Excalibur Land (S) Pte Ltd *v* Win-Win Aluminium Systems Pte Ltd and another [2011] SGHC 37

Case Number : Suit No 538 of 2001

Decision Date : 21 February 2011

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Marina Chin (Tan Kok Quan Partnership) for the plaintiff; Wilfred Goh and Rajendran Kumaresan (Central Chambers Law Corp) for the defendants.

Parties : Excalibur Land (S) Pte Ltd — Win-Win Aluminium Systems Pte Ltd and another

Arbitration

Civil Procedure

21 February 2011

Kan Ting Chiu J:

1 This case involved the development of a factory building, the aborted purchase of a unit in the building, and the disputes between the vendor/developer and the purchaser/sub-contractor.

2 The facts and issues are set out under these headings: The Parties, The Suit, The Arbitration Proceedings and The Order of Court.

The Parties

3 The plaintiffs, Excalibur Land (S) Pte Ltd ("Excalibur") were the developers of an industrial building at Ubi Avenue 1 Singapore, known as the Excalibur Centre.

4 Tavica Design Pte Ltd ("Tavica") was the main contractor for the construction of the Excalibur Centre. The first defendant, Win-Win Aluminium Systems Pte Ltd ("Win-Win"), entered into a sub-contract ("the Subcontract") with Tavica to carry out aluminium works for the building.

5 Win-Win purchased from Excalibur unit #08-13 in the Excalibur Centre ("the Property") pursuant to an Option to Purchase which was exercised on 8 October 1998 and a Sale and Purchase agreement signed on 6 November 1998 ("the Agreement").

6 The second defendant, Leck Kim Koon ("Leck"), a director of Win-Win, issued a Letter of Guarantee dated 17 March 1999 ("the Guarantee") to Excalibur whereby he guaranteed the payments of all amounts due from Win-Win to Excalibur under the Agreement and undertook to purchase the Property if Win-Win failed to complete the purchase.

The Suit

7 Win-Win failed to pay Excalibur the full balance of the progress payments due under the Agreement amounting to $154,049.39. Excalibur treated the Agreement as repudiated. Excalibur commenced this Suit against Win-Win (*qua* purchaser) and Leck (*qua* guarantor), for, *inter alia*, the

sum of $94,107.05 which is the balance amount on the progress payments due upon the repudiation. The Suit was filed on 4 May 2001.

The Arbitration Proceedings

8 Disputes also arose between Win-Win and Tavica in relation to the Subcontract. On 12 February 2001, Win-Win issued a notice of intention to refer the disputes to arbitration.

9 Win-Win's Points of Claim were lodged on 1 August 2001 and Tavica's Points of Defence and Counterclaim were lodged on 25 September 2001. Win-Win claimed, *inter alia*, for work done; Tavica denied Win-Win's claim and counterclaimed for damages arising from, *inter alia*, delay and defects.

The Order of Court

10 In the arbitration proceedings and the Suit, Win-Win raised common issues of fact. These centred on its assertion that the obligation to pay Excalibur under the Agreement had not yet arisen and/or was conditional upon other events.

11 On 26 November 2001, when the trial for this Suit came up for hearing before me, I sought clarification on these common issues of fact in relation to the Agreement. It was also pointed out to me that technically, the only party in common in this Suit and the arbitration proceedings was Win-Win. However, I was concerned that there were common issues of fact and that it would not be desirable to have inconsistent findings of fact by the court and the arbitrator.

12 I ordered that:

(a) the hearing of the Suit be adjourned pending the conclusion of arbitration proceedings between Win-Win and Tavica;

(b) Excalibur and Win-Win abide and be bound by the decision of the arbitrator in the said arbitration proceedings for the purposes of this Suit; and

(c) costs of the adjournment shall be costs in the cause ("the Order").

The parties did not appeal against the Order.

The bifurcated issues

13 Subsequent to the Order, the arbitration proceedings went ahead. Tavica applied for issues of fact common to the arbitration proceedings and the Suit to be bifurcated from the issues arising from the Subcontract ("the bifurcated issues"), and to be determined first.

14 Counsel for Excalibur had explained that:

> Tavica applied for the *common issues of fact* to be the subject of a bifurcated hearing in the arbitration to be dealt with before the Subcontract issues (for example, the issues on defects and delay in the completion of the Works which were distinct from the common issues of fact).

...

[T]he Bifurcated Issues arose only because of the case run by Win-Win. They alleged that:

(a) the award of the Subcontract on 2 October 1998 was conditional upon them purchasing the Property;

(b) that on that date, there was a "set-off agreement";

(c) that Win-Win were entitled to withhold payment to Excalibur under the Agreement of the Property until the Letter of Award for the Subcontract was signed;

(d) that Win-Win were entitled to an upfront payment of $89,000 plus GST under the Subcontract which amount should have been set-off against what was due under the Agreement. [note: 1]

[emphasis added]

15 It should be noted that the bifurcated issues were the common issues in the arbitration proceedings and the Suit. The corollary to that is that issues peculiar to one set of proceedings or the other were not covered by the bifurcated issues.

16 The arbitrator, Mr Johnny Tan Cheng Hye ("the Arbitrator"), granted the application after hearing Win-Win's objections and ordered that the following issues be bifurcated and determined first:

(a) Whether the agreement on 2 October 1998 to award the Subcontract (at a contract sum of $1.71 m) to Win-Win was conditional upon Win-Win agreeing to purchase the Property.

(b) Whether there was any set-off agreement reached on 2 October 1998 that payments due under the Agreement between Win-Win and Excalibur were to be set-off, whether in part or in full, and at any time, against the payments due under the Subcontract between Win-Win and Tavica.

(c) Whether Win-Win was entitled to withhold payment to Excalibur under the Agreement until the letter of award for the Subcontract was signed.

(d) Whether Win-Win was entitled to an upfront lump sum payment of $89,000 plus GST under the Subcontract.

The Arbitrator's decision on the bifurcated issues

17 On 19 May 2009, more than eight years after the commencement of the arbitration proceedings, and five changes of the solicitors who acted for Win-Win [note: 2], the Arbitrator issued his "Interim Award (Bifurcated Issues)" in which he decided all four bifurcated issues in favour of Tavica ("the Interim Award"). In particular, he found that:

(a) There was no agreement reached on 2 October 1998 that the award of the Subcontract to Win-Win is conditional on Win-Win agreeing to purchase the Unit.

(b) There was no agreement reached on 2 October 1998 that payments due under the Agreement between Win-Win and Excalibur were to be set-off, whether in part or in full, and at any time, against the payments due under the Subcontract between Win-Win and the Excalibur.

(c) Win-Win was not entitled to withhold payment to Excalibur under the Agreement until the letter of award for the Subcontract was signed.

(d) Win-Win was not entitled to an upfront lump sum payment of S$89,000 plus GST under the Subcontract.

18 Win-Win was not satisfied with the Interim Award and applied to court in Originating Summons No. 687/2009, *Win-Win Aluminium Systems Pte Ltd v Tavica Design Pte Ltd (now known as Crescendas Pte Ltd)*, for leave to appeal against the Arbitrator's findings on 2 October 2009. The application was dismissed by Judicial Commissioner Quentin Loh who found that no questions of law arose from the Arbitrator's findings.

19 After Win-Win's application to appeal against the Interim Award was dismissed, Excalibur filed an application in the Suit on 4 November 2009 in SUM 5752/2009 under Order 33 rules 2 and 3 of the Rules of Court (Cap 322, R5, 2006 Rev Ed) for, *inter alia*, an order that there be a preliminary hearing before the trial whether in open court or in chambers for the Court to determine as preliminary issues:

(a) whether the findings in the Interim Award issued by the Arbitrator in the arbitration proceedings between Win-Win and Tavica:

(i) are to be binding on the plaintiffs and defendants pursuant to the Order (see [12] *supra*);

(ii) are to be applied to the questions of fact and/or law raised in this Suit; and

(b) whether upon treating the findings in the Interim Award as binding on the plaintiffs and defendants, and/or upon applying the findings in the Interim Award to the questions of fact and/or law raised in this Suit, judgment may be entered for the plaintiffs against the defendants.

20 The application was heard on 30 December 2009 by Judicial Commissioner Steven Chong who made an order in terms of Excalibur's application ("the 2009 Order").

The hearing before me

21 After the 2009 Order was made, the Suit came back before me, and I had to decide on the preliminary issues.

22 There were at this stage, three questions which were:

(i) whether the Arbitrator's findings are binding on Excalibur, Win-Win and Leck in the Suit pursuant to the Order;

(ii) whether the Arbitrator's findings are to be applied to the questions of law and facts in this Suit; and

(iii) if the Arbitrator's findings are treated as binding, whether judgment may be entered against Win-Win and Leck.

Question (i): Whether the Arbitrator's findings are binding in this Suit

23 Order 2 of the Order was that:

> The Plaintiff and the Defendants abide and be bound by the decision of the Arbitrator in the ... arbitration proceedings for the purpose of this action.

24 Excalibur took the position that the Arbitrator's findings are binding on the parties in this Suit. Win-Win and Leck, however, contended that they do not bind them in this Suit.

25 Order 2 was framed in plain and broad terms. There was no doubt that the arbitration proceedings which were referred to in Order 2 of the Order had already commenced. The parties and the issues and disputes were identified when the Order was made.

26 One may ask if there are circumstances where the Arbitrator's decision will nevertheless not bind the parties in this Suit. That is possible. If the parties to the arbitration proceedings changed, *eg*, by the addition, removal or replacement of parties, or the issues in the proceedings changed, then a situation may arise where it can be said that the arbitration proceedings contemplated in the Order were not the proceedings that followed.

27 Win-Win and Leck's objections were not made on that basis. Their objections were three-fold:

(a) bifurcation was not within the contemplation of the Court;

(b) the parties in the arbitration proceedings and the Suit were not the same parties; and

(c) the "*Arnold* exception" applied.

Bifurcation was not within the contemplation of the Court

28 When the Order was made, the Arbitrator had not yet made the bifurcation order. That came later on 17 October 2008. Nevertheless, bifurcation *per se* did not affect the operation of Order 2. When the Order was made, the arbitration proceedings were in the early stages. It was entirely within the purview of arbitration proceedings to have bifurcated issues, and for an arbitrator to order them. For a bifurcation order to have any effect on Order 2, it must be such that it can be said that the bifurcation went against the contemplation of the Order, in that the Order would not have been made if it was foreseen that the arbitration proceedings would be bifurcated.

29 The defendants also argued that the bifurcation order was not a decision for the purposes of Order 2 because:

> ... Justice Kan Ting Chiu specifically directed that **the action in Suit no. 538 of 2001/P be adjourned pending the conclusion of the arbitration proceedings** . It is clear in this instance case that the said " ***arbitration proceedings*** " have not concluded.
>
> [emphasis in original]

This submission took liberties with the Order which was that the parties were to abide and be bound by the decision of the Arbitrator *in* the arbitration proceedings. The term "decision" is therefore not limited to the final decision of the Arbitrator. Hence, the order of the Arbitrator made on Tavica's application for bifurcation came within Order 2. As the decision was final on the bifurcated issues which took place in the arbitration proceedings, the Arbitrator's findings bind the parties even if the Arbitrator had not made his final decision on the whole arbitration proceedings.

The parties in the arbitration proceedings and the Suit were not the same parties

30 When the Order was made, it was known that the parties in the arbitration proceedings are the parties in the Subcontract, *ie*, Tavica and Win-Win, whereas the parties in the Suit were the parties to the Agreement, *ie*, Excalibur and Win-Win, and Leck as Win-Win's guarantor.

31 Excalibur, Win-Win and Leck were parties in the Suit in which the Order was made. Tavica was the only non-party in the Suit. Win-Win and Leck did not appeal against the Order. Tavica, which must have been aware of the making of the Order and was represented in the arbitration proceedings by the same solicitors as Excalibur, was content with the Order.

32 Having accepted the Order without appealing against it, there was no merit in Win-Win's and Leck's contention that the Order should not apply against them because the parties in the arbitration proceedings and the Suit were not the same parties.

The "Arnold exception" applied

33 The defendants submitted in their written submissions that:

> 27. The Singapore Court of Appeal in *Lee Tat Development Pte Ltd v MCST Plan No. 301* [2009] 1 SLR(R) 875, held that –
>
> In *Arnold v National Westminister Bank plc* [1991] 2 AC 93 ("*Arnold*"), the House of Lords recognized an exception to the doctrine of res judicata, that is, where the Court itself had made such an egregious mistake that grave injustice to one or more parties would result if the Court's erroneous decision were to form the basis of an estoppel against the aggrieved party or parties ("the *Arnold* exception"). The Singapore Courts should likewise recognize this

exception.

28. It is thus submitted that the Arbitrator's findings are indeed wrong, in that he did not fully apply the contextual approach in interpreting the relevant documents.

34 I make two observations on this submission. First, the *Arnold* exception is an exception to the doctrine of *res judicata*. In the present suit, however, the Arbitrator's findings do not bind Win-Win and Leck by virtue of the operation of that doctrine, but by the force of the Order. This is a conceptually distinct base on which parties may be bound by the Arbitrator's findings, and the *Arnold* exception has no application to the application of the Order.

35 Secondly, even if it is assumed that the *Arnold* exception may apply in this context, the defendants had not shown that the Arbitrator had made such an egregious mistake that grave injustice would result if his findings were to bind Win-Win and Leck. Win-Win had fought long and hard to deny any liability towards Excalibur.

36 I therefore found that the Arbitrator's findings are binding in this Suit.

Question (ii): Whether the Arbitrator's findings are to be applied to the questions of law and facts in this Suit

37 On the basis that the bifurcated issues were the common issues in the arbitration proceedings and the Suit, the Arbitrator's findings in the arbitration proceedings on the common issues are to be applied to the Suit pursuant to the Order. This, however, does not mean that the Arbitrator's findings are to be taken to have addressed all questions of law and fact in the Suit.

38 Consequently, I ruled that the answer in Question (ii) is in the affirmative.

Question (iii): If the Arbitrator's findings are treated as binding, whether judgment may be entered against Win-Win and Leck

39 It hardly needs mentioning that the rights and liabilities of Win-Win and Leck are not necessarily determined by the Arbitrator's findings. If there are issues raised in the Suit that were not addressed in the bifurcated issues and dealt with in the Arbitrator's findings, then those issues must be dealt with before Excalibur's claims against Win-Win and Leck can be determined.

40 Win-Win submitted that:

> the Interim findings by the learned Arbitrator did not address several important issues of fact and/or law raised by Win-Win (in this suit), for a complete determination of this suit, in particular on the issues of estoppel and relief against forfeiture [note: 3].

A reading of Win-Win's defence confirmed that estoppel was pleaded. It was pleaded [note: 4]:

> 6 [T]he Plaintiff is estopped and precluded from saying that the instalments were payable according to clause 5.1 of the Agreement by reason of its conduct and/or the verbal agreement and/or promise made to the 1st Defendant, with the intention that the 1st Defendant should act on such conduct and/or the verbal agreement and/or promise, which the 1st Defendant did, in fact do.

Particulars

i. At the meeting on or about 4 October 1998, it was agreed that the Subcontract and the Agreement would be a package deal and that until the Subcontract was signed, no payment would be due under the Agreement.

...

and

13 [T]he Plaintiff is estopped and precluded from saying that the Agreement was annulled with effect from 15 May 1999 by reason of its conduct and/or the verbal agreement and/or promise made to the 1st Defendant, with the intention that the 1st Defendant should act on such conduct and/or representation and/or promise, which the 1st Defendant did, in fact do.

Particulars

i. On or about 15 June 1999, there was a meeting at the Plaintiff's site office between the Plaintiff's Mr Lawrence Leow, a Mr Tan Boon Leong who was a Manager from M/s Colliers Jardine (the Plaintiff's selling agent) as well as the 1st Defendant's Mr William Loh Kum Yim and Mr Sim Piak How.

...

iii It was represented by Mr Lawrence Leow that the 8 October 1998 agreement and all previous agreement [sic] would continue so long as the 1st Defendant was willing to carry on with the purchase of the Property.

...

Both pleas of estoppel were founded on the alleged agreement that no payment would be due till the Subcontract was signed. There was no specific plea for relief against forfeiture or plea on other issues. However, the existence of even one issue in the Suit that is not covered by the bifurcated issues will suffice to answer the question.

41 While it is correct that estoppel was not expressly mentioned in the bifurcated issues, the question should be viewed in a broader context. This is so because Win-Win's liability to pay Excalibur under the Agreement was specifically raised in the third bifurcated issue, and the Arbitrator had found that Win-Win was not entitled to withhold from Excalibur payments due under the Agreement (see [16] and [17] *supra*).

42 When Win-Win's obligation to make payment under the Agreement came up in the arbitration proceedings, Win-Win contended that the payments were not due, and that led to the Arbitrator making his findings that Win-Win was not entitled to withhold payment to Excalibur pending the confirmation of the Subcontract. Win-Win should and would have put up its full case that payment was not due, including the pleaded defence of estoppel. Consequently, when the Arbitrator found that payment was due, the defence of estoppel was either abandoned, or had failed.

43 Excalibur had sued Leck in his capacity as a guarantor. The document that Excalibur relied on

was a letter from Leck to Excalibur dated 17 March 1999 which reads:

> Dear Sirs
>
> PURCHASE OF UNIT #08-13 AT EXCALIBUR CENTRE (hereinafter "the Unit"); PURCHASER: WIN WIN ALUMINIUM SYSTEMS PTE LTD (hereinafter "the Company")
>
> In consideration of you agreeing at my request to proceed with the sale of the Unit notwithstanding a breach by the Company of the terms thereunder, I hereby unconditionally and irrevocably warrant the performance of the Company and guarantee the payment of all sums due under the Sale and Purchase Agreement relating thereto and if for whatever reasons, the Company shall fail, neglect or refuse to complete the purchase of the Unit, I undertake to purchase the Unit at the same price and on the same terms and shall be liable for all costs and expenses arising thereof.

The letter was signed and sealed by Leck. There was no reference to this document in the Arbitrator's findings.

44 By this letter, Leck stood as guarantor for all payments due from Win-Win under the Agreement. It was argued that his undertaking to purchase the Property in the event that Win-Win failed to complete the purchase absolved him from the liability under guarantee as he was prepared to purchase the Property in place of Win-Win. This argument was flawed because Leck had no entitlement to purchase the Property. He was obliged to purchase it if Excalibur called on his undertaking, but Excalibur was acting within its rights to waive the undertaking, and to enforce the guarantee.

45 In the circumstances, Question (iii) was answered in the affirmative, and judgment was entered against Win-Win and Leck.

[note: 1] Plaintiffs' Submissions paras 16 and 19

[note: 2] See para 7 of the Interim Award

[note: 3] Defendants' Written Submissions para 36

[note: 4] Re-Amended Defence paras 6 and 13

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