DALAM MAHKAMAH TINGGI MALAYA DI JOHOR BAHRU
GUAMAN NO. JA-22NCVC-25-02/2017

Antara

Create Fortune Enterprise Sdn. Bhd.
(No. Syarikat: 604170-W) Plaintif

Dan

Pelabuhan Tanjung Pelepas Sdn. Bhd. Defendan

DECISION
(Enclosure 4)

CHOO KAH SING
Judicial Commissioner
High Court Johor Bahru

Date: 10.7.2017

Introduction

[1] This is an application (encl. 4) filed by the defendant to stay proceedings pending arbitration pursuant to s.10 of the Arbitration Act 2005 (the Act). On 31.5.2017, this Court allowed the defendant's application. The reasons for the decision are set down as below.

Background Facts

[2] Pursuant to a Project Development Agreement entered into between the plaintiff and defendant, the plaintiff was to develop construct and complete construction of a *Facility* on a premises which was identified as an area totalling approximately 40.13 acres or approximately 1,748,062.8 square feet at Port Tanjung Pelepas, Johor; and then, the plaintiff was to lease the *Facility* to the defendant upon completion.

[3] Following from the above arrangement, the plaintiff and the defendant entered into an *Agreement For Lease* dated 11.1.2006 (the impugned lease agreement) for the leasing of the *Facility* for a term of ten (10) years on the terms and conditions stated therein. In the impugned lease agreement, the plaintiff was the lessor and the defendant was the lessee. The consideration for the lease was stipulated in Clause 2 in the impugned lease agreement as follows:

> *"(1) Pursuant to the Project Development Agreement and in consideration of the Lessor having agreed to construct the Facility at its sole cost and expense on the Demised Premises and the Lessee having agreed*

to assign the Monthly Rental to the Lenders throughout the duration of the Lease Period in such manner and at such terms and conditions to be determined and agreed by the parties hereto, the parties hereto agree that the Lessee shall pay to the Lessor for this Lease a once-off lease rental calculated at Ringgit Malaysia Ten (RM10.00) only through out the Lease Period."

[4] In the impugned lease agreement, the plaintiff acknowledged that the defendant and one Flextronics Technology (M) Sdn Bhd (hereinafter referred to as 'Flextronics') had entered into a sub-lease agreement known as 'Agreement for Sub-Lease' dated 13.7.2005, wherein the defendant desired to sub-lease the Facility to Flextronics for a term of ten (10) years (the "Flextronics Term").

[5] In the impugned lease agreement, Clause 3(2) states as follows:

"In the event Flextronics shall exercise its option to extend the sub-lease of the Facility beyond the term of the Agreement for Sub-Lease by one (1) year or more successive contract years (each a "Subsequent Terms(s)"), the Lessee may, by serving written notice to the Lessor no later than two (2) months prior to the expiry of the Flextronics Term, extend the term for a period required by Flextronics and, unless terminated earlier pursuant to Clause 9 or extended by a further Subsequent Term by the Lessee serving written notice to the Lessor prior to the expiry of the relevant

Subsequent Term, this Agreement will terminate at the end of the relevant Subsequent Term."

[6] Sometime in September 2015, the defendant served a letter to the plaintiff informing the plaintiff that the defendant intended to extend the impugned lease agreement for another 10 years upon expiry of the impugned lease agreement, i.e. on 30.4.2016. The ten years extension was to commence on 1.5.2016 and end on 30.4.2026. The plaintiff replied to the defendant saying it had no objection to the defendant's request subject to further negotiation of the relevant commercial terms, including but not limited to the consideration sum to be mutually agreed upon by the parties for the extended 10 years lease period.

[7] The parties met on numerous occasions to discuss the commercial terms for the renewal of the impugned lease agreement before the expiry of the lease on 30.4.2016. The discussion came to a stalemate when the defendant refused to offer any increase of the consideration sum for another 10 years lease. Upon the expiry of the impugned lease agreement on 30.4.2016, the defendant continued to occupy the said premises. As such, the plaintiff took out this civil suit against the defendant. The plaintiff prays for, inter alia, a declaration that the impugned lease agreement had ceased to take effect on 30.4.2016 and that the plaintiff is entitled to claim damages for loss of use and other ancillary reliefs against the defendant.

Enclosure 4

[8] The defendant avers that Flextronics had exercised its option to extend the sub-lease of the Facility. Pursuant to Clause 3 of the

impugned lease agreement, the defendant may, by serving a written notice to the plaintiff, extend the term of the impugned lease agreement for a period as required by Flextronics. The defendant avers that the extension of the impugned lease agreement ought to be based on the same terms and conditions without any modification of the terms. The plaintiff objected to such averment.

[9] The defendant further avers that a dispute has arisen in relation to the impugned lease agreement, therefore, in accordance with Clause 10 of the impugned lease agreement, the parties ought to comply with the said Clause to resolve their differences.

[10] Clause 10 of the impugned lease agreement states as follows:

> *"(1) The parties hereto that any matter, dispute or claim ("Dispute") between the parties hereto arising out of or relating to this Lease shall first be referred to a dispute resolution committee which shall comprise of one representative of each party, each of whom must be authorised to settle the dispute ("Dispute Resolution Committee").*
>
> *(2) The Dispute Resolution Committee shall endeavour to achieve an amicable settlement of the Dispute and, for this purpose, may conduct discussions in such manner and at such times as it deems fit.*

(3) The objective of the Dispute Resolution Committee shall be to resolve Disputes promptly with the intent of avoiding litigation.

(4) If the Dispute Resolution Committee fails to resolve the Dispute within sixty (60) days from the date on which such Dispute was referred to it, or such other period as may be agreed in writing by the parties hereto, then either party may refer the Dispute for final resolution by arbitration to be held in Kuala Lumpur at the Kuala Lumpur Regional Centre for Commercial Arbitration in accordance with the Arbitration Act 1952 (Revised 1972) or any statutory modification or re-enactment thereof for the time being in force.

(5) The number of arbitrators shall be three (3), one (1) each to be nominated by the parties in dispute and the third (3rd) arbitrator shall be appointed by the arbitrators nominated by the parties as aforesaid. English language shall be the language of the arbitration proceedings.

(6) The arbitration award shall be final and binding on both parties."

[11] The defendant's application is premised on the above Clause 10 for an order of the court to stay this proceeding. The defendant avers that the plaintiff did not comply with Clause 10 to resolve the difference of the rental rate for the extension of the impugned lease agreement.

[12] The plaintiff opposes the defendant's application. In essence, the plaintiff argues that (i) no dispute has arisen between the parties from the impugned lease agreement because the plaintiff's claim is outside the impugned lease agreement, and furthermore, the impugned lease agreement has expired; and (ii) the purported arbitration clause was ambiguous and uncertain, therefore, it is null and void, inoperative or incapable of being performed.

[13] The plaintiff's counsel submitted that the difference (rental rate) between the parties does not fall within the ambit of a 'dispute' as envisaged in the arbitration clause. The learned counsel for the plaintiff submitted that the impugned lease agreement did not mention about the consideration for a subsequent lease period, therefore, leaving the issue of consideration at large. The impugned lease agreement had expired on 30.4.2015, the difference over the rental rate concerns the consideration of the subsequent period, i.e. after the 10 years lease. Hence, it is outside the impugned lease agreement.

The Findings of this Court

[14] The relevant parts of s.10 of the Act states as follows:

> (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the

agreement is null and void, inoperative or incapable of being performed;

(2) The court, in granting a stay of proceedings pursuant to subsection (1), may impose any conditions as it deems fit.

(2A)….

(2B)….

(2C)….

(3) Where the proceedings referred to in subsection (1) have been brought, arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court.

(4) ….

[15] In ***Press Metal Sarawak Sdn. Bhd. v Etiqa Takaful Bhd*** [2016] 9 CLJ 1, the apex court has lucidly laid down the principles for the application of s.10(1) of the Act. The Federal Court held at p. 17 as follows:

> *"[32] The clear effect of the present s.10(1) of the 2005 Act is to render a stay mandatory* ***if the court finds that all the relevant requirements have been fulfilled****; while under s.6 of the repealed 1952 Act, the court had a discretion whether to order a stay or otherwise.*
>
> *[33] What the court needs to consider in determining whether to grant a stay order under the*

present s.10(1) (after the 2011 Amendment) ***is whether there is in existence a binding arbitration agreement or clause between the parties, which agreement is not null and void, in operative or incapable of being performed****.* ***The court is no longer required to delve into the details of the dispute or difference****. (see TNB Fuel Services Sdn Bhd (supra)). In fact the question as to whether there is a dispute in existence or not is no longer a requirement to be considered in granting a stay under s.10(1). It is an issue to be decided by the arbitral tribunal."*

[16] What constitute a binding arbitration agreement or clause is explained and defined in s. 9 of the Act which states as follows:

(1) In this Act, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing where it is contained-

(a) a document signed by the parties;

(b) an exchange of letters, telex, facsimile or other means of communication which provide a record of the agreement; or

(c) an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(5) A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.

[17] In this instant case, Clause 10 clearly satisfied the definition of an arbitration agreement. Clause 10 is part of the impugned lease agreement which is in writing and is signed by both parties. The critical issue is, as submitted by the plaintiff's counsel, whether the difference/dispute which have arisen is arising out of or in relation to the impugned lease agreement.

[18] This Court is of the considered view that the parties' differences in relation to the rental rate for the extension period of the lease of the Facility has sprung from Clause 3 of the impugned lease agreement. Clearly, the 'dispute' as to how much is the consideration for the extension period ***is a matter arising out*** of the impugned lease agreement.

[19] The fact that the impugned lease agreement is silent on the rental rate for the extension period of the lease, this itself could not sustain the argument that the 'dispute' is outside the ambit of the impugned lease agreement. When an issue in hand is not specifically provided in an impugned document that does not necessarily mean the issue is outside the ambit of the impugned document. As long as the issue in hand arises out of the impugned document, such an issue is within the domain of the impugned document. It necessarily follows that the difference between the parties does fall within the scope of the arbitration clause of the impugned lease agreement.

[20] Clause 3(2) of the impugned lease agreement has envisaged the situation in the event the sub-lessee intends to extend the sub-lease, the defendant may serve a notice in writing to the plaintiff for the extension of the lease. The question is whether the plaintiff could or could not request for a consideration for the extension of the lease would be a question to be determined by the mechanism which the parties have elected to submit to. The mechanism to resolve the parties' dispute has been provided for in Clause 10 of the impugned lease agreement.

[21] The next consideration is whether the arbitration clause could be null and void, inoperative or incapable of being performed? The plaintiff's counsel submits that Clause 10 is ambiguous and uncertain because it did not clearly state that the parties have agreed to the mechanism of resolving the dispute.

[22] The plaintiff's counsel submitted that Clause 10 begins as follows:

> *"(1) The parties hereto that any matter, dispute or claim ('Dispute')…."*

[23] The word '*agree*' is missing after the word 'hereto' in the sentence. The plaintiff's counsel submits that the sentence appears to be incomplete and hanging. He further submits as follows:

> *"It cannot be said for certain that the parties have either agree or disagree to refer disputes relating to the Agreement for Lease to the dispute resolution mechanism ("DRM") as evinced under the arbitration clause. Clause 10 is tainted with ambiguity."*

[24] This Court is of the considered view that the submission advanced by the learned counsel for the plaintiff is rather misconceived. The agreement was entered on 11.1.2006, and after 10 years later, the plaintiff argues that it is not sure whether it has agreed or it has not agreed to the dispute resolution mechanism. The plaintiff had sat on Clause 10 for 10 years, and now the plaintiff is not so sure whether it has agreed to the contents. This argument seems incoherent with the plaintiff's past action, or rather inaction. This argument is clearly an afterthought when the negotiation between the parties have reached a deadlock.

[25] The impugned lease agreement was drafted by a firm of solicitors, and the contents in Clause 10 are comprehensive, and it has detailed the two stage dispute resolution process to resolve the parties' differences

with clarity. The only noticeable clanger is the missing word ‘agree’ in the first sentence. However, the intention of the parties in that they have intended to submit to a dispute resolution mechanism could be inferred from the reading of the contents of Clause 10 in which was drafted with such breadth. It is the considered view of this Court that the parties clearly have intended to abide by and agreed with the contents of Clause 10, notwithstanding the word ‘agree’ was missing in the first sentence.

[26] It is also the considered view of this Court that the contents in Clause 10 is not ambiguous or uncertain, the dispute resolution mechanism has been clearly spelled out. The intention of the parties to submit to the dispute resolution mechanism could not be undermined merely because a word is missing in the first sentence. Hence, the impugned lease agreement and Clause 10 could not be said as null and void, inoperative or incapable of being performed.

[27] This Court has scrutinized Clause 10 of the impugned lease agreement and found that Clause 10 is indeed a valid and binding arbitration agreement that has fulfilled all the requirements stated in s.9 of the Act.

[28] This Court is of the considered view that the difference between the parties does fall within the scope of Clause 10 of the impugned lease agreement which has been explicated earlier.

[29] Having said that, this Court observed that the plaintiff’s claim essentially premised on the facts that the defendant refuses to offer the consideration sum as requested by plaintiff and also refuses to surrender vacant possession of the Facility back to the plaintiff, as such, the

plaintiff seeks, *inter alia*, for a declaration that the impugned lease agreement has ended on 30.4.2016 and also damages.

[30] This Court is of the considered view that the remedies the plaintiff is seeking in the court proceeding are remedies stemming from the difference / dispute of the parties. As such, it is also the considered view of this Court that the claims made in this proceeding are within the scope of the arbitration clause and the remedies sought are within the powers of an arbitral tribunal, and the plaintiff's claim could be fully determined and disposed by the appropriate arbitrator(s) in an arbitration proceeding (see paras 94-101 of the judgment of ***Press Metal Sarawak Sdn. Bhd.*** (supra)).

[31] This Court observes that there is no time frame stipulated in the impugned lease agreement for a party to refer the difference/dispute to a dispute resolution committee. As such, it is not too late for either party to exercise its right to invoke Clause 10 of the impugned lease agreement.

[32] The counsel for the defendant has indicated to this Court that the defendant is ready and willing to resolve the difference/dispute through the means of arbitration proceedings. However, the counsel for the plaintiff was not keen with the idea, because he orally submitted that the impugned lease agreement had ceased to have effect upon the expiry date, i.e. 30.4.2016, therefore, any consequent action based on Clause 10 shall cease to have effect, including any appointment of arbitrators at a later stage.

[33] This Court is of the considered view that any jurisdictional issue and the validity of the appointment of arbitrators could be raised in the

arbitration proceedings and could be determined by the arbitrators. In the event, any party not satisfied with the decision(s) or ruling(s) of the arbitrators, such party could always come back to the court.

Conclusion

[34] For the reasons discussed above, this Court allowed the defendant's application and ordered costs of RM2,000.00 to be paid to the defendant by the plaintiff.

-Signed-

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(CHOO KAH SING)
Judicial Commissioner
High Court, Johor Bahru

Plaintiff's Counsel	:	Syed Faisal B. Syed Abdullah Messrs. Syed Faisal & Company
Defendant's Counsel	:	Lambert Rasa Ratnam Messrs. Lee Hishammuddin Allen & Gledhil