Construction Case Watch

Contractors and subcontractors are responsible for safety at worksites

The Singapore Court of Appeal in *Jurong Primewide Pte Ltd v Moh Seng Cranes Pte Ltd and others* [2014] SGCA 6 has reminded contractors and subcontractors that they share a duty of care to keep every person within the worksite safe, and cannot transfer that responsibility to others.

The responsibility for failing to prevent the collapse of a crane into a concealed manhole was placed upon both the main contractor and the subcontractor.

The Court, in reversing the earlier decision by the High Court to hold the main contractor solely liable for the crane accident, also held that:

- an occupier of the site was sufficiently proximate to an injured worker for such a duty to be imposed; and
- a party could not abrogate its duty to ensure safety, by way of contractual arrangements put in place with other parties.

The Court considered that the scheme of the Workplace Safety and Health Act (**WSHA**) intended that the burden of making worksites as free from hazards as possible fell on main contractors and subcontractors. This correlated with the common law duty of care. The Court went as far as to say that it would be very hard to think of situations where a common law duty of care would not exist due to the control contractors and subcontractors have over the worksite and the activities on it.

On the facts of the case, the responsibility to identify an underground hazard like the manhole in question, and taking measures to ensure that it ceased to be an unknown danger, fell on the main management contractor (who was also the occupier under the WSHA) who was held to be 60% liable. The subcontractor, who was to carry out the works that led to the accident and who had duties to perform checks on worksite conditions, was held to be 40% liable.

The contractor and subcontractor were both found to be negligent and liable to pay damages to the owner of the crane involved in the accident.

"Contractors and subcontractors should therefore be forewarned that regardless of the hiring or other contractual arrangements in place, they are primarily responsible for workplace safety.

They will need to undertake all necessary measures, such as checks, surveys and improvements, to ensure that the workplace is safe."

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"On-Demand" performance guarantee language must be clear and unequivocal

In *York International Pte Ltd v Voltas Ltd* [2013] SGHC 124*, the Singapore High Court granted an injunction restraining Voltas Ltd (Voltas) from receiving payment upon a performance guarantee, pending the outcome of an arbitration that had been commenced.

Pursuant to a purchase agreement (the **Contract**), York International Pte Ltd (**York**), agreed to supply, deliver, test and commission five chillers for a district cooling plant.

The Contract required a performance guarantee (the **Performance Guarantee**) to be issued, and York procured the Performance Guarantee to be issued by Citibank.

Disputes arose when some of the motors in the chillers had ceased to function and York carried out urgent repairs.

The parties could not agree on the cause of the problem and whether it resulted from any breach by York.

York claimed 10% of the purchase price due upon the expiry of the defects liability period and costs of repairs.

These claims were referred to

arbitration.

The Defendant, Voltas, requested that the Performance Guarantee be extended. York refused to extend the validity of the Performance Guarantee.

Voltas then proceeded to make a demand under the Performance Guarantee.

The terms of the Performance Guarantee appeared to be fairly straightforward and suggested that the Performance Guarantee was an unconditional one:

"In the event of [York] failing to fulfil any of the terms and conditions of the said [Purchase Agreement], we shall indemnify [the defendant] against all losses, damages, costs, expenses or otherwise[sic] sustained by [the defendant] thereby up to the sum of Singapore Dollars five hundred twenty three thousand only (SG$523,000.00) ('the guaranteed sum') upon receiving your written notice of claim for payment made pursuant to clause 4 hereof."

This was further reinforced by paragraph 5 of the Performance Guarantee which stated as follows:

"…We shall be obliged to effect payment required under such a claim within 30 business days of our receipt thereof. We shall be under no duty to inquire into the reasons, circumstances or authenticity of the grounds for such claim or direction and shall be entitled to rely upon any written notice thereof received by us (within the period specified in clause 4 hereof) as final and conclusive."

The Court, however, found that the wording of the Performance Guarantee was ambiguous and ultimately concluded that the Performance Guarantee was conditional in nature. Consequently, a breach of the underlying contract leading to loss was required before Voltas could make a demand on the Performance Guarantee. In other words, Voltas could only make a demand on the Performance Guarantee if and when York was found liable in arbitration proceedings between Voltas and York arising from the underlying contract.

In reaching its conclusion, the Court considered the underlying contract as extrinsic evidence to assist in the interpretation of the terms of the Performance Guarantee. The Court also considered the discussions between the parties.

The rationale for the Court's decision that the Performance Guarantee was conditional, was stated as follows:

"Clause 26 of Appendix 2 of the Purchase Agreement explicitly states that: "The Performance Bank Guarantees shall be unconditional". However the word 'unconditional' is nowhere to be found in the terms of the Guarantee. ... The omission of the unequivocal word 'unconditional' here is an even stronger indicator … that the Guarantee is conditional in nature. This is also fortified by the parties having had discussions on the terms of the Guarantee, and the defendant having had the opportunity to vet the terms of the Guarantee and suggest changes which were subsequently adopted. Notably, the defendant did not suggest the retention of the stipulation in Clause 26 that the Guarantee was to be unconditional."

The demand made by Voltas was also defective in that it had failed to state that it had suffered loss. This would have constituted an additional ground on which an injunction would have been granted.

In this respect, the Court emphasised that the doctrine of strict compliance applied to performance guarantees.

* ***An appeal was filed by Voltas against this decision. There has as yet been no published decision by the Court of Appeal***

"What appeared to be the deliberate omission of the word "unconditional" in the terms of the bond, coupled with the *contra proferentem* rule, led the Court to the conclusion that the Performance Bond was in fact conditional in nature. The ambiguity was to be construed against the beneficiary of the bond. The language used had to be clear and unequivocal for a performance guarantee to be construed as being unconditional."

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