# Australian Timber Products Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd
# [2004] SGHC 243

**Case Number** : DC Suit 190/2004, RAS 23/2004

**Decision Date** : 29 October 2004

**Tribunal/Court** : High Court

**Coram** : Belinda Ang Saw Ean J

**Counsel Name(s)** : Andrew Chan (Allen and Gledhill) and Chua Boon Thien (David Siow Chua and Tan LLC) for plaintiff; Lai Kwok Seng (Lai Mun Onn and Co) for defendant

**Parties** : Australian Timber Products Pte Ltd — Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd

*Arbitration – Stay of court proceedings – Defendant applying to stay proceedings and refusing to file defence – Whether defendant should file defence pending outcome of stay application – Whether application to extend time to serve defence constituting "step in the proceedings" – Whether application to set aside default judgment constituting "step in the proceedings" – Section 6(1) Arbitration Act (Cap 10, 2002 Rev Ed)*

*Civil Procedure – Judgments and orders – Default judgment – Plaintiff obtaining judgment in default of defence – Whether judgment regularly obtained – Whether judgment should be set aside – Whether defence having real prospect of success – Principles governing court's discretion to set aside default judgments*

29 October 2004

**Belinda Ang Saw Ean J:**

1 The facts of this appeal are simple. On 16 June 1997, the defendant, Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd, as the main contractor for the "Villa Begonia" development at Saraca Road/Begonia Road ("the project"), appointed the plaintiff, Australian Timber Products Pte Ltd, as its nominated sub-contractor for the supply and installation of timber strip flooring for the project ("the works"). Following the purported completion of all of the works, a dispute arose between the plaintiff and the defendant as to the amount due to the plaintiff in respect of the works. That dispute was not resolved, and on 15 January 2004 the plaintiff commenced proceedings in the District Court against the defendant for the balance sum of $134,031.24.

2 The writ of summons was served on 20 January 2004. On the same day, an appearance to the action was entered on behalf of the defendant. An amended writ of summons was re-served on the defendant's solicitor on 5 February 2004. The deadline for the defendant to serve its defence was 20 February 2004.

3 On 17 February 2004, the defendant applied to stay the entire action under s 6(1) of the Arbitration Act (Cap 10, 2002 Rev Ed). Before the stay application could be heard, Mr Chua Boon Thien, for the plaintiff, wrote to the defendant on 20 February 2004, which was a Friday. In his letter, he called upon the defendant to serve its defence within 48 hours. Mr Lai Kwok Seng, for the defendant, spoke to Mr Chua on the same day and in his letter of 24 February, he confirmed that the defendant would not be filing its defence pending the outcome of the stay application, which was fixed for hearing on 18 March 2004. Mr Lai explained that the defendant might be deemed to have taken a step in the proceedings if it were to file the defence, thereby affecting the stay application. Moreover, he stated that the filing of the defence would escalate costs unnecessarily.

4 The defendant's case is that the contract with the plaintiff contained in or evidenced by the defendant's letter dated 16 June 1997 provided for disputes to be referred to arbitration. The contrary position, which was taken by the plaintiff, was that the matters forming the subject matter of the action were not covered by the alleged arbitration clause. There was no agreement to arbitration as the arbitration clause relied upon by the defendant was inapplicable as far as the relationship between the plaintiff and the defendant was concerned.

5 It is common ground that the 48-hour notice expired on 24 February 2004. Since no defence was served, the plaintiff on 25 February 2004 entered judgment in default of defence in the sum of $134,031.24. On 9 March 2004, the defendant applied to set aside the default judgment.

6 The defendant's application to set aside the default judgment was refused by the Deputy Registrar, whose decision was reversed on appeal to the district judge in chambers on 5 May 2004. The plaintiff on 14 May 2004 appealed against the decision of the district judge in which he set aside the default judgment.

7 Mr Andrew Chan was engaged as counsel to argue the appeal before me on behalf of the plaintiff. He contends that the plaintiff was entitled to enter default judgment following the failure of the defendant to serve its defence. If anything, it was up to the defendant to apply for leave to extend time to serve the defence. The default judgment was a regular judgment and it should not be set aside, the contention being that the defendant had not shown that it had a real prospect of successfully defending the claim.

8 To the defendant, the notice to serve the defence was issued without basis as the plaintiff was already served with the stay application on 18 February 2004. The defendant relied on the decision in *Samsung Corp v Chinese Chamber Realty Pte Ltd* [2004] 1 SLR 382 ("*Samsung*") for the proposition that once a stay application has been served, and until it has been finally disposed of, it is not proper for the plaintiff to insist on the defence being served and to enter judgment in default of defence. Mr Lai pinned his colours on the following passage by Chao Hick Tin JA in *Samsung* at [7]:

> It seems to us that as a matter of logic, it makes absolute sense that when the question of stay is put in issue that should first be determined before any further step is taken by either party in the action. In the context of an arbitration clause, it is all the more so as under s 6(1) of the Arbitration Act (Cap 10) it is expressly provided that the party who wants a stay of the court proceeding should apply "after appearance and before delivering any pleading or taking any other step in the proceeding". Once the stay question is finally determined, then everything else will follow from that.

9 In resisting the appeal before me, the defendant adopted the reasoning of the learned district judge, who in his Notes of Arguments said that:

> In my view, it would be conceptually wrong to compel a Defendant to file his Defence while the Defendant's stay application pursuant to s 6(1) of the Arbitration Act is still pending, as it would be clearly inconsistent with the requirement in s 6(1) that the Defendant must not deliver any pleading or take any other step in the proceedings. See the Court of Appeal's judgment in *Samsung Corporation v Chinese Chamber Realty Pte Ltd* [2004] 1 SLR 382.
>
> In my view, a Defendant cannot be required or compelled by the [Rules of Court] (which is subsidiary legislation) to do something when there is primary legislation (in this case s 6 Arbitration Act) that requires that he should not.

> In my view, therefore, the Plaintiff was not entitled to insist that the Defendant file its Defence while the Defendant's stay application was still pending. It follows that the Judgment in default of Defence should not have been entered and must be set aside.

10 A further ground was added as a postscript to the Notes of Arguments. After setting out in full the text of O 1 r 2(3) of the Rules of Court (Cap 322, R 5 2004 Rev Ed), the district judge stated:

> In the present case, there is a dispute as to the jurisdiction of the court. It follows that the applicability of the Rules is disputed. This issue of jurisdiction ought to be determined first before the timeframe prescribed in the Rules for the filing of Defence can be held to apply.

11 As stated above, the plaintiff does not accept that the claims advanced in the action are within the arbitration clause. Be that as it may, even on the defendant's view, the starting point is that the existence of an agreement to arbitrate does not prevent either party from commencing the action herein. The common law rule is based on the principle that the parties may not agree to oust the jurisdiction of the court: see *Arbitration Law* by Robert Merkin (LLP, 1991) at para 6.1. Above all, the challenge is not as to the court's jurisdiction as such. The defendant here is asking the court to exercise its discretion not to assume jurisdiction over the case, but to let the case be heard by the agreed forum of arbitration. The power to grant a stay under the Arbitration Act is discretionary: see s 6(2) Arbitration Act and *Halsbury's Laws of Singapore*, vol 2 (LexisNexis, 2003 Reissue) at paras 20.032 and 20.037. The court has discretion to refuse a stay of the action if it is satisfied that there is "sufficient reason why the matter should not be referred in accordance with the arbitration agreement". In contrast, the stay of proceedings involving a non-domestic arbitration under the International Arbitration Act (Cap 143A, 2002 Rev Ed) is mandatory.

12 I agree with the submissions of Mr Chan that *Samsung* is distinguishable on its facts and that the issues therein were different. In that case, the Court of Appeal had to consider whether it was proper for the court to either waive the requirement of O 14 r 1, or, in the alternative, compel a defendant to serve his defence so as to enable the plaintiff to apply for summary judgment. In so allowing, both the stay and O 14 applications could be heard at the same sitting, as was the practice prior to the amendments to O 14 r 1 that came into effect on 1 December 2002. Previously, a plaintiff could apply for summary judgment even though a stay application had been filed. The Court of Appeal held that the new O 14 r 1 changed the previous practice and that the court should not make a compromise order to compel the defendant to serve its defence. The compromise order would have allowed the defence to be served without treating that course as a step in the proceedings.

13 In *Yeoh Poh San v Won Siok Wan* [2002] 4 SLR 91, the defendant applied for a stay of a Singapore action on grounds of *forum non conveniens*. The assistant registrar dismissed the application and the defendant appealed. No defence was filed. Before the appeal was heard, the plaintiff applied for summary judgment in default of defence, presumably preferring to obtain a judgment on the merits. In turn, the defendant applied for an extension of time until after the hearing of the appeal to serve her defence. The Deputy Registrar who heard the application extended the time to serve the defence by 14 days together with a reservation that in so doing the defendant would not be treated as having taken a step in the proceedings in the pending appeal to the judge in chambers. The defendant appealed against the order of the Deputy Registrar and before Woo Bih Li JC (as he then was) she sought a longer extension of time until she had exhausted all avenues of appeal on the *forum non conveniens* point.

14 Woo JC first commented on the situation where parties in general voluntarily or tacitly agree

to keep matters in abeyance pending an application to stay proceedings on grounds of *forum non conveniens*. He also went on to deal with the converse situation where a plaintiff, nonetheless, insists on a defence being served. In the event, the defendant should apply to extend time to serve the defence under O 3 r 4. The proper order that the court should make was to extend time to serve the defence until after the final resolution of the stay application.

15 In my judgment, the proper occasion to cite the observations made by Chao JA in *Samsung* and Woo JC in *Yeoh Poh San* v *Won Siok Wan* is at the time when the court hears an application to extend time. Woo JC observed at [19] that the court should generally allow an application to extend time on the ground that there was a pending stay application or an appeal to stay the proceedings, and the court should extend time to serve the defence until the final resolution of the stay question. The rationale, as explained by Woo JC and accepted by Chao JA in *Samsung*, is that the filing of the defence before the hearing of the original stay application would defeat the purpose of the stay application. This is equally applicable to an appeal. Woo JC said that the extension should generally be granted so as not to render the appeal nugatory. I agree that the court should be wary of a requirement to serve a pleading, which might be liable to be a temporary pleading, especially when the action might be stayed for another forum or arbitration. Woo JC reasoned that a defendant should not be required to meet the plaintiff's claim on the merits and have its attention distracted by engaging in two contradictory courses of action at the same time. In the context of s 6(1) of the Arbitration Act, the wording of the subsection does not allow for such a dual approach. It is clear that the court has no jurisdiction (as opposed to discretion) under s 6(1) to stay the proceedings once a step in the proceedings has been taken: see *Arbitration Law* ([11] *supra*) at para 6.19. I would venture to state that the "compromise order" made by the judge in *Samsung* would undoubtedly blur, if not affect, the jurisdiction of the court to stay the proceedings. As alluded to by Chao JA at [24], such a compromise order would not be in line with the object and spirit of s 6(1).

16 In my judgment, a pending stay application in itself does not stop time running for the service of the defence. The Rules of Court have their own self-contained provisions relating to the service of defence, time extension and default judgment. Unless and until there is a stay order to halt proceedings, the plaintiff is entitled to give notice to the defendant to serve its defence. It is for a defendant, faced with a 48-hour notice to serve its defence, to respond appropriately. A proactive approach should be adopted. The defendant could have seen the duty registrar to bring forward the hearing date of the stay application for immediate hearing as a matter of urgency or apply for an extension of time to serve the defence under O 3 r 4 and at the same time seek an urgent hearing of the matter. In the present case, *Samsung* had not been interpreted correctly. Consequently, the defendant did not take any valid step before the time ran out under the plaintiff's notice. Mr Lai tried to argue that the defendant had in its summons sought an extension of time to serve the defence. Mr Lai's submission is misconceived. The alternative prayer in the defendant's stay application is not a proper application to extend time but was taken out contingent upon its application for a stay being unsuccessful.

17 Mr Chan argues that the defendant would not have lost its right to stay the proceedings under s 6(1) of the Arbitration Act if it had made an application to extend time to serve the defence. He referred me to *London Sack & Bag Co, Ltd v Dixon & Lugton, Ltd* [1943] 2 All ER 763 in support of his contention that an application to extend time to serve the defence would not be viewed as a "step in the proceedings". In that case, the defendant applied to stay the action for arbitration. The defendant also applied for and obtained an order to extend time to serve its defence until the hearing of the stay application. McKinnon LJ was of the view that in these circumstances, the defendant could not be said to have taken a "step in the proceedings". Scott LJ said in *obiter* that on the facts of the case, he was doubtful whether a step had been taken that barred the right to a stay. The

third member, Du Parcq LJ, expressed no opinion on the question whether the defendant could be said to "have taken a step in the proceedings".

18 The question what amounts to a step in the proceedings has been considered a number of times by the English courts: see *Pitchers, Ltd v Plaza (Queensbury), Ltd* [1940] 1 All ER 151, *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd's Rep 357 ("the *Eagle Star* case"), *Kuwait Airways Corporation v Iraq Airways Co* [1994] 1 Lloyd's Rep 276 ("the *Kuwait Airways* case") and *Patel v Patel* [2000] QB 551. In *Patel v Patel*, the English Court of Appeal held that the principle outlined in *Pitchers, Ltd v Plaza (Queensbury), Ltd* applied to the new law under the UK Arbitration Act 1996 as it did to the UK Arbitration Act 1950. Section 9(3) of the UK Arbitration Act 1996 is on similar terms to s 1(1) of the UK Arbitration Act 1975 and s 4 of the UK Arbitration Act 1950.

19 The underlying principle was set out in the *Eagle Star* case by Lord Denning MR at 361, in a passage that was subsequently followed in the *Kuwait Airways* case:

> On those authorities, it seems to me that in order to deprive a defendant of his recourse to arbitration a "step in the proceedings" must be one which impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with a determination by the Courts of law instead of arbitration.

20 Lord Denning's approach is echoed in *Halsbury's Laws of Singapore* ([11] *supra*), at 20.035, which reads:

> There is no definitive rule as to what amounts to a 'step in the proceedings'. It is generally accepted that any step which affirms the correctness of the proceedings or demonstrates a willingness or intention to defend the substance of the claim in court instead of arbitration may be construed as such.

21 Mustill and Boyd in *The Law and Practice of Commercial Arbitration* (Butterworths, 2nd ed, 1989) at p 472 said:

> The reported cases are difficult to reconcile, and they give no clear guidance on the nature of a step in the proceedings. It appears, however, that two requirements must be satisfied. First, the conduct of the applicant must be such as to demonstrate an election to abandon his right to stay, in favour of allowing the action to proceed. Second, the act in question must have the effect of invoking the jurisdiction of the Court.

22 In addition, an act, which would otherwise be regarded as a step in the proceedings, will not be treated as such if the applicant has specifically stated that he intends to seek a stay or expressly reserves his right to do so: see *Chong Long Hak Kee Construction Trading Co v IEC Global Pte Ltd* [2003] 4 SLR 499.

23 In my judgment, an application by the defendant to extend time to serve the defence will not constitute a step in the proceedings within the meaning of s 6(1) of the Arbitration Act on the basis of the principles set out above. In the present case, the defendant clearly intends to seek a stay. An application to extend time would be to safeguard the defendant's position pending the determination of the stay application as opposed to an act that seeks to contest the proceedings on its merits.

24 For completeness, I make the following observation. After default judgment was entered, the defendant applied to court to set it aside. The fact that the defendant had applied to have the

default judgment set aside was not a step in the proceedings. As the English Court of Appeal noted in *Patel v Patel* ([18] *supra*), unless there was an application to set aside the default judgment there would be nothing to stay.

24 I now turn to the issue whether or not the default judgment should be set aside. The default judgment here was a regular judgment. The defendant's decision not to serve the defence stemmed from its incorrect interpretation of *Samsung*. In *Singapore Civil Procedure 2003* (Sweet & Maxwell Asia, 2003) at para 13/8/2, it is stated:

> On the application to set aside a default judgment the major consideration is whether the defendant has disclosed a defence on the merits, and this transcends any reasons given by him for the delay in making the application even if the explanation given by him is false.

25 To set aside a judgment regularly obtained, the burden is on the defendant to satisfy the court that it has a defence on the merits which has a real prospect of success and carries some degree of conviction, an approach set out in the decision of *Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc* (*The Saudi Eagle*) [1986] 2 Lloyd's Rep 221 and followed in *Abdul Gaffer v Chua Kwang Yong* [1995] 1 SLR 484 and subsequent decisions like *Oversea-Chinese Banking Corp Ltd v Measurex Corp Bhd* [2002] 4 SLR 578 at [17].

26 The defendant argues that the plaintiff's works were incomplete and defective, which caused the defendant to incur extra expenses in the sum of $114,198. That seems to be a bare assertion in the face of countervailing evidence. Despite the plaintiff's request, the defendant did not give details of the allegations and the documentation it referred to is outdated. It was first disclosed, according to the date on the fax transmission, in May 2000. According to the plaintiff, it is being re-circulated for use in these proceedings. Since the time the document was first disclosed, the defendant had on 20 December 2002 countersigned the plaintiff's statement of final account for $134,031.02 whereby the defendant confirmed that it had no further claims on this sub-contract against the plaintiff. This admission was not denied by the defendant. Furthermore, on 13 October 2003, the project's quantity surveyor had certified the plaintiff's work in the sum of $134,031.24. The architect's final certificate dated 29 October 2003 showed that the employer had paid the defendant for the plaintiff's work in the sum of $134,031.24. In my judgment, there is no substance in the suggested defence and I conclude that the defendant has not discharged its burden so as to warrant a setting aside of the default judgment.

27 For all these reasons, I allowed the appeal, with costs to be taxed if not agreed.