CCH and others *v* CDB and others and another matter
[2020] SGHC 143

Case Number	: Originating Summonses Nos 72 and 102 of 2020
Decision Date	: 13 July 2020
Tribunal/Court	: High Court
Coram	: Andre Maniam JC
Counsel Name(s)	: Thio Shen Yi SC and Nanthini d/o Vijayakumar (TSMP Law Corporation) for the plaintiffs in OS 72/2020; Nish Kumar Shetty and Joan Peiyun Lim-Casanova (Cavenagh Law LLP) for the plaintiffs in OS 102/2020; Zhuo Jiaxiang, Lau Hui Ming Kenny and Abraham S Vergis (Providence Law Asia LLC) for the defendants.
Parties	: CCH — CCI — CCJ — CCK — CCL — CCM — CCN — CCO — CCP — CCQ — CCR — CCS — CCT — CCU — CCV — CCW — CCX — CCY — CCZ — CDA — CDB — CDC — CDD — CDE

Arbitration – Agreement – Breach

Arbitration – Anti-suit injunction

13 July 2020

Andre Maniam JC (delivering the judgment of the court *ex tempore*):

1 The parties in Originating Summons No 72 of 2020 ("OS 72/2020") and Originating Summons No 102 of 2020 ("OS 102/2020"), save for the first and second plaintiffs in OS 72/2020, are also parties to various arbitration agreements. The defendants first filed a notice of arbitration in June 2019 ("the June NOA") wherein they applied to consolidate two arbitrations. Upon the rejection of their consolidation application, they filed two fresh notices of arbitration as directed in November 2019 ("the November NOAs"). The arbitrations are currently pending the constitution of the arbitral tribunals.

2 Notwithstanding the arbitration agreements between the parties, the defendants commenced foreign proceedings against the plaintiffs ("the Foreign Proceedings") a day before filing the June NOA. The defendants then proceeded to commence a suit in Singapore against the plaintiffs ("the Singapore Suit") on the same day that they filed the June NOA. It is common ground among the parties that the ongoing arbitrations, the Foreign Proceedings and the Singapore Suit concern the same disputes.

3 The plaintiffs contend that the defendants have breached the arbitration agreements by commencing the Foreign Proceedings and the Singapore Suit (collectively, "the Court Proceedings"). OS 72/2020 and OS 102/2020 are the plaintiffs' applications for anti-suit injunctions against the defendants. The plaintiffs also seek an order that the defendants are to forthwith discontinue the Court Proceedings, as well as sealing and redaction orders. The plaintiffs in OS 102/2020 further seek a declaration that the Court Proceedings are breaches of the arbitration agreements.

4 I agree with the plaintiffs that the defendants have acted in breach of the arbitration agreements. The defendants should not have commenced court proceedings against all the plaintiffs, save possibly for CCH and CCI, *ie*, the first and second plaintiffs in OS 72/2020. But as regards CCH

and CCI, the defendants commenced arbitration proceedings against them and the other plaintiffs, and CCH and CCI agreed that the disputes in question be resolved in arbitration, such agreement at the latest being conveyed by paragraph 17 of the supporting affidavit in OS 72/2020 dated 17 January 2020, which was filed together with that originating summons. From that time, the defendants should not have continued with the Court Proceedings against CCH and CCI.

5 The defendants sought to justify the Court Proceedings as being "protective" in nature. I understood their arguments to be that the Court Proceedings were a safety net against:

(a) possible defects in the purported commencement of arbitration by way of the June NOA, and them being too late to remedy that by the November NOAs;

(b) more generally, against anything they may have failed to do in relation to properly commencing arbitration within the limitation period; and

(c) any issue of non-arbitrability of the matters in the Court Proceedings, or with the availability in arbitration of the relief sought in the Court Proceedings. This appeared to be a new argument that the defendants only raised at the hearing on 26 June 2020.

6 I did not regard any of these as justifying the defendants' commencement of the Court Proceedings (or their continuance, in the case of CCH and CCI).

7 When parties agree to arbitration, they agree to pursue their disputes in arbitration, and not in court. That entails properly commencing proceedings in arbitration within the limitation period. If a party fails to commence arbitration proceedings in time, or purportedly commences proceedings in time but only in a defective manner, he cannot use that as the basis for going to court instead. These would not be grounds on which a stay of proceedings under s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") could be resisted; nor are they grounds on which an anti-suit injunction can be resisted.

8 As for the defendants' third argument, the defendants' own position is that all the matters in the Court Proceedings fall within the arbitration agreements, and all the relief sought in the Court Proceedings is available in arbitration.

9 Counsel for the defendants candidly acknowledged that he was arguing against himself in saying there might be some matters or relief which the plaintiffs might contend fall outside the scope of arbitration, which might then prove to be the case. Even so, the defendants did not contend that there was any real risk that *all* of the matters raised in court, or *all* of the relief sought, might meet that fate, if only pursued in arbitration.

10 Counsel for the defendants directed my attention to the pleadings in the Foreign Proceedings. I did not think that the section of the claim cited to me, the two paragraphs of interlocutory relief sought, or the two paragraphs of final relief sought, were matters that might prove to be non-arbitrable or outside the scope of a tribunal's powers to grant. The plaintiffs' counsel also confirmed at the hearing on 26 June 2020 that the disputes in the Court Proceedings fall within the scope of the arbitration agreements and are arbitrable between the parties. I thus adjourned the matter to allow counsel for the defendants to take instructions on whether the defendants would be willing to discontinue the Court Proceedings on that basis.

11 In any event, with the abovementioned confirmation from the plaintiffs' counsel (which was stated again in paragraph 5 of the letter dated 30 June 2020 from counsel for the plaintiffs in OS

72/2020, and paragraph 4 of the letter from counsel for the plaintiffs in OS 102/2020 of the same date), the defendants' stated concern would no longer be a valid reason for the Court Proceedings, if it ever was. The letter of 29 June 2020 from counsel for the defendants in effect confirms this. The finesse in that letter is only in relation to wanting to commit the plaintiffs to accepting the November NOAs, as the basis upon which the Court Proceedings would be discontinued. The plaintiffs were not obliged to agree to this finesse and never agreed to this at the hearing before me. It is also telling that the real (or at least only remaining) concerns are in relation to the June NOA and limitation. As I have already stated, those do not justify the commencement or continuance of court proceedings.

12 Counsel for the defendants wrote further on 1 July 2020, right before the hearing on the same day. At first blush it appeared that the defendants were agreeable to discontinuing the Court Proceedings, but counsel for the defendants made a further point that the plaintiffs' formulation of their confirmations about arbitrability was the *same* as the defendants' formulation of them. To me, they were *different*. The defendants avoided express mention of the plaintiffs having the right to challenge jurisdiction or raise any and all available defences. If the matter rested with the correspondence, there might subsequently be controversy as to the basis of discontinuance, if the matter were in fact discontinued. I consider that the plaintiffs are entitled to finality, and to be free of such controversy.

13 The defendants dispute whether they had breached the arbitration agreements. I find that they had.

14 That in turn justifies anti-suit relief. As stated by the Court of Appeal in *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 ("*Sun Travels*") at [68], "[i]n cases involving an arbitration agreement … it would suffice to show that there was a breach of such an agreement, and anti-suit relief would ordinarily be granted unless there are strong reasons not to …" In the present case, such agreements were breached and there were no strong reasons (indeed no reasons) not to grant anti-suit relief.

15 The defendants however contend that any anti-suit relief should only be prohibitory and not mandatory in nature, *ie*, that I should only order that they not continue with the Court Proceedings, rather than order them to discontinue those proceedings. The defendants indicated that they were and in fact had always been agreeable to a *stay* of the Court Proceedings.

16 The defendants also cite *Belbana N V v APL Co Pte Ltd and another* [2014] SGHCR 17 ("*Belbana*"), which involved local and foreign court proceedings, to support their contention that a stay, and not discontinuance, was appropriate. I do not need to examine whether *Belbana* was correctly decided. It is enough for me to say that proceedings brought in breach of an arbitration agreement, where all parties agree that the dispute ought to be resolved in arbitration, are different. In this scenario, there is no issue of the parties ever resolving their dispute in court instead. In *Belbana*, the unresolved challenge to the Belgian court's jurisdiction might have eliminated Belgium as an available forum, and the court was concerned that the plaintiff should have *a* forum to go to. Here, the defendants at all material times had a forum to go to, namely arbitration, as agreed between the parties. If anything is the defendants' undoing here, it is only what they have done or failed to do within the limitation period: that does not justify them then pursuing their claims in court. As I have rejected the defendants' so-called "protective" justifications for the Court Proceedings, there is no scenario in which the defendants would legitimately be pursuing their claims in court. Should the Court Proceedings then be kept alive indefinitely, or at least till the conclusion of the arbitrations which they cannot properly be used as a safety net for?

17 Under s 6(4) of the IAA, the court can of its own motion discontinue court proceedings if they

have been stayed and inactive for at least two years, but that is without prejudice to the parties' right to apply for them to be reinstated. I see that as catering for a possible scenario where the arbitration agreement proves to be null and void, inoperative or incapable of being performed (per s 6(2) IAA). That is not an issue here, particularly given the plaintiffs' confirmations; defence counsel's letters of 29 June 2020 and 1 July 2020, in which they agree to discontinue on terms, in effect acknowledges that. With that, the defendants' argument that discontinuance would cause them inordinate, irremediable prejudice falls away. For me to now hold the defendants to their bargain, *ie*, to resolve their disputes with the plaintiffs in arbitration and not in court, would not cause them prejudice. Any detriment from what the defendants did or failed to do in relation to properly commencing arbitration in time, will not be caused by my orders; it would have been caused by the defendants themselves. It is but a function of the agreement to arbitrate.

18 In *Daiichi Chuo Kisen Kaisha v Chubb Seguros Brasil SA (formerly Ace Seguradora SA)* [2020] EWHC 1223, the court stated at [47] that "in order to give practical effect to the Undertaking and/or any prohibitory injunction enforcing it, it is necessary for the order to require Chubb to discontinue, as there will otherwise now be a real risk that the Brazilian court will proceed to judgment on the merits at some stage after 25 May."

19 I do not however consider this to stand for the proposition that discontinuance should only be required if there is a real risk of some court order being made otherwise. In some cases, it may be that a stay will suffice; but in others, discontinuance may be appropriate.

20 In *Mobile Telecommunications Company Ltd v HRH Prince Hussam Bin Saudi Bin Abdulaziz Al Saud* [2018] EWHC 1469 at [19], the court stated that "that specific provision [*ie*, ordering discontinuance], mandatory in form, in truth does no more than express in words what ordinarily is required and, indeed, is expected and assumed to occur when final injunctive relief is granted preventing a defendant from prosecuting, pursuing or otherwise further continuing proceedings that have been brought in breach of contract or otherwise vexatiously or oppressively …" Pausing there, that would support my view that an order for discontinuance need not be justified by special circumstances.

21 I recognise though that the quote does continue: "… and is plainly appropriate in circumstances where that relief has now been granted on a final basis and on the evidence of the events of the last few weeks it is apparent that it is necessary for the defendant to take an active step in order to prevent the Saudi proceedings from going any further. So in my judgment, it is entirely correct to express that in terms in a specific mandatory form of order in the injunction to be granted today."

22 What is being sought from this court is final relief. If the Court Proceedings are only stayed, at some point a discontinuance may yet be sought. In effect, the defendants were saying: just grant a prohibitory anti-suit injunction; the plaintiffs can have liberty to apply. But keeping the Court Proceedings afoot would serve no legitimate purpose. It would only keep the plaintiffs as defendants to the Court Proceedings, which should not have been commenced, or at least should not have been continued. It would cause the plaintiffs prejudice for the Court Proceedings merely to be stayed (at least the prejudice inherent in still being defendants to court proceedings); it would not cause the defendants prejudice for the Court Proceedings to be discontinued, particularly as discontinuance would in effect be no more than the inevitable consequence of a prohibitory anti-suit injunction. Furthermore, if the anti-suit relief in this case were merely in prohibitory terms, the Foreign Proceedings might yet continue to a hearing on the pending applications to have them discontinued or stayed, the outcome of which I could not predict, and I did not think it right that the plaintiffs should have to continue being engaged in those proceedings. The fact that the defendants were prepared to discontinue (but only on terms) reinforces my view that discontinuance is appropriate here.

23 I have noted that the defendants said they agree to discontinue, and will discontinue, the Court Proceedings; yet they would not agree to a consent order in the terms of the applications. Instead, they submitted that no order should be made on the applications since they had already given their word that they would discontinue the Court Proceedings. I consider that the plaintiffs are entitled to finality in this regard. It would not be appropriate for me to make no order on the plaintiffs' applications.

24 What do the "ends of justice" require? The principles governing the issue of anti-suit injunctions have been set out in, *eg*, *Sun Travels* at [65] and *Koh Kay Yew v Inno-Pacific Holdings Ltd* [1997] 2 SLR(R) 148 at [14]. Having regard to those principles, I find that the ends of justice warrant discontinuance rather than just a stay of proceedings.

25 I thus grant the anti-suit relief in the terms sought.

26 As for the declaration sought by the plaintiffs in OS 102/2020, I find that, contrary to the defendants' submissions, there was a live dispute between the parties as to whether the defendants had breached the arbitration agreements. This much was evident when defence counsel orally confirmed the defendants' position that they had *not* breached the arbitration agreements. I have decided that dispute in favour of the plaintiffs. In effect, my decision on that dispute is already the very declaration sought. Moreover, I accept the plaintiffs' contention that the declaration may be of some value to them. On the principles set out in *Sun Travels* at [136]–[142], I grant the declaration.

27 On the principles in *BBW v BBX and others* [2016] 5 SLR 755 at [33] and [36]–[39], and also because the Court Proceedings should not have been commenced in the first place, I grant the sealing and redaction orders. The defendants argue in favour of open justice for the Court Proceedings; but they should not have commenced those proceedings in the first place. If the public would like to know more, but my sealing and redaction orders get in the way, so be it.

28 The plaintiffs, having succeeded in their applications, seek an award of indemnity costs. On the other hand, the defendants contend that the plaintiffs are only entitled to standard costs. I am mindful of the holding in *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 ("*Tjong*") at [19] and [71] that where it could be established by a successful application for an anti-suit injunction as a remedy for breach of an arbitration clause that the breach had caused the innocent party reasonably to incur legal costs, those costs should normally be recoverable on an indemnity basis. The circumstances of the present case appear to be precisely those contemplated by the Court of Appeal in *Tjong*. Having heard parties, I order the defendants to pay costs on an indemnity basis, to be taxed if not agreed.