IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 211

Originating Summons No 633 of 2016

Between

BDG

… *Plaintiff*

And

BDH

… *Defendant*

JUDGMENT

[Companies] – [Winding up] – [Injunction to restrain winding up application]

BDG
v
BDH

[2016] SGHC 211

High Court —Originating Summons No 633 of 2016
Aedit Abdullah JC
16 September 2016

29 September 2016 Judgment reserved.

Aedit Abdullah JC:

Introduction

1 The Plaintiff sought to restrain the presentation of a winding up application against it by the Defendant, arguing that there was a dispute between them that was governed by an arbitration clause. The case turns on the resolution of the conflict between the relevant standards for a stay in favour of arbitration on the one hand, which requires a dispute *prima facie*, and the standard required for a stay of winding up on the other, requiring a triable issue. I find that an injunction as applied for should be granted.

Background

2 The Plaintiff, [BDG], contracted with the Defendant, [BDH], for the supply of drilling units for fossil fuel production off Nigeria. There were two separate contracts, the [B] Contract, and the [C] Contract, named after the

respective fossil fuel fields. The two contracts were in the same form, with payment milestones specified. The submission of documents was made a condition for payment.

3 The contracts included a tiered dispute resolution clause, Clause 28.1 which specifies that discussions are to be held between representatives, and eventually the top management, of each company:

> **28 DISPUTE RESOLUTION**
>
> 28.1 Any dispute between the [Plaintiff] and the [Defendant] in connection with or arising out of the PURCHASE ORDER or the GOODS shall be resolved by means of the following procedure:
>
> 28.1.1. the dispute shall initially be referred to the [representatives of the Plaintiff and Defendant] who shall discuss the matter in dispute and make all reasonable efforts to reach an agreement;
>
> 28.1.2 if no agreement is reached under Clause 28.1.1 the dispute shall be referred to the two persons each nominated by the [Plaintiff and Defendant];
>
> 28.1.3 if no agreement is reached under Clause 28.1.2 the dispute shall be referred to the Managing Directors of the [Plaintiff and Defendant].

Only if the above dispute resolution mechanisms do not work out does arbitration come in:

> 28.2 If no agreement is reached under Clause 28.1.3 above, the parties shall refer the dispute to arbitration…
>
> 28.3 It shall be a condition precedent to the referral of a dispute to the Arbitration under Clause 283 that the party which intends to commence proceedings in relation to the dispute first uses its reasonable endeavours to follow and complete the procedures set out in Clauses 28.1 …

4 As things turned out, a number of invoices from the Defendant were not paid by the Plaintiff. The circumstances are in dispute: the Plaintiff claims there was a suspension of work agreed between the parties as well as that

some of these invoices were not accompanied by the necessary documents. The Defendant contends that the money was due.

5 Discussions were held between the two sides. The Defendant says ultimately nothing was agreed. The Plaintiff contends that there was a settlement agreement. It is undisputed that two payments of US$300,000 were made by the Plaintiff: the Plaintiff says this shows that a settlement agreement was made; the Defendant says that the payments were accepted as part-payment of the claims it had made. Further, a third payment of US$300,000 was put by the Plaintiff into escrow. Arbitration notices were also issued by the Plaintiff. The Defendant however took the position that there was no dispute subject to the arbitration clause.

6 Rather, in April 2016, the Defendant, through its former solicitors, issued a statutory demand for US$8.9 million (the 1st Statutory Demand) as due under various invoices. While there was a change of solicitors representing the Defendant, the new solicitors (who are the present ones), maintained the 1st Statutory Demand and filed a winding up application against the Plaintiff. The Plaintiff in turn filed an application to restrain the commencement of winding up proceedings. Both applications were eventually withdrawn.

7 Then in June 2016, another statutory demand (the 2nd Statutory Demand) was served by the Defendant: this covered a similar set of invoices, though several were omitted. That led to the present application to restrain the commencement of winding up proceedings.

The Plaintiff's Case

8 The Plaintiff argues that an injunction may be granted to restrain the commencement of winding up if the winding up application is not an appropriate means of enforcing a debt; one ground would be that there is a debt that is *bona fide* disputed. For this proposition, the Plaintiff cited various cases including *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268 ("*Metalform*") and *Re Mechanised Construction* and *Lai Shit Har v Lau Yu Man* [2008] 4 SLR(R) 348. The usual standard is the same as that required to defeat a summary judgment application, *ie*, triable issues must be raised: *Mohd Zain bin Abdullah v Chimbusco International Petroleum (Singapore) Pte Ltd and another appeal* [2014] 2 SLR 446 at [16].

9 However, where an arbitration agreement governs the dispute, the relevant standard is whether *prima facie* there is an arbitration clause and if so, the dispute is governed by that clause: *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] Ch 589 ("*Salford Estates*"); *Eco Measure Market Exchange Ltd v Quantum Climate Services* [2015] BCC 877. The position in England and Wales should be adopted in Singapore as well as it gives due recognition to the upholding of arbitration agreements. Using the summary judgment standard of triable issues would result in the courts usurping the functions of the arbitral tribunal and condoning breach of the arbitration agreement. The English approach in *Salford Estates* would be consistent with Singapore decisions granting stay of proceedings in favour of arbitration. There is also a strong leaning in Singapore towards upholding arbitration agreements.

10 Following *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 ("*Tomolugen*"), disputes should be referred to arbitration if *prima facie* there is a valid arbitration clause, the

dispute falls within its scope and the arbitration clause is not null and void, inoperative or incapable of being performed. In this case, there is *prima facie* a dispute, as all that needs be shown is that there is an assertion of a dispute or denial of a claim: *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 ("*Tjong Very Sumito*"). The fact that the dispute may be readily determined does not show that there is no dispute. Moreover, the arbitration clause covered the dispute between the parties as it covered whether a settlement agreement was reached: *Doshion Ltd v Sembawang Engineers and Constructors* [2011] 3 SLR 118 ("*Doshion*").

11 On the facts, the Plaintiff had complied with the requirements of the dispute resolution clause. A dispute did arise on the facts as there is disagreement in relation to one of it the invoices: the parties disagree whether it is due; there is also the question of whether a binding settlement was reached. That settlement covered the whole of the claim between the parties, including even otherwise undisputed invoices.

12 In addition, the Defendant's conduct disclosed an abuse of process as the threat of winding up was used as illegitimate pressure to compel payment of a debt disputed *bona fide*. This was evidenced by the conduct of the Defendant in accepting the installment payments while denying a settlement being reached, the Defendant's failure to take steps in compliance with the dispute resolution process, and a false statement in the solicitors' letter sent for the Defendant.

The Defendant's Case

13 The Defendant argues that there was no agreement reached between the parties. Nothing was signed, there was no agreement on important elements including the quantum of payment, and negotiations were stalled

when the Plaintiff did not remit US$300,000 to the Defendant as an indication of good faith ahead of the finalisation of the agreement.

14 No dispute actually arose between the parties. There was no *bona fide* dispute made on substantial grounds. In any event, it would be open to the court to determine the merits of the dispute between the parties. The appropriate standard to determine the existence of a *bona fide* dispute is whether any triable issue has been raised.

15 The Plaintiff is also precluded by the agreement from raising any dispute on an invoice after ten days had passed. Furthermore, even if there is a *bona fide* dispute, there is also an undisputed debt above the statutory minimum. Given this, any winding-up petition should not be dismissed.

16 A number of points were made in oral arguments. The Defendant emphasised that the Plaintiff was trying to create a dispute on tenuous grounds. It was also argued that if a settlement agreement was created, that agreement fell out of the dispute resolution clause. The Defendant emphasised as well that *Salford Estates* introduced a novel test at too low a level,; and argued in favour of retaining the requirement that a triable issue be raised. An Australian case, *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170 ("*A Best Floor Sanding*"), was cited for the proposition that arbitration clauses should not oust the jurisdiction of the courts. That decision ought to be followed as there would otherwise be a disregard for the principles governing winding up applications. It was also argued that, from the draft agreement that was to be reached, there was an indication that the settlement was not to be subject to the arbitration clause, as the parties had specified an exclusive jurisdiction clause.

The Decision

17 I have concluded that the injunction applied for should be granted as there is *prima facie* a dispute between the parties, which is subject to the arbitration clause. It is not necessary for the Plaintiff to have raised a triable issue. There may be possible ramifications on winding-up applications, but avoiding these ramifications cannot trump the need to uphold the arbitration agreement.

Analysis

18 The analysis first determines whether a dispute exists and the relevant standard to be applied. As the injunction is sought in favour of an arbitration clause, the analysis then considers whether the relevant thresholds have been reached in respect of the compliance with the dispute resolution clause, and the scope of the arbitration agreement contained in the relevant sub-clause.

Existence of a dispute

19 A dispute exists whenever a claim by one side is asserted to be disputed or denied by the other: *Tjong Very Sumito* at [49]. The Plaintiff and Defendant are at odds on whether a dispute exists. The differences between them relate to both the invoices presented and the putative settlement agreement. In relation to the invoices presented, I do note that as submitted by the Defendant, the 2nd Statutory Demand included undisputed invoices that involved sums above the statutory minimum. For that reason, there would not be any relevant dispute either on the *prima facie* or triable issue standard. What remains in play is the settlement agreement. The Plaintiff says agreement was reached; the Defendant says it was not, and that there is evidence to show that this is so.

20 What matters then is by what standard the existence of a dispute is to be measured. The general approach in determining the existence of a *bona fide* dispute in Singapore is to consider whether a triable issue has been made out, applying a standard similar to that for summary judgment: *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 at [23]. That case was concerned with bankruptcy strictly speaking, but the same principles should apply in relation to winding up. By that measure, whether a dispute exists would require the Court to examine the affidavit evidence, and consider whether on such material, an arguable case could be made meriting the holding of a trial of the issues. That standard would require more inquiry and assessment than a standard requiring only making out that a dispute exists *prima facie*. By such measure, it would at least have been harder for the Plaintiff to obtain an injunction.

21 The Plaintiff argues that a different standard applies where an application to enjoin the presentation of winding-up is made on the basis that there is a dispute between the parties, which is subject to an arbitration clause, citing *Salford Estates*. In that case, the English Court of Appeal found that while s 9 of the Arbitration Act 1996 (c 23) (UK) did not apply on the facts so justify a mandatory stay in favour of arbitration, the Court had the discretion under s 122 of the Insolvency Act 1986 (c 45) (UK) to decline to order a winding up if it was satisfied that there was a dispute which was subject to an arbitration agreement. If there was such a dispute, the Court would generally dismiss the petition, and leave the parties to go to arbitration. The Plaintiff asks the Court to adopt the same approach, pointing out that s 254 of the Companies Act (Cap 50, 2006 Rev Ed) is *in pari materia* with s 122 of the Insolvency Act 1986. It is further argued that, applying cases on stay of proceedings in favour of domestic arbitration, what needed to be shown was a *prima facie* case of dispute: *Uni-Navigation Pte Ltd v Wei Loong Shipping Pte*

Ltd [1992] 3 SLR(R) 595, *Kwan Im Tong Chinese Temple v Fong Choong Hung Construction Pte Ltd* [1998] 1 SLR(R) 401 and *Sim Chay Koon v NTUC Income Insurance Co-operative Ltd* [2016] 2 SLR 871. *Four Pillars Enterprises Co Ltd v Beiersdorf Aktiengesellschaft* [1999] 1 SLR(R) 382 is also authority for the proposition that winding up could be stayed in favour arbitration in some circumstances. As noted above, the Defendant contends that the *prima facie* standard the bar too low; winding up can be staved off too readily.

22 I accept that the broad approach in *Salford Estates* should be followed. The objective of the triable issue or good arguable case standard is to ensure that winding-up is not staved off on flimsy or tenuous grounds. Similarly, summary judgment should not be avoided if the defendant's case is without foundation or basis. The triable issue standard thus ensures that remedies are readily obtained when nothing much can be said against the claim or application. This helps to oil the machinery of commerce and trade, and presumably helps promote certainty and efficiency. That objective is however less pressing and dominant when one is confronted with an arbitration clause. The countervailing concern is to hold parties to their agreement; if they have made a bargain that disputes are to be arbitrated, then they should be held to it. It may be that their case is weak, and would be readily dismissed by the arbitrators; but such weakness of the case would be a matter for the arbitrators to decide. The Court should not generally step in; indeed, it may be that the parties selected process, arbitration, may lead to a different result from the Court's assessment. Given such different considerations, the adoption of a different standard from the usual one in the stay or enjoining of winding up proceedings would be justified on principle. In addition, in these situations, the parties are essentially in dispute about the existence of a dispute. Trying to

ascertain a triable issue in this context is likely to be an exercise that is not fruitful, efficient or proportionate, without any countervailing benefit.

23 It may be thought that adopting this lower standard would stymie the winding up regime by opening the door to gaming of the system by companies desperate to fend off their creditors. There are two responses to this. Firstly, if indications are that issues are not raised *bona fide*, that would be a reason to find that there is no dispute *prima facie*, or that the court's powers should not be exercised in the applicant's favour. Secondly, any apparent injustice suffered by the creditors would have to be assessed in the context of the bargain struck between these creditors and the company. Arbitration would have been contemplated as being part of the process from the moment the parties signed off on the agreement. Nothing inequitable or unfair would result from the parties being made to go through arbitration before they invoke the winding up process. If an arbitration clause was included, there is no real injustice: *pacta sunt servanda*.

24 The Defendant cites *A Best Floor Sanding*, an Australian case, as authority for the proposition that the usual winding-up standard should prevail. However, that case was really concerned with the rights of a contributory: unsurprisingly, the Supreme Court of Victoria held an arbitration agreement to be void in so far as it purported to have the question of winding up subject to arbitration.

The existence of a dispute on the facts

25 As noted above, what the Plaintiff relies on is the putative settlement agreement, which they argue covered the undisputed invoices as well. They point to the fact that what was discussed was the whole sum owing, and that the parties intended to negotiate all of the claims. The Defendant denies a

settlement: their case is that the agreement was not finalised. However, the Defendant's position does not settle the matter.

26 A dispute *prima facie* exists: there is an allegation of a binding settlement on the one side, and a denial on the other. Nothing which is apparent undermines or contradicts the Plaintiff's assertion of the existence of a dispute. Going into the merits or otherwise of the respective parties' claims would be to apply something other than a *prima facie* standard.

Compliance with the dispute resolution clause

27 As the dispute resolution clause involves a series of alternative mechanisms, starting with discussions and escalating ultimately to arbitration, it is clear that these various steps were to be taken in turn. The Plaintiffs asserts that they had sought meetings as required by the clause, but he Defendant declined to meet. Given this, the Plaintiff was entitled to start the arbitration proceedings.

28 I am of the view that what would be required here is for the Plaintiff to show *prima facie* compliance with the requirements. Applying any stricter standard would lead to incongruities with the standard applicable the stays in favour of arbitration, which as laid down in *Tomolugen* (at [65]) involves a *prima facie* standard. While *Tomolugen* was decided in the context of the International Arbitration Act (Cap 143A, 2002 Rev Ed), there was no reason to adopt a different position outside that statute.

29 While strictly not in play, as the question of a discretionary stay under the Arbitration Act (Cap 10, 2002 Rev Ed) is not directly engaged, I am in any event satisfied as well that the Plaintiff through its actions in respect of the

dispute resolution clause, is ready, willing and able to proceed with the arbitration.

Scope of the arbitration clause

30 The arbitration clause is broad enough to encompass the dispute relied upon by the Plaintiff, namely the putative settlement agreement. Again, all that the Plaintiff needs to establish is a *prima* facie case that the dispute falls within the agreement: *Tomolugen* at [65]. Other than that, the scope of the arbitration clause would be a matter for the arbitrator to decide on: *Doshion* at [4].

Granting of an injunction

31 In view of the conclusions I have reached, I find that grounds have been made out for an injunction against winding up proceedings against the Plaintiff. The basis of the Defendant's application for winding up is subject to arbitration and must be determined through that process.

Abuse of process arguments

32 The Plaintiff also claims that there was an abuse of process committed by the Defendant, disclosing a lack of good faith and applying illegitimate pressure. I did not find that the allegation of abuse was made out on the facts. While there were some questions about the Defendant's actions, these were nothing more than the Defendant's attempts to pursue what it considered in its interests, on its version of the facts.

Conclusion and orders

33 The substantive orders prayed for by the Plaintiff are, in brief, for:

(a) An injunction to restrain the filing of winding up applications on the basis of the 2nd Statutory Demand;

(b) A declaration that all disputes covered by the 2nd Statutory Demand should be referred to arbitration; and

(c) An order that all such disputes be referred to arbitration.

34 As the arguments before me were focused on (a), I will grant an order in terms in respect of (a). As for (b) and (c), I will hear the parties if needed. I will also see parties on costs if they are unable to agree on costs and reasonable disbursements. The Plaintiff is to write in within two weeks from the date of the release of this judgment if directions are needed on these matters.

Aedit Abdullah
Judicial Commissioner

Jainil Bhandari, Aleksandar Anatoliev Georgiev, Raelene Su-Lin Pereira & Han JiaMin (Rajah & Tan Singapore LLP) for the plaintiff;
Nicholas Lazarus and Elizabeth Toh Guek Li (Justicius Law Corporation) for the defendant.