IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC(I) 02

Suit No 1 of 2016 (HC/Summons No 1542 of 2016 and SIC/Summons No 3 of 2016)

Between

Teras Offshore Pte Ltd

… *Plaintiff*

And

Teras Cargo Transport (America) LLC

… *Defendant*

GROUNDS OF DECISION

[Civil procedure] — [Rules of Court] — [Singapore International Commercial Court] — [Offshore case]

[Civil procedure] — [Summary judgment]

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Teras Offshore Pte Ltd
v
Teras Cargo Transport (America) LLC

[2016] SGHC(I) 02

Singapore International Commercial Court — Suit No 1 of 2016
(HC/Summons No 1542 of 2016 and SIC/Summons No 3 of 2016)
Henry Bernard Eder IJ
7 June 2016

22 June 2016

Henry Bernard Eder IJ:

1 These proceedings were recently transferred to the Singapore International Commercial Court (the "SICC") on 29 March 2016. By way of background, the proceedings concern various claims and counterclaims arising in connection with three liquefied natural gas projects in or near Queensland, Australia. In summary, the Defendant entered into a series of contracts (the "Main Contracts") with Bechtel Oil Gas and Chemicals Inc. and Bechtel International Inc. for the provision of various services and the supply of equipment in relation to these projects; and had then sub-contracted such work to the Plaintiff on what have been referred to as "back-to-back" terms (the "Sub-Contracts"). The Plaintiff's claims total approximately US$29m. The Defendant denies liability and itself advances various counterclaims totalling approximately US$14m. In addition, both parties claim interest and costs.

2 On 7 June 2016, I heard two applications on behalf of the Defendant in this action: *viz*, (a) an application under O 110 r 36 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) (the "Rules of Court") for a decision by the Court that the present action is an "offshore case" (and a related application for an extension of time to bring that application); and (b) an application for summary judgment under O 14 r 1 in respect of one of the Defendant's counterclaims relating to the payment of freight tax. After hearing full argument, I informed the parties of my decisions: *viz*, (a) that this was an "offshore case"; and (b) that the Defendant's application for summary judgment would be dismissed and that the Plaintiff would be granted unconditional leave to defend. These are my reasons.

Offshore Case (SIC/Summons No 3 of 2016)

3 It is common ground that the present application for a decision that the action is an "offshore case" is out of time; and the Defendant accordingly makes a separate application for an extension of time. These applications are supported by two affidavits of Sonny Joe Sanders, the Chief Executive Officer of the Defendant. The Plaintiff opposes the substantive application (but not the application for an extension of time) and relies upon the affidavit of Mark Benjamin Ortega, legal counsel to Ezion Holdings Limited, which is the parent company of the Plaintiff.

4 I can deal with the application for an extension of time quite shortly. O 110 r 36(2)(*a*) of the Rules of Court stipulates that where an action is commenced by writ (as it was in the present case), such an application shall be made within 28 days after the close of pleadings. In the present case, the close of pleadings was on 4 March 2016. On this basis, the 28 day period expired on 1 April 2016. However, the present application was only issued on 5 May

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2016, *ie*, about 35 days late; hence, the present application for an extension of time.

5 By virtue of O 3 r 4 of the Rules of Court, I have no doubt that the Court has the power to extend time. As to discretion, it is sufficient to say that the matters referred to in the affidavits of Mr Sanders persuade me that this is a proper case to grant an extension of time; unsurprisingly, and as already noted, the Plaintiff did not object to this. On that basis, I granted the necessary extension of time.

6 I turn then to consider the substantive application for a decision that this action is an "offshore case", which is defined in O 110 r 1(1) of the Rules of Court to mean "an action which has no substantial connection with Singapore".

7 At the outset, I would make certain preliminary observations.

8 First, an "offshore case" is defined by a negative, *ie*, it is an action that has *no* substantial connection with Singapore. Thus, it is important to bear in mind that the question is *not* whether the action has a substantial connection with some place or places other than Singapore but whether the action has no substantial connection with Singapore. It follows that the mere fact that an action may have a substantial connection with one or more places other than Singapore does not necessarily mean that it may not also have a substantial connection with Singapore. It also follows that an action may have a substantial connection with Singapore as well as one or more other places. In other words, as submitted by the Defendant, it is not the *presence* of substantial connections with other jurisdictions that is important but the *absence* of a substantial connection with Singapore.

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9 Second, the Rules of Court do not define or otherwise describe what is meant by "substantial connection". Rather, O 110 r 1(2)(*f*) puts the matter negatively where it states:

> for the purposes of the definition of "offshore case" in paragraph (1), an action has *no* substantial connection to Singapore where —
>
> > (i) Singapore law is not the law applicable to the dispute and the subject-matter of the dispute is not regulated by or otherwise subject to Singapore law; or
> >
> > (ii) the only connections between the dispute and Singapore are the parties' choice of Singapore law as the law applicable to the dispute and the parties' submission to the jurisdiction of the Court.
>
> [emphasis added]

Here, the Sub-Contracts were governed by Singapore law; and it was common ground that the present dispute does not fall within either of the categories set out in O 110 r 1(2)(*f*).

10 Third, on behalf of the Defendant, it was submitted that the purpose of an action being designated as an "offshore case" may help guide what was described as a "normative evaluation" of the various connections between an action and Singapore. In that context, it was further submitted that the subsidiary legislation and the Singapore International Commercial Court Practice Directions ("SICC Practice Directions") indicate that the predominant purpose of a decision that the action is an "offshore case" is to allow foreign representation. In that connection, it was also submitted that in cases where there are only a handful of coincidental or procedural connections with Singapore, there is no need for parties to be represented by lawyers with an expertise in Singapore law; and that, conversely, given the role of the SICC to provide a dispute resolution framework for the resolution of international

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commercial disputes, a "parochial" insistence that parties appoint Singapore qualified lawyers (even when there are only a handful of coincidental or procedural connections with Singapore) would be anomalous and self-defeating. I bear these submissions well in mind. However, in my view, the question whether or not an action is an "offshore case" must be determined by reference to the particular action; and, at the risk of stating the obvious, the focus must be the "action" itself and whether it can properly be said that the action has no substantial connection with Singapore.

11 Fourth, on behalf of the Plaintiff, reliance was placed on paragraph 29(3) of the SICC Practice Directions ("paragraph 29(3)"), which provides as follows:

> *"Substantial connection to Singapore"*
>
> (3) For the purposes of Order 110, Rule 1(2)(f)(ii) of the Rules of Court, the existence of each of the following factors will not, by itself, constitute a substantial connection between the dispute and Singapore:
>
> (a) any of the witnesses in the case may be found in Singapore;
>
> (b) any of the documents that are relevant to the dispute may be located in Singapore;
>
> (c) funds connected with the dispute have passed through Singapore or are located in bank accounts in Singapore;
>
> (d) one of the parties to the dispute has properties or assets in Singapore that are not the subject matter of the dispute;
>
> (e) where one of the parties is a Singapore party, or where a party is not a Singapore party, but has Singapore shareholders.

12 In passing, it is to be noted that the language of the definition of "offshore case" in O 110 r 1(1) of the Rules of Court is slightly different from

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the language in paragraph 29(3). The former refers to the absence of a substantial connection of the "action" with Singapore while the latter refers to the absence of a substantial connection between the "dispute" and Singapore. This gave rise to some debate as to a possible distinction between an "action" and a "dispute" and, in particular, whether the latter is concerned only with the underlying substantive dispute(s) between the parties, whereas the former is much broader – embracing not only the underlying substantive dispute(s) between the parties but also other matters including, for example, what Plaintiff's Counsel referred to as procedural and administrative matters. One possible explanation for the difference in language is that paragraph 29(3) refers back specifically to O 110 r 1(2)(*f*)(ii) where the word "dispute" rather than "action" is used (see [9] above). Be all that as it may, and whatever the reasons for these differences in wording, I propose to assume in favour of the Plaintiff that I should adopt the broad test: *ie*, that which embraces not only the underlying substantive dispute(s) between the parties but also other matters relevant to the action as a whole.

13 Turning then to paragraph 29(3), it is plain that the existence of any one of the stated factors will not, by itself, constitute a substantial connection between the dispute and Singapore. However, on behalf of the Plaintiff, it was submitted that this did not mean that the existence of two or more factors could not cumulatively constitute a substantial connection. In that connection, Plaintiff's Counsel relied upon a passage in Mohan R Pillay & Toh Chen Han, *The SICC Handbook: A Guide to the Rules and Procedures of the Singapore International Commercial Court* (Sweet & Maxwell, 2016), where it was "suggested" at paragraph 11.13 that "the greater the presence and extent of such factors, the more likely a finding of a substantial connection to Singapore, and the less likely the matter [will] be considered an offshore

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case." Initially, Defendant's Counsel accepted this proposition. However, he later withdrew such concession and submitted that the factors listed in paragraph 29(3) were, in effect, irrelevant and to be completely disregarded in deciding whether an action had any substantial connection with Singapore – even if two or more factors existed. In the event, I do not consider that it is necessary to reach a definitive conclusion on this point. For present purposes, I am prepared to assume (again in favour of the Plaintiff) that the existence of more than one of the stipulated factors, taken either on their own or with other factors, is at least capable of justifying a conclusion that the action has a substantial connection with Singapore.

14 With these considerations in mind, I turn to the facts of the present case. In summary, it was submitted on behalf of the Plaintiff that the action in the present case had a substantial connection with Singapore. In particular, reliance was placed on the fact that all of the factors listed in paragraph 29(3) were present. It was also pointed out that the parties had agreed that the governing law of the dispute would be Singapore law and that the parties had submitted to the jurisdiction of the Singapore courts. In relation to the factors listed in sub-paragraphs 29(3)(a)–(e) of the SICC Practice Directions, the Plaintiff submitted as follows. As to (a), all the Plaintiff's witnesses are located in Singapore; and the Defendant has a (small) operational office in Singapore. As to (b), the relevant documents including the various charterparties for work done under the Main Contracts, the invoices, notices are all located in Singapore; and the Defendant's servers are also located in Singapore. As to (c), funds connected with the dispute have passed through Singapore; in particular, the sum of US$3.5m advanced to the Defendant by the Plaintiff which forms part of the Plaintiff's present claim was paid through the Plaintiff's bank account in Singapore to the Defendant's bank account in

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the USA. As to (d), the Plaintiff has assets in Singapore which are not the subject matter of the dispute. As to (e), the Plaintiff is a Singapore company.

15 As explained above, I am prepared to assume that any two or more of these factors taken either on their own or with other factors are potentially relevant in considering whether the present action has a substantial connection with Singapore. However, in my view, such a conclusion is not justified in the circumstances of the present case.

16 Taking the stated factors in reverse order, it seems to me that the fact that the Plaintiff is a Singapore company and the fact that it has assets in Singapore which are not the subject matter of the dispute are, in this context, irrelevant or, at best, makeweight so far as the "action" is concerned. Equally, the fact that the sum of US$3.5m advanced to the Defendant by the Plaintiff which forms part of the Plaintiff's present claim was paid through the Plaintiff's bank account in Singapore to the Defendant's bank account in the USA is, at best, peripheral. That leaves the first two factors, *ie*, the presence of the Plaintiff's witnesses and documents as well as the Defendant's servers in Singapore. I agree that these factors indicate some connection of the "action" with Singapore in a procedural or administrative sense; but, even taken together with other factors, they do not persuade me that such connection is "substantial".

17 To my mind, the important point is that, as I have already mentioned, the various claims and counterclaims are all concerned with the provision of services in connection with three liquefied natural gas projects in or off Queensland, Australia. The vast majority of these services and the issues relating thereto have nothing whatsoever to do with Singapore. For example,

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paragraphs 12, 13 and 14 of the Statement of Claim (Amendment No. 1) dated 20 May 2016 summarise the various claims advanced by the Plaintiff for work done, services rendered, unpaid charter hire and/or charges allegedly incurred on behalf of the Defendant. These claims are made up of approximately 75 individual claims. Some of these are relatively small – less than US$1,000; some are much larger – in excess of US$2m. It is unnecessary to examine each claim in detail. For present purposes, it is sufficient to note that most, if not all, of these claims relate to work allegedly done in relation to these three projects in or off Queensland, Australia. At the moment, it is not clear what specific issues may arise in relation to the claims. That is because the Defendant's present pleading simply consists of a bare denial. At the hearing on 7 June 2016, I gave directions with regard to the service of further particulars in the form of a Scott Schedule. Whatever may be pleaded in due course in such Scott Schedule, it would seem that the Court will be concerned to evaluate the factual bases of these claims; that this will be the focus of the relevant evidence (whether factual or expert); and that such exercise which is at the heart of this "action" has no substantial connection with Singapore.

18 Similar considerations apply to the various counterclaims advanced by the Defendant. For example, it is the Defendant's case that it entered into what is referred to as a "Services Agreement" with the Plaintiff; and that, pursuant thereto, the Defendant provided to the Plaintiff services which involved (but were not limited to) the preparation of administrative documents, the hiring of independent contractors, the hiring of third-party sub-contractors, and the hiring of equipment and supplies for the operation of vessels needed for work under the Main Contracts. The existence of such Services Agreement and the claims advanced pursuant thereto are all denied by the Plaintiff. Again, I have directed the service of further particulars by way of a separate Scott Schedule.

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As with the Plaintiff's various claims, it would seem that the Court will be concerned to evaluate the factual basis of these counterclaims; that this will be the focus of the relevant evidence (whether factual or expert); and, again, that such an exercise which is at the heart of the Counterclaim in this action has no substantial connection with Singapore.

19 It is for all these reasons that I decided that this action has no substantial connection with Singapore. I ordered that the costs of and incidental to the application are to be costs in the cause.

Summary Judgment (Summons No 1542 of 2016)

20 The Defendant's application was for summary judgment under O 14 r 1 of the Rules of Court on the Defendant's counterclaim as pleaded at paragraphs 38 to 42 of the Defence and Counterclaim (Amendment No. 2) dated 3 June 2016 (the "Defence and Counterclaim"). In summary, the claim is for reimbursement of what is referred to as "freight tax" originally incurred by the Defendant on various voyages transporting certain cargo and pre-fabricated modules from ports in Thailand and the Philippines to Australia. The tax was allegedly levied by the respective port authorities on the value of the cargo/modules and paid by the Defendant in connection with the Main Contracts.

21 It is the Defendant's case that its obligations were in effect sub-contracted to the Plaintiff on "back-to-back" terms and that, on this basis, the freight tax is recoverable by the Defendant from the Plaintiff under two of the Sub-Contracts, *ie*, the Queensland Curtis Sub-Contract and the Gladstone Sub-Contract. The total claims amount to US$222,750.80 and US$55,437.16 respectively plus interest and costs. The application for summary judgment in

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respect of these claims was supported by the two affidavits of Mr Sanders referred to at [3] above. The first affidavit was dated 1 April 2016 and the second was dated 13 May 2016 (I shall refer to them as "Mr Sanders' affidavit of 1 April 2016" and "Mr Sanders' affidavit of 13 May 2016" respectively).

22 It is important to note that at the time this application was made (on 1 April 2016) and Mr Sanders' affidavit of 1 April 2016 served, the Plaintiff's only pleaded "defence" was a bare denial: *ie*, that the Plaintiff had "no knowledge" of these payments and that the Defendant was put to strict proof. This was contained at paragraph 16 of the Plaintiff's Reply and Defence to Counterclaim dated 19 February 2016 (the "original Reply and Defence"). Mr Sanders sought to provide the requisite proof by confirming in his affidavit of 1 April 2016 the fact and circumstances of these payments by the Defendant and by exhibiting thereto the relevant documents.

23 It was only following service of Mr Sanders' affidavit of 1 April 2016 that the Plaintiff sought to advance any positive case. This was set out in the affidavit of Ho Koon Chyuan (the Plaintiff's project manager for the Sub-Contracts) dated 28 April 2016 and a draft amended pleading. In essence, it is the Plaintiff's case that in or about June/July 2012, the parties came to a "common understanding and/or agreement" to the effect that it was the Defendant who would bear the freight tax and not the Plaintiff. According to Mr Ho, such agreement/understanding was made in the course of one or more meetings and is, he says, evidenced by a string of emails which he exhibits to his affidavit. In support of this, the Plaintiff also prays in aid (a) the fact that until service of the Defence and Counterclaim on 18 January 2016, the Defendant had never advanced any claim for reimbursement of this freight tax and (b) on the contrary, the invoices sent to the Plaintiff on behalf of the

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Defendant for reimbursement of various expenses incurred expressly excluded the freight tax. On that basis, the Plaintiff denies liability and/or relies upon an estoppel. In addition, the Plaintiff relies on various other "defences" which it is unnecessary to consider in detail.

24 In response, Mr Sanders made a further affidavit. This was Mr Sanders' affidavit of 13 May 2016 and in it, he denies any agreement or understanding as alleged by Mr Ho and states that the only agreement/understanding that was reached was that the Defendant agreed to pay the freight tax *in the first instance* but that this was without prejudice to the Defendant's right to claim reimbursement from the Plaintiff. Mr Sanders also sought to explain why the other "defences" were bound to fail.

25 It is most regrettable that the Plaintiff did not advance any positive case in its original Reply and Defence and, in such circumstances, it is right that the Court should look very carefully as to whether the various defences now advanced (in particular, the alleged agreement/understanding) bear scrutiny. However, it seems to me that it is quite impossible to determine the issues now raised on a summary basis. The resolution of the freight tax claim necessarily involves ruling on factual issues which cannot be resolved at this stage. Given that conclusion, it would be inappropriate to say anything more about the merits of such issues.

26 It was for these reasons that I dismissed the Defendant's application and granted the Plaintiff unconditional leave to defend the Defendant's counterclaim for reimbursement of the freight tax. I ordered costs to be paid to the Plaintiff fixed at $11,000 all in.

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27 I should mention that the Plaintiff submitted in the alternative that it was, in any event, entitled to set-off against the freight tax claim its other claims as pleaded in its Statement of Claim (Amendment No. 1) dated 20 May 2016. This gave rise to some debate as to (a) whether this was truly a case of set-off; and (b) whether the Plaintiff could in any event advance such a case when, although it had pleaded all relevant facts, it had not pleaded in terms that such facts could be relied upon by way of set-off. In the event, it is unnecessary to consider these points.

Henry Bernard Eder
International Judge

Peter Doraisamy, Andrew Lee & Joan Xue (Selvam LLC) for the plaintiff;
Chew Kei-Jin and Tham Lijing (Tan, Rajah & Cheah) for the defendant.

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