Shanghai Construction (Group) General Co. Singapore Branch *v* Tan Poo Seng [2012] SGHCR 10

Case Number : Suit No 146 of 2012 (Summons No 3323 of 2012)

Decision Date : 27 July 2012

Tribunal/Court : High Court

Coram : Eunice Chua AR

Counsel Name(s) : Mr Patrick Ong (David Ong & Co) for the plaintiff; Mr Tan Tian Luh (Chancery Law Corporation) for the defendant.

Parties : Shanghai Construction (Group) General Co. Singapore Branch — Tan Poo Seng

Civil Procedure

27 July 2012 Judgment reserved.

AR Eunice Chua:

Introduction

1 This application was for a stay of proceedings pending the resolution of Originating Summons No 119 of 2012 ("OS119/2012") or, in the alternative, pending the resolution of "intended arbitration" between the plaintiff in this action and Top Zone Construction & Engineering Pte Ltd ("Top Zone"). After hearing the submissions of counsel I reserved judgment to fully consider the authorities cited to me, particularly because I was invited to grant the stay in exercise of the inherent jurisdiction of the court pursuant to O 92 r 4 of the Rules of Court (Cap 332, R 5, 2006 Rev Ed) ("the Rules").

Factual background

2 The plaintiff is a foreign company registered in Singapore and is in the construction business, including providing services as general contractors. The defendant is a director and shareholder of Top Zone, a company also involved in the construction business.

3 On 24 February 2012, the plaintiff filed a writ of summons and statement of claim against the defendant. The following events are described in the statement of claim.

4 On 23 June 2010, the plaintiff entered into a sub-contract agreement with Top Zone for certain building works required in a lift upgrading programme. In June 2011, Top Zone requested the plaintiff to make direct payment to Top Zone's subcontractors. On 15 June 2011, the plaintiff paid a total of $454,451.60 to Top Zone's subcontractors.

5 As "security" for the plaintiff's direct payments to Top Zone's subcontractors, however, the defendant issued a United Overseas Bank cheque for the sum of $450,000 dated 16 June 2011 ('the UOB cheque") in favour of the plaintiff.

6 Sometime later, in breach of the sub-contract agreement, Top Zone stopped the building works and withdrew from the site on or about 19 July 2011. Because no repayment of the sum of $454,451.60 was forthcoming from Top Zone, on or about 10 October 2011, the plaintiff presented the UOB cheque for payment. However, the cheque was dishonoured on the grounds that payment

had been stopped.

7 The plaintiff's claim against the defendant is therefore based on the UOB cheque. The defendant does not dispute the above account, save to take the position that there was another crucial term to the arrangement for the plaintiff to make direct payments to Top Zone's subcontractors, i.e. that the plaintiff would recoup the payments in two deductions from the progress claims paid by the Housing and Development Board; that there had been a settlement between Top Zone and the plaintiff; and the plaintiff was not entitled to present the UOB cheque for payment. Additionally, the defendant also claimed that the plaintiff's conduct in presenting the UOB cheque for payment was unconscionable because of its part in delaying the building works and its failure to properly value payments to Top Zone.

8 Before the plaintiff commenced suit against the defendant, however, it had on 6 February 2012 made a demand on a performance bond obtained by Top Zone from India International Insurance Pte Ltd under the subcontract agreement. On 13 February 2012, Top Zone filed OS119/2012 seeking an injunction to restrain the plaintiff from receiving payment under the performance bond and to restrain India International Insurance Pte Ltd from paying the plaintiff, pending the final determination of the "intended arbitration" between the plaintiff and Top Zone. The injunction application was heard on 18 July 2012 by Justice Andrew Ang, who granted it.

9 It is common ground between the parties in this suit that there are numerous disputes between the plaintiff and Top Zone arising from the subcontract agreement (including whether there was a breach of the subcontract agreement, whether there was delay on the part of Top Zone, whether the plaintiff had under-certified Top Zone's claims, and whether there was a settlement between Top Zone and the plaintiff in July 2011), and that the subcontract agreement contains a provision for arbitration. The "intended arbitration" between the plaintiff and Top Zone, however, has not been commenced.

Issue

10 In the light of Justice Ang's decision in OS119/2012, the only issue I had to decide was whether the circumstances of the case justified the court exercising its inherent jurisdiction to stay proceedings between the plaintiff and the defendant until the "intended arbitration" between the plaintiff and Top Zone was resolved.

The law

11 The defendant relied heavily on the English High Court's decision in *Reichhold Norway ASA & Anor v Goldman Sachs International* [1999] CLC 486 ("*Reichhold (HC)*"), which was upheld by the English Court of Appeal in *Reichhold Norway ASA and another v Goldman Sachs International* (2000) 1 WLR 173 ("*Reichhold (CA)*"), as precedent for its application. In *Reichhold (CA)*, the English Court of Appeal upheld Moore-Bick J's decision to grant a stay of proceedings in England pending arbitral proceedings in Norway in order that the main dispute between the plaintiffs and the Norwegian company relating to the sale of a subsidiary of the Norwegian company to the plaintiff could be resolved before the plaintiffs' claim against the defendant for negligent misstatement in the course of providing financial advice relating to the sale.

12 Reference was further made to more recent cases where *Reichhold (CA)* was followed and applied in both England (*Citigroup Markets Ltd v Amatra Leveraged Feeder Holdings Ltd* [2012] EWHC 1331; *ET Plus SA and others v Jean-Paul Welter and others* [2006] 1 Lloyd's Rep 251) ("*ET Plus*") and Canada (*Jardine Lloyd Thompson Canada Inc v Western Oil Sands Inc* [2006] ABQB 933 ("*Jardine*

Lloyd Thompson Canada").

13 The defendant stressed that its application for a stay was not brought pursuant to the Arbitration Act (Cap 10, 2002 Rev Ed) but was based on the inherent jurisdiction a court had "to manage its own business with due regard to the resources available to it and the interests of other litigants, as well as the interests of the immediate parties themselves" (per Moore-Bick J in *Reichhold (HC)* at 492).

14 The plaintiff did not dispute that the court had an inherent jurisdiction to stay proceedings, but emphasised that this jurisdiction is a residual one and should only be exercised rarely and exceptionally, for example in situations where it was necessary to prevent the abuse of the court's process. For this proposition, the plaintiff relied on the Court of Appeal decision of *Four Pillars Enterprises Co Ltd v Beiersdorf Aktiengesellschaft* [1991] 1 SLR(R) 382 ("*Four Pillars*") as well as the High Court decision of *Lanna Resources Public Co Ltd v Tan Beng Phiau Dick* [2011] 1 SLR 543 ("*Lanna Resources*"). The plaintiff submitted that no exceptional circumstances existed on the facts of the present case.

15 The defendant responded by pointing out that *Four Pillars* and *Lanna Resources* placed reliance on the English Court of Appeal decision in *Etri Fans Ltd v NMB (UK) Ltd* [1987] 1 WLR 1110 ("*Etri Fans*"), which although had not been dealt with in *Reichhold (HC)* or *Reichhold (CA)*, ought to be regarded as having been overtaken by those cases and their progeny.

16 The authorities are clear that it is only in rare and exceptional circumstances that a court will exercise its inherent jurisdiction to grant a stay of proceedings (albeit temporary) pending the resolution of arbitration proceedings where there was no arbitration agreement between the parties to the court proceedings or where some other pre-condition to invoking the statutory provisions relating to a stay pending arbitration had not been fulfilled. The Court of Appeal in *Four Pillars* (at [27]) and the High Court in *Lanna Resources* (at [14]) have both approvingly quoted Woolf LJ's reasoning in *Etri Fans* at 1114 as follows:

> [I]n order to protect itself in relation to attempts to abuse the process of the court, the court has undoubtedly very wide powers of staying proceedings. However ... because here the area covered by that inherent jurisdiction has been the subject of detailed and precise Parliamentary intervention, the circumstances in which the court will grant a stay under its inherent jurisdiction in situations dealt with by the statutory provisions, but where it could or would not do so in exercise of its statutory jurisdiction, will be rare. *The jurisdiction is truly a residual one principally confined to dealing with cases not contemplated by the statutory provisions.* [emphasis added]

17 Additionally in *Reichhold (CA)*, Lord Bingham of Cornhill CJ (at 185–186) alluded to the principle that "a plaintiff who had claims against a number of different people was entitled to choose for himself whom to sue and whom not to sue" (at 179) and recognised fully the "risks" (at 185) of a court exercising its inherent jurisdiction to grant a stay, including "open[ing] the door to a flood of applications, some successful and some unsuccessful", involving "the court in trying to adjudicate on matters which were barely justiciable", introducing "a new dimension of uncertainty" and giving "charter to evasive and manipulative defendants". Nevertheless, he expressed confidence (at 186) that judges would be alive to those risks and stated that it "will very soon become clear that stays are only granted in cases of this kind in *rare and compelling*, circumstances" [emphasis added].

18 It is therefore worth emphasising that even after *Reichhold (HC)* and *Reichhold (CA)* it remains the position that it will only be in rare and exceptional circumstances that a court would exercise its inherent jurisdiction to grant a stay of proceedings pending the resolution of arbitral proceedings.

However, it would appear that after *Reichhold (HC)* and *Reichhold (CA)* the justification for granting a stay pending arbitration pursuant to the inherent jurisdiction of the court has been extended beyond preventing the abuse of the court's process (as appeared to be the position in *Etri Fans* as quoted above at [16]) to include the efficient resolution of disputes and management of cases (see *ET Plus* at [91]; *Jardine Lloyd Thompson Canada* at [23]).

19 As aptly put by Moore-Bick J in *Reichhold (HC)* at 491:

> ... in principle a plaintiff who has claims against a number of different people is entitled to choose for himself whom to sue and whom not to sue ... . *However, choosing whom to sue is one thing; choosing in what order to pursue proceedings against different defendants may be another, especially when two related sets of proceedings are being, or could be pursued concurrently. In such a case the court itself has a greater interest, not only because the existence of concurrent proceedings may give rise to undesirable consequences in the form of inconsistent decisions, but also because the outcome of one set of proceedings may have an important effect on the conduct of the other.* [emphasis added]

20 Returning to the question of what circumstances would be sufficiently rare or exceptional to warrant a court exercising its inherent jurisdiction to grant a stay pending arbitration, it appears from the authorities cited to me that this would require a careful consideration of all the facts of the case and what would be in the interests of justice. There is no standard approach given that the court's inherent jurisdiction "is exercised under a wide range of circumstances to achieve a wide variety of ends" (*Reichhold (HC)* at 179). This is not to discount, however, the value of precedents, which shed light on the factors that a court should take into account in deciding whether or not to exercise its jurisdiction.

21 As alluded to earlier, it is important to examine the circumstances in which the proceedings were commenced as well as what was sought in the proceedings in order to determine if they were frivolous, vexatious, oppressive or otherwise an abuse of process. This exercise was embarked on in the local cases of *Four Pillars* and *Lanna Resources*.

22 *Four Pillars* involved winding-up proceedings brought by the respondent against a joint venture company that it had set up with the appellant. The appellant argued that the joint venture agreement it had with the respondent (which contained an arbitration clause) required its dispute with the joint venture company to be submitted to arbitration and alleged that respondent brought the winding-up proceedings to oppress the appellant and that the proceedings were frivolous, vexatious or otherwise an abuse of process. The Court of Appeal held that the matters referred to in the winding up application did not fall within the ambit of the arbitration agreement, that there was in fact a sufficient reason for not granting a stay of the winding-up proceedings as the relief sought was one that was not available in arbitration, and that the appellant had failed to substantiate the allegations it had made.

23 In *Lanna Resources*, the plaintiff's case was based on a guarantee given by the defendants in consideration of a loan to the company in which the defendants were directors. Having already rejected the defendants' arguments based on the existence of an arbitration agreement, the Singapore courts not being an appropriate forum, multiplicity of proceedings (or *lis alibi pendens*) and *forum non conveniens*, the High Court rejected the defendants' argument that justice and fairness required the grant of a stay of proceedings because the parties had provided in their documentation for two different regimes to govern the different disputes and must be held to their contractual bargains.

24 In *Reichhold (HC)* (upheld in *Reichhold (CA)*), in which the stay was ordered based on the court's case management powers, the factors considered by Moore-Bick J were more varied and included the following:

(a) The relationship between the parties to the proceedings before the court and in arbitration (at 492);

(b) Whether the proceedings before the court and the arbitral tribunal were distinct and the effect they may have on each other (at 493);

(c) Costs and convenience (including time) of obtaining resolution at either forum (at 496); and

(d) Disadvantage or prejudice to the plaintiff if a stay of proceedings is ordered (at 497).

25 At the risk of oversimplifying but in the interests of brevity, Moore-Bick J ultimately concluded after reviewing the evidence before him that the agreements between the parties formed a coherent arrangement under which it made practical sense for the arbitration proceedings to take priority over the court proceedings. The claim in court was more complex than the claim in arbitration, but if the arbitration claim failed there would be little prospect of the court proceedings succeeding. There was also a possibility that if the claim in court proceeded, the Norwegian company with whom the plaintiffs' main dispute lay would be joined as a defendant against whom the defendant would seek an indemnity, and the Norwegian company could then rely on its arbitration agreement with the plaintiff to stay the proceedings. Moore-Bick J further noted that there was minimum inconvenience and expense that would result if the arbitration proceedings proceeded first and that the plaintiffs had failed to suggest that they would suffer any disadvantage or prejudice in that event.

26 It would be apparent from this brief survey of authorities that all the circumstances of the case would have to be carefully considered before a court would order a stay pending arbitration pursuant to its inherent jurisdiction. This would only be done where there are "strong reasons" for doing so and where the resulting benefits "clearly outweigh any disadvantage to the plaintiff" (see *Reichhold (HC)* at 492).

Application to the facts

27 The defendant's arguments to justify the grant of a stay may be summarised as follows:

(a) The defendant's defence to the plaintiff's claim was entirely within the domain of Top Zone because it involved, amongst others, establishing that the plaintiff and Top Zone had reached a settlement agreement;

(b) Top Zone would have to be made either a co-defendant or a third party to the present suit as the defendant was entitled to an indemnity against Top Zone under common law because he was a director of Top Zone that guaranteed Top Zone's loan;

(c) The present suit would permit the plaintiff to circumvent its arbitration agreement with Top Zone as substantive issues that the plaintiff and Top Zone had agreed should be arbitrated would be dealt with in court;

(d) There was no juridical advantage to be gained by the plaintiff from persisting with the present suit;

(e) There was a risk of inconsistent decisions on the same issues that may prejudice the defendant (I note that the defendant had framed its argument in terms of multiplicity of proceedings or *lis alibi pendens* but in my view this doctrine required, amongst others, identity of parties in the proceedings, which was not so in this case. The risk of inconsistent decisions on the same issues, nevertheless, remained a factor to be considered);

(f) Both proceedings were not separate and distinct and were closely interrelated;

(g) In effect, the present suit was an "interim action" for security because, assuming the plaintiff succeeded in the present proceedings, if there was ultimately a decision against the plaintiff in arbitration, the plaintiff would have to return the money obtained from the defendant in the present proceedings; and

(h) Any delay in the determination of the present suit can be compensated by interest.

28 The plaintiff, on the other hand, urged the court to regard this suit with the defendant as separate and independent from its dispute with Top Zone because it was a claim based on the Bills of Exchange Act (Cap 23, 2004 Rev Ed) for a dishonoured cheque. The plaintiff also argued that the stay application had not been brought in good faith because it was filed late in the day (about four months after the defendant had entered an appearance) and just six days before the plaintiff's summary judgment application in Summons No 2774 of 2012 was due to be heard. The plaintiff emphasised that there was nothing exceptional or rare in the circumstances of the case that would justify the exercise of the court's inherent jurisdiction.

My decision

29 After weighing all the arguments of the parties, I decided that this was an appropriate case to exercise the court's inherent jurisdiction to grant a stay of proceedings pending the resolution of the "intended arbitration" between the plaintiff and Top Zone.

30 The factors favouring the granting of the stay were strenuously argued by the defendant and I agree with most of them. To begin with, in my judgment, the characterisation of the dispute between the plaintiff and the defendant as simply one based on a dishonoured cheque was not correct. On the plaintiff's own case, the UOB cheque was made out to it as "security" for the plaintiff making direct payment to Top Zone's subcontractors. Although the UOB cheque was dated 16 June 2011, it was not until 10 October 2011 that the plaintiff presented it for payment after disputes arose between it and Top Zone. Evidently, there was an agreement between the parties as to when the plaintiff was entitled to present the UOB cheque for payment that was dependent, *inter alia*, on Top Zone performing its obligations under the subcontract agreement.

31 Whether or not the plaintiff was entitled to present the UOB cheque for payment was therefore closely intertwined with whether or not there had been a breach of the subcontract agreement, which formed the subject matter of the intended arbitration proceedings. Unlike *Lanna Resources*, it was far from clear given the absence of documentation relating to the provision of the UOB cheque as security that the parties had intended for separate regimes to govern the subcontract agreement and the provision of security.

32 In fact, although it was understandable that the plaintiff would try to have what it viewed as the more straightforward claim against the defendant disposed of before tackling the numerous issues in dispute between it and Top Zone, this was not the sensible way of obtaining resolution for the plaintiff given how much both proceedings overlapped. If the arbitration proceedings were permitted

to proceed before the present suit, its outcome would determine the result of the present suit without further costs or expenses having to be incurred. On the other hand, if the present suit were permitted to proceed before the arbitration proceedings, Top Zone would certainly have to be involved (whether as a third party or co-defendant) to give evidence on whether or not there had been a breach of the subcontract agreement whether on their part or the plaintiff's part, whether it had reached a settlement with the plaintiff in relation to those breaches and whether or not those breaches affected the plaintiff's right to present the UOB cheque for payment. This would undoubtedly require an airing in court of the issues that the parties had agreed to arbitrate.

33 For the same reasons stated above, if both the present suit and the arbitration proceedings proceeded concurrently, there would be a significant and undesirable risk of inconsistent outcomes.

34 As the English High Court observed in *Reichhold (HC)*, similarly here, the plaintiff did not suggest that it would suffer any disadvantage or prejudice in the event a stay was granted that could not be compensated for with interest or costs. Unlike in *Four Pillars*, where the remedy sought of a winding-up was not available in arbitration, there was no such difficulty here. Rather, as I have explained at [32] above, the most practical order for the resolution of the disputes between the plaintiff, Top Zone and the defendant, would be for the plaintiff's dispute with Top Zone to be determined before the plaintiff's dispute with the defendant.

35 I note that there were factors that would weigh against ordering a stay of proceedings but on balance they were far outweighed by the benefits of ordering a stay.

36 One such factor was the fact that no steps whatsoever had been taken to commence arbitration proceedings by the plaintiff against Top Zone whereas pleadings had closed in the present suit between the plaintiff and the defendant. However, there was no suggestion that the plaintiff was not ready and willing to commence arbitration proceedings and, in fact, it recognised that there was an arbitration agreement between it and Top Zone that was binding. It was also important that no benefit would have been gained if the present suit were permitted to proceed first (see [32] above).

37 Another factor was the significant delay before the defendant filed its application for a stay of proceedings. However, there was insufficient evidence to suggest that this was due to a lack of *bona fides* on the part of the defendant. It was equally likely that the defendant had come to a late realisation as to the most efficient way for resolving the disputes involving it, the plaintiff and Top Zone.

Conclusion

38 For the foregoing reasons, I came to the conclusion that the circumstances of the case were sufficiently exceptional to justify the court exercising its inherent jurisdiction to grant a temporary stay of proceedings pending the resolution of the intended arbitration between the plaintiff and Top Zone. I will hear parties on costs.