IN THE HIGH COURT OF MALAYA

AT KUALA LUMPUR

ORIGINATING SUMMONS NO. WA-24C(ARB)-26-06/2019

BETWEEN

CONEFF CORPORATION SDN BHD **PLAINTIFF**

AND

VIVOCOM ENTERPRISE SDN BHD **DEFENDANT**

AND

DR ENG ZI XUN **APPLICANT**

GROUNDS OF DECISION

Introduction

[1] This is an application to set aside a subpoena *duces tecum* as well as a subpoena *ad testificandum*.

[2] The Plaintiff is a private limited company involved in the construction business.

[3] Likewise the Defendant is a private limited company also involved in the construction business.

[4] The Applicant is an individual and the general manager of Geonamics (M) Sdn Bhd ("GSB").

Salient Background Facts

[5] The Plaintiff appointed the Defendant as the contractor to construct and complete the project described as 'Cadangan Membina 2 Menara Komersial Yang Mengandungi:

A Menara 1 (30 Tingkat) dan Menara 2 (33 Tingkat)

I - Menara 1 (21 Tingkat) Tingkat 9 - Tingkat 29 Apartmen Servis - 292 Unit

II - Menara 2 (25 Tingkat) Tingkat 8 - Tingkat 32 Apartmen Servis - 498 Unit

III - 1 Tingkat Rekreasi Di Tingkat 8

B Kompleks Komersial 2 Tingkat Kompleks Perniagaan (Tingkat Bawah & Tingkat 1)

C 6 Tingkat Tempat Letak Kereta (Tingkat 2 –Tingkat 7)

Dengan 1 Tingkat basemen Tempat Letak Kereta Serta 3 unit Pencawang Electrik Dan M&E Di Atas Lot 36071 Dan 36072 Fasa 3B Desa Tasik, Mukim Petaling Sg. Besi Kuala Lumpur Untuk DBKL Dan Tetuan Coneff Corporation Sdn Bhd' ("Project")

[6] There were subsequently disputes and differences that arose between them and the disputes were referred to arbitration before Ar. Boon Chee Wee.

[7] The disputes and differences, inter alia, concerned the adequacy of the piling works constructed by the Defendant's piling sub-contractor Boremas Piling Sdn Bhd ("BPSB").

[8] During the course of the piling works, the BPSB appointed GSB to conduct PDA tests to ascertain the integrity of a number of the constructed bored piles.

[9] The Plaintiff subsequently appointed ACE Approach Sdn Bhd ("AASB") to opine on the adequacy of the pile capacity of the piles

constructed by the Defendant and AASB concluded that the PDA test results conducted by GSB were dubious and questionable.

[10] As a result, the Plaintiff on 19 June 2019 filed this OS pursuant to s. 29 of the Arbitration Act 2005 to issue a subpoena *duces tecum* as well as a subpoena *ad testificandum* on the Applicant to produce the PDA raw data to the Plaintiff and to testify at the forthcoming arbitration proceedings between the Plaintiff and the Defendant.

[11] Consequently, my predecessor Justice Lee Swee Seng on 11 July 2019 gave leave for the subpoenas to be issued to the Applicant. The Plaintiff accordingly issued the subpoenas and served them on the Applicant.

[12] The Applicant refused to provide the PDA raw data and has on 26 August 2019 filed this application to set aside both the subpoenas ("Application").

[13] The affidavits that were filed for purposes of the Application are as follows:

(i) Applicant's affidavit in support affirmed by Eng Zi Xun dated 26 August 2019;

(ii) Plaintiff's affidavit in reply affirmed by Er Ka Wei dated 13 September 2019;

(iii) Defendant's affidavit in reply affirmed by Ng Huat Chai dated 25 September 2019;

(iv) Applicant's affidavit in reply affirmed by Eng Zi Xun dated 30 September 2019;

(v) Plaintiff's affidavit in reply affirmed by Er Ka Wei dated 13 September 2019;

(vi) Plaintiff's affidavit in reply affirmed by Er Ka Wei dated 10 October 2019;

(vii) Applicant's supplementary affidavit affirmed by Eng Zi Xun dated 25 October 2019; and

(viii) Applicant's supplementary affidavit in reply 2 affirmed by Eng Zi Xun dated 4 November 2019.

[14] The Application came before me for hearing on 28 November 2019. After having read the cause papers and written submissions of the parties as well as hearing oral arguments of counsel, I ordered that the subpoena requiring the Applicant to testify in the arbitration proceedings be set aside. As to the subpoena to produce the PDA raw data, I ordered the Applicant to produce the PDA raw data in respect of the tests on 9 of the tested piles to the Plaintiff and the Defendant on a without admission of liability basis within 3 weeks from the date of the Order. There is no order as to costs.

[15] The Applicant is dissatisfied with my decision and has on 9 December 2019 filed his appeal to the Court of Appeal.

[16] In consequence, I hereby furnish below the supporting grounds of my decision.

Contention and Findings

[17] The Applicant contended that it had been engaged by BPSB to conduct PDA (pile driving analyser) tests on 9 bored piles. The PDA test results were reduced into 3 GSB reports with four appendices which included field details, signal matching – CAPWAP, filed sheets and calibration and certificates. These are already in the possession of the Plaintiff.

[18] According to the Applicant, there is firstly no nexus between him and the parties in the arbitration proceedings. He was also only employed by GSB from 2 February 2017 onwards, after the PDA tests were already done.

[19] Secondly, the PDA raw data sought by the Plaintiff do not touch on the facts in issue but merely on collateral facts in the arbitration proceedings. Reliance is made on the Federal court case of ***Ismail v Hasnul; Abdul Ghaffar v Hasnul*** **[1968] 1 MLJ 108**. They are hence not relevant and inadmissible. It is also a fishing for evidence expedition embarked by the Plaintiff, which cannot be sanctioned following ***Ong Commodities Pte Ltd v Kek Tek Huat Sdn Bhd*** **[2015] 10 CLJ 585** and ***Nguang Chan aka Nguang Chan Liquor Trade v Hai-O Enterprise Bhd*** **[2009] 5 MLJ 40**.

[20] Thirdly, the issuance of the subpoena offended the finality rule that a challenge to a collateral fact is inadmissible following the Court of Appeal case of ***CGU Insurance Bhd v Asean Security Paper Mills Sdn Bhd*** **[2006] 3 MLJ 1** and the Australian High Court case of ***Nicholls v The Queen*** **[2005] HCA 1**.

[21] Fourthly, the subpoena was issued to obtain documents for cross examination of witnesses which is impermissible following the English Court of Appeal cases of ***Thorpe v Chief Constable of the Greater Manchester Police*** **[1989] 2 ALL ER 827** and ***Macmillan Inc v Bishopsgate Investment Trust Ltd*** **[1993] 4 ALL ER 998**.

[22] Fifthly, the production of the PDA raw data has the effect of shifting the burden of proving fraud to the Applicant since serious allegations of impropriety, in relation to the GSB reports, have already been advanced against the Applicant and/or GSB. Again, reliance is made on the case of ***Ong Commodities Pte Ltd v Kek Tek Huat Sdn Bhd*** **(supra)** and the old English case of ***Steele v Savory*** **[1891] WN 195.**

[23] Finally, the subpoena is burdensome and oppressive on the Applicant and clearly in abuse of process. This is because the piling works are not defective as separately confirmed by the maintain load test ("MLT") conducted by the Plaintiff's tester itself. Thus, the resultant burden and prejudice suffered by the Applicant outweighs the probative value of the production of the PDA raw data. The PDA raw data is hence sought principally to discredit GSB, particularly the Applicant during the forthcoming cross examination in the arbitration proceedings.

In addition, there may not be the opportunity for the Applicant and/or GSB to defend the interpretation of the PDA raw data by AASB in the arbitration proceedings which is gravely unfair and prejudicial to the Applicant/GSB following the Court of Appeal case of ***Protasco Bhd v Tey Por Yee & Another Appeal*** **[2018] 5 CLJ 299**. In other words, it has been targeted to destroy the aforesaid GSB reports.

[24] The Plaintiff contended that the PDA raw data sought is the primary data obtained from the PDA tests in the form of wave data recordings. These are documents that have been specifically identified and therefore not a fishing expedition as so alleged by the Applicant. They are undoubtedly relevant to substantiate the correctness and reliability of the PDA test results of the 9 bored piles conducted by GSB.

[25] In addition, the Plaintiff contended that the Applicant and/or GSB need not require nexus in the arbitration proceedings, particularly as parties, as so suggested by the Applicant. This is irrelevant as the critical prerequisite is that the PDA raw data is relevant and material to the determination of issues in the arbitration proceedings. In this respect, the PDA test results that were based on the PDA raw data is material to the ascertainment of the adequacy of the constructed bored piles. The Plaintiff has contended that the capacity of these bored piles is inadequate but which are opposed by the Defendant in the arbitration proceedings.

[26] As the usefulness of the PDA test results *vis a vis* the MLT, which has confirmed the adequacy of the bored piles as contended by the

Applicant, the Plaintiff retorted that these are issues within the principal issue of the adequacy of the capacity of the bored piles to be addressed by the arbitrator in the arbitration proceedings.

[27] Finally, the Plaintiff contended that the PDA raw data sought were neither privileged nor confidential documents that are subjected to non disclosure. This is because they are non-proprietary in nature. Be that as it may, there is no privilege against self incrimination too, following the Federal court case of ***Public Prosecutor v Datuk Haji Wasli bin Mohd Said*** **Criminal Appeal no. 05-147-072012 (W) (unreported)**

[28] For purposes of this Application, the Defendant took a neutral stance by neither supporting nor opposing the same.

[29] It is provided as follows in s. 29 of the Arbitration Act 2005:

"29. Court assistance in taking evidence

(1) Any party may with the approval of the arbitral tribunal, apply to the High Court for assistance in taking evidence.

(2) The High Court may order the attendance of a witness to give evidence or, where applicable, produce documents on oath or affirmation before an officer of the High Court or any other person, including the arbitral tribunal."

[30] In the Supreme Court case of ***Wong Sin Chong & Anor v Bhagwan Singh & Anor*** **[1993] 4 CLJ 345**, Haji Mohd Azmi bin Dato' Haji Kamaruddin SCJ held as follows:

"...In every case, the onus is on the party issuing the subpoena to show the materiality of the witness for the just decision of the case, in that it outweighs any oppression that may be caused to the party objecting..."

(See also ***ECM Libra Investment Bank Bhd v Foo Ai Meng & Ors*** **[2013] 3 MLJ 35**)

[31] Although the Evidence Act 1950 is not intended to apply to arbitration proceedings, the principles relating to the law of evidence do apply generally. In ***Jeuro Development Sdn Bhd v Teo Teck Huat (M) Sdn Bhd*** **[1998] 6 MLJ 545**, Augustine Paul J (later FCJ) held as follows:

"I also refer to the words of Evatt J in R v. War Pensions Entitlement Appeal Tribunal Ex parte Bott [1933] 50 CLR 228 at p 256,

Some stress has been laid by the present respondent upon the provision that the Tribunal is not, in the hearing of appeals, 'bound by any rules of evidence'. Neither it is. But this does not mean that all rules of evidence may be ignored as of no account. After all, they represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although the rules of evidence, as such, do not bind, every attempt must be made to administer 'substantial justice'."

Furthermore in the English case of ***Sunderland Steamship P. And I. Association v Gatoil International Inc*** **[1988] 1 Lloyds Rep 180**, Steyn J held as follows:

"These principles, which I have set out, apply to Court proceedings. They certainly apply with no less rigour to arbitration proceedings. Since the purposes of the arbitral process are expedition, cost effectiveness and finality, it may fairly be said that in considering a subpoena duces tecum issued under section 12(4) of the 1950 Act, the Court will be vigilant to ensure that it was issued for legitimate purpose only and that it was not cast too widely."

[32] For purposes of this Application, I observed that the Applicant did not deny the existence of the PDA raw data which are sought by the Plaintiff. Moreover, it does not also seem to be in dispute that this raw data has not been included in the aforesaid GSB reports and the appendices annexed thereto on the PDA test results.

[33] Generally, I am of the view that the principal governing considerations to justify the issuance of a subpoena whether to produce a document or summon a witness under s. 29 of the Arbitration Act 2005 are relevancy and materiality. That notwithstanding if the subpoena has however been issued for a non legitimate purpose or is oppressive, then the subpoena would be set aside. It is immaterial that the person subpoenaed is not a party in the arbitration proceedings.

[34] I am mindful that the Applicant has attempted to differentiate that the required relevancy and materiality of the document or witness must plainly be connected with the main facts in issue and not the collateral facts in the arbitration proceedings. To my mind, there should not be over splitting hairs. It is adequate so long as the subpoenaed document or witness is related to a pivotal issue in the arbitration proceedings as disclosed from the pleadings or statements of case of the parties.

[35] In this regard, I am satisfied that the adequacy of the capacity of the constructed bored piles is, amongst others, a principal issue in the arbitration proceedings. Justice Lee Swee Seng must have arrived at the same conclusion too; otherwise the subpoenas would not have been issued. The Defendant would inevitably rely on the PDA results to defend the adequacy of the capacity of the bore piles. I am hence further satisfied that the PDA raw data is not only relevant but material and cogent in justification of the PDA test results. It is not a fishing for evidence expedition. Beyond this, it is not the purview of this Court but that of the arbitrator to analyse the cogency or effect of all the evidence including the PDA raw data to arrive at the ultimate determination of whether the bores piles as constructed are adequate. In my opinion, it is only fair and just that all relevant evidence must be made available before the arbitrator, particularly since the evidence has been specifically identified and sought by the parties. It does not matter if the PDA raw data would be used for cross examination of GSB or has the effect of shifting the burden of proof as so contended by the Applicant. In my opinion, GSB must be professionally ever-ready to defend its work which GSB has been remunerated for doing. In the premises, I find that the cases relied upon by the Applicant are readily distinguishable as their facts are starkly different.

[36] I am also convinced that the Plaintiff's request for the raw data was not made for a non legitimate purpose because I find that it was made merely to advance its case in the adversarial arbitration proceedings. There is no oppression caused to the Applicant or GSB as I could not detect how they would tangibly be victimized or prejudiced in and/or by the arbitration proceedings. Again the case of ***Protasco Bhd v Tey Por***

Yee & Another Appeal **(supra)** relied on by the Applicant are again plainly distinguishable on its starkly different facts.

[37] Premised on the above, I find and hold that the Applicant did not make out a meritorious case to set aside the subpoena *duces tecum*.

[38] As for the subpoena *ad testificandum*, I find that the Applicant was employed by GSB after the PDA testing was already carried out. Consequently, he has no personal knowledge of the derivation of the PDA raw data.

[39] In the circumstances, the Applicant is not a material witness of assistance to the arbitrator in the arbitration proceedings. It would also be oppressive and embarrassing to him.

[40] I hence set aside the subpoena *ad testificandum* that was issued.

Conclusion

[41] It is for the foregoing reasons that I partly allowed the Application as so ordered.

Dated this 20 December 2019

t.t.

LIM CHONG FONG

JUDGE

HIGH COURT KUALA LUMPUR

COUNSEL FOR THE PLAINTIFF: M. MUTHURAMAN

SOLICITORS FOR THE PLAINTIFF: MUTHU & PARTNERS

COUNSEL FOR THE DEFENDANT: S. SEKHAR

SOLICITORS FOR THE DEFENDANT: SEKHAR SAVIN & PARTNERS

COUNSEL FOR THE APPLICANT: WILLIAM LEONG JEE KEEN (HEAW YU HOEY WITH HIM)

SOLICITORS FOR THE APPLICANT: WILLIAM LEONG & CO