

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 241

Suit No 139 of 2018
(Registrar's Appeal Nos 180, 181 and 182 of 2018)

Between

NK Mulsan Co Ltd

... Plaintiff

And

INTL Asia Pte Ltd

... Defendant

FOUNDATIONS OF DECISION

[Civil Procedure] — [Summary Judgment]

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NK Mulsan Co Ltd

v

INTL Asia Pte Ltd

[2018] SGHC 241

High Court — Suit No 139 of 2018 (Registrar's Appeal Nos 180, 181 and 182 of 2018)

Woo Bih Li J

4 September 2018

8 November 2018

Woo Bih Li J:

Introduction

1 This is an action by the plaintiff, NK Mulsan Co Ltd (“NKM”), against the defendant, INTL Asia Pte Ltd (“INTL”) for the return of US\$3 million (“the Deposit”) under a Deposit Agreement dated 19 August 2016 (“the Deposit Agreement”) between the parties. NKM is a company registered in the Republic of Korea and its shares are publicly traded on the Korea Stock Exchange. INTL is a private company incorporated in the Republic of Singapore.

2 After the close of pleadings, INTL filed an application to strike out or to stay the action pending the outcome of arbitration proceedings in Hong Kong. Subsequently, NKM filed an application for summary judgment against INTL for the Deposit. Both applications were heard by an Assistant Registrar (“the

AR”) who decided to dismiss NKM’s application for summary judgment by granting INTL unconditional leave to defend. The AR also dismissed that part of INTL’s application to strike out the action but granted a stay of the action as part of case management pending the resolution of the Hong Kong arbitration proceedings. This resulted in three appeals being filed. The first two appeals were filed by NKM against the decision of the AR to stay the action and not to grant summary judgment. The third appeal was filed by INTL against that part of the AR’s decision which was not to strike out the action but only to stay it.

3 I heard arguments on the three appeals on 4 September 2018 and allowed NKM’s appeal for summary judgment in part. I granted judgment against INTL who was to pay US\$1,646,860 (being part of the Deposit) to NKM forthwith with interest and costs. Consequently, I varied the stay order of the AR so that it applied only in respect of the balance of NKM’s claim. I dismissed INTL’s appeal to strike out the action.

4 INTL is appealing to the Court of Appeal against my decision granting summary judgment to NKM against INTL for US\$1,646,860 with interest and costs.

5 NKM has also filed two appeals in respect of my decision. The main appeal is for summary judgment for the balance of the Deposit. The second pertains to my consequential order that the rest of the action for the balance of the Deposit be stayed pending the resolution of the Hong Kong arbitration proceedings. It may be that NKM is not even entitled to file an appeal to the Court of Appeal against my decision not to grant summary judgment for the balance of the Deposit and consequently it is also not entitled to file the second

appeal as well in respect of my consequential order. However, that is a matter for the parties to address the Court of Appeal at the appropriate time.

6 I set out below the reasons for my decision granting summary judgment for US\$1,646,860 to NKM against INTL. The reasons will also explain why my decision to grant judgment was limited to that sum.

Background

7 As mentioned, the Deposit Agreement was dated 19 August 2016. It was amended on 9 January 2017 and again on 31 May 2017. The Deposit was to secure NKM's performance of its obligations to INTL arising from a Coal Sales Agreement between the parties. The Coal Sales Agreement provided the framework under which the parties would enter into purchase and sale contracts whereby NKM would purchase coal from INTL. These contracts were defined as "Sale Contracts" in the Deposit Agreement. Apparently, five Sale Contracts were entered into between the parties.

8 Under the Deposit Agreement, as amended, INTL was to return the Deposit on 5 January 2018 if NKM fulfilled its obligations to INTL under the Sale Contracts. By email and letter dated 22 December 2017, Yoon & Yang ("Y&Y"), who are the Korean lawyers of NKM, wrote to INTL to remind INTL that the date of the return of the Deposit was 5 January 2018.

9 Apparently, Y&Y had sent a second letter also dated 22 December 2017 to INTL to claim demurrage against INTL.

10 On 29 December 2017, Holman Fenwick Willan Singapore LLP ("HFW"), the lawyers for INTL, replied to say that they were currently

reviewing the file and seeking further instructions and would revert substantively in due course. There was no further response then from HFW. The Deposit was not returned on 5 January 2018.

11 By an email dated 10 January 2018, Y&Y wrote to HFW to say that the deadline to return the Deposit had passed on 5 January 2018. They warned HFW that if they did not receive confirmation by the close of business on 11 January 2018 that the Deposit would be paid on or before 12 January 2018, they would take immediate action.

12 HFW replied on 12 January 2018. They said that INTL's obligation to return the Deposit was conditional on NKM fulfilling all its obligations under all contracts between the parties. This included consideration of NKM's claims for other sums under the Sale Contracts. They asked for clarification of the claims made by Y&Y and in particular, whether they related to claims under the Deposit Agreement or under the Sale Contracts or both. They said they would respond substantively to the claim by 17 January 2018 given the time of the year and that they received instructions from New York.

13 However, HFW did not reply by 17 January 2018 or soon thereafter.

14 On 23 January 2018, NKM commenced arbitration proceedings in Hong Kong against INTL for demurrage, dead freight and overpayment arising from the parties' dealings in respect of the Sale Contracts.

15 On 7 February 2018, NKM filed the present action in Singapore against INTL to claim the Deposit, interest and costs.

16 On 7 March 2018, INTL filed its Defence. The crux of the Defence was that INTL was making a counterclaim in the Hong Kong arbitration for US\$1,353,140 which was due and owing under agreements referred to in the Hong Kong arbitration. Until that sum was paid by NKM to INTL, NKM had not fulfilled all its obligations to INTL. Likewise, until all costs and disbursements awarded to INTL in the Hong Kong arbitration were paid by NKM, NKM had not fulfilled all its obligations to INTL. Accordingly, the Deposit was not repayable at all.

17 On 21 March 2018, NKM filed a Reply to INTL’s Defence.

18 On 16 April 2018, INTL filed Summons No 1788 of 2018 to strike out or stay the action pending the outcome of the Hong Kong arbitration proceedings. The application was made under O 18 r 19 of the Rules of Court (Cap 322, R5, 2014 Rev Ed) (“ROC”) or under the inherent jurisdiction of the court. The application was supported by an affidavit.

19 On 30 April 2018, NKM filed an affidavit to respond to INTL’s striking out application. NKM also filed Summons No 2020 of 2018 for summary judgment for the Deposit against INTL under O 14 of the ROC and a supporting affidavit for its own application.

20 On 1 June 2018, INTL filed an affidavit for both summonses.

21 On 4 July 2018, the AR dismissed NKM’s application for summary judgment and made various other orders as summarised at [2] above.

22 On 17 July 2018, three Registrar's Appeals were filed:

(a) RA 180 of 2018 – NKM's appeal against the AR's decision in respect of INTL's striking out or stay application where the AR granted a stay of NKM's action.

(b) RA 181 of 2018 – NKM's appeal against the AR's decision in which the AR dismissed NKM's application for summary judgment.

(c) RA 182 of 2018 – INTL's appeal against the AR's decision dismissing INTL's application to strike out the action.

23 On 4 September 2018, I heard arguments in respect of all three appeals.

24 I allowed NKM's appeal in RA 181 of 2018 in part. I granted judgment against INTL who was to pay US\$1,646,860 to NKM forthwith. INTL was also to pay interest thereon at 5.33% per annum from 5 January 2018 to the date of full payment.

25 In view of my decision in RA 181 of 2018, I varied the order below in respect of the stay of action granted by the AR. This came under RA 180 of 2018. Thus I varied the order below so that the stay of action would be in respect of the balance of the Deposit, *ie*, US\$1,353,140 only.

26 As for RA 182 of 2018, counsel for INTL explained that it was brought as the AR had stayed the present action on a wrong legal footing. While counsel accepted that the appropriate relief was for the court to grant a stay of the Singapore action instead of striking out the claim, his point was that this order should have been made pursuant to the court's discretion to stay an action under

O 18 r 19 of the ROC, on the basis that the ground INTL had relied on to strike out had been made out. Hence, the AR was in error as he had stayed the action based on the court’s inherent case management powers instead. I dismissed RA 182 of 2018. I was of the view that the AR was correct in concluding that INTL had not made out any of the grounds in O 18 r 19(1) of the ROC.

The arguments and the court’s reasons

27 To put matters in perspective, the appeals before me essentially centred on NKM’s efforts to have the Deposit returned and INTL’s insistence that it was justified in withholding the Deposit as it had a counterclaim against NKM. The relevant provisions of the Deposit Agreement are Section 2 and Section 4. Section 2 states:

Section 2. Obligations. The Deposit shall secure all present and future obligations of Customer to INTL, arising under or in connection with this Agreement, the Coal Agreement, the Sale Contracts, or any other agreement ancillary thereto, and whether matured or unmatured, liquidated or unliquidated or absolute or contingent, including any costs of collection (the “Obligations”).

Upon any failure of Customer to pay or perform any Obligations owing to INTL, INTL shall have the right, without prior notice to Customer, to apply all or any portion of the Deposit in satisfaction of such Obligations.

28 Section 4 states:

Section 4. Withdrawal Rights Limited. Customer shall have no right to withdraw or otherwise require the return of the Deposit unless and until all outstanding Obligations have been fulfilled. irrevocably in full, whether contingent or otherwise and INTL has no further commitments [*sic*] under the Coal Agreement and any Sales Contracts which may result in the required fulfillment of further Obligations. With all obligations fulfilled, \$3 million shall be returned on the 5th of January 2017.

29 As mentioned above at [8], the date for the return of the Deposit was amended to 5 January 2018. I should also mention that there is no provision for arbitration in the Deposit Agreement although there is such a provision in the Sale Contracts.

30 NKM argued that in order for INTL to be entitled to withhold the return of the Deposit, INTL was obliged to give notice of any objection to the return on or before 5 January 2018. In the absence of such a notice, INTL was obliged to return the Deposit. INTL disagreed.

31 My tentative view was that NKM's argument was incorrect. There was nothing in the Deposit Agreement that supported this argument. In any event, the point was arguable. Accordingly, INTL could rely on any legitimate objection to withhold the return of the Deposit even if the objection had not been raised on or before 5 January 2018.

32 INTL's objection to the return of the Deposit stemmed from a counterclaim which it raised sometime towards the end of February 2018. As can be seen from the sequence of correspondence/emails set out above, neither INTL nor HFW initially raised any specific objection or claim to justify withholding the return of the Deposit even though Y&Y (on behalf of NKM) had given advance notice of the due date to return the Deposit in the email dated 22 December 2017. Also, notwithstanding that HFW had later said that they would reply Y&Y by 17 January 2018, HFW apparently did not do so then. It was only by an Answer to Notice of Arbitration on 23 February 2018 that INTL first said that it had a counterclaim fee for an estimated sum of US\$1,353,140. Apparently, the counterclaim arose from the parties' dealings in respect of the Sale Contracts.

33 INTL’s position was that under the Deposit Agreement, it was entitled to withhold the entire Deposit so long as there was any outstanding obligation of NKM under the Sale Contracts or the Coal Sales Agreement regardless of the value of the outstanding obligation or, put in another way, regardless of the quantum of INTL’s counterclaim against NKM.

34 INTL also pointed out that under Section 2 of the Deposit Agreement, the Deposit was to secure not only the obligations of NKM to INTL but also “any costs of collection” by INTL. According to INTL, this phrase included INTL’s costs of the arbitration. When asked for an estimate of such costs, INTL’s counsel estimated the costs of the arbitration proceedings at US\$500,000 as NKM was claiming US\$6.7 million in the arbitration proceedings. INTL’s position was that the costs aspect would also justify INTL in withholding the return of the entire Deposit.

35 While INTL’s construction of the Deposit Agreement (*ie*, that it was entitled to withhold the entire Deposit regardless of the quantum of its counterclaim against NKM) could be supported by a literal interpretation of Sections 2 and 4 of the Deposit Agreement, I was of the view that a purposive interpretation pointed otherwise. The purpose of the Deposit could not have been to allow INTL to withhold the entire Deposit even if its counterclaim was for, say, US\$100,000. Such a construction was commercially repugnant. It would mean that INTL could hold NKM to ransom.

36 In the circumstances, I concluded that the correct construction of the Deposit Agreement was that INTL was entitled to withhold only so much of the Deposit as was equivalent to the amount of its estimated counterclaim against NKM. The balance of the Deposit would thus be clearly due to NKM. As

INTL's counterclaim was estimated to be for US\$1,353,140, it should return the balance of US\$1,646,860. There was not enough material before me to say that INTL's counterclaim was clearly without merit and indeed that was not the basis of NKM's arguments. Also, the counterclaim was to be decided by the arbitral tribunal. For present purposes, NKM's primary contention appeared to be that it was entitled to the return of the entire Deposit since no objection was raised by INTL on or before 5 January 2018. Since that might not be the correct construction, I did not include the amount equivalent to the estimated counterclaim in the summary judgment I granted.

37 I was prepared to consider that INTL was also entitled to withhold so much of the Deposit as was sufficient to meet its costs of making its counterclaim against NKM in the Hong Kong arbitration proceedings in view of the "costs of collection" mentioned in Section 2 of the Deposit Agreement. As mentioned above at [34], INTL's counsel estimated INTL's costs of the arbitration proceedings at US\$500,000.

38 However, I was of the view that this was not a reliable figure which the court should adopt for present purposes.

39 First, it was a figure which counsel had plucked out of the air. His only reason for mentioning that figure was the amount of NKM's claim in the arbitration proceedings.

40 This brings me to the second reason. The second reason was that Section 2 of the Deposit Agreement mentioned INTL's costs of collection and not its costs to resist a claim by NKM. I did not agree with INTL that Section 2 would include the latter. Thus, there was effectively no suggestion by INTL's counsel of INTL's estimated costs of the arbitration proceedings if such costs

were confined to the costs of its counterclaim alone. Further, any estimate, if reasonable, would mean that if there was still a balance of the Deposit, after taking into account its counterclaim and estimated costs thereof, that balance would have to be refunded to NKM. It seemed to this court that INTL did not want to refund anything. Since INTL's counsel did not provide any estimate of its costs of collection, I did not think it was for the court to step in to provide an estimate for INTL. In the circumstances, I did not allocate any sum for INTL's costs of making its counterclaim.

Woo Bih Li
Judge

Suresh Divyanathan and Leong Yu Chong Aaron
(Oon & Bazul LLP) for the plaintiff;
Tan Thye Hoe Timothy and Shakti Sadashiv (AsiaLegal LLC)
for the defendant.
