

Mancon (BVI) Investment Holding Co Ltd v Heng Holdings SEA (Pte) Ltd
and Others
[1999] SGHC 324

Case Number : Suit 1348/1999

Decision Date : 28 December 1999

Tribunal/Court : High Court

Coram : Tay Yong Kwang JC

Counsel Name(s) : AT Selvam (S Nabham & Partners) for the Plaintiffs; Zaheer Merchant
(Madhavan Partnership) for the defendants

Parties : Mancon (BVI) Investment Holding Co Ltd — Heng Holdings SEA (Pte) Ltd

Arbitration – Stay of court proceedings – Arbitration clause contained in main contract – Whether arbitration clause applicable to dispute arising from supplemental agreement – Whether stay mandatory – ss 5, 6(2) International Arbitration Act (Cap 143A, 1995 Rev Ed)

: On 14 September 1999, the plaintiffs commenced this action making certain claims against the three defendants arising out of a joint venture agreement (‘JVA’) and a supplemental agreement (‘SA’). The plaintiffs are a company incorporated in the British Virgin Islands. The first defendant is a company incorporated in Singapore, the second defendant resides in Singapore and the third defendant is a company incorporated in New Zealand. The writ of summons was served in Singapore on solicitors acting for all three defendants.

On 6 October 1999, the defendants entered appearance jointly in this action. The next day, they applied by way of SIC 6277/99 for the following:

- 1 all/any further proceedings by the plaintiffs in this action and/or this action be forthwith stayed on the ground that parties have agreed to international arbitration of any disputes or differences;*
- 2 the defendants and/or each or any of them be granted an injunction against the plaintiffs from commencing any action and/or pursuing any proceedings and/or action in connection with the plaintiffs’ alleged claims herein and/or arising out of or in connection with the joint venture agreement and/or supplemental agreement and/or guarantee elsewhere otherwise than by submission of such claims to international arbitration;*
- 3 such further or other order the honourable court deems fit to make; and*
- 4 the costs of and incidental to this application be forthwith paid by the plaintiffs to the defendants. ’*

I granted an order in terms of prayer 1, made no order in respect of prayer 2 and awarded costs fixed at \$4,500 to the defendants. The plaintiffs are appealing against the order staying these proceedings. [The appeal was struck off on the defendants' motion on 24 January 2000.]

The plaintiffs' claim

Under the JVA dated 20 June 1997, the plaintiffs and the first defendant agreed to cooperate for the purpose of establishing and operating a company in New Zealand to purchase and develop certain properties in New Zealand. The vehicle chosen was the third defendant, then known as Quercus Investments Limited, a wholly owned subsidiary of the first defendant and a party to the JVA by virtue of the definition of parties therein. The second defendant was the managing director of the third defendant.

Under the JVA, the plaintiffs would advance NZ\$6,600,000 to the first defendant which would use this amount for the purchase of the properties. The first defendant would then have to satisfy certain conditions precedent within six months of the date of the JVA failing which the JVA would be deemed terminated. In such an event, cl 13 read with cl 2.2.1 would apply and the latter provided that the amount advanced shall become immediately repayable upon demand, together with interest calculated from the date the advance was made until full payment. If the conditions precedent were fulfilled, the JVA would become unconditional.

The said NZ\$6,600,000 was paid to the first defendant on 20 June 1997. Pursuant to oral agreements between the plaintiffs and the first defendant in September and in November 1997, the plaintiffs paid another two amounts of NZ\$2m and NZ\$4,110,000 to the first defendant. The plaintiffs had therefore handed over a total of NZ\$12,710,000 to the first defendant before 20 December 1997. However, the first defendant breached the JVA by failing to fulfil the conditions precedent by 20 December 1997.

By the SA dated 30 March 1998 made between the plaintiffs, the first defendant and the second defendant, in consideration of the plaintiffs advancing a further amount of NZ\$1.8m to the first defendant, the first and second defendants acknowledged receipt of the said sum of NZ\$12,710,000, agreed that this sum included an amount of NZ\$2m in excess of the consideration payable under the JVA and further agreed to repay to the plaintiffs, in the absence of completion of the JVA whether on grounds of rescission or breach by the first defendant or any reason whatsoever, the said NZ\$12,710,000 upon demand together with interest at a specified rate and for specified periods. The first defendant also agreed to repay NZ\$1.8m and NZ\$2m together with interest out of the proceeds of sale of the interest in the properties receivable by the third defendant or, in any event, within three months from the date of execution of the SA (ie by 30 June 1998) whichever shall occur sooner. The second defendant further agreed to guarantee performance by the first defendant of the terms and conditions of the JVA and the SA and payment of the amounts advanced.

The plaintiffs paid the said additional amount of NZ\$1.8m to the first defendant on 27 March 1998 but, in breach of the JVA and the SA, the first defendant again failed to satisfy the conditions precedent set out in the JVA within a reasonable period of time and/or to take any reasonable steps to complete the JVA. Accordingly, the said amounts of NZ\$12,710,000 and NZ\$1.8m became due and owing to the plaintiffs by the first and second defendants together with interest as provided for in the JVA or the SA. Despite the plaintiffs' demands for repayment, the first and second defendants failed to do so.

The plaintiffs' claim against the third defendant for the said amounts was on the basis that the

third defendant was a party to both the JVA and the SA by virtue of the definition of parties in the JVA which included any member in the first defendant's group of companies. Alternatively, the plaintiffs claimed against the third defendant on the ground that the third defendant had been unjustly enriched at the plaintiffs' expense and held the properties purchased or leased with the plaintiffs' money as constructive trustees for the plaintiffs. It was also averred that the third defendant was a wholly owned subsidiary of the first defendant and was controlled by the second defendant who also controlled the first defendant.

The plaintiffs therefore claimed against all three defendants the said amount of NZ\$12,710,000 and NZ\$1.8m, contractual interest and costs on an indemnity basis. The plaintiffs further claimed a declaration that the third defendant held the properties bought or leased as constructive trustees for the plaintiffs, an injunction against the disposal of all such properties and an account of profits made by the third defendant from the sale of the said properties.

The defendants' first affidavit

In the first affidavit affirmed by the second defendant in support of SIC 6277/99, the defendants set out cl 16 of the JVA which is in the following terms:

Clause 16 ARBITRATION

If any dispute or difference shall arise between the parties touching any clause matter or thing herein contained or the operation or construction thereof or any matter or thing in any way connected with this agreement or the rights, duties or liabilities of either party under or in connection with this agreement then and in every such case the dispute or difference shall be referred to a single arbitrator in case the parties agree upon one and otherwise to three (3) arbitrators one to be appointed by each party and the third to be appointed by the parties jointly in either case in accordance one to be appointed by each party and the third to be appointed by the parties jointly in either case in accordance with and subject to the provisions of the Malaysian Arbitration Act 1952 or any statutory modification or re-enactment thereof for the time being in force and such arbitration shall be held in Malaysia or in such other place as the parties shall mutually agree.

It was further provided in the SA that:

Whereas

...

(b) The expressions contained in the JVA shall be adopted for use in this supplemental agreement and bear the same meaning.

Clause 8 EFFECT

Subject only to the amendments effected herein and such other modifications and variations (if any) as may be necessary to make the JVA consistent with this supplemental agreement, the JVA shall continue to remain in full force and effect and shall be read and construed together with the terms of the JVA.

The last `JVA` was probably a typographical error and should have read `SA` instead.

It was therefore evident that the parties were bound by agreement to proceed to arbitration in Malaysia. Both the JVA and the SA had been prepared by the plaintiffs' Malaysian solicitors. The arbitration clause was an international one in that it did not provide for arbitration in Singapore but in Malaysia. The plaintiffs and the third defendant are foreign companies. The plaintiffs are a wholly owned subsidiary of Mancon Bhd, a public listed company in Malaysia. The currency and the subject matter were all connected with New Zealand. The governing law was expressed to be Malaysian law. The plaintiffs' letter of demand was also issued by their Malaysian solicitors. Malaysia is a country of the Commonwealth and any award of an arbitrator there would be given due recognition by the courts of Singapore.

The defendants remained ready, willing and able to proceed to arbitration in accordance with the terms of the JVA and the SA and had never been notified by the plaintiffs of their intention to litigate the matters in court.

The defendants also had a good defence on the merits of the claim. The time for performance had been extended by the SA and the defendants complied with the conditions precedent. On the other hand, the plaintiffs breached the JVA/SA by failing to contribute their share for the development of the properties due to the economic crisis in the region in the early part of 1998.

The injunction sought in the application was necessary as there was a real risk that the plaintiffs would seek to commence an action in another jurisdiction, thereby ventilating matters which were meant to be confidential in nature and putting the defendants to substantial expense in having to instruct solicitors.

The plaintiffs' affidavit in response

The plaintiffs stated that what was clear was that the conditions precedent had not been satisfied in full and that the JVA was therefore not unconditional. It was with this in mind that the SA was drafted in the way it was. The defendants did not even attempt to comply with the terms of the SA. The sums claimed therefore became undeniably due and owing. The defendants did not pay the sums nor respond to the letter of demand dated 9 July 1999. There existed no dispute or difference for the arbitration clause to be invoked.

It was apparent from cl 8 of the SA that the parties' intention was that the arbitration clause in the JVA was not to be incorporated in the SA. There was also clear admission as to the amounts advanced. The JVA was to be made consistent with the SA and not vice versa. There was nothing for arbitration in the SA.

The defendants had taken the plaintiffs for a ride. The second defendant failed to inform the court in his affidavit that the third defendant was placed under liquidation in New Zealand on 26 August 1999. The first defendant appeared to be charged to the hilt and the second defendant was in financial difficulties himself. Their professed willingness to go for arbitration was thus suspect.

Since the first defendant is a Singapore company and the second defendant is a Singaporean, the plaintiffs wondered why they should clamour for arbitration when the matter could be tried on their home ground. The plaintiffs also asked rhetorically, `Moreover, if they claim they have a good and valid defence would not the Singapore courts be the best place to defend it?`. They professed their faith in the efficiency and fairness of the legal system here. If the matter should proceed to arbitration in Malaysia, `the matter will be dragged further than necessary`. The ploy of the

defendants in applying for a stay was to delay and prolong the matter.

The defendants had no defence at all and were attempting to raise matters outside the scope of the JVA and the SA.

The defendants` second affidavit

The defendants disputed the plaintiffs` reading of the two contractual documents. According to the defendants, cl 8 of the SA made it clear that the JVA was the main document and continued to remain in full force and effect and that the SA was to be read and construed in accordance with the terms of the JVA.

The first and second defendants had just come to know of the third defendant`s liquidation because the change of address for service of New Zealand was not received by them. They had since verified the plaintiffs` assertion and received confirmation about this. Knowing that the third defendant had been placed under liquidation on 26 August 1999, the plaintiffs had nevertheless commenced this action against the third defendant on 14 September 1999 without leave of the New Zealand court or the liquidator. The action against the third defendant was therefore a nullity and ought to be stayed in any event.

Malaysian law governed the agreement and the Malaysian Contracts Act differed materially from the law applicable in Singapore.

The plaintiffs` action was based entirely on alleged breaches of several conditions precedent in the JVA but they were seeking to sever the arbitration clause from the JVA. From the inception of the JVA, the plaintiffs wanted to ensure they could flush funds on behalf of the plaintiffs` principals, Mancon Bhd, a public listed company in Malaysia. After the signing of the JVA, the defendants, on the express instructions of Mancon Bhd`s Soo Tian Chai, remitted US\$4m pursuant to the JVA. These funds were then transferred to Soo Tian Chai`s company in Hong Kong. Mancon Bhd even drafted the letter which the defendants were to send to them in this respect. Payment was in fact not made pursuant to the JVA. It was made to ensure there were sufficient funds outside Malaysia should Soo Tian Chai leave the country. This constituted an offence under the Securities Act of Malaysia perpetrated by the plaintiffs` principals. The plaintiffs were fully aware of this and were therefore seeking desperately to avoid arbitration in Malaysia as they did not wish such matters to be ventilated.

The defendants did comply with the conditions precedent in the JVA as shown in the documentary evidence. However, the plaintiffs delayed their funding substantially. The plaintiffs knew that they had to keep sufficient funds for the development of the project and that further sums had to be invested. They failed in their financial obligations resulting in the sudden liquidation of the third defendant. The defendants would be counterclaiming in the arbitration proceedings for the lost profits.

The plaintiffs knew that these were all `matters of sensitivity and utmost confidentiality` but were improperly forcing the defendants to ventilate them in Court. The plaintiffs and their principals were also in dire financial straits.

The decision of the court

The plaintiffs argued that they were justified in commencing this action for the following reasons:

- (1) the arbitration clause had been rendered inoperative by the termination of the JVA and the signing of the SA;
- (2) the arbitration clause was not incorporated in the SA;

(3) the defendants had no defence;

(4) the defendants accused the plaintiffs of having acted illegally and fraudulently and cast aspersions on their motives in forwarding US\$4m under the JVA.

On the face of the JVA and the SA, I found it difficult to accept the first two contentions of the plaintiffs. Even if the JVA had been breached and the entire agreement therein brought to an end, the respective rights and liabilities still had to be construed according to the terms of the JVA. Assuming there were some dispute or difference - I shall deal with this later - cl 16 of the JVA would govern the mode of resolution of such dispute or difference. If the whole contract disappeared upon breach, which is in essence what the plaintiffs were asserting, how would one determine the rights and liabilities or even whether there was a breach in the first place?

The SA did not override all the terms of the JVA. They were meant to be read harmoniously and that was expressly stated. I saw nothing to justify saying that the SA rendered cl 16 JVA inoperative. If the two contractual documents had to be read together, it would be totally illogical to have the arbitration clause apply to one but not the other unless that was explicitly agreed upon and, again, I saw nothing in the SA evidencing such an agreement. It made no difference that cl 16 JVA had not been expressly incorporated into the SA. The two documents had become one save for the obvious contradictions such as the original six-month period for compliance in which case the SA's terms clearly took precedence and modified the JVA.

Was there a dispute or difference for arbitration? In **Fasi v Specialty Laboratories Asia Pte Ltd (No 1)** [1999] 4 SLR 488, at p 495, I made the following observations on the Court of Appeal's decision in **Kwan Im Tong Chinese Temple v Fong Choon Hung Construction Pte Ltd** [1998] 2 SLR 137 which dealt with s 7 of the Arbitration Act:

The following principles can be gleaned from the Court of Appeal's judgment:

- (1) the basis of an application to stay proceedings is the contract wherein the parties have chosen arbitration over litigation in court;*
- (2) the parties' agreement to have their disputes decided by their chosen tribunal should be honoured by the court;*
- (3) the party resisting the stay of proceedings bears the burden of showing that the other party has no defence to the claim;*
- (4) the court should adopt a holistic and commonsense approach to see if there is a dispute save in 'obvious' or 'very clear cases';*
- (5) applying summary judgment principles should not be held to be an exhaustive means of weighing the claims; if the party applying for a stay makes out a prima facie case of a dispute, the court should not embark on an examination of the validity of the dispute as though it were an application for summary judgment.*

Adopting and applying the above principles, it seemed clear to me that a dispute or difference had arisen between the parties which entitled any one of them to invoke the arbitration clause. It could well be the case that upon a detailed examination of all the evidence, a court might conclude that there is no triable issue within the meaning of O 14 of the Rules of Court but that is besides the point. A dispute or difference having arisen, the mode and the place of resolution that the parties had agreed on ought to be adhered to. The Singapore court would otherwise be usurping the

position of the arbitration tribunal in Malaysia.

The apparent lack of an answer from the defendants in relation to cl 4 SA did not mean that that part of the proceedings should be allowed to continue in court. The said cl 4 provides:

Repayment of further advance/excess

Heng shall repay the further advance and excess together with interest thereon calculated at the rate of thirteen per centum (13%) per annum on monthly rests basis from the date of such advance to the date of repayment (to accrue before and after judgment) which repayment is to be derived from proceeds receivable by the JV company from the disposal of its interest in Sites 1 and 2 comprising part of the Viaduct Basin Land (as defined in the JVA) or in any event within three (3) months from the date of execution of this Supplemental Agreement, whichever shall sooner occur.

As I have stated earlier, the two documents have become one and cl 4 SA was but a part of the larger claim and should not be excised from it to proceed independently here in court.

In this case, it was not in dispute that the arbitration agreement fell within the ambit of s 5 of the International Arbitration Act. That being the case, s 6 of the Act obliges the court to make an order staying the present action unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed. Such a stay is mandatory under s 6(2) of the Act (see **Coop International Pte Ltd v Ebel SA** [1998] 3 SLR 670 , a decision of Chan Seng Onn JC, upheld by the Court of Appeal). I have already dealt with the plaintiffs' contention that cl 16 JVA was inoperative. The plaintiffs have affirmed the existence of the arbitration clause and have not invoked any of the other two grounds mentioned in s 6(2). The myriad of factors that a court dealing with s 7 Arbitration Act might consider in deciding whether to order a stay or not thus become quite irrelevant. Accordingly, this action must be stayed.

I declined to grant the injunction sought by the defendants as that would be an overreaching interference with the judicial process of other jurisdictions. If the plaintiffs decide subsequently to commence a similar action elsewhere, I would leave it to the good judgment of the courts in that country whether to assume jurisdiction or to make a similar order staying the proceedings and enjoining the parties to go for arbitration as agreed.

I therefore made the orders stated in para 3 of this judgment.

Outcome:

Order accordingly.

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