IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 249

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] — [Material non-disclosure]

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Tecnomar & Associates Pte Ltd
v
SBM Offshore N V

[2020] SGHC 249

High Court — Suit No 897 of 2019 (Registrar's Appeal No 166 of 2020)
Andre Maniam JC
25 August 2020

11 November 2020

Andre Maniam JC:

Introduction

1 The plaintiff applied *ex parte* and obtained leave to serve process on the defendant out of jurisdiction. The defendant then successfully applied to set aside the *ex parte* order allowing service, and the service that had been effected. The learned assistant registrar (the "AR") found that: (a) there was material non-disclosure in the plaintiff's *ex parte* application, which justified setting aside the order and the service; and (b) the plaintiff did not have a good arguable case under Order 11 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"). The plaintiff appealed against the AR's decision.

2 Before me, counsel for the plaintiff accepted that there *had* been material non-disclosure (see [122] below). But he contended that the plaintiff nevertheless had a good arguable case on the facts, all of which were now before

the court, and that the court should exercise its discretion to let the *ex parte* order, and the service, stand.

3 I however agreed with the AR and dismissed the plaintiff's appeal. The plaintiff has appealed against my decision, and these are my grounds.

Background

The plaintiff's case

4 The plaintiff is a Singaporean company. The defendant, a publicly-listed company incorporated in the Netherlands, is the holding company of the "SBM Offshore" group of companies, as stated in the defendant's annual report.[1]

5 The plaintiff's claim against the defendant was for breach of contract for services rendered to the "Yetagun FSO" (the "Vessel"), a floating storage and offloading ("FSO") unit, the plaintiff having undertaken the tank cleaning of the Vessel.[2]

6 The plaintiff claimed a contract between it and the defendant had been formed by an exchange of correspondence – specifically[3] that the plaintiff's quote in an e-mail of 10 April 2018 at 11.20pm (the "10 April Quote")[4] was accepted by an e-mail of 17 April 2018 at 11.56am (the "17 April E-mail")[5].

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1 Affidavit of Mr Paul David Hopkins ("Mr Hopkins") dated 10 October 2019, pages 13, 23-28

2 Statement of Claim (Amendment No 1) ("Amended SOC") paras 3-27

3 Amended SOC paras 7, 9

4 Affidavit of Thomas Chapman ("Mr Chapman") dated 15 November 2019, pages 227-228; Mr Hopkins' affidavit dated 10 October 2019 pages 46-60

5 Mr Hopkins' affidavit dated 10 October 2019, page 70

7 The plaintiff relied on the terms in the 10 April Quote, particularly clause 12. The Vessel had high levels of mercury, and clause 12 provided that in such an event, the plaintiff was to be indemnified and the contract was to be amended to take the appropriate remedial action.

8 After obtaining leave of court on 11 October 2019, the plaintiff effected service on the defendant in the Netherlands on 30 October 2019, and the defendant entered appearance on 4 November 2019. The plaintiff's position then was that the contract included six appendices, namely, Appendix 1 to Appendix 6.

9 The plaintiff however then amended its Statement of Claim ("SOC") on 25 November 2019 to delete reference to Appendix 6: see paragraph 9 of the Statement of Claim (Amendment No 1) (the "Amended SOC").

The defendant's case

10 The defendant denied the existence of any contract between it and the plaintiff. The defendant said that it was instead another company in the SBM Offshore group, South East Shipping Co Ltd ("SES"), that had contracted with the plaintiff. SES was a subsidiary of the defendant.[6]

Correspondence and discussions until the 17 April E-mail

11 On 30 March 2018, a Request for Quotation ("RFQ") was sent by one Lee Sok Ling ("Ms Lee") to the plaintiff's Paul Hopkins ("Mr Hopkins"), for "FSO Yetagun tank cleaning prior to recycling".[7]

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6 Mr Hopkins' affidavit dated 10 October 2019, pages 23-28 at page 25, S/No 12

7 Mr Chapman's affidavit dated 15 November 2019, pages 42-127

12 Ms Lee used the e-mail address SokLing.Lee@sbmoffshore.com. Her e-mail reflected her designation as "Supply Chain Buyer", had a "SBM Offshore" logo, and had a reference to the www.sbmoffshore.com website. It was copied to Carolina.Fonzar@sbmoffshore.com, the e-mail address of Carolina Fonzar dos Santos ("Ms Fonzar"), who was a Unit Operations Manager.[8]

13 Mr Hopkins replied on 6 April 2018 and attached the plaintiff's "Technical/Commercial proposal",[9] which the plaintiff referred to as the "6 April Quote".[10] The 6 April Quote referred to *four* appendices.[11]

14 The plaintiff amended the 6 April Quote on 10 April 2018, thereby producing the "10 April Quote"[12] (see paragraph 7 of the Amended SOC). The 10 April Quote referred to *five* appendices, the fifth of which (Port Agency and Crew Formalities) was included in an e-mail sent by Mr Hopkins on 10 April 2018 at 12.59pm.[13] The 10 April Quote was then attached to Mr Hopkins' e-mail of 10 April 2018, 11.20pm.[14]

15 On 11 April 2018 at 3.40pm, Ms Fonzar e-mailed Mr Hopkins seeking some clarifications.[15] The fourth of these was: "Will Tecnomar provide any

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8 Mr Chapman's affidavit dated 15 November 2019, pages 129, 271

9 Mr Chapman's affidavit dated 15 November 2019, pages 128-226

10 Amended SOC para 6

11 Mr Chapman's affidavit dated 15 November 2019, page 226

12 Mr Hopkins' affidavit dated 10 October 2019, pages 46-60

13 Mr Chapman's affidavit dated 15 November 2019, page 229

14 Mr Chapman's affidavit dated 15 November 2019, pages 227-228

15 Mr Chapman's affidavit dated 15 November 2019, page 227

contract to SBM or should it be done under a PO only? If you have a contract, would you please provide its draft?" Mr Fonzar e-mailed again that day (11 April 2018 at 6pm)[16] to say:

> Dear Paul
>
> Just one additional info, SBM is considering to make the work with you.
>
> We are still evaluating our options but we are tending to go for your proposal.
>
> If you can provide the draft of contract that you use to offer, I will appreciate and already share with my supply chain.
>
> Thank you

16 On 12 April 2018, Mr Hopkins replied by e-mail to Ms Fonzar.[17] He attached the plaintiff's "DRAFT Standard Terms and Conditions (Appendix 6)" for her review and comments.[18] He also provided clarifications in an attached "Annex 1",[19] which referred to the draft Appendix 6; the fourth clarification in Annex 1 reads as follows:

> Q. Will Tecnomar provide any contract to SBM or should it be done under a PO only? If you have a contract, would you please provide its draft?
>
> A. In this specific case and with the involvement of a 3rd party entity, ie the Shipyard, we will be operating at their facility and shall extend the Shipyard Standard Terms and Conditions, modified to suit this particular agreement.
>
> The Terms and Conditions of the agreement we will attach to our Technical and Commercial submission as an appendix (appendix 6) and subsequently shall be happy for SBM to issue TECNOMAR with a Purchase Order to carry out the work.

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16 Mr Chapman's affidavit dated 15 November 2019, page 235

17 Mr Chapman's affidavit dated 15 November 2019, pages 244-263

18 Mr Chapman's affidavit dated 15 November 2019, pages 244, 255-263

19 Mr Chapman's affidavit dated 15 November 2019, pages 244, 253-254

> Please find attached our first draft Terms and Conditions for your early review and approval.

17 Ms Fonzar replied on the same day, 12 April 2018, to say (among other things):[20]

> …
>
> I have shared the T&C with the supply chain for review.
>
> Attached you have SBM standard terms and conditions, it is tailored for offshore work.
>
> …
>
> Your quotation is valid for 7 days. Would be possible to have it extended for other 7 days?

18 The "standard terms and conditions" Ms Fonzar referred to are titled, "Purchase Order General Terms And Conditions" ("PO General T&C").[21]

19 There was then further correspondence between Ms Lee, Ms Fonzar and Mr Hopkins on 12 and 13 April 2018.[22]

20 On 16 April 2018, Ms Fonzar e-mailed three further questions to Mr Hopkins[23] and Mr Hopkins duly replied.[24]

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20 Mr Chapman's affidavit dated 15 November 2019, page 264

21 Mr Chapman's affidavit dated 15 November 2019, pages 296-303

22 Mr Chapman's affidavit dated 15 November 2019, pages 307-309

23 Mr Chapman's affidavit dated 15 November 2019, pages 306-307

24 Mr Chapman's affidavit dated 15 November 2019, pages 305-306

21 In her 17 April E-mail to Mr Hopkins, Ms Fonzar referred to Mr Hopkins' e-mail of 16 April 2018.[25] The plaintiff argues that its 10 April Quote was accepted by the 17 April E-mail, in which Ms Fonzar said:

> Dear Paul
>
> Thank you for the reply.
>
> I am working on the PO issuance today to Tecnomar. Due to the value, I have to get many approvals in my internal process.
>
> I will try to expedite the process and have it delivered to you latest tomorrow.
>
> Just for formality, I am confirming that the working is being awarded to Tecnomar.
>
> Just for update, the unit should be already free of its mooring lines but we had some delays for the mooring line disconnection, which is already the last phase of the disconnection.
>
> Soon the vessel will be out of the email range.
>
> Would you be able to provide a list of documents required to clear the vessel at its arrival?
>
> Thank you

22 There was further correspondence between Mr Hopkins and Ms Fonzar later the same day, on 17 April 2018.

23 Mr Hopkins replied to the 17 April E-mail to say (among other things), "Thank you so very much for sharing the news with me and for placing your trust with TECNOMAR & Associates. We look forward to delivering to you and SBM the very best of our professional services and solutions."[26]

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25 Mr Hopkins' affidavit dated 10 October 2019, page 70

26 Mr Chapman's affidavit dated 15 November 2019, page 304

24 Ms Fonzar e-mailed Mr Hopkins some comments on the draft Appendix 6 that Mr Hopkins had provided earlier (see [16] above); she said, "The queries is [*sic*] much more about the difference between the T&C and your proposal."[27] Evidently, Ms Fonzar did not think that she had formed a contract by the 17 April E-mail she had sent earlier that day, certainly not one incorporating the draft Appendix 6, which she was still commenting on. Nor did Mr Hopkins reply to say that any contract had been formed by the 17 April E-mail or to provide an indication that he thought the same.

25 Mr Hopkins simply replied to Ms Fonzar's request for a list of documents required to clear the Vessel;[28] Ms Fonzar responded by sending him the vessel certificates.[29] The Certificate of Registry[30] showed that the owner of the Vessel was SES.

26 The plaintiff's case was that, with the 17 April E-mail from Ms Fonzar, a contract had come into being between the plaintiff and the defendant. But had it? I consider this below at [49]–[92].

Purchase orders from SES, invoices to SES, and payment by SES

27 The next day, on 18 April 2018, Ms Lee e-mailed Mr Hopkins to say, "Please find attached a new purchase order from 'SOUTH EAST SHIPPING CO LTD' along with its Terms and Conditions."[31] She asked that Mr Hopkins

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27 Mr Chapman's affidavit dated 15 November 2019, pages 319-337

28 Mr Chapman's affidavit dated 19 June 2020, pages 62-63 and 65

29 Mr Chapman's affidavit dated 19 June 2020, pages 62, 80-110

30 Mr Chapman's affidavit dated 19 June 2020, page 80

31 Mr Chapman's affidavit dated 15 November 2019, pages 338-349

confirm receipt of the e-mail by clicking on the link provided (the "PO Acknowledgment Link") or the attached icon. She concluded by saying, "If you have any queries please contact me."

28 The attached purchase order ("PO") named SES as "Purchaser", and the plaintiff as "Supplier".[32] The PO bore the SBM Offshore logo, and included the PO General T&C[33] which Ms Fonzar had sent Mr Hopkins on 12 April 2018 – see [17]–[18] above. The invoicing instructions in the PO also indicated that SES was an "SBM Company" – the plaintiff was asked to "[m]ention SBM Company Invoicing name and address"[34] and the PO specifically stated that the plaintiff should issue and send its invoice to SES c/o SBM Holding Inc. SA (which was another company in the SBM Offshore group, not the defendant).[35]

29 The definitions in clause 1 of the PO General T&C include: "**PARTY** or **PARTIES** shall mean either the PURCHASER or the SUPPLIER or both."[36] [emphasis in original]. Clause 37 is an entire agreement clause which states, "The contents of this PO sets out the entire agreement between the PARTIES and supersedes any and all prior representations and agreements between the PARTIES relating to the subject matter contained herein and merge all prior discussions among them …" The dispute resolution clause (*ie*, clause 33) provides for disputes to be resolved by arbitration under the London Court of International Arbitration Rules, if such disputes are not settled amicably by

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32 Mr Chapman's affidavit dated 15 November 2019, page 339

33 Mr Chapman's affidavit dated 15 November 2019, pages 342-349

34 Mr Chapman's affidavit dated 15 November 2019, page 341

35 Mr Chapman's affidavit dated 15 November 2019, page 339

36 *Supra*, note 33

negotiation between the parties within 30 days of written notice of such a dispute.

30 On the terms of the PO, the contracting parties were SES and the plaintiff. The plaintiff would also have known from the PO that SES intended for the PO General T&C to apply to that PO, and any subsequent POs.

31 The defendant's evidence was that Mr Hopkins would have clicked on the PO Acknowledgment Link for that (and subsequent POs), otherwise the SBM Offshore group's systems would not have processed matters such as payment.[37] In his second affidavit, Mr Hopkins did not dispute these facts, other than to say he was advised and verily believed that these matters were not relevant to the plaintiff's application for leave to serve process out of jurisdiction.[38]

32 Mr Hopkins also provided Ms Lee with an e-mail acknowledgment of receipt on the same day, *ie*, 18 April 2018: "Many thanks for your kind PO for which we acknowledge receipt and have confirmed accordingly as per your instructions."[39]

33 Following the first PO,[40] SES issued a revised PO to increase[41] the amount payable by US$477,141 on account of certain variation works.

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37 Mr Chapman's affidavit dated 15 November 2019, paras 15, 18, 20

38 Mr Hopkins' affidavit dated 20 January 2020, para 15

39 Mr Chapman's affidavit dated 15 November 2019, page 350

40 Mr Chapman's affidavit dated 15 November 2019, para 14(k) and pages 338-349

41 Mr Chapman's affidavit dated 15 November 2019, para 18 and pages 353-356

34 Pursuant to the first PO, the plaintiff issued three invoices to SES;[42] pursuant to the revised PO, the plaintiff issued another invoice to SES.[43] SES paid the plaintiff on these invoices.[44]

35 SES issued several more POs to the plaintiff,[45] for which the plaintiff invoiced SES, and SES paid the plaintiff accordingly.[46]

36 The POs did not merely cover works within the 10 April Quote. PO 038.00596.011633 REV 00[47] was for a cold lay-up of the Vessel; clause 10 of the 10 April Quote stated that the agreement concerning the cold lay-up would be "a separate contract and does not form part of the FSO Yetagun Decontamination agreement".[48]

37 The defendant's case was thus that contracts between SES and the plaintiff had been formed on the terms of SES' POs and the PO General T&C, and that the plaintiff had indicated its agreement to those contracts by acknowledging receipt of the POs, proceeding with the works, invoicing SES, and accepting payment of those invoices from SES.

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42 Mr Chapman's affidavit dated 15 November 2019, pages 357-359

43 Mr Chapman's affidavit dated 15 November 2019, page 360

44 Mr Chapman's affidavit dated 15 November 2019, para 18

45 Mr Chapman's affidavit dated 15 November 2019, para 20 and pages 361-385

46 Mr Chapman's affidavit dated 15 November 2019, para 20

47 Mr Chapman's affidavit dated 15 November 2019, page 379

48 Mr Chapman's affidavit dated 19 June 2020, para 30(a); Mr Hopkins' affidavit dated 10 October 2019, page 52

The handover of the Vessel

38 On 3 May 2018, the Vessel was handed over to the plaintiff. The Handover Letter was on the letterhead of SES.[49] The letter was addressed to the plaintiff "[f]rom SES"; it stated that the Vessel "was handed over from SES / SBM Operations" to the plaintiff, and it was signed by Ms Fonzar "[f]or SES / SBM Operations".

39 Further to the handover of the Vessel and the Handover Letter, Mr Hopkins sent a letter the next day, on 4 May 2018.[50] Addressed to SES, the letter stated that the plaintiff would "[m]ake disclosure statement to the ship yard senior management basis early indication of these gas detection findings (TECNOMAR & Associates) on behalf of South East Shipping Co. Ltd. (SES)" and that "[u]pon the receipt of SGS laboratory report regarding these samples onboard, we will then share these reports with SES and the yard". Mr Hopkins also e-mailed a copy of the letter to Ms Fonzar.[51]

The "Soft Proposal"

40 The plaintiff put forward a "Soft Proposal" dated 17 July 2018 and described as "FSO Yetagun, the Complete Green Recycling Solution".[52] As stated on the cover page, the Soft Proposal was presented to SES c/o SBM Holding Inc. SA, and it was submitted to Ms Fonzar. Page 2 of the Soft Proposal[53] stated that the attached technical solution was for SES' consideration,

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49 Mr Hopkins' affidavit dated 24 March 2020, page 368

50 Mr Hopkins' affidavit dated 24 March 2020, page 370

51 Mr Hopkins' affidavit dated 24 March 2020, page 369

52 Mr Hopkins' affidavit dated 24 March 2020, pages 434-440

53 Mr Hopkins' affidavit dated 24 March 2020, page 435

and that "[t]hroughout this document, references to Tecnomar & Associates Pte Ltd shall either be 'Tecnomar' or 'CONTRACTOR' and references to South East Shipping Co Ltd shall be 'SES' or 'CLIENT'". Mr Hopkins e-mailed the Soft Proposal to Ms Fonzar on 18 July 2018.[54]

The sale of the Vessel

41 In or around late July 2018, SES sold the Vessel. Ms Fonzar spoke to Mr Hopkins about this on 31 July 2018; Mr Hopkins referred to this conversation in his e-mail to her that day[55] and raised three points for consideration, the third of which was: "With specific regard to the attached SES PO Number 038.00596.011631 RevO you will understand we require total PO value to be paid in full prior to FSO departure. Obviously with a change of ownership and an impending vessel departure our basis of security has diminished to zero yet our responsibilities and liabilities remain the same." Ms Fonzar replied the next day.[56]

42 Mr Hopkins then wrote on 8 August 2018,[57] stating (among other things):

> …
>
> Item 1
>
> We understand verbally from your good self that SES have sold the FSO Yetagun and under new ownership the vessel shall proceed for (green recycling.) …
>
> Item 2

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54 Mr Hopkins' affidavit dated 24 March 2020, page 433

55 Mr Hopkins' affidavit dated 24 March 2020, pages 444-445

56 Mr Hopkins' affidavit dated 24 March 2020, page 444

57 Mr Hopkins' affidavit dated 24 March 2020, pages 442-443

> … Current status: PT PELAYAN NASIONAL VARUNA SERVICITAMA (Kenny Lee) is appointed by TECNOMAR & Associates Pte Ltd as a function of our relationship with SES as owners. Once SES cease to be the Owners of FSO YETAGUN then we consider our instructions to the agent are without relevance and invalid. …
>
> Item 3
>
> …
>
> Further our concerns are basis, but not limited to the following concerns;
>
> 1. SES have sold the vessel.
>
> …
>
> 3. SES exists (as we understand the situation as previously advised) solely as owners of FSO Yetagun (What will happen to SES as an entity once FSO Yetagun is no longer an SES company asset?)
>
> …

43 Ms Fonzar addressed Mr Hopkins' concerns under item 3 as follows, in her reply of 8 August 2018:[58]

> …
>
> Item 3
>
> SES will continue after the unit is sold as it has ongoing obligations in relation to the recycling. SES will not be dissolved this year. If you are concerned that SES will 'disappear' after the sale, we can assure you that this will not be the case. SES will honor its obligations and we also wish to ensure that the waste disposal is done properly up to completion. In any event and as previously communicated to you, we are intending to settle the SES account with you prior to departure of the unit. However, in this regard, we are waiting to receive the final figures from you and need these urgently if we are to process the payments in time.
>
> …

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58 Mr Hopkins' affidavit dated 24 March 2020, page 442

The arbitration

44 On 28 May 2019, the plaintiff commenced arbitration against *both* the defendant and SES under the Rules of the Singapore Chamber of Maritime Arbitration (3rd Ed, October 2015) (the "SCMA Rules").[59] The plaintiff's claim in arbitration (as in this action) was under a purported contract based on the 10 April Quote having been agreed to on 17 April 2018.[60] Moreover, as with the original SOC in this action, the contract was said to include Appendix 6.[61] Indeed, the draft Appendix 6 contained the clause providing for arbitration under the SCMA Rules and which clause the plaintiff relied on.[62] The plaintiff acknowledged that it had issued invoices to SES and that it had received payment from SES.[63]

45 The solicitors for the defendant and SES replied on 11 June 2019 (the "defendant's Denial").[64] Paragraph 3 of the defendant's Denial read:

> It is denied that [the defendant] is a party to any contract with Tecnomar. It is denied that any alleged arbitration agreement exists between [the defendant] and Tecnomar. It is denied that the alleged arbitration agreement exists between SES and Tecnomar and it is denied that SES is party to a contract with Tecnomar on the terms of the alleged Agreement (as defined in the Purported Notice of Arbitration).

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59 Notice of arbitration – Mr Chapman's affidavit dated 15 November 2019, pages 386-392

60 Mr Chapman's affidavit dated 15 November 2019, page 388 para 6

61 Mr Chapman's affidavit dated 15 November 2019, page 389 para 7

62 Mr Chapman's affidavit dated 15 November 2019, pages 391-392 paras 17-21

63 Mr Chapman's affidavit dated 15 November 2019, page 389 para 8

64 Mr Chapman's affidavit dated 15 November 2019, pages 393-394

46 On 12 July 2019, the plaintiff's solicitors wrote to the parties' arbitrator-nominees (the tribunal had yet to be formed with the appointment of a third member) to convey that the plaintiff would not be proceeding with the arbitration, and that the defendant and SES had been informed of this.[65]

47 Some two months later, on 10 September 2019, the plaintiff commenced this action against the defendant alone.

Did the plaintiff have a good arguable case?

Relevant legal principles

48 For leave to serve process out of jurisdiction, a plaintiff must have a good arguable case that he has satisfied one or more of the limbs in O 11 r 1 of the ROC; a plaintiff has a "good arguable case" if he has "the better of the argument" (*Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 ("*Shanghai Turbo*") at [49]; *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 ("*Vinmar*") at [45]).

49 The plaintiff's claim against the defendant was for breach of contract for services rendered in respect of the Vessel. That was also the premise of its application for leave to serve process out of jurisdiction, in which the plaintiff relied on O 11 rr 1(*d*)(i) and 1(*d*)(iii) and O 11 r 1(*p*) of the ROC.[66]

50 The plaintiff thus needed to have a good arguable case that there was indeed such a contract between the plaintiff and the defendant.

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65 Mr Chapman's affidavit dated 15 November 2019, pages 395

66 HC/SUM 5063/2019, Mr Hopkins' affidavit dated 10 October 2019, paras 15-25

51 On the plaintiff's case that its 10 April Quote had been accepted by the defendant by way of the 17 April E-mail, such a contract would not have included Appendix 6: Appendix 6 was not part of the 10 April Quote and was only provided in draft by Mr Hopkins later, on 12 April 2018. The plaintiff thus did not have a good arguable case that there was a contract between the plaintiff and the defendant *that included Appendix 6*, which was the contract described in the plaintiff's original SOC and its application for leave for service out of jurisdiction.[67]

52 Did the plaintiff nevertheless have a good arguable case that there was a contract between itself and the defendant *that only included Appendices 1-5*? That was the plaintiff's case under the Amended SOC, after it had abandoned its original position that the contract included Appendix 6.

53 I found that the plaintiff did not have a good arguable case that it had *any* contract with the defendant.

It was not contemplated that a contract would be concluded by an exchange of correspondence on the 10 April Quote

54 Ms Fonzar considered that a contract might be formed in one of two ways: in the form of a draft contract from the plaintiff, or under a PO (see [15] above). She thus asked Mr Hopkins if he had a draft contract; in response, he provided Appendix 6 as that draft (see [16] above). On her part, Ms Fonzar sent Mr Hopkins the PO General T&C (see [17]–[18] above). The plaintiff's case was that although the discussions up to the 17 April E-mail only referred to two possible ways of forming a contract, Ms Fonzar had chosen a third method

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67 SOC para 6, Mr Hopkins' affidavit dated 10 October 2019, paras 11-12

instead: she had formed a contract by an exchange of correspondence – namely, by accepting the plaintiff's 10 April Quote by way of the 17 April E-mail. But that is an unlikely conclusion to draw.

55 Put another way, both Mr Hopkins and Ms Fonzar contemplated that any contract would not simply be on the terms of the plaintiff's 10 April Quote: for this reason, Mr Hopkins had provided the draft Appendix 6 as a draft contract, while Ms Fonzar had provided the PO General T&C. The plaintiff's case was that neither set of terms was eventually used, whereas the defendant's case was that SES had contracted with the plaintiff on SES' POs and the PO General T&C. The plaintiff did not have the "better of the argument" on this.

The contents of the 17 April E-mail did not support the plaintiff's case

56 The 17 April E-mail itself (see [21] above) stood against rather than for the plaintiff's case. In the e-mail, Ms Fonzar first informed Mr Hopkins that she was "working on the PO issuance today to [the plaintiff]". This suggested that Ms Fonzar was proceeding with the PO method of forming a contract, which would in turn imply that she had not contemplated that her 17 April E-mail alone would suffice for the formation of a contract with the plaintiff. Further, Ms Fonzar stated that she had to get many approvals in her internal process – that pointed to her not being in a position there and then to award a contract to the plaintiff.

57 The plaintiff relied on the following sentence in the 17 April E-mail: "Just for formality, I am confirming that the working is being awarded to Tecnomar." That sentence, however, cannot be read in isolation – it must be read in the context of the whole e-mail, and especially what Ms Fonzar had just said about working on the PO issuance and having to get many internal

approvals. But even if that sentence were read in isolation, the phrase "is being awarded" would appear to refer to a process that was underway, rather than concluded; Ms Fonzar did not say that a contract "is awarded", "was awarded" or "had been awarded", *etc*. Moreover, Ms Fonzar expressed that she was *still* in the process of "confirming" that the contract was being awarded to Tecnomar. The plain meaning of the sentence that the plaintiff relied on was clear – the contract had yet to be awarded to Tecnomar and Ms Fonzar had yet to obtain confirmation of the same – and did not assist the plaintiff.

58 Reading the 17 April E-mail in its entirety, and noting Ms Fonzar's reference to needing many internal approvals, the picture which emerged was that she did not form any contract with the plaintiff by the 17 April E-mail. The plaintiff's case was extreme: even if Ms Fonzar failed to get the internal approvals which she said she needed, she had nevertheless awarded a contract to the plaintiff by the 17 April E-mail. That would have either brought the party she represented into contractual relations with the plaintiff or exposed her to a claim for acting without authority. This argument and its consequences flew in the face of Ms Fonzar telling the plaintiff (in the same 17 April E-mail) that she still needed many internal approvals.

59 It was also curious that the plaintiff's case was that Ms Fonzar had accepted the plaintiff's 10 April Quote by the 17 April E-mail, but before me, the plaintiff did not contend that she had also accepted Appendix 6, which Ms Fonzar had in draft form by 17 April 2018. Appendix 6 contained an arbitration clause providing for arbitration according to the SCMA Rules, and indeed, the plaintiff had commenced arbitration against both the defendant and SES pursuant thereto. Thus, when the defendant applied to set aside the *ex parte* order and service in this action, it included an alternative prayer for a stay of proceedings under s 6 of the International Arbitration Act (Cap 143A, 2002 Rev

Ed). But the plaintiff abandoned the arbitration, the defendant withdrew the prayer for a stay, and the plaintiff amended its SOC to delete the reference to Appendix 6 that was originally in paragraph 9.

60 With the plaintiff having already put forward its proposed terms and conditions in the form of draft Appendix 6, was there still an offer on the terms of its 10 April Quote alone? And if (as the plaintiff seemed to accept before me) Ms Fonzar did not accept Appendix 6 by the 17 April E-mail, did she even accept the 10 April Quote by the same e-mail? As of 17 April 2018 when Ms Fonzar sent the 17 April E-mail, what the plaintiff had proposed was its 10 April Quote *and* the draft Appendix 6. The plaintiff cherry-picked the former and left out the latter, but it was questionable whether *any* contract had been formed by the 17 April E-mail.

The 17 April E-mail was not Ms Fonzar's last e-mail of the day

61 After sending the 17 April E-mail, Ms Fonzar corresponded further with Mr Hopkins that day. Ms Fonzar sent an e-mail commenting on the plaintiff's proposed terms in the draft Appendix 6 (see [24] above). This was inconsistent with her already having formed a contract by accepting the plaintiff's 10 April Quote. Mr Hopkins did not however respond to say that there was already a contract in place. Nor did Mr Hopkins provide such a response when he received the first PO from SES the next day, under cover of Ms Lee's e-mail (see [27]–[30] above). One would have expected him to clarify that there was a contract *with the defendant* on the terms of the *10 April Quote*, when presented with a PO *from SES* with the *PO General T&C*. Instead, Mr Hopkins proceeded to acknowledge the POs; the plaintiff invoiced SES thereafter and was paid by SES (see [31]–[36] above).

62 Later the same day, Ms Fonzar sent Mr Hopkins the vessel certificates, including the Certificate of Registry which showed that the owner of the Vessel was SES (see [25] above). If Mr Hopkins thought the plaintiff had by then contracted with the defendant, it was curious that he raised no issue about SES' being the owner of the Vessel. He would however later express concerns about SES' sale of the Vessel, and specifically about the impact of the sale on the plaintiff's security for payment for its work (see [41]–[43] above). Yet throughout the correspondence with Ms Fonzar, Mr Hopkins unquestioningly accepted that the Vessel had been sold *by SES*[68] – a fact that must surely have troubled him had he genuinely believed that the plaintiff had contracted with the defendant rather than with SES.

63 The plaintiff argued that Ms Fonzar had concluded a contract with the plaintiff by the 17 April E-mail because she was concerned that the plaintiff's 10 April Quote was only valid for seven days, and so if she did not accept it by 17 April 2018, she might be left with no contract with anyone. That is however not the impression one gets from reading the correspondence. In particular, Ms Fonzar said in the 17 April E-mail itself: "I am working on the PO issuance *today* to Tecnomar … I will try to expedite the process and have it delivered to you *latest tomorrow*." [emphasis added]. From that, it sounded like Ms Fonzar thought "PO issuance today", *ie*, on 17 April 2018, was still possible, or at least "latest tomorrow". If Ms Fonzar were concerned about the expiry of the plaintiff's 10 April Quote, one would have expected her to ask Mr Hopkins if he could extend its validity by one day, if need be. Ms Fonzar had in her earlier e-mail of 12 April 2018[69] asked if the 10 April Quote could be extended for

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68 Mr Hopkins' affidavit dated 24 March 2020, pages 442-443

69 Mr Chapman's affidavit dated 15 November 2019, pages 309-310

another seven days, and Mr Hopkins did not appear to have responded to this in the correspondence. Moreover, the 17 April E-mail was sent at 12.56pm, and Ms Fonzar went on to send two further e-mails later the same day, as I noted above. If Ms Fonzar were concerned about the 10 April Quote expiring, she could have waited till later in the day to see if she could get the necessary approvals and have a PO issued, before taking the drastic step of purportedly concluding a contract which she admittedly had no approval for.

From 18 April 2018 onwards, the plaintiff dealt with SES

64 The POs, invoices and payments all involved SES rather than the defendant (see [27]–[28], [30], [33]–[35] and [61] above). Likewise, the subsequent dealings, in terms of the handover of the Vessel, the Soft Proposal, and the sale of the Vessel, all pointed to SES (rather than the defendant) being the party that had contracted with the plaintiff (see [38]–[43] above).

65 Although there were various references to "SBM", those appeared to refer to the SBM Offshore group rather than to the defendant alone. SES owned the Vessel; SES handed the Vessel over to the plaintiff; the plaintiff addressed the Soft Proposal to SES; and it was SES who sold the Vessel. The plaintiff understood all of this full well – nowhere was this made clearer than in Mr Hopkins' e-mail of 31 July 2018 to Ms Fonzar, in which he stated that "our formal arrangements are with your good selves, (SES/SBM)" and that "we are in a position to only receive instructions from *yourself/SES* at this time"[70] [emphasis added].

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70 Mr Hopkins' affidavit dated 24 March 2020, page 444

It was contemplated that the plaintiff would contract with the Vessel owner (*ie, *SES)

66 The discussions tended to show that the intended contract would be between the plaintiff and whichever company in the SBM Offshore group was the owner of the Vessel, rather than with the defendant regardless of whether the defendant owned the Vessel. Thus, the RFQ provided by Ms Lee[71] contained various references to "Owner" and "Owners", with a "split of responsibilities" between the Contractor and the Owner.[72] The Owner's responsibilities included "[r]eview[ing] and approv[ing] Contractor procedures and other contractual and Technical documents".

67 The RFQ also referred to various SBM codes of practice, copies of which were provided to the plaintiff[73]; those codes of practice had the following copyright notification footer:

> Copyright © 2015 SBM Offshore N.V. and/or one or more of its subsidiaries and/or affiliates, as the case may be. This document is the property of SBM Offshore N.V. and/or one or more of its subsidiaries or affiliates. This document or any part thereof is confidential and may not be distributed, copied, multiplied, or used in any other way without the express written permission of the copyright holder(s). All rights are reserved.

68 That footer did not point specifically to the defendant; rather, it was a reference to the SBM Offshore group. The other references to "SBM" in the correspondence between the parties, and in other documents, similarly appeared to refer more generally to the SBM Offshore group (or one or more of the companies in it), instead of only to the defendant singly.

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71 Mr Hopkins' affidavit dated 24 March 2020, pages 47-131

72 Mr Hopkins' affidavit dated 24 March 2020, page 48

73 Mr Chapman's affidavit dated 15 November 2019, pages 43-127 at 50-127

69 The "sbmoffshore" e-mail addresses, like those which Ms Lee and Ms Fonzar used, were similarly generic, as was the www.sbmoffshore.com website which provided information on the SBM Offshore group and not just on the defendant. In particular, the website provided a link to the defendant's annual report (extracts of which were exhibited to Mr Hopkins' first affidavit), which described the defendant as the holding company of the SBM Offshore group and listed SES amongst the defendant's subsidiaries.[74]

70 The plaintiff's 6 April Quote[75] was provided in response to the RFQ and did not seek to change the premise that the plaintiff would be contracting with the owner of the Vessel (whichever SBM Offshore company that might be).

71 When the plaintiff in its 6 April Quote referred to the Vessel as "the SBM asset FSO Yetagun",[76] that did not appear to be an assertion that the Vessel was owned by the defendant rather than some other SBM Offshore company; rather, it seemed to be simply a general reference to the Vessel being an asset of the SBM Offshore group (which it was). In Mr Hopkins' e-mail of 8 August 2018 (see [42] above), he would refer to the Vessel more specifically as a "SES company asset".

72 When the plaintiff received the vessel certificates on 17 April 2018 which showed that the SBM Offshore company that owned the Vessel was SES, and thereafter received POs from SES, invoiced SES, and was paid by SES, at no point did the plaintiff take issue with the Vessel not being owned by the defendant. The flavour of the correspondence and documents was to the effect

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74 Mr Hopkins' affidavit dated 10 October 2019, pages 11-28 at 13 and 25

75 Mr Chapman's affidavit dated 15 November 2019, pages 128-226

76 Mr Chapman's affidavit dated 15 November 2019, pages 128-226 at 215

that the plaintiff intended to, and did, contract with the Vessel owner, namely, SES.

73 Similarly, the plaintiff's draft Appendix 6[77] stated at clause 1(f) that "'**Parties**' refers to both the Contractor and the Owner", and at clause 1(d) that '**Owner**' means the owner of the Vessel and/or demise (or bareboat) charterer of the Vessel and/or the employee master, authorised representative or agent of such owner and/or demise (or bareboat) charterer of the Vessel". Clause 21 was an entire agreement clause between the parties, *ie*, the Contractor and the Owner. Under clause 7, "the Owner shall pay for the Work immediately as invoiced by the Contractor on its completion". Clause 5 provided as follows:

> The Owner shall immediately notify the Contractor of any intended change of ownership of the Vessel during the performance of the Work and while payment in full or in part for the Work remains outstanding. Should there be an intended change of ownership before the Vessel departs the Contractor's premises, all Sum(s) in respect of the Work shall become immediately due and payable and the Owner must make full payment for the Work before the departure of the Vessel, notwithstanding any prior agreement for payment to be made by instalments. …

74 When the plaintiff was informed that SES had sold the Vessel, it invoked clause 5 of Appendix 6. Mr Hopkins sent an e-mail on 28 August 2018 to Peter Holst from the SBM Offshore group,[78] to say:

> …
>
> What we are reading is that you (SES) have delivered the FSO Yetagun to new ownership as of yesterday 28 August, 1140 Monaco time. Basis your confirmation and as per the attached our Standard Terms and Conditions, (in particular you will note Section 5) all invoices outstanding as per the attached notice to

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77 Mr Chapman's affidavit dated 15 November 2019, pages 255-263

78 Mr Chapman's affidavit dated 19 June 2020, page 39

> your Ms Carolina Fonzar (Billing to SBM) are immediately due and payable. Kindly remit to our account today.
>
> Notably and additionally, the change of ownership does not absolve SES of accrued liability. Even for newly incurred or ongoing liability these too become "immediately due and payable"
>
> …

75 The plaintiff invoked clause 5 of Appendix 6 as a contractual provision, but Appendix 6 was drafted as a contract between the plaintiff and the Vessel owner, *ie*, SES. Thus, the plaintiff was saying that because *SES* had sold the Vessel, clause 5 of Appendix 6 was triggered, with consequences for *SES* in terms of payment obligations and accrued liability. The "attached notice" which Mr Hopkins referred to was titled: "SES(FSO Yetagun) / TECNOMAR & Associates Final Balance Sheet (provisional) ETDeparture 31/08 from ASL batam or Handover to New Ownership".[79] The document had various other references to SES but no references to the defendant.

76 At that point in time, the plaintiff's position was evidently that it had contracted with the owner of the Vessel, *ie*, SES, and not with the defendant.

The parties' positions in the arbitration do not support the plaintiff's case

77 The plaintiff then claimed against *both* the defendant and SES in arbitration, the premise being that there was a contract which included Appendix 6 (which contained the relevant arbitration clause). The basis of including the defendant as a respondent was unclear: if Appendix 6 applied, the parties would be SES as Owner and the plaintiff as Contractor. The defendant

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[79] Mr Chapman's affidavit dated 19 June 2020, page 46

would not be a party to the contract, nor would it be a party to the arbitration agreement. Further, paragraph 8 of the Notice of Arbitration stated that invoices were issued by the plaintiff to SES "through the 1st Respondent", *ie*, the defendant, but that was factually wrong. The invoices were not issued to SES through the defendant; they were issued to SES through another company in the SBM Offshore group, SBM Holding Inc. SA (in accordance with the POs) – see [28] and [33]–[35] above. Similarly, paragraph 12 of the Notice of Arbitration referred to the Soft Proposal as "an amended quotation dated 18 July 2018", and stated that it was issued to the defendant, but the documents showed that the Soft Proposal was addressed to SES – see [40] above. The impression one gets is that the plaintiff knew that it had contracted with SES, but nevertheless wanted to bring in the defendant somehow.

78 The defendant's position was clearly stated in the defendant's Denial of 11 June 2019 – see [45] above. The defendant denied being a party to any contract with the plaintiff; SES was the party that would have contracted with the plaintiff, but not on the terms alleged by the plaintiff.

Was there one contract or were there two?

79 The plaintiff made a strained argument that there may have been two contracts: one between the plaintiff and the defendant on the terms of the plaintiff's 10 April Quote, and another between the plaintiff and SES on the terms of SES' POs. This did not make sense to me. If the plaintiff were already contractually bound to do the work *vis-à-vis* the defendant, it would add nothing for SES to then make another contract with the plaintiff (at least to the extent of the same work) with different terms and conditions. Nothing in the contemporaneous documents indicated that the plaintiff considered it had two contracts, with different parties, on different terms. Even the Notice of

Arbitration did not bear this out. It referred to a single "agreement" having been reached on 17 April 2018 (before the SES POs were issued from 18 April 2018 onwards).[80]

The defendant never admitted that there was a contract with the plaintiff

80 The plaintiff made another tenuous argument that the defendant had *admitted* the existence of a contract between the plaintiff and the defendant, on the terms of the 10 April Quote, by a portion of Thomas Chapman's ("Mr Chapman's") third affidavit.[81] This was an affidavit filed by Mr Chapman for the defendant's application to set aside the *ex parte* order for leave to serve process out of jurisdiction, and the consequent service of process. In his first affidavit, Mr Chapman had stated the defendant's position that "the contract for the Plaintiff's services was (i) not based on the Plaintiff's 10 April Quote and (ii) was not with the Defendant, but was with SES".[82] This continued to be his position in his second affidavit:[83]

> 13. First, and to clarify:
>
> (a) it is the Defendant's position that any contract with the Plaintiff was with SES, not the Defendant; and
>
> (b) there was no amendment to any contract between the Plaintiff and SES pursuant to the Soft Proposal. The Soft Proposal was merely what it is titled, a proposal, which was never accepted by SES (a fact which is even pleaded by the Plaintiff in paragraph 24(b) of the Statement of Claim).

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80 Mr Chapman's affidavit dated 15 November 2019, page 388 para 6

81 Mr Chapman's affidavit dated 19 June 2020, para 43(b)

82 Mr Chapman's affidavit dated 15 November 2019, para 16

83 Mr Chapman's affidavit dated 6 February 2020, para 13

81 Mr Chapman said the same in his third affidavit.[84] In paragraphs 7–23, he said that the plaintiff had contracted with SES, which was the Vessel's owner; in paragraphs 29–31, he said that the POs from SES had not been issued pursuant to the alleged contract on the basis of the 10 April Quote; he addressed the Handover Letter in paragraphs 32–34; he addressed the plaintiff's Soft Proposal to SES in paragraphs 35–44; he addressed SES' sale of the Vessel in paragraphs 45–47; and finally, he concluded at paragraph 48:

> 48. I have been advised and verily believe that the Plaintiff is unable to show that it has a good arguable case against the Defendant because:
>
> (a) The Plaintiff cannot show a good arguable case that the Defendant contracted with the Plaintiff; and
>
> (b) The Plaintiff cannot show a good arguable case that the Defendant is in breach of any alleged contract.

82 It is unlikely (to say the least) that in the midst of all that, Mr Chapman had admitted the exact opposite: that there *was* a contract between the plaintiff and the defendant on the terms of the 10 April Quote. But that was the plaintiff's argument.

83 This argument focused on what Mr Chapman said in paragraph 43(b) of his third affidavit:

> (b) Therefore, it cannot be said that the Defendant failed "to amend agreement to take the appropriate remedial action" as there was in fact an amendment to the 10 Apr Quote pursuant to Clause 12 by way the said Purchase Order. [emphasis in original omitted]

84 The plaintiff argued that this was an admission by Mr Chapman that there *was* a contract between the plaintiff and the defendant on the terms of the

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[84] Mr Chapman's affidavit dated 15 November 2019

10 April Quote, notwithstanding that Mr Chapman had said the opposite in his earlier affidavits and elsewhere in the same affidavit.

85 There was no such admission.

86 Mr Chapman was simply rebutting the plaintiff's contention that nothing was done in response to the high levels of mercury and benzene detected. Thus, in paragraph 41, he set out the narrative that Mr Hopkins had attempted to portray; in paragraph 42, he said that that narrative was wholly untrue; and then in paragraph 43, he said, "First, additional work was in fact carried out as a result of the identification of the benzene and mercury vapours that were discovered …" Paragraph 43(a) referred to one of *SES'* POs, and paragraph 43(b) stated: "Therefore, it cannot be said that the Defendant failed 'to amend agreement to take the appropriate remedial action' as there was in fact an amendment to the 10 Apr Quote pursuant to Clause 12 by way the said Purchase Order." [emphasis in original omitted].

87 Mr Chapman was just making the point that the plaintiff was wrong in asserting that nothing was done to address the high levels of mercury and benzene, when in fact SES had issued a PO to engage the plaintiff's services to address this issue, thereby incurring (and paying) "additional demucking cost due to the presence of hazardous component (benzene and mercury) that was identified during regular scale demucking form [*sic*] FSO Yetagun".[85]

88 What Mr Chapman said was to the effect that *if* clause 12 of the 10 April Quote were a term of the contract, requiring action to address high levels of

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[85] Mr Chapman's affidavit dated 15 November 2019, pages 376-378 at 377

mercury (and benzene), that term had been satisfied. He was not thereby admitting that the terms of the 10 April Quote (including clause 12) applied, or that there was any contract between the plaintiff and the defendant.

89 Putting the plaintiff's case at its highest, if paragraph 43(b) of Mr Chapman's third affidavit were an admission, it would be an aberrant admission adrift in a sea of consistent denial, flowing from the defendant's Denial of 11 June 2019 (see [45] above). Looking at everything which Mr Chapman said across his three affidavits, he was denying rather than admitting a contract between the plaintiff and the defendant on the terms of the 10 April Quote. In any event, that "admission" would not turn the tide, and the plaintiff would still be swimming against the current.

90 In *Vinmar* ([48] *supra*), the court found (at [49]–[51]) that the appellant did not have a good arguable case that the parties had agreed to the "Written Terms" in question; however, the court found (at [52]–[68]) that there was a good arguable case that the exclusive jurisdiction clause there had been incorporated by the parties' course of dealings into their contract.

91 In deciding if the plaintiff had a good arguable case, I undertook a similar exercise of reviewing the facts in the present case. I found that the plaintiff did not have a good arguable case that it had a contract with the defendant on the terms of the 10 April Quote.

92 With that finding, it follows that the order granting leave to serve process out of the jurisdiction, and the consequent service on the defendant, must be set aside. The AR was right to do so.

93 That result could however also be justified on the ground of material non-disclosure, as the AR decided, and which I agreed with. I address this below.

Should the *ex parte* order, and the service of process, be set aside for material non-disclosure?

Was there non-disclosure?

94 On an *ex parte* application, the applicant is obliged to make full and frank disclosure (see *Shanghai Turbo* ([48] *supra*) at [105]–[106]) – an obligation that includes mentioning material points that are unfavourable to the applicant's case.

95 There was much in the present case that was material yet not disclosed.

96 I start by reviewing the little that the plaintiff *did* disclose. Mr Hopkins' first affidavit[86] (which was filed in support of the *ex parte* application for leave to serve process out of jurisdiction) had just nine pages of text, 70 pages including exhibits.

97 Mr Hopkins asserted that there was a contract between the plaintiff and the defendant, formed through an exchange of correspondence: specifically that the plaintiff's 10 April Quote had been accepted by 17 April E-mail. He referred to paragraphs 3–22 of the SOC for particulars of the contract, and said that a copy of the contract was exhibited at pages 46–69 of his exhibit, and that the defendant's acceptance of the contract was exhibited at page 70 (the 17 April E-mail).

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86 Mr Hopkins' affidavit dated 10 October 2019

98 The supposed "contract" exhibited comprised the plaintiff's 10 April Quote running into 15 pages (pages 46–60 of the affidavit), together with Appendix 6 which was still titled "Appendix 6 (Draft)" (pages 61–69 of the affidavit).

99 The other documents exhibited in the affidavit were: extracts from the defendant's annual report (pages 11–28), the writ and the SOC (pages 29–45).

100 Although the plaintiff's case was that the contract had been formed through an exchange of correspondence, the only correspondence that was exhibited was the plaintiff's 10 April Quote and the 17 April E-mail. The other correspondence was not exhibited – not Ms Lee's 30 March 2018 e-mail with the RFQ, not the plaintiff's original 6 April Quote, not Mr Hopkins' covering e-mail of 10 April 2018 to which the 10 April Quote was attached, not the correspondence leading up to the 17 April E-mail, not the correspondence after the 17 April E-mail.

101 This gave the court an incomplete and misleading picture. Thus, the 17 April E-mail started with Ms Fonzar saying "[t]hank you for the reply" – but what "reply" from Mr Hopkins was she referring to? The only prior correspondence exhibited in Mr Hopkins' first affidavit was the 10 April Quote. If the court had the full correspondence, it would have seen that Ms Fonzar was *not* replying to the 10 April Quote in her 17 April E-mail; rather, she was replying to Mr Hopkins' 16 April 2018 e-mail that provided answers to certain questions she had raised.

102 Indeed, several e-mails were exchanged between the 10 April Quote and the 17 April E-mail. Significantly, those included Mr Hopkins' e-mail of

12 April 2018 attaching the draft Appendix 6.[87] It would have been apparent from that, that the 10 April Quote did not include the draft Appendix 6 that was provided only *two days later*. On the plaintiff's own case that the contract was formed by the 17 April E-mail accepting the 10 April Quote, the contract would not have included the draft Appendix 6. But the plaintiff told the court that the contract *did* include Appendix 6, and Appendix 6 was exhibited as part of the purported contract.

103 The court was none the wiser about the truth, because not only did the plaintiff misrepresent the position regarding the draft Appendix 6, the relevant correspondence which would have rebutted that misrepresentation was also not disclosed.

104 The full correspondence would also have shown that the draft Appendix 6 was never agreed upon; after the 17 April E-mail, Ms Fonzar wrote further the same day to provide comments on Appendix 6, which remained as a draft throughout (see [24] above).

105 Before me, the plaintiff claimed that it had mistakenly pleaded that the contract included Appendix 6, and Appendix 6 had mistakenly been included as an exhibit to Mr Hopkins' first affidavit. The plaintiff's solicitor filed an affidavit to explain the mistake, which was also addressed in Mr Hopkins' second affidavit.[88] But if the full correspondence had been disclosed, it would have shown that the draft Appendix 6 could not have been part of the contract formed in the manner asserted by the plaintiff.

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87 Mr Chapman's affidavit dated 15 November 2019, pages 244-263

88 Mr Hopkins' affidavit dated 20 January 2020, para 109 and pages 475-477

106 The full correspondence was also relevant to the plaintiff's assertion that a contract with the defendant had been concluded by an exchange of correspondence. By examining the correspondence, I concluded that the plaintiff did not have a good arguable case on this issue. But without the correspondence, the court would only have the plaintiff's assertions on the point and what the plaintiff had put before the court. In the event, there was a misrepresentation that the draft Appendix 6 formed part of the contract, and non-disclosure of correspondence – not just relating to the draft Appendix 6, but also to the process of contract formation more generally.

107 There was also non-disclosure of:

(a) the provision of the vessel certificates to the plaintiff on 17 April 2018, which named SES as the owner (see [25], [62], [72] above);

(b) the POs from SES to the plaintiff (see [27]–[36] above);

(c) the invoices from the plaintiff to SES (see [34]–[35], [61] and [64] above);

(d) the payments SES had made to the plaintiff (see [34]–[35], [61] and [64] above);

(e) the handover of the Vessel by SES to the plaintiff, and the Handover Letter from SES to the plaintiff (see [38]–[39] and [64]–[65] above);

(f) the Soft Proposal from the plaintiff to SES (see [40] and [64]–[65] above);

(g) the sale of the Vessel by SES, and related correspondence (see [41]–[43], [64]–[65] and [73]–[76] above);

(h) the arbitration which the plaintiff had commenced against the defendant and SES, which the plaintiff then withdrew (see [44]–[46] and [77]–[78] above); and

(i) the defendant's Denial, in which the defendant denied that it was a party to any contract with the plaintiff. The defendant's position was that it was SES that had contracted with the plaintiff; moreover, the contract was not on the terms of the plaintiff's 10 April 2018 quote, but on the terms of SES' POs (see [45] and [78] above).

Was the non-disclosure material?

108 The Court of Appeal stated in *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 ("*Zoom*") at [68]: "The test of materiality, which is an objective test, is whether the facts in question are matters that the court would likely take into consideration in making its decision …"

109 In *Shanghai Turbo* ([48] *supra*), which concerned an application for service out of jurisdiction, the Court of Appeal put it thus (at [106]):

> … the question ultimately is whether the facts which are disclosed are (*The Vasiliy Golovnin* at [91]):
>
> > '… sufficient for [the] purpose of making an informed and fair decision on the outcome of the application, such that the threshold of full and frank disclosure can be meaningfully said to be crossed.'

110 In relation to the draft Appendix 6, the non-disclosure (and indeed misrepresentation) was obviously material: the court was told that the contract included Appendix 6, which was exhibited to the supporting affidavit for the *ex*

parte application, but it turned out that the draft Appendix 6 had never been agreed to and did not form part of the contract. The misrepresentation and non-disclosure led the court to grant leave on the premise of a contract that included Appendix 6, a premise which was now discernibly wrong.

111 All the other categories of information and documents I have listed (at [107] above) are likewise material: they would likely have been taken into consideration by the court, and without them the court could not have made an informed and fair decision on the outcome of the application. I took them into account in evaluating whether the plaintiff had a good arguable case (see [49]–[92] above).

112 I considered the non-disclosure of the defendant's Denial to be particularly troubling. In this regard, the Court of Appeal in *The Vasiliy Golovnin* [2008] 4 SLR(R) 994 had stated at [87]:

> … [T]he duty imposed on the applicant requires him to ask what might be relevant to the court in its assessment of whether or not the remedy should be granted, and not what the applicant alone might think is relevant. This inevitably embraces matters, both factual and legal, which may be prejudicial or disadvantageous to the successful outcome of the applicant's application. It extends to all material facts that could be reasonably ascertained and defences that might be reasonably raised by the defendant. …

113 Here, the defendant's position – that SES was the contracting party with the plaintiff – was not just a defence that "might reasonably be raised"; it *had been raised* by the defendant when the plaintiff commenced arbitration. The plaintiff knew about the defendant's Denial, yet did not inform the court of it.

114 Whether or not the plaintiff thought there might be two contracts, one with the defendant and one with SES (as it sought to argue – see [79] above), the plaintiff knew that the defendant's position was that there was only one

contract, and that the contract was not with the defendant, but with SES. The plaintiff ought to have informed the court of that, but it did not.

115 Besides material *non-disclosure*, various facts were *misrepresented* to the court in the SOC, which Mr Hopkins' first affidavit referred to and exhibited:

(a) Paragraph 21 of the SOC said that several amendments were made to the contract (between the plaintiff and the defendant) to provide for works to be conducted by the plaintiff; but everything that was done in that regard, was done by POs from SES.

(b) Paragraph 22 of the SOC said that, as provided for under clause 12 (of the plaintiff's 10 April Quote), the plaintiff forwarded to the defendant, by an e-mail dated 18 July 2018, an amendment to the contract in the form of the Soft Proposal. In fact, the Soft Proposal was addressed to SES.

(c) Paragraphs 25–26 of the SOC said that the Vessel was sold by and removed from the yard by the defendant. In fact, SES owned the Vessel, SES sold the Vessel, and it was because of SES' sale of the Vessel that the Vessel was removed from the yard – and the correspondence showed that the plaintiff knew this full well.

116 All these facts related to the core issue of whether the defendant or SES had contracted with the plaintiff, and like the non-disclosures identified above, were material.

117 Other than in relation to Appendix 6, there was no attempted explanation of the litany of material non-disclosures and misrepresentations. Indeed, at first

instance, the plaintiff disputed whether there had been *any* material non-disclosure. The AR's notes recorded counsel for the plaintiff saying, "If Your Honour takes the position that this (*ie*, the defendant's Denial) should have been disclosed, humbly apologise and say that this was inadvertent error."[89] In saying that, the plaintiff did not concede that there was material non-disclosure: it merely said that *if the court were to find* there was material non-disclosure, then it would apologise and chalk it up as an inadvertent error.

118 The AR's conclusion (at [81] of her oral judgment) was: "The statement of claim and the Plaintiff's Order 11 application were completely silent on SES. Given the role of SES in the parties' dealings and the position that the Defendant has taken which was made clear to the Plaintiff in the context of the arbitration proceedings, I question whether it is even possible for the Plaintiff to have innocently omitted all mention of SES."

119 I would put it even more strongly: my conclusion was that the plaintiff had *deliberately* omitted all mention of SES (including the defendant having denied being the contracting party and pointing to SES instead). What was more, the plaintiff had replaced SES with the defendant, in its narrative of the additional works commissioned to deal with the mercury within the Vessel, the Soft Proposal, and the sale and removal of the Vessel (see [115] above).

120 Unlike the arbitration, where the plaintiff had proceeded against both the defendant and SES, and had referred to SES' POs, the invoices to SES and payments from SES, in this action the plaintiff tried to make SES disappear. In the SOC, the Amended SOC, the plaintiff's *ex parte* application, and Mr

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89 Transcript for HC/SUM 5780/2019 on 3 March 2020, page 16 lines 24–25

Hopkins' first affidavit, the only trace of SES was that it was innocuously listed in a long list of subsidiaries of the defendant.[90] The plaintiff gave the court no clue as to how significant SES was to the correspondence, documents and events in this matter – all of which were hidden from the court's sight.

121 Had the plaintiff been full and frank with the court, the court may well not have granted the *ex parte* order. Instead, the plaintiff gave the court the misleading impression that it had a neat and tidy case of a contract between the plaintiff and the defendant, for which the court should grant leave to serve out of jurisdiction. But the real picture was not so flattering to the plaintiff – indeed, not flattering at all.

122 Towards the end of the hearing before me, counsel for the plaintiff articulated the gravamen of the complaint as being non-disclosure of SES' role, the POs and the defendant's Denial. That did not capture the full extent and flavour of what the plaintiff had done here. But at least counsel finally acknowledged that *there had been non-disclosure*. He asked that the court nevertheless exercise its discretion to let the *ex parte* order and the service stand, a discretion recognised in *Zoom* ([108] *supra* at [92(c)]) and other cases. He acknowledged though that *Zoom* was not authority for the proposition that if a plaintiff had made out a good arguable case, non-disclosure on its part did not matter.

Did the material non-disclosure warrant setting aside?

123 If there has been material non-disclosure, the court may set aside the *ex parte* order; but the court has a discretion to continue the order or to make a new

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90 Mr Hopkins' affidavit dated 10 October 2019, pages 23-28 at 25, S/No 12

order (see *Tay Long Kee Impex Pte Ltd v Tan Beng Huwah (trading as Sin Kwang Wah)* [2000] 1 SLR(R) 786 ("*Tay Long Kee*") at [25], [33] and [35]). How that discretion is exercised "depends on the nature of the non-disclosure and the circumstances of the case" (*Tay Long Kee* at [33]).

124 In *Zoom*, the Court of Appeal decided not to set aside an *ex parte* order notwithstanding that there had been material non-disclosure, as it considered that what was undisclosed was not so material in all the circumstances as to warrant setting aside (at [69] of the judgment). In that regard, I found in the present case that what was undisclosed, and what was misrepresented, was *highly* material – indeed, it went to the heart of the issue of who had contracted with the plaintiff: the defendant or SES?

125 Another consideration is whether the non-disclosure (or misrepresentation) was innocent or deliberate. Even if non-disclosure were innocent, setting aside may be warranted (see *Tay Long Kee* at [25] and [27]). But if the non-disclosure were *deliberate*, it "must be a special case for the court to exercise its discretion not to discharge the *ex parte* [order]" (*Tay Long Kee* at [35]). In that case, the Court of Appeal agreed with the first instance judge that there had been deliberate suppression and that the non-disclosures could not be viewed as minor (*Tay Long Kee* at [31] and [35]); the Court of Appeal upheld the judge's decision setting aside the *ex parte* order and declining to grant a fresh order.

126 In the present case, the undisclosed information and documents were highly material; there was not just non-disclosure but also misrepresentation; and all of this was deliberate – the plaintiff went from claiming against both the defendant and SES in arbitration, to scrupulously avoiding any mention of SES

in this action against the defendant alone. In the circumstances of this case, setting aside was warranted.

Conclusion

127 I agreed with the AR that the plaintiff did not have a good arguable case for service of process out of jurisdiction, and that there had been material non-disclosure which warranted setting aside the *ex parte* order and the consequent service of process. I thus upheld the AR's decision, with costs to be paid by the plaintiff to the defendant.

Andre Maniam
Judicial Commissioner

Peter Gabriel, Nandwani Manoj Prakash, Henry Li-Zheng Setiono and Selina Naidu (Gabriel Law Corporation) for the plaintiff; Kenneth Tan SC (Kenneth Tan Partnership) (instructed), Loh Wai Yue, Alankriti Sethi and Chan Zijian Boaz (Incisive Law LLC) for the defendant.