

Yokogawa Engineering Asia Pte Ltd v Transtel Engineering Pte Ltd
[2009] SGHC 1

Case Number : OS 814/2008

Decision Date : 02 January 2009

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Lawrence Tan and Sandra Tan (Drew & Napier LLC) for the plaintiff; Vincent Chan (Chan & Goh) for the defendant

Parties : Yokogawa Engineering Asia Pte Ltd — Transtel Engineering Pte Ltd

Civil Procedure – Stay of proceedings – Whether arbitration proceedings should be stayed

Equity – Estoppel – Estoppel by representation – Prerequisites – Whether contractor's conduct and letter constituted operative representations – Whether subcontractor relied on contractor's representations – Whether subcontractor suffered detriment in reliance on contractor's representations

2 January 2009

Judith Prakash J:

Introduction

1 In October 2003, the plaintiff, Yokogawa Engineering Asia Pte Ltd ("the plaintiff"), was selected by Nacap Asia Pacific Sdn Bhd ("Nacap") to execute, complete and maintain the Supervisory Control and Data Acquisition, Telecommunications and Metering works to be carried out in Thailand and Malaysia ("the Works") for a project known as the Trans Thailand Malaysia (TTM) Project Gas Project, Onshore Pipeline System ("the Project").

2 By an agreement entered into between the plaintiff and the defendant, Transtel Engineering Pte Ltd ("the defendant"), on 26 January 2004 ("the Transtel Sub-Contract"), the defendant agreed to execute, complete and maintain the Works for the Plaintiff. The pertinent clause in the Transtel Sub-Contract reads as follows:

All disputes and differences which arise between the CONTRACTOR and the SUB-CONTRACTOR in connection with or arising out of the SUB-CONTRACT or the carrying out of the SUB-CONTRACT WORKS which cannot be settled amicably between the parties *shall be settled by arbitration, all in accordance with the provisions of Clause 20 of the General Conditions of SUB-CONTRACT*, which shall be deemed to have been set out in full in this Agreement. [emphasis added]

3 The Transtel Sub-Contract did not enclose a copy of the applicable General Conditions of Sub-Contract ("General Conditions"). The one and only copy provided by the plaintiff to the defendant during the tender process ("the defendant's version of the General Conditions") contained a dispute resolution clause, clause 19, which reads:

19.0 DISPUTES

19.1 All disputes arising out of or in connection with this SUB-CONTRACT which cannot be resolved amicably [sic] between the Parties shall be finally and exclusively settled by arbitration

in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one (1) arbitrator appointed in accordance with the said Rules.

19.2 The *venue of the arbitration shall be Singapore*, or such other place as the Parties may agree. The proceedings will be conducted in the English language.

19.3 The award shall be given in writing stating the reasons for the award. The finding of any arbitration hearing or proceedings shall be binding on the Parties. The award shall also contain a stipulation as to the allocation of the costs of the arbitration proceedings between the Parties.

[emphasis added]

The plaintiff submitted that this particular version of the General Conditions which contained clause 19 was outdated and invalid. In the plaintiff's version of the General Conditions of Sub-Contract ("the plaintiff's version of the General Conditions"), clause 20 reads:

20.0 DISPUTES

20.1 Any dispute concerning any question arising under this SUB-CONTRACT which is not disposed of by agreement shall be decided promptly by the Chairman of CONTRACTOR company, who shall furnish to SUB-CONTRACTOR a written copy of his decision. Such decision shall be final and conclusive unless within sixty (60) days from the date of receipt thereof SUB-CONTRACTOR shall deliver to CONTRACTOR a written notice, addressed to the Chairman of CONTRACTOR company that he desires that the controversy be submitted to arbitration. Pending decision from arbitration of a dispute, SUB-CONTRACTOR shall proceed diligently with the performance of the SUB-CONTRACT and in accordance with the decision of the Chairman of CONTRACTOR company. The notice of SUB-CONTRACTOR shall, if possible, already contain the name of the arbitrator he has appointed. Otherwise such notice stating the name of SUB-CONTRACTOR'S arbitrator shall be given within fourteen (14) days after SUB-CONTRACTOR'S first notice. CONTRACTOR shall appoint an arbitrator within sixty (60) days from the date of receipt of SUB-CONTRACTOR'S notice stating the name of his arbitrator.

20.2 Should the Arbitrators fail within sixty (60) days after the appointment of CONTRACTOR'S arbitrator to agree upon the appointment of an umpire, they, or either of them, should the other refuse to act, shall apply to the Arbitration Institute of the Ministry of Justice, Thailand, for an appointment of an umpire. The decision shall be by the majority vote of the arbitrators and the umpire, and shall be final, conclusive and binding upon the parties thereto. All arbitration proceedings shall be carried on in Thailand in accordance with the rules of the Arbitration Institute of the Ministry of Justice, Thailand. Each party shall bear the cost of its own arbitrator and its own Attorney's fees. The proportion in which each party is to bear the cost for an umpire, should one be appointed should be decided by the arbitrators, or in case they disagree, by the umpire.

[emphasis added]

4 On 5 February 2008, the ICC International Court of Arbitration ("the ICC") informed the plaintiff that the defendant had referred disputes which had arisen between the plaintiff and the defendant to be arbitrated under its jurisdiction pursuant to an arbitration clause in the Sub-Contract (*ie*, clause 19 of the defendant's version of the General Conditions). The plaintiff objected to the jurisdiction of the ICC on the ground that the defendant had relied on an outdated and invalid dispute resolution clause. After considering comments from both parties, the ICC decided that it had jurisdiction to hear and

decide the disputes.

5 Therefore, the plaintiff applied to this court for a stay of the arbitration proceedings commenced by the defendant and for an order that all disputes which arise between the plaintiff and the defendant in connection with or arising out of the Works be settled by arbitration in Thailand in accordance with the rules of the Arbitration Institute of the Ministry of Justice, Thailand. I dismissed the plaintiff's application. The plaintiff has appealed.

Estoppel by representation

6 The primary reason for my dismissal of the plaintiff's application is that I considered the plaintiff to be estopped, by virtue of its representations, from insisting that the dispute resolution mechanism relating to the Project is not arbitration in Singapore under the Rules of Arbitration of the ICC.

7 It is settled law that for a person to successfully raise the defence of estoppel by representation, three elements must be satisfied, namely, representation, reliance and detriment (see *United Overseas Bank Ltd v Bank of China* [2006] 1 SLR 57 at [18]). Therefore, the first question I had to consider was whether there was a representation by the plaintiff to the defendant.

Representation

8 In *Estoppel by Representation*, 4th Ed (Lexis Nexis, 2004) ("*Spencer Bower*") at para 1.2.2, Spencer Bower defines estoppel by representation of fact as follows:

Where one person ('the representor') has made a representation of fact to another person ('the representee') *in words or by acts or conduct*, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive) and with the result of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in proper manner, objects thereto. [emphasis added]

A representation may thus be by words or conduct. In my view, the plaintiff's conduct, taken as a whole, constituted a representation that the operative mechanism for dispute resolution was arbitration in Singapore under the Rules of Arbitration of the ICC. In particular, the plaintiff's letter dated 26 December 2007 constituted a written representation to the same effect.

The plaintiff's conduct in misleading the defendant constituted an operative representation

9 At the outset, I noted that the plaintiff only provided the defendant with one copy of the General Conditions, *ie*, the defendant's version of the General Conditions. This version of the General Conditions was furnished by the plaintiff when it invited the defendant to perform the system integration role of the Project which the plaintiff was tendering from Nacap. From then till the time of the signing of the Transtel Sub-Contract, the plaintiff did not furnish any newer version nor indicate to the defendant that its version of the General Conditions was outdated or no longer valid. Further, the Transtel Sub-Contract only made a reference to the General Conditions but did not enclose a copy of the same. In fact, as the Transtel Sub-Contract was pre-signed by the plaintiff and forwarded to the defendant thereafter for its counter signature, the plaintiff afforded the defendant no reason to suspect that its version of the General Conditions, as provided by the plaintiff, had been replaced by another version. In these circumstances, I accepted the defendant's submission that it

was not aware that there was a different version of the General Conditions, and had no reason to believe that its version of the General Conditions was not the applicable version to the Transtel Sub-Contract.

10 The plaintiff sought to rely on a portion of the Transtel Sub-Contract that read as follows:

AND WHEREAS the SUB-CONTRACTOR, *having studied and noted all the provisions of the MAIN CONTRACT* (other than the details of the CONTRACTOR'S prices there under) has agreed to execute, complete and maintain the SUB-CONTRACT WORKS... [emphasis added]

According to the plaintiff, this portion of the Transtel Sub-Contract placed the burden on the defendant to study all the provisions of the Main Contract, and if it had not received all the documents in relation to the Main Contract (these documents would include the General Conditions), to request the same from the plaintiff.

11 In my view, it would not be equitable for the plaintiff to be permitted to rely on this clause in this manner. The plaintiff had not only failed to provide the defendant with the General Conditions, it had provided the defendant with an invalid version of the General Conditions. The various versions of the General Conditions were the plaintiff's own documents. It would be reasonable to infer that it must have known that there was more than one version of the General Conditions, and that the different versions contained different dispute resolution clauses. Unless evidence to the contrary was adduced (which was not the case here), I was of the view that the plaintiff should be taken to know which version of the General Conditions it had provided the defendant with. Having furnished the defendant with an outdated or invalid copy of the General Conditions, the plaintiff must have known that the defendant would take this version, with its antecedent dispute resolution clause, to be the applicable version since the defendant had not been provided with any other version and had not requested the same from the plaintiff.

12 Knowing that the defendant would be misled into believing that its version of the General Conditions was valid, the plaintiff should have provided the defendant with an accurate and valid copy of the General Conditions when the Transtel Sub-Contract was being concluded so that the defendant would be clear about the bargain it was entering into. This the plaintiff did not do. The Transtel Sub-Contract was concluded and entered into on 26 January 2004. From this time until December 2007, the plaintiff did not provide the defendant with the plaintiff's version of the General Conditions. Nor was there even a hint from the plaintiff to the defendant that the defendant's version of the General Conditions might be outdated or invalid. As observed in *Spencer Bower* at 54, there is a duty to correct a continuing representation that a party knows to be incorrect:

There is such a duty of correction: to disclose a previous fraud by the silent party in relation to the subject matter of the contemplated transaction with the representee, *not to be economical with the truth so as to mislead, and to correct a continuing representation subsequently revealed to the silent part to be untrue* or rendered untrue by supervening events. [emphasis added]

Thus, the plaintiff had a continuing duty to correct the defendant's erroneous view as to the applicable dispute resolution mechanism but failed to do so for more than four years.

13 Although clause 20 was the dispute resolution clause incorporated into the Transtel Sub-Contract, the plaintiff had, by its conduct, misled the defendant into thinking that the wording of clause 20 was as found in clause 19 of the defendant's version of the General Conditions. To my mind, the plaintiff's conduct in so misleading the defendant constituted an operative representation capable

of supporting an estoppel by representation.

The plaintiff's letter dated 26 December 2007 constituted a written representation

14 Sometime in December 2007, the defendant engaged solicitors to issue a demand letter for payment of outstanding monies in relation to the Project and two other projects (which will be collectively referred to as "the three projects"). The two other projects were:

- (a) Sai Noi – North/South Bangkok Power Plants Gas Pipeline Project; and
- (b) Third Transmission Pipeline Project.

On 26 December 2007, the plaintiff replied, by way of letter, to the defendant's solicitors, referring to the dispute resolution clauses in the three projects and advised the defendant to follow the proper dispute resolution procedures as stated therein ("the plaintiff's letter"). In the plaintiff's letter, the three projects were defined in the heading as follows:

- 1. Trans Thailand Malaysia Project Gas Pipeline ("TTPP")
- 2. Sai Noi – North/South Bangkok Power Gas Pipeline Project ("SNP")
- 3. Third Transmission Pipeline Project ("TTM")

15 Pursuant to paragraph 4A of the plaintiff's letter, the plaintiff stated that for TTPP (which is defined by the Plaintiff as the Trans Thailand Malaysia Project Gas Pipeline, *ie*, the Project):

Clause 20 provides that any dispute shall be referred to arbitration in Singapore under the Rules of Arbitration of the International Chamber of Commerce.

The plaintiff's own letter thus instructed the defendant to resolve the dispute in relation to the Project by reference to arbitration in Singapore under the Rules of Arbitration of the ICC! The defendant admits that its solicitors had noticed, when preparing the request for arbitration, that the Transtel Sub-Contract referred to clause 20 instead of clause 19 of the General Conditions for dispute resolution. However, the defendant did not suspect that anything was amiss given the plaintiff's letter had stated clearly that clause 20 provided for arbitration in Singapore under the Rules of Arbitration of the ICC and this was exactly the same dispute resolution mechanism provided for in the defendant's version of the General Conditions.

16 It was only on 7 March 2008 that the defendant received the plaintiff's version of the General Conditions, which was enclosed with the plaintiff's letter to the Secretariat of the ICC disputing jurisdiction. The defendant's director, Tarek Abdel Tawab Mohamed Abdel Bary ("Mr Tarek"), testified in his affidavit that prior to 7 March 2008, neither he nor his colleagues had ever had sight of this document. While the plaintiff did not expressly admit this fact, it did not mount any serious argument that it had ever provided the defendant with the plaintiff's version of the General Conditions prior to March 2008. Therefore, I was minded to accept Mr Tarek's evidence.

17 As observed in *Handley, Estoppel by Conduct and Election* (Sweet & Maxwell, 2006) at para 4-008, "[w]here the representor's conduct is linked with an oral or written statement they must be considered together, and the conduct may speak more loudly than the words". Taking the plaintiff's conduct together with the written statement in the form of the plaintiff's letter, I was of the view that the plaintiff had clearly represented that the dispute resolution mechanism provided for in the

Transtel Sub-Contract, was arbitration in Singapore under the Rules of Arbitration of the ICC. As such, the plaintiff would be estopped from taking a contrary position if the defendant had relied on this representation to its detriment.

Reliance and detriment

18 For an estoppel by representation to arise, it must be demonstrated that a party was encouraged to act to his detriment by the representation such that it would be unconscionable for the party making the representation to insist upon his strict legal rights (see *Keppel Tatlee Bank Ltd v Teck Koon Investment Pte Ltd* [2000] 2 SLR 366 at [22]). The element of reliance requires that the representation *caused* the relevant conduct (see *Spencer Bower* at 90). The defendant requested arbitration from the ICC International Court of Arbitration in accordance with the dispute resolution mechanism specified both in clause 19 as well as the plaintiff's letter. As such, in my view, the element of reliance was fulfilled as the defendant's institution of arbitration proceedings in Singapore under the Rules of Arbitration of the ICC was caused by the plaintiff's representation that this was the mode of dispute resolution specified in the Transtel Sub-Contract.

19 It would also be unconscionable for the plaintiff to insist on its strict legal rights since the defendant had acted to its detriment in reliance on the plaintiff's representation. As stated in *Spencer Bower* at 116:

Detriment of any character which the law recognises as sounding in damages may found an estoppel; indeed, it is arguable that detriment need not be of a character sounding in damages if it amounts to an unfairness that equity would recognise and remedy... It may assume a wide variety of forms, such as... *incurring trouble and expense*. [emphasis added]

Up to the time of hearing, the defendant had paid an aggregate of US\$30,000 to the ICC as advance for costs for the said arbitration. The defendant was therefore liable to suffer the detriment of monetary loss and time wasted if the plaintiff was allowed to back away from its representation. Further time and expense would also be wasted if the defendant was required to institute arbitration proceedings in Thailand instead. Therefore, I was of the view that the defendant had acted to its detriment on reliance of the plaintiff's representation.

Conclusion

20 As all the elements of estoppel by representation were fulfilled, the plaintiff was estopped from asserting that the proper dispute resolution procedure is not arbitration in Singapore under the Rules of Arbitration of the ICC. Accordingly, I dismissed the plaintiff's application with costs fixed at \$4,000 plus reasonable disbursements.

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