

NCC International AB v Alliance Concrete Singapore Pte Ltd
[2007] SGHC 64

Case Number : OS 429/2007, SUM 1109/2007
Decision Date : 11 May 2007
Tribunal/Court : High Court
Coram : Kan Ting Chiu J
Counsel Name(s) : Balachandran s/o Ponnampalam and John Wang (Robert Wang & Woo LLC) for the plaintiff; Kwek Choon Lin Winston (Rajah & Tann) for the defendant
Parties : NCC International AB — Alliance Concrete Singapore Pte Ltd

11 May 2007

Kan Ting Chiu J:

1 The plaintiff applied for an interlocutory mandatory injunction. After it failed to persuade me to make an order in its favour, it has appealed against my decision.

Background

2 The plaintiff, NCC International AB, is the main contractor for the construction of underground train stations and tunnels at Upper Paya Lebar and Macpherson of the Circle Line under a contract ("the main contract") with the Land Transport Authority ("LTA"), scheduled to be completed on 30 November 2007.

3 The defendant, Alliance Concrete Singapore Pte Ltd, is a supplier of ready-mix concrete. The plaintiff entered into a contract ("the concrete contract") on 26 July 2006 with the defendant for the latter to supply concrete it needed for the main contract.

4 On 23 January 2007, the Indonesian government declared that the export of concreting sand to Singapore was to be banned with effect from 6 February 2007.

5 This announcement reverberated throughout the construction industry in Singapore because Indonesia is the primary, if not the sole, source of concreting sand used in Singapore.

6 The repercussion of the ban was such that the authorities concerned intervened to assist individual parties to overcome the problems created by the ban. The governmental body overseeing the construction industry, namely the Building Construction Authority ("BCA"), and the Singapore Contractors Association Ltd ("SCAL") took steps to ensure that concreting sand will be available to the parties which needed it.

7 SCAL issued a circular to its members on 1 February 2007 ("the SCAL Circular") which read:

Land Sand Export Ban By Indonesia
BCA Order Form For Concreting Sand

Further to the several meeting with BCA on 24th, 26th, 30th and 31st January 2007 to raise major concerns of contractors and to seek clear directions on to address the land sand export ban

issue, the government has decided to release sand starting from today. BCA has agreed to supply sand directly to contractors for onward delivery to ready-mixed concrete suppliers, precaster and those contractors with onsite batching.

The following are the key points for contractors to note for obtaining sand from BCA:

- Please note only contractors who have ongoing projects, excluding HDB projects with direct supply scheme which shall follow the existing contract arrangement. Only projects with concreting work to be carried out in the month of February 2007 are allowed to request for sand to be released from stockpile for February.
- Amount of concrete, grade of concrete and concreting sand required for the February weekly demand shall be certified by the Professional Engineer (PE) of the project. Contractors shall compute the volume of sand required and PE to the best of their knowledge shall verify and certify the quantity of concrete and concreting sand required for the week.
- For the month of February, the price is cap at \$25.0 per tonne ex-stock. The release of sand shall be from the designated stockpile allocated by BCA.
- Where the supply is from the HDB stockpile, the payment mode shall be by cheque only. Where the supply is from other stockpile, payment made is by current commercial arrangement between the supplier and buyer.
- Main contractor shall arrange with the sand supplier on the collection details. Any form of hoarding of sand shall not be tolerated and the government will take actions against the parties concerned.

Please use the attached correct request form and ignore the form that we had previously given out during the meeting at SCAL today. Thank you.[\[note: 1\]](#)

8 This circular informed the members of SCAL (including the plaintiff) that BCA had agreed to supply sand directly to contractors with ongoing projects for onward delivery to ready-mixed concrete suppliers, precasters and on-site batching contractors, but the circular did not spell out the supply procedure.

9 The SCAL Circular was followed up by a more comprehensive document dated 3 February 2007 and entitled "SCAL Advisory":

Land Sand Export Ban

Situation Update as at 2nd February 2007

The following framework was announced by BCA on 31st January 2007:

1. Government will release sand stockpile with effective from 1st Feb 2007. The release of sand is applicable to Ready Mix Suppliers, Precasters and Projects with On-site Batching Plants.
2. Fixed price for sand (ex-stock) from government stockpile at:
 - a. February 2007 – S\$25/MT

- b. March 2007 – S\$60/MT
- c. April 2007 – S\$60/MT
- d. May 2007 – S\$60/MT
- e. From June 2007 Government will make further announcements.

3 . *Cost sharing of additional cost only in relation to sand between Employer/Contractor/Ready Mix Supplier. Public Agency will lead the way as Employer to absorb 75% of the sand cost increase with the balance 25% to be shared between Contractor and Ready Mix Supplier. Ratio between Contractor and Ready Mix Supplier to be settled internally.* Government encourages the private developers to adopt same cost sharing ratio. [emphasis added]

4. For distribution of the sand stockpile, Contractors are required to fill in a weekly usage requirement Form and send this to BCA. BCA will inform Contractor of the name of sand stockist to take the sand from. Form to be endorsed by Employer's PE. This Form will be used from the month of February.

Although the above framework has been announced, the following have been left unclear from BCA.

1. Administration protocol of the sand order is unclear. No explanation on the flow of the Order Form from Contractor to BCA and from Contractor to Ready Mix Supplier to Sand Stockist. As most Contractors will be unfamiliar with this new arrangement, further disruption of concrete supply is expected and normalcy is not expected so soon.
2. Since BCA mentioned ex-stock for supply of sand, transportation arrangement for the sand will have to be arranged by Contractor. The issue of transportation cost has not been addressed. In normal circumstances, sand suppliers have always provided the transportation of the sand to the Ready Mix Suppliers' batching plant/stockyard within their sand cost.
3. While the cost sharing ratio has been spelled out, the actual mechanism has still to be worked out.
4. No clarity on other sand related products eg: plastering sand, etc
5. Contractual considerations have still to be ironed out. This is especially so for private sector projects.
6. No consideration of knock-on effect of other costs arising from this sand ban which has unexpected cost impact for Contractor and the industry through no fault of hers.

BCA has issued a statement on the procedure for "Obtaining Sand from the Stockpile" on 2nd February 2007. This was sent via email to us through CIJC. A copy of the procedure is attached as Appendix A together with the BCA Form (See "Concreting Sand Weekly Request Form").

SCAL suggests that the following be put in place to ensure that the sand supply can go towards the Ready Mix Suppliers:

1. Set-up within the Company/Site Project Administration to handle the following:
 - a. Who will handle the Order Form,
 - b. Determine the sand volume,
 - c. Determine which sand supplier you prefer. Please call before hand to get agreement and also to get them to agree to transport sand to ready mix supplier. If possible send them Order Form so that they can keep track when BCA calls them,
 - d. Get the Employer's PE to sign,
 - e. Send the Form to BCA. BCA will check with preferred supplier. If there is pre-arranged agreement between Contractor and sand supplier, sand supplier will agree to take the order and BCA will confirm preferred sand supplier. Note that BCA need not necessarily assign preferred sand supplier to Contractor,
 - f. Chase BCA for their confirmation,
 - g. Confirm the transportation (if not by sand supplier),
 - h. Notify Sand Supplier,
 - i. Notify Ready Mix Supplier's Batching Plant/stockyard

SCAL also recommends that Contractor's take heed of the following:

1. Review current status with Ready Mix Supplier. The situation will vary with each project and the terms of their contract.
2. Contractor to ensure that they do not void their existing supply contract with the ready mix supplier. Please study carefully any request for changes to supply rates. This can come in many forms.
3. If situation is complicated between Contractor and ready mix supplier, you may need to seek legal opinion so as not to diminish your contractual rights.
4. Payment and compensation mechanism will be on a project to project basis.
5. There are now additional payment processes such as payment to sand supplier, transportation companies, etc. *Contractor may also need to negotiate payment terms with sand suppliers.* Be warned that currently some sand suppliers have asked for cash terms. This needs to be factored in to avoid any delay in the release of the sand. [emphasis added]
6. If possible try to arrange for the transportation mechanism to be undertaken by the sand supplier (possibly with cost).

We enclose two sample letters for Contractors' to send to their respective Employer (Appendix B) and Ready Mix Suppliers (Appendix C). These two drafts are only intended as a guide for members' consideration and use. SCAL takes no responsibility or liability whatsoever for the Members' use of the draft and the Members are advised to review and modify the draft to suit

their own contractual arrangements and situations, and to seek their own appropriate legal advice.

The above advisory will need to be tailored to suit individual Contractors' function and needs. The situation will be updated progressively.

10 The intent of the SCAL Advisory is that by following the procedure set out, a contractor will be able to obtain sand for its requirements. It is to be noted that the framework provided for the sharing of the additional cost of sand between employers, contractors and ready mix suppliers, with the contractor making the initial payments to the sand suppliers. The scheme contemplated that the increased cost will be shared, with the employer absorbing 75% of it, and the remaining 25% borne by the contractor and the concrete supplier on a ratio they are to work out between themselves.

11 It can be inferred from the fact that there is no widespread stoppages of construction work that many contractors have been able to obtain construction sand and to continue work.

12 That, however, does not apply to the parties here. They could not agree on the collection and payment for the sand from the suppliers. The plaintiff complained that the defendant effectively ceased supply of ready-mix concrete since 2 February 2007.

The dispute resolution process between the plaintiff and the defendant

13 The concrete contract between the plaintiff and the defendant set out a dispute resolution process. Clause 80 of the concrete contract provides that if any dispute or difference shall arise between the plaintiff and the defendant in connection with or arising out of the concrete contract, the dispute or difference shall be referred to for settlement in the manner set out in cl 71 of the main contract.

14 Clause 71 of the main contract in turn provides that any dispute or difference shall in the first place be referred to the person appointed by the LTA to be the Engineer for the main contract. If either party is dissatisfied with the Engineer's decision, it may require that the dispute or difference be referred to mediation in accordance with the mediation rules of the Singapore Mediation Centre. In the event it is unsuccessful, the dispute or difference is to be referred for arbitration in accordance with the rules of the Singapore International Arbitration Centre.

15 In this case no part of the process, i.e. submission to the Engineer, submission to mediation or submission to arbitration, has been complied with. In the course of the hearings before me, I have advised the parties that it is more in their interests to carry on with the main contract and the concrete contract, and avoid the risk of being found to be in breach of contract, and having to face the consequences. While the parties indicated that they were amenable to meet to discuss the dispute, they could not come to any agreement.

The present proceedings

16 On 15 March 2007, the plaintiff took out an originating summons and filed an ex-parte summons for an interlocutory mandatory injunction, for the defendant to deliver ready-mix concrete to it under the terms of the concrete contract pending the commencement of arbitration proceedings.

17 I considered that it was wrong for the plaintiff to attempt to obtain such an order ex parte, and I directed it to serve the papers on the defendant. Pursuant to my direction, the papers were served, and the defendant appointed counsel to oppose the application.

The plaintiff's position

18 The plaintiff started on the premise that the remedy is available to a party intending to commence arbitration proceedings to seek specific performance.

19 Its main argument is that the defendant has no grounds for seeking a fresh arrangement to share the additional cost of sand because the concrete contract was a fixed sum contract, and the contract was not frustrated because the contract did not specify that the sand to be used is to be obtained from Indonesia.

20 Counsel for the plaintiff then submitted that the plaintiff was entitled an interlocutory mandatory injunction. He pointed out that the requirement set by Megarry J in *Shepherd Homes Ltd v Sandham* [1971] 1 Ch 340 at 351:

[O]n motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction.

has been relaxed.

21 He referred to *Films Rover International Ltd and others v Cannon Film Sales Ltd* [1986] 3 All ER 772 ("*Films Rover*") where Hoffmann J examined the principles and practice for the granting of interlocutory mandatory injunction at 780-781:

The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle.

...

The question of substance is whether the granting of the injunction would carry that *higher risk of injustice which is normally associated with the grant of a mandatory injunction*. The second point is that in cases in which there can be no dispute about the use of the term 'mandatory' to describe the injunction, the same question of substance will determine whether the case is 'normal' and therefore within the guideline or 'exceptional' and therefore requiring special treatment. If it appears to the court that, *exceptionally, the case is one in which withholding a mandatory interlocutory injunction would in fact carry a greater risk of injustice than granting it* even though the court does not feel a 'high degree of assurance' about the plaintiff's chances of establishing his right, there cannot be any rational basis for withholding the injunction.

[Emphasis added]

He submitted that a statement is the current law, and emphasised that *Films Rover* was endorsed by the Court of Appeal in *Chuan Hong Petrol Station Pte Ltd v Shell Singapore (Pte) Ltd* [1992] 2 SLR 729

where Warren LH Khoo J in delivering the judgment of the court stated at 743:

We agree with [Hoffmann J] that a fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong at trial in the sense of granting relief to a party who fails to establish his rights at the trial, or of failing to grant relief to a party who succeeds at the trial. We agree with Hoffman J that the guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle.

The 'high assurance' test mentioned by counsel is no more than a generalization, albeit a useful one, of what courts normally do. It is not a principle in the sense of being capable of application in all cases or capable of explaining what courts do in all cases. It is a factor, no doubt often a strong factor, which the court will take into consideration when granting a mandatory injunction. The stronger the case appears at this stage, the lesser the risk of being proved wrong at the trial. However, the court, of necessity, has to consider other relevant factors, such as the conduct of the parties and whether damages instead of an injunction are an adequate remedy. The strength of a party's case (reaching a 'high assurance' or 'clear case' standard) is neither a necessary, nor is it a sufficient, condition for the grant of a mandatory injunction.

22 On the principles enunciated, it was submitted that it was appropriate in this case for an interlocutory mandatory injunction to be issued.

The defendant's position

23 The defendant's primary position is that the sand ban has frustrated the concrete contract. It claimed that both parties knew that Indonesian sand was to be used in the contract, and that the ban had so radically altered the defendant's obligations that the defendant is no longer bound to perform it.

24 The defendant blamed the breakdown on the plaintiff. It asserted that the plaintiff had refused to bear any part of the increased sand price, or follow the BCA procedure laid out in the SCAL Advisory to obtain the required sand. The plaintiff had also not heeded the advice of the LTA to collect the sand it needed from the BCA stockpile.[\[note: 2\]](#)

25 The defendant also submitted that the plaintiff is not entitled to the interlocutory mandatory injunction because it had sought to bypass the dispute resolution process by not referring the dispute to the Engineer or submitting the dispute to mediation.

My decision

26 It would be wrong to ignore the exceptional circumstances of this case, and to regard it as an ordinary dispute between two contracting parties. The application must be viewed in the context of the external and unavoidable cause of the disruption of the supply of sand, its widespread repercussions on the construction industry and the extra-contractual measures that have to be put in place.

27 The onus is on the plaintiff to satisfy the court that it needs and deserves the court's assistance to issue an interlocutory mandatory injunction to compel the defendant to supply the concrete.

28 Before deciding whether to make the order, the court has to take into account the prospects of the plaintiff obtaining specific performance in the arbitration proceedings.

29 I find that the plaintiff has not shown itself to need or deserve the court's assistance for an interlocutory mandatory injunction to be issued against the defendant. I come to this conclusion because the plaintiff is not justified in taking the position that because the concrete contract did not specify Indonesian sand, all is well, and there is nothing that it needs to do but to insist on delivery. The plaintiff should be more pragmatic, and try to resolve the very real problems that have arisen. It should refer the matter to the Engineer, or a mediator as provided in the contract, and it should avail itself to the procedure set out in the SCAL Advisory to obtain the sand it requires. Its decision not to do any of that weakens its case that it needs and deserves the urgent intervention and assistance of the court.

30 The plaintiff also has to contend with the question of the assurance of success in the arbitration proceedings it intends to take up. Although that is not an essential condition for the plaintiff's entitlement to an interlocutory mandatory injunction, it is a factor to be taken into consideration. Here, I have to be cautious not to pre-judge the issue which is reserved for the arbitration proceedings. However, I think it likely that an arbitrator would look at the situation from a broad perspective when deciding on the dispute, and I do not think that it can be said that the plaintiff is assured of obtaining an order for the specific performance of the contract.

31 For the foregoing reasons, I found that the plaintiff has not made out a case for the interlocutory mandatory injunction it sought, and dismissed its application.

[\[note: 1\]](#) Affidavit of Hong Chim Chew dated 2 April 2007, pages 56-57

[\[note: 2\]](#) Affidavit of Hong Chim Chew of 2 April 2007, page 92

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