IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 158

Suit No 28 of 2012
(HC/Registrar's Appeal No 207 of 2016)

Between

(1) Long Well Group Limited
(2) PT Citrabumi Sacna
(3) Private Energy Pte Ltd
(4) First Power International Limited

… *Plaintiffs/Appellants*

And

(1) Commerzbank Aktiengesellschaft
(2) Commerz Asset Management Asia Pacific Pte Ltd
(3) Commerzbank Asset Management Asia Ltd
(4) Commerz Asia Best SPC

… *Defendants/Respondents*

JUDGMENT

[Civil Procedure] – [Discovery of documents] – [Application]

Long Well Group Ltd and others
v
Commerzbank AG and others

[2016] SGHC 158

High Court — Suit No 28 of 2012(HC/Registrar's Appeal No 207 of 2016)
Choo Han Teck J
26 July 2016

11 August 2016 Judgment reserved.

Choo Han Teck J:

1 This was an appeal by the plaintiffs against the decision of Assistant Registrar Bryan Fang ("AR Fang") on the further discovery of documents in Suit 28 of 2012 ("the suit"). The suit relates to the plaintiffs' recovery of alleged losses suffered in a business venture with the defendants. The purpose of the venture was to engage in the drilling for oil and gas in a concession in Libya in 2005.

2 The plaintiffs are investment companies. The first and fourth plaintiffs are registered companies in the British Virgin Islands. The second plaintiff is a company registered in Indonesia. The third plaintiff is a Singapore registered company. They are suing the defendants for among other things, breach of contract, negligence and misrepresentation. The fourth defendant is the active defendant and is a special purpose vehicle incorporated in the Cayman Islands. It is wholly owned by the third defendant which, is wholly owned by the

second defendant, and the second defendant is wholly owned by the first defendant. At the time of this appeal, the plaintiffs had withdrawn its claim against the second defendant.

3 From the amended statement of claim, it was pleaded by the plaintiffs that there were discussions between the plaintiffs' representatives and defendants' representatives concerning the money needed for the exploration and development of an oil and gas venture in Libya. Specifically, it was alleged by the plaintiffs that the defendants had represented to them that save for the initial funding to win the bids for the oil and gas concessions which would be provided by the plaintiffs, the defendants would provide and/or raise the funds required for the exploration and development of the concessions. It was also pleaded that the parties agreed to have the third defendant set up and manage the financing plan for the exploration work. Consequently, a fund was set up for this purpose by the third defendant (through the fourth defendant which it wholly owned) and named 'Commerz Asia Emerald' ("Emerald"). Subsequently, Emerald and a company known as PT Pertimina (Persero) ("Pertamina") then entered into a joint-operating agreement ("JOA") and a joint-venture company was set up. That company was Pertamina E&P Libya Ltd ('PEPL').

4 Mr Christopher De Souza ("Mr De Souza"), counsel for the plaintiffs submits that Emerald was the sub-fund created by defendants and was an agent of the defendants. On the other hand, Mr Khelvin Xu ("Mr Xu"), counsel for the defendants, argues that Emerald was created for the plaintiffs and was the plaintiffs' agent. Mr De Souza submits that the Pertamina-Emerald joint venture managed to obtain rights to the Libyan concession but was not able to exploit the exploration and development of the concessions.

According to the plaintiffs, this was due to the defendants' failure to contribute US$50m, contrary to the representations that they had made to the plaintiffs. The plaintiffs also rely on Art 6.1.2 of the JOA to establish such an obligation of the defendants to provide funding. All of this is denied by the defendants who argue that both the control of the venture and the funding obligation lay on the plaintiffs.

5 The first category of documents sought by the plaintiffs was an arbitral award dated 11 November 2010 pursuant to an arbitration between Pertamina and the fourth defendant. According to the plaintiffs, Pertamina had a dispute with the fourth defendant arising from matters related to the Libyan concessions and the JOA. Pertamina succeeded in the arbitration and the plaintiffs now sought discovery of the arbitration award, to ensure, among other things, that the fourth defendant maintained a consistent position in respect of Emerald in the arbitration and in the present suit. This category of documents sought in discovery was disallowed by AR Fang. He held that the arbitral award would only show the obligations between the fourth defendant and Pertamina (a non-party in this suit) under the JOA and not the obligations between the plaintiffs and defendants in this suit. He also accepted the submission by Mr Xu that the findings made in arbitration proceedings could not be adduced as proof of facts in subsequent proceedings between one or more different parties.

6 The second category of documents sought related to two letters of credit which were issued by the first defendant in favour of PEPL. The plaintiffs sought these documents to "show that the defendants had funding obligations". AR Fang disallowed discovery of this category on the basis that the plaintiffs had not pleaded that the first defendant was involved at all in

funding the venture by providing PEPL funding support through the issuance of letters of credit. He observed that the plaintiffs' own pleaded case is that the defendants "did not *at all* provide and/or raise the funds needed" [emphasis added] for the venture.

7 The third category of documents sought related to the bank account opened and maintained by PEPL with the first defendant. The plaintiffs wanted the correspondence between PEPL and the defendants leading to the creation of the account as well as bank statements to see who opened the accounts. AR Fang similarly denied this request because it was not a part of the plaintiffs' pleaded case that the defendants had provided funding support through the creation and maintenance of a bank account.

8 AR Fang further observed two difficulties in respect of the second and third categories of documents requested by the plaintiffs. First, he opined that the documents requested fell within the definition of "customer information" in s 40A of the Banking Act (Cap 19, 2008 Rev Ed) and were therefore, subject to the banking secrecy provision in s 47 of the Act. He also observed the lack of temporal proximity to the material events as the documents sought in the second and third categories related to circumstances that happened several years after the alleged misrepresentations.

9 The plaintiffs appealed for an order to reverse AR Fang's orders. The real question is why were the plaintiffs before AR Fang and now before me so convinced that the documents were relevant and discoverable? The crux of the plaintiffs' claim in this appeal is that the defendants (either all or some of them) represented that they will raise funds in the sum of US$50m towards the

"exploration and development of the Libyan concession" and that the documents requested were necessary and relevant in showing that.

10 With regard to the first category of documents, I note that both parties accept the confidential nature of arbitral awards but recognise that there may be exceptions to such a bar of confidentiality. For instance, such confidentiality would not apply to a party in litigation seeking discovery of documents generated in an arbitration if a court considers it relevant and necessary for the fair disposal of the case (*AAY v AAZ* [2011] 1 SLR 1093 at [53]). In that respect, the plaintiffs rely on Raymond Pribadi's ("Pribadi") 15th affidavit deposing that "the arbitration tribunal had held that the 4th defendant entered into the JOA [the Pertamina-Emerald joint venture] as principal and not agent for the 1st and 2nd plaintiffs". Pribadi further stated that there were recorded admissions during the arbitral proceedings by Mr Leisentritt and Mr Cheong, witnesses for the fourth defendant, that there was no evidence that the fourth defendant was acting only as agent in respect of the JOA. Pribadi also deposed that the arbitration tribunal held that all of the fourth defendant's shares in PEPL be transferred to Pertamina. According to the amended statement of claim, Pertamina held 55% of PEPL shares and Emerald held 45% of the shares. That being the case, it brings the plaintiffs' role into question. What business do the plaintiffs have in this oil adventure in Libya since they neither held PEPL shares nor were they parties to the JOA? Why was the arbitral award relevant and necessary in the light of that?

11 The answer is not clear because the pleadings have become a voluminous bog of quicksand and the plaintiffs are now caught in it. In spite of his bold effort, Mr De Souza could only repeat what Pribadi has been deposing, namely, that the defendants had represented to the plaintiffs that

they 'would be providing and/or raising the funding required for the exploration and development of the concessions'. Was this just a representation or a contract term? "Funding obligation" is a very general description. What does that mean in this context? Did the defendants have to give US$50m outright to PEPL or was this to take the form of a loan to PEPL, and if not, what was it?

12 The plaintiffs say that they were misrepresented to by the defendants but what exactly did the representations (if true) that the defendants would "raise the funds" mean? This was nowhere made clear. The statement of claim could have dispensed with many pages if it could only state that "the defendant represented that if the plaintiffs … they (the defendants) would pay US$50m to PEPL for use in accordance with …" The ellipses are the matters that could have, but were not made clear in the pleaded claim. The statement of claim refers to three sets of representations that began in May 2005 up until 28 October 2005. It is again unclear what the effect of these diverse representations was on the plaintiffs.

13 The statement of claim then claimed that on 3 February 2006 the first and second plaintiffs signed a "transfer agreement" to buy over the shares Emerald had in the joint venture. The matter gets more complicated when the plaintiffs pleaded that the first and second plaintiffs signed a share subscription agreement with the fourth defendant in which they agreed to pay US$9,375,000 and US$5,643,000 respectively, but they allege that the shares in Emerald were not transferred to the plaintiffs.

14 If that was the case, the plaintiffs' claim against the fourth defendant would be a straightforward one for breach of the transfer agreement in failing

to deliver up the shares. Though that might indeed be the case, it is not entirely clear because the plaintiffs have pleaded so many representations involving multiple parties over a period of five or six months in which several contractual documents were signed. If the money involved the large sum of US$50m, involving big commercial parties, one would have expected the contract to be well-advised and tight so that disputes that arise will be narrow and straightforward.

15 If the shares held by the fourth defendant in Emerald had been awarded by the arbitration tribunal to Pertamina, of what concern is it to the plaintiffs? They can sue for any money advanced (perhaps the initial $5m) but they have to set out the terms on which they paid that money. Alternatively, they can claim damages for breach of contract on account of the fourth defendant transferring or allowed the shares in Emerald to be transferred to Pertamina instead of to them. The statement of claim presently pleads too much evidence and too little cause. If, as the fourth defendant say, Emerald was created by them for the plaintiffs, then the plaintiffs are the joint venture partners of Pertamina but from the submissions, both oral and written, it seems that Pertamina are strangers to the plaintiffs. On the other hand, if, as the plaintiffs claim, that Emerald belongs to the defendants, then what interest or even standing do the plaintiffs have in the joint-venture?

16 Accordingly, I am unable to see the relevance and necessity in further discovery of the first category of document sought by the plaintiffs. First, the arbitral award did not involve the plaintiffs and only shed light on the obligations between the fourth defendant and Pertamina, a non-party. Secondly, the admissions, if at all made by the defendants' witnesses during the arbitration cannot be used in the present proceedings as proof of facts and

therefore are neither relevant nor necessary to its disposal. I further note that the defendants have denied the admissions of their witnesses and the transfer award and that the plaintiffs have not adduced any evidence or annexed any portion of the arbitral award to prove their allegations true. In the light of this, I find that the plaintiffs' justification that the arbitral award can be used to test the consistency of the factual positions taken by the defendants' witnesses in the present suit is untenable as the plaintiffs have not even proved that there were positions taken in the arbitration to be compared with in the first place. Finally, in the light of what had been deposed in Pribadi's affidavit about the details of the arbitral award and the plaintiffs' admission that they had been "supplied information about an arbitral award that went against [Emerald] and went in favour of Pertamina", I find it hard to see why there is a further need to disclose the arbitral award. I dismiss the appeal on the first category of documents accordingly.

17 With respect to the second and third categories of documents, the plaintiffs seek to rely on the documents sought to show that there was an understanding between the plaintiffs and defendants that the defendants would fund the joint venture pursuant to the defendants' representations. With respect to the letters of credit, *ie*, the second category of documents, Mr De Souza submits that the defendants must have provided some form of security for them to be issued. With respect to the bank account correspondence, *ie*, the third category of documents, Mr De Souza submits that there existed a special relationship between the defendants and PEPL such that the PEPL bank account had been opened on special terms given by the first defendant.

18 In response, the defendants argue that this flies in the face of the plaintiffs' pleaded case in paragraph 40(ii)(a) of the amended statement of claim where it is pleaded that "the [defendants] …did not *at all provide and/or raise the funds needed*…after the successful bids" [emphasis added]. When this was raised to Mr De Souza by AR Fang, his response was only that the documents sought in the second and third categories were collateral documents such as emails, instructions or correspondence referring to some obligation or responsibility that were meant to show that defendants had the obligation to fund the joint venture from the very beginning. The defendants also argue that the documents sought in the second and third categories are protected by banking secrecy.

19 I am unable to agree with the plaintiffs that the documents sought in the second and third categories are relevant and necessary. First, the plaintiffs' reasons for the documents run contrary to their pleaded case that the defendants had provided no funding at all. As Mr Xu points out, the plaintiffs have not pleaded that the first defendant was involved in funding the venture by providing PEPL with banking facilities through a banking account and/or through the issuance of letters of credit. Secondly, I agree with AR Fang that the documents sought in the second and third categories of documents related to events long after the alleged misrepresentations in 2005 and lack temporal proximity. Even taking the plaintiffs' case at its best and accepting that it would have taken PEPL some time to build up the "special relationship" with the defendants in order to open the bank account on preferential terms, the plaintiffs have been unable to adduce any evidence to show that such a special relationship existed at all. I further accept the defendants' submission that Pribadi, being a director of PEPL at the material time would have very been aware of any material transactions concerning the opening of the bank account

or the issuance of the letters of credit and his failure in deposing anything on affidavit is telling of the plaintiffs' speculation in these categories.

20 For the aforementioned reasons, even without considering the issue of banking secrecy raised by the defendants, I am unable to find the relevance and necessity of the documents sought in the second and third category of the plaintiffs' requests. I therefore dismiss the appeal on the second and third categories of documents.

21 As a whole, I do not see any relevance in the categories of documents sought by the plaintiffs in this appeal. The cause and effect in the story are not clear, and the statement of claim sets out many events with a lot of information but no clearly discernible story. The appeal is therefore dismissed with costs reserved to the trial judge.

- Sgd -
Choo Han Teck
Judge

Christopher De Souza, Darrell Wee Jiawei and Nandhu (Lee & Lee) for the plaintiffs/appellant;
Khelvin Xu Cunhan and Tao Tao (Rajah & Tann LLP) for the defendants/respondents.