IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC(I) 26

Suit No 1 of 2019

Between

(1) POSH Semco Pte Ltd

… Plaintiff

And

(1) Makamin Petroleum Services Co
(2) Offshoreworks Global (L) Ltd

… Defendants

JUDGMENT

[Credit and Security] — [Guarantees and indemnities]
[Civil Procedure] — [Rules of court] — [Judgment without trial]
[Commercial Transactions] — [Obligation of good faith]

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POSH Semco Pte Ltd
v
Makamin Petroleum Services Co and another

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Singapore International Commercial Court — Suit No 1 of 2019
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18 December 2020 Judgment reserved.

Jeremy Lionel Cooke IJ:

Introduction

1 This action, SIC/S 1/2019, ("the Action") was listed for trial on 15 December 2020, following a history which can be seen by reference to the Court of Appeal judgment in this matter dated 22 September 2020 (*Offshoreworks Global (L) Ltd v POSH Semco Pte Ltd* [2020] SGCA(I) 4 (the "Court of Appeal judgment")) and to the grounds for my decision when giving summary judgment for part of the plaintiff's claim against the Second Defendant ("OWG") on 6 September 2019 in respect of its liability under the guarantee given by it on 24 October 2014 (the "OWG Guarantee"). The part of the claim for which summary judgment was not given is the sum of US$771,779.98 which represents the difference between the "Outstanding Debt" and the "Settlement Sum", as defined in the Settlement Agreement of 15 November 2015 between

the plaintiff and the charterer ("MOS") whose liability was the subject of the OWG Guarantee.

2 OWG did not appear on 15 December 2020 following the decision of the Court of Appeal that a foreign defendant in this court could not appear unrepresented. The rationale for that decision appears in the Court of Appeal judgment where Captain Koh Chen Tien ("Cpt Koh"), OWG's sole shareholder and executive director was permitted to argue the case on appeal from the summary judgment *de bene esse*, pending the court's decision as to whether that was technically allowable.

3 Following the summary judgment, OWG filed an appeal on 4 October 2019. On 3 and 17 March 2020, after the parties had filed their respective appellant's case and respondent's case, but before the hearing in the Court of Appeal on 1 April 2020, the solicitors instructed by OWG gave notice that they were ceasing to act in the Action and in the appeal. At each of the hearings of the appeal on 1 April and 5 August 2020, OWG did not appear with counsel or solicitors and Cpt Koh addressed the court, having been given a full opportunity, as set out in the Court of Appeal judgment, to instruct lawyers if he so wished. The court rejected the appeal on the merits as well as ruling that a foreign corporation could not appear unrepresented by lawyers on the record.

4 Since the date of the Court of Appeal judgment, the plaintiff and the court have persistently corresponded with OWG without obtaining any response. On 1 October 2020, the plaintiff sought information from OWG as to whether it would be appointing solicitors for the conduct of the Action and seeking agreement to various directions that the plaintiff indicated it would request at a forthcoming case management conference. In the same message, the plaintiff informed OWG that it would take further steps in the Action

without further reference to OWG if it failed to respond by 9 October 2020. OWG did not respond by that date and on 12 October 2020, the plaintiff explained the position to the Singapore International Commercial Court ("SICC") Registry (the "SICC Registry") and said it would seek judgment in default. The SICC Registry fixed a case management conference for the Action on 21 October 2020. OWG was informed of the date but did not appoint solicitors to attend or provide any information as to its intentions in relation to the future conduct of the Action.

5 Following the case management conference at which I gave directions for the future conduct of the Action, including the filing of evidence and fixed a further case management conference, the plaintiff informed OWG of this order and the fixing of the trial for 15–16 December 2020. The SICC Registry has sought to engage with OWG in a sequence of correspondence to which no reply has ever been received. The orders and directions given by the court have been notified to OWG, including the further directions for the hearing of the trial, given at the later case management conference on 4 December 2020.

6 It is in these circumstances that the plaintiff submits that judgment should be entered for it against OWG without any trial. It relies on O 35, r 1(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) which apply to the SICC by virtue of O 110, r 3(1) of the same Rules. Order 35 r 1(2) provides that:

> If, when the trial of an action is called on, one party does not appear, the Judge may proceed with the trial of the action or any counterclaim in the absence of that party, or may without trial give judgment or dismiss the action, or make any other order as he thinks fit.

7 In support of that submission that I should give judgment without a trial, the plaintiff contends that it is clear that OWG has no intention of defending the remaining part of the claim, relying upon the history of the matter that I have

just set out. I accept the submission that OWG has no intention of defending the balance of the claim in the Action as being the inevitable inference of what has occurred. Nonetheless, in circumstances where OWG had submitted evidence in relation to the balance of the plaintiff's claim when resisting summary judgment (and, in particular, evidence of Saudi Arabian law ("Saudi law") which governs the relationship between the plaintiff and MOS, the charterer of the vessel *POSH Pelican*), in the light of which I found that there was a matter which should go to trial, I consider that it would not be appropriate to give judgment without exploring that evidence and the evidence adduced by the plaintiff. As a matter of discretion, it seems to me to be right that I should determine the points which I have held to be arguable on the application for summary judgment.

8 The plaintiff submitted that the burden was on OWG to make good its defence under the law of the Kingdom of Saudi Arabia ("Saudi Arabia") and that, when the court, in discussion at the application for summary judgment had made it plain that there were questions which it would have wanted OWG's appointed expert to answer, the fact that it did not proceed with the defence of the Action spoke for itself. Whilst the plaintiff also submits that it is prejudiced in being prevented from cross-examining OWG's appointed expert in Saudi law, Mr Al-Qahtani, Saeed Ahmad M ("Mr Al-Qahtani"), on the points then raised by the court, it has adduced evidence on Saudi law from its own appointed expert lawyer, Dr Baassiri, Faisal Adnan S ("Dr Baassiri"), whose evidence is before the court and who was available for cross examination, should OWG appear, and to answer any questions the court might have. He specifically addressed the points that the court had previously raised.

9 In all the circumstances, it appeared to me that I should weigh the evidence of Dr Baassiri against, and in the light of, the previous evidence, supported by affidavit from Mr Al-Qahtani.

10 I therefore decided that I should proceed with the trial on the basis of the evidence before me and the previous evidence from Mr Al-Qahtani. The plaintiff's witness, Mr Teo Kim Leng, Kelvin confirmed the accuracy of his 6th and 7th affidavits filed in the Action as his evidence-in-chief. That evidence set out the history underlying the dispute between the parties and established the balance of the Outstanding Debt in the figure set out at [1] above. His evidence also showed that, in seeking to have the Action stayed in favour of Saudi Arabia as the appropriate forum, OWG had told the court that interest could be awarded by the courts there, in an attempt to show that there was no detriment to the plaintiff in having liability under the OWG Guarantee determined in that jurisdiction.

11 The plaintiff's appointed expert in Saudi law, Dr Baassiri confirmed his affidavit and expert report as his evidence in the Action.

The remaining claim

12 No purpose would be served in a detailed account of the facts which are recorded in the Court of Appeal judgment to which reference should be made but it is necessary to set out the most important elements in the Settlement Agreement of 15 November 2015, which speak for themselves in relation to the prior history:

> **WHEREAS:**
>
> (A) MOS is the Charterer of the vessel 'POSH Pelican' from [the plaintiff] under a time charter on an amended

Supplytime 2005 form with additional clauses dated 28 October 2013 ('Charter')

(B) [The plaintiff] has various claims against MOS under the Charter. In order for MOS to alleviate its financial situation, at MOS's request, [the plaintiff] has, solely with a view of achieving an amicable resolution agreed to the matters set out in this Agreement.

NOW THEREFORE, in consideration of the mutual covenants and agreements contained in this Agreement, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. MOS agrees and acknowledges that as of 30th June 2015, MOS' total outstanding debt due and owing to [the plaintiff] under the Charter (including for charterhire up to and including 30th June 2015) is US$2,891,241.54 ('**Outstanding Debt**') …

2. In consideration for [the plaintiff] refraining from taking legal action to recover the Outstanding Debt, MOS agree and undertakes to:

   a) Pay [the plaintiff] a total of US$2,119,461.56 ('**Settlement Sum**') … as set out below:

   …

   (iii) US$264,932.69 on or before 31 January 2016 ['third instalment']

   (iv) US$264,932.69 on or before 29 February 2016 ['fourth instalment']

   …

   The aforementioned sums shall be paid to [the plaintiff's] designated bank account, as set out below, before 5pm (Singapore time), free of any deductions, fees commissions or bank charges whatsoever:

   …

   b) Execute an addendum to the Charter, set out in **Appendix B** herein.

…

4. In the event any of the payment set out at clause 2a) above are not provided by MOS to [the plaintiff] by the

> timeline set out at clause 2a) above or satisfy any of its obligations under this Agreement, the entire Outstanding Debt (or any part or balance thereof) shall immediately become payable and MOS agree that [the plaintiff] shall be entitled to pursue recovery of the entire Outstanding Debt (or any part or balance thereof) through any means in any competent jurisdiction without further notice or reference to MOS … Further and in addition … [the plaintiff] may impose interest of 1% per month on the Outstanding Debt (or any part or balance thereof) from 1st July 2015 after the date of actual payment (both before and after judgement).
>
> …
>
> 7. The failure of any of the Parties to insist upon strict adherence if any provision of this Agreement on any occasion shall not be construed as a waiver of any right to insist thereafter upon strict adherence to that provision or any other provision of this Agreement.
>
> …
>
> 11. This Agreement constitutes the entire agreement between the Parties with regard to its subject matter and supersedes all and any previous such agreements in relation to the Outstanding Debt. No amendment, waiver or other variations of this agreement shall be effective unless it is in writing and signed on behalf of the Parties.
>
> 12. This Agreement shall be governed by the laws of the Kingdom of Saudi Arabia.
>
> …
>
> [emphasis in original]

13 It was because this Settlement Agreement between the plaintiff and MOS was governed by Saudi law, as was the Charter and the Addendum to that Charter which appears as Annex B to the Settlement Agreement, that I considered that OWG had an arguable defence to this part of the claim for the balance of the Outstanding Debt, in the light of the evidence which it adduced from its Saudi law expert, in circumstances where there was no evidence from

the plaintiff on the subject. If MOS had a valid defence under the Charter, Settlement Agreement and Post–Addendum Charter, then OWG had a defence under the OWG Guarantee.

14 Whilst the plaintiff has submitted that the effect of para 49 of the Court of Appeal judgment is that Saudi law has no relevance because the OWG Guarantee is governed by the law of Singapore, I do not accept that submission.

15 The Court of Appeal was, in that paragraph, concerned with the award of interest on sums claimed under the OWG Guarantee. The Court of Appeal upheld my decision that, in awarding interest in respect of the OWG Guarantee claim (governed by Singapore law), the court was entitled to take into account the contractual rate of interest which had been agreed between the plaintiff and MOS in the Settlement Agreement (governed by Saudi law) even if that was unenforceable as a matter of Saudi law which governed the relationship between the plaintiff and MOS.

16 Because I held that the OWG Guarantee was a true guarantee (a "see to it guarantee") as opposed to an "on demand" guarantee (a decision which was not the subject of appeal), it follows that, for the OWG Guarantee to "bite" it is necessary for there to be an established liability of MOS to the plaintiff.

17 In consequence, if the plaintiff is unable to recover, as against MOS, the differential between the Outstanding Debt and the Settlement Sum, as a matter of Saudi law, it cannot recover that sum from OWG either, despite the fact that the OWG Guarantee is governed by Singapore law. Questions of substantive liability under Saudi law are different from issues of procedural law as to the award of interest in another forum, where the substantive law against the grant of interest is a relevant but not a conclusive factor in a court's consideration.

The relevant principles of Saudi law

18 Mr Al-Qahtani's evidence to this court in 2019, in so far as relevant to this issue, can be summarised in the following manner. Under Saudi law, a commercial party is bound by obligations of good faith found in the Qur'an and the Sunnah. Such obligations have the force of law by reason of Art(s) 1 and 7 of the Basic Law of Governance of Saudi Arabia. Dr Baassiri expressly agreed with this in his expert report.

19 Mr Al-Qahtani, based on this premise, stated that commercial parties were bound to observe a number of good faith obligations which included:

(a) the obligation to "act rightly in dealings each other";

(b) the obligation "not to deal unjustly with another commercial partner"; and

(c) the obligation, if owed money and if its debtor is in difficulty, to "grant the debtor time until it is easy for the debtor to repay the debt".

20 In answer to the question posed as to whether the plaintiff was entitled to rely on receipt of the third instalment on 3 February 2016 instead of 31 January 2016 in order to claim the entire Outstanding Debt, as defined in the Settlement Agreement, Mr Al-Qahtani would appear to have strayed beyond the proper limits of an expert in setting out the conclusions which he drew from the facts in relation to the principles of law of which he had spoken. He concluded that the plaintiff was not entitled to assert that the entire Outstanding Debt had become payable. That would be contrary to the good faith obligations binding on the plaintiff because:

(a) the delay in the receipt of the instalment was minimal;

(b) the delay in the receipt was due to a problem at MOS' bank;

(c) no real harm was suffered by the plaintiff from late receipt; and

(d) on 16 February 2016, when the plaintiff asserted that the balance of the Outstanding Debt was payable, it is had already received payment of the third instalment.

21 Dr Baassiri's opinion was that the general principles of good faith, which are part of Saudi law, always fall to be applied to specific situations in the light of the overall facts. He stated that the plaintiff had complied with its good faith obligations by adhering to the specific terms of the Charter and by giving MOS an opportunity to make up for its previous deficiencies in making payment when entering into the Settlement Agreement and the Annex B addendum to the Charter. The terms of the Settlement Agreement speak for themselves in setting out MOS' earlier failures pay and in showing the leniency and indulgence of the plaintiff in not enforcing the terms of the original Charter but giving time to pay in a series of instalments.

22 Dr Baassiri pointed out that the doctrine of good faith entailed the principle that parties should comply with their contractual commitments. He drew attention to the well-known provision in the Qur'an, Surah Al-Ma'idah verse 1, which requires believers to fulfil their contractual obligations and to supporting citations which were attached to his expert report. It was MOS which had failed to perform its obligations under the original Charter and had now failed, having been given a further opportunity to pay over a period of time, even to adhere to the agreed schedule for such extended payments, both in respect of the third and fourth instalments.

23 Furthermore, Dr Baassiri relied upon the terms of cl 4 of the Settlement Agreement and the express language in it which provided that, if any of the payments set out in cl 2(a) were not met in time, "the entire Outstanding Debt (or any part or balance thereof) shall immediately become payable". The parties had specifically agreed, in circumstances where they had already been afforded time to pay, that any failure to pay any one instalment on time would automatically have the effect of triggering liability to repay the entire balance of the Outstanding Debt, without any need for the plaintiff to exercise any right or option to accelerate liability to repay that sum, which was one which was previously due in any event. The clause actually referred to the time of day on the relevant date by which each instalment was to be paid. If payment was late, the balance of the Outstanding Debt immediately became payable, it being agreed that the plaintiff would thereupon be entitled to pursue recovery in any competent jurisdiction without further notice or reference to MOS.

24 He considered, although this is a matter properly for the court to decide, that the entire purpose of the Settlement Agreement was to settle overdue amounts from MOS by the specific times stated for each particular instalment and that the obligation to make timely payments of those instalments was central to it. Thus, the duty of good faith could not have prevented the acceleration of the Outstanding Debt. The court agrees.

The application of those principles

25 Like Mr Al-Qahtani, Dr Baassiri went on to reach conclusions which are properly the province of the court. He opined that the plaintiff did not act contrary to the duty of good faith when informing MOS on 16 February 2016 that the latter had defaulted in failing to pay the third instalment on time, whilst also stating its entitlement to claim the balance of the Outstanding Debt with

interest for which the Settlement Agreement provided. He also expressed the view that the plaintiff discharged its duty of good faith in granting the debtor time for repayment, as it undoubtedly had, as the prior history makes plain. As at 17 October 2014, MOS owed the plaintiff more than US$3m when the plaintiff called on the guarantee issued by the Royal Bank of Scotland plc. MOS asked the plaintiff to withdraw its call on that guarantee, offering the OWG Guarantee and guarantees from others in addition. MOS continued to fall into arrears on the hire due under the Charter which led to the Settlement Agreement of 15 November 2015, the terms of which reveal the extent of outstanding indebtedness and the forbearance shown by the plaintiff thus far. The terms of that agreement show more forbearance exercised by the plaintiff and the agreement of the parties that no further forbearance should be forthcoming in the event of breach of those terms.

26 It is also pointed out by the plaintiff that there is no evidence that MOS' failures to pay were a result of genuine financial difficulty on the part of MOS.

27 The court accepts the evidence of Dr Baassiri on the principles and ambit of the good faith obligations which rest on a commercial party under the Saudi law. It has formed its own conclusions as to the facts and whether or not there was a breach of those principles by the plaintiff. It has concluded that no such breach is arguable in circumstances where it was MOS which had defaulted on its obligations and where the plaintiff had exercised much patience and forbearance in not withdrawing the vessel during an extended period of time when MOS was in breach for the same reasons as Dr Baassiri. Good faith was exercised by the plaintiff, but not by MOS which continued to break its contractual obligations, particularly in relation to the third and fourth instalments.

Conclusion

28 When the plaintiff withdrew the vessel and terminated the Charter on 26 March 2016, it was entitled to do so and to accept the repudiation of the Post-Addendum Charter in the light of all the previous failures of MOS. The balance of the Outstanding Debt was rightly claimed.

29 No separate defence was raised in relation to enforcement of the OWG Guarantee in relation to the balance of the Outstanding Debt, that has not already been decided by myself and the Court of Appeal, so that, once the liability of MOS is clear, then the liability of OWG is established. The plaintiff is, therefore, entitled to judgment against OWG in the further sum of US$771,779.98 and to interest thereon.

30 The Court of Appeal at para 50 of its judgment confirmed my decision that the indemnity provision in the OWG Guarantee was wide enough to include interest on the claim and that there was no reason why the contractual provisions on the rate of interest set out in the Post-Addendum Charter should not be given effect, notwithstanding the prohibition in Saudi law against *riba*. Given the misleading information given to the court by OWG as to the enforceability of interest in Saudi Arabia, there is every reason to apply the agreed rate of interest which appears in the Charter as between the plaintiff and MOS.

31 This court has a discretion in the award of interest as a matter of its own procedure and whereas, ordinarily, the prohibition under the law of the contract against the award of interest would carry weight with the court, here, I consider that it should award interest on sums due under the OWG Guarantee at the contractual rate agreed between the plaintiff and MOS in the Charter, the obligations of which were the subject of the OWG Guarantee, even if that

particular obligation to pay interest is, as both expert Saudi Arabian lawyers agree, unenforceable as against MOS under Saudi law. Where there was agreement in the guaranteed contract to pay interest, notwithstanding the governing law to the contrary, effect should be given to what can be assumed to be the true mutual intention of the parties at best. If that is not the assumption, the inference is of duplicitous conduct on the part of the likely paying party in agreeing the provision, knowing it was incapable of enforcement under the governing law.

32 The figure for interest up to 5 April 2016 at 12% per annum has been calculated at US$84,191.21 and for interest at the same rate thereafter until today at US$435,664.51, making a total of US$519,855.72. That rate will continue until payment in accordance with the Post-Addendum Charter, despite it being in excess of the judgment rate of 5.33%.

33 So far as costs are concerned, I see that the Court of Appeal considered that indemnity costs were appropriate in relation to the appeal by reason, I take it, of the indemnity provisions in the OWG Guarantee relating to "losses, damages, claims, costs, charges and expenses of whatever nature and howsoever arising" which the plaintiff might suffer in connection with OWG's failure to observe or comply with its guarantee obligations. Given that provision and the attitude of OWG to the continuing proceedings which it has ignored, I consider that indemnity costs are appropriate here, since the OWG's conduct of the proceedings, as set out above, is "beyond the norm".

34 The plaintiff has submitted its bill of costs and I see no reason to disallow any part of it in the light of the contractual indemnity. The figure is US$577,070.10 plus S$132,306.50 and disbursements of US$37,758.62 plus

S$5,889.74. Interest should be payable on those costs from today's date at the judgment rate of 5.33% per annum.

35 Judgment will therefore be entered for the plaintiff for US$771,779.98 (the "principal judgment sum"), together with interest thereon of US$519,855.72 to today's date. Interest will continue to run on the principal judgment sum at the rate of 12% per annum and pro rata from todays' date up to the date of actual payment together with costs on an indemnity basis and interest on those costs running from today's date at the rate of 5.33% per annum and pro rata, as set out in para 34 above.

Jeremy Lionel Cooke
International Judge

Chan Tai-Hui, Jason ("Chan"), Oh Jialing, Evangeline and Gan Yun Han, Rebecca (Allen & Gledhill LLP) for the plaintiff; and the defendants unrepresented, absent.