IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 36

Civil Appeal No 152 of 2020

Between

Tecnomar & Associates Pte Ltd

… *Appellant*

And

SBM Offshore N.V.

… *Respondent*

In the matter of Suit No 897 of 2019 (Registrar's Appeal No 166 of 2020)

Between

Tecnomar & Associates Pte Ltd

… *Plaintiff*

And

SBM Offshore N.V.

… *Defendant*

GROUNDS OF DECISION

[Civil Procedure] — [Service] — [Out of jurisdiction]
[Civil Procedure] — [Material non-disclosure] — [Setting aside]

[Civil Procedure] — [Costs] — [Indemnity costs]

Tecnomar & Associates Pte Ltd
v
SBM Offshore NV

[2021] SGCA 36

Court of Appeal — Civil Appeal No 152 of 2020
Steven Chong JCA and Woo Bih Li JAD
9 April 2021

13 April 2021

Steven Chong JCA (delivering the grounds of decision of the court):

Introduction

1 It cannot be gainsaid, in a claim brought for a breach of contract, that the identities of the contracting parties are of paramount and vital importance. This is elementary. It is axiomatic that a failure to properly identify the correct parties will inevitably lead to dire consequences for the claim. The present appeal is a stark demonstration of one such case. As we explain below, pursuing a hopeless claim on appeal against the wrong contracting party may also lead to dire costs consequences.

2 The appellant is a private company incorporated in Singapore, in the business of marine and offshore engineering consultancy. The respondent is a publicly listed company incorporated in the Netherlands, in the business of

providing systems and services to the offshore oil and gas industry. The respondent is the holding company of the "SBM Offshore" group of companies.

Procedural history leading up to the present appeal

3 On 10 September 2019, the appellant commenced Suit No 897 of 2019 (the "Suit") against the respondent. The Suit concerned a straightforward claim for breach of contract that the appellant alleges it had entered into with the respondent to provide decontamination, cleaning and preparation services for a vessel known as the "Yetagun FSO" (the "Vessel") for "Green Ship" recycling. The appellant's case is that a valid and binding contract had been concluded by way of (a) a quotation that its representative, Mr Paul Hopkins ("Mr Hopkins"), had sent to the respondent (representing the *offer*) on 10 April 2018 (the "10 April Quote"); and (b) the respondent's subsequent reply (representing the *acceptance*) on 17 April 2018 (the "17 April Email") that was sent by a Units Operation Manager for the Vessel, Ms Carolina Fonzar dos Santos ("Ms Fonzar"). The respondent's case is that it did not conclude any such contract with the appellant and that the contract had instead been concluded between the appellant and its subsidiary, an entity known as South East Shipping Co Ltd ("SES"), the owner of the Vessel.

4 On 10 October 2019, the appellant filed Summons No 5063 of 2019 in the Suit, seeking leave to serve the Writ of Summons (the "Writ") and Statement of Claim (the "SOC") out of jurisdiction in the Netherlands (the "Leave Application"). The Leave Application was made pursuant to O 11 r 1 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) (the "ROC"). In essence, the factual premise underlying the appellant's Leave Application is that it had concluded a valid and enforceable contract with the respondent, such contract having been offered, accepted and formed in Singapore.

5 On 11 October 2019, the appellant's Leave Application was heard *ex parte* and was subsequently granted by way of HC/ORC 6856/2019 (the "Service Order").

6 On 30 October 2019, the appellant duly served the Writ and SOC on the respondent at its registered office in the Netherlands.

7 On 4 November 2019, the respondent entered appearance in the Suit.

8 On 18 November 2019, the respondent filed Summons No 5780 of 2019 ("SUM 5780") seeking, pursuant to O 12 r 7 of the ROC, orders for the Service Order to be discharged and for the service of the Writ and SOC to be set aside, on the basis that there was "no full and frank disclosure in the affidavit of the [appellant] in support of its application to obtain [the Service Order]".

9 On 29 July 2020, the learned Assistant Registrar (the "AR") granted SUM 5780 and exercised her discretion to set aside the Service Order as well as the service of the Writ and SOC. The AR held that there had been non-disclosure of material facts by the appellant in its Leave Application and that the appellant had failed to demonstrate that it had "the better of the argument" that it had contracted with the respondent. Dissatisfied, the appellant appealed against the AR's decision.

10 On 25 August 2020, the High Court Judge (the "Judge") dismissed the appellant's appeal against the AR's decision and subsequently issued his clear and comprehensive grounds of decision in *Tecnomar & Associates Pte Ltd v SBM Offshore NV* [2020] SGHC 249 (the "Judgment"). The appellant then filed the present appeal against the Judge's decision.

Our decision

11 The issues that lie to be determined in this appeal are hence:

(a) whether there was material non-disclosure in the appellant's Leave Application; and

(b) if so, whether the Court should exercise its discretion to set aside the service of the Writ and SOC on the respondent and the Service Order?

Was there material non-disclosure in the Leave Application?

12 The nature of the Leave Application being an *ex parte* application, the appellant was subject to a duty of full and frank disclosure. This is a duty that is owed to the Court and is driven by the need for the Court to satisfy itself that the case is a *proper* one for service out of jurisdiction. Such a duty invariably extends to facts that may go towards rebutting the applicant's claim (*Manharlal Trikamdas Mody and another v Sumikin Bussan International (HK) Ltd* [2014] 3 SLR 1161 at [78]).

13 At the outset of the appeal hearing, counsel for the appellant, Mr Peter Gabriel, readily acknowledged that there was material non-disclosure in the appellant's Leave Application but sought to argue, albeit unconvincingly, that such non-disclosure was not deliberate. This was consistent with the appellant's concession before the Judge below (see Judgment at [2] and [122]). In its Case, the appellant sought to rely on an alleged admission made by the respondent's representative Mr Thomas Chapman ("Mr Chapman"), to contend that there was indeed such a contract concluded between the appellant and the respondent, on the terms of the 10 April Quote. In support of its argument, the appellant cites

para 43(b) of Mr Chapman's third affidavit dated 19 June 2020, in which he stated that it "cannot be said that the [respondent] failed 'to amend agreement [*sic*] to take the appropriate remedial action'". The appellant argues that in denying that it had failed to amend the "agreement" (and thus had not acted in breach), the respondent had implicitly admitted to having contracted with the respondent. In our judgment, this argument is misguided.

14 First, Mr Chapman's third affidavit was filed *after* the Leave Application was heard. Whether there is material non-disclosure of facts has to be determined by reference to the facts disclosed *at the time* of the application. It does not lie in the appellant's mouth to point to Mr Chapman's third affidavit, which was filed close to eight months *after* the Leave Application, to claim that it had somehow fulfilled its duty of disclosure *then*. Second, and more fundamentally, the extract cited plainly does not amount to any admission as the appellant suggests. To do so is simply a woeful mischaracterisation of the statement in the affidavit. Mr Chapman had made that statement in the context of the appellant's narrative that the respondent had failed to do anything in response to the levels of mercury and benzene detected in the Vessel. However, it is undisputed that it was in fact SES who issued a purchase order to engage the appellant's services to address this very issue. The appellant's argument also blithely disregards the position *consistently* taken by Mr Chapman in all his earlier affidavits that no such contract, on the terms of the 10 April Quote, was ever concluded between the appellant and the respondent.

15 In our view, we have no hesitation in finding that there was in fact material non-disclosure by the appellant in its Leave Application. It bears repeating that the duty of full and frank disclosure requires a party to furnish information which is relevant to the opponent's case. The party may well

disagree with the opponent's case but it remains obligatory, and indeed incumbent on it, to candidly disclose *all* such information. Only then may a Court be able to properly deliberate, with the benefit of the holistic evidence placed before it. It is perplexing to us how the appellant could credibly contend otherwise. The appellant's affidavit filed in support of its Leave Application was bereft of the relevant details. It purported to briefly explain the background of the contract and the alleged breaches, and the only exhibits attached were (a) the Writ and SOC; (b) the 10 April Quote and the 17 April Email; and (c) an extract from the respondent's annual report of 2018. None of these documents contained *any* reference to SES or alluded to *any* hint that the appellant had not contracted with the respondent but with SES instead.

16 This was not just an argument that the appellant should have known might be raised by the respondent: it was an argument that had in fact *already* been raised. On 11 June 2019, the respondent's and SES's solicitors had written to the appellant's solicitors (the "11 June Letter"), responding to a Notice of Arbitration that had been filed by the appellant, wherein it was expressly "denied that SBM is a party to any contract with Tecnomar". We pause to note that in response to the 11 June Letter, the appellant decided not to proceed with the arbitration. As such, by the time of the Leave Application, the respondent's position would have been clear beyond peradventure and indeed, known to the appellant (who was represented by the same set of solicitors in the arbitration and the present proceedings). Yet, the appellant failed to disclose the 11 June Letter, the aborted arbitration or any of the correspondence and documents including purchase orders issued by SES, invoices issued by the appellant to SES, a handover letter from SES to the appellant and vessel certificates showing SES as the vessel owner, as well as a soft proposal which significantly was addressed by the appellant to SES (see Judgment at [11]–[47]). These facts and

documents are materials that would have been very relevant to the Court in arriving at its decision whether to grant the Service Order as it concerned the most basic element of any contractual claim, *ie*, the identities of the contracting parties (see *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 ("*Zoom Communications*") at [68]).

17 Very tellingly, in the Notice of Arbitration, the appellant brought claims against the respondent *and* SES under the *same* contract. In adding SES to the aborted arbitration, at the very minimum, the appellant had asserted a contractual claim against SES. Yet, the appellant in applying for leave for service outside jurisdiction in respect of the same contractual claim, completely omitted *any* reference to SES notwithstanding its own acknowledgment that SES was potentially a party to the contract. This makes the non-disclosure all the more egregious.

18 In our judgment, it is thus clear that the appellant had not fulfilled its duty of full and frank disclosure in the Leave Application. This was a textbook case of non-disclosure. But that was not all. It was also a paradigmatic case of *deliberate and systematic* non-disclosure, aimed at omitting any trace of SES whatsoever. This was not a case of mere inadvertence in which only one or two documents referring to SES were omitted. Quite the contrary. There was a complete and conspicuous absence of any reference to SES at all. Further, the references in the appellant's SOC purportedly made to the respondent were in actual fact, references to SES (see Judgment at [115]). This can hardly be said to have just been an oversight. We agree with the Judge's conclusion that this was "not just non-disclosure but also misrepresentation; and all of this was deliberate" (Judgment at [126]). In short, this was a case of wilful suppression of material facts.

19 Given our finding that the suppression/non-disclosure was deliberate, it "must be a special case for the court to exercise its discretion not to discharge the *ex parte*" order (*Tay Long Kee Impex Pte Ltd v Tan Beng Huwah (trading as Sin Kwung Wah)* [2000] 1 SLR(R) 786 at [35]). As will be apparent from our analysis below, this case does not remotely satisfy the "special" criterion.

Did the appellant have a good arguable case?

20 Even in the face of deliberate material non-disclosure, the appellant submits that the Court should nevertheless exercise its discretion not to set aside the Service Order, as well as the service of the Writ and SOC. Relying on *Zoom Communications*, the appellant contends that in light of the disclosed correspondence and documents, it has established a good arguable case that it had in fact entered into a contract with the respondent. We reject this argument and agree with the Judge that the appellant did not have a good arguable case that it had *any* contract with the respondent (Judgment at [51]–[79]).

21 First, the appellant argues that the Judge erred in considering correspondence *after* the 17 April Email because a contract had already come into existence and Ms Fonzar's subsequent enquiries were irrelevant. However, this erroneously presupposes that a contract had already come into existence – to assert this is to beg the logically anterior question of the existence of a contract between the appellant and the respondent: the exact subject of the present dispute. Further, this mischaracterises the Judge's analysis of the correspondence. The Judge did not refer to the correspondence after the 17 April Email in order to suggest that Ms Fonzar's subjective intention therein could displace the parties' objective intention in concluding the contract on 17 April 2018. Rather, the Judge was merely relying on the objective evidence of the parties' correspondence and conduct to *infer* what the parties' objective

intention must have been at the time when the 10 April Quote and the 17 April Email were sent. After all, determining the parties' objective legal intention at any given point in time does not prescribe the range of factual evidence that can be considered.

22 Second, on whatever interpretation that the parties may seek to ascribe to the 10 April Quote and 17 April Email, it is clear that both parties contemplated and in fact agreed that a purchase order ("PO") would be issued for the provision of the appellant's services. This much is made clear by Ms Fonzar's email to Mr Hopkins on 11 April 2018, in which she sought clarification whether "Tecnomar [will] provide any contract to SBM or should it be done under a PO only". Mr Hopkins's reply on 12 April 2018 is particularly telling. He replied that the appellant "shall be happy for SBM to issue TECNOMAR with a Purchase Order to carry out the work". This must have been the common understanding between the parties because Mr Hopkins expressed no concern when the PO was sent as an attachment in an email on 18 April 2018, with the cover email stating that it was a "new purchase order from 'SOUTH EAST SHIPPING CO LTD' along with its Terms and Conditions" (the "18 April Email"). The PO specified the purchaser as SES and the supplier of the services as the appellant.

23 After the issuance of the PO, the parties acted on the basis that the PO would form the governing contractual document and, further, that SES, as the owner of the Vessel, was the contracting party: (a) Mr Hopkins not only confirmed receipt of the PO by clicking on an acknowledgment link contained in the 18 April Email but further "confirmed accordingly" the instructions contained in the same email which attached the PO; (b) the appellant issued invoices *to SES* pursuant to the PO; and (c) SES consequently paid the sums

owing to the appellant under those invoices. Moreover, as the Judge pointed out, the documentary evidence simply did not support the appellant's case that the parties had contemplated the formation of a contract by an exchange of correspondence (Judgment at [54]–[55]). The PO, which contained a set of Terms and Conditions, also included an entire agreement clause by way of cl 37 that stated, "[t]he contents of this PO … supersedes any and all prior representations and agreements between the [parties] relating to the subject matter contained herein". This makes irrelevant all the prior correspondence between the parties leading up to the PO. In our judgment, this puts a conclusive end to the matter.

24 Finally, it is perhaps relevant to mention that the Suit was triggered by the sale of the Vessel. When the appellant discovered the sale, its reaction is very revealing. Mr Hopkins sent an email on 28 August 2018 stating that "the change of ownership does not absolve SES of accrued liability". Evidently, the appellant recognised that it had contracted with SES which was the reason why it claimed that it could look to SES for the "accrued liability".

25 Therefore, we do not consider that the appellant has demonstrated a good arguable case that it entered into a contract with the respondent. In our view, the appellant's case was way off the mark. It thus cannot conceivably be argued that the Judge had erred in exercising his discretion to set aside the Writ, SOC, as well as the Service Order. This suffices to dispose of the present appeal.

Costs

26 Having dismissed the appeal, we turn to consider the issue of costs. In the circumstances, we consider it appropriate to award costs against the appellant on an indemnity basis, such costs to be taxed if not agreed. It is clear

that the Court's discretion under O 59 r 27 of the ROC to order taxation on an indemnity basis is not confined to cases which have been brought with an ulterior motive or for an improper purpose. In deciding whether to order indemnity costs, the Court should have regard to all the circumstances of the case, and "the test is not conduct attracting moral condemnation, which is an *a fortiori* ground, but rather unreasonableness" (*Three Rivers District Council v The Governor and Co of the Bank of England (No 6)* [2006] EWHC 816 (Comm) at [25]). This discretion must of course be exercised judicially, and "[c]osts on an indemnity basis should only be ordered in a special case or where there are exceptional circumstances" (*Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others (Tung Yu-Lien Margaret and others, third parties)* [2011] 1 SLR 582 at [29]). But the present case is just that: *exceptional*.

27 The conduct of the appellant throughout the course of the proceedings was shocking, troubling and unreasonable, to say the least. It was simply antithetical to the rationale underlying the duty of full and frank disclosure in an *ex parte* application, which is to allow the Court to come to a considered conclusion notwithstanding the strictures of having to hear only one party. To date, the appellant has yet to proffer any satisfactory explanation for the non-disclosure, apart from a perfunctory assertion that it was not deliberate. But for the reasons already highlighted above at [18], we are satisfied that it was in fact deliberate. It is also noteworthy that the appellant was not forthcoming in conceding that there was such material non-disclosure (see Judgment at [117]) and the eventual acknowledgement of such non-disclosure emerged only at the end of the hearing before the Judge (see Judgment at [122]). Such conduct was incontrovertibly beyond the pale.

28 The deliberate material non-disclosure gave the Court hearing the Leave Application the misleading impression that it was undisputed that the appellant had entered into a contract with the respondent when the appellant knew, at the very least, that this was challenged by the respondent and there was documentary evidence supporting the respondent's position. This was especially so since the appellant was already apprised of the respondent's clear position in the 11 June Letter. Yet, by virtue of the appellant's misrepresentations, the Court was none the wiser to the existence of SES at all. Additionally, the appellant had led the Court to believe that Appendix 6 was part of the terms of the purported contract (as stated in the appellant's original SOC), when, in truth, Appendix 6 was only attached as a draft to the appellant's email of 12 April 2018, two days *after* the 10 April Quote. Indeed, this fact, which must have been known to the appellant at the time of the Leave Application, necessitated the appellant's subsequent amendment of its SOC to remove any reference to Appendix 6 *after* it had obtained the Service Order. Likewise, when confronted with the material non-disclosure, the appellant concocted confounding arguments in an attempt to assert that it had nonetheless concluded the contract with the respondent. This included a blatant mischaracterisation of Mr Chapman's affidavit (see [14] above) as well as the appellant's submission that even if there was a contract between the appellant and SES, there could *simultaneously* have been an entirely separate contract – *in respect of the same services for the Vessel* – between the appellant and respondent (Judgment at [79]). Yet, this argument, which the Judge politely described as a "strained argument", flew in the face of basic commercial sense. The appellant made increasingly disingenuous arguments as it became apparent that it had no real arguable case on the facts. This would have been abundantly clear from the questions posed by the Judge to the appellant in the course of the hearing below. Nonetheless, the appellant doggedly persisted with the present

appeal notwithstanding the clear objective evidence to the contrary and its own acknowledgment there was material non-disclosure.

29 We take this opportunity to reiterate that the Court will not hesitate to order costs on an indemnity basis in the face of such unreasonable conduct by litigants who evince a flagrant disregard of their duty of full and frank disclosure owed to the Court. Such duty should not and cannot be breached with impunity. In the same vein, the existence of an appeal mechanism as of right merely provides the opportunity to pursue a matter further. This, however, should not be interpreted as giving litigants (and counsel) *carte blanche* to pursue arguments that are wholly unmeritorious, devoid of any legal and factual basis. Opportunity is not a guise for opportunism. In the circumstances, we can see no legitimate reason why the respondent should be made to bear any costs or expense in resisting such an unmeritorious appeal. At the appeal hearing, we invited Mr Gabriel to address us on our indication to award indemnity costs to which he confirmed that he had no objection to our proposed costs order. For all the above reasons, this is an appropriate case which merits an award of indemnity costs against the appellant. Such costs to be taxed if not agreed.

Conclusion

30 As such, we dismiss the appeal and make the costs order stated in [26] above. The usual consequential orders shall follow.

31 It appeared to us that the lawyers advising the appellant were privy to the non-disclosure. Given the gravity of the deliberate nature of the non-disclosure, we invited both Mr Gabriel and his colleague, Mr Manoj Nandwani (who was apparently the lawyer who handled the Leave Application) to offer an explanation that the non-disclosure was not deliberate notwithstanding the

findings here and below. Mr Nandwani sought to justify the merits of his understanding that the appellant had an arguable case against the respondent. We say no more other than to observe that he was unable to offer any explanation as to why the *entirety* of the evidence in relation to the respondent's defence was suppressed from the Court. This was the gravamen of the appellant's non-disclosure. We are concerned that the appellant's lawyers might be responsible for the non-disclosure, the full extent of which, if any, will be addressed separately.

Steven Chong
Justice of the Court of Appeal

Woo Bih Li
Judge of the Appellate Division

Gabriel Peter, Nandwani Manoj Prakash and Chang Guo En Nicholas Winarta Chandra (Gabriel Law Corporation) for the appellant;
Tan Wee Kheng Kenneth Michael *SC* (Kenneth Tan Partnership) (instructed), Loh Wai Yue, Chan Zijian Boaz and Alankriti Sethi (Incisive Law LLC) for the respondent.