Lian Teck Construction Pte Ltd v Woh Hup (Pte) Ltd and Others
[2004] SGHC 260

Case Number : OS 855/2004, RA 241/2004

Decision Date : 17 November 2004

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Ian de Vaz (Wong Partnership) for plaintiff; Lawrence Teh and Loh Jen Wei (Rodyk and Davidson) for defendants

Parties : Lian Teck Construction Pte Ltd — Woh Hup (Pte) Ltd; Shanghai Tunnel Engineering Co Ltd; NCC International Aktiebolag all trading as a partnership known as WH-STEC-NCC JV

Arbitration – Agreement – Scope – Whether arbitration clause in sub-contract having universal application to all claims plaintiff might have against defendants

Civil Procedure – Discovery of documents – Application – Pre-action discovery – Whether court having inherent jurisdiction to order pre-arbitration discovery – Whether plaintiff's affidavits in support of application for pre-action discovery stating "material facts pertaining to the intended proceedings" – Order 24 r 6(3) Rules of Court (Cap 322, R 5, 2004 Rev Ed)

17 November 2004

Lai Siu Chiu J:

The background

1 This was an action for pre-action discovery by Lian Teck Construction Pte Ltd ("the plaintiff") against Woh Hup (Private) Limited, Shanghai Tunnel Engineering Co Ltd and NCC International Aktiebolag (referred to collectively as "the defendants").

2 The plaintiff applied in the present Originating Summons ("the application") for, *inter alia*, orders that the defendants give discovery of the following documents pertaining to a contract made between the Land Transport Authority ("the LTA") as employer and the defendants as main contractors on 7 August 2001 ("the main contract") for a project known as Contract-825 Design, Construction and Completion of Stations at Millenia ("MLN"), Convention Centre, Museum ("MSM") and Dhoby Ghaut ("DBG") including tunnels:

(a) the letter of award issued to the defendants by the LTA;

(b) the main contract conditions and particular conditions;

(c) the main contract specifications (relating to earthwork only);

(d) the original master programme and subsequent amended master programmes and all recovery programmes issued in respect of DBG, MSM and MLN;

(e) all applications for extension of time submitted by the defendants and all replies thereto;

(f) all minutes of site meetings in which the defendants were in attendance;

(g) all monthly progress reports in respect of DBG, MSM and MLN;

(h) all monthly records/documentation and/or concrete control sheets evidencing the concrete casting dates for each bore at DBG, MSM and MLN (limited to sub-structure only); and

(i) all diaphragm wall records for DBG, MSM and MLN.

3 The application was heard on 4 August 2004 by an assistant registrar who granted an order in terms of items (a) to (d) above only. The defendants appealed against the decision of the assistant registrar in Registrar's Appeal No 241 of 2004 ("the Appeal") and asked for it to be reversed. I heard and dismissed the Appeal. The defendants have filed a notice of appeal against my decision (in Civil Appeal No 81 of 2004).

4 The plaintiff filed an affidavit by the plaintiff's director, Loh Teck Lok ("Loh"), to support the application, while the defendants filed an affidavit by their project manager, Per Jonsson ("Jonsson"), to oppose the application.

5 In his supporting affidavit, Loh deposed that the plaintiff was an earthwork sub-contractor of the defendants for the project, having been so appointed by a letter of award dated 27 July 2002 ("the sub-contract"). The sub-contract included the Conditions of Sub-contract dated 23 July 2002 ("the Conditions"). Loh alleged that the defendants partially terminated the sub-contract wrongfully in February 2004. The plaintiff elected on or about 5 March 2004 to treat the partial termination as a repudiation of the sub-contract by the defendants.

6 Loh deposed that following the termination, disputes and differences arose between the parties and pursuant to cl 23 of the Conditions ("cl 23"), the plaintiff intended to refer the disputes and differences to arbitration to which the defendants were likely to be a party.

7 Jonsson objected to the application on the following grounds set out in his affidavit:

(a) Items (a) to (c) of the application had been made available to the plaintiff earlier. This could be seen from p 13 of the preamble to the Conditions where it was stated that the plaintiff had been given a reasonable opportunity to inspect the main contract (save for detailed prices of the defendants). The plaintiff should not be asking for the documents again.

(b) The arbitration clause precluded the plaintiff from referring its dispute to arbitration until after the completion or alleged completion of the works. As the defendants had obtained an extension of five months for the scheduled completion date of 30 January 2006 on the main contract, this meant that the plaintiff could only commence arbitration in two years' time. The application was therefore premature and unnecessary.

(c) The massive scale of the project which commenced in August 2001 had, in the three and a half years' interval since that date, generated voluminous documents which, in relation to the plaintiff's request, consisted of 85 lever arch files.

(d) In relation to the minutes of meetings (item (g) of the application), the defendants had over 200 sub-contractors and had attended numerous site meetings with these sub-contractors which minutes did not concern the plaintiff's works or its allegations.

(e) Documentation pertaining to items (h) and (i) of the application ran into 35 lever arch files and if at all, the defendants should only be asked to produce summaries of the concrete

records and diaphragm wall records.

(f) In the light of the arbitration clause which bound both sides, the defendants were unlikely to be a party to court proceedings.

8 Before the hearing in the court below, the plaintiff filed a second affidavit by Loh in which it did a *volte-face*. Loh said that, having taken legal advice, the plaintiff did not necessarily regard the arbitration provision in cl 23 as being of universal application to all the claims the plaintiff had or might have against the defendants. The plaintiff no longer considered going to arbitration.

9 Loh deposed[1] that the plaintiff intended to institute legal proceedings against the defendants in the High Court for sums estimated to be in the region of about $2.5m. He added that the plaintiff had other claims against the defendants for damages, expenses and losses which might need to be assessed. Ascertaining whether a cause of action exists is one of the key reasons for which pre-action discovery is sought (*Kuah Kok Kim v Ernst & Young* [1997] 1 SLR 169 ("the *Kuah* case")).

10 Loh disagreed with the defendants' interpretation of the arbitration clause and asserted that the plaintiff did not accept that cl 23 had been drafted so widely as to apply to every conceivable dispute or alleged dispute.

The submissions

The plaintiff's arguments

11 The plaintiff submitted that the arbitration clause would not apply so as to preclude it from commencing legal proceedings against the defendants for wrongfully terminating the sub-contract.

12 It would be appropriate at this stage to set out the relevant extract from cl 23; it reads:

> Provided always that in case any dispute or difference except a dispute or difference as to rates of wages or conditions of employment of workmen employed by the Sub-Contractor in and for the purpose of this Sub-Contract including workmen employed by the authorised Sub-Contractor engaged directly by the Sub-Contractor shall arise between the Main Contractor and the Sub-Contractor, either during the progress or after completion of the Works, or after the determination, abandonment, or breach of this Sub-Contract, as to the construction of this Sub-Contract or as to any matter of [*sic*] thing of whatsoever nature arising out of, or, in connection therewith or as to the withholding by the main contractor of any payment certificate to which the Sub-Contractor may claim to be entitled, then either party shall give to the other notice in writing of such dispute or difference and such dispute or difference shall be referred to arbitration. … Such reference, except on the question of certificates shall not be commenced until after the completion or alleged completion of the works …

13 Relying on the underlined portions of cl 23, the plaintiff submitted that the plaintiff and/or the defendants were only obliged to go to arbitration on specific disputes, *viz* those relating to the construction of, or any matter arising in connection with, the sub-contract and on disputes relating to payment certificates which the plaintiff claimed to be entitled to. Similarly, the moratorium in cl 23 would only apply to such disputes. Consequently, the plaintiff was not barred from going to court on its claim for wrongful termination of part of the sub-contract.

14 Even if the plaintiff was wrong in its interpretation of cl 23, its counsel argued that the court

had an inherent jurisdiction to grant pre-action discovery, based on O 24 r 6(1) of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) ("the Rules"), read with para 12 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) ("the SCJA").

15 Order 24 r 6(1) of the Rules states:

> An application for an order for the discovery of documents before the commencement of proceedings shall be made by originating summons in Form 7 and the person against whom the order is sought shall be made defendant to the summons.

16 Paragraph 12 of the First Schedule to the SCJA (which sets out the additional powers of the High Court) reads as follows:

> **Discovery and interrogatories**
>
> Power before or after any proceedings are commenced to order discovery of facts or documents by any party to the proceedings or by any other person in such manner as may be prescribed by Rules of Court.

17 The plaintiff also relied on O 24 r 6(3) of the Rules which states:

> A summons under paragraph (1) or (2) shall be supported by an affidavit which must —
>
> (a) in the case of a summons under paragraph (1), state the grounds for the application, the material facts pertaining to the intended proceedings and whether the person against whom the order is sought is likely to be party to subsequent proceedings in Court;
>
> (b) in any case, specify or describe the documents in respect of which the order is sought and show, if practicable by reference to any pleading served or intended to be served in the proceedings, that the documents are relevant to an issue arising or likely to arise out of the claim made or likely to be made in the proceedings …

for the proposition that it would suffice for the plaintiff to say that the party from whom discovery was sought was *likely* to be a party to subsequent proceedings, not that the party *had to be* the party to subsequent proceedings. It was conceivable in some instances that the party from whom pre-action discovery was sought was a third party who was in possession of documents, but that third party was not likely to be a party to subsequent court proceedings.

18 The court must have the same power to grant discovery where arbitration proceedings were contemplated. Otherwise, the plaintiff would have no recourse as the arbitral tribunal would not have been constituted; the plaintiff would have no avenue other than the courts. As a matter of policy, the court's inherent powers and jurisdiction could never be completely ousted by the presence of a private agreement to arbitrate, relying on O 92 r 4 of the Rules. For that reason, a stay of legal proceedings in the face of an arbitration clause and/or agreement was a discretionary, not mandatory, relief granted under s 6 of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the Act").

The defendants' arguments

19 The defendants put forward opposing arguments. Their counsel contended that cl 23 was all-encompassing and did not have the restrictive interpretation placed on it by the plaintiff.

20 The court had no power to order pre-arbitration discovery of documents. Section 18 of the SCJA referred to powers vested in the High Court by written law and included the powers in the First Schedule but there were no powers accorded to the court in the Act. Indeed, s 31 of the Act provided powers to the court in support of arbitration proceedings which had already commenced. Even O 69 of the Rules, which set out the procedure in relation to arbitration proceedings, made no reference to pre-arbitration discovery. The reference to *any proceedings* in para 12 of the First Schedule (see [16] above) could only be a reference to court proceedings, not arbitration proceedings. That would be the only permissible interpretation as the SCJA was concerned with proceedings in the superior courts of Singapore. This interpretation was reinforced by the reference to *proceedings* in paras 4, 5, 6, 9 and 19 of the First Schedule.

21 Counsel pointed out that Loh's second affidavit had abandoned arbitration as the sole ground for discovery. However, Loh's reference therein to court proceedings was vague and tentative. Loh did not elaborate on the precise claims which the plaintiff intended to institute against the defendants in court. If the claims were admitted by the defendants, court proceedings would in any event be unnecessary. If the claims were disputed, the disputes would have to be referred to arbitration pursuant to cl 23.

22 Loh's second affidavit also failed to comply with O 24 r 6(3) in that he had not demonstrated that the documents were relevant to an issue arising or likely to arise out of the claims likely to be made, relying on the *Kuah* case ([9] *supra*) and *Bayerische Hypo- und Vereinsbank AG v Asia Pacific Breweries (Singapore) Pte Ltd* [2004] 4 SLR 39 ("the *APB* case").

23 In any case, Loh had not shown the necessity for early discovery as the plaintiff seemed to be able to estimate that the aggregate sum of its claims would be $2.5m and had identified its claims to be for damages, expenses and losses which might need to be assessed. There had to be grounds for pre-action discovery as the normal course was to apply for ordinary discovery after commencement of proceedings. Order 24 r 6(3) should not be used for "fishing" expeditions.

The decision

24 In dismissing the Appeal, I affirmed the order made by the assistant registrar on the basis that the documents ordered below to be discovered from the defendants were to be used for court proceedings if the plaintiff decided to pursue its claim, but not for arbitration. I further extended the time for the defendants to comply with the order for discovery.

25 Although the court below was of the view that the inherent jurisdiction of the court could not be ousted by an arbitration clause or agreement, I was much less confident. The arguments of counsel for the defendants, based on a reading of s 18 of the SCJA in conjunction with the First Schedule, O 24 r 6 and O 69 of the Rules, as well as s 31 of the Act, cast some doubts on whether the court's inherent jurisdiction would extend to ordering pre-arbitration discovery.

26 Counsel for the plaintiff had, upon my inquiry, confirmed that his client did indeed intend to commence a suit against the defendants for, *inter alia*, wrongful termination of the sub-contract. Hence, I made the orders which I did as there was no necessity to decide whether Singapore courts have the jurisdiction to order pre-arbitration discovery.

27 I turn next to the case cited by both parties, for the principles applicable in an application for pre-action discovery. In the *Kuah* case, the applicants for pre-action discovery were Kuah and the other appellants. The appellants were minority shareholders in a company ("CLLS") and had agreed to sell their shares to the majority shareholders at a price to be valued. The respondents ("E&Y") were

appointed to provide a non-speaking valuation and they valued the shares at $2.15 per share. The appellants sold their shares at that price to the majority shareholders. The appellants subsequently obtained a valuation from another accounting firm which valued the shares at between $3.17 to $3.26 per share. That firm provided a brief statement of the various methods of valuation which it had used and the methods which it had considered inappropriate.

28 The appellants requested E&Y to disclose their valuation but E&Y refused, stating they had agreed to a non-speaking valuation. The appellants commenced proceedings for pre-action discovery against E&Y under O 24 r 7A of the Rules of the Supreme Court 1990 which then governed the application, which provision is similar to O 24 r 6 of the Rules. The appellants applied for the working papers which E&Y had used or referred to in determining their valuation, to enable the appellants to decide whether to bring an action against E&Y for breach of contract or negligence.

29 The assistant registrar granted the appellants' application and ordered E&Y to give discovery of documents or working papers used in the valuation of the shares of CLLS. However, the trial judge allowed E&Y's appeal in part and varied the order to exclude working papers created or prepared by E&Y.

30 The appellants' appeal was allowed by the Court of Appeal. The appellate court held that the plaintiff in an action for pre-action discovery had a duty to set out the substance of his claim to enable a potential defendant to know the essence of the complaint against him. The safeguards in O 24 r 7A (now O 24 r 6 of the Rules) were to ensure that the plaintiff was not allowed to go on a fishing expedition. Although the affidavit to support such an application should state the cause of action, it was not necessary to give particulars of it, although it might be desirable. The rule did not state that particulars of the cause of action must be given. Moreover *material facts* under sub-r (3)(a) did not mean all the facts sufficient to constitute the elements of the cause of action; so long as the appellants stated the facts sufficiently to explain why pre-action discovery was necessary, this was adequate.

31 The defendants had also relied on the *APB* case which I now turn to. There, a number of foreign banks in Singapore, including the plaintiffs, had extended loans of various amounts purportedly to a company, APB. The finance manager of APB during that period, Chia Teck Leng ("Chia"), had deceived the banks into thinking that the borrower was APB, by forging the signatures of the directors of the company on various resolutions. The resolutions purportedly signified the company's acceptance of the loans and the appointment of Chia as the authorised sole signatory for the loans. Chia was charged for cheating and forgery to which he pleaded guilty and was convicted.

32 The banks applied for pre-action discovery against APB under O 24 r 6(3) of the Rules, which application was granted by the assistant registrar. On appeal, the order for discovery was reversed by Belinda Ang Saw Ean J on the ground that the plaintiffs had not made out their case under O 24 r 6(3)(b) based on the twin tests of *relevancy* and *possession, custody or power*. The basis put forward by the plaintiffs for seeking pre-action discovery was their disbelief that APB had no knowledge of the unauthorised accounts and the unauthorised loans taken by Chia. However, a disbelief of APB's position itself could not be a sufficient reason for seeking pre-action discovery.

33 Applying the *ratio decidendi* of the *Kuah* and *APB* cases to our case, it appeared to me that the plaintiff had satisfied the requirements of O 24 r 6(3) by Loh's affidavits. In his first affidavit, Loh had deposed that part of the plaintiff's sub-contract had been wrongfully terminated. He had exhibited the relevant documents which included the defendants' letter dated 19 February 2004 ("the termination notice") partially terminating the sub-contract pursuant to cl 16(a)(ii) of the Conditions. Loh also set out the issues likely to arise from such a claim (albeit for arbitration at that stage) in the

affidavit[2]. In his second affidavit, Loh deposed that the plaintiff had claims against the defendants for work done under the sub-contract. Surely, the plaintiff thereby stated the *material facts pertaining to the intended proceedings* as required under O 24 r 6(3)(a), and the defendants were fully aware that they were the likely party to be sued in subsequent proceedings, as they were the authors of the termination notice.

34 The plaintiff had also proved that the documents were *relevant* under O 24 r 6(3)(b). The documents ordered to be discovered by the court below related to items (a) to (c) of the application. The letter of award forming the main contract between the defendants and the LTA and the attendant conditions and specifications were obviously relevant. In his affidavit, Jonsson did not dispute their relevancy but only contended that the plaintiff had been given sight of them earlier.

35 Item (d) was equally relevant as the defendants had given the plaintiff the termination notice based on breach of cl 16(a)(ii) of the Conditions and had expressed disappointment therein with the plaintiff's progress and overall performance throughout the duration of the sub-contract. The defendants had concluded the notice by reserving their rights to claim against the plaintiff for all additional costs associated with employing another sub-contractor to complete the MLN station earthworks on the plaintiff's behalf. In order for the plaintiff to found a claim for wrongful termination, it would need to know the defendants' original master programme and any amendments in relation thereto to ascertain the basis for the issuance of the notice of termination and how the plaintiff's overall performance had affected the progress under the master programme.

36 Counsel for the defendants had put forward, as an ancillary argument, that the plaintiff's intended legal proceedings in any case would be stayed by reason of the arbitration provision. I rejected that argument because it was premature. If and when the plaintiff commenced its suit, the defendants could take this objection at the appropriate time. It was not for the court at this juncture to decide whether cl 23 should be upheld and the plaintiff be ordered to arbitrate on its dispute with the defendants. It may well be that the court would refuse a stay of proceedings because the ambit of cl 23 did not cover the termination of the plaintiff's sub-contract, as its counsel contended before me.

37 For the foregoing reasons, I dismissed the Appeal.

---

[1] See his para 5 of his affidavit

[2] Para 85 of Loh's first affidavit

Copyright © Government of Singapore.