EQUITY IN CONSTRUCTION LAW - NEW MALAYSIAN DIRECTIONS: *THE RADIO & GENERAL TRADING CO. SDN BHD V WAYSS & FREYTAG (M) SDN BHD*

Introduction

As the title of this paper indicates, I wanted to look briefly at the role of equity in Malaysian construction cases. Alas it was both encouraging and discouraging to quickly come to see that the topic was larger than I had anticipated. Some choices clearly had to be made. Thus, in the end, I have perused a selection of recent cases to come up with one case that is at once interesting and illustrative of new Malaysian directions.

It is perhaps appropriate to begin by considering what this notion of 'equity' involves for me. Many academics and professionals alike have pondered the question and various definitions, or more accurately, attempted definitions have been accorded to this term. I use the expression 'attempted', as I tend to share the view of the author of *Snell's Equity*,[1] that indeed no satisfactory definition of equity in its technical sense can be evolved. The concept of equity has been likened to that of natural justice, on the moral ground. However, much of the latter rules in terms of enforcement by the courts are common law or statute based. Equity on the other hand, has come about separate from the general body of law essentially as a result of those cases which have arisen where application of the general rules would have produced substantial *unfairness*. I wish to emphasise this term and will return to it later. It can be said then that equity has evolved as a new body of rules aimed at achieving justice where established means would

[1] P.V. Baker and P. St. J. Langan, *Snell's Equity*, Twenty-Ninth Edition.

either bring about the opposite or even be rendered useless. As Sir Nathan Wright L.K. put it in *Lord Dudley and Ward v Lady Dudley*:[2]

> "Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and is a universal truth; it does also assist the law where it is defective and weak in the constitution (which is the life of the law) and defends the law from crafty evasions, delusions, and new subtleties, invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless; and this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it, but assist it."

Equity's Foundation

Equity's foundation as it were in the Malaysian legal system can be seen in section 3 of the Malaysian Civil Law Act 1956 where the differing evolutionary paths of the law are reflected. For example the "reception" of the English law, including the rules of equity in West Malaysia - English common law and rules of equity as at 7 April 1956; Sabah - English common law, rules of equity and statutes of general application as at 1 December 1951; Sarawak - English common law, rules of equity and statutes of general application, as at 12 December 1948, subject to some specific extensions and modifications carried forward from the Application of Laws Ordinance of Sarawak.[3] It is noticeable to a casual observer of Malaysian law that the emergence of equity and its integration into the Malaysian legal system is really relatively recent. So what of its role then in Malaysian construction law cases? In what circumstances will the Malaysian courts provide equitable injunctive relief to aggrieved parties in such cases? Does the Malaysian approach differ from that in England for example? Could the Malaysian approach broadly be described as progressive?

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[2][1705] Prec. Ch. 241, at page 244.

[3]Robinson, Lavers, Heng & Chan, *Construction Law in Singapore and Malaysia*, Second Edition.

The Radio & General Trading Co. Sdn Bhd v Wayss & Freytag (M) Sdn Bhd

In this case,[4] the plaintiff contracted with the defendant to perform certain sub-contract works on the Kuala Lumpur Telecommunications Tower. The contract required the plaintiff to place a performance bond with the defendant, which the plaintiff duly did. The plaintiff alleged that it had substantially completed the sub-contracted works although an unfinished portion remained which was attributable to certain defaults of the defendant or the defendant's sub-sub-contractors. The plaintiff said it had made complaints about the alleged defaults to the defendant. Disputes continued between the parties as a result of which the defendant made a demand on the relevant bank for payment of the performance bond. The plaintiff argued that the defendant had no right to call upon the bond. Meanwhile the defendant filed an application for a stay of all further proceedings and for the matter to be referred to arbitration. The application was granted and really became a side issue in a simultaneous request by the plaintiff for a perpetual injunction to restrain the defendant from calling on the performance bond. For present purposes we may ask whether equity would intervene to come to the assistance of the plaintiff, and if so, on what basis? What would be the prime considerations of the court? How would the interests of the parties be balanced in the face of what appeared to be an unconditional right on the part of the defendant to make the call upon the bond?

"Fraud" and "Unconscionable" Conduct

It has been noted that the plaintiff sought an injunction to prevent the call upon the bond or alternatively restrain the receipt of payment under the bond. Various arguments were put forward by the plaintiff including an allegation that the value of the bond amounted to a penalty and alternatively that the defendant should only receive actual damages in any event upon proof of a breach of contract rather than receipt of

[4] [1998] 1 MLJ 346. In *Kirames Sdn Bhd v Federal Land Development Authority* [1991] 2 MLJ 198, at page 200, Zakaria Yatim J refers with approval to Ackner LJ's dicta in *United Trading Corp SA v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554 describing the *Edward Owens* case as the "locus classicus".

the value of the bond without more. Whether or not a breach of contract and damages must in fact be proved turns in many cases upon the simple classification of the bond: be it conditional or unconditional (on-demand). Arguments were also advanced by the defendant under the Specific Relief Act 1950 suggesting that the application for a perpetual injunction was premature and that damages might not be an adequate remedy. Numerous cases were relied upon by the defendant in support of his putative right to call upon the bond including:

(i) *Patel Holdings Sdn Bhd v Ested Pekebun Kecil & Anor*,[5] a case which similarly concerned an application for an injunction restraining payment under a performance guarantee and in which the court held that the guarantees were to be honoured unless there was clear evidence of fraud;

(ii) *Kirames Sdn Bhd v Federal Land Development Authority*,[6] a case concerning an injunction restraining the defendant from any action with regard to a security deposit that was in place and seeking to maintain the status quo pending the outcome of the action being dealt with by arbitration. His Lordship, Zakaria Yatim J said:[7]

> "Following the authorities I have just cited I am of the view that the defendant in the present case is entitled to demand payment under the terms of the security guarantee. There is *no evidence of fraud in this case* ...".

(iii) *Bocotra Construction Pte Ltd v A-G (No. 2)*[8] where the Court of Appeal held:[9]

> "In our opinion, whether there is *fraud or unconscionability* is the sole consideration in applications for injunctions restraining payment or calls on bonds to be granted."

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[5][1989] 1 MLJ 190.

[6][1991] 2 MLJ 198.

[7]At page 202. Emphasis added.

[8][1995] 2 SLR 733 (Court of Appeal).

[9]At page 746. Emphasis added.

I have italicised excerpts so that one may see that the most important consideration for the court in deciding whether to grant the injunctions sought was whether or not fraud or unconscionability existed as these were seen as the only exceptions to the right to payment under the bonds in question. From these and other authorities that were looked at by the court, it appeared that unless at least one of these elements could be clearly established the court would not exercise its equitable jurisdiction to enjoin.

This point was made starkly be Ratnam JC:[10]

> "At the outset, it would seem that all the authorities inclusive of the highest authority of this land favour the refusal of the grant of an injunction."

So was there some element of unconscionability present that the court could base a holding in favour of the plaintiff upon. As it happened, indeed there was. While the plaintiff contended that the value of the outstanding works amounted to RM40,000 only, the defendant alleged loss and damage amounting to about RM1.2 million plus a claim for liquidated damages of RM940,000. But if these issues were to be the subject of the arbitration proceedings, which they were, the judge in this case quite rightly asked the question as to what the basis could then be for the defendant to still call on the performance bond. After all were not the issues to be dealt with in the arbitration. Additionally, there was really very little at stake for the defendant given such an arbitration proceeding. A further factor was also relevant. The defendant had alleged that the sub-contract works were not completed. However, documentary evidence in the form of a letter from the defendant to its architect revealed that the defendant had requested a certificate of practical completion. Thus, one could say that it appeared the defendant had avowed and disavowed at once. Ultimately, in the court's view, this gave rise to not only unconscionability but inequity as well. The points were very shortly put by Ratnam JC:[11]

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[10]At page 352.

[11]At page 357.

(i) it is plain therefore that the call on the performance bond is inequitable; and
(ii) I find that it is unconscionable on the part of the defendant in this case to call on the performance bond.

New Malaysian Directions

Whilst this element of unconscionability was a major factor to consider in this case, another fundamental issue also arose; that is, whether the case should turn upon the classification of the bond as unconditional alone. With regard to the construction of such agreements, Eveleigh J, in the case of *Potton Homes Ltd v Coleman Contractors Ltd*, said:[12]

> "As between buyer and seller, the underlying contract cannot be disregarded so readily. If the seller has lawfully avoided the contract, it seems to me he should be entitled to restrain the buyer from making use of the performance bond. Moreover, in principle, I do not think it possible to say that in no circumstances whatsoever, apart from fraud, will the court restrain the buyer. The facts of each case must be considered...".

He went on to say:[13]

> "For a large construction project, the employer may agree to provide finance (perhaps by away of advance payments) to enable the contractor to undertake the works. The contractor will almost certainly be asked to provide a performance bond. If the contractor were unable to perform because the employer failed to provide the finance it would seem wrong to me if the court were not entitled to have regard to the terms of the underlying contract and could be prevented from considering the question whether or not to restrain the employer by the mere assertion that a performance bond is like a letter of credit."

Despite the fact that *Potton Homes* was not mentioned in even one of the earlier cases cited, Ratnam JC went on to point out that the case

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[12](1984) 28 BLR 19, at page 28.

[13]At page 29.

was approved and applied in the Singaporean case of *Royal Design Studio Pte Ltd v Chang Development Pte Ltd*[14] where his lordship Thean J said in part:

> "The dispute is only between the plaintiff and the defendant and relates solely to the main or underlying contract made between them. In such case, I do not see why the court should be inhibited from exercising its equitable jurisdiction and restraining the defendant from calling on the bond, if the facts warrant it, merely because the bonds is like a letter of credit."

The letter of credit argument, it should be noted, can be traced to the decision of the English Court of Appeal in *Edward Owen Engineering Ltd v Barclay's Bank Ltd*[15] and a judgment of Lord Denning. Some still find the case persuasive and it has been followed in Malaysia.[16] Movement away from this line of authority began in earnest in England with the case *of IE Contractors Ltd v Lloyds Bank plc and Rafidain Bank*[17] which held that:

> "... to discover what the parties intended should trigger the indemnity under the bond involves a straightforward exercise of construction, or interpretation, of the bond to discover the intention of the parties in that respect."[18]

The *IE Contractors* case has purportedly been followed in Malaysia in *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd*[19] and both the headnotes and reasons indicate that to be so. However, upon closer examination it is submitted that the court did not go as far as *IE Contractors* intended the court to have the right to, when construing

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[14][1991] 2 MLJ 229, at page 234.

[15][1978] QB 159.

[16]See *Syarikat Perumahan Pegawai Kerajaan Sdn Bhd v Bank Bumiputra Malaysia Bhd* [1991] 2 MLJ 565, commented upon by Vincent Powell-Smith in "Calls on Performance Bonds in Malaysia - The Current Law", [1992] 2 *MLJ* i.

[17](1991) 15 BLR 1.

[18](1991) 51 BLR 1, at page 15, per Sir Denys Buckley.

[19][1995] MLJ 149.

a bond. Thus, a court is entitled to go considerably beyond deciding simply whether the bond is conditional or unconditional on its face before coming to its decision. In the *Esso Petroleum* case, Peh Seee Chin FCJ for the court said:[20]

> "Dealing with the construction of the performance bond, since we found it was an on demand performance bond, this would, in our view, make the present performance bonds independent of any underlying contract, ie any contract between the buyer and the seller. We thought, therefore, it was not open to his Lordship in the court below to impart into this on demand guarantee, by implication, a requirement to have regard to, or inquire into the breach of any obligation of such underlying contract, and this seems to have been done... On the type of such pure on demand performance bonds, the issuer should unquestionably pay on demand except in the case of fraud. Any argument of immediate disadvantage to the party who caused such a document to be in use is of no avail to the party who must face the risks of such unquestioned payment except where there is fraud."

This view once again seems too narrow. In fact, it was the defendant who relied upon *Esso Petroleum* in opposition to the grant of the injunction rather than the plaintiff. Hence, the case cannot be considered a strong authority in favour of construing bonds versus an *a priori* classification of them to determine what rights exist either in support of or against an injunction. Notwithstanding this though, the *Esso Petroleum* case is alive and well and was lately followed to this effect in *Ramal Properties Sdn Bhd v East West-UMI Insurance Sdn Bhd*.[21]

To reiterate the defendant's opposition to the grant of any injunction, it contended that the performance bond, as an unconditional performance bond, was independent of the underlying contract between the parties. The defendant was further able to rely upon an express term in the bond that payment was to be made by the bank notwithstanding the plaintiff's protests. Lastly, and convincingly once again, the defendant invoked that line of cases equating performance bonds to letters of

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[20]At pages 157-158.

[21][1998] 5 MLJ 233.

credit. It may have been thought that given these arguments in addition to the weight of the jurisprudence mentioned above that there would have been very little scope for the court to grant an injunction. However, the court disagreed. Once again what was it that allowed the court to so find? It was not simply a crack in the armour of authority that suggests that performance bond or not, bonds are still contracts calling for construction but something more yet again; that is, *the equities of the situation*.

In *Radio & General*, the court looked at the equities and found them heavily in favour of the plaintiff. Not only were the defendant's actions unconscionable but they appeared inequitable as well. This too is new. It appears to be a broad form of inequity, that is, it is submitted, akin to fairness as that term has also occasionally come to be associated with in terms of unconscionability.[22] Fairness was in evidence in yet another way in the case as it can also be noted that the court, in seeking to mete out justice, was wary in proceeding lest it be seen to distort the commercial or contractual relations between the parties. This is evident from the close examination given by the court to *Potton Homes* and *Royal Design Studio*. The court was very mindful of preserving the contractual status quo between the parties (and of being seen to do so) until resolution of the matter by arbitration. As a general rule, courts are unwilling to grant injunctions where it is not clear whether irreparable harm or prejudice might result to either party and this factor was also considered in the subject case. On this point the court held that the defendant would not be unfairly prejudiced because the defendant, if found by arbitration to be entitled to the bond monies, could collect them at that stage. The court had to ask itself the question though, who would be prejudiced if the injunction were not granted? The scenario would be that the bank would be obliged to pay the debt and would then seek to recover from the plaintiff. This would surely prejudice the plaintiff on the other hand because the plaintiff would then be forced to wait until the conclusion of the arbitration before it

[22]Malik Imtiaz Sarwar draws out this point with reference to a number of authorities including *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133, at pages 151-152 per Oliver J in "Equity and Commerce: An Alternative Perspective", [1997] 3 *MLJ* cxlix.

could recover from the defendant (assuming that the findings of arbitration were in favour of the plaintiff).

Conclusion

So why did the court apparently go so far? It would have been enough to find as it did solely upon the unconscionability point. It may be because the court was mindful perhaps of a bigger picture in exercising its jurisdiction to enjoin. What was in the picture - *equity* for as Ratnam JC himself put it:[23]

> "After all, what the parties are seeking is justice based on equitable principles."

Perhaps therefore, this being the case, the court clearly felt it could not decide on the basis of the classification or for that matter even the simple construction of the bond. If the court were to invoke its equitable jurisdiction then in doing so it would act resolutely, properly and on the merits.

The message perhaps that can be taken from this case, on facts which commonly arise in the construction field locally, is that equity is on the march. Courts seem willing to invoke their equitable jurisdiction to enjoin and redress unfairness when it arises. As Professor David Hayton has noted that while there may be:

> "Uncertainty as to what is "unreasonable", "unconscionable" or "unfair" has not prevented the court from deciding what is reasonable, conscionable or fair."[24]

However, the court will remain sensitive to the dictates of commercial practice and careful to ensure that the exercise of such discretion will not result in compounding any wrong suffered or allowing underhand invasions which could undermine the common law.

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[23]At page 355.

[24]Professor David Hayton, "The Significance of Equity in Construction Contracts", [1994] *Construction Law Yearbook*, 19, at page 28. Footnotes omitted.

The words of Sir Nathan Wright, whose statement regarding "equity" per se, at the beginning of this paper, in my view is still apposite insofar as the approach of the courts toward invoking their discretionary equitable powers:

> "Equity does not destroy the law, nor create it, but assists it."[25]

It is just that today in Malaysia the assistance is perhaps a little greater than it has been recently.

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[25]Sir Nathan Wright L.K. put it in *Lord Dudley and Ward v Lady Dudley* (1705) Prec. Ch. 241, at page 244.

AKTA BAHASA KEBANGSAAN 1963/67: PERISYTIHARAN TANPA TARING

Di dalam usaha mendaulatkan Bahasa Kebangsaan, Akta Bahasa Kebangsaan 1963/67[1] merupakan pemangkin yang diberikan kuasa undang-undang. Persoalan seringkali telah ditimbulkan tentang keberkesanan Akta ini mencapai matlamatnya[2] dan sama ada falsafah di sebalik Akta ini dapat dipraktikkan.[3] Artikel ini akan cuba mengenengahkan beberapa faktor tunjang yang mempengaruhi Akta tersebut yang akan menjawab atau menunjukkan kepada jawapan persoalan-persoalan tersebut.

Faktor yang dilihat sebagai asas sekali adalah perisytiharan umum tentang penggunaan Bahasa Kebangsaan. Seksyen 2 Akta menyatakan:

> "Kecuali sebagaimana diperuntukkan dalam Akta ini dan tertakluk kepada perlindungan-perlindungan yang terkandung dalam Perkara 152(1) Perlembagaan berhubungan dengan mana-mana bahasa lain dan bahasa mana-mana kaum lain dalam Malaysia, Bahasa Kebangsaan hendaklah digunakan bagi maksud-maksud rasmi."

Seperti yang dinyatakan oleh seksyen ini, Perlembagaan Persekutuan sebenarnya yang meletakkan peruntukan asas mengenai penggunaan Bahasa Kebangsaan. Perkara 152(1) telah mengisytiharkan bahawa Bahasa Melayu adalah Bahasa Kebangsaan dan melalui provisonya mensyaratkan seperti berikut:

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[1]Akta 32. Selepas ini disebut sebagai 'Akta'.

[2]Dari aspek undang-undang sila lihat kertas-kertas kerja Seminar Bahasa dan Undang-Undang 1991 di dalam Nik Safiah Karim & Faiza Tamby Chik, *Bahasa dan Undang-Undang*, Dewan Bahasa dan Pustaka, Kuala Lumpur, 1994.

[3]Untuk latarbelakang polisi Bahasa Kebangsaan dan kaitannya dengan undang-undang, lihat Mead, R., *Malaysia's National Language Policy and the Legal System*, Yale University (New Haven), 1988.