PT Selecta Bestama *v* Sin Huat Huat Marine Transportation Pte Ltd [2015] SGHCR 16

Case Number : Adm No 135 of 2014 (Summons No 1088 of 2015)

Decision Date : 30 July 2015

Tribunal/Court : High Court

Coram : Nicholas Poon AR

Counsel Name(s) : Jason Tan Hin Wa (Asia Ascent Law Corporation) for the plaintiff; Michael Chia Peng Chuang and Darius Lee (Legal Solutions LLC) for the defendant.

Parties : PT Selecta Bestama — Sin Huat Huat Marine Transportation Pte Ltd

Civil procedure – setting aside default judgment – stay of proceedings

30 July 2015 Judgment reserved.

Nicholas Poon AR:

Introduction

1 The main action concerns a dispute over the payment of the contract price under two alleged contracts for the construction of two barges (the "Contracts"). The Defendant's application before me, Summons No 1088 of 2015, is for two reliefs.

2 The first is to set aside a judgment that was entered in default of entry of appearance by the Defendant, on the ground that there are issues to be tried. The second relief is for a stay of further court proceedings, if the default judgment is set aside, on the ground that the parties had agreed, by virtue of an exclusive jurisdiction agreement in the Contracts, to submit their disputes to the court of Batam, Indonesia.

3 Having considered the parties' affidavit evidence and submissions, I set aside the default judgment, albeit on condition that the Defendant pays into court $173,500, which is the sum of liquidated damages awarded to the Plaintiff under the default judgment. I make no order in relation to the stay application.

The salient facts

4 The Plaintiff, an Indonesian company, is in the business of building barges. The Defendant is a Singapore company which operates barges. Its principal director is one Mr Low.

5 Sometime in 2013, Mr Low met two representatives of the Plaintiff, one Mr Lynn and one Ms Rina. This was the first of several meetings at Mr Low's office in Singapore. The purpose of these meetings was, broadly speaking, to discuss the possibility of the Defendant engaging the Plaintiff to construct barges. What happened thereafter is hotly disputed.

The Plaintiff's version of events

6 According to Mr Lynn who was the only representative of the Plaintiff to give evidence, the parties came to an in-principle oral agreement in one of these meetings for the construction of two

barges at the price of $1.33m per barge. Subsequently, Mr Lynn drew up more than 10 different draft contracts, signed and dated each of them 20 September 2013, and had these draft contracts "delivered" to Mr Low for his consideration and signature. It is not clear what the mode of delivery was. Mr Lynn claimed that Mr Low had asked for these additional draft options because he was interested in ordering more barges.

7 The payment schedule in all the draft contracts provides that the contract price shall be payable in three instalments: 20% upon signing of the contract; another 20% upon laying of the keel and erection of the bottom steel plate; and the remaining 60% upon completion of construction of the vessel and vessel documents but before signing of the protocol of acceptance and delivery.

8 Mr Low, Mr Lynn and Ms Rina then met on 25 September 2013 at Mr Low's office. It was at this meeting that Mr Low apparently signalled his intention to proceed with the in-principle agreement for the two barges by signing and returning the two Contracts to Mr Lynn.

The Defendant's version of events

9 The Defendant's version, as put forward by Mr Low, is substantially different. He claims that the first time the parties had any sort of agreement was at the 25 September 2013 meeting. Prior to that, Mr Lynn had merely sent him quotations for barges of different specifications and prices. Mr Low said that he told Mr Lynn at the meeting that the Defendant was only interested in purchasing one of the barges, but that the listed price of $1.49m for that barge was too steep. Mr Low also claimed to have said that the payment schedule was unattractive as the Defendant did not have sufficient funds at that time.

10 In response, Mr Lynn purportedly offered three concessions. First, the Plaintiff would sell the barge to the Defendant for a reduced price of $1.33m. Second, the Defendant only needed to pay the 20% deposit upon signing of the contract, with the balance 80% payable upon delivery. Third, if the Defendant did not pay the deposit, the contract would cease to be binding; neither party would be liable to perform any of the obligations in the contract. Mr Low said he accepted Mr Lynn's counter-proposal.

11 According to Mr Low, it was pursuant to this agreement – which he calls the Oral Agreement – that Mr Lynn then presented him with a large number of documents to sign. (These are the draft contracts in Mr Lynn's version.) Mr Low proceeded to sign a number of those documents which turned out to be the Contracts, on the back of Mr Lynn's alleged representation that those documents formalised the Oral Agreement, and nothing more. It is important to note that the Defendant has expressly disclaimed reliance on the doctrine of *non est factum*. In other words, the Defendant is not taking the position that there is a "radical difference" between what Mr Low signed and what he thought he was signing (for a general understanding of the doctrine, see Andrew Phang & Goh Yihan, *Contract Law in Singapore* (Wolter Kluwers, 2012) at para 458).

After the Contracts were signed

12 The Plaintiff then commenced construction of the two barges under the Contracts, notwithstanding that the Defendant did not pay the deposit. It is also common ground that the Plaintiff tendered invoices to the Defendant in October and November 2013 for the 20% deposit and 20% progress payment, all of which were ignored by the Defendant.

13 The Plaintiff accordingly commenced this action for liquidated damages, as well as damages for consequential loss arising from the Defendant's failure to pay the contract price due under the

Contracts.

The parties' respective submissions

14 The arguments below are those which I consider to be principal and material to my decision.

Setting aside of default judgment

15 In relation to the prayer to set aside the default judgment, the Defendant's case rests principally on two planks. First, the Defendant is not liable for the Plaintiff's losses because it was misled into signing the Contracts; at all times, it was the Oral Agreement which the parties had agreed to be bound by. Second, the Plaintiff's claim for liquidated damages is unsustainable because, amongst other things, the clause in the Contracts which entitles the Plaintiff to claim for liquidated damages is unenforceable.

16 The Plaintiff, on the other hand, submits that there is no defence to the claim, given that Mr Low has acknowledged signing the Contracts. The Plaintiff denies that the parties' agreement is captured in the Oral Agreement, or that Mr Lynn had represented that the Contracts' sole purpose was to formalise the Oral Agreement. The Plaintiff further denies that the liquidated damages clause is unenforceable.

Stay of proceedings

17 As to the prayer for a stay of the proceedings, the Defendant submits that the Plaintiff is unable to satisfy the "strong cause" test in *The Jian He* [1999] 3 SLR(R) 432, in that there are no exceptional circumstances which justify disregarding the plain effect of the exclusive jurisdiction agreement.

18 The Plaintiff's response consists of two arguments in the main. First, if the Defendant denies being bound by the Contracts, it cannot avail itself of the exclusive jurisdiction agreement contained in the Contracts. Second, the Defendant had waived its right to rely on the exclusive jurisdiction agreement because it had affirmed the Singapore court's jurisdiction over this matter by taking out a Notice to Produce under O 24 r 10 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("Rules of Court"), which is essentially a request to the Plaintiff to produce certain documents referred to in the Statement of Claim.

My decision

Setting aside of default judgment

19 The law on setting aside of default judgments pursuant to O 13 r 8 of the Rules of Court is very clear and settled. In the leading case of *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907 ("*Mercurine*"), the Court of Appeal stated (at [60]):

> [I]n deciding whether to set aside a regular default judgment, the question for the court is whether the defendant can establish a *prima facie* defence in the sense of showing that there are triable or arguable issues. It is, in our view, rather illogical to hold that the test for setting aside a regular default judgment should be any stricter than that for obtaining leave to defend in an O 14 application.

20 As for what constitutes a "triable issue", reference may be made to *Evans v*

Bartlam [1937] AC 473, in which Lord Wright opined that a triable issue exists where there are "merits to [the defence] which the Court should pay heed". In the context of an O 14 application, the triable issue test is satisfied if "a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence": *Habibullah Mohamed Yousuff v Indian Bank* [1999] SLR(R) 880 at [21].

21 Hence, the threshold for demonstrating the existence of triable issues is not high. Even so, Mr Low's evidence in my view falls short of this minimum standard because his version of events is inherently incredible. I list just three of the more serious difficulties that I had with his account.

Veracity of factual assertions

22 The first has to do with his claim that he was handed the Contracts at the very meeting on 25 September 2013. It is critical to note that the listed price of the barges in the Contracts was $1.33m, the exact same discounted price that Mr Low said Mr Lynn had offered for the first time at that meeting. If Mr Low is to be believed, it would mean that Mr Lynn went into the meeting with a view to lowering the prices for the two barges, notwithstanding that Mr Low had not yet told him that the Defendant was short of funds and found the previous quotations too expensive.

23 Moreover, Mr Lynn had not gone into the meeting with multiple contracts for the *same* barge at different prices hoping that Mr Low would sign the contract with the price which appealed to him most. The draft contracts were for *different* types of barges. Again, if Mr Low is to be believed, Mr Lynn went into the meeting with only one expectation: that the parties would shake hands on $1.33m for the two barges that were eventually contracted for.

24 It was far more likely that Mr Lynn went into the meeting confident that a deal would be struck, precisely because the parties had already previously agreed on the price of $1.33m, and for which the draft contracts were drawn up and conveyed to Mr Low ahead of the 25 September 2013 meeting. The purpose of the meeting, therefore, was as Mr Lynn puts it in his affidavit, to collect the signed Contracts, which he did.

25 The second problem with Mr Low's story concerns the terms of the Oral Agreement, in particular, the term entitling the Defendant to pay 80% of the contract price only upon delivery of the barge. From any ordinary commercial perspective, it would take a lot of convincing to argue that the Plaintiff would have agreed to such an arrangement, especially after having just agreed – on Mr Low's case, that is – to lowering the price by $160,000. The Defendant was neither a particularly lucrative prospective customer (it has only one barge), nor was it a repeat customer. Moreover, the Defendant did not offer any security or undertakings. There seemed hardly any logical, much less strong commercial reason, for the Plaintiff to take on such disproportionate financial risk for a client that had yet to chalk up any goodwill.

26 Last but certainly not least, I am unable to reconcile the Defendant's silence following its receipt of the four invoices with the position that it now takes. The invoices clearly show that the Defendant had contracted for two barges, not one, and that 20% of the contract price was payable upon laying of the keel and erection of the bottom steel plate, in addition to the 20% payable on signing of the Contracts.

27 If the parties had truly agreed for the procurement of only one barge, with 80% of the purchase price payable only upon delivery of the barge, and on condition that the contract would disengage automatically if the Defendant did not make the 20% deposit payment, the invoices should have set alarm bells ringing. A reasonable party in the shoes of the Defendant would have informed

the Plaintiff that the invoices grossly misrepresent the agreement between the parties. The response would also rehash the real agreement is, that is, the Oral Agreement. There was nothing of that sort, at least on paper.

28 Mr Low claims he had told Mr Lynn "over the phone on a few occasions" that the Defendant had no funds and hence the Plaintiff "should therefore not proceed with building the barge". Mr Lynn denies having any conversation with Mr Low on this issue. No contemporaneous evidence of calls having been made was tendered. Moreover, Mr Low's evidence does not state that he had told Mr Lynn that the invoices were wrong. Having regard to all the circumstances, Mr Low's explanation after the event seems way too convenient.

29 Another example of the incoherence of Mr Low's evidence is the fact that his purported response over the phone is limited to the invoices concerning the 20% deposit, but not the invoices concerning the 20% progress payment for the laying of the keel and erection of the bottom steel plate which he says nothing about. One would have thought that if Mr Low had thought it necessary to communicate his inability to pay the deposit, he would have had more reason to decry any attempt by Mr Lynn to enforce the 20% progress payment despite the terms of the Oral Agreement that the Plaintiff shall not proceed with construction until the deposit is paid.

30 This brings me to a point of law concerning the assessment of conflicting affidavit evidence. Courts have consistently cautioned against resolving conflicting evidence on the basis of affidavits alone. There are good reasons for this restrained approach one of which, in the context of interlocutory applications such as the present, is that every party should not be deprived of a full opportunity to ventilate its case: *Mercurine* at [58].

31 Equally, it is established law that a mere assertion in an affidavit of a given situation is insufficient to raise a triable issue if the court, looking at the whole situation, is not satisfied that there is a fair or reasonable probability of the defendant having a real or *bona fide* defence: see *Prosperous Credit Pte Ltd v Gen Hwa Franchise International Pte Ltd and others* [1998] 1 SLR(R) 53 at [14].

32 Taking a step back and looking at the evidence in the round, it seems to me that there is no factual basis upon which the Defendant can safely put forward a *prima facie* defence to justify setting aside the default judgment. To borrow the phrase used by Lord Diplock in *Eng Mee Yong and others v V Letchumanan s/o Velayutham* [1980] 1 AC 331 at 341 to describe the state of the evidence in that case, Mr Low's evidence was vague, self-contradictory and implausible.

Argument on the liquidated damages clause

33 Although I do not find the Defendant's factual account to be credible, its defence in relation to the liquidated damages claim is *prima facie* arguable. In essence, the Defendant argues that the liquidated damages clause in the Contracts relied upon by the Plaintiff is a penalty clause and thus unenforceable. There are two facets to this argument: the first is that it is a penalty clause under Singapore law; the second, which is the one that I find is *prima facie* arguable, is that the clause is a penalty under Indonesian law which is expressed as the governing law of the Contracts.

(1) The liquidated damages clause under Singapore law

34 The defence based on Singapore law begins with the argument that the clause itself uses the word "penalty". That does not take the argument very far because the consensus across the authorities is that the label given to the damages payable under a liquidated damages clause is

inconclusive, at best: see *eg*, *Dunlop Pneumatic Tyre Co, Ltd v New Garage and Motor Co, Ltd* [1915] AC 79 at 86.

35 Next, the Defendant claims that the stipulated liquidated damages sum of $500 per day is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. The Plaintiff says it is not extravagant or unconscionable because its associated costs alone – primarily leasing of land and financing – comes up to approximately $400 per day.

36 Apart from a bare denial, the Defendant does not contest the financing costs. It disputes the cost of the lease, on two grounds, namely, that the Plaintiff had been using that parcel of land even before the Contracts were entered into, and that the land may not have been used exclusively for the construction of the two barges.

37 As to the first ground, I do not see how the fact that the Plaintiff has been operating out of the same location shows that the cost of the lease should not be attributed to the projects under the Contracts. As to the latter, it should be noted that the size of the land is 10,000m^2, or a hectare.

38 For illustrative purposes, a sports field bounded by a standard athletics track is typically just over a hectare. 10,000m^2 is therefore not a very big area. Even if the Plaintiff had other projects using the same parcel of land at the same time, the construction of the two barges would have occupied a substantial portion of the land. Even if some discount is to be applied, the Defendant is still a very long way from showing that $500 per day is so excessive by reference to the greatest conceivable actual loss that it is extravagant and unconscionable.

39 In this connection, reference could be made to *Philips Hong Kong Limited v The Attorney General of Hong Kong* (1993) 61 BLR 41 ("*Philips*") where Lord Woolf stated (at 58–59 and 63):

> Except possibly in the case of situations where one of the parties to the contract is able to dominate the other as to the choice of the terms of a contract, it will normally be insufficient to establish that a provision is objectionably penal to identify situations where the application of the provision could result in a larger sum being recovered by the injured party than his actual loss. … *[A]rguments based on hypothetical situations where it is said that the loss might be less than the sum specified as payable as liquidated damages … should not be allowed to divert attention from the correct test as to what is a penalty provision — namely is it a genuine pre-estimate of what the loss is likely to be? — to the different question, namely, are there possible circumstances where a lesser loss would be suffered?* [emphasis added]

Philips was cited with approval by the Singapore Court of Appeal in *Hong Leong Finance Ltd v Tan Gin Huay and another* [1999] 1 SLR(R) 755 at [23].

(2) The liquidated damages clause under Indonesian law

40 The defence based on Indonesian law, however, is more difficult to determine at this preliminary stage of proceedings. According to the Defendant's expert on Indonesian law, pursuant to State Gazette No 22 of 1848, the Defendant is liable to pay a maximum of 6% of the value of the barges per annum, which works out to less than $500 per day. It bears mentioning that the State Gazette appears to be concerned with the statutory interest rate that may be levied, not dissimilar to provisions in the Rules of Court which confer on the Chief Justice the power to determine the rate of interest that should be levied in respect of various matters.

41 Another material claim of the Defendant's expert is that the inconsistency between the numbering and wording of the liquidated damages clause – which prescribes the sum payable as "$500.00 (Singapore Dollars Five Thousand only" – will be resolved under Indonesian law in favour of the amount that is spelt out in words, not numbers, which is to say that the liquidated damages should be $5,000 per day instead of $500. That being the case, even if the clause is not a penalty, the sum payable by the Defendant would be larger and consequently more of a penalty.

42 While I have some reservations over the merits of the Defendant's arguments premised on Indonesian law, because the Plaintiff has elected not to canvass any expert opinion to the contrary, I do not have any legal basis to disregard the Defendant's expert's opinion. It is for this narrow reason that I hold that this part of the Defendant's defence qualifies as a *prima facie* defence.

43 Nevertheless, in view of my assessment that the Defendant's factual assertions are inherently incredible, coupled with my doubts over the Defendant's defence to the liquidated damages claim under Singapore law, I consider it fair and just to require the Defendant to put up security in the amount of $173,500 as a condition for progressing its defence. There is no question that O 13 r 8 of the Rules of Court permits the court to require payment of security as a condition for the setting aside of a default judgment: see *eg*, *Alps Electric Co Ltd v Jinli Freight Express Consolidators Pte Ltd* [1994] 3 SLR(R) 532 and *TR Networks Ltd and Others v Elixir Health Holdings Pte and Others* [2005] SGHC 106.

Stay of proceedings

44 Turning then to the application for a stay of proceedings, I do not agree with the Plaintiff's first submission that the Defendant may not avail itself of the exclusive jurisdiction agreement in the Contracts because of its defence that it is the Oral Agreement that is binding on the parties.

45 Although there is some ambiguity as to the exact nature of its defence, the Defendant has made it very clear that it is not disclaiming signing the Contracts. Nor is it saying it did not know what it signed. That is sufficient for me to hold that the Defendant accepts at least most of the terms of the Contracts even if it denies being bound by the terms relating to the payment schedule. That must be so, even on the Defendant's case that the Oral Agreement covered only one barge, because the Oral Agreement does not contain important terms, for example, those relating to delivery or technical specifications. Those terms would have to be drawn from the Contracts.

46 I am likewise unable to agree with the Plaintiff's other submission that the Notice to Produce taken out by the Defendant constitutes a waiver of any objection to the Singapore court's exercise of jurisdiction. I respectfully follow the reasoning and conclusion of Lee Seiu Kin J in *Amoe Pte Ltd v Otto Marine Ltd* [2014] 1 SLR 724, that where a Notice to Produce documents referenced in the pleadings is taken out to ascertain or genuinely investigate the nature of the plaintiff's claim, that act alone will not amount to taking a step in proceedings to the exclusion of later objecting to the Singapore court's exercise of jurisdiction. I am satisfied that the Defendant took out the Notice to Produce primarily because Mr Low could not recall signing or having copies of the Contracts. Hence, the Defendant is not now precluded from objecting to the Singapore court's exercise of jurisdiction.

47 Accordingly, it is necessary to determine if the exclusive jurisdiction agreement justifies staying any further court proceedings. While I agree with the Defendant's submission that the Plaintiff has not satisfied the "strong cause" test, the real question, in my view, is whether the exclusive jurisdiction agreement is even engaged at this point in time.

48 The following analysis assumes Singapore law applies, notwithstanding that Indonesian law is

the governing law of the Contracts. This is because neither side has provided evidence of Indonesian contract law on this issue. On the contrary, the Defendant refers extensively to Singapore case law in its submissions. I therefore see no prejudice in determining this issue from the lens of Singapore law.

49 It is necessary to return to the words of the exclusive jurisdiction agreement which is a subset of a broader dispute resolution clause that reads:

> Save for the matters set out in [the following] paragraph [concerning disputes over the quality of materials or workmanship], *all disputes arising in connection with this contract including but not limited to the validity, the interpretation or the execution of this contract* ***shall be settled amicably by negotiation*** . ***In case*** *no settlement can be reached the parties hereto agree to submit* all such disputes to the Governing Jurisdiction of the Courts Batam in Batam (*sic*). [emphasis added in italics and bold italics]

50 Ostensibly, there are two parts to the clause: the first calls for an attempt to settle amicably through negotiation; the second calls for resolution by the Batam court. The critical link between the first and second parts of this multi-tiered dispute resolution clause is to be found in the words "[i]n case no settlement can be reached" from which two conclusions may be drawn.

51 First, the parties are under an obligation to attempt negotiation as their initial mode of dispute resolution. The pursuit of any other mode prior to attempting negotiation amounts to a breach of the dispute resolution clause. There is no evidence, by either party, that negotiation was attempted and failed.

52 Second and more importantly, the natural implication of the operative phrase is that the parties' promise to submit to the exclusive jurisdiction of the Batam court is subject to the existence of an agreed state of affairs, that is, a failed attempt at negotiations. Thus, the proper construction of this dispute resolution clause is that the promise to submit any dispute under the Contracts to the Batam court is conditional on negotiations having taken place and failed.

53 Such a clause seems to me to be no different, in principle at least, from ordinary multi-tiered dispute resolution clauses that contain a precondition to the commencement of arbitration. In relation to such clauses, courts have consistently held that an arbitral tribunal has no jurisdiction if the precondition is not satisfied, provided of course that the precondition is itself an enforceable obligation: see *eg*, *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2014] 1 SLR 130 at [54].

54 Indeed, both parties in their further written submissions on this point agreed that the obligation to negotiate was a precondition to the exclusive jurisdiction agreement. The Defendant however does not elaborate on the consequences of the breach of the obligation to negotiate. I am therefore unable to accept its assertion that the jurisdiction of the Singapore court was "prematurely and in any event wrongly invoked" by the Plaintiff.

55 There being no argument that the obligation to negotiate is unenforceable or no longer binding, and given that negotiations have not been attempted, it follows that the parties' promise to submit to the exclusive jurisdiction of the Batam court is not yet enforceable. Consequently, it is premature to consider the application of the "strong cause" test.

56 It may be wondered whether the Plaintiff's commencement of court proceedings in Singapore, arguably in breach of the obligation to negotiate, entitles the Defendant to enforce the exclusive

jurisdiction agreement. As that has not been argued by the Defendant, it is a point that I need not decide, save that it seems to me that on the application of the usual contract law principles, the right to enforce the promise to submit the dispute to the exclusive jurisdiction of the Batam court does not necessarily arise just because the Plaintiff's commencement of these proceedings constitutes a breach of the precondition.

57 That is not to say that the Defendant may never rely on the exclusive jurisdiction agreement. The Defendant is at liberty to attempt to commence negotiations forthwith. If negotiations fail, whether because the parties cannot agree on terms or because the Plaintiff insists on pursuing its litigation in the Singapore court, the Defendant may then at that stage argue that the obligation to submit the dispute to the Batam court is engaged, with the corollary that the Singapore court should stay its proceedings in the absence of exceptional circumstances.

Conclusion

58 For the above reasons, the default judgment is set aside upon the Defendant putting up security in the amount of $173,500. The Defendant has 21 days from the date of this judgment to satisfy the condition, and a further 7 days to enter an appearance after the judgment is set aside. I shall hear the parties on the mode of security as well as on costs.