IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 202

Suit No 218 of 2015
(Registrar's Appeal No 278 of 2016)

Between

BDC

… *Plaintiff*

And

(1) BDD
(2) BDE

… *Defendants*

GROUNDS OF DECISION

[Arbitration] — [Stay of court proceedings]

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BDC
v
BDD and another

[2016] SGHC 202

High Court — Suit No 218 of 2015 (Registrar's Appeal No 278 of 2016)
Lee Seiu Kin J
22 August 2016

22 September 2016

Lee Seiu Kin J

1 This was an appeal by the plaintiff against the decision of the assistant registrar to stay proceedings in suit no 218 of 2015 ("the Suit") against the second defendant in favour of arbitration.

Background

2 The plaintiff, intending to carry out addition and alteration works ("the Works") on a two-storey conservation shophouse ("the Property"), engaged the second defendant as architects for the Works. The contract of engagement included an arbitration clause.

3 The plaintiff had earlier engaged the first defendant to carry out a survey of the Property and produce drawings of the building structure of the Property ("the Drawings"). The plaintiff passed the Drawings to the second

defendant, which used them to prepare architectural design drawings ("the Design"). It turned out that the Design was based on a wrong dimension. That dimension ("the Dimension") was obtained by the second defendant from the Drawings by means of scaling, *ie*, measuring the distance from the Drawings which were purportedly drawn to scale. As it turned out, this part of the Drawings was not accurately drawn to scale. The Design, based on the Dimension (which was erroneous), was submitted to the relevant authorities for approval. This was eventually granted. It was only after a contractor was engaged to carry out the Works that the error was discovered. In the event, the Design was rectified and re-submitted for approval. However, this caused the Works to be delayed. The plaintiff claimed that it had incurred various forms of losses as a result of this delay.

4 Initially, the plaintiff took out the Suit against the first defendant only. In its defence, the first defendant pointed out that the Dimension was not expressly stated in the Drawings and that it was not good practice for such a crucial element of the Design to be scaled off from the Drawings. Following this, the plaintiff added the second defendant to the Suit. There was no arbitration clause in the contract between the plaintiff and the first defendant.

The issue and the submissions

5 The issue before me was whether the second defendant was entitled to a stay of proceedings in favour of arbitration. The plaintiff submitted that, as there was no arbitration agreement between the plaintiff and the first defendant, the latter could not be joined in any arbitration between the plaintiff and the second defendant. A stay of proceedings would result in parallel proceedings: in court between the plaintiff and the first defendant, on the one hand, and in arbitration between the plaintiff and the second defendant, on the

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other. Although the issue of whether the second defendant, in scaling the Dimension from the Drawings, had breached its duty, contractual or otherwise, to the plaintiff was special to the second defendant and did not involve the first defendant, there were two common issues in the plaintiff's claims against both defendants. These pertained to causation as well as the quantum of damages. The plaintiff submitted that a stay of proceedings should be refused because there would otherwise be a risk of inconsistent findings by the court, on the one hand, and the arbitral tribunal, on the other.

6 The plaintiff cited the case of *Taunton-Collins v Cromie and Others* [1964] 1 WLR 633 ("*Taunton-Collins*"), in which the English Court of Appeal refused a stay of proceedings in favour of arbitration. The plaintiff in *Taunton-Collins* had engaged an architect to design a house and contractors to build it based on the architect's design. The work turned out to be unsatisfactory and the plaintiff sued the architect for breaching his duty in badly designing the house and in not keeping proper supervision over the contractors. The plaintiff subsequently joined the contractors as second defendant. In reliance on the arbitration clause in the construction contract, the contractors applied for a stay of proceedings in favour of arbitration. The decision of the official referee to deny a stay of proceedings was upheld by the English Court of Appeal. Lord Denning MR considered (at 635) that it was most undesirable for two separate tribunals to decide the same questions of fact as this could result in inconsistent findings. Other factors which persuaded the Master of the Rolls to deny a stay of proceedings were the additional costs involved in having two proceedings going on side by side, further delay and procedural difficulties (at 635–636). Citing *Halifax Overseas Freighters Ltd. v Rasno Export; Technoprominport; and Polskie Linie Oceaniczne P.P.W. (The "Pine Hill.")* [1958] 2 Lloyd's Rep 146, Lord Denning agreed (at 636) that judicial

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procedure would risk being brought into disrepute should there be conflicting decisions of different tribunals. Pearson LJ added (at 637) that the case presented a conflict between two well-established principles: (a) that parties should normally be held to their contractual agreements; and (b) that a multiplicity of proceedings is highly undesirable as great confusion may arise if there are different decisions on the same question. He also pointed out (at 637) that this was not a case where the architect had been cynically added as a second defendant in order to avoid the arbitration clause. It was a case in which the plaintiff had wanted to sue the architect, but on account of the architect putting part of the blame on the contractors in his defence, the plaintiff had to bring in the latter as a second defendant. Before me, the plaintiff submitted that *Taunton-Collins* was on all fours with the present case.

7 The second defendant submitted that a crucial difference between *Taunton-Collins* and the present case was that there was one crucial issue that did not overlap. This was the question whether the second defendant was in breach of its duty, contractual or otherwise, to the plaintiff by having obtained the Dimension by means of scaling it from the Drawings. There was no dispute of fact pertaining to this issue and it was a question that could be simply and neatly posed to the arbitrator for his decision. The second defendant submitted that this was therefore a suitable situation for the grant of a stay of proceeding on terms, *ie*, for the arbitrator to decide only on the question whether there was such a breach of duty by the second defendant. A decision against the plaintiff would dispose of its claim against the second defendant in the Suit as that claim was predicated upon such breach of duty. On the other hand, if the arbitrator decided against the second defendant, the stay of proceedings would be discharged and the Suit could proceed on the basis of the arbitrator's finding that the second defendant had breached that

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duty. In support of this position, the second defendant cited the decision of the Court of Appeal in *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 ("*Tomolugen*") and the decision of the High Court in *Maybank Kim Eng Securities Pte Ltd v Lim Keng Yong and another* [2016] 3 SLR 431 ("*Maybank*").

My decision

8 In *Tomolugen*, the plaintiff ("Silica") was a minority shareholder of a company ("AMRG") and sought relief under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) for oppressive or unfairly prejudicial conduct. The eight defendants comprised AMRG and some of its shareholders and directors. Silica had purchased shares in AMRG from the second defendant ("Lionsgate") under a share sale agreement which contained an arbitration clause. There were four allegations made by Silica against the defendants, one of which fell within the scope of the arbitration clause ("the Arbitrable Allegation"). Under the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"), on application by any party to an arbitration agreement under s 6(1) of the IAA, the court must order a stay of proceedings pursuant to s 6(2) of the IAA, which provides as follows:

> (2) The court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

9 In the event, the Court of Appeal issued (at [191]) a stay of proceedings on the following terms:

> (a) Silica to decide within a specified period whether it intends to pursue the Arbitrable Allegation against Lionsgate by arbitration.

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(b) If Silica decides to do so, then:

(i) As between Silica and Lionsgate, the court proceedings in respect of the Arbitrable Allegation will be stayed in favour of arbitration under s 6 of the IAA.

(ii) The remaining court proceedings between Silica and Lionsgate, as well as the entirety of the court proceedings against the remaining defendants will also be stayed in the interests of case management, subject to certain provisos.

(iii) Silica to decide within the specified period whether it is willing to offer to arbitrate the Arbitrable Allegation with the remaining defendants on specified terms. If Silica makes such an offer to arbitrate, the remaining defendants are to respond to Silica's offer within two weeks. Regardless of whether or not the remaining defendants accept any offer to arbitrate which Silica may make, pending the resolution of the arbitration concerning the Arbitrable Allegation, the court proceedings against the remaining defendants in respect of all four allegations will be stayed, subject to certain provisos.

(c) If, on the other hand, Silica abandons reliance on the Arbitrable Allegation, then it may proceed in court against all eight defendants in respect of the other three allegations made in the Suit, save for the Arbitrable Allegation.

10 In making the order on those terms, the Court of Appeal was concerned with striking a balance between complying with the requirement of granting a stay of proceedings in favour of arbitration as mandated by s 6(2) of the IAA and the efficient disposition of the dispute, which was between

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multiple parties and which involved multiple issues. The Court of Appeal exercised its powers of case management to craft the stay of proceedings on terms that would promote the most efficacious disposal of all the issues in dispute between the parties.

11 *Tomolugen* involved the IAA, under which a stay of proceedings is mandatory. The arbitration agreement in the present case was governed by the Arbitration Act (Cap 10, 2002 Rev Ed) ("the AA"), under which the power of the court to stay court proceedings is discretionary. This is provided for by s 6 of the AA, the relevant provisions of which read as follows:

> **Stay of legal proceedings**
>
> **6.**—(1) Where any party to an arbitration agreement institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.
>
> (2) The court to which an application has been made in accordance with subsection (1) may, if the court is satisfied that —
>
> > (*a*) there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement; and
> >
> > (*b*) the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration,
>
> make an order, upon such terms as the court thinks fit, staying the proceedings so far as the proceedings relate to that matter.

12 In *Maybank*, the first defendant entered into contracts for difference with the plaintiff ("MKE"), a securities brokerage. A dispute arose between the first defendant and MKE which was subject to an arbitration clause falling

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under the AA. The second defendant was the first defendant's remisier, and MKE claimed against him under an indemnity agreement which did not contain an arbitration clause. MKE urged the assistant registrar to refuse a stay of proceedings on the ground that there was a risk of inconsistent findings. However, the assistant registrar stayed the proceedings against the first defendant. In addition, following *Tomolugen*, the assistant registrar exercised the court's power of case management to stay the proceedings against the second defendant pending the outcome of the arbitration between MKE and the first defendant. The plaintiff's appeal was dismissed by Steven Chong J ("Chong J"), who held (at [22]) that the principles enunciated in *Tomolugen* are applicable in cases involving arbitrations under the AA. Although a stay of proceedings under the AA is discretionary, unlike the mandatory stay of proceedings under the IAA, Chong J was of the opinion (at [23]) that the burden is nevertheless on the party who wishes to proceed in court to show sufficient reason against the stay of proceedings and the court will only refuse it in exceptional cases. The judge also said (at [23]) that:

> … the higher-order concerns identified by the Court of Appeal [in *Tomolugen*], namely: the plaintiff's right to choose whom he wants to sue and where; the court's desire to prevent a plaintiff from circumventing the operation of an arbitration clause; and the court's inherent power to manage its processes to prevent an abuse of process and ensure the efficient and fair resolution of disputes, apply equally whether the relevant arbitration is governed by the IAA or the AA.

13 I respectfully agreed with Chong J that the same principles apply in arbitrations governed by the AA. The only difference is that the court has the discretion to grant or refuse a stay of proceedings under the AA and the only question is whether the circumstances of the case justify a stay of proceedings or otherwise.

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14 In the case before me, there were three main issues for determination by the arbitrator: (a) whether the second defendant, in scaling the Dimension from the Drawings, had breached its duty, contractual or otherwise, to the plaintiff; (b) whether such a breach had caused the plaintiff's losses, whether in part or in full; and (c) the quantum of damages. I was of the view that the most expedient and cost-effective solution that would give effect to the arbitration agreement as well as the policy against possible inconsistent findings was to stay the proceedings in relation to issue (a) in favour of arbitration. The arbitral tribunal has the advantage of an arbitrator (or arbitrators) who would possess specialist knowledge of industry norms in deciding whether or not there was such a breach of duty by the second defendant. Such an arbitration can be completed very quickly as there is no substantive dispute of fact. If it is resolved in favour of the second defendant, the matter ends there for the second defendant and the Suit may then be proceeded with against the first defendant. On the other hand, if the arbitration is resolved in favour of the plaintiff, then the Suit may resume with the binding arbitral finding that the second defendant was in breach of its duty to the plaintiff. The remaining issues of causation and quantum of damages then fall to be determined by the court against both defendants. I therefore ordered accordingly.

Lee Seiu Kin
Judge

Lim Yee Ming and Lim Yu Jia (Kelvin Chia Partnership) for the plaintiff;

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Chan Kah Keen Melvin and Kishan Pillay s/o Rajagopal Pillay (TSMP Law Corporation) for the second defendant.

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