Kaki Bukit Industrial Park Pte Ltd v Ng Man Heng and Others
[2004] SGHC 60

Case Number : Suit 509/2003, RA 420/2003

Decision Date : 25 March 2004

Tribunal/Court : High Court

Coram : MPH Rubin J

Counsel Name(s) : Oommen Mathew (Tan Peng Chin and Partners) for plaintiff; Christopher Chuah and Lawrence Tan (Drew and Napier) for defendants

Parties : Kaki Bukit Industrial Park Pte Ltd — Ng Man Heng; Puncak Maju Corporation Sdn Bhd; Syarikat Permata Gemilang Sdn Bhd; Syarikat Kesenangan Sdn Bhd

Civil Procedure – Stay of proceedings – Forum non conveniens – Relevant factors.

Conflict of Laws – Natural forum – Stay of proceedings on ground of forum non conveniens – Relevant factors.

25 March 2004

MPH Rubin J:

Introduction

1 In this Registrar's Appeal, the defendants appealed against the decision of Assistant Registrar Joyce Low, who dismissed the defendants' application for a stay of proceedings. The said application was based on the ground that Malaysia, and not Singapore, was the appropriate forum in respect of this action. After hearing arguments on 28 January 2004 and further arguments on 26 February 2004, I dismissed the defendants' appeal. My grounds now follow.

Background facts

2 The plaintiff, Kaki Bukit Industrial Park Pte Ltd, a company incorporated in Singapore, is now in compulsory liquidation. The winding up order against the plaintiff was made on 11 January 2002 by the High Court. Prior to the winding up order, the plaintiff was, for a period, under judicial management. Pursuant to the winding up order, Mr Goh Boon Kok was appointed as the liquidator of the plaintiff.

3 According to the liquidator, his review of the plaintiff's records appeared to confirm that between December 1997 and July 1999, a sum of about $107,781,100 had been paid out of the plaintiff's bank accounts to various third parties as follows:

(a) $44.5m for the purchase of shares in a Malaysian company known as Syarikat Permata Gemilang Sdn Bhd ("SPG"), the third defendant; and

(b) $63,281,100 for the purchase of two plots of land (Lots 1447 and 1450) in Bentong, Pahang ("the Bentong land") from one Deluxe Gain Sdn Bhd ("Deluxe Gain") at the price of RM183m.

4 The liquidator's view, in a synopsis, as appears from the affidavits filed by him, was that the said payments were not legitimate payments, the records did not seem to reflect any commercial benefit to the plaintiff in relation to the SPG transaction and the price paid for the Bentong land was grossly inflated and far in excess of its true market value. He averred that the said payments were

made by the first defendant in breach of trust and in breach of the first defendant's fiduciary duties to the plaintiff. It appeared from the records that at the date of the winding up order the first defendant was one of the two directors of the plaintiff, the other person being one Mdm Ho Peng Sze. It would also appear from the averments of the liquidator that apart from the first defendant, a number of other individuals were also involved in the management and control of the plaintiff. They included one Mr Ho Kok Cheong from Singapore and members of his family.

5 In para 14 of his affidavit filed on 3 November 2003, the liquidator said that the transactions and payments which formed the basis for the plaintiff's claims in this action were carried out over a period of about two years between December 1997 and July 1999. The officers of the plaintiff during this period of time were:

Name	Office	Period	Place of residence
Mary Wong	Director	03.07.97-12.02.98	Singapore
The first defendant	Director	04.08.97-present	Malaysia
Yeo Kai Eng	Secretary	05.12.97-present	Singapore
Miriam Tan	Director	08.01.98-present	Singapore
Robert Lee	Director	09.02.98-30.04.98	Singapore
Ong Cheong Wei	Director	25.02.98-29.12.98	Singapore
Ho Kah Leong	Director	02.03.98-11.08.98	Singapore
Sitoh Yih Pin	Director	30.04.98-11.08.98	Singapore
Ho Miaw Ling	Director	28.12.98-26.04.99	Singapore
Ho Peng Sze	Director	12.04.99-present	Malaysia

6 In the event, the plaintiff commenced proceedings against all the named defendants. The order sought against the first defendant was for him to pay the plaintiff the sums set out in [3] herein on the ground that he had committed breaches of trust and had acted in breach of his fiduciary

duties to the plaintiff. The plaintiff also sought declarations that the first defendant had failed to act honestly and use reasonable diligence in the discharge of his duties as a director of the plaintiff and that he was privy to carrying on the business of the plaintiff for a fraudulent purpose. There was also a claim for damages against him for conspiracy. As against the second to the fourth defendants, the plaintiff's claim was founded on knowing receipt, dishonest assistance and conspiracy. The plaintiff also sought various tracing orders against the second, third and fourth defendants. It must be added at this stage that the plaintiff has also instituted a parallel action in Singapore against Ho Kok Cheong, Yeo Kai Eng, Ho Miaw Ling and Ho Peng Sze in Suit No 707 of 2003, claiming relief for breach of trust and other wrong-doings on their part in relation to the plaintiff's affairs.

7 Having failed to set aside the service of the writ of summons, the defendants filed an application to the court for a stay of proceedings on the grounds that Malaysia was the appropriate forum in relation to the plaintiff's claim. In this connection, the first defendant who is a Malaysian citizen and resident in Malaysia, filed two affidavits, one on 21 October 2003 and the second on 24 November 2003. He claimed that he suffers from severe asthma and cardiac problems which prevent him from coming to Singapore. As regards the Bentong land transaction, the first defendant averred that Mr Steven Ng, who valued the land at the material time and is thus an important witness, is unwilling to testify in court. In this regard, he referred the court to the correspondence exchanged between SPG and Mr Steven Ng of Chesterton International, Malaysia. In so far as is material, the letter dated 22 November 2003 and signed by Mr Steven Ng reads as follows:

> Date: 22nd November, 2003
>
> The Directors
>
> Syarikat Permata Gemilang Sdn Bhd
>
> …
>
> Dear Sir,
>
> Valuation of Lot 1447 & 1450, Mukim Of Bentong
>
> District of Bentong, State of Pahang
>
> We refer to your letter dated 20/11/2003 regarding the above. Our valuation of RM182,000,000 was on your instructions to ascertain the total value as a whole integrated development when fully built and sold.
>
> We regret to inform you that we are not willing and not prepared to appear in any legal proceedings in this matter as this is not within the scope of our original appointment.
>
> Thank you.
>
> Yours faithfully,
> Chesterton International (J) Sdn Bhd
> (signed)
> Steven H S Ng
> (Registered Valuer)

8 In the main, the contention by the first defendant was that his present medical condition

would not permit him to come to Singapore to defend the suit against him and that Mr Steven Ng who is a vital witness, whilst he can be subpoenaed to appear in Malaysian courts, cannot be forced to testify in Singapore courts. It must also be mentioned at this stage that the first defendant was the sole spokesman and affirmant for all the defendants. It would appear from the statement of claim that the plaintiff and the second, third, and fourth defendants had common shareholders and that the first defendant had been at all times an alternate director in the second, third, and fourth defendants, in addition to being a director of the plaintiff.

Arguments

9 Defendants' counsel, in his submission, contended that given the connecting factors, Malaysia is the appropriate forum for determining the issues in this case. In so far as is material, paras 21 to 36 of the submission read as follows:

> 21 All the Defendants are Malaysians. They do not maintain any presence in Singapore.
>
> 22 The shares to be purchased by the Plaintiff are shares in a Malaysian company; the 3rd Defendant. The payment of S$44.5 million was for the purchase of these shares.
>
> 23 The other main head of claim i.e. the payment for the sum of S$56,042,900.00 for the purported purchase of the Bentong land was clearly payment made for the transfer of Malaysian land.
>
> 24 The main witness for the Defendants (other than Chua Kheng Chuan who has since passed away) is the 1st Defendant. However, the 1st Defendant is presently unwell and cannot travel to Singapore for purposes of the trial.
>
> 25 His medical condition has restricted his travel and movement considerably. …
>
> 26 Other than him, the other crucial witness for the Defendants' case is Stephen Ng of Chesterton International.
>
> 27 The Plaintiff's chief allegation is that the monies paid by the Plaintiff were for transfer of shares in the 3rd Defendant and for transfer of the Bentong land which were excessive and of no commercial benefit as the Bentong land was overvalued. The real contention lies in the true value of the Bentong land.
>
> 28 The Defendants' case rests on the valuation done by Chesterton International on 18 November 1997 in relation to the transfer of the Bentong land in April 1998.
>
> 29 The valuation by Stephen Ng of Chesterton International showed the value of the Bentong land to be RM182,000,000.00. …
>
> 30 The Plaintiff's liquidator is now contending that the value of the Bentong land is far less. In fact, in the liquidator's report, it is stated that the value is less than RM4,000,000.00. …
>
> 31 In this regard, the true value of the land is important. The 1st Defendant has made it clear that despite his best efforts, he cannot compel Stephen Ng to give evidence or to produce the documents in Singapore. It would, of course, be different if the proceedings were conducted in Malaysia as Stephen Ng would be subject to the subpoena procedure. …

32 The Defendant's case will collapse entirely without the explanation of Stephen Ng of Chesterton International as to the true value of the land. He can only be compelled to give evidence in Malaysia and his evidence is crucial.

33 These 2 crucial witnesses are required for the Defendants to effectively defend this case. It is clearly in the interest of justice that the matter be heard in Malaysia.

34 As the matters clearly arise out of the 2 main issues i.e. the transfer of the shares in the 3rd Defendant and the purchase of the Bentong land, it is important to bear in mind the cardinal principle.

35 The law of a country where a thing is situate (lex situs) determines whether

(i) the thing itself is to be considered an immovable or a movable; or

(ii) any right, obligation or document connected with the thing is to be considered an interest in an immovable or in a movable.

See Dicey & Morris on the Conflict of Laws, Rule 111, pp. 917, 945 …

36 The issue of the transfer of shares in the 3rd Defendant which owns the Bentong land and the transfer of the Bentong land itself is to be determined by the law of Malaysia and in particular the laws of Pahang.

10 Plaintiff's counsel in his submission underscored the following:

Payment of $44.5 million in connection with the alleged purchase of shares in the 3rd Defendants by the Plaintiffs

8. … (a) The Plaintiffs are a company incorporated in Singapore with shareholders who are either Singaporean citizens or Singaporean companies. … [T]he management and control of the Plaintiffs was exercised from within Singapore. [The Plaintiffs are presently in liquidation and act through their liquidator. The 1st Defendant is a director of various Singapore companies. He also has an interest in a number of Singapore companies.]

(b) Based on the evidence of the Plaintiffs' company secretary, instructions … were, for the most part, issued by the 1st Defendant while he was in Singapore.

(c) The EGM at which the 1st Defendant had represented that the Bentong Land was worth RM182 million and … had recommended that the Plaintiffs invest in the3rd Defendants had taken place … in Singapore. …

(d) The cheques for the payment [in relation to] the shares … were drawn on the Plaintiffs' [Singapore bank account] and were signed in Singapore. The [moneys] paid to the 2nd Defendants were paid to an account maintained by the 2nd Defendants in Singapore. All payments were made in Singapore dollars.

(e) The sale and purchase agreement [in respect of the shares is expressed to be governed by] Singapore law … Two of the three [contracting parties] are Singaporean.

(f) The director's resolution authorizing the use of the Plaintiffs' profits for investment in the 3rd Defendants was passed in Singapore.

(g) The loss and damage flowing from the 1st Defendant's breach of duty was sustained by the Plaintiffs in Singapore.

Payment of $56,042,900 and $7,238,200 – Purchase of land in Bentong, Pahang

9. … (a) The Plaintiffs are a company incorporated in Singapore with shareholders who are either Singapore citizens or Singapore companies. At all material times, the management and control of the Plaintiffs was exercised from within Singapore.

(b) Based on the evidence of the Plaintiffs' company secretary, instructions concerning the affairs of the Plaintiffs were, for the most part, issued by the 1st Defendant while he was in Singapore.

(c) The cheques for the payment of the sums of $56,042,900 and $7,238,200 to the 3rd Defendants were drawn on the Plaintiffs' accounts with Maybank and the Bank of Singapore, both of which were situated in Singapore. The said cheques were signed in Singapore. The monies paid to the 3rd Defendants were paid to an account maintained by the 3rd Defendants with Maybank in Singapore. All payments were made in Singapore dollars.

(d) The relevant director's resolutions … were passed in Singapore.

(e) The Plaintiffs' accounts and ledgers recording payment to the 4th Defendants were drawn up in Singapore.

(f) The written instructions to the 3rd Defendants to effect payment to the 4th Defendants were issued from Singapore.

(g) The Plaintiffs' common seal [was] affixed to the relevant contract documents … in Singapore.

(h) The loss and damage … was sustained by the Plaintiffs in Singapore.

11 The list submitted by plaintiff's counsel stating the location of the prospective witnesses reads as follows:

No	Singapore	Malaysia

1. Goh Boon Kok – Liquidator
2. Wong Tui San – Liquidator's Consultant
3. Ho Kok Cheong – Shadow/De-facto director of the Company [Bankrupt in Singapore]
4. Yeo Kai Eng – Company secretary and cheque signatory
5. Peter Lim – Proxy for Chng Heng Tiu Pte Ltd, Chwee Meng Chong and Yeo Siew Hang at the EGM of 6 December 1997
6. Wong Tat Ming – Representative of Tenby Investments Pte Ltd at the EGM of 6 December 1997 [Bankrupt in Singapore]
7. Wong Lye Kuen – Representative of Straits International Resources Pte Ltd at the EGM of 6 December 1997 [Bankrupt In Singapore]
8. Ho Miaw Ling – Director and cheque signatory
9. Ho Mun Fei – Seller of the SPG shares [Bankrupt in Singapore]
10. Ho Kah Leong – Director
11. Ong Cheong Wei – Director
12. Foo Kok Fong – Cheque Signatory

Ng Man Heng, 1st Defendant

Steven Ng

Plaintiffs' Malaysian Property Valuer (prepared to give evidence in Singapore)

Decision

12 The principles governing the granting of stay of proceedings, such as the one before this

court, are set out by Lord Goff of Chievely in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*The Spiliada*") and were re-stated succinctly in *Dicey & Morris on the Conflict of Laws – Third Cumulative Supplement to the Eleventh Edition* (Sweet & Maxwell, 1990) at paras 393–395 as follows:

> (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, *ie* in which the case may be tried more suitably for the interests of all the parties and the ends of justice;
>
> (b) the legal burden of proof is on the defendant, but the evidential burden will rest on the party who asserts the existence of a relevant factor;
>
> (c) the burden is on the defendant to show both that England is not the natural or appropriate forum, and also that there is another available forum which is clearly or distinctly more appropriate than the English forum;
>
> (d) 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;
>
> (e) 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;
>
> (f) 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.

13 *The Spiliada* principles are well-entrenched in our system, having been re-affirmed by the High Court as well as the Court of Appeal in several cases (see: *The Vishva Apurva* [1992] 2 SLR 175; *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR 776; *Eng Liat Kiang v Eng Bak Hern* [1995] 3 SLR 97; *Oriental Insurance Co Ltd v Bhavani Stores Pte Ltd* [1998] 1 SLR 253; *Datuk Hamzah bin Mohd Noor v Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj* [2001] 4 SLR 396; *PT Hutan Domas Raya v Yue Xiu Enerprises (Holdings) Ltd* [2001] 2 SLR 49); *Praptono Honggopati Tjitrohupojo v His Royal Highness Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj* [2002] 4 SLR 667.

14 In this context, it would suffice if reference is made only to *PT Hutan Domas Raya*, where it was held by the Court of Appeal at [16] that:

> The first stage is for the court to determine whether, prima facie, there is some other available forum, having competent jurisdiction, which is more appropriate for the trial of the action. … Unless there is clearly another more appropriate available forum, a stay will ordinarily be refused. If the court concludes that there is such a more appropriate forum, it will ordinarily grant a stay unless … "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" … [T]he mere fact that the plaintiff has a legitimate

personal or juridical advantage in proceedings in Singapore is not decisive; regard must be had to the interests of all the parties and the ends of justice.

15 In my view, the circumstances of the case did not seem to support the defendants' contention that Malaysia, and not Singapore, was the most appropriate forum. First and foremost, the plaintiff, now in liquidation, is a Singapore entity. The claim formulated by the liquidator for the plaintiff bespoke wrongdoings and breaches committed in Singapore. The directorial responsibilities undertaken by the first defendant were carried out in Singapore. All the resolutions pertaining to the payments under the microscope were made in Singapore. At all times, the management and control of the plaintiff remained in Singapore. The relevant cheque payments in respect of the transactions were made from accounts operated with Singapore banks and in Singapore dollars. The winding up order of the plaintiff was made in Singapore. The liquidator is resident in Singapore and all the documents of the plaintiff (450 arch files, according to the liquidator) were at all times, and are now, housed in Singapore. The first defendant, who now wants the matter to be stayed in Singapore, has been a director of not only the plaintiff but, by his admission, also in other Singapore companies.

16 The main strand in the application of the defendants is that their principal witness, the first defendant, is not well enough to travel to Singapore. The reply to this by plaintiff's counsel is that if indeed the first defendant is so indisposed to travel to Singapore, the problem can be easily solved by his testifying in Malaysia by video link, as is not uncommon nowadays. The second objection by the defendants is that their valuer, Mr Steven Ng, whose evidence is so vital, is unwilling to give evidence at the trial and if the action were to continue in Singapore, the court process would not bind him. In my view, one of the issues to be determined at the trial is the true market value of the property in 1997. For this, the parties could produce evidence from any reputable valuer, even if Mr Steven Ng is unwilling to testify. At any rate, it would appear from the letter of Mr Steven Ng that court appearance was not within the scope of his appointment and he gave his valuation premised on certain assumptions which were seemingly suggested by the first defendant.

17 Apart from the fact that the first defendant and Mr Steven Ng are located in Malaysia, all the other *dramatis personae* appear to be resident and available in Singapore. As to the point that the second, third and fourth defendants are Malaysian entities, my conclusion, having regard to the averments of the parties, was that this aspect was not a significant factor since the first defendant himself had in his affidavits made it plain that he would be the only material witness in relation to the dispute at hand. Additionally, there are parallel proceedings in relation to the acts and omissions of the other officers and *de facto* directors of the plaintiff in Singapore in Suit No 707 of 2003. In my view, the connecting factors in this case clearly pointed to Singapore as the most appropriate forum. The other arguments raised by defendants' counsel, that the laws of Malaysia applied to the sale of Bentong land and to the transfer of shares in the third defendants, were found by me to be red herrings. In my view, even if an issue arose as to the applicability of Malaysian laws, Singapore courts would be able to deal with them, as has been done in so many cases.

18 Having considered all the arguments, my conclusion was that Singapore was the natural and appropriate forum. In this regard, I should add here that whereas the plaintiff had discharged its evidential burden, the defendants had not, on balance, discharged their burden that Singapore was not the appropriate forum. Consequently, I dismissed the appeal of the defendants with costs.