BAF *v* BAG and others
[2016] SGHC 251

Case Number	: Suit No 1158 of 2015 (Summons No 1812 of 2016)
Decision Date	: 07 November 2016
Tribunal/Court	: High Court
Coram	: Chua Lee Ming JC
Counsel Name(s)	: Hri Kumar Nair, SC, Shivani d/o Sivasagthy Retnam, Hasharan Kaur and Teo Wei Ling (Drew & Napier LLC) for the plaintiff; Kronenburg Edmund Jerome, Zheng Huirong Lynette Ann and Tan Tien Wen (Braddell Brothers LLP) for the second defendant.
Parties	: BAF — BAG — BAH — BAI

Arbitration – Stay of court proceedings – Terms for grant of stay

7 November 2016

Chua Lee Ming JC:

Introduction

1 The second defendant ("D2") applied for a stay of all proceedings against it in this action pursuant to s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA"). The plaintiff had no objections to the stay but wanted to serve certain interrogatories on D2 to be answered by the first defendant ("D1") on behalf of D2. D1 was the sole commissioner of D2, an Indonesian company.

2 I granted D2's application and stayed all proceedings against it on the condition that the plaintiff was at liberty to serve interrogatories on it within seven days and that D1 was to answer the interrogatories on behalf of D2 within one month of service of the interrogatories ("the Condition"). D2 has appealed against the imposition of the Condition.

Background

3 The plaintiff is a Singapore company carrying on business in, among other things, mining activities and trading in coal, minerals, raw materials and commodities in general. At all material times, the plaintiff was controlled by one [TN] who was also the major shareholder of the plaintiff.

4 D1 is an Indonesian national and the founder and former chairman (having stepped down in 2012) of the [PTP] Group in Indonesia. D2 is an Indonesian company which carried on business in, among other things, coal mining and trading. The third defendant ("D3") is a company incorporated in the British Virgin Island.

5 D1 and [TN] entered into a Master Agreement dated 14 April 2011 ("the Master Agreement"). [note: 1] TN entered into the Master Agreement on behalf of himself or a company majorly owned or controlled by him. It was not disputed that the plaintiff was a company majorly owned or controlled by TN and that TN had entered into the Master Agreement on its behalf. In any event, on 30 July 2015, the plaintiff ratified the Master Agreement.

6 In summary, under the Master Agreement:

(a) D1 confirmed (i) his representation to the plaintiff that D2, a company within the [PTP] Group, held a mining concession for coal in Indonesia and (ii) his wishes to enter into a joint venture with the plaintiff to develop and use D2's mining concession; [note: 2]

(b) D1 would hold 70% of the shares in the joint venture company ("the JV Co") and the plaintiff would hold 30%; [note: 3]

(c) the plaintiff would provide the JV Co with US$30m either through equity investment, loans or other means, for commencement of mining works ("the Commencement Fund"). The Commencement Fund was to be paid in two stages – US$20m was to be paid within 48 hours of completion of due diligence by the plaintiff and US$10m was to be paid within 15 days of the date of the first payment; [note: 4]

(d) the US$30m was to be paid in the following manner:

(i) the plaintiff was to advance a loan of US$30m to a Singapore company (which was not defined in the Master Agreement) for a period ending 31 March 2016;

(ii) the Singapore company was to advance monies to the JV Co in accordance with the JV Co's business plan approved unanimously by the JV Co's board ("the Approved Business Plan");

(iii) any payment to the JV Co by the Singapore company would be deemed to be a repayment of such portion of the loan from the plaintiff and would be counted towards the plaintiff's participation in the JV Co;

(iv) such portions of the amount that were not advanced to the JV Co by 31 March 2016 may be used by the Singapore company in collaboration with D1 for the development of townships, construction of residential and commercial premises in Indonesia ("the Estate Development Project"); [note: 5] and

(e) the plaintiff had an option to require D1 to buy the plaintiff's 50% interest in the Estate Development Project. The plaintiff's 50% interest was valued at US$30m plus profits, if any, to be determined by D1. [note: 6]

7 By a letter dated 15 April 2011, D2 acknowledged that it was bound by the terms of the Master Agreement as if it was a party to the agreement. [note: 7]

8 By a letter dated 17 April 2011, D1 gave instructions for the payment of the US$30m ("the Monies") as follows: [note: 8]

(a) US$20m was to be paid to D3's account with BNP Paribas Wealth Management, Singapore ("D3's Singapore Account") for value date 19 April 2011.

(b) US$10m was to be paid to D3's Singapore Account for value date 5 May 2011.

9 In accordance with D1's instructions, the plaintiff remitted US$20m and US$10m to D3's

Singapore Account on 19 April 2011 and 5 May 2011 respectively.

10 By a letter dated 14 September 2011, D2 confirmed that the Monies had been received by it in D3's Singapore account and would be used in accordance with the Master Agreement. [note: 9]

11 The plaintiff claimed that, on 3 May 2011, D1 and [TN] entered into a Supplementary Agreement ("the Supplementary Agreement"). [note: 10] Again, [TN] entered into the agreement on behalf of himself or a company majorly owned or controlled by him. On 30 July 2015, the plaintiff ratified the Supplementary Agreement.

12 The Supplementary Agreement provided that:

(a) the Supplementary Agreement would govern the utilization of the Monies and the operation of the joint venture until such time detailed shareholders' agreements were entered into; [note: 11]

(b) the Monies would be used to invest in the joint venture. Payment of expenses out of the Monies required the plaintiff's express approval and all payments by the joint venture required the joint signatures of D1 and the plaintiff; [note: 12]

(c) D1 and the plaintiff would enter into a shareholders' agreement with respect to the joint venture, and various other agreements including mine development management agreements and marketing agreements, by 18 August 2011; [note: 13]

(d) D1 was to make the mines under D2's mining concession operational by December 2012; [note: 14]

(e) all decisions of the JV Co were to be taken unanimously; [note: 15] and

(f) the Supplementary Agreement was deemed to be an integral part of the Master Agreement. [note: 16]

13 The plaintiff's representative sent a draft marketing agreement to D1's representatives in May 2011 and a draft shareholders' agreement in June 2011. According to the plaintiff, D1 was to send to the plaintiff a draft mine development management agreement. None of these agreements were signed by the deadline of 18 August 2011 stipulated in the Supplementary Agreement. D1 and D2 did not respond to the two drafts sent to them and D1 did not provide any draft mine development management agreement.

14 D1 failed to make the mines under D2's mining concession operational by December 2012 as required under the Supplementary Agreement.

15 Between July 2011 and February 2013, the plaintiff sought updates on the status of the mining concession but did not receive any updates from D1 and D2.

16 By a letter dated 7 February 2013, [note: 17] D2 informed [TN] and the plaintiff that:

(a) the Monies were a "commencement fund" and were advanced with the primary intention of processing the development of the mining concession;

(b) the Monies had "only been utilised to process the development of [the mining concession] and not for an Estate Development Project";

(c) there had been "significant politically influenced policy changes relating to the coal mining and coal trading business in Indonesia, adversely affecting [D2] in its efforts to process its permits" which consequently had "disrupted the development" of its mining concession and thereby "suspending mining production"; and

(d) therefore, returns from the funds invested in the JV Co "cannot be realized at present, pending recovery of the unfavourable turn of events".

17 In March 2013, D2 informed the plaintiff that it had made efforts to obtain other coal mining concessions in other parts of Indonesia but provided no details. [note: 18] In June 2014, D2 repeated that government policy changes had hindered the finalization of the production permit. [note: 19] In October 2014, D2 informed the plaintiff that the mining concession was still pending due to the changes in the government policy and new laws that had been issued. [note: 20]

18 By a letter dated 27 August 2015, [note: 21] the plaintiff's solicitors, Drew & Napier LLC ("D&N") wrote to the defendants and the JV Co, requesting information and documents relating to the whereabouts and/or use of the Monies, the status of the development of the mining concession and the status of D2's search for alternatives to fulfil the coal production quota in the Master and Supplementary Agreements. The plaintiff claimed that the defendants and the JV Co refused to provide a proper account and/or the documents requested.

19 By a letter dated 16 October 2015 from D1's Indonesian lawyers, MR & Partners ("MRP"), [note: 22] D1 claimed that the only agreement he entered into was the Master Agreement and that he had no knowledge of having entered into and signed the Supplementary Agreement.

20 By a letter dated 21 October 2015 from D&N to MRP, [note: 23] the plaintiff claimed that it had been misled into transferring the Monies and demanded payment of the sum of US$30m. Through MRP's reply dated 29 October 2015, [note: 24] D1 claimed that the Supplementary Agreement was not binding on him because the financial advisors who had signed the agreement on his behalf were not authorised to do so.

The plaintiff's claim

21 In this action, the plaintiff sued:

(a) D1 and/or D2 for fraudulent misrepresentation and dishonestly assisting D3 in D3's breach of trust;

(b) all three defendants for conspiracy with intent to injure the plaintiff by unlawful means; and

(c) D3 for breach of trust and unjust enrichment.

22 The plaintiff sought:

(a) recovery of the sum of US$30m, further and/or alternatively damages, from the

defendants;

(b) an account by the defendants for the sum of US$30m;

(c) declarations that the plaintiff is entitled to trace the sum of US$30m into and claim a proprietary interest in the Monies and/or assets acquired directly or indirectly with the Monies.

Banker's Book Application

23 The writ of summons and statement of claim were served on D3 at its registered office in the British Virgin Islands on 17 November 2015. [note: 25]

24 On 20 November 2015, the plaintiff filed an application under s 175 of the Evidence Act (Cap 97, 1997 Rev Ed) for discovery of documents relating to, among other things, D3's Singapore Account and the Monies ("the Banker's Book Application"). [note: 26] On 7 December 2015, the Assistant Registrar ("AR") granted the order ("the Banker's Book Order"). D3 did not attend the hearing although it was served with the application and informed of the hearing date. The Banker's Book Order was served on D3 on 12 December 2015. [note: 27]

25 D3 entered appearance on 14 December 2015, *ie* six days after the deadline for it to enter appearance had expired.

26 On 21 December 2015, BNP Paribas Wealth Management, Singapore, complied with the Banker's Book Order and produced the documents relating to D3's Singapore Account and the Monies. The documents suggested that:

(a) as at 31 March 2011, D3's Singapore Account had a closing balance of US$100,437.93;

(b) on 19 April 2011 and 5 May 2011, D3's Singapore Account received the Monies;

(c) between 26 April 2011 and 10 May 2011, some US$13.6m of the Monies were transferred to D1's personal account, [NSB] (the ultimate holding company that managed the [PTP] Group) and one [BQ];

(d) thereafter, the balance of the Monies were mixed with other funds that were received in D3's Singapore Account from other parties;

(e) on 11 June 2012, about US$1m was transferred from D3's Singapore Account to D2;

(f) D3's Singapore Account was closed on 12 April 2013. Just before it was closed, the remaining balance of US$1,676,821.53 was remitted to [NSB]; and

(g) none of the Monies were transferred to the JV Co as required under the Master Agreement.

27 The plaintiff alleged that it did not know whether the Monies were transferred for purposes under the Master Agreement.

D3's application to stay the proceedings

28 By a letter dated 18 December 2015, Braddell Brothers LLP ("BB"), acting on behalf of D1 and D2, sent a Notice of Arbitration to the plaintiff and [TN] pursuant to an arbitration clause in the

Master Agreement ("the arbitration agreement"). D3 was not a party to Master Agreement. BB also informed D&N that they represented only D3 but not D1 and D2 in this action (although they acted for D1 and D2 in the arbitration).

29 On the same day, 18 December 2015, D3 applied for a stay of this suit until the arbitration brought by D1 and D2 against the plaintiff and [TN] ("the SIAC Arbitration") is finally disposed of. [note: 28] As D3 was not a party to the arbitration agreement, it argued that a stay ought to be granted under the court's inherent jurisdiction to stay the proceedings against D3 for reasons of case management. D3 submitted that a stay should be granted because of the overlap between the court proceedings against it and the SIAC Arbitration. D3 relied on *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 for the proposition that if part of a dispute is sent for arbitration, the court proceedings relating to the rest of the dispute may be stayed where doing so would serve the ends of justice. D3 also confirmed its agreement to join the SIAC Arbitration and to be bound by the SIAC Arbitration if it could not be so joined.

30 The plaintiff objected to D3's application for a stay but also submitted that if a stay were to be granted, the stay should be subject to the plaintiff's ability to seek leave of court to serve interrogatories. The plaintiff's position was that it needed to serve interrogatories on the defendants on the use of the Monies so that it could follow, trace and recover the Monies from the third parties to whom the Monies had been paid.

31 On 29 December 2015, I granted an order staying the action against D3 subject to (a) the plaintiff being at liberty to seek the court's leave to serve interrogatories on D3, and (b) D3's agreement that it will be bound by the findings in the SIAC Arbitration if it is not made a party to the same. No appeal was filed against the order.

32 D3 was added as a party to the SIAC Arbitration on 29 April 2016.

Interrogatories against D3

33 On 28 January 2016, the plaintiff applied for leave to serve interrogatories on D3. [note: 29] On 11 April 2016, the AR granted the application. On 11 April 2016, the plaintiff served the interrogatories on D3. In summary, the interrogatories sought answers to the following questions:

(a) whether certain identified transfers of funds from D3's Singapore Account were for purposes under the Master Agreement and,

(i) if so, how were they used;

(ii) if not, what were the purposes of the transfers and what consideration was provided by the recipients;

(b) apart from the specific transfers mentioned above,

(i) when were the rest of the Monies transferred out;

(ii) who were they transferred to;

(iii) whether the transfers were for purposes under the Master Agreement and, if so, how were they used;

(iv) if the transfers were not for purposes under the Master Agreement, what were the purposes of the transfers and what consideration was provided by the recipients.

34 D3 did not answer the interrogatories and instead filed an appeal on 21 April 2016 against the AR's decision [note: 30]. I dismissed the appeal on 5 May 2016.

35 On 31 May 2015, D3 filed its answers to the interrogatories served on it. [note: 31] The answers were given by one [G], a director of D3, who took the position that D3 was "unable to answer the interrogatories as it does not possess any information as to the matters therein, within its present records or within the knowledge of its employees or officers". [G] also stated in his affidavit that he was appointed as a director of D3 on 5 January 2015 after D1 ceased to be a director/officer of D3.

D2's application to stay the proceedings

36 In the meanwhile, D2 was served with the writ of summons and statement of claim on 16 March 2016 and entered appearance on 18 March 2016.

37 On 18 April 2016, D2 applied for a stay of proceedings pending the SIAC Arbitration pursuant to s 6 of the IAA. [note: 32]

38 On 29 June 2016, the defendants applied to the arbitral tribunal in the SIAC Arbitration to restrain the plaintiff and [TN] from taking any further steps in the present action "immediately after the stay of [the action] in respect of [D2]". The application was adjourned.

39 On 4 July 2016, I heard D2's application. The plaintiff agreed to the application for a stay but asked that the stay be made subject to the Condition. I granted the stay subject to the Condition.

40 On 29 July 2016, D2 filed its appeal to the Court of Appeal against the imposition of the Condition.

Reasons for the Condition

41 Section 6(1) of the IAA provides for international arbitration agreements to be enforced by way of applications to stay court proceedings. Section 6(2) of the IAA then provides as follows:

> The court to which an application has been made in accordance with subsection (1) shall make an order, *upon such terms or conditions as it may think fit*, staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.
>
> [emphasis added]

42 The discretion of the court to impose terms and conditions upon a stay in favour of arbitration is unfettered although it must be exercised judiciously: *The "Duden"* [2008] 4 SLR(R) 984 at [12] and [14]. The court is entitled to impose terms and conditions as appear reasonable or required by the ties of justice: *The "Duden"* at [15]–[16]; *PT Budi Semestra Satria v Concordia Agritrading Pte Ltd* [1998] SGHC 127 at [13].

43 As stated earlier (see [30] above), the plaintiff's position was that it needed the answers to the interrogatories so that it could follow, trace and recover the Monies from the third parties to whom the Monies had been paid. The plaintiff submitted that it was necessary for D1 to answer the

interrogatories on behalf of D2 for the following reasons:

(a) The documents obtained pursuant to the Banker's Book Order showed that the Monies paid into D3's Singapore Account had been paid out to third parties. Significantly, the documents did not show:

(i) any funds being transferred to the JV Co as required under the Master Agreement;

(ii) whether the funds were transferred for purposes under the Master Agreement;

(iii) why the funds were transferred to the various third parties; and

(iv) what consideration, if any, the various third parties provided for receiving the funds.

(b) During the hearing of D3's application for a stay, D3 had argued that it would be embarrassed by having to answer the interrogatories before the statement of claim was filed in the SIAC Arbitration and that the interrogatories would be answered in the statement of claim to be filed in the SIAC Arbitration. The court ordered D3 to answer the interrogatories one day after the deadline for filing the statement of claim in the SIAC Arbitration. However, the statement of claim that was subsequently filed in the SIAC Arbitration on 6 June 2016 did not provide any answer to the interrogatories.

(c) D3 had not even attempted to obtain information from D1 when answering the interrogatories served on it. D1 had authorised and directed the payments of the Monies and was a director of D3 at the time the payments were made and remained the beneficial owner of D3.

(d) D2 had admitted in its letter dated 14 September 2011 that the Monies had been received by it and that they would be used in accordance with the Master Agreement. However, D2 had not provided details as to how the Monies had been utilised.

(e) D1 was the sole commissioner of D2. D2 was a company within the [PTP] Group which was founded by D1 and of which D1 was the chairman.

44 D2 did not dispute the court's discretion to impose terms and conditions upon a stay of proceedings under s 6(2) of the IAA. However, D2 objected to the Condition on two grounds. First, D2 submitted that the plaintiff had no basis to go after the third parties who received the Monies because the Master Agreement did not require the Monies to be used for the joint venture. The Supplementary Agreement had such a requirement but D2's case was that the Supplementary Agreement was not binding as its execution was not authorised by D1.

45 D2's first ground of objection went to the general question whether the interrogatories were necessary. In my view, whether the Supplementary Agreement was binding on D1 and if not, whether the Monies were required by the Master Agreement to be used for the joint venture, were not questions that could be determined at this stage. I also agreed with the plaintiff that D2's assertion that the defendants were free to use the Monies as their own seemed to be an afterthought. In its letter dated 14 September 2011 to the plaintiff, D2 had clearly stated that the Monies had been received by it and "shall be utilized in accordance to the… Master Agreement" (see [10] above).

46 Next, D2 submitted that the plaintiff's application to serve interrogatories on D2 ought to be made to the arbitral tribunal in the SIAC Arbitration first. Only if the arbitral tribunal decided that the matter was not within the scope of the arbitration could the plaintiff then seek assistance from the

court. This was D2's main objection.

47 I agreed with the plaintiff that since the interrogatories were solely to enable the plaintiff to take action against third parties, the issue relating to the interrogatories was of no concern to the arbitral tribunal in the SIAC Arbitration. Requiring the plaintiff to apply to the arbitral tribunal for such interrogatories would be an exercise in futility. The arbitral tribunal's jurisdiction being consensual, there was no reason for it to concern itself with interrogatories for the purpose of following and tracing the Monies to third parties who were not parties to the arbitration or the arbitration agreement. D2 did not produce any authority in support of its claim that the scope of the SIAC Arbitration would include ordering such interrogatories.

48 In the circumstances, I saw no necessity to require the plaintiff to make the application to the arbitral tribunal first.

Post script

49 On 1 August 2016, D2 applied for a stay of the Condition pending its appeal to the Court of Appeal. [note: 33] On 3 August 2016, the plaintiff applied for an order that D1 be required to answer the interrogatories served on D3 on 11 April 2016 pursuant to the order made on the same day (see [33] above). [note: 34]

50 I heard both applications on 13 September 2016. I granted a stay of the Condition pending appeal, on the ground that otherwise the appeal would be rendered nugatory. I also granted the plaintiff's application for D1 to answer the interrogatories served on D3.

[note: 1] Plaintiff's Bundle of Documents ("PBD") vol 1, Tab 2, pp 81–88.

[note: 2] Clause 1 of the Master Agreement.

[note: 3] Clause 6 of the Master Agreement.

[note: 4] Clause 7 of the Master Agreement.

[note: 5] Clause 10 of the Master Agreement.

[note: 6] Clause 11 of the Master Agreement.

[note: 7] PBD vol 1, Tab 2, p 90.

[note: 8] PBD vol 1, Tab 2, p 92.

[note: 9] PBD vol 1, Tab 2, p 111.

[note: 10] PBD vol 1, Tab2, pp 97–107.

[note: 11] Clause 1 of the Supplementary Agreement.

[note: 12] Clause 2 of the Supplementary Agreement.

[note: 13] Clauses 6.1 and 6.5 of the Supplementary Agreement.

[note: 14] Clause 3 of the Supplementary Agreement.

[note: 15] Clause 6.3 of the Supplementary Agreement.

[note: 16] Clause 9 of the Supplementary Agreement.

[note: 17] PBD vol 1, Tab 2, pp 113–114.

[note: 18] PBD vol 1, Tab 2, p 116.

[note: 19] PBD vol 1, Tab 2, p 117.

[note: 20] PBD vol 1, Tab 2, p 118.

[note: 21] PBD vol 1, Tab 2, pp 120–123.

[note: 22] PBD vol 1, Tab 2, p 140.

[note: 23] PBD vol 1, Tab 2, pp 141–142.

[note: 24] PDB vol 1, Tab 2, pp 143–144.

[note: 25] 16 November 2015 (British Virgin Islands time).

[note: 26] Summons No 5631 of 2015.

[note: 27] 11 December 2015 (British Virgin Islands time).

[note: 28] Summons No 6119 of 2015.

[note: 29] Summons No 533 of 2016.

[note: 30] Registrar's Appeal No 149 of 2016.

[note: 31] PBD vol III, Tab 22.

[note: 32] Summons No 1812 of 2016.

[note: 33] Summons No 3746 of 2016.

[note: 34] Summons No 3814 of 2016.