HCCL 2/2013

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

COMMERCIAL ACTION NO 2 OF 2013

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BETWEEN

EMIRATES SHIPPING LINE DMCEST Plaintiff

and

TRANS ASIAN SHIPPING SERVICES PVT LTD Defendant

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Before: Hon Ng J in Chambers

Date of Hearing: 16 April 2015

Date of Judgment: 30 November 2015

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J U D G M E N T

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Introduction

1. This is the Defendant's application to set aside the Order of Mr Justice Bharwaney dated 21 January 2013 granting leave to the Plaintiff to issue and serve a concurrent writ out of the jurisdiction and for

a declaration that the court has no jurisdiction over it ("**Setting Aside Application**"). The grounds relied upon[1] are viz:

(1) The contract in question was not made in Hong Kong within RHC Order 11 rule 1 (1)(d)(i).

(2) The contract is not by its express terms, or by implication, governed by Hong Kong law within RHC Order 11, rule 1 (1)(d)(iii).

(3) In all the circumstances, this is not a proper case for service out of the jurisdiction.

(4) The Plaintiff has commenced an identical or similar action against the Defendant in the High Court of Judicature of Bombay, India ("**Bombay Court**") in respect of the same cause of action and claiming the same relief sought in this action and the Bombay Court is the appropriate and more convenient forum for the resolution of the disputes between the parties.

(5) There was material non-disclosure at the ex parte stage.

2. Further or alternatively, the Defendant seeks a stay of proceedings on the grounds that Bombay Court is the appropriate and more convenient forum and the Plaintiff has commenced an identical or similar action against the Defendant in the Bombay Court and for a declaration that the court should not exercise any jurisdiction it may have ("**Stay Application**").

[1] The sequence of the grounds set out in the Defendant's summons has been rearranged in this judgment to facilitate ease of comprehension.

The Plaintiff's Claim

3. The Plaintiff is a company incorporated in Dubai, United Arab Emirates, carrying on business as a container shipping line. It was formerly of the name "Emirates Shipping Line FZE" and changed to its present name in November 2008.

4. The Defendant is a company incorporated in India carrying on shipping business.

5. The Statement of Claim is short. For ease of reference, the relevant paragraphs are:

> "3. At all material times, the Plaintiff, through its agent, Emirates Shipping (Hong Kong) Ltd ("**Emirates Hong Kong**"), operated a container liner service called Hyper Galex 1 (the "**Hyper Galex Service**") with container vessels provided by the Plaintiff or its business partners sailing about once a week between ports in the PRC, Hong Kong, Singapore, India and the Middle East in a round trip.
>
> 4. The Plaintiff and the Defendant entered into a contract (the "**Slot Charter Contract**") on 19 September 2008 through exchange of emails. The Slot Charter Contract provided, *inter alia*, the following:-
>
> (i) The Plaintiff agreed to provide the Defendant with 150 TEUs of container space, i.e. slots, on vessels sailing between the PRC and the Middle East under the Hyper Galex Service.
>
> (ii) The Defendant agreed to pay US$1,200 per TEU (the "**Slot Rate**") for the 150 TEUs of container space provided, whether the space was used or not.
>
> (iii) The Plaintiff or the Defendant could terminate the Slot Charter Contract by giving the other a notice of 60 days but the said notice could not be tendered before 1 January 2009 (the "**Termination Restriction**").

5. The Slot Charter Contract provided for a formula for computation of adjustment of the Slot Rate in accordance with the increase or decrease of the bunker prices (the "**Bunker Adjustment Formula**"). An oral understanding was subsequently arrived between the Plaintiff and the Defendant that instead of applying the Bunker Adjustment Formula, the parties would agree on a lump-sum variation of the Slot Rate from time to time.

6. Pursuant to the understanding mentioned in Paragraph 5 above, the parties agreed to reduce the Slot Rate from US$1,200/TEU to US$1,040/TEU for voyages commencing after 15 November 2008 and to further reduce the Slot Rate from US$1,040/TEU to US$900/TEU for voyages commencing after 15 December 2008.

7. In November, December 2008 and January 2009, the Defendant used the slots provided by the Plaintiff in 10 voyages. The Plaintiff issued 10 invoices for the said 10 voyages and 2 credit notes to reflect the adjustment of the Slot Rates in relation to the last 2 voyages in December 2008. The sum due under the 10 invoices, taking into account the 2 credit notes, was US$1,500,000 in total.

….

8. Further, in breach of the Slot Charter Contract, the Defendant failed to load any cargo for 5 voyages in January and February 2009. The Plaintiff issued 5 invoices for a total sum of US$675,000 to the Defendant for freight and/or dead freight for the said 5 voyages.

….

9. Further or alternatively, by reason of the breach of the Defendant stated in Paragraph 8 above, the Plaintiff has suffered loss and damage. The amount of loss and damage is same as the amounts stated in Paragraph 8 above.

10. Further or alternatively, as a result of the Termination Restriction, the earliest day on which the Slot Charter Contract could be terminated was 2 March 2009, on the assumption that a 60-day notice of termination was served on 1 January 2009.

11. In breach of the Slot Charter Contract, the Defendant sought to terminate the Slot Charter Contract by failing to provide cargoes after the second voyage in January 2009 and/or indicating its intention not to provide cargoes. By reason of the wrongful termination, the Plaintiff has suffered loss and

damage. The amount of loss and damage is the same as the amounts stated in Paragraph 8 above.

12. The Defendant made payments of US$200,000, US$100,000 and US$100,000 on 20 December 2008, 10 January 2009 and 14 January 2009 respectively, totalling US$400,000, to the Plaintiff.

13. In breach of the Slot Charter Agreement, the Defendant has failed and/or refused to pay the sum of US$1,775,000 (US$1,500,000 + US$675,000 – US$400,000) or any part thereof to the Plaintiff under the Slot Charter Agreement."

The Setting Aside Application

6. The applicable principles are not in dispute. A plaintiff seeking leave to effect service out of the jurisdiction must satisfy the following requirements:

(1) One or more of the relevant heads of jurisdiction under RHC Order 11 rule 1(1) is established. The relevant test is for the plaintiff to show a good arguable case.

(2) With regard to the substantive claim itself, the plaintiff must show there is a serious issue to be tried on the merits.

(3) The case is a proper one for service out of the jurisdiction within RHC Order 11 r 4(2). The relevant test is whether Hong Kong courts are clearly and distinctly the appropriate forum for the trial of the action: *Spiliada Maritime v Cansulex* [1987] AC 460, 481D-E; 484E-F; *Robin Hargreaves v Taian Insurance Co. Ltd.* [2006] 3 HKLRD 70, para. 50.

Hartanto Hady v Radnaabazar Bazar [2012] 3 HKLRD 29 para. 66.

7. Although this is technically the Defendant's application, Mr Smith SC accepts the burden of proof of the above is on the Plaintiff.

Whether jurisdiction under Order 11 was made out

8. The Plaintiff's application for leave before Mr Justice Bharwaney was put on two bases:

(1) the Slot Charter Contract was made within the jurisdiction: RHC Order 11 r 1(1)(d)(i);

(2) the Slot Charter Contract was governed by Hong Kong law: RHC Order 11 r 1(1)(d)(iii).

9. The Defendant challenges either basis of jurisdiction.

10. The evidence adduced by the Plaintiff suggests the Slot Charter Contract was concluded by an exchange of emails between Mr Johnson Mathew ("**JM**"), managing director of the Defendant, and Captain Rajashekhar (**Raj**"), Senior Vice President of the Plaintiff, on 19 September 2008.

11. By an email sent at 17:16 hours to JM, Raj replied "to the points where we have an issue" and then summarised the terms he offered to JM. Towards the end of the email, Raj said he would be on vacation from Monday - "Pls confirm asap". The email was sent by Raj as "Senior Vice President, Trades, Emirates Shipping Line FZE", the then

name of the Plaintiff, "c/o Emirates Shipping (Hong Kong) Ltd." ("**Emirates HK**").

12. The evidence before Mr Justice Bharwaney was that all the business and negotiation of the Plaintiff with the Defendant in relation to the Hyper Galex Service was carried out through Emirates HK. At the material time, Raj was based in Hong Kong and worked in the office of Emirates HK at 21st Floor, Convention Plaza Office Tower, Wanchai, Hong Kong. This is corroborated by the email itself which set out the contact numbers of Raj's direct line, fax line and mobile phone, all having the prefix (852) being the code for Hong Kong.

13. JM sent his acceptance of the offer by email to Raj at 8:31pm on the same day. Since Raj was then based in Hong Kong, the acceptance email was therefore received by him on behalf of the Plaintiff in Hong Kong.

14. Mr Smith SC submits that in the case of near-instantaneous communications, the postal rule does not apply. This is trite law: *Entores Ltd v Miles Far East Corporation* [1955] 2 QB 327; *Brinkibon Ltd v Stahag Stahl Und Stahlwarenhandels – Gesselschaft mBH* [1983] 2 AC 32, 42E; *Greenclose Ltd v National Westminster Bank* [2014] 2 Lloyd's L Rep 169 at [138].

15. As Blair J put it in the context of communications by email in *David Thomas and another v BPE Solicitors* [2010] EWHC 306 (Ch) at [86]:

> "The general rule is that the acceptance of an offer is not effective until communicated to the offeror. The "postal rule" is an anomalous exception to the general rule, which is limited to

> its particular circumstances. It does not apply to acceptances made by some "instantaneous" mode of communication (*Chitty on Contracts*, 30th edn, paragraph 2-050). This was decided in *Entores Ltd v Miles Far East Corporation* [1955] 2 QB 327 as regards communications by telex. At page 334, Denning LJ said that in such a case, "The contract is only complete when the acceptance is received by the offeror". Contrary to the claimants' submissions, in my view the same principle applies to communication by email, at least where the parties are conducting the matter by email, as the solicitors were in this case."

16. If this view of the law is correct and in accordance with established principles, which I find it is, then acceptance of an offer by email is only effectively communicated to the other side upon the receipt of the email, and not upon it being sent. It therefore follows that the Slot Charter Contract was concluded upon Raj's receipt of JM's email in Hong Kong, shortly after 8:31 pm.

17. In his first affidavit at paragraph 24, Mr Thomas Wilson of the Defendant appeared to accept that JM's 8:31pm email was received in Hong Kong, albeit he alleged it was "by chance". It is unclear to this court why the email was received in Hong Kong "by chance" when the evidence shows that Raj was based in Hong Kong at the time and he was then negotiating the terms of the Slot Charter Contract with JM, cumulating in JM's email sent at 8:31pm. There was nothing fortuitous about that. Indeed, Raj specifically asked JM to "confirm asap" as he would be on vacation soon. Further, given the Defendant's acceptance that JM's 8:31pm email was received in Hong Kong, any suggestion that the Slot Charter Contract was concluded in India (from where the email was sent) or in Dubai, where the Plaintiff was incorporated, is untenable in view of the authorities.

18. It seems to this court the Defendant has no real answer to the Plaintiff's case, based as it is on the general law of contract. Instead, the Defendant has put forward a number of submissions the effect, if not the purpose, of which is to obscure the simple issue of whether the Slot Charter Contract was made in Hong Kong. None of the submissions are meritorious and I reject them all.

(1) First, it is said Raj has not been shown to be an employee of the Plaintiff, other than by bare assertion, or known to be such when he dealt with the Defendant. This is incorrect. The evidence shows Raj was involved in the negotiations between the Plaintiff and the Defendant on the terms of the "Previous Agreement" back in 2006. Further, when the parties negotiated the terms of the Slot Charter Contract in 2009, Raj's title was "Senior Vice President, Trades, Emirates Shipping Line FZE". Anyway, if the Defendant honestly thought Raj did not represent the Plaintiff in the negotiation, why did JM purport to accept the terms offered by Raj by his 8:31 pm email? It is not suggested by the Defendant that it all along intended to contract with Emirates HK. On the contrary, paragraph 21(g) of Ms Thomson's written submissions stated "The Defendant intended to contract with the Plaintiff".

(2) Second, it is said there is no evidence that the Plaintiff had authorised Emirates HK to enter into slot charters with the Defendant or as its agent in relation to the Slot Charter Contract. This point is a red herring. The Plaintiff's case is

that the Slot Charter Contract was negotiated and entered into by Raj on its behalf by exchange of emails with JM.

(3) Third, the Defendant relies on sections 19(4) and 19(5) of the Electronic Transactions Ordinance, Cap.553 ("**ETO**"), which provide:

> "(4) Unless otherwise agreed between the originator and the addressee, an electronic record is taken to have been –
>
> (a) sent at the place of business of the originator; and
>
> (b) received at the place of business of the addressee.
>
> (5) For the purposes of subsection (4)-
>
> (a) if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction, or where there is no underlying transaction, the principal place of business of the originator or the addressee, as the case may be;
>
> (b) if the originator of the addressee does not have a place of business, the place of business is the place where the originator or the addressee ordinarily resides."

19. The Defendant submits, without giving any reasons, that the ETO should be applicable in the present case. It further submits that, since the Plaintiff's place of business was in Dubai, JM's 8:31pm email should be regarded as having been received in Dubai, by virtue of section 19(4)(b).

20. This court is unable to accept these submissions. As I said earlier, the Defendant also challenges the Plaintiff's case that the Slot Charter Contract was governed by Hong Kong law. Instead, it contends

that Indian law should apply. Yet, for the present purpose, the Defendant asserts that Hong Kong law ie the ETO was applicable. This court finds it very difficult to accept the logic of the Defendant's approach: it assumes Hong Kong law ie ETO applies in order to arrive at the "conclusion" that Hong Kong law does not apply to the Slot Charter Contract. This court also finds it difficult to accept how the Defendant can be allowed to assert Indian Law is applicable for the purpose of one part of its case while Hong Kong law is applicable for the purpose of another. If the Defendant could make out a coherent case, based on authorities, as to how its apparently irreconcilable stance can logically be reconciled, so be it. But no such coherent case has been made out.

21. For completeness, if and in so far as section 19(4)(b) ETO is relevant to the present discussion, this court accepts Mr Smith SC's submission that the addressee of JM's email was Raj and his place of business as stated in his emails to JM was "c/o Emirates HK" at its Convention Plaza address. Hence, JM's 8:31 pm should be regarded as having been received in Hong Kong by virtue of ETO, a result which is in line with the general principles of contract law discussed above.

22. To conclude, this court finds the Plaintiff has discharged its burden of showing a good arguable case that the Slot Charter Contract was made in Hong Kong for the purpose of Order 11 r 1(1)(d)(i).

23. Regarding the contention that the Slot Charter Contract was governed by Hong Kong law, Mr Smith SC submits that, there being no express choice of proper law, the governing law is the system of law with which the contract has its closest and most real connection - for this purpose, the court's task is to have regard objectively to the various factors

pointing one way or the other and to estimate, as best it can, where the preponderance lies: *Amin Rasheed Corpn v Kuwait Insurance* [1984] AC 50, 69B-C.

24. Mr Smith SC submits that the contract has its closest and most real connection with Hong Kong. The principal reason put forward by him is this: the Slot Charter Contract was for the chartering of slots under the Hyper Galex Service which was operated and controlled by the Plaintiff through Emirates HK pursuant to a Service Agreement dated 1 March 2006.

25. Clauses 3 and 4 of the Service Agreement provide as follows:

> "3.1 Subject to the terms and conditions set forth hereinafter, the Line [ie the Plaintiff] hereby appoints the Service Provider [ie Emirates HK] as its service provider in relation to the Services and the Service Provider warrants that it shall use its best endeavour to perform the Services described under Annex 1.
>
> 3.2 the Service Provider shall have the right to appoint such third parties as the Service Provider sub-contractors to perform all or part of the Services subject matter of this Agreement, subject to The Line's approval, which shall not be unreasonably withheld…
>
> 4.1 Without prejudice to the generality of any of the obligations, duties, powers and discretion vested in the Service Provider pursuant to this Agreement, The Line hereby authorises and empowers the Service Provider to employ, for and on behalf of the Line, such agents, brokers, consultants, terminal operators, ports, vendors, salvors, pilots, fuel suppliers, experts, surveyors, lawyers and any and all third contractors as may be necessary to carry out the Services, the Service Provider and/or its mangers shall be entitled to negotiate and to enter into agreements with such third parties as agent for and on behalf of the Line.

4.2 All the expenses relating to the employment of the aforementioned third parties shall be for the Line's account and shall be set off with the Line's revenue..."

26. Annex 1 of the Service Agreement provides *inter alia*:

"The Service Provider shall use its best endeavour to perform the Services described hereinafter and shall be granted power to do and perform all acts, deeds and matters which may be necessary or expedient for the performance of all or any such Services, or ancillary thereto, or otherwise in relation to the proper and efficient performance of the Service Provider's duties and obligation hereunder.

a) the Service Provider shall ensure the supervision of the Line's activities in the performance of its corporate object.

b) the Service Provider shall arrange the necessary contracts with shipping agents, vendors, ports terminals, lawyers, experts, consultants, brokers, bunker suppliers, salvors, pilots and any other third party whose assistance to the Line shall be needed or required in the Service Provider's judgment.

….

d) the Service Provider shall enter the vessels operated by the Line in a protection and indemnity, defence or other such clubs or association as the Service Provider will elect.

e) the Service Provider shall handle and settle, for and on behalf of the Line, all insurance, average, salvage, cargo, collision or other claims in connection with the Line's activities and the vessels operated by the Line, or with any of the matters herein entrusted to the Service Provider.

f) the Service Provider shall pay, for and on behalf of the Line, all the costs and expenses incurred by and/or for the Line's activities and the vessels operated by the Line.

....

i) the Service Provider shall collect, for and on behalf of the Line, the Line's revenues and income and will take reasonable steps to recover the same from the Line's debtors. The Service Provider shall set off the Line's income against the Line's expenses as stated above.

> j) the Service Provider shall ensure sale and marketing functions, for and on behalf of the Line, to promote the Line's transportation services."

27. It can be seen from the above that Emirates HK had to do almost everything in order to run the Hyper Galex Service. Obviously, Emirates HK carried out its numerous functions in its office in Hong Kong. On the evidence before this court, there was a whole operation team based in Emirates HK's office to carry out those functions. There was also an accounting team based in the office who invoiced the relevant parties who had purchased slots or swapped slots under the Hyper Galex Service. While payments were to be made to the Plaintiff in Dubai, the accounting team in Hong Kong had to acknowledge receipt of payments.

28. The Defendant accepts that, where there is no express choice of proper law, the governing law will be the system of law with which the contract has its closest and most real connection. It, however, contends that system of law is Indian law. A total of 12 factors allegedly connecting the Slot Charter Contract with India were given in paragraph 30 of Ms Thomson's written submissions.

29. This court is not persuaded that there are nearly as many as 12 factors connecting the Slot Charter Contract with India as submitted. Nor is this court persuaded that, such of the factors connecting the Slot Charter Contract with India are sufficient to give rise to the conclusion that Indian law was the governing law.

30. First, this court rejects the submission that the Slot Charter Contract was not made in Hong Kong. For the reasons set out in

paragraphs 10 to 21 above, this court finds an arguable case has been shown that the Slot Charter Contract was indeed made in Hong Kong.

31. Second, very little weight can be placed on a number of the so-called connecting factors. These include the following:

(1) The Defendant intended to contract with the Plaintiff, a Dubai company, not with Emirates HK.

(2) The Defendant agreed the terms from India and no express mention was made of Hong Kong or Hong Kong jurisdiction.

(3) The email confirming agreement was sent from the Defendant in India intended for the Plaintiff, a company in Dubai.

(4) The principal place of the Defendant's business is India.

32. These factors are merely stating the obvious ie the Defendant was based in India, the Plaintiff was based in Dubai and they intended to and did contract with each other. What they do not explain is why the Slot Charter Contract was more closely connected with the Indian system of law, rather than that of Hong Kong.[2]

33. Third, this court also rejects the submission that the place of performance of the Slot Charter Contract was principally in India. In this regard, the basis of the Defendant's submission was three-fold: (i) payments under the Slot Charter Contract were made from India, (ii) Indian ports (Bombay and Cochin) were used in loading and

[2] Neither party suggests that the Slot Charter Contract had its closest and most real connection with Dubai so that could be discounted for the present purpose.

discharging and (iii) many of the shippers and consignees of the goods shipped were in India.

34. The reasons are these.

35. The Slot Charter Contract was essentially a contract under which the Plaintiff sold and the Defendant purchased container space under the Hyper Galex Service. As pleaded in the Statement of Claim and not disputed by the Defendant, the Hyper Galex Service provided a round trip container vessels service sailing about once a week between ports in the PRC, Hong Kong, Singapore, India and the Middle East. In this regard, the Defendant admitted that the Hyper Galex Service served 13 ports, only 2 of which were in India. In order to run a round trip service among 13 ports, a lot of coordination work had to be done on the part of the Plaintiff. On the evidence, that work was performed by its agent Emirates HK in Hong Kong. The extent of such work was clearly shown by the width of the services required under the Service Agreement already outlined above.

36. No doubt, the vessels under the Hyper Galex Service had to load and discharge goods at the ports along the route including the 2 Indian ports and that counted as part of the Plaintiff's performance under the Slot Charter Contract. Concerning the Defendant, its major obligation was to make payment for the slot it had committed by contract ie 150 TEUs of container space whether they were used or not. In other words, the Defendant had the right but not the obligation to load and discharge goods (up to 150 TEUs) at the 2 Indian ports. While payment by the Defendant was likely to be made from India, this factor, together the Plaintiff's

obligation to load and discharge goods at the 2 Indian ports, was about all that can be said to be performance of the Slot Charter Contract in India.

37. Fourth, regarding the Defendant's submission made in paragraph 29 of its written submissions that the Plaintiff has accepted Indian law governs the Slot Charter Contract (by submitting to the jurisdiction of the Bombay Court) and is bound by this, the simple answer is that a contract must have a proper law from its inception and that proper law is to be determined, in the absence of an express choice, by reference to all relevant and objective connecting factors. No authority has been cited by the Defendant in support of the proposition that a party's conduct subsequent to the formation of a contract can alter its proper law. On the contrary, Lord Wilberforce has expressly indicated in *Amin Rasheed v Kuwait Insurance supra* at 69C that the court is not permitted to have regard to the conduct of the parties subsequent to the making of the contract in ascertaining its proper law.[3]

38. Looking at the matter in the round, it seems to this court the preponderance of the objective factors point to Hong Kong law as the system of law with which the Slot Charter Contract had the closest and most real connection.

39. To conclude, this court finds the Plaintiff has discharged its burden of showing a good arguable case that the Slot Charter Contract is governed by Hong Kong law for the purpose of Order 11 rule 1(1)(d)(iii).

[3] The Bombay proceedings have other relevance and will be further discussed below in the context of *lis alibi pendens* and the appropriate forum.

Serious issue to be tried

40. The Plaintiff's claim is one for unpaid invoices (being outstanding freight and dead freight) issued pursuant to the Slot Charter Contract.

41. At paragraph 13 of the 1st Affidavit of Mr Thomas Wilson, group general manager of the Defendant, he succinctly summarised the Defendant's contention at that time thus:

> "Without submission to jurisdiction of the Hong Kong courts and without prejudice to the Defendant's right to rely on all available defences in law and in fact, the Defendant contends that the slot charter arrangements under the Contract was terminated with immediate effect on or about 19 December 2008. Accordingly, as the entire claim for dead freight was allegedly incurred post termination, the claim is a non-starter. As for the claim for outstanding freight, the Defendant denies that any freight is due to the Plaintiff. The Plaintiff has not provided evidence or particulars of any alleged outstanding freight. In this regard, the inclusion of the invoices at pages 11 to 27 of the First Affirmation of Hui Dennis Kam Wah filed to support the application for service out of jurisdiction served to mislead. I can confirm that the Defendant had paid all the invoices coming within the period of the agreement before termination on 19 December 2008 Invoices issued after termination were not paid."

42. The Defendant's contention was further elaborated in the 2nd Affidavit of Mr Thomas Wilson.

43. To the credit of Ms Thomson, it is agreed that there are serious issues to be tried on the merits. The crux of the matter is whether the issues should be tried in India or in Hong Kong, to which I shall now turn.

Proper Case for Service Out - appropriate forum

44. In considering this question, the court will (1) take into account the nature of the dispute, the legal and practical issues involved, such questions as local knowledge, availability of witnesses and their evidence and expense; and (2) give to such factors the weight which in all the circumstances of the case it considers to be appropriate: *Amin Rasheed Corpn v Kuwait Insurance supra* at 72C-D; *Spiliada Maritime Corp v Cansulex Ltd supra* at 479F; 480C; 481F-482A.

45. At the behest of this court, the parties have filed their respective lists of issues subsequent to the hearing. The Plaintiff's list is short and succinct and can conveniently be set out in full:

> "1. Whether the Defendant has paid the invoices no. 1 – 8 set out in Paragraph 7 of the SOC [4/35], these being the invoices dated prior to the alleged termination of the Slot Charter Contract on 19 December 2008. (See Paragraph 13 of 1st Thomas Wilson [17/110]).
>
> 2. Whether the Slot Charter Contract was terminated on 19 December 2008 as alleged by the Defendants (See Paragraphs 7 and 8 of the SOC [4/35]; Paragraph 13 of 1st Thomas Wilson [17/110] and Paragraph 17 of 2nd Thomas Wilson [21/143]).
>
> 3. As to the two shipments the subject of invoices no. 9-10 set out in Paragraph 7 of the SOC:-
>
> (i) whether these shipments were made pursuant to the Slot Charter Contract or under a separate Segmental Arrangement as alleged by the Defendant; and
>
> (ii) whether the Defendant has paid the sums due under these invoices.
>
> 4. If the answer to Issue 2 above is in the negative, whether the Defendant is liable to pay deadfreight for failing to load cargoes for 5 voyages in January and February 2009 as per the invoices listed in Paragraph 8 of the SOC [4/36], alternatively whether the Plaintiff is entitled to claim

damages in the said amounts as per Paragraph 9 of the SOC [4/36]."

46. As expected, the Defendant's list is more protracted. But apart from issues pertaining to the formation [4] of the Slot Charter Contract, its terms, principal place of performance (ie India), governing law (ie Indian law) and limitation, the factual issues identified in its list substantially agree with those in the Plaintiff's, save perhaps for one ie whether the sums claimed by the Plaintiff have been extinguished by set off and counterclaim for alleged breach of a container lease agreement made in 2006.

47. Regarding witnesses, the Plaintiff has identified two potential witnesses whose current location is in Hong Kong:

(1) Mr Wilson Hung Yue Wah (senior accountant who handled the Defendant's account under the Hyper Galex Service, issued invoices to the Defendant and acknowledged receipt of payments) on *inter alia* the alleged termination of the Slot Charter Contract on 19 December 2008, the Defendant's payment of the 8 invoices issued prior to 19 December 2008, the issue of invoices after that date and the Plaintiff's claim for dead freight.

(2) Mr Kenneth Lam Hau Kan, general manager operations, on *inter alia* the alleged termination of the Slot Charter Contract on 19 December 2008, the alleged Segmental Arrangement and the Plaintiff's claim for dead freight.

[4] No issues were raised regarding the existence of the Slot Charter Contract.

48. In paragraph 35 of the 2nd affidavit of Mr Thomas Wilson, he has identified JM, himself and "other members" of the Defendant as likely witnesses, all of whom are from India. As far as JM is concerned, the relevance of his evidence is fairly clear – he was the one who negotiated the Slot Charter Contract on the Defendant's behalf and who allegedly terminated the Slot Charter Contract over the phone with a Mr Vikas Khan of the Plaintiff. As for Mr Thomas Wilson and "other members", the indication is that they may be required to deal with the Defendant's "payments by cash and by set off which is disputed by the Plaintiff".

49. In my view, the issues identified by the parties are fairly straightforward. The making of the Slot Charter Contract and its terms are covered by documents, specifically exchange of emails. The payment or non-payment of the Plaintiff's invoices is a matter of accounting records. The Plaintiff's records are all located in Hong Kong. No doubt, the Defendant has its own records in India but there can be no suggestion that the existence of documents in India renders Hong Kong an inconvenient forum for trial. The assertion by the Defendant of a counterclaim will also, at least partly, be covered by documents, most likely to be accounting records and correspondence. Lastly, from the materials available, it seems that the parties were quite accustomed to communicating with each other by exchange of emails so that any oral discussions and/or agreements (if any) between them, for instance, regarding termination of the Slot Charter Contract and its substitution by the Segmental Arrangement, will likely be reflected by their presence or absence in the emails.

50. That is not to say oral testimony is redundant. In this regard, this court notes the Defendant's reliance on the fact that it is based in India and that JM, Mr Thomas Wilson and some unidentified witness(es) reside there. But equally, the Plaintiff intends to call witnesses who reside in Hong Kong. At this day and age, where commercial flights between cities, whether between Hong Kong, Mumbai or otherwise, are so readily available and affordable, it seems that requiring witnesses to travel cannot be regarded as great inconvenience.

51. Further, I agree with Mr Smith SC's submission the fact that some potential witnesses reside out of the jurisdiction is not a matter of great significance in this case.

(1) First, the factual matters are at least partly, if not largely, covered by documents, as explained above.

(2) Second, on the evidence, both JM and Mr Thomas Wilson had attended meetings in Hong Kong at the office of Emirates HK in connection with the subject matter of this case. It is not unreasonable to expect both gentlemen's attendance in Hong Kong to testify on the subject matter of this case if need be.

(3) Third, in so far as physical ailment precludes JM from travelling to Hong Kong to testify at trial, then just like any other case where a witness is so precluded, an application can be made for his testimony to be given by way of video link: *Daimler AG v Leiduck* (No 2) [2013] 2 HKLRD 822.

52. At this juncture, it is convenient to deal with the topic of *lis alibi pendens* and the significance of the Bombay proceedings.

53. Although it was once thought that there were special factors in cases of *lis alibi pendens*, it is now clear that the existence of simultaneous foreign proceedings is no more than a factor relevant to the determination of the appropriate forum: Dicey, Morris & Collins: The Conflict of Laws 15th Ed. Volume 1, 12-043. Importantly, the principles enunciated in *Spiliada Maritime Corp v Cansulex Ltd* apply whether or not there are relevant proceedings already pending in the alternative forum: *De Dampierre v De Dampierre* [1988] AC 92, 108B.

54. The evidence before this court is that the Plaintiff commenced proceedings in the Bombay Court in December 2011 solely for the purpose of protecting a three-year limitation period in India and the Writ and Plaint in the Bombay proceedings have yet to be served. Importantly, as indicated in the 1st Affirmation of Mr Hui, the Plaintiff's avowed intention is to pursue its claim in Hong Kong if the Court does exercise jurisdiction over the matter.

55. In these circumstances, the relevance of the Bombay proceedings is in my view minimal.

56. Where the foreign proceedings have not passed beyond the stage of the initiating process, they may have no relevance at all to the question of appropriate forum. It is only when genuine proceedings have been started and have developed to the stage where they have had some impact on the dispute between the parties, especially if it is likely to have a continuing effect, that this may be a relevant[5] factor when considering

[5] Though not necessarily decisive: *Meadows Indemnity Co Ltd v Insurance Corp of Ireland Plc* [1989] 2 Lloyd's Rep 298 (CA).

whether the foreign jurisdiction provides the appropriate forum: *De Dampierre v De Dampierre* [1988] AC 92, 108C-D.

57. The position in the present case, which is undisputed, is that the Writ and Plaint in the Bombay proceedings have not been served. In other words, the Bombay proceedings have not even passed beyond the stage of the initiating process. Of course, where the same plaintiff sues the same defendant in Hong Kong and abroad, it is unlikely that the court would allow the continuation of both proceedings, except in very unusual circumstances. Instead, the court would put the plaintiff to his election: Dicey, Morris & Collins: The Conflict of Laws at para. 12-044. But in the present case, it is not necessary for this court to put the Plaintiff to his election – the Plaintiff has made his election and confirmed it on oath in the 1st Affirmation of Mr Hui.

58. Lastly, this court wishes to put to bed a curious argument raised by the Defendant which is scattered around in its affidavit evidence and written submissions ie the Plaintiff has voluntarily and unconditionally submitted to the jurisdiction of the High Court of Bombay. The argument is not only unsupported by authorities – it is positively contradicted by those mentioned in paragraph 52 above concerning the legal significance of *lis alibi pendens.*

59. In my view, it is highly misleading to describe a plaintiff who has instituted proceedings in the High Court of Bombay (or any other court) as having submitted to that jurisdiction. It has not. What it has done is to invoke the jurisdiction of that court. For the sake of clarity of thought, the phrase "submission to jurisdiction" is best reserved to the situation where a defendant who would not otherwise be subject to the jurisdiction of the

court has by his own conduct been precluded from objecting to the jurisdiction and thus give the court an authority over him which, but for his submission, it would not possess: Dicey, Morris & Collins: The Conflict of Laws at para. 11R-124.

60. To conclude, in considering the question of appropriate forum, this court has borne in mind the nature of the dispute, the issues involved, availability of witnesses and expense and the fact that the Slot Charter Contract was made in Hong Kong and governed by Hong Kong law. This court has also borne in mind that ultimately its task is to identify the forum in which the case can be suitably tried in the interests of all parties and for the ends of justice: *Spiliada Maritime Corp v Cansulex Ltd supra* at 480G.

61. In the circumstances of this case, this court is satisfied that Hong Kong is clearly the appropriate forum for the trial of the disputes between the parties and will so find.

Material Non-Disclosure

62. The applicant in any ex parte application owes a duty to make full and frank disclosure of all material facts to the court. This is well established.

63. In *Wo Fung Paper Making Factory Ltd v Sappi Kraft (Pty) Ltd* [1988] HKC 10 at pp 23 H – 24 I, Hunter JA explained this duty in the context of an Order 11 application as follows:

> "I turn now to the two principles I conceive to be relevant, in relation to non-disclosure. First the court's power to discharge any order obtained ex-parte for material

> non-disclosure is salutary and necessary. As one of the earlier cases shows, ex-parte Polignac, it is there for the court's own protection. It is necessary to prevent its processes being abused. Secondly, there is another equally significant principle in this jurisdiction. This is to make sure that the court does not get itself in a position of what might be called "counter-abuse": where this sort of point is regarded by litigants as "a very present help in trouble"; and where problems arise on the substance to resort to attack as the best method of defence. The point was put in words upon which I will not attempt to improve by this court in Citibank v Express Ship Management Service; first in the judgment my Lord the Vice-President. He starts by citing, from the judgment of Browne-Wilkinson J. in Thermax Limited v Schott Industrial Glass Limited that what are material are
>
> > 'all facts that are relevant to the weighing operation which the court has to make, in deciding the point before it.'
>
> My Lord went on in these terms:
>
> > 'While the courts must be vigilant, and insist that full and frank disclosure be made in grounding affidavits for ex parte applications for injunctions, Anton Piller orders etc, it is essential to bear in mind the true principle upon which this rule is based. Unless the courts use the sanction which the principle gives only where the non-disclosure is of facts which are relevant to the ex parte judges' 'weighing operation', an impossible burden would be placed upon applicants and their advisers, and affidavits ex abundanti will tend to contain all sorts of facts and exhibits which are not really necessary for the proper exercise of the court's discretion when ex parte relief is sought.' "

64. In *Mattel Inc v Tonka Corp* [1991] 2 HKC 411, at 429I - 430B, Deputy High Court Judge Andrew Li QC (as he then was) reiterated the principle that material facts were those which were material for the judge to know in dealing with the particular application before it. Materiality was to be decided by the court.

65. In an application for leave to serve a writ outside jurisdiction, the court is concerned with whether it should assume jurisdiction – it is not concerned with the merits of the case, save that it has to be satisfied that there is a serious issue to be tried: *Ren Yun Liang & Ors v China Merchants Bank Company Ltd & Ors* unrep.; HCA1456 of 2005; 29 January 2007; Recorder B. Yu SC; paras 26 – 7.

66. In general, a failure to refer to arguments on the merits which the defendant may seek to raise in answer to the plaintiff's claim would not amount to material non-disclosure, unless they are of such weight that their omission may mislead the court in exercising its jurisdiction under the rule and its discretion whether or not to grant leave: *BP Exploration Company (Libya) v Hunt* [1976] 3 All ER 879, 893 h – j.

67. With these principles in mind, the Defendant's argument on material non-disclosure can be disposed of quickly.

68. In the Defendant's summons dated 7 May 2014, it is said the Plaintiff failed to inform the court at the ex parte application for leave that (i) "the invoices rendered before 19 December 2008 had been paid" ("**Alleged Payment**") and (ii) "the Plaintiff had fully pleaded to the proceedings they commenced in Bombay" ("**Pleading**").

69. As far as Alleged Payment is concerned, it is the Plaintiff's case that the invoices in question have not been paid – thus the present action. The Defendant has not adduced any evidence of "payment" of the invoices as such. Judging from paragraph 33 of the 2nd Affidavit of Thomas Wilson and paragraph 13 of the Defendant's list of issues, its case

appears to be that the invoices amount has been set off or somehow extinguished by its counterclaim.

70. This court agrees with Mr Smith SC's submission that the Plaintiff cannot be expected to disclose the alleged "fact" that the invoices have been paid when they have not. As for the Defendant's argument on set off and/or counterclaim, it seems to this court that it is at most an argument on the merits which the Defendant may seek to raise in answer to the Plaintiff's claim and need not be disclosed: *BP Exploration Company (Libya) v Hunt supra.*

71. Regarding the Pleading point, it is with respect another non-point. In the 1st Affirmation of Mr Hui in support of the ex parte application for leave, the Plaintiff has already disclosed the fact that proceedings had been commenced in India on 17 December 2011 to protect the time limit in India and the proceedings have not been served on the Defendant. It is true that the document filed by the Plaintiff with the Bombay Court to commence the Bombay proceedings (with exhibits attached and an affidavit verifying the "Plaint") is lengthier than a writ of summons with an endorsement of claim as we normally know it in Hong Kong but that is neither here nor there. What a plaintiff is required to do in an ex parte application under RHC Order 11 is to disclose the *existence* of related proceedings abroad: Hong Kong Civil Procedure 2016 Vol. 1 para. 11/1/11.

72. The content and the length of the document required to commence legal proceedings abroad obviously depends on the practice and procedure of that particular jurisdiction and it is difficult to see why the master or the judge hearing a RHC Order 11 application should be

concerned with that. As I said, materiality is a matter for the court and in my judgment the Pleading point has no merits and should be rejected.

Conclusion

73. There is no merits in the Setting Aside Application and should be dismissed.

Stay Application

74. Given that the court has not been seised with jurisdiction by the service of process on the defendant in Hong Kong, the Stay Application is misconceived: Dicey, Morris & Collins: The Conflict of Laws at para. 12-003. It is also completely redundant in light of the Setting Aside Application. For these reasons and in view of this court's conclusion above on the appropriate forum being Hong Kong, the Stay Application has no merits and should be dismissed.

Disposition and Cost Order Nisi

75. The Defendant's summons dated 7 May 2014 is hereby dismissed.

76. There shall be an order *nisi* that costs of and occasioned by the application be paid by the Defendant to the Plaintiff, to be taxed if not agreed, with certificate for counsel.

(Peter Ng)
Judge of the Court of First Instance
High Court

Mr Clifford Smith SC, instructed by Clyde & Co, for the plaintiff

Ms Mary Thomson, instructed by Li & Partners, for the defendant