

Agricultural Productive Cooperative v Dragon Seafoods Ltd

Date of Reasons for Decision: 16 March 2021

Court of First Instance

CFI

High Court Action No 1240 of 2017

HCA 1240/2017

Citations: [2021] HKCFI 675  
[2021] HKEC 920

Presiding Judges: Deputy Judge MK Liu in Chambers

Phrases: Civil procedure - summary judgment - claim for outstanding balance of price of products sold and delivered - whether defence arguable

Counsel in the Case: Mr Barrie Barlow SC & Mr William Leung (Solicitor Advocate), instructed by William K W Leung & Co, for the plaintiff  
Mr Byron Phillips of Hogan Lovells, for the defendant

Cases cited in the judgment: First Laser Ltd v Fujian Enterprises (Holdings) Co Ltd (2012) 15 HKCFAR 569  
Menfond Electronic Art & Computer Design Co Ltd v Wong Wang Tat Victor [2013] 2 HKC 259  
Paul Y Management Ltd v Eternal Unity Development Ltd (CACV 16/2008, [2008] HKEC 1359)

REASONS FOR DECISION:

Deputy Judge Liu in Chambers

1. At the end of the hearing on 15 March 2021, I allowed the plaintiff ("P")'s application for summary judgment and awarded costs of these proceedings (including costs of the application for summary judgment) to P. These are my reasons for the decision.

2. In January 2021, the defendant ("D") entered into a voluntary winding up. D's solicitors remained as the solicitors for D in these proceedings on the record, but they had no instruction to make any submission on behalf of D in the hearing on 15 March 2021. Although no submission was made on behalf of D in the hearing, I have considered all the papers, including the defence and the affidavit and affirmations filed by D.

3. Previously, by a summons dated 1 September 2017, D has made an application for a stay of these proceedings pending the final determination of the disputes between P and D by the court of the Russian Federation ("the Stay Application"). That application was heard by Madam Recorder Yvonne Cheng SC on 15 May 2019. On 27 May 2019, the learned judge handed down a written judgment ("the 2019 Judgment") and dismissed the Stay Application.

P' s CASE

4. P's case is simple and straightforward. As summarized in [3] of the 2019 Judgment, P is suing for US\$3,387,116.25, being the outstanding balance of the price of the fish products sold and delivered

by P to D under a "Master Agreement for Fish Supplies" entered into by the parties on 17 December 2010 ("the Agreement"). P also claims interest on this sum.

## D' s CASE

5. D has raised 3 defences to P's claim:

(1) Limitation Defence

The Agreement is governed by Russian law. Under Russian law, the limitation period for P to make a claim for a sum due to P under the Agreement is 3 years. The last delivery of the fish products by P to D was made on 22 February 2011. The writ in these proceedings was only issued on 25 May 2017. Therefore, at the time of the commencement of these proceedings, P's claim has already been time barred.

(2) Part Payment Defence

On 19 January 2011, D received a written payment instruction from P's chairman, directing D to pay a sum of US\$2,400,000 to an account in accordance with the terms of the invoice attached to the payment instruction. On 21 January 2011, D transferred US\$2,400,000 to Alesund in accordance with the payment instruction. Accordingly, the unpaid amount due to P under the Agreement should be reduced to US\$987,116.25 (US\$3,387,116.25 - US\$2,400,000).

(3) Charter Fees Defence

P has entered into some chartering agreements ("the Chartering Agreements") with some companies, which are subsidiaries of the Norebo group. D and Norebo are associated companies. P has not paid some charter fees under those chartering agreements. As a result, D is not obliged to pay the outstanding sum under the Agreement to P.

## THE PRINCIPLES

6. In assessing whether an arguable defence has been raised by the defendant in an application for summary judgment, the reminder given by the Court of Appeal in *Paul Y Management Ltd v Eternal Unity Development Ltd & Others* CACV 16/2008<sup>1</sup> has to be borne in mind. In that case, the Court of Appeal said at [19]:

"In deciding whether a plaintiff is entitled to summary judgment the relevant test is whether the defendant has raised credible triable issues. If there are, the matter should go to trial. If not, judgment should be entered against the defendant. In considering whether there are triable issues the Court will, of course, not take the alleged defence on its face value but test it against the evidence disclosed in the affidavit including matters such as contemporaneous documents, whether the alleged defence is inconsistent with the defence previously put forward or whether the defence is only recently raised despite opportunity being given to the defendant to respond earlier. The Court will also consider the inherent probability of the defence. But what the Court should not do is to conduct a mini-trial on complicated factual issues."

7. In *Menfond Electronic Art & Computer Design Co Ltd v Wong Wang Tat Victor* [2013] 2 HKC 259<sup>2</sup>, DHCJ Lisa Wong SC (as she then was) referred to, inter alia, Paul Y and said at [61]:

"The principles governing the grant or refusal of summary judgment under Order 14 are well established. It is for the defendant to show that there is an arguable defence or triable issue. In doing so, the defendant must condescend to particulars. The mere assertion in an affidavit of a given situation by the defendant does not, ipso facto, ground leave to defend. The defendant must satisfy the court that his evidence is capable of being believed and that on the basis of such evidence, there is a fair or reasonable probability of the defendant having a real or bona fide defence. In deciding whether there is a fair or reasonable probability of the defendant having a real or bona fide defence, the court does not isolate each factual issue and consider whether it is possible that the defendant's story on that issue is credible. Rather, the court must look at the whole situation. In assessing the credibility of the defendant's factual case, while the court will not embark on a mini-trial on affidavit evidence, the court is not obliged to suspend its critical faculties and assume that the defendant's evidence is accurate. If having regard to inherent plausibility, inconsistency with contemporaneous documents and other compelling evidence, the defence is not credible, the court must say so. If the defendant's defence is incredible in any material respect, it cannot be said that there is a fair or reasonable probability that the defendant has a real or bona fide defence..."

## ANALYSIS

8. I would analyse the defences put forward by D in turn.

### Limitation Defence

9. Clause 5 of the Agreement provides:

#### " 5. Consultations and Arbitration, Legal Force

##### Consultations

In the event a dispute arises in connection with the interpretation or implementation of this Agreement, the Parties shall attempt to resolve such dispute through consultations. ... If the dispute cannot be resolved in this manner within thirty (30) days after the commencement of discussion, any Party may submit the dispute to arbitration.

##### Arbitration

If the Party of this Agreement fails to perform its obligations, the other Party shall have the right to address for the security of its rights to the permanently acting Arbitration tribunal under the Limiter Liability Company 'Murmansk shore' having its location at: 450008, Bashkortostan Republic, Ufa, Kirov Street, building 1, office 338. The Arbitration tribunal decides the disputes in accordance with the regulations of the Arbitration tribunal and the substantive laws of the Russian Federation.

The Parties agreed to consider that the decision of the Arbitration tribunal is final, not appealed, enters into the effect immediately after the declaration, acts directly and does not require the confirmation of the other authorities and officials. ...

##### Legal Force of the Agreement

Any illegality, invalidity or unenforceability of any provision of this Agreement under the law of any jurisdiction shall not effect [sic ] its legality, validity or enforceability under the law of any other jurisdiction nor the legality, validity or enforceability of any other provision.

This Agreement is severable in that if any provision hereof is determined to be illegal or unenforceable, the offending provision shall be declared void and without any legal effect, but without affecting the legal validity of the remaining provisions of the Agreement.

..."

10. Upon an application made by D, the Commercial Court of Murmansk Oblast of the Russian Federation ("the Russian Commercial Court") held that the arbitration clause in Clause 5 of the Agreement was invalid or void. Further that court held that the parties' dispute stemming from the Agreement was not within the jurisdiction of the commercial courts in the Russian Federation <sup>4</sup>.

11. D's stance is that notwithstanding the ruling of the Russian Commercial Court, the parties' agreement as to the choice of Russian Federation law as the governing law of the Agreement is still valid. I am unable to accept this as correct.

(1) The Russian Commercial Court has declared that the arbitration clause in Clause 5 of the Agreement as invalid or void. That being the case, it is difficult to imagine that the choice of governing law as provided in the arbitration clause is still valid.

(2) This conclusion is reinforced by the fact that the Russian Commercial Court has held that the dispute stemming from the Agreement is not within the jurisdiction of the commercial courts in Russia <sup>4</sup>. D is also unable to identify any other Russian court which would have jurisdiction over the parties' dispute <sup>5</sup>. The fact that no Russian court has jurisdiction over the parties' dispute strongly suggests that the original choice of jurisdiction as contained in the arbitration clause in Clause 5 of the Agreement is gone and is deemed to be never in existence.

12. In the absence of any express choice of jurisdiction in an agreement, the agreement is governed by the system of law with which the transaction has its closet and most real connection <sup>6</sup>. There are factors showing that the Agreement has connection with Russia. There are also factors showing that the Agreement has connection with Hong Kong.

- (1) Factors showing connection with Russia:
- (a) Severnaya Zvezda ("SZ") was registered in Russia.
  - (b) Payments should be made to SZ by transferring the same to SZ's account in Russia. However, payments may also be made in accordance with the details on any payment instruction<sup>1</sup>.
- (2) Factors showing connection with Hong Kong:
- (a) D is a company incorporated and operating in Hong Kong.
  - (b) The negotiation of the Agreement was concluded in Hong Kong.

13. In my view, there is a crucial factor showing that the Agreement has the closest and most real connection with Hong Kong law, ie the ruling made by the Russian Commercial Court. By that ruling, it would not be possible to resolve the disputes stemming from the Agreement by arbitration. It would also not be possible to have those disputes adjudicated in a court in Russia. In the light of that ruling, the system of law with which the Agreement has its closest and most real connection cannot be Russian law. In my judgment, that system of law should be Hong Kong law.

14. Applying Hong Kong law, the relevant limitation period is 6 years. These proceedings were commenced within the limitation period. There is no merit in the limitation defence.

#### Part Payment Defence

15. D has never produced any document to show the alleged transfer of US\$2.4 million to Alesund on 21 January 2011. If there is any truth in this allegation, there would be some documents evidencing the transfer. However, not a single piece of document has been produced to support this allegation.

16. In the Stay Application, D produced a payment instruction dated 19 January 2011 requesting D to pay US\$2.4 million according to the Contract No.010-01-11 dd 18/1/2011, and an invoice dated 18 January 2011 for that sum. However, this payment instruction is unrelated to the Agreement dated 17 December 2010. The US\$2.4 million mentioned in that payment instruction cannot be the part payment alleged by D in these proceedings.

17. The Part Payment Defence is unbelievable.

#### Charter Fees Defence

18. As a matter of law, there is no privity of contract between P and D in respect of the Chartering Agreements. Even if P is owing some charter fees under those Chartering Agreements, D cannot rely upon the same as a defence to P's claim in these proceedings.

19. The Charter Fees Defence is unarguable.

#### DISPOSITION

20. For the reasons above, none of the defences advanced by D is arguable. I therefore granted summary judgment to P at the end of the hearing.

21. I thank counsel for the assistance rendered to the court.

<sup>1</sup> CACV 16/2008, 12 August 2008

<sup>2</sup> [2013] 2 HKC 259

<sup>3</sup> 2019 Judgment, [6] and [13]

<sup>4</sup> 2019 Judgment, [19]

<sup>5</sup> 2019 Judgment, [22]

<sup>6</sup> First Laser Ltd v Fujian Enterprises (Holdings) Co Ltd (2012) 15 HKCFAR 569, [53]

<sup>7</sup> Agreement, Clause 6

Westlaw Asia<sup>SM</sup>