Construction Law Focus

CHAN TAN & PARTNERS ISSUE 2 OF 1994 NO.1 COLOMBO COURT #09-26/27 SINGAPORE 179742

Construction contract - issue of certificate that works ought reasonably to have been completed by superintending officer - validity of certificate

Engineering Construction Pte Ltd v Attorney General [1994] 1 SLR 687

In this case the plaintiff agreed to complete certain construction works for the government by 18 Dec 1991. Completion of the works was delayed and on 30 April 1992, the government terminated the contract. The agreement entitled the government to liquidated and ascertained damages ("LAD") for any delay in completion if a superintendent officer certified that the works ought reasonably to have been completed. On 29 Sept 1992, the director issued an extension of time certificate granting the plaintiff an extension of 10 more days. On the same day the director issued a LAD certificate claiming liquidated damages from the 28 Dec 1991 to 30 April 1992 at $3000 per day. The material clauses in the contract are:

> Clause 31(a) "If the contractor fails to complete the works...the superintending officer shall certify in writing that, in his own opinion, the same ought reasonably to have been completed, the contractor shall pay ...to the government a sum calculated at the rate of $3000 per day as LAD."
>
> Clause 32(a) "If, in the opinion of the superintending officer (SO), the works be delayed by force majeure...the SO shall make a fair and reasonable extension of time for the completion of the works."

The plaintiff sought for a declaration that the government was not entitled to liquidated damages for the delay up to 30 April 1992. The court granted the declaration sought by the plaintiff holding that these clauses became inoperative when the government terminated the contract before the completion of the works. The court was of the view that the superintending officer's power to issue the certificates under clauses 31(a) and 32(a) came to an and upon their wrongful termination of the contract on 30 April 1992. Thus the superintending officer is not entitled to liquidated damages before the contract was completed. (per *H Fairweather Ltd v Asden Securities*). The issuing of the certificates on the 29 Sept 1992 by the superintending officer was a primary obligation which had come to an end on the

30 April 1992. The superintending officer was functus officio when the certificates were issued. The court also expressed the opinion that since the entire question of the extent of the delay had been put before an arbitrator appointed under the terms of the agreement prior to the issue of the superintending officer's certificate. He was therefore functus officio and the certificate was null and void.

EDITORIAL COMMENT

It appears that once the contract has been terminated the superintending officer under the contract becomes functus officio and accordingly has no power to issue any certificate that the works ought reasonably to have been completed. This case apparently also stands for the proposition that the superintending officer has no such power once an arbitrator is appointed. A certificate of this kind is a familiar feature of most building contracts based on the JCT-RIBA model.

The previous standard form SIA contract (SIA70) required such a certificate to be issued before the employer can deduct his liquidated damages from payments due to the contractor. The Delay Certificate under the current SIA standard form contract is in many ways similar to this certificate. It may therefore be possible to argue, based on this decision that the architect under the current SIA standard form contract would be functus officio with regard to the certification of, say, delays under a Delay Certificate once the contract has been terminated or once an arbitrator has been appointed.

Performance bond - injunction to restrain call on bond - question of fraud

Chartered Electronics Industries Ltd v The Development Bank of Singapore Ltd; Suit no. 485 of 1990 (unreported).

The goods were to be delivered in six consignments within specified periods. The bank furnished a performance guarantee as security for the seller's performance under a certain term of the contract. The guarantee was confirmed by an international bank against the counter-indemnity of the local bank. All the consignments were shipped as of the date of action but dispute arose relating to the shipments. After an abortive meeting to resolve the dispute, the bank received a demand that it either extend the expiry date of the guarantee or make payment. There were a number of these "extend or pay" demands before the plaintiffs commenced the present action and obtained interim injunction restraining the bank from paying under the performance guarantee. Another interim injunction was later obtained to restrain the bank from paying the international bank on the counter-indemnity.

The court in deciding to allow the injunction to continue until the trial of the action had to consider, inter-alia, the question of alleged fraud on the part of the buyers and the validity of the demand. In looking at the demand, the court also made certain observations relating to the "extend or pay" demand. On the issue of fraud, the court reviewed "the Ackner standard" and the various authorities on which it was based and noted that the main reason for imposing such a "high standard of proof" was the apparent acceptance that such bonds and guarantees were in the nature of letters of credit or promissory notes and "the life-blood of international commerce." He noted also that the Singapore Court of Appeal had in fact applied the Ackner standard to a dispute relating to letters of credit in *Korea Industry Co Ltd v Andoll Ltd* [1989] 3 MLJ 449 and proceeded to state that he did not consider this case to be "an authority for the application of the Ackner standard in Singapore in cases concerning performance guarantees." In rejecting the Ackner standard, the court state the position as follows:

> "In my view, there is no reason why the less onerous test of a "strong *prima* [*sic. facie*] case" should not suffice for instruments given purely to secure the performance of contracts."

EDITORIAL COMMENT

The observations that the court made to arrive at this decision can be summarised as follows:

(a) The court noted that the Ackner LJ himself had made a previous observation that the more liberal approach adopted by the American courts in granting temporary restraining orders based only on "suspicion of fraud" had not "resulted in the commercial dislocation that was feared by the application of the American standard."

(b) The application of the Ackner standard tends to "cause more injustice to the performer than it achieves justice to the beneficiary." A performance bond does not have the same function as a letter of credit. The letter of credit is an "established mode of payment in exchange for goods" whereas a bond is "merely a security."

(c) An interlocutory injunction does nothing to affect the nature of the security. It merely "postpones the realisation of the security until the plaintiff is given an opportunity to prove his case."

(d) The court noted that "it is generally recognised that a performance bond can be an oppressive instrument if abused" and that such abuse can be given encouragement if the court were to lay such a high standard of proof that the plaintiff cannot meet.

(e) The requirement is inconsistent with the approach with respect to the grant of interlocutory injunctions in ordinary cases that does not involve performance bonds.

The decision in this case essentially lowers the threshold required for the proof of fraud. It does not appear to do away entirely with the requirement to demonstrate fraud, albeit at a lower threshold than the Ackner standard. It leaves open the question whether the court would restrain temporarily an unfair call devoid of fraud. It is submitted that if one is to accept that the usual principles for other injunction cases should also be applied for interlocutory injunctions relating to bonds there is no reason why there should be a specific need to demonstrate fraud. All that an applicant for an interlocutory injunction needs to satisfy are the well known requirements for there to be a serious question to be tried and that the balance of convenience is in favour of granting the injunction.