

Stay Pending Arbitration : Limitation Stops When Action Commences In Civil Suit – Revisited

BONGSOR BINA SDN. BHD. v SH BUILDERS & MARKETING SDN. BHD. [W-02(C)(A)-2315-12/2022]

28th June 2024

ISSUES

For the purposes of computing limitation in arbitration, limitation stops running when the claimant commences arbitration by serving the respondent a written notice to appoint an arbitrator and to refer the dispute(s) to arbitration (**Section 30 of Limitation Act 1953**). Correspondingly, an arbitral proceeding is deemed to commence when the written notice to refer the dispute to arbitration is received by the respondent (**Section 23 of Arbitration Act 2005**).

What happens if limitation period had set in by the time the notice of arbitration is served but there was a prior civil court suit that was filed within the limitation period, albeit stayed pursuant to section 10 of the Arbitration Act 2005? Would limitation stops running when the civil suit was initiated or will it only stop when the notice of arbitration is served, rendering the claim to be out of time?

The High Court in this matter held that limitation stops running when the civil court action commences and not when the notice of arbitration is served thereafter ([Read our update on the High Court decision here](#)). Dissatisfied with the decision, the Defendant appealed to the Court of Appeal.

The Court of Appeal revisited this question in case of **Bongsor Bina Sdn. Bhd. v SH Builders & Marketing Sdn. Bhd. [W-02(C)(A)-2315-12/2022]**.

BRIEF FACTS

The brief facts of the case are as follows:-

- (a) The Defendant is the main contractor for a project known as “*Cadangan Membina 12 Unit Banglo 1 Tingkat Yang Mengandungi Type A – 6 Unit dan Type B – 6 Unit Berserta 1 Unit Substation di Atas Lot 2512, Seksyen 36, Poskod 40470 Shah Alam*” (“**Project**”).
- (b) The Defendant appointed the Plaintiff as the sub-contractor for the Project vide Letter of Award dated 26.06.2012 (“**Contract**”).

- (c) The completion of the project was delayed and the Plaintiff sought for an extension of time but the Defendant did not respond to the same. The Plaintiff also issued a Final Progress Claim (No.14) amounting to RM430,030.78 and notified the Defendant of the Plaintiff's intention to terminate the Contract.
- (d) The Defendant rejected the Plaintiff's unilateral termination of the Contract. Consequently, the Plaintiff instituted a suit in the KL Sessions Court to claim for the sum of RM430,030.78 ("**KLSC Suit 350**"). The KLSC Suit 350 was instituted within the limitation period.
- (e) The Defendant filed an application to stay the KLSC Suit 350 for the disputes to be referred to arbitration as there was an arbitration clause in the Contract. The Sessions Court allowed the application on 31.10.2019.
- (f) The Plaintiff did not appeal against the stay order and instead served a Notice of Arbitration on 01.07.2020. The Defendant vide their solicitors agreed to refer the matter to arbitration but stressed that limitation has already set in pursuant to sections 6 and 30 of the Limitation Act 1953 ("**LA 1953**").
- (g) The Parties thereafter commenced arbitration proceedings and a preliminary issue on statutory limitation was raised. With the consent of the Arbitrator, the Plaintiff made an application to the High Court to determine this issue as questions of law.

PROCEEDINGS BEFORE THE HIGH COURT

The High Court was satisfied that the following questions posed were indeed questions of laws in accordance to the requirements of Section 4(2) of the Arbitration Act 2005 ("**AA 2005**"):-

"(i) In the context of section 6 of the Limitation Act 1953, whether time already stops when the Plaintiff / Applicant filed the Writ Summons and Statement of Claim vis a vis Kuala Lumpur Sessions Court suit no. WA-B52(NCVC)-350-08/2019 on 6.8.2019, which was subsequently stayed pending Arbitration pursuant to the Order dated 31.10.2019 or time only stops when the Plaintiff / Applicant served the Notice of Arbitration on the Defendant / Respondent on 1.7.2020;

In the alternative;

(ii) Whether the Plaintiff's / Applicant's claim against the Defendant / Respondent was time-barred by section 6 of the Limitation Act 1953 when the Plaintiff / Applicant served the Notice of Arbitration on the Defendant / Respondent following the Order by the Kuala Lumpur Sessions Court suit no. WA-B52(NCVC)-350-08/2019 dated 31.10.2019 pending Arbitration, even though the Writ Summons and Statement of Claim was filed much earlier on 6.8.2019."

Thereafter, the High Court held, amongst other, that any court action commenced in breach of an arbitration agreement is valid, subject to party applying for a stay and to have the dispute referred to arbitration. Therefore, limitation period stops when the court action begins, notwithstanding the stay and reference to arbitration.

The High Court also held that section 30 of the LA 1953 and section 23 of the AA 2005 only applies to cases where the dispute is directly referred to arbitration without any prior court action that has been stayed.

Consequently, the High Court answered the main question in the affirmative and the alternative question in the negative. Dissatisfied, the Defendant appealed to the Court of Appeal.

PROCEEDINGS BEFORE COURT OF APPEAL

Having considered the previous Federal Court, Supreme Court as well as English cases on limitation, the Federal Court held that limitation laws are promulgated primarily to prevent plaintiffs from sleeping on their rights to claim:-

“[25] ...In short, the doctrine of limitation law is promulgated primarily to prevent plaintiffs from sleeping on their right of actions. The limitation of action is justified since long dormant claims have more of cruelty than justice in them and the defendant might have lost the evidence to disprove a stale claim. The doctrine surely encourages person with good cause of action to pursue it with reasonable diligence.”

The Federal Court also considered the effect and application of section 30 of the LA 1953 and section 23 of the AA 2005 on when an arbitration and arbitral proceedings commence as well as section 6 of the LA on limitation of action and held that a liberal approach should be adopted in the circumstances of the case:-

*“[31] Considering the aforementioned principles of interpretation of law on limitation to this present appeal, we are of the considered view that the liberal or reasonable approach should prevail over the strict approach, since it involves an act of taking away the plaintiff right to act against the defendant. Thus, the legal maxim *benigniora praeferenda sunt* which means in doubtful cases, the more favourable views are to be preferred and the more liberal interpretation should apply.*

*[32] On the same point of law, we would also like refer to a legal maxim, *ut res magis valeat quam pereat*, which means words are to be understood in such that the subject matter may be more effective than wasted or it is better for a thing to have effect than to be made void...*



[35] *Applying the maxim ut res magis valeat quam pereat in relation to the plaintiff's situation in the appeal before us, we find that it is important to clarify the subject matter rather than confuse. More importantly, we have to adopt the legal maxim in order to avoid any absurd results. Based on those considerations in mind, we moved on to consider the issue raised in this appeal."*

The Court of Appeal held that the arbitration agreement does not prohibit the Plaintiff instituting proceedings in courts and that the KLSC Suit 350 is a valid action:-

"[36] *In relation to the appeal before us, the fact that the plaintiff first initiated its claim against defendant by filing the KLSC suit 350 despite the existence of an arbitration clause in the LOA, is significant. Under the law, the arbitration clause did not prohibit the contracting parties from instituting proceedings in courts...*

[39] *...The courts, always maintained the unfettered jurisdiction to hear any civil action, and for the lower courts it will subject to the jurisdictional limit set under the Subordinate Courts Act 1948 (SCA 1948).*

[40] *In relation to the Sessions Court's civil jurisdiction, paragraph 65(1)(b) of the SCA 1948 provides that a Sessions Court shall have jurisdiction to try all other actions and suits of a civil nature where the amount in dispute or the value of the subject matter does not exceed one million ringgit. As the basic principle of law states that a court's jurisdiction cannot be ousted by consensus or parties, we are of the view that the jurisprudential philosophy on the jurisdiction of the Courts to deal with all civil matters, including the matters that involved an arbitration agreement, as propounded by the Supreme Court in Newacres Sdn Bhd's case and the Federal Court in Tan Kok Cheng's case remains as good law even after the enactment of AA 2005. Thus, the KLSC suit 350 is a valid action even though it is subjected to the to stay application under s 10 of the AA 2005 to refer the dispute to arbitration."*

The Court of Appeal further noted that the arbitration proceedings are a continuation of the KLSC suit 350 and the Plaintiff could not be said to have sat on his rights:-

"[41] *Besides that, we are also of the view that the Notice of Arbitration issued by the plaintiff is a consequence of the stay order issued by the LSCJ [Learned Sessions Court Judge] on the defendant's application. It is a continuation process which flows from the plaintiff's action in the KLSC suit 350. Therefore, the process of issuing the Notice of Arbitration arising out of a stay order cannot be viewed in isolation...*

[42] *Moreover, s 2 of the LA 1953 defines an "action" to include a suit or any other proceeding in a court of law. Plainly, the plaintiff cannot be said to have sat on his*

right, nor can he be blamed for not taking action on a stale claim upon filing the Notice of Arbitration after the KLSC suit 350 has been stayed...”

In the upshot, Court of Appeal agreed with the High Court that limitation stops when the plaintiff commences an action in the civil suit and that section 30 of the LA 1953 and section 23 of the AA 2005 only applies to cases where the disputes are referred directly to arbitration without a prior court action that has been stayed:-

“[45] Based on those foregoing, we agree with LCP’s [Learned Counsel for Plaintiff] argument that it would be unreasonable, unjust, unfair and indeed tactical for the defendant to subsequently raise the defence of limitation against the plaintiff in the arbitration proceedings when the plaintiff was complying with the stay order in satisfying the request of the defendant to resolve the matter in dispute in arbitration. We also find that the stay order would be rendered nugatory or redundant if we decide in favour of LCD’s [Learned Counsel for Defendant] arguments, that is, the limitation had set in against the plaintiff upon service of the Notice of Arbitration on 1.7.2020.

[46] Applying the principles of law adumbrated above, we find ourselves in agreement with the finding of the LHCJ that the limitation stops based on subsection 6(2) of the LA 1953 in respect of the dispute when the plaintiff commence an action via the KLSC suit 350 against the defendant on 6.8.2019. We also agree with the LHCJ finding that s 30 of the LA 1953 and s 23 of the AA 2005 only applicable to cases where the dispute is directly referred to arbitration ab initio in the absence of a prior court action that has been stayed.”

Further to the above, the Court of Appeal also emphasised that the plaintiff must act with reasonable promptitude in pursuing its claim in arbitration, following the stay to avoid the risk of the claim being barred by laches.

“[47] On the final note, we have to emphasise that the plaintiff must act promptly or within a reasonable time in filing the Notice of Arbitration once the KLSC granted the stay application in favour of the defendant. Failing with, the plaintiff is at risk to be find liable for laches...”

KEY TAKEAWAY

Following the decision, it is important to note that:-

- (a) Limitation stops in respect of a dispute when the Plaintiff commences a civil suit, even if it is stayed for the disputes to be referred to arbitration;



- (b) Section 30 of the Limitation Act 1953 and Section 23 of the Arbitration Act 2005, on when an arbitration and arbitral proceedings commence respectively for the purposes of computing limitation, only apply to cases where the disputes are referred directly to arbitration without a prior court action that has been stayed; and
- (c) Following the stay of the civil suit, the plaintiff must act with reasonable promptitude in pursuing its claim in arbitration to avoid the risk of the claim being barred by laches.

If you have any questions or comments on this article, please contact:-

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