examination that delayed completion of one of the chillers meant that it could not be tested and commissioned by Johnson until July 2001. When cross-examined, he said:

> Q Looking at page 1416 of the Bundle of Affidavits, when can Johnson complete the task of testing and commissioning of the chillers?
>
> A For one part of the chiller system, they can do so after May 2001 and for another part, they can do so after 11 July 2001. Both parts of the system are in Phase 2 of the project.

17 Thirdly, on 3 May 2001, Ho Aircon's Mr Chong wrote to Johnson to ask for some data required for the purchase of a shock violator. In his letter, he stated that the required equipment would arrive from the United States two months later. When cross-examined on this letter, Mr Mike Loo confirmed

that this equipment, which was scheduled to arrive in July 2001, was required before Johnson could complete their testing and commissioning work.

18 Fourthly, on 5 July 2001, Johnson wrote to Ho Aircon to point out that there was outstanding work to be done. The letter was as follows:

> We wish to highlight that the change Chiller Interfacing panel (Tracer) has yet to be installed in the Basement 3 storey Chiller Room. Please proceed with the necessary installation in order for our interfacing to be possible.

Mr Loo testified that until the interfacing panel had been installed by Ho Aircon's other sub-contractors, Johnson could not complete their task of testing and commissioning.

19 There was thus ample evidence that Ho Aircon's assertion that Johnson should have completed the testing and commissioning of the equipment by 12 May 2001 does not rest on solid ground. As such, Ho Aircon have no right to claim damages from Johnson for phase 2 of the project for the period 20 May 2001 to 16 July 2001.

20 The position is the same with phase 3 of the project, in respect of which liquidated damages were imposed on Ho Aircon by Koh Brothers for the period 9 January 2002 to 24 January 2002. Ho Aircon must have known that their contention that Johnson could, with diligence, have completed the testing and commissioning work by 17 December 2001 is absolutely unsound because some four months after this date, their project supervisor, Mr Ling, wrote to Koh Brothers on 16 April 2002 to complain that the delay in the completion of the air-conditioning work was due to the latter's sub-contractors. In his letter, he stated as follows:

> We wish to inform you that you have not confirmed with us on the monitoring points for the following [items]:
>
> a) Good Hoist System at Blk B, C:- … your sub-contractor haven't terminal [*sic*] our BMS cabling to the lift panel.
>
> b) Lift System at Blk B, C:- … your sub-contractor haven't terminal [*sic*] our BMS cabling to the lift panel.
>
> c) Dock Leveller System:- not confirmed with us the location of panel and monitoring points. We need to install conduit & control wiring …
>
> …
>
> e) Auto-Gate System.
>
> In view of the above reasons we trust you have understood that the main cause for the delay to the completion is due to your sub-contractor. Therefore we hold you fully responsible for all related delay [caused] by your outstanding work.

21 When cross-examined, Ho Aircon's managing director, Mr Hoh, conceded that the equipment referred to in items (a), (b), (c) and (e) of Mr Ling's letter of 16 April 2002 had to be tested and commissioned by Johnson. If on 16 April 2002, Johnson could not have done any testing and commissioning on the equipment referred to in the said letter, Ho Aircon were in no position to contend that Johnson could have completed the testing and commissioning work in the project by

17 December 2001.

22 As it is amply clear that Johnson could not, through no fault on their part, have been expected to complete their work by 17 December 2001, Ho Aircon's counterclaim with respect to damages for phase 3 was also dismissed.

23 Ho Aircon's claim with respect to the defects liability period, which covered a period of 12 months as from the handover date, will next be considered. To begin with, Ho Aircon claimed to have spent $85,554 on, among other things, salaries of personnel who had to remain at the site during the defects liability period. In addition, in paras 16 and 17 of their re-re-amended counterclaim, they pleaded as follows:

> 16 [T]he Defendants had incurred loss and expenses when they had to continue to mobilise their manpower and resources to remain at site during the [Defects] Liability Period. The said cost and expenses, which include inter alia the salaries of the personnel at site, operating cost of equipment amounted to $85,554.00.
>
> 17 Further, they were put to costs and expenses, including but not limited to consequential damages arising from the defective works and labour charges when the Defendants had to mobilise resources required to maintain and service the materials and/or equipment supplied by the Plaintiffs.
>
> PARTICULARS
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> | | | |
> |---|---|---|
> | a | Additional labour charges incurred for the period from March 2002 to October 2002 | S$27,703.75 |
> | b | Supply of labour and tools to replace [numbers] of flow switches at chiller room | S$5,150.04 |

24 Regrettably, Ho Aircon did not furnish any credible evidence to support their counterclaim for their alleged costs and expenses. No serious attempt was made to prove why Johnson were responsible for the expenditure on salaries of Ho Aircon's staff during the defects liability period. It ought to be noted that Ho Aircon had other sub-contractors for the air-conditioning work in the building project and many of the problems and defects were related to wrong wiring work and tripping of the power supply, both of which were outside the scope of Johnson's work. There was sufficient evidence that Johnson tried to help out even though many of the problems were outside their scope of work. In view of the lack of credible evidence furnished by Ho Aircon, their counterclaim in relation to expenses and the cost of rectifying defects during the defects liability period was also dismissed.

Costs

25 As Johnson have succeeded in their claim and Ho Aircon have failed in their counterclaim, the former are entitled to the costs of the action.