IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 215

Suit No 239 of 2020 (Registrar's Appeal No 122 of 2020)

Between

Trinity Construction
Development Pte Ltd

… Plaintiff

And

Sinohydro Corp Ltd
(Singapore Branch)

… Defendant

JUDGMENT

[Arbitration] — [Striking out]
[Arbitration] — [Stay of court proceedings] — [Stay of court proceedings]
[Arbitration] — [Arbitral tribunal] — [Jurisdiction]
[Civil Procedure] — [Pleadings] — [Striking out]
[Civil Procedure] — [Jurisdiction] — [Inherent]
[Civil Procedure] — [Rules of court]
[Courts And Jurisdiction] — [High court]

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Trinity Construction Development Pte Ltd
v
Sinohydro Corp Ltd (Singapore Branch)

[2020] SGHC 215

High Court — Suit No 239 of 2020 (Registrar's Appeal No 122 of 2020)
Lee Seiu Kin J
17 August 2020

7 October 2020 Judgment reserved.

Lee Seiu Kin J:

Introduction

1 When a plaintiff commences an action in court and there is a parallel arbitration commenced on the same claim, the court will, on the defendant's application, ordinarily order the suit to be stayed. In the present case, the Defendant initially applied for striking out of the action rather than a stay. This raised the interesting and unique question of whether, under O 18 r 19(1) of the Rules of Court (Cap 332, R 5, 2006 Rev Ed) ("ROC"), or in the exercise of my inherent jurisdiction pursuant to s 18(2) read with paragraph 9 of the First Schedule of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") and/or O 92 r 4 of the ROC, an order to strike out the Plaintiff's Statement of Claim ("SOC") ought to be made.

Background to the application

2 On 7 March 2019, the Defendant received a statutory letter of demand from the Plaintiff for $9,718,759.71. This sum was purportedly due pursuant to two invoices, issued in relation to a "Consulting Service Agreement" (the "Agreement"). The Defendant responded on 15 March 2019, requesting for documents referred to in the statutory letter of demand. Having received no reply, the Defendant again wrote to the Plaintiff on 26 March 2019 ("26 March 2019 Letter"), reiterating the request for documents. In this further letter, the Defendant also disputed the Plaintiff's statutory letter of demand on the basis that, *inter alia*, it was unclear who the proper parties to the Agreement were. On 2 April 2019, the Plaintiff wrote to the Defendant, rejecting the request for documents and refusing to withdraw the statutory letter of demand. The Plaintiff repeated its demand for payment on 9 May 2019. The Defendant then responded on 23 May 2019, reiterating its position that it disputed the Plaintiff's entitlement to payment under the statutory demand.

3 There was no further correspondence between the parties up until 1 November 2019, when the Defendant received a letter from the Plaintiff, enclosing a Notice of Arbitration. Following this, the Defendant filed a response to the Notice of Arbitration and both parties proceeded to nominate their respective arbitrators. Throughout this, however, the Defendant consistently maintained its objection to jurisdiction of the arbitral tribunal. These objections were first raised on 13 November 2019, in the Defendant's letter to the Singapore International Arbitration Centre (the "SIAC"). Further examples included the Defendant's Response to Notice of Arbitration and Challenge to Jurisdiction on 26 November 2019, its 9 December 2019 letter to the SIAC, and its Amendments to Response to Notice of Arbitration on 30 December 2019.

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These jurisdictional objections were made on the basis that: (1) there was no arbitration agreement between the parties; and (2) even if such an agreement did exist, the arbitral procedure and composition of the tribunal was not in accordance with that agreement. It should be noted that the Defendant maintained this position on the jurisdictional objections at the hearing before me.

4 In the face of such objections and amidst concerns of issues of the limitation period for the claim, the Plaintiff wrote to the Defendant on 13 January 2020, indicating that it was "compelled to commence proceedings in the Singapore High Court". In the same letter, the Plaintiff stated that its position was for the substantive dispute between the parties to "properly be brought to determination", requesting the Defendant to elect between arbitration or court proceedings. The Defendant, while maintaining its jurisdictional objections to the arbitration, refused to make such an election, deeming in its letter dated 17 January 2020 that the Plaintiff's position "to be entirely misconceived". This culminated in the Plaintiff commencing the present Suit against the Defendant on 16 March 2020. It is not disputed that the issues raised within the Suit overlap with those that the arbitral proceedings are concerned with.

5 On 6 April 2020, the Defendant applied to court seeking, *inter alia*, an order that the Plaintiff's SOC be struck out and the Suit be dismissed. This application was heard by the Assistant Registrar (the "AR") on 22 June 2020. At that hearing, the Defendant argued that the Plaintiff's SOC should be struck out as it was frivolous and vexatious and/or an abuse of the process of the court. In the alternative, it argued that the Suit should be dismissed for multiplicity of proceedings.

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6 The AR disagreed with the Defendant, finding that there was no basis to hold that the Suit was frivolous and vexatious, or an abuse of process. The AR also held that by commencing the arbitration proceedings, the Plaintiff had not waived its right to commence the present Suit. Crucially, in the AR's view, a stay of proceedings would have been the appropriate course of action, but was not granted as that had not been the Defendant's application before the AR. In the circumstances, the Defendant's application was dismissed.

7 The Defendant then appealed against the AR's decision. At the hearing before me, the Defendants relied on substantially the same arguments they had raised before the AR, with the additional alternative argument that the court could stay the present proceedings in favour of arbitration.

Issues

8 Two issues thus arise to be determined in this application, which I will deal with in turn:

(a) whether the Plaintiff's SOC should be struck out and proceedings dismissed; and

(b) in the alternative, whether a stay of proceedings should be granted.

Whether the Plaintiff's SOC should be struck out and proceedings dismissed

9 The Defendant relies on three broad grounds in this issue:

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(a) First, that the Plaintiff's SOC and the Suit should be *struck out* for being frivolous or vexatious, under O 18 r 19(1)(b) and O 18 r 19(1)(d) of the ROC;

(b) Secondly, that the Suit should be *dismissed* as it is an abuse of court process, pursuant to O 92 r 4 of the ROC; and

(c) Thirdly, that the Suit should be *dismissed* for multiplicity of proceedings, under pursuant to s 18(2) read with paragraph 9 of the First Schedule of the SCJA.

10 It is apparent, however, that these grounds are not distinct and do share a degree of overlap. In fact, both parties proceeded on the basis that there was no distinction between the grounds of "frivolous or vexatious" and an "abuse of process". Naturally, a finding in each of the grounds raised above will have a further effect on the subsequent grounds.

The law

11 Order 18 Rule 19(1) of the ROC provides that:

> **Striking out pleadings and endorsements (O. 18, r. 19)**
>
> **19.**—(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that –
>
> (a) it discloses no reasonable cause of action or defence, as the case may be;
>
> (b) it is scandalous, frivolous or vexatious;
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the Court.
>
> and may order the action to be stayed or dismissed or judgment

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> to be entered accordingly, as the case may be.
>
> …

12 This power of striking out should only be invoked where it is plain and obvious that the plaintiff does not have a cause of action: *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 ("*Gabriel Peter*") at [18]; *The Osprey* [1999] 3 SLR(R) 1099 at [6]. It is clear that this is a high threshold to meet, to the extent that the claim must be "obviously unsustainable, the pleadings unarguably bad and it must be impossible, not just improbable, for the claim to succeed": *Singapore Civil Procedure 2020* vol 1 (Chua Lee Ming gen ed) (Sweet & Maxwell, 2020) ("*Singapore Civil Procedure*") at para 18/19/6, citing *Ha Francesca v Tsai Kut Kan (No. 1)* [1982] H.K.C. 328; see also *Chee Siok Chin and other v Minister for Home Affairs and another* [2006] 1 SLR(R) 582 ("*Chee Siok Chin*"). In this vein, the practice of courts has generally been to decline to proceed with the argument where an application for striking out involves lengthy and serious argument: *Gabriel Peter* at [18].

13 The specific ground under O 18 r 19(1)(*b*) of the ROC refers to cases that are *obviously frivolous or vexatious* or *obviously unsustainable*: *Singapore Civil Procedure* at para 18/19/12. As to the definition of what frivolous or vexatious means, this has been pithily summarised in *Chee Siok Chin* at [33] as follows:

> Proceedings are frivolous when they are deemed to waste the court's time, and are determined to be incapable of legally sustainable and reasoned argument. Proceedings are vexatious when they are shown to be *without foundation* and/or where they *cannot possibly succeed* and/or where an action is brought only for annoyance or to gain some fanciful advantage.
>
> [emphasis in original]

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14 In considering this ground, the court can have regard to the history of the matter and relevant correspondence exchanged between parties in addition to the pleadings (see *Active Timber Agencies Pte Ltd v Allen & Gledhill* [1995] 3 SLR(R) 334 at [21]–[22], citing *Goh Koon Suan v Heng Gek Kiau* [1990] 2 SLR(R) 705 ("*Goh Koon Suan*")).

15 Turning then O 18 r 19(1)(*d*) of the ROC, an abuse of process largely refers to instances where the court's machinery is used improperly or not *bona fide*: *Gabriel Peter* at [22]. The High Court in *Chee Siok Chin* again helpfully identified four categories of an abuse of process, at [34]:

> The instances of abuse of process can therefore be systematically classified into four categories, *viz*:
>
> (a) proceedings which involve a deception on the court, or are fictitious or constitute a mere sham;
>
> (b) proceedings where the *process of the court is not being fairly or honestly used but is employed for some ulterior or improper purpose or in an improper way*;
>
> (c) proceedings which are *manifestly groundless or without foundation* or which serve no useful purpose;
>
> (d) multiple or successive proceedings which cause or are likely to cause improper vexation or oppression.
>
> [emphasis in original]

16 It is also clear that there is a significant degree of overlap between O 18 r 19(1)(*b*) and O 18 r 19(1)(*d*) of the ROC: *Chee Siok Chin* at [38]; *Riduan bin Yusof v Khng Thian Huat and another* [2005] 2 SLR(R) 188 at [29]; *Gabriel Peter* at [22]; *Goh Koon Suan* at [15]. Similarly, these two specific grounds also largely mirror and share a consistent juridical basis with the court's residual and inherent jurisdiction, as contained within O 92 r 4 of the ROC. Consequently, the application of the principles under O 18 r 19(1)(*b*) and O 18 r 19(1)(*d*) of the ROC and O 92 r 4 of the ROC will, in most cases, bear similar results: *Chee*

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Siok Chin at [29] and [35].

17 The final ground upon which the Defendant relies is a broad one, under s 18 of the SCJA, that provides as follows:

> **Powers of High Court**
>
> 18.—(1) The High Court shall have such powers as are vested in it by any written law for the time being in force in Singapore.
>
> (2) Without prejudice to the generality of subsection (1), the High Court shall have the powers set out in the First Schedule.
>
> …

18 Paragraph 9 of the First Schedule to the SCJA then provides as follows:

> **Stay of proceedings**
>
> 9. Power to dismiss or stay proceedings where the matter in question is res judicata between the parties, or where by reason of multiplicity of proceedings in any court or courts or by reason of a court in Singapore not being the appropriate forum the proceedings ought not to be continued.

Application of the principles to the present case

19 On the present facts, I am unable to see how the present Suit commenced by the Plaintiff is in any way frivolous or vexatious under O 18 r 19(1)(*b*) of the ROC. The Plaintiff's claim is based on sums it is argues are due and payable to it from the invoices under the Agreement, as stated above at [2]. While the Defendant has consistently disputed the Plaintiff's claim, it has not shown how these claims are obviously unsustainable such that a proper adjudication is unnecessary. In fact, I agree with the Plaintiff that the Defendant's general course of action demonstrates that the Plaintiff has, at minimum, a proper cause of action. For instance, when first confronted with the letter of statutory demand, the Defendant stated in its 26 March 2019 Letter that the proper course of action

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would be for the Plaintiff to withdraw the statutory letter of demand and have the "claim adjudicated upon in a proper forum". It certainly did not intimate any position that the Plaintiff's demand was frivolous or vexatious.

20 Similarly, I agree with the AR that the present Suit does not disclose an abuse of process that satisfies O 18 r 19(1)(*d*) of the ROC or that requires an exercise of inherent jurisdiction as contained in O 92 r 4 of the ROC. As a starting point, parties should be entitled to *elect to commence* proceedings in any forum they deem fit. In essence, the Defendant is arguing that the mere fact of bringing the present Suit amounts to an abuse of process. However, taking that position to its logical conclusion, it would mean that in every case where there are parallel arbitral proceedings, proceedings in court would amount to an abuse of process and should be struck out. That simply cannot be the correct position at law and would render the stay provisions under Singapore *lex arbitri* entirely otiose.

21 It is further telling that, when asked at the hearing before the AR, the Defendant was unable to point to a single precedent where a claim had been struck out simply on the basis of either pending parallel arbitration proceedings or that the subject matter of the claim ought validly to proceed for arbitration instead. At the hearing before me, the Defendant similarly made no reference to any authorities to that effect.

22 Instead, the Defendant relies on the Malaysian case of *Ansa Teknik (M) Sdn Bhd v Cygal Sdn Bhd* [1989] 2 MLJ 423 ("*Ansa Teknik*"), which it says is instructive. In *Ansa Teknik*, the plaintiff there had originally filed a civil action for sums allegedly outstanding for the supply of granite. About a month after the defendant had filed its defence disputing the amount, the plaintiff filed an

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application seeking summary judgment. The application was heard and dismissed, and no appeal was lodged by the plaintiff. Shortly after, a notice of discontinuance was filed, albeit without leave of the court and therefore in contravention of the relevant Malaysian Rules of the High Court. Notwithstanding this, the plaintiff wrote to the defendant, enclosing the notice of discontinuance, and requesting settlement negotiations between parties. When no settlement was reached, the plaintiff then sent a statutory demand for payment of the very same sum that it claimed in the civil suit, which it had already sought to discontinue. The plaintiff then presented and advertised the corresponding winding-up petition, which the defendant contested. The High Court of Johor Bahru held that the presentation of the winding-up application was an abuse of the process of the court and accordingly struck it out. In doing so, KC Vohrah J held that the filing of the notice of discontinuance and the presentation of the winding-up petition were "acts calculated to circumvent the normal course of going to trial after the dismissal of the application for summary judgment… and to embarrass the respondent."

23 With respect, *Ansa Teknik* simply does not support the Defendant's case. In *Ansa Teknik*, the abuse of the process was stark and evident. Steps had been taken by the plaintiff there to subvert the normal trial process and the course of justice. This is quite distinct from the present case, where the Plaintiff has merely commenced proceedings before this court.

24 In bringing the present Suit, the Plaintiff appears to be acting to preserve its own rights, out of concerns relating to the limitation periods of its claims, as alluded to above at [4]. The reason for such concerns was that the Plaintiff's claim is brought in relation to payment for consulting services of the T227 Project that was awarded to the joint venture between the Defendant and

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Sembcorp Design and Construction Pte Ltd. Pursuant to this contract, it was alleged that the Defendant became liable to pay the Plaintiff a fixed fee of $298,953.00 and an incentive fee of 1.8% of the contract sum. However, as the T227 Project was awarded on 25 July 2014, and on the basis that the Defendant was in breach of its obligations by failing to pay the requisite sums on that same date, the Plaintiff took the view that the limitation period would have expired on 25 July 2020. As the arbitral proceedings had not yet proceeded, the Plaintiff then commenced the present Suit before that date. In the circumstances, it can hardly be said that a party abuses the process of the court simply by acting in a manner that preserves its rights.

25 It also bears noting that part of the reason why the arbitral proceedings would have been held up was because of the very position the Defendant itself had taken in its jurisdictional objections. While a party is well-entitled to raise such objections in an arbitration, doing so in this instance had several implications. First, in view of its consistent and persistent objections as outlined above at [3], it was only natural that the Plaintiff would begin looking to other methods or fora to resolve the dispute. This is particularly so given the view that the Plaintiff had taken in relation to the limitation periods and thus took steps to avoid the situation in which its claims would become time-barred.

26 Secondly, the Defendant raises the argument, correctly, that issues of jurisdiction of the arbitral tribunal falls to be heard by the tribunal itself. However, should the tribunal find that it has no jurisdiction, the limitation period for the claim would have passed. The Defendant disputes this by arguing that in considering its jurisdictional objections, the arbitral tribunal will necessarily have to consider issues going to the substantive dispute. In particular, because it founds its jurisdictional objections on the absence of any

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binding contract containing an arbitration agreement, the tribunal will have to determine whether such a contract exists and whether it is in the form attached to the Notice of Arbitration and the Amended Notice of Arbitration. The counter to this, however, is found in the Defendant's very own submissions – while the tribunal may invariably have to deal with issues *relating to* the substantive dispute in dealing with the jurisdictional objections, that does not *resolve the substantive dispute itself*. By applying to strike out the present Suit, the Defendant is, in reality, presenting the Plaintiff with Hobson's choice.

27 I deal with three further points raised by the Defendant. First, it was argued that the Plaintiff had waived its right to commence court proceedings by electing to commence arbitration. In this regard, the Defendant relies on *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at para18.089 as well as *Vitol SA v Norelf Ltd (The Santa Clara*) [1996] AC 800. The Defendant, however, has failed to demonstrate how that is applicable to the current instance. As seen from the very authorities cited, the contractual doctrine of waiver by election is more commonly found in instances where one contracting party commits a repudiatory breach of contract. This breach then gives the other contracting party a right of election: whether to affirm or discharge the contract. Such an election between contrasting, and indeed inconsistent, contractual rights is quite distinct from the current situation. Similar to the point noted above at [21], neither party was able to point to any authority where this doctrine of waiver by election was extended to a choice between different fora to commence proceedings.

28 This brings me to the second point. A large portion of the Defendant's submissions were devoted towards policy-based arguments, namely that: (1) jurisdictional arguments are properly matters for the arbitral tribunal to consider

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and rule on; (2) the court plays a limited, supervisory role over arbitral proceedings; and (3) there is a clear judicial policy of promoting arbitration by upholding the *kompetenz-kompetenz* principle. These arguments were made principally in reliance on the cases of *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd* [2017] 2 SLR 362, *Sim Chay Koon and others v NTUC Income Insurance Co-Operative Ltd* [2016] 2 SLR 871 and *PUBG Corp v Garena International I Pte Ltd and others* [2020] 2 SLR 379. While these cases are useful in setting out the principles in relation to the relationship between the court and arbitral tribunals, they again do not demonstrate how the mere act of bringing court proceedings amounts to an abuse of the process of the court. More crucially, these cases were concerned with applications for a *stay* of proceedings in favour of arbitration and not striking out.

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29 Finally, the Defendant argues that the existence of a multiplicity of proceedings amounts to an abuse of the process of the court where they are likely to cause vexation or oppression, relying on the fourth ground under the test in *Chee Siok Chin* ([12] *supra*) at [34]. This issue does not arise, given my decision on whether a stay of proceedings should be granted, as discussed below at [33]–[44]. In any case, even if neither a stay nor an order to strike out were made, I note that on 21 April 2020, the Plaintiff had already written to inform SIAC of its election and intention to resolve the substantive dispute by way of court proceedings. In that same letter, the Plaintiff also stated the following:

> In the premises, the [Plaintiff] hereby requests that the Arbitration be held in abeyance, pending the Court's final determination of the Striking Out Application. Upon the Court's final dismissal of the Striking Out Application or any agreement or order between parties to such effect, the [Plaintiff] will write to the SIAC again to formally discontinue the Arbitration.

30 This request was reiterated, in similar wording, in a subsequent letter that the Plaintiff sent to the SIAC on 29 April 2020. There is no evidence to suggest that the Plaintiff intends to renege on this request, should this application be dismissed. That should suffice to put an end to the matter.

31 With no possibility of a multiplicity of proceedings, the Defendant's argument on s 18(2) read with paragraph 9 of the First Schedule of the SCJA must also fail.

32 Accordingly, I find that there is no basis to strike out the Plaintiff's Statement of Claim or dismiss the proceedings.

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Whether a stay of proceedings should be granted

33 The Defendant then submits that stay of proceedings should be granted. It makes this submission on the same three legislative bases, as above at [1].

34 I focus on the question of whether the court's inherent jurisdiction, as recognised in O 92 r 4 of the ROC, extends to granting a stay of court proceedings in favour of arbitration. In my view, such a jurisdiction does exist and is consistent with the court's inherent jurisdiction to grant a case management stay.

35 The starting point of the analysis in this regard is the Court of Appeal's decision in *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 ("*Tomolugen Holdings Ltd*"). There, following a comprehensive review of the authorities in England and New Zealand, the Court of Appeal observed as follows at [187]–[188]:

> 187 We would not set the bar for the grant of a case management stay at the "rare and compelling" threshold that the English and the New Zealand courts have adopted. ***We recognise that a plaintiff's right to sue whoever he wants and where he wants is a fundamental one. But, that right is not absolute.*** It is restrained only to a modest extent when the plaintiff's claim is stayed temporarily pending the resolution of a related arbitration, as opposed to when the plaintiff's claim is shut out in its entirety: *Reichhold Norway (HC)* ([165] *supra*) at 491 *per* Moore-Bick J. In appropriate cases, that right may be curtailed or may even be regarded as subsidiary to holding the plaintiff to his obligation to arbitrate where he has agreed to do so. The strength of the plaintiff's right of timely access to the court will therefore vary depending on the facts of each case. …
>
> 188 This does not mean that if part of a dispute is sent for arbitration, the court proceedings relating to the rest of the dispute *will* be stayed as a matter of course. ***The court must in every case aim to strike a balance between three higher-order concerns that may pull in different considerations:*** first, ***a plaintiff's right to choose whom he wants to sue***

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> ***and where;*** second, ***the court's desire to prevent a plaintiff from circumventing the operation of an arbitration clause; and*** third, ***the court's inherent power to manage its processes to prevent an abuse of process and ensure the efficient and fair resolution of disputes. The balance that is struck must ultimately serve the ends of justice.*** In this regard, we consider that the court's discretion to stay court proceedings pending the resolution of a related arbitration, at the request of parties who are not subject to the arbitration agreement in question, can in turn be made subject to the agreement of those parties to be bound by any applicable findings that may be made by the arbitral tribunal. …
>
> [emphasis added in bold italics and underline]

36 As is evident from the extract above, this inherent jurisdiction must be exercised judiciously, pursuant to a balance of higher-order concerns. Crucially, these concerns include the inherent jurisdiction to manage the court's processes and ensure the efficient and fair resolution of disputes. The overarching aim of this exercise would be to ensure that the ends of justice are served: see *Maybank Kim Eng Securities Pte Ltd v Lim Keng Yong and another* [2016] 3 SLR 431 ("*Maybank Kim Eng*") at [39].

37 The approach to exercising this discretion has been said to follow a two-step inquiry: *Gulf Hibiscus Ltd v Rex International Holding Ltd and another* [2017] SGHC 210 ("*Gulf Hibiscus*") at [64]–[67]. The court first looks at the nature of the claims pursued in the court proceedings, or what the "substance of the controversy" is: *Tomolugen Holdings Ltd* at [125]–[127]. Following this, the court then determines whether that "substance of the controversy" falls within the scope of the arbitration agreement, the approach to construction of the arbitration clause being one based on the presumed intention of the parties as rational commercial parties: *Tomolugen Holdings Ltd* at [124].

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38 Alternatively, recourse can also be had to the set of factors laid out by Venning J in *Danone Asia Pacific Holdings Pte Ltd v Fonterra Co-operative Group Limited* [2014] NZHC 1681 (the "*Danone Factors*"), namely:

(a) the relationship between the parties to the court proceedings and the parties to the arbitration;

(b) the claims in the court proceedings and those in the arbitration, and the respective issues which they raised;

(c) issue estoppel;

(d) the risk of inconsistent findings between the two sets of proceedings;

(e) the risk of delay; and

(f) cost.

39 The *Danone Factors* have been endorsed by the Court of Appeal in *Tomolugen Holdings Ltd* at [188] as offering a "comprehensive (although by no means exhaustive) and instructive guide", as well as in *Maybank Kim Eng* at [37] and *Gulf Hibiscus* at [63].

40 I note that the principles and approach in *Tomolugen Holdings Ltd* were laid down in the context of s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed). In *Maybank Kim Eng*, the High Court extended the application of these principles to a stay of proceedings involving an arbitration clause subject to the Arbitration Act (Cap 10, 2002 Rev Ed). While this would have been of help to the Defendant in the current instance, it raises the point that it is unable to rely on s 6 of the Arbitration Act for a stay of proceedings as it has taken the position that it is not a party to the arbitration proceedings.

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Nevertheless, in *Gulf Hibiscus*, Abdullah JC (as he then was) ordered a conditional stay even when the defendant in that case was not a party to the arbitration agreement. In doing so Abdullah JC (as he then was) observed at [59] that:

> … The power to order a case management stay is part of the court's own inherent and immediate powers to control proceedings before it. … Furthermore, the jurisprudential basis for the exercise of the power to stay in the absence of an agreement is the wider need to control and manage proceedings between the parties for a fair and efficient administration of justice; it is not predicated on holding parties to any agreement – the absence of such an agreement is therefore irrelevant.

41 This was similarly recognised in *Shanghai Construction (Group) General Co. Singapore Branch v Tan Poo Seng* [2012] SGHCR 10 ("*Shanghai Construction*"). In *Shanghai Construction*, the plaintiff had entered into a contractual agreement with a construction company, Top Zone Construction & Engineering Pte Ltd ("Top Zone") for the performance of certain building works. The contractual agreement contained an arbitration clause. When a dispute arose between the parties, the plaintiff opted to commence legal proceedings against the defendant, who was a director and shareholder of Top Zone. The defendant applied for a stay of court proceedings pending resolution of an "intended arbitration" between Top Zone and the plaintiff, which was granted.

42 Although *Shanghai Construction* had applied a different threshold, it being a pre-*Tomolugen Holdings Ltd* decision, I respectfully agree with the holding in *Gulf Hibiscus* at [58], that the decision affirms that a stay can be granted in respect of proceedings between parties who are not bound by an arbitration agreement. This must be so even in instances like the present, where there is the possibility of the non-existence of an arbitration agreement. A

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defendant may seek a stay so long as it is necessary to "serve the ends of justice" and that stay may be granted where the factors weigh in favour of it: *Tomolugen Holdings Ltd* at [188]; *Maybank Kim Eng* at [39]; *Gulf Hibiscus* at [60].

43 On the facts of the present case, I am satisfied that a stay should be granted pursuant to the court's inherent powers of case management.

(a) First, as stated in *Tomoulgen Holdings Ltd* and noted above at [35], a party's right to proceed in court is *not absolute*. The Plaintiff here had previously demonstrated its willingness to proceed *via* arbitration and has only turned to the courts due to the position taken by the Defendant in the arbitration and legitimate concerns regarding the limitation period. A stay of proceedings will not prejudice the Plaintiff as it can fully avail itself of those rights should the stay be lifted.

(b) Secondly, not only has the Plaintiff been willing to arbitrate, it has consistently recognised its obligation to do so as a contracting party. This was particularly clear at the early stages of this dispute, and even in the face of persistent jurisdictional objections from the Defendant. As stated in *Maybank Kim Eng* at [37(b)], this surely "diminishes the force of its objection that its right of timely access to the courts is being undermined".

(c) Thirdly, a number of *Danone Factors* point in favour of granting a stay in this instance. The parties to the arbitration and the court proceedings are identical. The factual bases and the claims that are raised are duplicated. Consequently, there is also a risk of inconsistent findings between the court proceedings and arbitration, and also increased corollary costs owing to the potential duplication of witnesses

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and evidence.

(d) Finally, I would note that because the pertinent questions raised concern the jurisdiction of the arbitral tribunal, those questions should rightly be dealt with by the tribunal itself. That course of action is still available in this case, given that the Plaintiff had only written to the SIAC to hold the pending case in abeyance and had not discontinued the proceedings.

44 Accordingly, I find that the balance of this case weighs in favour of ordering a stay of the Suit pending the resolution of the related arbitration between the parties. Given that this stay is granted pursuant to the court's inherent powers, as recognised under O 92 r 4 of the ROC, there is no need for me to consider the alternative bases upon which the Defendant relies.

Conclusion

45 For the reasons given, I dismiss the appeal in part. The striking out application is dismissed. However, I order that the present Suit be stayed pending resolution of the arbitration between the parties. In view of the fact that the Defendant's application for striking out had rightfully been dismissed by the AR below and a considerable proportion of this appeal was spent dealing that that issue, I am of the view that there should be no order as to costs in this appeal. For avoidance of doubt, the order for costs below is not disturbed.

Lee Seiu Kin

Version No 1: 27 Oct 2020 (22:41 hrs)

Judge

Lim Dao Kai, Ee Jia Min and Tiong Yung Suh Edward (Allen & Gledhill LLP) for the plaintiff;
Pillay Mohan Reviendran and Tay Kai Yi Wynne (MPillay) for the defendant.

Version No 1: 27 Oct 2020 (22:41 hrs)