IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 51

Civil Appeal No 205 of 2020

Between

Reputation Administration Service Pte Ltd

… *Appellant*

And

Spamhaus Technology Ltd

… *Respondent*

In the matter of Suit No 814 of 2019

Between

Spamhaus Technology Ltd

… *Plaintiff*

And

Reputation Administration Service Pte Ltd

… *Defendant*

EX TEMPORE JUDGMENT

[Civil Procedure] — [Stay of proceedings] — [Exclusive jurisdiction clause]
[Civil Procedure] — [Jurisdiction] — [Submission]
[Contract] — [Waiver]

Reputation Administration Service Pte Ltd
v
Spamhaus Technology Ltd

[2021] SGCA 51

Court of Appeal — Civil Appeal No 205 of 2020
Sundaresh Menon CJ, Andrew Phang Boon Leong JCA and Judith Prakash JCA
11 May 2021

11 May 2021

Judith Prakash JCA (delivering the judgment of the court *ex tempore*):

Introduction

1 The appellant is seeking a stay of High Court Suit No 814 of 2019 ("Suit 814"). Suit 814 is a contractual claim in which the respondent claims from the appellant arrears of commission payable under an alleged agreement for the resale of spam control services ("the Contract"). The appellant denies that any such contract existed but, as an alternative position, it says that if there was a contract it was in the terms of a Resellers' Agreement which the appellant entered into in 2009 with Spamhaus Research Corp ("SRC") an associate of the respondent. Somewhat counter-intuitively, it is the appellant's alternative position which underpins this appeal.

2 The appellant applied to the High Court to stay Suit 814 on the basis that the Contract contained an exclusive jurisdiction clause that conferred

jurisdiction over disputes between the parties on the Courts of England and Wales ("the EJC"). This application was dismissed by an Assistant Registrar. The appellant's appeal to the judge below ("the Judge") in High Court Registrar's Appeal No 145 of 2020 ("RA 145") was, likewise, dismissed. Before us, the parties have renewed arguments they made below, with the respondent, additionally, seeking to uphold the Judge's decision on a different basis.

3 There are two issues in the appeal. The appellant accepts that in order to succeed in the appeal it must succeed on both issues. The appellant formulates the issues as follows:

(a) Has the appellant, by its conduct in these proceedings, waived its rights under the EJC or demonstrated an unequivocal, clear and consistent intention to have the present dispute determined by the Singapore courts? ("Issue 1")

(b) If not, whether there is a good arguable case that the EJC exists and governs the dispute between the appellant and the respondent? ("Issue 2")

The Facts

4 Before we go on to discuss the issues, a brief factual background.

5 The commercial relations that led to this case started with the Resellers' Agreement in 2009. Between then and November 2016, the appellant dealt with SRC, not the respondent. The appellant purchased spam control services from SRC and provided these to its own customers. In return, the appellant paid SRC commission.

6 Clause 18.2 of the Resellers' Agreement was the EJC. It reads as follows:

> 18.12 Law and Jurisdiction
>
> This Agreement shall be exclusively governed by the laws of England and Wales, and the parties submit to the exclusive jurisdiction of the Courts of England and Wales in relation to this Agreement and any dispute or claim that arises out of or in connection with this Agreement.

7 According to the respondent, from November 2016 onwards, the appellant dealt with the respondent instead of SRC. The respondent, like SRC, sold its spam control services to the appellant and received commission in return. The appellant dealt primarily through one Mr Adesh Kumar Goel ("Mr Goel"), its sole director and Chief Financial Officer. The respondent dealt primarily through one Mr Jonathan Leigh, its Chief Financial Officer ("Mr Leigh").

8 No new formal agreement was concluded between the appellant and the respondent in November 2016 or thereafter. On Mr Leigh's evidence, there was no novation or assignment of the Resellers' Agreement from SRC to the respondent. At this stage it is not for us to decide whether the dealings between the respondent and the appellant were governed by the Resellers' Agreement or by some other terms. We observe only that it is arguable that between 2016 and 2019, the appellant and the respondent were dealing with each other on the terms of the Resellers' Agreement.

9 The respondent claims that the appellant was in arrears of payment of commission for several months in 2018 and early 2019. Thus, on 12 February

2019, Mr Leigh terminated, by way of e-mail and on SRC's behalf, the *Resellers' Agreement*.

Procedural History

10 We now detail the procedural history because it is highly relevant to determination of Issue 1.

11 On 16 August 2019, the respondent commenced Suit 814. In the first iteration of its Statement of Claim, the respondent claimed from the appellant a sum of US$242,285.20, interest and costs. This sum comprised the total amounts allegedly payable by the appellant to the respondent under the "Resellers' Agreement", which was referred to at para 3 of the Statement of Claim.

12 The appellant entered an appearance to Suit 814 on 30 August 2019 and filed the Defence on 9 September 2019. Thereafter, the parties were involved in several interlocutory applications:

(a) The respondent filed a summary judgment application on 17 December 2019 ("the Summary Judgment Application"), which the appellant contested.

(b) In response, the appellant filed a Notice to Produce on 18 December 2019, requesting production of the Resellers' Agreement. The respondent complied and provided the Resellers' Agreement to the appellant on 8 January 2020.

(c) The appellant then filed a striking out application on 14 January 2020 ("the Striking Out Application"). Therein, the appellant alleged

that the respondent lacked standing to enforce the alleged agreement between the parties (*ie*, the Contract).

13 Both the Summary Judgment and Striking Out Applications were dismissed by an Assistant Registrar. Upon dismissing the latter, the Assistant Registrar directed the respondent to amend its Statement of Claim. In its Statement of Claim (Amendment No 1) filed on 6 April 2020, the respondent disclosed further particulars of the Resellers' Agreement. Following this, some two months later, the appellant filed the Stay Application seeking to stay Suit 814 on the basis of the EJC.

14 The Stay Application was dismissed by an Assistant Registrar and the appellant's appeal against the dismissal was heard and dismissed by the Judge subsequently. The Judge agreed with the Assistant Registrar's conclusion that: (a) the appellant did not unequivocally submit to the Singapore court's jurisdiction; but that (b) the appellant did not show a good arguable case that the EJC governed Suit 814.

The Appeal

15 On appeal, the appellant challenges the Judge's finding that the EJC does not govern Suit 814. It is not contesting the Judge's conclusion that it did not submit to the Singapore court's jurisdiction. The respondent has not filed a Notice of Appeal but contends, in the Respondent's Case, that the Judge erred on the issue of submission.

16 The appellant, correctly, has not contended that the court cannot hear arguments on the issue of submission due to the absence of a formal Notice of Appeal on this specific point. In our view, the issue of submission can be

brought up and decided in this appeal. In *L Capital Jones Ltd and another v Maniach Pte Ltd* [2017] 1 SLR 312, we noted, at [51] of that decision, that O 57 r 9A(5) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("Rules of Court") "only required a respondent to *state in its case* that it desired to contend on appeal that the decision below should be varied or affirmed on other grounds not relied on by the court below, and to specify the grounds of its contention" [emphasis in original]. This is precisely what the respondent has done in the present appeal, by raising the issue of submission in the Respondent's Case.

Our Decision

17 In our view, the appeal must be decided in the respondent's favour on the basis of Issue 1. The appellant submitted to the Singapore court's jurisdiction and, in so doing, waived its right to rely on the EJC.

18 Before going into our reasons, we clarify one point. In their respective cases, the parties appear to disagree on the significance of a finding that the appellant has *submitted* to the court's jurisdiction.

(a) The respondent equates submission to the appellant's inability to rely on the EJC. If the court finds that the appellant has submitted to the court's jurisdiction, the appellant cannot invoke the EJC.

(b) The appellant disagrees and characterises the issue at hand as one of *waiver*. The appellant argues it is untrue that submission to jurisdiction would preclude it from relying on the EJC in an application under O 12 r 7(2) of the Rules of Court. This is because an invocation of an EJC under O 12 r 7(2) "does not challenge the jurisdiction of the Court". Such an application is a request for the court not to *assume*

jurisdiction over a case, despite having jurisdiction. Consequently, a finding of submission (which establishes the court's jurisdiction) is not fatal to an application under O 12 r 7(2). The real question is whether the appellant has taken steps that evince *waiver* of its right to rely on the EJC.

19 The distinction drawn by the appellant would be germane in certain situations. For example, this court in *Sun Jin Engineering Pte Ltd v Hwang Jae Woo* [2011] 2 SLR 196 ("*Sun Jin*") observed, at [17], that "the filing of the defence by the Respondent does not in itself disentitle him from applying for a stay of the Singapore Action". In that case, the court was dealing with a stay application on grounds of *forum non conveniens* under O 12 r 7(2) of the Rules of Court. What *Sun Jin* demonstrates is that in certain cases, submission to jurisdiction would not preclude an invocation of O 12 r 7(2). The present case, however, is distinguishable on two counts. First, O 12 r 7(2) is being invoked not on grounds of *forum non conveniens*, but by virtue of the EJC. Second, and as we will explain shortly, the facts making out the appellant's submission to jurisdiction equally evince a waiver of its contractual right to invoke the EJC.

Applicable principles

20 The tests for submission and waiver are similar:

(a) Submission is established where a party has taken a "step" that is incompatible with the position that the Singapore court does not *have* jurisdiction. This may be inferred through a "step that is 'only necessary or only useful' if: (a) any objection to the existence of the local court's jurisdiction has been waived; or (b) no such objection has ever been entertained at all": *Zoom Communications Ltd v Broadcast Solutions Pte*

Ltd [2014] 4 SLR 500 at [43]; *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 ("*Shanghai Turbo*") at [44].

(b) Waiver is established where a party has taken a "step" that is incompatible with the position that the Singapore court *should not assume* jurisdiction over the matter. That is, where such party takes a step demonstrating a clear intention to have the dispute determined by the Singapore court: *Wing Hak Man v Bio-Treat Technology* [2009] 1 SLR(R) 446 at [63] ("*Wing Hak Man*"). While *Wing Hak Man* involved a stay application premised on an arbitration clause, the observations therein are equally applicable to a jurisdiction clause, given that both clauses are contractual instruments that are given effect to pursuant to the principle of party autonomy.

21 In both inquiries, the step taken by a party must be clear and unequivocal. Each inquiry involves a question of fact to be determined in the circumstances of the particular case. Accordingly, a party could conceivably take a step that is a clear submission as well as a clear waiver of rights. It all turns on the factual matrix before the court.

Steps taken by the appellant

22 The appellant has taken several steps in Suit 814. In our view, these steps clearly and unequivocally demonstrate that the appellant submitted to the Singapore court's jurisdiction and intended to have the dispute heard in the Singapore court. These are, namely:

(a) the appellant's filing of its Defence on 9 September 2019;

(b) the appellant's contesting of the Summary Judgment Application; and

(c) the appellant's filing of the Striking Out Application on the basis of the respondent's lack of standing to sue on the Contract.

23 The pivotal step is the appellant's filing of the Defence. There was no need for the appellant to do so if it did not intend to defend Suit 814 in Singapore. A defence clearly indicates an intention to *defend the suit in question*; it would only be useful to a defendant if such defendant wishes to contest the suit within the *jurisdiction*. The appellant, in its Defence, denied and chose not to admit to the respondent's allegations. The indication, therefore, was that the appellant was prepared to go to trial in Singapore to put the respondent's allegations to the test.

24 In similar vein, the appellant *contested* the Summary Judgment Application. It raised its primary defence: that the respondent has no standing. This was consistent with the appellant intending to defend Suit 814 in Singapore on that basis. The appellant's primary defence was then reiterated in its filing of the Striking Out Application. There, the appellant sought to invoke the High Court's powers to strike out the Statement of Claim in Suit 814 on the basis that the respondent lacks standing. This, again, indicated an intention to contest Suit 814 on its merits. Further, this step was taken after the appellant obtained a copy of the Resellers' Agreement and would have been reminded of the EJC.

No protest

25 The steps taken by the appellant were not accompanied by any protest against the court assuming jurisdiction over the parties. The Defence did not

contain any such reservation. The closest intimation to a protest would be the raising of the EJC in Mr Goel's affidavit and the appellant's written submissions in the Summary Judgment Application. The former was produced on 14 January 2020, and the latter on 7 February 2020, four to five months after the Defence had been filed on 9 September 2019. These documents do not assist the appellant.

26 Primarily, we do not view the raising of the EJC in these documents as a clear protest. In its written submissions in the Summary Judgment Application, the appellant used the EJC to buttress its contention that the said application should be dismissed. It did *not* indicate a jurisdictional objection, or a preference for the dispute to be heard in the contractual forum. Similarly, in the Striking Out Application, the appellant raised the EJC *via* Mr Goel's affidavit not as grounds for a jurisdictional objection, but rather to supplement its primary contention that the respondent lacks standing in Suit 814.

The appellant's failure to file a prompt jurisdictional objection

27 Bookending each of the above steps taken by the appellant is the fact that the appellant could have, but did not, file a *prompt* stay application. It was open to the appellant to do so once it had entered its appearance on 30 August 2019. Order 12 r 7 of the Rules of Court stipulates that any jurisdictional objection may be taken after entering an appearance and within the time limited for serving a defence. In other words, the appellant could have objected to the court's assumption of jurisdiction *without* having to file the Defence.

28 The appellant has sought to characterise the situation as one where it was not aware, until sometime later, of the EJC's existence in the "Resellers' Agreement" mentioned in the first Statement of Claim. It was on this basis that

Mr Goel argued, in the Stay Application, that "[f]or the first time in that amended Statement of Claim were the terms of the contract upon which the Plaintiff relies specified". It was also on this basis that the Judge found that the appellant had not unequivocally submitted to the court's jurisdiction.

29 We do not accept the appellant's characterisation of events. The documentary evidence adduced thus far shows that the appellant did know, and must have known, of the contents of the "Resellers' Agreement" referred to in the first iteration of the Statement of Claim. The correspondence between Mr Leigh and the appellant, which pre-dated Suit 814, always referred to the agreement that was being enforced as the "Resellers' Agreement". This agreement was the sole writing that had any connection at all to the parties' dealings; there is no evidence of any other document being involved. Mr Goel and the appellant must have therefore known, all along, to what the "Resellers' Agreement" stated at para 3 of the first Statement of Claim referred. Thus, even though SRC's dealings with the appellant and the *date* of the Resellers' Agreement (1 March 2009) were only introduced in the Statement of Claim (Amendment No 1), these did not change the complexion of the dispute between the parties.

30 We also note that Mr Goel's signature is on the Resellers' Agreement. He has not alleged forgery or inauthenticity. The appellant has also not explained why it would not have known of the existence of the EJC *despite* having signed the Resellers' Agreement. It accordingly lies ill in the appellant's mouth to deny knowledge of the existence of the EJC, and to insinuate that the amendment to the Statement of Claim was a revelatory event that brought that clause to the appellant's attention for the first time.

31 Finally, we assume, for argument's sake, that the appellant truly did not know of the contents of the Resellers' Agreement at the time the first Statement of Claim was filed. Even then, two points are fatal to the appellant's case. First, if the appellant was faced with uncertainty when Suit 814 commenced, it could have taken other steps that did not involve filing the Defence. The appellant could have, upon entering an appearance, immediately filed a Notice to Produce, compelling the respondent to disclose the Resellers' Agreement. The appellant eventually did file such a notice on 18 December 2019, showing that it was aware of the availability and utility of such an application. However, the Notice to Produce was filed *after* the appellant filed its Defence.

32 Secondly, on 8 January 2020, the Resellers' Agreement was disclosed by the respondent pursuant to a Notice to Produce filed by the appellant. The contents of the Resellers' Agreement were revealed, and consequently the dispute between the parties as disclosed in the first Statement of Claim. Why did the appellant not file a stay application *then*? The appellant clearly could have done so, since it had sight of the EJC at that point. The appellant did not file for a stay and instead filed the Striking Out Application on the basis of the respondent's lack of standing. This, as explained above, was a step that is incompatible with the position that the Singapore court should not assume jurisdiction over Suit 814.

33 In view of the conclusion we have come to in relation to Issue 1, there is no need for us to deal with Issue 2.

Conclusion

34 In these circumstances, we dismiss the appeal. While we disagree with the Judge's finding that the appellant did not submit to the Singapore court's

jurisdiction, we agree with his ultimate conclusion in RA 145: that Suit 814 should not be stayed.

Sundaresh Menon
Chief Justice

Andrew Phang Boon Leong
Justice of the Court of Appeal

Judith Prakash
Justice of the Court of Appeal

Vanathi Eliora Ray and Kyle Yew Chang Mao
(Joseph Lopez LLP) for the appellant;
Han Wah Teng and Winston Chui Jun Sheng
(CTLC Law Corporation) for the respondent.