Doshion Ltd v Sembawang Engineers and Constructors Pte Ltd [2011] SGHC 46

Suit No :Originating Summons No 132 of 2011 (Summons No 767 of 2011)

Decision Date :28 February 2011

Court :High Court

Coram :Choo Han Teck J

Counsel :A Verghis and Sandra Tan (Drew & Napier LLC) for the Plaintiff; Mohan Pillay and Yeo Boon Tat (MPillay) for the Defendant.

Arbitration

28 February 2011

Judgment reserved.

Choo Han Teck J:

1 Doshion Limited ("the plaintiff") is an Indian Company and Sembawang Engineers and Constructors Pte Ltd ("the defendant") is a Singaporean Company. The plaintiff was the defendant's sub-contractor. A dispute arose from two sub-contracts ("the Sub-Contracts") between them. The parties commenced arbitration proceedings ("the Arbitration") under the arbitration clause in the Sub-Contracts. The Arbitration was scheduled for ten days and was to start on Monday, 28 February 2011. On Thursday, 24 February 2011 the plaintiff applied in this Originating Summons to stop the arbitration, and prayed for:

(1) A declaration that the plaintiff and the defendant had reached a binding settlement agreement on a "drop hands" basis ("the Settlement Agreement") for all disputes in respect of or in connection with the Arbitration.

(2) A declaration that the Arbitration was terminated pursuant to the Settlement Agreement; and

(3) An injunction to restrain the defendant from continuing with the Arbitration.

Counsel for the plaintiff submitted that all disputes in the Arbitration were settled on 15 February 2011 because the plaintiff had accepted the defendant's proposal in the Settlement Agreement (which counsel conceded was an oral agreement reached between the solicitors for the parties). As such, counsel argued, the Arbitration should have been terminated as of that date.

2 The defendant disputed the existence of the Settlement Agreement. Further, the defendant contended that the right and power to decide whether there was a Settlement Agreement lay within the jurisdiction of the arbitral tribunal. The defendant interpreted the

plaintiff's argument to be a claim that the arbitral tribunal had become *functus officio* by reason of the Settlement Agreement. This argument that the arbitral tribunal had become *functus officio* amounted to a challenge to the tribunal's jurisdiction. In support of this, the defendant relied on the case of *Dawes v Treasure & Son Ltd* [2010] EWHC 3218 where it was accepted that the issue of whether an arbitrator is *functus officio* went to the jurisdiction of the arbitrator. In my view, the position of the arbitrator in this case was not *functus* when it had not even begun to hear.

3 If there is no dispute between the parties, naturally the arbitration clause cannot be invoked. However, once a dispute arises, including a dispute as to whether there is a dispute at all, the matter falls into the hands of the arbitrator. In construing the scope of the arbitration clause, the purpose of an arbitration clause is vital. It was said in *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, that where parties have entered into a relationship or an agreement which may give rise to disputes, they will want those disputes to be decided by the tribunal chosen under the arbitration clause. Where international contracts are concerned, as in the instant case, the parties will want a quick and efficient adjudication; not risk delay and, in some cases, partiality, in proceedings before a domestic court. The court went on to hold:

> [7] If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. ... If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention.
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> [13] ... 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*.
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> [emphasis added]

4 Even though the plaintiff might be right to say that the Settlement Agreement is a independent contract from the Sub-Contracts, the dispute over the existence of the Settlement Agreement is nevertheless a 'dispute arising out of the relationship into which [the parties] had

entered'. Was there a dispute between the parties, and if so, had it been resolved? These are questions that go to the root and nature of disputes, and they are thus part of the arbitrator's jurisdiction. The reason why the Settlement Agreement purportedly came into existence was to settle the Arbitration, as counsel conceded. Whether the Settlement Agreement was a separate contract unrestrained by an arbitration clause was not the question. Unless the wording of the arbitration clause in the Sub-Contracts clearly states otherwise, the determination of the existence of the Settlement Agreement is for the arbitral tribunal and should not be stolen from its hands by an injunction obtained in present circumstances. The Sub-Contracts in question have not been tendered before me, presumably because of the urgency of the plaintiff's application. Even so, the scope of the arbitration clause is a matter for the arbitration tribunal to decide on as it goes to the jurisdiction of the tribunal. Section 3 of the International Arbitration Act (Cap. 143A) provides that the Model Law shall have the force of law in Singapore, and Article 16 of the Model Law provides that the arbitral tribunal may rule on its own jurisdiction.

5 The plaintiff's application is therefore dismissed. I shall hear the question of costs at a later date if parties are unable to agree costs.