IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 248

Suit No 1004 of 2020
(Registrar's Appeal No 210 of 2021)

Between

1. The King's Challenge Pte Ltd
2. McGoun IV, Samuel Harvey

… *Plaintiffs*

And

Baer-Richner, Gabriele

… *Defendant*

JUDGMENT

[Civil Procedure] — [Service] — [Service out of jurisdiction]

The King's Challenge Pte Ltd and another
v
Baer-Richner, Gabriele

[2021] SGHC 248

General Division of the High Court — Suit No 1004 of 2020 (Registrar's Appeal No 210 of 2021)
Choo Han Teck J
30 September, 26 October 2021

29 October 2021 Judgment reserved.

Choo Han Teck J:

1 This action is incipient because an order, obtained *ex parte*, for leave to serve the writ and statement of claim out of jurisdiction was set aside by Assistant Registrar Gan Kam Yuin, and the plaintiffs now appeal to this court against AR Gan's decision. The application was made under O 11 r 1(*d*) of the Rules of Court (2014 Rev Ed). The plaintiffs are seeking damages and other reliefs for an alleged breach of contract, being a contract that is governed by the law of Singapore (O 11 r 1(*d*)(iii)). The *ex parte* order was granted on 5 January 2021, and was then set aside by the AR on 23 July 2021.

2 Mr Dinesh Dhillon appeared as counsel for the plaintiffs and conceded right away that the Statement of Claim was in need of repair. That was both an understatement and an act of kindness. The Statement of Claim sought to be served on the defendant is a potpourri of evidence, argument, and travel

brochure. Properly pleaded, the 14 pages could have been reduced to four at most. But that would still have left out the most crucial part of a statement of claim — the cause of action. Mr Dhillon, I gather, had nothing to do with the pleadings; and he had arrived too late to rectify its problems.

3 The Statement of Claim conveys an enthralling story about how the plaintiffs had created a "life-changing travel experience" named "The King's Challenge Journey", which was to involve a tour of Bhutan with "His Royal Highness Prince Jigyel Ugyen Wangchuk". It was to be a journey that offers "the historic opportunity to travel with [His Royal Highness] in the footsteps of [His] family, experiencing the Kingdom through the eyes of Kings and sharing in this legacy by helping to preserve and sustain it for the world's generations to come". We are, still at page one of the Statement of Claim, but I do not intend to repeat all of it in my judgment.

4 That was the introductory background. It is now important to set out the parties in this action. The first plaintiff is a company incorporated in Singapore and the second plaintiff is its sole shareholder and director. The second plaintiff is only a permanent resident of Singapore, but he does not tell us what his nationality is although the defendant says that he is an American. The defendant is a Swiss national residing in Switzerland. These facts, though incomplete, are, at least, clear.

5 I am compelled to return to the mess, also known as the Statement of Claim. After a further advertisement of the travel tour, the Statement of Claim abruptly informs us of the defendant's personal problems, with no details of what those problems were, except that she felt that taking "The King's Challenge Journey" would be an emotional balm to her problems, describing it,

or so the plaintiffs claim, as an "experience of body, mind and soul". She also described it as "a miracle", and was the plaintiffs' "gift sent from heaven". And therefore, so the plaintiffs claim, on 2 October 2014 the defendant made the decision to go on "The King's Challenge Journey".

6 The plaintiffs claim that the defendant orally agreed on 23 July 2014 and confirmed in an email of the same date to travel on "The King's Challenge Journey" from 5 October to 16 October 2014. Those dates were subsequently changed at the defendant's request to 28 March to 10 April 2015. We are then told how disappointed His Royal Highness was by the postponed trip because of "the enormous scope" of the venture, involving "dozens of Bhutanese senior leaders" and "a hundred Royal bodyguard" as His Royal Highness had "built his schedule around the defendant's travel dates".

7 Nonetheless, on 2 October 2014, the defendant met the second plaintiff again at her home in Zurich, where another discussion was allegedly held, and according to the plaintiffs, the defendant affirmed that she would take four places for herself and her children for the tour. It is not clear if this was a reference to the 5 October 2014 tour or the 28 March 2015 tour. But since this discussion was close to 5 October 2014, the parties were probably referring to the 28 March 2015 tour. The price for each seat on the tour was US$90,000.

8 Many paragraphs of the plaintiffs' grievances pass before we arrive at paragraph 33 in which we are told that on 5 February 2015, a "Mr Michel Vukotic, a close associate of the defendant's husband Mr Raymond Baer" wrote to the plaintiffs informing them that the defendant would not be travelling on "The King's Challenge Journey". Thereafter, the defendant became uncontactable, as the plaintiff claims.

9 Many more pages about the involvement of the Royal family, intermingled with more grievances of the second plaintiff follow. The second plaintiff claims to suffer depression and a mental breakdown as a result of the defendant not going on "The King's Challenge Journey". Part of his grievances was having to sell his shareholding in American Express, his former employer, and using that to pay the first plaintiff (which is really, himself) the US$360,000 fees that the defendant ought to have paid for her four "tickets" on "The King's Challenge Journey" (it is unclear whether the tickets were issued). The second plaintiff is thus claiming the US$360,000 from the defendant, by way of "reimbursement", because "it was too late not to proceed with 'The King's Challenge Journey'", as the plaintiffs had already arranged for services such as the rental of helicopters, hotels and flights. Hence, the second plaintiff claims, that he had no choice but to sell his stock in his previous employer, American Express, in order to cover the shortfall for the four places. He is also claiming US$1,147,826 "being tax paid by him" for the sale of his American Express shares. Finally, he is also claiming $14,135.90 for his medical fees on account of his mental breakdown. I am, of course, not concerned with how the claims might be justified, but the plaintiffs must plead the cause of action, whether in tort, contract, unjust enrichment, or all of that. Just saying he and the first plaintiff want a reimbursement is not sufficient, and on that alone, no judicial officer would allow such a rambling, aimless, and impotent claim to be served out of jurisdiction.

10 I will now consider Ms Aw Wen Ni's legal arguments. Ms Aw is counsel for the defendant. She argues that our courts have no jurisdiction over a defendant who is neither present in Singapore nor has any property in Singapore — unless that defendant has been served with a writ under O 11 r 1 of the Rules

of Court. Order 11 r 1 allows an originating process to be served out of Singapore if one of the conditions set out in O 11 r 1 is satisfied. The plaintiffs relied on the following conditions under O 11 r 1(*d*) that:

> (*d*) the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which —
>
> > (i) was made in Singapore, or was made as a result of an essential step being taken in Singapore;
> >
> > (ii) was made by or through an agent trading or residing in Singapore on behalf of a principal trading or residing out of Singapore;
> >
> > (iii) is by its terms, or by implication, governed by the law of Singapore; or
> >
> > …

11 Hence, it is as crucial to the plaintiffs that they obtain an order for service of process out of jurisdiction, as it is crucial to the defendant, that they do not. It is incumbent on the plaintiffs to show a good arguable case that their claim comes within one of the conditions in O 11 r 1. Further, the plaintiffs must show that their claim has sufficient merit, and that Singapore is the proper forum for the trial of the action (*Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500; *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779). Ms Aw argued that the plaintiffs have not shown a good arguable case that any of the abovementioned conditions had been satisfied. She also submitted that the plaintiffs' claim does not have a sufficient degree of merit; it is unclear what was the breach of the alleged oral contract, and when the breach took place. She submitted that the plaintiffs' claims are also time-barred under the Limitation Act (Cap 163, 1996 Rev Ed). Going by the plaintiffs' claim, the cause of action would have accrued by 2 October 2014, when the defendant did

not pay the 50% deposit. The plaintiffs also fail to show that Singapore is clearly the more appropriate forum. The defendant is resident in Switzerland. The attendees of the dinner who allegedly witnessed the oral agreement are all located in Switzerland. None of the meetings and discussions between the parties took place in Singapore. Hence, Singapore is clearly not the more appropriate forum.

12 On the issue of the time bar raised by the defendant, the plaintiffs' response is that the relevant breach took place on 29 January 2015, when the defendant confirmed in her e-mail that she could not "go on a trip of the dimension of the King's Challenge". Since the writ was filed on 19 October 2020, the relevant six-year period has not lapsed. Time bar may be a relevant factor where a contract is pleaded, and since there is no clear date of the contract, there are no co-ordinates with which I can consider whether time bar is a strong defence. That, of course, is no fault of the defendant. The burden of showing when the contract was made is on the plaintiffs. I am prepared to accept that the claim is not time-barred if the plaintiffs' case is that the breach occurred on 29 January 2015. But for all the reasons I elaborate below, the plaintiffs have failed to show how the present claim can be served out of jurisdiction.

13 Mr Dhillon submits that O 11 r 1(*d*)(i), (ii) or (iii) are individually sufficient to warrant an order for service out although he seems to place most reliance on O 11 r 1(*d*)(iii). It is to that end that he sought leave, which I reluctantly granted, to adduce evidence from a Swiss lawyer, Sylvain Marchand, to say that the Swiss courts would have applied Singapore law to the 'agreement between the first plaintiff and [the defendant]'.

14 There are fundamental problems with this opinion. First, it is dependent on there being a contract between the first plaintiff and the defendant. There must at least be *prima facie* evidence that a contract has been made. The Statement of Claim does not plead a contract other than saying that the defendant orally agreed to join the tour. The terms of such a contract have not been set out nor a breach pleaded save to say that the defendant changed her mind about going. It is not at all clear when exactly the contract was made, nor were terms pleaded. Moreover, what a Swiss court would apply to determine the governing law of the contract depends on the conflict of laws rules of the Swiss court as the *lex fori*. Insofar as the Singapore court is concerned, it is the Singapore conflict of laws rules that determine the governing law of the contract. Hence, the Swiss opinion on what the Swiss court would do is irrelevant.

15 Secondly, the plaintiffs' Swiss law expert made clear that the condition of 'ordinary consumption' in Swiss law may be an obstacle to the plaintiff's claim. This condition limits the amount that might be recovered, but the lawyer ventured to say that he is of the view that this condition does not apply on the facts of this case. That, surely, has placed the cart before the horse. Whether the condition of 'ordinary consumption' applies is a matter for the Swiss courts, which has first to determine whether the applicable substantive law should be Singapore law or Swiss law. In spite of Mr Marchand's optimistic assertion that the Swiss Court would apply Singapore law, I do not think that the matter will be so simply accepted, whether in the Swiss courts or ours, in the light of the fact that there are so many competing claims, and the utter failure of the plaintiff to state what his cause of action is. Even if we were to assume that it may be based on contract, the exact terms of the contract have not been set out.

16 Turning to the issue of the governing law of the contract, Mr Dhillon submits that Singapore law is the governing law by implication — as the first plaintiff is registered in Singapore, the second plaintiff is a permanent resident in Singapore, and there is an express clause for the 7% Goods & Services Tax ('GST') in the Deposit Letter dated 2 October 2014 which the defendant failed to pay. But none of these shows that Singapore law would be the governing law of the contract — if it can be said that there is a contract at all.

17 In determining the proper law of the contract, the court will examine whether there are express statements of the governing law; in the absence of which, the intention of the parties might be inferred from the circumstances. If that cannot be done, the court may consider to which system of law the contract has the most close and real connection. That system would be taken, objectively, as the governing or proper law of the contract (*Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 at [36] citing *Overseas Union Insurance Ltd v Turegum Insurance Co* [2001] 2 SLR(R) 285).

18 Since there is no written contract to speak of, I will have to examine the parties' intentions on what the governing law should be for the contract (or rather, the putative contract). The circumstances of this case do not point to Singapore law being the governing law of the contract. The meetings and discussion between the parties never took place in Singapore. The 'King's Challenge Journey' leads straight to the royal palace of Bhutan and not Singapore. Even when the second plaintiff pressed the defendant for an answer in an email dated 25 December 2017, he threatened to sue her in the Swiss courts. Furthermore, the second plaintiff had also invited the defendant to mediate in the Swiss Chambers' Arbitration Institution. By the alleged oral

agreements, payments were to be made in either Swiss Franc or US Dollars. As for the GST issue, the Deposit Letter dated 7 October 2014, as revised by the plaintiffs, was in fact, ambivalent as to whether GST applied to the fees for the journeys. The letter states that "[o]ur financial advisors are evaluating whether journeys sold by [the first plaintiff] are subject to Singapore Goods & Services Tax". These are purported facts and evidence found in the second plaintiff's affidavit dated 30 October 2020, and not in the Statement of Claim. With these ambiguities and inconsistencies, I am not persuaded that Singapore law is the governing law.

19 Nonetheless, I shall consider whether the plaintiffs' claim succeed on the other limbs of O 11 r 1. The counsel's argument that the plaintiffs' claim falls within O 11 r 1(*d*)(i), is without merit. The agreement, as pleaded, seems clearly to have been made in Zurich, and the essential first step referred to in O 11 r 1(*d*)(i) is hinged to that agreement in Zurich.

20 The plaintiffs cannot rely on the alternative ground under O 11 r 1(*d*)(ii) either. The requirement in O 11 r 1(*d*)(ii) is that the contract must have been made through an agent trading or residing in Singapore, on behalf of a principal trading or residing out of Singapore. The plaintiffs' case is that the second plaintiff entered into the oral agreement on behalf of the first plaintiff. The first plaintiff is not an agent of a principal trading or residing out of Singapore, nor a principal residing out of Singapore, since it is a Singapore-incorporated company. Assuming that the second plaintiff is an agent residing in Singapore acting on behalf of the first plaintiff, there is also no evidence of how the first plaintiff trades out of Singapore. Although there is an agreement for a helicopter service, signed by the second plaintiff on behalf of the first plaintiff, and an

order to purchase camping equipment from a foreign company, there is no evidence of the first plaintiff's trading activity. The two transactions are corporate expenditure, not trading.

21 Further, O 11 r 1(*d*)(ii) does not apply where the foreign principal in question is the plaintiff, and not the defendant. It would be not be justified to subject a foreign defendant to the jurisdiction of the court where it has an agent in this country, but the mere fact that a plaintiff has an agent trading or residing in Singapore does not give that plaintiff a right to subject the foreign defendant to the jurisdiction of Singapore. However, even if I were to accept that the second plaintiff, being a resident in Singapore, entered the contract on behalf of the first plaintiff which was trading out of Singapore, the plaintiffs' effort to serve out of jurisdiction still fails on other reasons below.

22 Furthermore, that Singapore is the more appropriate forum than Switzerland is far from clear. One of the reasons is that there is another contender — Bhutan. The contract appears to have been made in Switzerland and the performance of which is in Bhutan. The price was stipulated, by the plaintiffs' own reckoning to be in US dollars, but that is a neutral fact. The fact that the plaintiffs are in Singapore merely implies that payment should be made in Singapore, but the there is no averment to that as a term agreed. The only merit in a claim that Singapore is the appropriate forum is based only on the fact that the first plaintiff was incorporated here, but that is virtually the alter ego of the second plaintiff who, as the sole shareholder and director, is a Singapore permanent resident, but an American citizen.

23 Bhutan has yet another important claim to be the more appropriate forum. The plaintiff says that the tour is special because a large part of the

proceeds goes to charities in Bhutan. What is the amount of the proceeds that goes to Bhutan and what amount is retained by the plaintiffs? Even if the plaintiffs are not obliged to inform the defendant, he will have to quantify his damage. We do not know whether the Bhutan royalty has or will be writing off the loss. Mr Dhillon says that His Royal Highness will not be testifying in Singapore, but even so, the evidence of other Bhutanese witnesses may be required. The second plaintiff claims that he had already sold his American Express shares and paid US$360,000 to the first plaintiff, but where is the evidence that the first plaintiff had paid the amount due to Bhutan?

24 In O 11 cases, judges often have to remind themselves that the plaintiff needs a good arguable case. Although a plaintiff does not need to prove its case on a balance of probabilities, even a *prima facie* case in itself will not suffice — it has to be a good arguable case (*Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [45])). In this instance, I have a rather academic choice to make, for the facts as pleaded do not nudge close enough even to a *prima facie* case. They lie somewhere between no case and less than a *prima facie* case; and in the event, I incline towards the former. All this is no fault of Mr Dhillon at all. His attempt to revive a roadkill is admirable, but futile. Perhaps the plaintiffs ought to have stuck to their original intention of suing the defendant in Switzerland. Or Bhutan might end up being the most appropriate forum and the proper choice of law for the plaintiffs — unless, of course, there is more to the Royal assent than the plaintiffs had cared to disclose.

25 I find that every factor under O 11 is against the plaintiffs. The AR was correct to have set aside the original *ex parte* order. I now dismiss this appeal. I will hear costs at a later date if parties are unable to agree costs.

- Sgd -
Choo Han Teck
Judge of the High Court

Dhillon Dinesh Singh, Chee Yi Wen Serene (Allen & Gledhill LLP) for the plaintiffs;
Aw Wen Ni, Ayagari Srikari Sanjana (WongPartnership LLP) for the defendant.