Tay Way Bock v Yeunh Oi Siong
[2006] SGHC 21

Case Number : Suit 736/2005, SIC 5963/2005

Decision Date : 02 February 2006

Tribunal/Court : High Court

Coram : Christopher de Souza AR

Counsel Name(s) : Tito Isaac and Niko Isaac (Tito Isaac and Co) for the plaintiff; Manoj Sandrasegara, Dayne Ho and Shirani Alfreds (Drew and Napier LLC) for the defendant

Parties : Tay Way Bock — Yeunh Oi Siong

2 February 2006

AR Christopher de Souza:

Facts

This application was taken out by the Defendant for an order that the Suit be stayed on the grounds of *forum non conveniens* pursuant to paragraph nine of Schedule One to the Supreme Court Judicature Act (Chapter 322, 1999 Edn). The Defendant contends that the appropriate forum of adjudication is a court in Malaysia.

2 The Defendant is a Malaysian citizen who is the majority shareholder of Kumpulan City Axis Sdn Bhd ("Kumpulan"). Kumpulan is an investment holding company that presently holds, inter alia, 49,500,000 shares in ISG Asia Ltd ("Kumpulan's investment"), a listed company in Singapore. The Defendant's position is that the Plaintiff's business interests are mainly outside Singapore, with a sizeable portion in Malaysia.

3 Sometime in 2001, the Plaintiff, together with one Chung Wai Meng ("Chung"), provided funding to Kumpulan to assist in the listing exercise for Kumpulan's investment. The Defendant contends that at this time, it was agreed that Kumpulan would transfer 21,000,000 shares in Kumpulan's investment to the Plaintiff and Chung after the successful completion of the listing exercise. Approval for this transaction was sought from the Malaysian central bank, Bank Negara Malaysia. The requisite approval was granted on 17 April 2002.

4 The Listing exercise was completed in July 2002. Thereafter, as maintained by the Defendant, 15,000,000 shares in Kumpulan's investment were transferred from Kumpulan to Sanzio Ltd, the latter being a company jointly owned by the Plaintiff and Chung.

5 Following this, the Defendant became open to the idea of providing a further entitlement of assets in Kumpulan to both the Plaintiff and Chung on condition that Kumpulan's business operations performed well in the future. Nevertheless, as emphasised by the Defendant, this openness was merely a gesture of good will in the form of a 'gentlemen's arrangement.' The Defendant argued that it was understood at that time that the further entitlement would be amicably discussed and agreed to by parties concerned before any payments were executed. It must be stressed that the question as to whether this was indeed more than just a 'gentlemen's arrangement' is not for this Court to answer since answering such a question would require the Court to analyse the merits of the case, which, as will be shown later, is not the role of this Court.

6 It is the Defendant's argument that the Plaintiff asked for written assurance of this

"gentleman's arrangement" and the Defendant, out of goodwill, agreed to provide him with a comfort letter in this regard. Thereafter, the parties entered into negotiations in respect of the terms of the arrangement which negotiations the Defendant insists took place in Kuala Lumpur, Malaysia.

7 The fruit of the negotiations was a document signed by both parties on 3 January 2004 in Kuala Lumpur. This document was drafted by Mr Wong Swee Min, a Malaysian-based solicitor. The document provided for a transfer of shares from Kumpulan to the Plaintiff along with the re-purchase of said shares from the Plaintiff by the Defendant. This document forms, for all intents and purposes, the backbone in the argument between the two parties and therefore merits full reproduction in the judgment text:

MEMORANDUM OF AGREEMENT

Made between Yeunh Oi Siong ('Yeunh') and Tay Way Bock ('Tay') on this 3rd day of January 2004.

The Parties hereto understand and agree with each other as follows:

1. Yeunh confirms and acknowledges that Tay is the beneficial owner of 13,000,000 ordinary shares of SGD 0.05 in ISG (formerly known as City Axis Holdings Ltd) ('ISGA')('the Sale Shares') [Note that ISGA is referred to as "Kumpulan's investment" in the judgment].

2. The Sale Shares are registered through Kumpulan City Axis Sdn Bhd.

3. Yeunh has agreed to buy and Tay has agreed to sell his interest in the Sales Shares at the purchase price of SGD 0.125 per share ('Purchase Consideration') in accordance with the terms recorded herein this Memorandum of Agreement.

4. The sale of the Shares shall be made in 2 tranches and the Purchase Consideration payable in respect thereto shall be paid by Yeunh to Tay in the following manner: -

(a) the first tranche of 6,500,000 Sale Shares and a sum of SGD 812,500.00 (equivalent to 50% of the Purchase Consideration) shall be completed and paid on or before 14 February 2004 ('First Payment'); and

(b) the second tranche of 6,500,000 Sale Shares and the balance purchase consideration of SGD 812,500.00 shall be completed and paid on or before 30 July 2004 ('Second Payment').

5. At the request of Yeunh, the Purchase Consideration shall be paid in Ringgit Malaysia at a conversion rate of SGD 1.70 to RM3.80, to solicitors in Malaysia appointed by Tay, namely Messrs. Megat Najmuddin Leong & Co. of 102 Jalan Bangsar, 59200 Kuala Lumpur.

CONFIRMED BY:

Signed by)

YEUNH OI SIONG) SIGNED

in the presence of:)

Signed by)

TAY WAY BOCK) SIGNED

in the presence of:)

8 On 13 October 2005, the Plaintiff commenced these proceedings in the Singapore High Court, alleging that the Defendant had breached the agreement above. The Plaintiff, on his part, took issue with the Defendant's account of the facts and argued as follows:

(a) The agreement reached on 3 January 2004 was not merely a 'comfort letter';

(b) The Bank Negara document exhibited by the Defendant did not state that the Defendant could avoid payment of the agreed S$0.12 per share to the Plaintiff;

(c) The Bank Negara document predates the agreement and even the listing and is therefore irrelevant;

(d) The share transfer provided by the Defendant and stamp duty for 10,000,000 shares due to the Plaintiff were lodged and paid in Singapore;

(e) The Plaintiff's claim is for payment of those shares in the listed company in Singapore.

9 In addition, the Plaintiff argues that the Defendant had foiled a nearly successful transfer of 10,000,000 shares to the Plaintiff's wife. According to the Plaintiff, the Defendant did so by faxing a letter from Singapore disclaiming any knowledge of the Plaintiff's wife. In the words of Counsel for the Plaintiff, "this was the straw that broke the camel's back" and the suit commenced.

The law

(A) Merits Irrelevant

10 It is clear that where the Court is dealing with an application to stay proceedings on the grounds of *forum non conveniens*, it is not to apply its mind to the merits of the case. In the case of ***The Rainbow Joy*** [2005] SGCA 36, Chao Hick Tin JA ruled:

> "In weighing the balance of convenience under the doctrine of *forum non conveniens*, the issue of whether there is a defence to the claim is not a relevant consideration as the court should not be required to go into the merits."

11 To use an analogy, the pre-occupation of a Court hearing a *forum non conveniens* application should be to ascertain where the 'shell' of the case should be heard – in Singapore or in a more appropriate court overseas. Only after this has been ascertained and the 'shell' lands in the appropriate jurisdiction, does the Court of that jurisdiction go into the substance within that 'shell.' It is therefore not for this Court to decide whether the 'gentlemen's arrangement' was indeed a binding agreement since the Court is not interested in the issue of liability here.

(B) The Dual Limb Test

12 The judicial test to be applied in cases involving stays on the grounds of *forum non conveniens* is found in the authoritative case of ***Spiliada Maritime Corporation v Cansulex Ltd***

[1987] AC 460 where Lord Goff Of Chievely held:

> (a) The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.
>
> (b) [I]n general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay … It is however of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour, and that in respect of any such matter the evidential burden will rest on the party who asserts its existence. Furthermore, *if the court is satisfied that there is another available forum which is* ***prima facie*** *the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country.* [My emphasis].

13 The ***Spiliada*** case was cited with approval by Chao Hick Tin J (as he then was) in the case of ***Brinkerhoff Maritime Drilling Corp & Anor v PT Airfast Services Indonesia*** [1992] 2 SLR 776. In the ***Brinkerhoff*** case, Chao J stated that the following rubric, taken from ***Dicey & Morris's Conflict of Laws*** (11th Edn) should apply in cases where stays are argued for on grounds of *forum non conveniens*:

> "The court will look to see what factors there are which point to the direction of another forum, as being the forum with which the action has the most real and substantial connection, eg factors affecting convenience or expense (such as availability of witnesses), the law governing the transaction, and the places where the parties reside or carry on business.
>
> If at that stage the court concludes that there is no other available forum which is clearly more appropriate it will ordinarily refuse a stay.
>
> *If there is another forum which prima facie is clearly more appropriate the court will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should not be granted, and, in this inquiry the court will consider all the circumstances of the case*. But the mere fact that the plaintiff has a legitimate personal or juridical advantage in proceeding in England is not decisive; regard must be had to the interests of all the parties and the ends of justice." [My emphasis].

14 In the case of ***PT Hutan Domas Raya v Yue Xiu Enterprises*** [2001] 2 SLR 49, Chao Hick Tin JA elaborated on the judicial analysis to be undertaken by the Court:

> "If the court concludes that there is such a more appropriate forum, it will ordinarily grant a stay unless, in the words of Lord Goff, 'there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions.'"

15 Andrew Phang JC (as he then was) provided a detailed analysis of the relevant law in the case of ***Q & M Enterprises Sdn Bhd v Poh Kiat*** [2005] 4 SLR 494. It is clear from Andrew Phang JC's judgment that the ***Spiliada*** principles which were entrenched in Singapore law through the cases of ***Brinkerhoff*** and ***PT Hutan*** are binding on this Court today.

16 These four leading cases point to the conclusion that the litmus test to be applied by the Court possesses two limbs. First, the court must be satisfied that there is another available forum which is *prima facie* the appropriate forum for the trial of the action. Second, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country. Therefore, the test is, intrinsically, a weighing exercise.

(C) The Ultimate Question

17 The two pronged litmus test exists merely to aid the Court in answering the ultimate question which according to Chao Hick Tin JA in the ***PT Hutan*** is:

> "Where should the case be suitably tried having regard to the interest of the parties and the ends of justice?"

18 If in answering the question above the Court decides that the case is most suitably tried overseas, then the stay of proceedings must be ordered pursuant to paragraph nine of Schedule One to the SCJA.

Applying the law to the facts

19 Having mapped out the facts of this case and having set out the law, the Court is now required to apply the law to the facts without going into the merits of the case proper.

(A) Factors to consider

20 In the case of ***PT Hutan Domas Raya v Bhavani Stores Pte Ltd*** [2001] 2 SLR 49, Chao Hick Tin JA elaborated on the factors the Court should take into consideration when assessing the forum most connected to the circumstances of the case. Chao JA held:

> "In determining [whether, prima facie, there is some other available forum, having competent jurisdiction, which is more appropriate for the trial of the action], the court will look to see what factors there are which point in the direction of another forum as being the forum with which the action has the most real and substantial connection, eg *availability of witnesses, the convenience or expenses of having a trial in a particular forum, the law governing the transaction and the places where the parties reside or carry on business.*"

The legal burden of showing these factors rests on the Defendant applying for the stay.

(B) Agreement signed in Malaysia; Preparation and Negotiations leading up to Agreement carried out in Malaysia; Agreement drafted by Malaysian solicitor; Agreement envisioned execution to be performed in Malaysia

21 The Defendant was clear that the entire series of transactions and negotiations leading up to the signing of the document, including the funding arrangements for the listing exercise of Kumpulan's investment, were carried out in Malaysia. In addition, the defendant stated that all of these discussions took place in Kuala Lumpur and/or Malaysia.

22 Based on the evidence before the Court, I found three material facts that connected the case to Malaysia. Firstly, the document dated 3rd January 2004 was signed in Kuala Lumpur by both the Plaintiff and the Defendant. Secondly, the document was drafted in Malaysia by a Malaysian

solicitor – one Mr Wong Swee Min. Thirdly, clause 5 of the document unambiguously states that payment of the monies under the agreement will be paid to the Plaintiff's Malaysian-based solicitors (namely, Messrs. Megat Najmuddin Leong & Co. of 102 Jalan Bangsar, 59200 Kuala Lumpur.)

23 These are significant factors to be taken into account in the weighing exercise needed to be undertaken by the Court. Indeed, the very judgment of Andrew Phang JC in ***Q & M Enterprises*** shows that the three facts above are valuable indicators. Phang JC stated:

> "It is, indeed, clear that the majority of the real and close connecting factors were located in *Malaysia*. These include ***the underlying transaction upon which the defendant is basing his defences***, the ***material witnesses*** as well as the ***documents*** of ACT (which had, as already mentioned, since been wound-up as a result of proceedings initiated by the plaintiff itself in Malaysia). It is important to note that it is not the mere literal or factual geographical connections that are important (which the plaintiff raised in the context of Singapore). There must be legal significance, so that the mere number of geographical connections *per se* is not conclusive by any means. Besides, the concessions by counsel for the plaintiff also militate against the success of his case.
>
> In the circumstances, therefore, I found that the Malaysian courts were clearly more appropriate for the trial of the action." [My emphasis].

(C) Key witnesses based in Malaysia

24 I found merit in the Defendant's argument that Chung, a Malaysian citizen who is ordinarily resident there, was a key witness. After the listing exercise was completed in July 2002, the Defendant was open to the idea of providing a further entitlement of assets in Kumpulan to both the Plaintiff and Chung on condition that Kumpulan's business operations performed well in the future. Chung's evidence would therefore be important and relevant – it will give insight into the nature of the 'gentlemen's arrangement.'

25 I was of the opinion that the evidence of the Malaysian solicitor, Mr Wong Swee Min, would prove crucial since he was instrumental in the drafting of the document that is at the very heart of the argument. While I am aware that the Defendant had written a stern letter to him stating that he (the Defendant) did not agree with the contents of Mr Wong's draft affidavit, there is nonetheless the inescapable fact that holding the trial in Malaysia will provide Mr Wong with a more convenient forum to attend.

26 It is clear from the judgment of Chao J in the ***PT Hutan*** case that the availability of witnesses was a key consideration the Court should take into account.

(D) Agreement governed by Malaysian Law

27 The document which was signed in Kuala Lumpur made no reference to Singapore Law. In the case of ***Yugiantoro v Budiono Widodo*** [2002] 2 SLR 275, Tan Lee Meng J held:

> "If the alleged oral contract was made, it certainly did not deal with the question of the proper law of the contract. In the circumstances of this case, it would not be meaningful to try and determine whether or not any inference may be drawn regarding the intention of the parties on the choice of law. It would be more productive to determine whether or not the alleged agreement has the closest and most real connection with Indonesian law."

28 The 'most real connection' principle was extracted from the judgment of Chao Hick Tin J (as he then was) in the case of ***Las Vegas Hilton Corp t/a Las Vegas Hilton v Khoo Teng Hock Sunny*** [1997] 1 SLR 341 where it was held:

> "To determine the question of 'closest and most real connection' many factors may be taken into account, the main ones are — the place of contracting, the place of performance, the places of residence or business of the parties respectively; and the nature and subject-matter of the contract: see ***Re United Railways of Havana and Regla Warehouses Ltd*** [1960] Ch 52 at 91 per Jenkins LJ."

For the reasons already cited in paragraphs 22 and 23 above, I find that the alleged agreement has the closest and most real connection with Malaysian law.

(E) Lack of special circumstances to show that forum should remain in Singapore

29 For the sake of completeness, Lord Goff in the ***Spiliada*** case and Chao JA in the ***PT Hutan*** case stressed that the Court must still apply its mind to whether there were circumstances by reason of which justice required that a stay should nevertheless not be granted. In this respect, the Plaintiff raised three main points in his bid to challenge the stay.

30 The first argument was that a stay would deprive them of a judicial advantage. I was not persuaded by this argument. The facts showed that the Malaysian court would be the forum of most convenience and it is the principles of convenience, entrenched in the leading cases of ***Spiliada, Brinkerhoff, PT Hutan*** and ***Q & M Enterprises***, that ought to be the guiding lights for this Court and not enquiries into which forum would be more advantageous to a certain party. In fact, in the case of ***NM Rothschild & Sons (S) Pte Ltd v Plaza Rakyat Sdn Bhd*** [1995] 3 SLR 374, Kan Ting Chiu J re-emphasised the following principle laid down in the ***Spiliada*** case:

> "The fact that a refusal of leave to serve out of the jurisdiction or a stay of the action might deprive the plaintiff of a legitimate personal or juridical advantage would not, as a rule, deter the court from granting a stay or refusing leave if it is satisfied that substantial justice would be done in the appropriate forum."

For reasons already cited in paragraphs 22 to 28, I am convinced that substantial justice will be done in the Malaysian courts. The document was signed there. Key witnesses are based there. The parties even envisioned that the transaction was to be completed there. In addition to these considerations, the Court has the additional duty to respect international comity. The importance of giving such respect was emphasised by Andrew Phang JC in the case of ***Q & M Enterprises***. In particular, Phang JC held:

> "The importance of international comity cannot be underestimated. The domestic courts of each country must constantly remind themselves of this point – if nothing else, because of the natural tendency towards favouring domestic law over foreign law."

Thus, for the reasons given in paragraphs 22 to 28 and 30, the Plaintiff's first argument was incapable of challenging the stay application.

31 The second argument put forward by the Plaintiff was that the Defendant's application was clearly an attempt to delay proceedings. I am convinced that the Defendant is not abusing the processes of Court to achieve an ulterior aim. Admittedly, I say this without any knowledge of the merits of his defence but quickly add that it is in fact not the purpose of this Court to analyse the

substance of the issue in contention. What is unambiguous is the law on this issue. It is clear that an assertion by the Plaintiff that the Defendant was merely taking out an application under *forum non conveniens* to delay proceedings is, on its own, an insufficient tool to fight a stay application – see Lai Siu Chiu J's judgment in ***PT Jaya Putra Kundur Indah & Anor v Guthrie Overseas Investments Pte Ltd*** [1996] SGHC 285 and Kan Ting Chiu's Judgment in ***NM Rothschild & Sons (S) Pte Ltd v Plaza Rakyat Sdn Bhd*** [1995] 3 SLR 374. Therefore, this second argument lacked the strength to displace the merits in support of the stay application.

32 The third argument put forward by the Plaintiff was that one key aspect within the trial would go beyond the jurisdiction of the Malaysian Courts. In particular, the Plaintiff argued by way of written submissions:

> "14. The Defendant addresses the issue of his non-disclosure of the Plaintiff's beneficial interest in the Company's Initial Public Offering (IPO) prospectus, with a bare denial, saying that the agreement dated 3 January 2004 was made 2 years after the IPO.
>
> 15 The Question of whether a Court will give effect to the said agreement against the background of the non disclosure in the prospectus, is a decision only a Singapore Court can make because [it] relate[s] to shares in ISG Asia, a Singapore listed company.
>
> …
>
> 20 The Plaintiff's beneficial interest in the ISG Asia Ltd was created sometime prior to the listing company's listing and is substantial, the holding of which required a written notice to the Company, and post 1 October 2002 to the Exchange. Any change in the extent of the interest requires notification. The Defendant is duty-bound to make such notifications in Singapore as the principal executive here.
>
> 21 If a single omission to notify/disclose the Plaintiff's before 1 October 2002 (the date the relevant part of the Securities Future Act ("SFA") took effect) forms the basis of a possible prosecution in Singapore, it would be brought under the Companies Act ("CA") and a lesser maximum fine is payable.
>
> 22 Hence, this matter of the Defendant's failure to notify of the Plaintiff's substantial shareholding will come to light in the Plaintiff's suit and hence only a Singapore Court can give effect to the agreement dated 3 January 2004."

33 I analysed the provisions the Plaintiff sought to rely on in support of his third argument against the stay – namely, sections 7(6), 80(1), 80(2), 81(4), 82, 83, 84 and 89 of the Companies Act (Chapter 50) and s 137 of the Securities and Futures Act (Chapter 289) – and found that the potential application of these provisions would not impair a Malaysian Court's ability to adjudicate over the issue. The Companies Act provisions deal primarily with the 'notification obligations' of a substantial shareholder who has either relinquished or gained a substantial quantum of shares. In respect to s 137 of the Securities and Futures Act, this provision deals with the duty of substantial shareholders to notify the securities exchange.

34 From what is visible thus far, this case pertains to an alleged agreement prepared, negotiated, drafted and signed in Malaysia. The issue of liability is intrinsically linked to the validity of this agreement. Duties and obligations of notification under the Companies Act and the Securities and Futures Act will not hinder the Malaysian Court's ability to scrutinise the specific issue, which is the validity of the agreement dated 3rd January 2004. Thus, this third argument was insufficient to

challenge the stay application.

Conclusion

35 The Plaintiff asserted in an affidavit that the Defendant had dined with the Plaintiff and the Plaintiff's wife. Yet, the Defendant feigned ignorance of her when she started to play an instrumental role in the transfer of the shares in question. It was obvious from the Plaintiff's oral arguments that this was "the straw that broke the camel's back." The consequence is this suit. Why such ignorance was feigned must remain unanswered at this stage since probing any further would be to slide into an analysis of the merits of the case, which falls beyond the duty of this Court.

36 On the basis of the principles entrenched in the leading cases of ***Spiliada Maritime Corporation v Cansulex Ltd*** [1987] 1 AC 460, ***Brinkerhoff Maritime Drilling Corp & Anor v PT Airfast Services Indonesia*** [1992] 2 SLR 776, ***PT Hutan Domas Raya v Yue Xiu Enterprises*** [2001] 2 SLR 49 and ***Q & M Enterprises Sdn Bhd v Poh Kiat*** [2005] 4 SLR 494 the Court finds as follows:

(a) There is another available forum, which is *prima facie* the appropriate forum for the trial of the action.

(b) The plaintiff has not shown that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in Singapore.

The two conclusions above have aided the Court in coming to the following answer to the "ultimate question" as framed by Lord Goff in the ***Spiliada*** case and Chao JA in the ***PT Hutan*** case:

This case should be tried in Malaysia having regard to the interest of the parties and the ends of justice.

37 The Court will therefore grant the application in SIC 5963 of 2005/Q and will allow prayers 1 and 2.