Novus International Pte Ltd v Good Earth Agricultural Co Ltd
[2007] SGHC 143

Case Number : Suit 164/2007, RA 128/2007

Decision Date : 06 September 2007

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Roland Tong (Wong Tan & Molly Lim LLC) for the plaintiff; Ranvir Kumar Singh (Unilegal LLC) for the defendant

Parties : Novus International Pte Ltd — Good Earth Agricultural Co Ltd

Conflict of Laws – Choice of jurisdiction – Stay of proceedings on ground of forum non conveniens – No governing law clause in oral agreement – Whether Hong Kong proper forum after separate action had been heard there – Circumstances where court would grant stay

6 September 2007

Lai Siu Chiu J

The background

1 The defendant, Good Earth Agricultural Company Limited, was sued by the plaintiff, Novus International Pte Ltd, for *inter alia* breach of fiduciary duty and for secret profits amounting to US$1,698,484, arising out of an oral distributorship agreement made in 1978 between the parties ('the agreement"). The plaintiff is a Singapore registered company and is a wholly owned subsidiary of an American company called Novus International Incorporated ("the parent company") while the defendant is a trading company incorporated in Hong Kong.

2 Earlier, the defendant had sued the plaintiff in Hong Kong in October 2002 in Commercial Action No. 74 of 2002 ("the Hong Kong action"). By a judgment dated 25 January 2007 ("the Hong Kong judgment"), the Hong Kong court held the plaintiff liable to the defendant in the sum of US$542,594 with interest of US$157,873.31, making a total of US$700,467.31 ("the judgment sum").

3 The plaintiff did not file an appeal against the Hong Kong judgment and by Originating Summons No. 326 of 2007 ("the OS"), the defendant applied to our courts and the Hong Kong judgment was registered in Singapore on 1 March 2007 under the Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed). The plaintiff however has applied to set aside the registration. The plaintiff has also paid the principal amount on the judgment sum to the defendant. In support of the setting-aside application, the plaintiff's director of finance and operations Cecilia Chan ("Chan") filed two affidavits, one of which was referred to in the hearing before me.

4 On 5 April 2007, the defendant applied by Summons No. 1495 of 2007 ("the stay application") for a stay of proceedings under O 12 r 7(2) and/or O 92 r 4 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) on the ground that Singapore was not the proper forum for the disputes raised in the statement of claim and/or on the ground of *forum non conveniens*. In the event the stay was not granted, the defendant applied for 14 days' extension of time after the decision of the Registrar and/or after the outcome of any appeals, for the defendant to file its defence.

5 The stay application was heard and dismissed by the Assistant Registrar ("AR") on 7 May 2007.

The defendant appealed against the AR's decision in Registrar's Appeal No. 128 of 2007 ("the Appeal"). I heard and dismissed the Appeal on 25 June 2007. The defendant has now filed a notice of appeal (in Civil Appeal No. 83 of 2007) against my decision.

The facts

6 The defendant was a distributor of the plaintiff's products which were animal feed ingredients and supplements ("the goods"). It was the plaintiff's case that it would set the price for the goods to be distributed or sold by the defendant, say at $X. When the defendant's customers placed an order for the goods, the defendant would place a corresponding order with the plaintiff and open a letter of credit to secure the order placed.

7 The plaintiff would deliver directly to the defendant's customer the goods ordered. The defendant would bill the customer at $X as previously fixed by the plaintiff and collect payment accordingly. In turn, the plaintiff would invoice the defendant for the goods ordered and delivered at $X less the agreed commission payable to the defendant, which for most periods was set at 8%. In effect, the plaintiff would bill the defendant 92% of $X. For the years 1993 to 2002, the defendant paid the plaintiff who accepted, sums totalling US$132,840,012.00 based on 92% of $X.

8 The plaintiff discovered that the defendant did not bill its customers $X but instead had billed based on $X plus $Y, thereby wrongfully retaining (without the plaintiff's knowledge) $Y, which was the secret profits the plaintiff claimed in this suit.

9 The plaintiff's claim for secret profits of US$1,698,484 was based on the difference between the defendant's actual gross sales figures (to customers) and the plaintiff's own invoices to the defendant.

The stay application

10 In his first affidavit filed on 5 April 2007 in support of the stay application, the defendant's deputy managing-director Herbert Tsan ("Tsan") deposed that this suit and the Hong Kong action were not the only disputes between the parties arising out of the distributorship agreement. He revealed that this suit was also not the first time the plaintiff had claimed against the defendant for breach of fiduciary duty. The plaintiff had attempted to introduce the claim in the Hong Kong action and failed.

11 Tsan said the defendant disputed the plaintiff's claims but the appropriate venue for the resolution of the disputes was Hong Kong. Tsan pointed out that witnesses would have to be called by both parties and the majority of them were located in Hong Kong. In the Hong Kong action, the plaintiff called one witness from Singapore while the defendant had six witnesses, four from Hong Kong, one from Thailand and one from Singapore. He identified the defendant's witnesses for this suit as Q N Wong (the defendant's chairman), Edwin Wong (the defendant's managing-director), himself and Paweenee Mirinda Wuttiattapong ["Mirinda"] (the marketing manager of the defendant and wife of a son of the founder of the defendant).

12 Tsan added that documents which were the basis of the plaintiff's claim for breach of fiduciary duty were the defendant's documents such as invoices issued by the defendant to its final customers from Hong Kong. Documents evidencing payments made by the defendant's customers would also be relevant. These documents were voluminous, spanned a number of years and were located in Hong Kong.

13 Tsan understood from the defendant's Hong Kong solicitors that the Hong Kong court only had one dedicated judge (Justice Stone) to hear matters in the Commercial List. He anticipated that any proceedings in the Hong Kong court would have to be by way of a Commercial Action. If the plaintiff commenced proceedings in Hong Kong other than by way of a Commercial Action, the defendant could apply to transfer the proceedings to the Commercial List. Justice Stone heard the Hong Kong action and was familiar with the background facts in relation to the agreement.

14 The plaintiff quite naturally resisted the stay application. In the affidavit filed by its solicitor Roland Tong ("Tong") to oppose the same, he deposed that if the plaintiff succeeded in this action, its claim would extinguish the judgment sum. Tong exhibited in his affidavit the first affidavit filed by Chan in the OS (*supra* ([3]).

15 Tong pointed out that the plaintiff's suit here differed from the counterclaim it attempted but failed to introduce in the Hong Kong action albeit both involved secret profits retained by the defendant.

16 Tong gave the following reasons why Singapore was the proper forum for this suit:

(a) the plaintiff is a Singapore company;

(b) when the Hong Kong action was commenced, the plaintiff did not raise any dispute on jurisdiction by the Hong Kong courts because the plaintiff then had a presence in Hong Kong in the form of shareholdings in a company called Novus International Nutrition Limited ("Nutrition"). Nutrition had since ceased operations and was liquidated in March 2005. The plaintiff therefore no longer had a presence in Hong Kong and had no reason to litigate there. If it was forced to litigate in Hong Kong, the plaintiff would have to furnish security for costs which was a procedural disadvantage;

(c) it was the plaintiff's understanding that Singapore law would govern the relationship between the parties and that Singapore courts would have jurisdiction. The understanding was reflected in the draft distribution agreements proposed by the plaintiff to the defendant in 1992-1993 and which were drafted by Singapore lawyers. Although the defendant did not sign the proposed drafts, it did not object to the provisions on Singapore law and jurisdiction;

(d) all the documentation relating to sale of the goods by the plaintiff to the defendant were issued or originated from Singapore;

(e) the plaintiff's action was based essentially on the defendant's audited financial accounts. These documents were only produced by the defendant at the trial of the Hong Kong action in the affidavit of Mirinda (which were also exhibited by her in the affidavit she filed in the OS proceedings);

(f) only one witness needed to be called by the defendant, *viz.* Mirinda, as the plaintiff would be relying on the admissions she had made in the course of trial in the Hong Kong action; there was no necessity to recall all the witnesses who testified for the defendant in the Hong Kong action;

(g) in any event the case turned on documents and there were no factual issues which necessitated the calling of witnesses from Hong Kong;

(h) the plaintiff's witnesses were all based in Singapore. One potential witness, Chuah Chong

Hin ("Chuah"), was the plaintiff's former general manager. He may be a key witness if the defendant raised the defence of rebates to customers for the discrepant pricing. Although Chuah had signed a statement for use in the Hong Kong action, he had previously indicated that he was not inclined to travel to Hong Kong for the then intended counterclaim against the defendant. It was likely Chuah would have the same mindset and would be unwilling to testify for the plaintiff if this claim was tried in Hong Kong, resulting in great prejudice to the plaintiff. On the other hand, the plaintiff could subpoena Chuah to compel his attendance in a Singapore court for this case;

(i) the defendant had submitted to the jurisdiction of the Singapore courts when it applied to register the Hong Kong judgment in Singapore;

(j) given Tsan's specific reference to Justice Stone and the defendant's preference for him to hear the claim if proceedings were started in Hong Kong, the plaintiff was uncomfortable with this notion of "judge shopping" especially when Justice Stone had found against the plaintiff in the Hong Kong action;

(k) legal costs would be less in Singapore than in Hong Kong.

17 In Chan's first affidavit filed (on 14 March 2007) in the OS, she elaborated on (e) above. She explained that when the Hong Kong action was on-going, the plaintiff was unaware that the defendant had made and retained secret profits – the plaintiff thought that the Hong Kong action was strictly confined to whether the appropriate notice period had been given to the defendant in respect of termination of the agreement. It was only after the close of pleadings and in the discovery and inspection process (in 2004) that the defendant disclosed various invoices relating to orders it placed with the plaintiff and invoices that it issued in turn to its ultimate customers. Only then was the mark-up in pricing revealed.

18 The plaintiff then confronted the defendant on the pricing discrepancy. The plaintiff however was not satisfied with the defendant's explanation that the price differential was not a mark-up but was a rebate returned to its customers. The plaintiff therefore applied in September 2006 to add a counterclaim to the Hong Kong action. The defendant objected to the application and it was disallowed by the court on account of lateness as the trial dates were scheduled for December 2006.

19 In the course of trial of the Hong Kong action, the defendant had produced for the first time its audited financial statements for the years 1993 to 2002 in support of its claim for damages. This was followed by Mirinda's filing of a second supplementary witness statement. The plaintiff discovered from both sets of documents that the defendant had on-sold the goods to its customers for $X plus $Y.

20 In the course of Mirinda's cross-examination in the Hong Kong action, she had confirmed and admitted that the total gross sales revenue as given in her witness statement and/or audited accounts were net of rebates given to the defendant's customers. Prior thereto, the defendant had denied having received $Y or any secret profits. Mirinda's testimony contradicted the defendant's stand.

21 Chan pointed out that had the defendant given discovery in the Hong Kong action well before 6 December 2006 (in the midst of the trial which commenced on 4 December 2006) of its audited financial statements as well as the actual gross sales of the goods, the plaintiff would have applied to amend its defence earlier to include a counterclaim for secret profits. She complained that as a result of the defendant's concealment of the evidence relating to secret profits, the defendant wrongly and impliedly represented to the Hong Kong court that it was entitled to be paid damages without any right of set-off or counterclaim on the part of the plaintiff.

22 Chan added that the plaintiff's present action was substantially different from the counterclaim it sought to introduce in the Hong Kong action – the amount was different, the calculation was different and the evidence to support it was also different. Unlike the abortive counterclaim, the plaintiff would be relying on the defendant's documents and the evidence in the Hong Kong action for this claim.

23 I should point out that Tsan's second affidavit filed on 4 May 2007 took issue with a number of factors raised in Tong's affidavit as to Singapore being the more appropriate forum. Tsan objected in particular to the allegation of "judge shopping" by the defendant. He contended that Justice Stone would be the most appropriate person (from the perspective of efficiency and costs) to hear the plaintiff's claim as he was familiar with the background facts. He countered that if the plaintiff was unhappy with Justice Stone's decision, they could have appealed but they did not. Tsan further disputed that Singapore was the parties' choice of law pointing out that the draft distributorship agreement did not become a reality. Tsan questioned why the plaintiff had not objected to Hong Kong jurisdiction in the Hong Kong action if indeed Singapore was the more appropriate forum. Finally, he suggested that cross-examination in Singapore via video-link would resolve the issue of any reluctance on the part of Chuah to testify for the plaintiff in the Hong Kong courts.

The decision

24 The legal principles governing whether a stay should be granted on the basis of *forum non conveniens* are settled and were not disputed by either party.

25 The tried and tested two-stage inquiry test enunciated by the House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 was reiterated recently by our Court of Appeal in *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR 377 and is as follows:

(a) the first stage ("stage one") is to determine whether there is prima facie some other available forum which is more appropriate than Singapore for the case to be tried. The burden of satisfying stage one is on the defendant.

(b) the second stage ("stage two") applies only if the court concluded in stage one that there was a more appropriate forum. The court would then ordinarily grant a stay unless there are circumstances by reason of which justice required that a stay should nonetheless not be granted. The burden is on the plaintiff to satisfy stage two of the inquiry.

26 Under stage one, the following factors were to be considered to determine if Singapore was the appropriate forum in the circumstances of the case:

(a) general connecting factors;

(b) the jurisdiction in which the tort (or breach of contract) occurred; and

(c) choice of law (whether the choice of law clause in the contract was exclusive and if not, which law should be applied to the claims).

Different weightage would be accorded to each connecting factor depending on the nature of the dispute.

27 I was of the view that the defendant had failed to discharge the burden under stage one. As such, there was no necessity to proceed to stage two of the inquiry and for the plaintiff to persuade

the court that a stay ought not to be granted notwithstanding that Hong Kong was the more appropriate forum for this dispute.

28 I noted that whilst the plaintiff was prepared to allow the defendant its day in court in the Hong Kong action, the defendant was not similarly prepared to allow the plaintiff its day in a Singapore court. Tsan's argument (*supra* [23]) that the plaintiff could have but failed to challenge Hong Kong's jurisdiction in the Hong Kong action was misconceived. The defendant is a Hong Kong company and has every right to sue in its place of incorporation just as the plaintiff should be able to sue in its place of incorporation which is Singapore. Moreover the plaintiff had a business presence in Hong Kong at the material time but not now.

29 I was not convinced by Tsan's denial of "judge shopping". It was very clear (and I so informed counsel for the defendant) that the defendant's primary motive by the stay application was to have Justice Stone hear this claim in the Commercial Court in Hong Kong and rule in its favour as he had done in the Hong Kong action. Any doubts I may have on this score were removed by Tsan's own (first) affidavit where he said (at para 24):

> Further, I understand from the Defendant's solicitors Blank Rome that the Hong Kong Court had only 1 dedicated judge hearing matters in the Commercial List, Mr Justice Stone. It would be anticipated that any proceedings in Hong Kong would be commenced in the Commercial List. If the Plaintiffs issued proceedings in Hong Kong other than in the Commercial List, the Defendants could apply for those proceedings to be transferred to the Commercial List and I am advised by the Defendants' solicitors Blank Rome that it is highly likely that such an application would be successful. Mr Justice Stone heard the Hong Kong Suit and is familiar with the background facts in relation to the distributorship agreement.

30 Furthermore, it did not lie in the defendant's mouth to say that the plaintiff failed in its attempt to introduce a counterclaim in the Hong Kong action when it was the defendant's own action that denied the plaintiff this right. It is significant that both of Tsan's affidavits contained no rebuttal whatsoever of Tong's allegation that the lateness of the plaintiff's attempt to amend its defence to include a counterclaim in the Hong Kong action was wholly attributable to the defendant's eleventh hour disclosure of crucial documents in the Hong Kong action. To add insult to injury, the defendant capitalised on its own wrongdoing by objecting (on which it succeeded) to the plaintiff's late application to amend its defence to include a counterclaim. The plaintiff was severely prejudiced in the Hong Kong action despite not being at fault. The defendant's action should not be condoned by denying the plaintiff the right to have its claim based on secret profits heard by a Singapore court.

31 I did not accept Tsan's suggestion that Chuah's reluctance to testify if this claim was adjudicated in Hong Kong could be overcome by video-link testimony. He/the defendant overlooked the important fact that as he is no longer an employee of the plaintiff, Chuah as a crucial witness cannot be compelled or even persuaded to testify for the plaintiff (by whatever means) if the plaintiff's claim is not tried in a Singapore court. A Hong Kong court has no extraterritorial jurisdiction to issue a subpoena for service outside Hong Kong to summon the attendance of a witness not resident in Hong Kong to testify at a Hong Kong trial. Similarly, a Singapore court has no power to compel a Singapore resident to attend a foreign court to testify. The plaintiff would also suffer the prejudice of having to provide security for costs as a foreign plaintiff if this claim is tried in Hong Kong.

32 As for the expense and inconvenience of getting the defendant's non-resident witnesses to testify in Singapore, my short answer to this objection is that no witnesses other than Mirinda would be necessary. The plaintiff's claim is based on the defendant's audited financial statements. This

means that the defendant cannot dispute the figures nor is there a necessity to formally prove the documents before a Singapore court.

33 Apart from identifying the defendant's possible other witnesses (3 in number including himself) in para 22 of his first affidavit, Tsan did not elaborate on what he and the other potential witnesses would testify to at the trial of this claim.

34 I considered the question of documentation at best a neutral factor. Just as the plaintiff may have to bring voluminous documents to Hong Kong if the trial takes place in Hong Kong, the defendant may have to bring voluminous documents to Singapore if the trial takes place here. The inconvenience and expense of either possibility is easily compensated by an appropriate order for costs and disbursements.

35 I agreed with the AR that the applicable law in this case had not been clearly shown one way or the other, whether it was Hong Kong law or Singapore law. There was no choice of law clause purely because the agreement was oral. Even so, there were many links between the agreement and Singapore in that the plaintiff is a Singapore company, the agreement and its performance emanated from Singapore and as the defendant had not shown otherwise, a Singapore court is entitled to assume there were no differences between contract law in Singapore and Hong Kong, as both jurisdictions inherited their contract law from English common law.

36 For the various reasons I have stated, I dismissed the Appeal with costs to the plaintiff.