LDBM 180/2016

IN THE LANDS TRIBUNAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

BUILDING MANAGEMENT APPLICATION NO. 180 OF 2016

BETWEEN

DANCO INVESTMENT LIMITED	Applicant
And	
LUXE HOME LIMITED	1st Respondent
THE INCORPORATED OWNERS OF SUNNY VILLA	2nd Respondent

Coram: Deputy District Judge Eric Tam, Presiding Officer of the Lands Tribunal

Date of Hearing: 3 August 2017

Date of Decision: 3 August 2017

Date of the Reasons for Decision: 29 September 2017

REASONS FOR DECISION

Background

1. This is an application by the 2nd respondent ("R2") to stay the present proceedings in favour of arbitration ("Stay Application").

2. At the conclusion of the hearing, the application was granted with an order that the applicant to pay costs on an indemnity basis. My reasons are outlined below.

3. The applicant is the registered owner of the 6th Floor of Block B of Sunny Villa whereas the 1st respondent ("R1") is the registered owner of Block A as well as the roof located directly above both units ("the Roof"). Sunny Villa is a 6-storey residential block located in Blue Road, Hong Kong with 2 units on each floor, namely "Block A" and "Block B". The 2nd respondent ("R2") is the Incorporated Owners of Sunny Villa.

4. Since early June 2015, the applicant complained to R2 that water percolated from the Roof to its unit and alleged that:-

(a) The problem was caused by the defective waterproofing membrane underneath the Roof; and

(b) There were unauthorized building works ("UBW") on the Roof, apparently erected by R1.

5. Between 22 September 2015 and 27 October 2015, R2 instructed its former solicitors to correspond with R1 and its solicitors, and demanded the removal of the UBW as well as the reparation and/or reinstatement of the waterproofing membrane damaged by the erection of the UBW.

6. R1, through his solicitors by his letter dated 9 October 2015, alleged that the waterproofing membrane was the common part of the building, and denied that the alleged UBW had damaged the waterproofing membrane.

7. Clause 18 of the Deed of Mutual Covenant of Sunny Villa provides that: -

> "*18. **All disputes and questions** which shall hereafter arise between the parties hereto touching these presents or the construction or adjudication thereof or whether these presents are still subsisting or not or touching any account or calculation to be made hereunder or as to any act deed or omission by any of the parties hereto or as to **any other matter in any way relating to these presents or the rights duties or liabilities of any person** hereunder **shall be referred to a single arbitrator in case the parties agree upon one otherwise to two arbitrators one to be appointed by each party** to the difference and their umpire in accordance with and subject to the provisions of the Supreme Court Rules Order XXV and **the decision of the arbitrator arbitrators or umpire** as the case may be on any of the matters and things aforesaid **shall be final and absolutely binding upon all the parties hereto***" (emphasis added) "the Arbitration Clause".

8. In or around December 2015, 5 out of 6 members of management committee of R2 resigned from their posts.

9. On 12 April 2016, the applicant issued a Notice of Arbitration to R1, R2 and the Hong Kong International Arbitration Centre ("HKIAC") pursuant to the Arbitration Clause and proposed to refer the present dispute to arbitration in accordance with those terms.

10. On 15 April 2016, HKIAC indicated to the parties that as the Arbitration Clause provided for arbitration subject to the provisions of the Supreme Court Rules Order XXV, unless the parties agreed to adopt the 2013 Arbitration Rules, it could not administer the arbitration.

11. On 26 April 2016, R1 objected to arbitration and proposed the dispute be resolved in the Lands Tribunal.

12. R2 was defunct at that time and did not respond.

13. On 16 August 2106, the applicant filed its Notice of Application to commence these proceedings against R1 for breach of the Deed of Mutual Covenant ("DMC") and seek an order, inter alia, against R1 for removal of the UBW, and against R2 for replacement and reparation of the waterproofing membrane.

14. It was stated in §24 of the Notice of Application that "R2 has since on or about 9 December 2015 become defunct. …… the situation remains unchanged until the date of this Notice."

15. R2 was absent in the hearings on 5 October 2016, 20 December 2016, 13 January 2017 and 1 March 2017.

16. On 6 January 2017, the applicant applied to amend the Notice of Application to include the relief of appointing an administrator for R2.

17. On 16 February 2017, Madam Cheng Lai Yung Josephine ("Ms Cheng") was elected as the Chairperson. New committee members of R2 were also elected.

18. The application for appointment of administrator was withdrawn on 1 March 2017. On the same date, it was ordered R2 to file and serve the Notice of Opposition on or before 22 March 2017.

19. On 17 March 2017, Ms Cheng, through the management office, filed a 2-page homemade Notice of Opposition ("Notice of Opposition"). The Notice of Opposition consisted of 5 paragraphs and stated that:

(a) IO did not understand why she was regarded as R2 by the Tribunal in the case;

(b) The UBW on the Roof did not conform with the original plan of the Roof;

(c) IO would only be responsible for water leakage due to the external wall, not the waterproofing membrane;

(d) The UBW on the Roof were in private areas, not the responsibility of the IO;

(e) The applicant and R1 had no proof that the UBW in private areas and the leakage problem had direct or indirect relationship with IO.

20. On 6 April 2017, R2 instructed solicitors for this case.

21. On 15 May 2017, R2 took out the Stay Application.

22. R1 changed his stance and did not object to arbitration.

Issues in dispute

23. The issues in dispute are: -

(a) Whether the Tribunal should grant a mandatory stay under s.20 Arbitration Ordinance, Cap 609 ("AO");

(b) Whether the Tribunal should grant discretionary stay if R2 cannot rely on s.20 AO.

24. The core issue for the mandatory stay is, whether the Notice of Opposition filed by R2 should be regarded as the first statement on the substance of the dispute, and the implication of filing such Notice.

25. Mr Wong, counsel for the applicant, relied on the case *Louis Dreyfus Trading Ltd v Bonarich International (Group) Limited* [1997] 3 HKC 597. He submitted that the sub-requirements of first statement on the substance of dispute were: (1) it is a statement, (2) submitted to the court (in the same proceedings), (3) which is on the substance of the dispute, and (4) it is a first statement on the substance of the dispute.

26. Mr Wong submitted that the Notice of Opposition filed by R2 met all the 4 sub-requirements and should be regarded as the first statement of substance.

27. Mr Wong stated that the Notice of Opposition was properly signed and sealed with the chop of R2. It disputed that the waterproof membrane was a common part. R2 should not be allowed to backtrack by discrediting its own pleadings and challenging the authority of its own representative/agent. The internal deficiencies would never affect the validity of a signed documents.

28. Ms Law, counsel for R2, in reply, submitted that the 2-page homemade Notice of Opposition was extremely brief and contained very little material on R2's proper defence. All that it effectively did was to rhetorically ask why R2 should be responsible for repairing the waterproofing membrane of the Roof.

29. Ms Law further submitted that by reason of its content, notwithstanding that Form 7 was used, the filing of the Notice of Opposition ought not be treated as a step in the proceedings which "*impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with a determination by the Courts of law instead of arbitration*": see *Redfern and Hunter on Arbitration* §2.206, citing the House of Lords decision in *Eagle Star Insurance Co v Yuval Insurance Co* [1978] 1 Lloyd's Rep 357.

30. Ms Law emphasized that Ms Cheng and the Management Company filed the Notice of Opposition for the sole purpose of complying with the imminent deadline imposed by the Tribunal. They did so without the benefit of legal advice, without the proper authority and approval of the management committee of R2. Their conduct could not be binding on R2 in the sense of debarring R2 from pursuing the Stay Application.

31. R2 only ceased to be defunct in February 2017 and only had the benefit of legal advice in April 2017. The Stay Application was made at the first available opportunity.

32. R2 should not be considered as having "*abandoned*" the Arbitration Clause or "*waived*" its right to arbitrate. It would be wrong to construe Art. 8(1) of the Model law so narrowly as to mean that R2 would be debarred from applying for a stay by reason of a 2-page Notice of Opposition being filed on its behalf without its authority.

Discussion on Mandatory Stay

33. Mr Wong submitted that the Notice of Opposition disputed that the waterproofing membrane was not a common part. It is noted that §3 of the Notice of Opposition did not expressly deny that it was not a common part. It only stated that R2 would only be responsible for water leakage due to the external wall, not the waterproofing membrane. §4 of the Notice stated that the UBW were personal problems, not R2's responsibility. I find that the contents of the Notice of Opposition is confusing. It poses questions instead of identifying the issue in dispute. No authorization letter was adduced for filing of such document as required by Form 7, and in fact, according to the evidence, it was not authorized. The reconstituted management committee of R2 affirmed that they did not approve the Notice of Opposition. It should not be regarded as the formal defence of R2.

34. I accept Ms Law's submission that the sole purpose of filing the Notice of Opposition was to comply with the imminent deadline imposed by the Tribunal.

35. On p.606 B-E of *Louis Dreyfus Trading Ltd* (supra), it is stated that the court accepted that:-

> "(1) the tenor of the Model Law is strongly *in favour of international arbitration* and that the court should construe the bar to mandatory stay in art 8 *narrowly*. … it is not the intention of the Model Law to take away the strong right of mandatory stay easily by any casual act of the defendant.
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> (2) the bar to the right to be some formal act of consequence on the part of the defendant in the court action".

36. Ms Law submitted that in order to deprive a defendant of his recourse to arbitration, a step in the proceedings must be one which impliedly affirms the correctness of the proceedings and willingness of the defendant to go along with a determination by the Courts of law instead of arbitration. I accept Ms Law's submission that the filing of the Notice of Opposition ought not be treated as such a step.

37. Ms Cheng affirmed in §19 of her affidavit dated 15 May 2017 that she had no notice of the Notice of Arbitration sent to R2 on 12 April 2016, as she was preoccupied with some personal matters and was therefore not able to attend to the business of R2. From the evidence, R2 was defunct at that time as all committee members except Ms Cheng had resigned.

38. Mr Wong argued that "the IO called itself defunct. But it begs the question what does defunct mean? Apparently, management fees were still collected and the same Management Company, apparently, continued to provide services, certainly under some supervision of owners, for an extended period of more than 13 months."

39. I do not accept such argument. It was the applicant's own statement in §24 of the Notice of Application that R2 was defunct, and at same time, the management fees were still collected.

40. I accept that the normal operation of the management committee of R2 had broken down. Such fact could also be evidenced by the applicant's application for the appointment of administrator. Only when the reconstituted management committee convened its meeting, R2 resumed its function.

41. Despite the fact that the Notice to Arbitration had served on R2 in April 2016, I am not convinced that members of the management committee of R2 at the material time had actual knowledge of its right to arbitrate. In the absence of such knowledge, I do not accept that by filing the Notice of Opposition, R2 had unequivocally abandoned its right to arbitrate.

42. §1 of the Notice of Opposition is a question. The rest are statements trying to avoid liability instead of identifying the issues in dispute. Not much substance can be gained from the Notice of Opposition.

43. Mr Wong submitted internal deficiencies can never affect the validity of a signed document. But the issue before the Tribunal is not whether the Notice of Opposition is valid.

44. To conclude, I find that part of the contents of the Notice of Opposition is not a statement and the other parts are not a statement of substance. Not much substance is contained in the Notice of Opposition. It contains very little material on R2's proper defence. It was casual, not formal and not authorized. The filing of it should not be regarded as R2 having abandoned its right to arbitrate. It is ordered that there should be a mandatory stay.

Discussion on Discretionary Stay

45. R2's fallback position was that if its application for a mandatory stay failed, R2 submitted that the discretionary stay should be granted under the inherent jurisdiction of the court and/or Order 1B, rule 1(2)(e) of the Rules of the District Court (Cap 336H). I shall briefly deal with the issue.

46. In exercising the discretion, I take into account all the circumstances, in particular, the followings:

(a) The existence of the valid Arbitration Clause.

(b) R2 did not abandon the right to arbitrate.

(c) The Stay Application was brought without delay. R2 was legally represented in April 2017; the Stay Application was made in mid-May 2017.

(d) R2 had been defunct. I am not convinced that R2's inactive period was a delaying tactics.

(e) The costs involved in the application and evidence are not wasted. They help to define the issues to be determined by the arbitrator.

(f) Although it is not unreasonable for the applicant to commence these proceedings in the Lands Tribunal, as R1 opposed to arbitration in the beginning and R2 was not responsive, such background should only be considered on the issue of costs, in particular, the costs between the applicant and R1.

(g) The application by way of consent summons taken out on 12 April 2017 to vacate the hearing date on 13 April 2017 and the imposition of unless order against R2 were only to buy time for the perusal of papers. R2 appointed solicitors to represent it on 6 April 2017 and the Notice to Act was only filed on 11 April 2017.

47. To conclude, if I am wrong about the mandatory stay, I exercise my discretion and order that the action be stayed for arbitration.

Costs

48. On the issue of costs, it was disclosed that before the hearing, parties had agreed that the case be stayed for arbitration. The only outstanding issue was costs. The applicant proposed that costs of the application be in the cause of the arbitration. R2 disagreed and suggested that the issue of costs to be dealt with later, the hearing on 3 August 2017 be vacated and the costs issue be adjourned to a later date for argument if no agreement could be reached.

49. The applicant, instead of arguing solely the issue of costs, argued the whole case. I do not accept that as the proper approach to handle this application. If the only issue is costs, the applicant should not object to the application for stay.

50. In *Chimbusco International Petroleum (Singapore) Pte Ltd v Fully Best Trading Ltd* [2016] 1 HKLRD 582, Mimmie Chan J comprehensively reviewed the applicable legal principles on costs in these circumstances, and held, inter alia, that: -

> a. The basis of awarding costs on an indemnity basis, when a party unsuccessfully seeks to challenge an arbitral award, is that the award is made under a consensual agreement freely made by, *inter alia*, that party. The modern trend of the Courts is to uphold arbitration agreements and to facilitate arbitrations. As a matter of public policy, Hong Kong being a party to the New York Convention has the ***duty*** to comply with its duties under the Convention ***to recognise and enforce an arbitration agreement and to stay actions before the court in breach of a valid and subsisting arbitration agreement*** (§§10-11).
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> b. There is no reason to differentiate between unsuccessful attempts to resist enforcement of an arbitral award made under an arbitration agreement, and unsuccessful attempts to resist enforcement and recognition of the arbitration agreement itself.

51. In §14 of *Gao Haiyan & Another v Keeneye Holding Ltds & Another* (No 2) [2012] 1 HKC 491, it stated that the fact that the respondents' case is not unarguable is not a special circumstance (not to grant an indemnity costs order). Had it been clearly hopeless, that would have been an additional reason for ordering indemnity costs.

52. I accept that the applicant, in refusing to stay for arbitration, amount to refusal to recognize the arbitration agreement. The usual costs order is on indemnity basis. There are no special circumstances in this case. Coupled with the conduct of the applicant in handling the application above mentioned, I order the applicant do pay costs of this application, including the costs reserved on 18 May 2017, to R2 on indemnity basis, with certificate for counsel, on District Court scale, to be taxed if not agreed. Costs of the proceedings of the applicant, R1 and R2 be reserved (For the avoidance of doubt, R2's costs of the proceedings include R2's costs in this application is also reserved).

53. I thank counsel for their assistance.

Deputy District Judge Eric Tam
Presiding Officer
Lands Tribunal

Mr Timothy YH Wong, instructed by Hastings & Co., for the applicant

Mr Tang Siu Kai, of Lo & Lo, for the 1st respondent

Ms Jacqueline Law, instructed by Kao, Lee & Yip, for the 2nd respondent