MASHHOR GENERAL CONTRACTOR SDN BHD
MASHHOR OFFSHORE PAINTING SERVICES ....Appellants/Defendants

AND

SEAWISE SDN BHD .....Respondent/Plaintiff

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 4 of 2019)

Before: Burrell P, Seagroatt and Lunn JJ A.
27th November 2019

Mr Robin Cheok Van Kee (Messrs Cheok Advocates and Solicitors) for Appellants/Defendants
Mr Mathew Chiew Siew Koun (Messrs MCSK Advocates and Solictors) for Respondent/Plaintiff

Burrell, P.:

This is an appeal by the 1st and 2nd Defendants against the decision of Woolley J, Judicial Commissioner on 23rd September 2019 which set aside an order by Senior Registrar Hajah Hazarena binti POKSJDP Haji Abu Hurairah on 7th August 2019 which stayed the proceedings in favour of arbitration pursuant to s.6 of the Arbitration Order 2009.

In the action the Plaintiffs are suing the defendants for debts arising from a time charterparty contract between 2013 and 2016. We shall refer to the parties in this judgment as the 'Defendants' and the 'Plaintiff'.

Having heard submissions the judge concluded:-

"In the circumstances, given the lack of evidence of a serious dispute and the weakness of the Defendants' case, I am satisfied that the Plaintiff has shown sufficient reason why this should not be referred to arbitration and I accordingly allow the appeal and set aside the order of the Senior Registrar, with costs to the Plaintiff in any event of the application and this appeal."

On 5th November 2019 the defendants made an application, inter alia, for leave to appeal to this court to Hon. Kannan Ramesh, Judicial Commissioner. Leave was granted primarily on the basis of a prima facie case of error in that no finding was made by the judge as to whether the seat of arbitration was Brunei or Singapore. It is acknowledged that the judge was not asked to make any finding with regard to the proper seat of arbitration within the terms of the particular contract in issue. It is nonetheless necessary for the issue to be determined for the reason given by Hon. Kannan Ramesh, Judicial Commissioner:

"This is an issue of crucial importance in this case as it has in my view a critical bearing on the relevant test for stay pending arbitration. In this regard, if Singapore is the seat of the arbitration, the applicable statute for the grant of a stay would arguably be the International Arbitration Act of Singapore. The test thereunder is whether the dispute prima facie falls within the scope of the agreement to arbitrate. Once that is established, a stay will be granted save in very exceptional circumstances, the court eschewing an examination of the merits. On the other hand, if the seat is Brunei, the provisions of the Brunei Arbitration Order, 2009 on the grant of a stay pending arbitration would apply"

The relevant provision is Clause 31 (c) of the charterparty and the material words are *".....at the place stated in Box 33 subject to the law and procedure applicable there."* Box 33 states *"English law preferably in Brunei or otherwise in Singapore."* By a letter dated 15th April 2019 the Defendants unilaterally selected Singapore as the place of arbitration. The question arises, on a proper construction does Box 33 permit them to do so.

Our determination is that it does not. By their agreement to the words *"preferably in Brunei.."* both parties were stating a preference. Box 33 does not say *"in Brunei or Singapore"* it goes further than that in two respects. First, as stated, there is an agreed preference and secondly, the displacement of that preference must come about for a reason other than the whim of one of the parties. The addition of the words "or otherwise" so imply. It follows also that whatever the "otherwise" reason is, an alternative second choice of venue cannot be unilateral. It is not an option given to either party it is a fallback provision should a cogent reason arise to prevent an arbitration in Brunei. In his oral submission to this court Mr Robin Cheok, for the defendants, explained that the defendants' reason for selecting Singapore over Brunei as the place of arbitration was that since 2008, when this charterparty was first signed by both parties, there has been considerable developments in the Singapore International Arbitration Centre which have not been matched in Brunei. This may well be the case and could constitute a "cogent reason" if it was a position agreed by both parties. However, in the instant case it was not so agreed.

Having established the seat of the arbitration to be Brunei, it follows that the amendment sought by the defendant in its amended petition dated 6th November 2019 (pursuant to Ramesh J's ruling on 5th November 2019) is refused. In respect of the defendants' consequential application for leave to adduce further evidence, no order is made.

What remains is the defendants' Notice of Appeal dated 14th October 2019 to which we now turn.

<u>The claim</u>

It is first necessary to examine the nature and parameters of the claim, so as to be able to answer the question – is there a "dispute" arising out of this claim.

In the Statement of Claim dated 11th April 2019 the plaintiff claims for outstanding unpaid hire charges pursuant to a time charterparty agreement concerning a specified vessel, the 'Perkasa', within a specified time period, 1st January 2014 to 31st January

2016 concerning the 1st defendant, and 13th March 2016 to 10th June 2016 concerning the 2nd defendant plus continuing interest charges. The time charterparty provided for, *inter alia*, a daily rate of $5,900 "throughout the period of hire, "interest on arrears at 1% per month and further standard terms pursuant to the "Supplytime Uniform Time Charterparty" terms. The quantum of the claim against the 1st defendant is $303,029.03 plus interest of $368,370.81 and continuing and against the 2nd defendant in the sum of $526,154.40 and interest of $172,093.82 and continuing.

The evidence shows, and there is no real dispute about it, that invoices were submitted on a regular monthly basis but that payments were irregular both as to time and as to amounts paid. The pattern throughout 2014 and 2015 was for lump sums of, say, $50,000, $100,000, $200,000, $500,000 to be paid from time to time. Despite these arbitrary payments the defendants fell into arrears.

The test

Section 6 of the Arbitration Order enables a court to stay legal proceedings in favour of arbitration if it is satisfied "there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement."

Woolley J.C correctly observed:

"there are no previous decisions in the Brunei courts which deal with what amounts to "sufficient reasons". However, this has been considered at length in a number of Singapore cases where the conclusion was that the Plaintiff has to demonstrate that their claim is undisputable, or that there is no genuine dispute, or that the defence is so weak that the claim is undisputable, in which case it would be absurd for the court to stay such an action."

The party making the application for a stay is invariably the defendant. It is for the defendant to satisfy the court that *a bona fide prima facie dispute* exists. Failure to do so is a sufficient reason not to grant the stay.

Before we turn to a brief examination of the nature of the defendants' responses to the plaintiff's claims in this case it should be noted that the timing of the application of the above test is when it is made to the court. It is possible that between a hearing at first instance and a hearing on appeal further evidence falls for consideration, either by consent or by the court's direction, which could be relevant to the issue of, for example, bona fides.

Mr Cheok, on behalf of the defendant's submitted that his investigation and research into the relevant documentation could reveal "further" evidence in support of the existence of a genuine dispute. So be it. Such further unknown evidence may be admissible in future hearings of this matter. But, for the purposes of this appeal it was mere speculation. The submission was no doubt made in the light of the unchallenged report from Deloitte Touche, international accountants dated 2nd October 2019 which had not been before Woolley, J.C and which further supported the plaintiff's position that, in reality, there was no genuine dispute and/or that the defence advanced was so weak that the claim is undisputable.

Grounds of Appeal

1. It is the contention of the defendants that between 2008 and 2019 they have overpaid the plaintiffs a sum of $1,003,193.35. The defendants acknowledge that this purported overpayment is not confined to the time period stated in the Statement of Claim, nor is it confined to the particular vessel the subject of the claim. Ground 8.6 of the defendant's grounds states that the judge erred by failing to find that:

   "The defendants/appellants merely needed to show that there is a difference between the parties, a dispute, and in this case, as to whether a sum owing as claimed or between parties which is sufficient to constitute a dispute, is to be taken in deciding to stay proceedings. The learned Judge in Chambers should have taken that on the prima facie face of it"

   This seems to be a submission that mere claim of a dispute is sufficient, often referred to as a "bald assertion." This is wrong. It was incumbent on the judge to consider the contemporaneous documents, or lack of them, to determine not only if a prima facie dispute existed but also a bona fide prima facie dispute. He was entitled to observe that:

   "The second basis of the defendants' alleged dispute is the claim that they have in fact overpaid the plaintiff by over $1 million. They support this by exhibiting a document purporting to show payments made to the plaintiff going back to 5th February 2008, long before the events the subject of this action arose, and giving a total at the end, after the last apparent payment on 29th January 2019, of $19,177,889.31 with a figure in brackets of $1,003,193.35 said to be "Net outstanding payment." This document and the figures in it are not further explained or justified. It is little more than a bald assertion and in any event obviously includes dealings between the parties which have nothing to do with the claim here.

   I do not agree with the defendants' contention that, merely because they now say they do not agree with the plaintiff's claim, there is a dispute and it must be referred to arbitration under the contract. The dispute must be a real dispute with a defence that can be shown to have some substance. There is none here, merely assertions and an unsupported list of figures."

2. The defendants contend that the overpayment (particularized for the first time in the 2019 schedule referred to above which is absent any supporting documentation) arises because they should not have to pay for every day (at the agreed rate of $5,900) that the vessel was in their custody. Paragraph 8.5.2 of the grounds states:

   "however, it is sensible that there are days during the charter contract, that the vessel would need to return to shore to undergo maintenance or obtain supply or on days when there were bad weather to which the vessel would be docked and no activities would be carried out onshore at the project location."

And at 8.54 the defendants contended that they requested the documents such as time sheets or log books to verify the number of days which were changeable; adding; at 8.5.5 that *"it is a common practice to request supporting documents."* At paragraph 103, it is submitted that:

"the Appellants were only supposed to pay for days hired out at the rate per day and even then prorated within each day plus fuel charges consumed during the hire and no other charges ought have been levied on the Appellants."

In fact, these contentions are not supported by the terms of the charterparty. There is no requirement for time sheets, there is no provision for a running account, there are no terms which exclude a liability to pay for "downtime" when a vessel is not in use. We agree with the submission made by the plaintiff that this is "unilaterally imposing a new term to the charterparty and using this as an excuse to avoid paying the plaintiff. They have no other reasons for avoiding payment."

We agree also with the judge's succinct disposal of the argument:

"I cannot find any merit in this argument. All the evidence shows that the defendants were billed for a month at a time and, although the days were listed, I have been shown no invoice for anything other than full months. If there was any agreement or arrangement for days to be deducted from the invoices, there must be at least one example of this being done. The defendants have not shown any. It is quite clear that this is a contract for a period of time over which the plaintiff would be paid at a daily rate over the whole period. The request for time sheets and logbooks is therefore just a distraction and an unsuccessful attempt to muddy the waters."

3. Interest.

The defendants have denied any obligation to pay interest in the amount and at the rate, specified in the contract. They submit that because the plaintiff did in fact waive interest on one occasion they are obliged, by such conduct, to waive interest throughout the entire charterparty. There is no merit in this argument. It is an agreed fact that on one occasion interest on the amount due was waived. This part of the interest is not included in the plaintiff's claim. They remain entitled to the rest of the interest pursuant to the contract. This, on all the available evidence, is undisputable. To argue otherwise lacks bona fides.

The defendant's appeal is dismissed. The judge's order stands. Having heard the parties' submissions on costs at the conclusion of the hearing we are able to make a final order as to costs that the costs of and arising out of the defendants' application for a stay of proceedings be to the plaintiff/respondent.

Burrell, P.

Seagroatt, J.A. **Lunn, J.A**