IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 158

Suit No 294 of 2017
HC/SUM 5784 of 2018

Between

Viking Engineering Pte Ltd

… *Plaintiffs*

And

(1) Bjornar Feen
Also known as Bjoernar Feen
(2) Feen Marine Pte Ltd
(3) Viking Inert Gas Pte Ltd
(formerly known as Inert Gas
Asia Pte Ltd)
(4) Scanjet Feen IGS Pte Ltd
(5) Feen Marine Scrubbers Pte Ltd

… *Defendants*

And

Viking Inert Gas Pte Ltd
(formerly known as Inert Gas
Asia Pte Ltd)

… *Plaintiff in Counterclaim*

And

Viking Engineering Pte Ltd

… *Defendant in Counterclaim*

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v
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Valerie Thean J:

Introduction

1 On 9 April 2018, parties agreed that the first defendant, Bjornar Feen would pay the costs of a valuation ordered as a result of this action brought by the plaintiff, Viking Engineering Pte Ltd ("Viking Engineering"). Notwithstanding, Mr Feen subsequently failed to pay upon the invoice of the independent valuer agreed upon by parties. By Summons 5784 of 2018, Viking Engineering sought for Mr Feen to make payment of the outstanding invoice, within 7 days of the order. After hearing parties, I so ordered. Mr Feen has appealed, and I furnish my reasons.

Background

2 Viking Engineering and Mr Feen are joint venture partners in the third defendant, Viking Inert Gas Pte Ltd ("Viking Inert Gas"). This action arose out

of a sale and purchase agreement dated 10 September 2013 between parties in relation to Viking Inert Gas. By this agreement, Viking Engineering, at that time a 51% shareholder, sold 21% of its shareholding to Mr Feen, thereby giving Mr Feen a 70% shareholding in Viking Inert Gas. Mr Feen was obliged with various undertakings in return, including a change of the corporate name of Viking Inert Gas to Feen Marine Pte Ltd, the name of the second defendant ("Feen Marine"). Mr Feen is the sole director of Feen Marine, the fourth defendant, Scanjet Feen IGS Pte Ltd ("Scanjet Feen"), and the fifth defendant, Feen Marine Scrubbers Pte Ltd. All the companies in question are Singapore-incorporated companies.

3 On 4 April 2017, Viking Engineering commenced High Court Suit No 294 of 2017, as minority shareholders of Viking Inert Gas, for minority oppression. Its claim included contentions that in breach of the sale and purchase agreement, Mr Feen transferred his shareholding in Viking Inert Gas to Feen Marine. Further, not only did Mr Feen fail to change the name of Viking Inert Gas to Feen Marine as the sale and purchase agreement required, he instead incorporated a company of the same name. Thereafter the business and corporate opportunities of Viking Inert Gas were said to have been diverted to Feen Marine and Scanjet Feen IGS.

4 Viking Engineering then followed on with a summons seeking summary judgment. Leave was given to amend its prayers to include a buy-out of Viking Engineering's shares in Viking Inert Gas by Mr Feen on 24 November 2017. After considering the augmented arguments on 14 February 2018, I granted an injunction to restrain Mr Feen and his agents from using the name "Viking" in any manner which may compete with the business of Viking Engineering or be associated with or perceived to be associated with Viking Engineering or the business of Viking Engineering. I also ordered Mr Feen to purchase Viking Engineering's entire shareholding in Viking Inert Gas, with an independent

valuer being appointed by agreement within 14 days of final judgment to ascertain the fair value of the shares. Unconditional leave was given on the remainder of the claims, which were contractual and could conveniently be tried together with the counterclaim. Counsel asked for time to submit on whether a discount ought to be applied by the valuer to Viking Engineering's minority holding. At the same time, during the course of proceedings, after Viking Engineering contended that there was evidence of diversion of business opportunities from Viking Inert Gas also to Feen Marine Scrubbers, the latter was added by consent as the fifth defendant. On 9 April 2018, after hearing parties on the question of whether a discount for Viking Engineering's minority shareholding should apply, I held that no discount should be applied. The valuer was also asked, as part of his valuation, to make various adjustments for Mr Feen's conduct and the diversion of opportunities to Feen Marine, Scanjet Feen IGS and Feen Marine Scrubbers. On the same date, in the course of finalising the form of the final orders, parties agreed that the cost of the valuation exercise would be borne by Mr Feen.

5 Subsequently, on 13 June 2018, FTI Consulting (Singapore) Pte Ltd ("FTI") was jointly appointed by parties as the independent valuer, with the terms of FTI's appointment reflecting that the first defendant was to bear the costs of the valuation exercise. FTI's letter of engagement stipulated the scale of professional fees and hourly rates applicable, and estimated that their overall fee would be between $80,000 and $90,000.[1]

6 The timeline for the process was set out in an email dated 22 June 2018 from Mr Richard Hayler of FTI to parties' solicitors, setting out a timeframe of

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[1] Moh Liang Teng Evelyn's 8th Affidavit, Plaintiff's Bundle of Documents Tab 2, p 18.

6 weeks, with an additional three weeks for the production of the report, from 9 July to 10 September 2018. The documents were not delivered by Mr Feen in accordance with the prescribed time period, however. After various reminders, Mr Hayler wrote to Mr Feen to confirm that the documents would be received no later than 9 July, as he was required to allocate staff to the exercise. He also warned that under his terms of appointment, he was to commence work based on submissions received and any delay would increase costs. Further delay followed notwithstanding. As Mr Feen failed to send various documents, including audited statements, FTI also did detailed investigative and research work to complete their valuation. On 2 November 2018, parties were informed by email that FTI had completed its determination and an invoice would follow.[2]

7 On 12 November 2018, FTI issued its invoice to Mr Feen's solicitors, Xavier & Associates LLC ("XA"), for a sum of $181,900. FTI's letter explained that the significant cost overrun was "almost entirely attributable" to Mr Feen, who either failed to provide the requested documents or, where documents were provided, did so out of time. SGD250,956.75 was the fee resulting from the total time and manpower incurred. In the light of FTI's original estimate, however, the final sum carried a discount.[3]

8 In accordance with FTI's letter of engagement, this sum was due within 14 days of the invoice date, being 26 November 2018, and its valuation report would only be released to the parties upon payment in full of its outstanding fees, disbursements and expenses.

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2 Moh Liang Teng Evelyn's 8th Affidavit, p. 31.

3 Moh Liang Teng Evelyn's 8th Affidavit, Plaintiff's Bundle of Documents Tab 2, p 34 - 38.

9 Following FTI's invoice, Viking Engineering sent an email and a letter to Mr Feen's solicitors, XA, on 23 November 2018 and 4 December 2018 to seek confirmation that the invoice would be paid.[4] No response was received nor was the invoice paid. FTI has not released its valuation report to parties.

10 On 7 December 2018, Viking Engineering took out the present application against Mr Feen for the invoice to be paid within 7 days of a court order.

Parties' positions

11 Viking Engineering sought an order for Mr Feen to pay FTI pursuant to O 45 rr 6 and 8, and O 92 r 4 of the Rules of Court (Cap 322, R5, 2014 Rev Ed) ("Rules of Court"). It contended that there was no legitimate reason for the non-payment of FTI's invoice,[5] that any allegations of overcharging by FTI were unsustainable, and that the increase in FTI's costs from the initial estimate was for reasons "that were completely justified".[6]

12 Mr Feen took the position that none of the specified provisions were applicable. His view was that the correct procedure to move things forward was not the present summons, but a suit to be brought by FTI against him on its invoice. Regarding the sum specified, his stance was that FTI had failed to provide an adequate explanation for claiming a final invoice sum that was "almost triple the initial fee estimate", contending that there was no justification for having 12 employees carrying out work for 690.8 billable hours, and that

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4 Moh Liang Teng Evelyn's 8th Affidavit, p 40.

5 Plaintiff's Written Submissions at p 5.

6 Plaintiff's Written Submissions at p 8.

there was no breakdown of actual disbursements in the invoice or the cover letter.[7] As for his delays in providing the relevant documents to FTI, Mr Feen explained that he was a marine engineer who was overseas frequently and rarely in his office.[8]

Decision

13 There were two essential issues in this case: first, the applicable provision in the rules of court and its scope; and secondly, whether Viking Engineering was entitled to relief under the applicable provision.

14 For reasons that I explain below, I decided that it was appropriate to use O 45 r 6 of the ROC. I set a timeframe of 7 days for Mr Feen to pay FTI's invoice.

The applicable process

15 Viking Engineering relied on O 45 r 6, O 45 r 8 and O 92 r 4 of the Rules of Court. These read as follows:

> **Judgment, etc., requiring act to be done: order fixing time for doing it (O. 45, r. 6)**
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> 6.—(1) Notwithstanding that a judgment or order requiring a person to do an act specifies a time within which the act is to be done, the Court shall, without prejudice to Order 3, Rule 4, have power to make an order requiring the act to be done within another time, being such time after service of that order, or such other time as may be specified therein.
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> (2) Where, notwithstanding Order 42, Rule 6(1), or by reason of Order 42, Rule 6(2), a judgment or order requiring a person to do an act does not specify a time within which the act is to be done, the Court shall have power subsequently to make an

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7 Defendant's Skeletal Submissions at p 2.

8 Defendant's Skeletal Submissions at p 3.

> order requiring the act to be done within such time after service of that order, or such other time, as may be specified therein.
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> (3) An application for an order under this Rule must be made by summons and the summons must, notwithstanding anything in Order 62, Rule 10, be served on the person required to do the act in question.
>
> **Court may order act to be done at expense of disobedient party (O. 45, r. 8)**
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> 8. If a Mandatory Order, an injunction or a judgment or order for the specific performance of a contract is not complied with, then, without prejudice to its powers under section 14 of the Supreme Court of Judicature Act (Cap. 322), where applicable, and its powers to punish the disobedient party for contempt, the Court may direct that the act required to be done may, so far as practicable, be done by the party by whom the order or judgment was obtained or some other person appointed by the Court, at the cost of the disobedient party, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and execution may issue against the disobedient party for the amount so ascertained and for costs.
>
> **Inherent powers of Court (O. 92, r. 4)**
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> 4. For the avoidance of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

16 Order 45, rule 6 is a provision allowing the court to set a time on an order where none was previously specified. In *Mok Kah Hong v Zheng Zhuan Yao* [2016] 3 SLR 1 ("*Mok Kah Hong*") at [46], the Court of Appeal made clear that the court may utilise O 45 r 6 to impose a timeframe for payment where there is sufficient material before the court to warrant the exercise of such discretion under O 45 r 6(2). Its guidance is as follows:

> In our judgment, there must be sufficient material before us to warrant the exercise of our discretion under O 45 r 6(2). We should emphasise that the exercise of the court's discretion under O 45 r 6(2) will necessarily turn on the precise facts of each case. The type and nature of material to support such

> applications is likely to differ, depending on the subject matter of the substantive case. In most cases, evidence demonstrating some form of contumelious conduct, as in the present case, will likely suffice. In contrast, a one-off failure to comply with an order for the payment of money is unlikely to be a sufficient basis for the court to exercise its discretion.

17 The crux of the issue, therefore, was whether Mr Feen's conduct made it reasonable for the court to so order. Before I turn to the applicable facts, I deal briefly with the other two provisions relied upon by Viking Engineering. Order 45 rule 8 was a provision to be used where a party was requesting an act to be done by another party other than the disobedient party. Counsel clarified at the hearing that he was not seeking anyone other than Mr Feen to pay for the valuation. Order 45 rule 8 was on its face inapplicable. *Woo Koon Chee v Scandinavian Boiler Service (Asia) Pte Ltd and others* [2014] 4 SLR 1213 ("*Woo Koon Chee*") at [31], has, moreover, made clear that O 45 r 8 is a facilitative provision for s 14 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) - "to reiterate and reinforce what is provided in s 14" - which deals with the execution of a deed or indorsement of negotiable instrument. In *Woo Koon Chee*, the provision was used to apply for an order that the Registrar of the Supreme Court be authorised to sign share transfer forms on behalf of the appellant in order to effect completion of the sale and purchase of the shares in the first respondent as directed under the consent order. As for O 92 r 4, that is a general provision relying on the inherent jurisdiction of the court. Whilst such jurisdiction could be exercised in tandem with other rules (see *Singapore Civil Procedure* 2019 vol I (Sweet & Maxwell, 2019) at 92/4/3), neither counsel made detailed argument on the provision.

Whether the FTI must commence a separate action

18 Mr Feen's argument was that this was a matter of a private contract between him and FTI and therefore it would be FTI that ought to pursue

payment against him and not Viking Engineering. This was a red herring. The agreement between parties for Mr Feen to pay for the valuation was formalised in a part of the order that was obtained by consent. Viking Engineering, being a party to that order, had an entitlement under O 45 r 6 once there was sufficient basis to warrant exercise of the court's discretion.

Scope of O 45 r 6

19 It is convenient, at this juncture, for me to deal also with Viking Engineering's prayer 2. This was to give Viking Engineering leave to seek enforcement of the sum of $181,900 against Mr. Feen's assets, in the event that he failed to make payment within 7 days of the Order of Court. This was not within the scope of O 45 r 6. A different and consequential application, if appropriate, would be necessary. I therefore considered the facts of the case only in the context of an order to pay within a stipulated period. With that in mind, I turn to the facts relevant to the relief ordered.

Mr Feen's liability to pay

20 Mr Feen argued that FTI's final invoice was not in accordance with their estimate and that there was no justification for their final fee. This final fee, he submitted, was excessive.

Whether FTI's fees were reasonable

21 The key issue was whether the fees that FTI invoiced Mr Feen were reasonable despite the lower initial estimate. Mr Feen's complaints were first detailed in his affidavit of 3 January 2019. FTI responded in a letter dated 17 January 2019, which was included in Viking Engineering's affidavit in response. This letter provided a total of 7 reasons for the increase in its costs.

Mr Feen's delay in submissions, lack of disclosures and concerns over the veracity of the defendants' submissions resulted in additional time required for FTI's work, including:[9]

(a) Detailed investigative and review work on the documents provided, including the financial data, in view of the concerns over the veracity of those data;

(b) Research work on publicly available information to fill gaps in the information that were requested but not provided by the parties, including information on the business of the defendants (and stakeholders associated with them) and on the industry/markets;

(c) Additional efforts spent in attempting to obtain third party documents on the financial situation of the defendants, including numerous communications with the banks and tax authorities to obtain financial records of the defendants, and multiple attempts with solicitors to arrange for site visits to the offices of the defendants;

(d) Manual recreation of unaudited financial statements of three defendants provided in PDF format (despite being requested in spreadsheet format) into spreadsheet format for analysis purposes, and subsequent checking of the data;

(e) Change of approach and analysis to adapt to the lack of reliable information on the defendants;

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9 Moh Liang Teng Evelyn's 9th Affidavit, Plaintiff's Bundle of Documents Tab 4, p 75.

(f) Detailed documentation of the events following the appointment of Mr Hayler, including issues faced in relation to the information request, in the Determination Report, to explain the lack of disclosures and impact on the valuation approach and analysis; and

(g) Additional time spent on work arising from utilisation of different non-core team staff members to adapt to the disruption in resources planning in view of the extended timeline (extended by almost three months) and uncertainty as to when the requested documents would be received.

22 FTI further explained, in view of Mr Feen's criticism that 12 employees were used, that seven of the 12 employees involved were non-core team members who only billed for 57.5 hours out of the total of 690.1 hours. This was approximately 8.33% of the total amount of hours spent.[10] These non-core members were mainly involved in the re-creation of information provided by the defendants in PDF format to spreadsheet format, certain investigative work of the financial accounts of the defendants, and quality assurance work; much of this work could be avoided if the first defendant had adequately cooperated in providing the necessary documents to FTI.

23 Mr Feen took the view that many of the documents FTI requested did not exist or were in the process of being prepared. He was often at sea or working under conditions with limited or no email access.[11] I rejected these excuses for two reasons. First, when Mr Feen agreed to the valuation, he was aware what documents were required and that these were to be provided in

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10 Moh Liang Teng Evelyn's 9th Affidavit, Plaintiff's Bundle of Documents Tab 2, p 77.

11 Mr Feen's 5th affidavit, para 11.

accordance with a scheduled timeframe. Second, his response to FTI's queries was simply to ignore their requests. He neither asked for more time nor explained when he could comply. A rather frustrated Mr Hayler highlighted as early as 15 July 2018 the potential of increased cost if Mr Feen did not supply documents or properly ask for an extension of time to supply the documents. FTI had explained that its commencing work despite the presence of outstanding documents would result in wasted work as it would have to set aside manpower to deal with new documents as they were received.[12] Mr Feen did not respond meaningfully to this email. The email correspondence between FTI, Drew & Napier LLC and XA revealed that for more than a month, Mr Feen repeatedly ignored emails by both FTI and his own solicitors requesting documents for valuation.

Mr Feen's lack of good faith

24 Having failed to cooperate with the valuation process, Mr Feen thereafter omitted to deal with FTI's invoice. What followed FTI's invoice was not protest but inaction. While Mr Hayler's final paragraph of his letter of 12 November left it open to counsel to email him as permitted by the letter of engagement, no queries were posed. Reminders from counsel for Viking Engineering met with the same response. Mr Feen first expressed dissatisfaction with FTI's invoice through his lawyers in a pre-trial conference after this summons was filed, on 18 December 2018. His first substantive comments were made in his reply affidavit in this summons, dated 3 January 2019. He explained that his inaction arose from his being heavily engaged in working in Japan and Korea between June and December 2018. As a result he did not check for email

[12] Bjornar Feen's 5th Affidavit, Defendant's Bundle of Documents Tab C, p 108.

regularly.[13] In their affidavit in response, Viking Engineering showed that Mr Feen chaired an AGM in Singapore on 15 November 2018 and sent emails to Viking Engineering between 6-9 December 2019.[14] Mr Feen's belated complaints about FTI and attempts to explain his tardiness therefore wholly lacked conviction.

Sufficient basis for the use of O45 r 6

25 I was of the view, accordingly, that Mr Feen has not demonstrated any intention to comply with the agreed order of 9 April 2018. He has, instead, demonstrated contumelious conduct as envisaged in *Mok Kah Hong*. The purpose of the valuation report was for Mr Feen to purchase the shareholding of Viking Engineering in Viking Inert Gas. The component of the order encapsulating the agreement for Mr Feen to pay the valuation costs was in the nature of a consent judgment. Mr Feen had a duty to cooperate. Having failed to do so, he may not use his own failure to cooperate to stymie the process: see *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR (R) 634, [48] – [52].

26 From the outset, Mr Feen's strategy was to ignore FTI's requests and requirements, and to attempt to put off his potential liability to yet another day. His tardiness was but one aspect. His failure to tender the relevant documents resulted in additional time and effort on FTI's part to do investigative work in order to complete the valuation. FTI having done so, Mr Feen then ignored the invoice and reminders to pay. It was wholly expected, as set out in its letter of engagement, that FTI would not release its valuation without payment. Mr Feen

[13] Mr Feen's 5th affidavit, para 17.

[14] Ms Evelyn Moh's 9th affidavit, paras 24-5.

well knew that failure to pay would further stymie the court-ordered buy-out. While Mr Feen subsequently complained about the bill, and indeed even the discount which he considered arbitrary, he did not at any time suggest to FTI an alternative figure which he considered reasonable. It was clear from the facts that Mr Feen omitted to make any inquiry after receipt of FTI's invoice because Mr Feen was not genuinely interested to obtain the report or to proceed with the purchase of Viking Engineering's shares. This was therefore an appropriate case for the court to exercise its discretion under O 45 r 6(2).

Conclusion

27 I therefore ordered that Mr Feen pay the outstanding costs of the valuation exercise in the sum of $181,900 to the independent valuer, FTI, within 7 days of the Order of Court. Costs, inclusive of disbursements, were ordered in favour of Viking Engineering in the sum of $3,000.

Valerie Thean
Judge

Mahesh Rai s/o Vedprakash Rai and Ang Si Yi (Drew & Napier LLC) for the plaintiff;
Kelvin David Tan and Sara Ng (instructed counsel, Vicki Heng Law Corporation) and Byron Nicholas Xavier (Xavier & Associates LLC) for the defendants;