IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 71

Originating Application No 621 of 2022

Between

Maxx Engineering Works Pte Ltd

… *Applicant*

And

PQ Builders Pte Ltd

… *Respondent*

GROUNDS OF DECISION

[Contract— Specific performance — Mediation agreement]

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Introduction

1 In Originating Application No 621 of 2022 ("OA 621"), the applicant, Maxx Engineering Works Pte Ltd ("Maxx"), sought an order compelling the respondent, PQ Builders Pte Ltd ("PQ"), to refer their dispute to mediation under the Singapore Mediation Centre ("SMC") Mediation Procedure Rules, pursuant to a contract between them.

2 The application raised two legal issues. First, whether the parties were under a legal obligation to refer their dispute to mediation. Second, in the event that there was such a legal obligation, whether Maxx should be granted an order for specific performance to compel PQ to perform its obligation to refer the dispute to mediation.

3 I found that the parties were under a legal obligation to refer their dispute to mediation and that pursuant to this obligation, Maxx should be granted an order for specific performance to compel PQ to refer the dispute to mediation. As there does not appear to be any caselaw in respect of the latter issue, I set out the reasons for my decision below.

Background to the dispute

4 The parties entered into a contract (the "Sub-Contract). Clauses 54 and 55 of the Sub-Contract were salient:

> 54. If a dispute arises between the parties under or out of or in connection with this Sub Contract [*sic*] or under or out of or in connection with the Sub-Contract Works, the parties shall endeavor to resolve the dispute through negotiations. *If negotiations fail, the parties shall refer the dispute for mediation at the Singapore Mediation Centre in accordance with the Mediation Rules for the time being in force.* For the avoidance of doubt, prior reference of the dispute to mediation under this clause shall not be a condition precedent for its reference to arbitration by either party nor shall it affect either party's rights to refer the dispute to arbitration under Clause 55 below.
>
> 55. In the event of any dispute between the parties in connection with or arising out of this Sub-Contract or the Sub-Contract Works, including any dispute as to the existence, validity or termination of this Sub-Contract, and such dispute is not resolved by the parties in accordance with Clause 54, the parties shall refer the dispute for arbitration by an arbitrator agreed upon by the parties within 14 days of either party giving written notice requiring arbitration to the other, … . The place of the arbitration shall be Singapore and the arbitration shall be governed by the Arbitration Act (Chapter 10) as may be amended from time to time.
>
> [emphasis added]

5 Without referring the dispute to mediation, PQ referred the dispute to arbitration pursuant to Clause 55 of the Sub-Contract ("Clause 55"). In response, Maxx commenced OA 621 for, amongst other things, an order to

compel PQ to refer the dispute to mediation on the basis that the parties were legally obligated under Clause 54 of the Sub-Contract ("Clause 54") to do so.

Issue 1: Whether there was a legal obligation to refer to mediation

6 PQ submitted that the parties were not under a contractual obligation to refer the dispute to mediation *before* resorting to arbitration. Indeed, Clause 54 stated that "[f]or the avoidance of doubt, prior reference of the dispute to mediation under this clause *shall not be a condition precedent for its reference to arbitration* …" [emphasis added].

7 Maxx accepted that Clause 54 did not oblige the parties to mediate *before* commencing arbitration. Maxx pointed out that notwithstanding, Clause 54 also stated that "… the parties *shall refer* the dispute for mediation at the Singapore Mediation Centre" [emphasis added]. In a similar vein, Clause 55 stated that "… the parties *shall refer* the dispute for arbitration…" [emphasis added]. Maxx hence submitted that "shall refer" should be interpreted such that the parties *must* attempt dispute resolution by referring the dispute to *both* mediation and arbitration, so long as arbitration of the dispute had not been concluded.

8 As PQ's submissions were limited to mediation not being a condition precedent to referring the dispute to arbitration, PQ's submissions did not meet Maxx's submissions on this issue. I nevertheless considered PQ's submissions where it related to the parties' legal obligation to refer the dispute to mediation.

9 First, PQ highlighted that Clause 54 only stated that the parties "shall endeavor [*sic*]" to resolve disputes through negotiations. However, PQ failed to address the key portion of Clause 54 that Maxx relied on: "[i]f negotiations fail,

the parties shall refer the dispute for mediation". Moreover, the statement in Clause 54 that "prior reference of the dispute to mediation … shall not be a condition precedent for its reference to arbitration by either party" would not affect the parties' obligation to refer the dispute to mediation. Maxx's submission was not that parties must mediate *before* proceeding with arbitration but that the parties must refer the dispute to mediation even if parties had commenced arbitration (see [6] above).

10 PQ also did not dispute that the words "shall refer" in Clause 55, in respect of referring disputes to arbitration, imposed an obligation to refer the dispute to arbitration. Indeed, by commencing arbitration, PQ appeared to have accepted that its contractual obligation was to refer the dispute to arbitration under Clause 55. As a matter of consistency, and on the plain language of Clause 54, the phrase "shall refer" must have also imposed an obligation on the parties to refer the dispute to mediation.

11 Lastly, PQ argued that the parties were under a legal obligation only to *consider* referring the dispute to mediation, as opposed to being obligated to refer the dispute to mediation. In support of its argument, PQ cited the Court of Appeal decision of *Cheung Teck Cheong Richard and others v LVND Investments Pte Ltd* [2021] 2 SLR 890 ("*Cheung Richard*").

12 In *Cheung Richard*, the Court of Appeal considered the content of a contractual clause, cl 20A.1:

> 20A.1 The Vendor and Purchaser agree that before they refer any dispute or difference relating to this Agreement to arbitration or court proceedings, they *shall consider resolving the dispute or difference through mediation* at the Singapore Mediation Centre in accordance with its prevailing prescribed forms, rules and procedures.

[emphasis added]

The Court of Appeal held at [31] that cl 20A.1 imposed only an obligation to *consider* mediation and the obligation "did not rise to the level of an obligation to mediate". Relying on this finding, PQ submitted that Clause 54 similarly did not impose an obligation on the parties to mediate.

13 However, in contrast to the wording of cl 20A.1 that the parties "shall *consider* … mediation", the wording in Clause 54 was that the parties "shall *refer* the dispute … for mediation". In other words, Clause 54 obliged the parties to "*refer*" the dispute to mediation and not merely consider such referral (as was the case in *Cheung Richard*). Accordingly, PQ's analogisation of Clause 54 in the Sub-Contract to cl 20A.1 in *Cheung Richard* was unjustified.

14 Additionally, a further point of distinction was that, in *Cheung Richard*, cl 20A.1 was followed by a cl 20A.2 which stated: "[f]or the avoidance of doubt, [cl(l) 20A.1 and 20A.2] shall not amount to a legal obligation on the part of either [party] to attempt mediation as a means of resolving their dispute or difference". Clause 20A.2 thus emphasised that cl 20A.1 was not intended to be a legal obligation. In comparison, there was no similar clause in the Sub-Contract that pointed to or suggested that Clause 54 was not intended to impose a legal obligation on the parties to refer their dispute to mediation.

15 I hence found that, by its plain wording, Clause 54 imposed a legal obligation on the parties to refer their dispute to mediation, if negotiations failed.

Issue 2: Whether it was just and equitable to order specific performance

16 The question that followed was whether Maxx should be granted an order for specific performance to compel PQ to perform its contractual obligation to refer the dispute to mediation. The principles and considerations in relation to specific performance were set out by the Court of Appeal in*, inter alia*, *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 ("*Lee Chee Wei*") at [53]:

> While the dominant principle is that equity will only grant specific performance 'if under all the circumstances, it is just and equitable to do so' … factors affecting the court's discretion include considerations such as (a) whether damages would be an adequate remedy; and (b) whether the person against whom the relief of specific performance is being sought would suffer substantial hardship…

17 In assessing whether an order of specific performance was just and equitable in the circumstances, I considered the following factors:

(a) whether damages would be an adequate remedy if the order was not made;

(b) whether PQ would suffer substantial hardship from the order;

(c) whether the order would be futile;

(d) whether the order would be impractical; and

(e) whether there were other factors that would render granting the order just and equitable in the circumstances of this case.

Adequacy of damages

18 I first considered the adequacy of damages. Maxx submitted that damages would be inadequate because it would be denied the benefit of PQ's participation in the mediation of the dispute. Moreover, the time and costs which could have been saved through a mediated settlement was difficult to quantify. PQ confirmed at the hearing that it was not submitting that damages would be inadequate.

19 As a matter of doctrine, the substitutability of a good or service is a relevant factor in the consideration of whether damages are adequate. For example, the Court of Appeal in *Tay Ah Poon v Chionh Hai Guan* [1997] 1 SLR(R) 596 ("*Tay Ah Poon*") noted at [13] (quoting *Sharpe on Injunctions and Specific Performance* (2nd Ed, 1995) at paras 8.10-8.20 with approval):

> … It is often said that no two parcels of land can be identical and that therefore damages must be inadequate. The purchaser is entitled to get the very parcel bargained for and *not to be forced to take an inexact substitute.*
>
> [emphasis added]

In addition, the Court of Appeal in *Lee Chee Wei* observed at [54] that "[w]hile a contract to transfer shares in a publicly listed company will generally not be specifically enforced, a contract to transfer shares in an unlisted company on the other hand can be specifically enforced" [emphasis omitted].

20 In the present case, the parties had bargained for an obligation to refer their disputes to mediation. In a similar vein to the Court of Appeal's observations in *Tay Ah Poon* and *Lee Chee Wei*, I was of the view that damages for PQ's breach of this obligation would have been an inadequate and unsuitable substitute for this obligation. Thus, this factor leaned in favour ordering specific

performance of what the parties bargained for, *ie.* an obligation to refer the dispute to mediation.

Substantial hardship

21 The second factor I considered was whether PQ would suffer substantial hardship if specific performance was granted. PQ confirmed at the hearing that it was not submitting that granting specific performance would cause it to incur substantial hardship, legal costs, or delay. Moreover, in my judgment, there was no evidence that PQ would suffer substantial hardship by being compelled to take steps to refer the dispute to mediation.

Futility

22 The third factor was whether the order for specific performance would be futile. This was PQ's submission, on the basis that Maxx had not provided it with any proposal for the resolution of the dispute as at the hearing. PQ asserted that this showed that Maxx was insincere in seeking to mediate the dispute.

23 However, I found that the lack of a proposal from Maxx as at the date of the hearing did not necessitate that mediation of the dispute would be futile. Neither did it show that Maxx was insincere in seeking to resolve the dispute by mediation. Notably, PQ did not indicate that it was unamenable to mediation or that mediation would be rendered futile by its unwillingness to mediate. In the absence of evidence that either party was unamenable to mediation, there was no basis to find that an order of specific performance to mediate the dispute would be futile.

Practicability

24 The fourth factor was whether the order would be impractical. Relying on *Lee Chee Wei* at [56], PQ submitted that an order for specific performance would be impractical as the court would be unable to supervise the acts to be carried out by PQ pursuant to such order. In *Lee Chee Wei*, the Court of Appeal found it impractical to grant and supervise the acts under an order for specific performance since the relevant parties were in prison serving out sentences.

25 In the present case, the order sought required PQ to take specific and concrete steps to refer the dispute to mediation, including replying to the SMC to confirm its assent to mediation, providing dates for mediation, and providing its Case Summary to the mediator. These steps did not present impracticality of supervision as there would have been no serious difficulty in determining whether PQ had complied with such steps. Accordingly, I considered that an order of specific performance would not be impractical.

Other circumstances relating to the requirement of "just and equitable"

26 Lastly, I considered whether there were other circumstances relating to this case that weighed in favour of it being just and equitable to order specific performance. There were three such circumstances.

27 First, the mediation process would have provided both parties with the opportunity to resolve their dispute without incurring further legal costs or substantial delay. In other words, Maxx would not have been the sole benefactor of a grant of specific performance; PQ would also benefit from the referral of the dispute to mediation. Indeed, PQ acknowledged at the hearing that it would not be disadvantaged or incur losses from referring the dispute to mediation.

28 Second, as emphasised by the Court of Appeal in *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 ("*Toshin*") at [45], "[*t*]*he choice made by contracting parties, especially when they are commercial entities, on how they want to resolve potential differences between them should be respected*" [emphasis in original]. In the present case, the parties, in concluding the Sub-Contract containing Clause 54, agreed that they would resolve their disputes by mediation, should negotiations fail. Referencing *Toshin* as quoted above, I was of the view that the parties' choice to refer their dispute to mediation should be respected.

29 Third, the trend towards the promotion of amicable dispute resolution. The observations of the Court of Appeal in *Toshin* in the context of a contractual agreement for parties to "negotiate in good faith" at [45] are apposite:

> … Our courts should not be overly concerned about the inability of the law to compel parties to negotiate in good faith in order to reach a mutually-acceptable outcome. … "negotiate in good faith" agreements do serve a useful commercial purpose in seeking to promote consensus and conciliation in lieu of adversarial dispute resolution. These are values that our legal system should promote.

30 The values highlighted in *Toshin* found legislative grounding in the recently enacted Rules of Court 2021 ("the ROC"), which provides at O 5 r 1(1) that "[a] party to any proceedings has the duty to consider amicable resolution of the party's dispute before the commencement and during the course of any action or appeal." The ROC also empowers the court to order parties to attempt to resolve the dispute by amicable resolution and to consider any refusals to attempt amicable resolution in determining any issue of courts under O 5 r 3(1) and (3). An order of specific performance in the present case would have been consistent with this trend and preference for amicable dispute resolution.

Conclusion

31 Taking into consideration the factors highlighted above, I found that it was just and equitable in the circumstances to order for specific performance to compel PQ to perform its contractual obligation to refer the dispute to mediation. I hence granted order in terms of the prayers in 2.1 and 2.2 of OA 621.

Kwek Mean Luck
Judge of the High Court

Ng Boon Gan (VanillaLaw LLC) for the applicant;
Lee Wan Sim and Lim Poh Choo (Alan Shankar & Lim LLC) for the respondent.