IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 142 of 2017

BETWEEN : **SOUTH PACIFIC FERTILIZER LIMITED** a duly incorporated company having its registered office at Lautoka Waterfront Road, Veitari, Lautoka, Fiji

PLAINTIFF

AND : **ALLIED HARVEST INTERNATIONAL PTE LTD** a duly incorporated company having its registered office at 3 Anson Road # 34-02, Springleaf Tower, Singapore

DEFENDANT

Appearances : Mr S. Krishna for the Plaintiff
Ms S. Naidu for the Respondent
Date of Hearing: 2nd May 2019
Date of Ruling : 8th May 2019

RULING

INTRODUCTION

1. When this matter was called before me on 22 February 2019, Mr. Krishna appeared and sought a hearing date. He informed the Court that a tribunal had been appointed in Singapore and that, at that stage, no stay had yet been granted

in Singapore. He also said his client was adamant to have the Originating Summons heard.

2. There was no appearance by the defendant. I then adjourned the case to 28 February 2019 for hearing.

3. On 28 February 2019, Ms. Naidu appeared for the defendant. She informed the court that the defendant has since filed an application for stay in Singapore, but that the stay application was yet to be heard.

4. I proceeded to hear both the defendant's Summons for Stay of Legal Proceedings filed on 25 October 2018, and also the Originating Summons.

BACKGROUND

5. The background to this case is set out in my Ruling of 11 September 2017. That was a ruling on the plaintiff's application seeking some mandatory injunctive orders for the release of a consignment of fertilisers from Hong Kong by the defendant to the plaintiff in Fiji. The consignment had been held up at the Lautoka wharf due to some issues about whether or not the plaintiff had paid the defendant for the consignment.

28 FEBRUARY 2019 HEARING

6. At this hearing, I dealt with the Summons for Stay as a preliminary issue. Ms. Naidu specifically drew the Courts attention to the fact that the Fiji International Arbitration Act 2017 has, since, come into force on 04 December 2018.

7. Following the hearing, I adjourned the matter to 03 June 2019 for ruling.

APPLICATION TO SUBMIT FURTHER EVIDENCE

8. However, on 01 June 2019, the defendant filed a Summons pursuant to Order 32 Rule 1 of the High Court Rules 1988 seeking to submit material evidence for

consideration in the determination of the defendant's preliminary application for stay of legal proceedings.

9. The defendant seeks to adduce the following evidence in particular:

   (i) the Ruling by the SIAC dated 26 March 2019 on the Plaintiff's application for stay.
   (ii) emails between 01 March and 11 April 2019, showing status of and evidential issues raised in the arbitral proceedings.

10. The evidence sought to be adduced is all annexed to the supporting affidavit of Eroni Navuda sworn on 29 April 2019.

DETERMINATION ON THE APPLICATION TO SUBMIT FURTHER EVIDENCE

11. Mr. Krishna relies on the principles in **Ladd v Marshall** [1954] 3 All ER 745 to oppose the application. The case established the principles by which a Court should be guided, when confronted with an application to accept fresh evidence. The case itself concerned a situation where, the party seeking leave to adduce fresh evidence was making that application:

    (i) following a trial, and, the pronouncement of a judgement in the court below.
    (ii) where, the judgement pronounced, was adverse against the party seeking to leave to adduce fresh evidence.
    (iii) was doing so to the appellate court where an appeal (or an application for leave to appeal) of the judgement of the court at first instance, is already afoot.

12. The defendant in this instance is seeking to properly place before this court information pertaining to the latest development in the arbitral proceedings in Singapore. The two parties in this case are also the only two parties in the Singapore proceedings. The same substantive issues raised in this case are also the very same issues being placed before the arbitration tribunal in Singapore.

13. What the defendant is seeking to adduce formally into Court, albeit after the hearing of substantive arguments in this Court, is material, the existence of

which, and the contents of which, is not at all in contention. They relate to matters which both parties are privy to.

14. I have yet to make any final judicial pronouncement on the substantive issue between the parties. There is, also, the preliminary issue of whether or not I should I should stay the proceedings in this Court in light of the pendency of the arbitral proceedings in Singapore.

15. Considering all the above, I am of the view that the interest of justice which **Ladd v Marshall** is designed to safeguard would, in no way, be under any threat of compromise if I were to grant Order in Terms of the defendant's application in this case.

16. There is, on the other hand, another interest of justice which will be served if I grant Order in terms. This other interest of justice is nowhere better explained than in the following words of Lord Wilberforce (though dealing with a slightly different issue) in **Ampthill Peerage** (1976) 2 WLR 777:

> English law .... place(s) high in the category of essential principles that which requires that limits be placed upon the right of citizens to open or to reopen disputes. [It]...is the same principle as that which requires judgments in the courts to be binding, and that which prohibits litigation after the expiry of limitation periods. Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth (I do not say that this is such a case), and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud: so limitation periods may, exceptionally, be extended. But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved."

TO STAY OR NOT TO STAY PROCEEDINGS

17. The parties, by clause 13 of their contract, have chosen the Singapore International Arbitration Centre (**"SIAC"**) as the seat for arbitration for "any dispute", "in the course of execution of this contract".

> Arbitration – In the course of execution of this contract, any dispute shall be informed to the other party within 3 days for negotiation and solution. In case not reaching an amicable agreement, such dispute shall be finally settled by Singapore International Arbitration Centre beside chamber of the commercial and industry whose decision will be regarded as final and binding to both parties. The loosing party will pay arbitration charge and other charges

18. Hoffman J in **Premium Nafta Products Ltd and others v Fili Shipping Co Ltd and others** *[2007] UKHL 40* at paragraphs 13 and 14, opined that, where an arbitration agreement exists, the starting point for its interpretation should be the assumption that, unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction, all disputes between the parties should be referred to arbitration.

> 13. In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked, at para 17: "if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so."
>
> 14. This appears to be the approach adopted in Germany: see the *Bundesgerichtshof's Decision of 27 February 1970* (1990) Arbitration International, vol 6, No 1, p 79:
>
> > *"There is every reason to presume that reasonable parties will wish to have the relationships created by their contract and the claims arising therefrom, irrespective of whether their contract is effective or not, decided by the same tribunal and not by two different tribunals."*

19. No argument is raised before me as to whether or not the issue that arises in this case, should be excluded from the arbitrator's jurisdiction.

20. Section 5(1), (2) and (3) provide that the Act shall be interpreted by reference to the Arbitration Model Law and that regard should be had to the international origin of the Model Law and the **need to promote uniformity in its application and the observance of good faith**:

> 5(1) In the interpretation of this Act, reference shall be made to the **Arbitration Model Law**.
>
> (2) Without affecting the generality of subsection (1), in making reference to the Arbitration Model Law, regard is to be had to the international origin of the Arbitration Model Law and to **the need to promote uniformity in its application and the observance of good faith.**
>
> (3) Questions concerning matters governed by this Act which are not expressly settled in it are to be settled in conformity with the general principles on which the Arbitration Model Law is based.

21. Section 3 of the Act defines "Arbitration Model Law" as follows:

> **Arbitration Model Law**
> means the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and as amended by the United Nations Commission on International Trade Law on 7 July 2006.

22. In October 2017, civil proceedings were commenced in this Court when some urgent interim injunctive orders were sought, and granted. More than a year later, arbitral proceedings were commenced in Singapore. On 04 December 2018, the International Arbitration Act 2017 came into force.

23. Section 4(2) of the Act stipulates that the provisions of the Act shall apply only if the place of arbitration is in the territory of Fiji.

24. This limiting provision however does not apply to certain other provisions set out therein section 4(2). Amongst these certain other provisions, are sections 12 and 14 which are of interest to me in this instance.

> 4(2) The provisions of this Act, except sections 12, 14, 31, 32, 33, 53, 54 and 55, shall apply only if the place of arbitration is in the territory of Fiji

25. Section 14, when applied in this case, means that the fact that the plaintiff had sought and obtained in this Court in 2017 certain injunctive orders, will still **"not [be] incompatible"** with the arbitration agreement.

> **Arbitration agreement and interim measures by court**
> 14. It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

26. I interpret the phrase **"not [be] incompatible" with the arbitration agreement**, to mean that - the fact that the proceedings for the interim injunction were started in Fiji, does not displace Singapore as the seat of arbitration, or the parties obligation to the arbitration clause.

27. I now turn to section 12. I read section 12(1), together with section 4(2), to mean that, notwithstanding that SIAC is not a "place of arbitration in the territory of Fiji", this court may still refer the parties to arbitration before the SIAC[1].

> **Arbitration agreement and substantive claim before court**
> 12.(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement **shall**, if a party so requests not later than when submitting his or her first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

28. Section 12(1), mandates that this Court **must** refer parties to arbitration at SIAC if the following three conditions are made out.

(a) the matter before this court is the subject of an arbitration agreement
(b) a party has requested that the matter be referred to arbitration
(c) that request is made before the requesting party submits his statement on the substance of the dispute

---

[1] Section 8(1) of the UNCITRAL Model Law provides:
"(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

29. Section 12(4) provides that, if the court refers the parties to arbitration, it shall order a stay of its own proceedings.

> (4) If the court refers the parties to arbitration under subsection (1), it shall make an order staying the legal proceedings in that action.

30. The second limb of section 12(1) provides that, the court shall not refer the parties to arbitration if:

> (a) the agreement is null and void
> (b) the agreement is inoperative
> (c) the agreement is incapable of being performed

31. Firstly, it has not been suggested to me that the contract between the plaintiff and the defendant is null and void, or is inoperative, or is incapable of being performed.

32. Secondly, it is not clear to me when exactly the defendant submitted its statement before the SIAC. Section 12(1), it seems, stipulates that the request to this Court (Fiji) to refer the matter for arbitration (at SIAC) must be made before the requesting party submits his statement (to SIAC) on the substance of the dispute.

33. It would appear that, the mandate given to this court to refer the matter to arbitration only kicks in if, inter alia, the request is made before the requesting party submits his statement to SIAC.

34. What if the request was made after the requesting party has submitted his statement to SIAC? The short answer is, in that case, the court is no longer mandated to refer the matter to arbitration. However, the court still has a discretion as to whether or not to refer the matter to arbitration.

35. In this case, the fact that the arbitration hearing has also concluded, is a matter I would take into account in the exercise of that discretion.

36. Hinkson J. in the Canadian Court of Appeal in **Gulf Canada Resources Limited v. Arochen International Limited** [1992] BCJ 500, referring to the test for granting stay under the UNCITRAL model, said:-

> "The test formulated is that a stay of proceedings should be ordered where: (i) it is arguable that the subject dispute falls within the terms of the arbitration agreement; and (ii) where it is arguable that a party to the legal proceedings is a party to the arbitration agreement."

37. The meaning of Article 8(1) of the Model Law, which we in Fiji have enacted in our section 12, was interpreted by Mac Eochaidh J. in **P. Elliot & Co. Limited (In Receivership and In Liquidation)** [2012] IEHC 361, where he said at para. 56:-

> "..... Article 8 of the Model Law does not create a discretion to refer or not to refer matters to arbitration but directs a court to grant or not to grant a stay, depending on the threshold issue of whether the parties to the proceedings are parties to an arbitration agreement. If they are, and the dispute is within the scope of the arbitration agreement and there is no finding that the agreement is null and void, inoperative or incapable of being performed, then the stay must be granted. Contrarily, if the parties are not bound by an arbitration agreement, then the stay, of course, must be refused."

38. I accept that the interpretation of Article 8 of the Model Law as set out in those cases is correct.

CONCLUSION

39. I order under section 12(1) that the parties be referred to arbitration and under section 12 (4) that the civil proceedings in this court be stayed.

40. Parties to bear their own costs.

HIGH COURT OF FIJI LAUTOKA

.....

Anare Tuilevuka
JUDGE
Lautoka