Piong Michelle Lucia *v* Yuk Ming Cheung and others
[2010] SGHC 110

Case Number : Suit No 659 of 2009 (Registrar's Appeal No 50 of 2010)

Decision Date : 12 April 2010

Tribunal/Court : High Court

Coram : Quentin Loh JC

Counsel Name(s) : Carolyn B.H. Tan and Tony Au Thye Chuen (Tan & Au LLP) for the plaintiff/appellant; Kenneth Pereira (Advocatus Law LLP) for the defendants/respondents.

Parties : Piong Michelle Lucia — Yuk Ming Cheung and others

Civil Procedure

12 April 2010

Quentin Loh JC:

1 The Plaintiff, Vice President, Finance of Pan Sino International Holdings Ltd ("Pan Sino"), a Cayman Island Corporation listed on the Hong Kong Stock Exchange, ("HKSE"), sued the Defendants for defamation. The 1st Defendant was an auditor sent by the 2nd Defendant to audit the accounts of Pan Sino. The 2nd Defendant was a company incorporated and based in Hong Kong and were appointed by Pan Sino to be their auditor and to audit its annual accounts. The 3rd Defendant was a company incorporated in Hong Kong under the control of or closely associated to the 1st and 2nd Defendants and provided corporate secretarial services to clients of the 1st and 2nd Defendants. These facts appeared from the Statement of Claim and the Plaintiff's Affidavit affirmed on 25 August 2009.

2 The Plaintiff obtained leave under O 11 r 1(c), (f), (p) and (q) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) to serve the Writ on the Defendants in Hong Kong. Various applications were made. The appeals before me concerned two applications:

(a) Summons No 5283 of 2009: the Defendants' application for a stay of proceedings on the ground of *forum non conveniens* (there were other prayers in the summons, including whether there was proper service of the Writs on the Defendants, but they were not before me); and

(b) Summons No 5472 of 2009: the Plaintiff's application for interlocutory and/or final judgement against the Defendants, for damages to be assessed, for a full and complete withdrawal of all defamatory statements and a written apology on terms to be agreed to by the Plaintiff, for an apology in terms acceptable to the Plaintiff to be published in the major newspapers in Singapore, Jakarta, Makasar and Hong Kong, and for costs and interest.

AR Ang Ching Ping heard these applications on 26 January 2010 and granted the stay, holding that the Defendants had discharged their burden in showing that Hong Kong was a distinctly more

appropriate forum, and that there were no special circumstances requiring the trial take place in Singapore. She dismissed the Plaintiff's application for judgment. Costs were also awarded against the Plaintiff. The Plaintiff appealed against those decisions. After hearing counsel, I dismissed the appeal with costs on 4 March 2010. The Plaintiff wrote in for further argument, I acceded to the request and after hearing further argument, I saw no reason to change my mind. The Plaintiff appealed against my decision on 31 March 2010.

3 The Writ of Summons, endorsed with a Statement of Claim was filed on 29 July 2009. In the Statement of Claim, the Plaintiff alleged the following defamatory acts:

(a) the 1st Defendant defamed the Plaintiff by sending an email dated 29 April 2008 to one Mr Lau Kee Swan ("LKS") in Singapore and copied to one Mr Rudi Zulfian ("Rudi") and the 2nd Defendant, alleging that the Plaintiff was "very cunning and dishonest" and told lies to them;

(b) the 1st Defendant defamed the Plaintiff by sending an email dated 30 April 2008 to LKS and Rudi alleging that the Plaintiff was doing two of them a "big dis-service" and giving the impression that they were rushing to "cover up some very bad things from the shareholders and regulators", that the Plaintiff should be replaced, that retaining her was a "high risk" to them and Pan Sino and its shareholders and to the auditors, and that the Plaintiff was "not ethical, not truthful and not fit to be an accounting person of a listed company who should behave honestly and fairly";

(c) the 1st Defendant sent an email dated 10 June 2008 to LKS, copied to Rudi, stating that the Plaintiff was "toxic, unfair, lying, attacking, bullying, threatening and like so much to frame up people", that was why they had to complain to LKS, and that continuing to use the Plaintiff would "keep [LKS] in an endless cycle of stressful struggle with others in the future";

(d) the 3rd Defendant sent an email to one Ms Nelcia of Portcullis Trustnet Ltd ("Portcullis") in the British Virgin Islands, who in turn forwarded the email to Mr Mohan Abraham, an advocate and solicitor in Singapore, stating that it was unlikely that Ms Nelcia would get a reply from her "master client as she has absconded from Singapore to avoid a criminal charge and the pursuit by the Indonesian government on certain suspected fraud";

(e) the 3rd Defendant sent a letter dated 17 June 2009 to the Chairman of Platinum Securities Ltd, one Mr Lui Chee Ming ("Mr Liu") in Hong Kong, asking that he freeze shares registered in the name of Silk Route International Ltd ("Silk Route") (279,741,000 shares) and Flanders Fields Corporation ("Flanders Fields") (179,659,000 shares), stating that his assistance in holding the shares and not transferring them to anyone was necessary to facilitate police investigations in Police Case No CCB 08008767 relating to a police report dated 16 June 2009 that had been lodged to report the theft of the abovementioned shares from Mr Harmiono Judianto ("Judianto");

(f) the 2nd Defendant sent a letter dated 9 July 2009 to G W Barth AG ("GWB") of Germany referring to the purchase of a plant from them by Hesley Cocoa International Pte Ltd, ("Hesley Cocoa"), and stating that it was conducting an audit investigation of Hesley, asking for confirmation of the total purchase price at S$19,877,225 or €9,341,460 and confirmation

that there was no amount due to GWB as at 31 December 2007 and 31 December 2008; and

(g) the 3rd Defendant sent a letter dated 17 July 2009 to Tricor Tengis Ltd ("Tricor") in Hong Kong, asking for some share certificates, copies of letters, notices or other correspondence sent to Judianto by Tricor or others concerning any of the shares, stating that they needed to find out the truth as they were "afraid that the loss may not be traced and recovered as the particular directors who [were] suspected to have arranged the matters including the transfer forms [had] closed Pan Sino's head office in Jakarta and disappeared", as a result of which the annual reports of 2007 and 2008 had not been issued on time to the shareholders as were required under the listing rules, and asking for the two transfer forms, without redaction, to ascertain the identities and addresses of the two transferees from the Standard Transfer Forms where Judianto was described as the seller or transferor although he did not know or agree to the sale or transfer.

The Plaintiff also alleged that she was the CEO and substantial shareholder of Hesley Cocoa, which was intended for public listing on the Singapore Stock Exchange and that she was widely known as the founder and key person behind Hesley Cocoa; she had been involved in businesses in Singapore, Indonesia and Hong Kong for many years. The Plaintiff alleged aggravating factors in support of her claim for damages.

4 Numerous affidavits were filed by the parties and further facts emerged from these affidavits. The 1st Defendant filed affidavits on behalf of all the Defendants. The subparagraphs below set out some of the facts alleged in the 1st Defendant's Affidavit of 16 October 2009.

(a) The Plaintiff controlled a BVI company, Tapleys, which was a substantial shareholder of Pan Sino.

(b) The 2nd Defendant was appointed auditor of Pan Sino for 2007. Prior to that, another audit firm, Li, Tang and Cheng were the auditors. That firm issued a heavily qualified or adverse audit report for Pan Sino for the year ending 31 December 2006. Prior to the 2006 audit, PKF Certified Public Accountants ("PKF") and Andrew Ma (DFK) Ltd ("Andrew Ma") were Pan Sino's auditors. Both PKF and Li, Tang and Cheng resigned whilst Andrew Ma, another auditor, was removed by Pan Sino.

(c) The 2nd Defendant issued an adverse report for the year ending 31 December 2007. In the exhibited report, 2 pages of reservations on various items were set out. One of those items was the inability to verify whether inventories of HK$8.33 million, accounts receivable of HK$89.07 million, deposits in respect of a factory under construction in Singapore of HK$149 million, and payment of HK$100 million for a purported joint venture had been correctly stated. Another was the insufficient information over a dispute between Pan Sino and its subsidiaries, the builder and the principal supplier over the Hesley Cocoa factory and the recovery of HK$163 million in relation to that dispute. A third related to a doubtful payment of HK$140.68 million to Vantage Unicom Holding Ltd, a BVI company with an Indonesian subsidiary. Other items concerned transactions and balances with customers on which satisfactory audit evidence could not be obtained. After setting out the above, the 2nd Defendant stated in that audit report that the directors required them to give a "good and clean report" stating that except for two items the financial statements showed a true and fair view of the company, and to give a sign off on a draft audit report adapted from the 2nd Defendant's draft with an implicit threat that the 2nd Defendant's fees would not be paid if

they did not co-operate. The report stated that the 2nd Defendant did not agree to that.

(d) Judianto, one of the shareholders of Pan Sino (and former spouse of the Plaintiff), complained to the 2nd Defendant in late 2008 that 279,174,000 of his shares in Pan Sino had been stolen or unlawfully transferred to another BVI company, Silk Route and another 177,266,000 shares had been similarly transferred to Flanders Field.

(e) That alleged theft from Judianto was reported to the Hong Kong police who were investigating the matter.

(f) Tricor was the share registrar of Pan Sino. Hence the Defendants wrote the letter of 17 July 2009 (see [3(g)] above) to Tricor for information and documents on the transfer of Judianto's shares. There were discussions and correspondence between Tricor and the Defendants.

(g) The letter to GWB was also to ascertain facts and confirmation of amounts paid to them by Pan Sino, There was no reference to the Plaintiff there.

(h) Portcullis was a company in BVI representing Silk Route and possibly used by the Plaintiff to incorporate Silk Route. The email complained of only showed the email from the 3rd Defendant to Portcullis. The Plaintiff had not produced the purported email sent to Mr Mohan Abraham.

(i) LKS was first represented to the Defendants to be the "boss". The Defendants later found out that LKS was in fact the Plaintiff's lover or consort and they stayed together at the same address, at 43 Jalan Anggerek which was owned by LKS. The 1st Defendant stated that strangely, if the email to LKS (at [3(a)] above) was defamatory, LKS's reply was an apology to the 1st Defendant for the Plaintiff's behaviour. (That email and subsequent emails were exhibited in the 1st Defendant's Affidavit.)

(j) Complaints had also been lodged with the Securities and Futures Commission in Hong Kong by the Defendants' staff.

(k) The complainants of the reports in Hong Kong and Jakarta, Mr Johanas Herkiamto and Judianto, were willing to give evidence in Hong Kong if necessary but not in Singapore.

(l) The Defendants would be relying on expert evidence both from the private sector and the governing body of auditors in Hong Kong as to their duties, the manner of performance of their duties, their reasons for making the enquiries that they did and whether they were justified in doing so, and whether it was in accordance with the practices and standards applicable to auditors in Hong Kong. This would include reliance on officials from the HKSE, on

audit standards for listed companies in Hong Kong as well as the Hong Kong police.

(m) The Defendants would be calling the previous auditors.

5 From the affidavits filed, there was obviously going to be substantial dispute on the facts when the matter went to trial. However it was fairly clear what the issues were likely to be in the defamation claim.

6 The principles applied in deciding the appeal were well settled. There was a considerable body of Singapore case law covering the area. There is little to be gained by repeating them here.

7 Both counsel accepted, quite rightly, that the principles in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*") were to be applied here. Those principles were well known and well set out in *Singapore Civil Procedure* 2007 (Sweet & Maxwell, 2007) at para 11/1/9 and Jeffrey Pinsler's *Singapore Court Practice* 2009 (LexisNexis: 2009) at pp 145 – 148. From these texts, it was settled law to consider the alleged facts and issues in two stages with the latter stage broken down further into two:

(a) First, the Plaintiff had the burden of proof in applying for leave under O 11 to show that her case fell under r 1, and further, the Plaintiff had to satisfy the court that it was proper to exercise its discretion to grant leave to serve proceedings outside the jurisdiction.

(b) Second, when it came to the stay application on the ground of *forum non conveniens*, the *Spiliada* prescribed a two stage test:

(i) First, the burden of proof would be on the Defendants to show the court why it should exercise its discretion to stay the proceedings. The fundamental principle was that the court would choose that forum in which the case could be tried more suitably for the interests of all the parties and for the ends of justice. The Defendants had to show not merely that Singapore was not the natural or appropriate forum, but that there was another available forum which was clearly or distinctly more appropriate than Singapore. The Defendants had to show that there was that other forum with which the action had the most real and substantial connection, *eg*, in terms of the nature of the dispute, the legal and practical issues involved, questions such as local knowledge and practices, the convenience or expense, the availability of witnesses, the law governing the dispute, and the place where the parties reside or carry on business.

(ii) Second, having weighed these factors, if the court came to the conclusion that there was available another distinctly more appropriate forum, then the burden shifted to the Plaintiff to show the court why, because of some special reasons or circumstances, the court should not grant a stay, *eg*, the Plaintiff would not obtain justice in the foreign jurisdiction.

8 The Plaintiff contended that her claim had nothing to do with Hong Kong and everything to do with Singapore. She was a Singapore Permanent Resident and in her third affidavit, filed on 23 November 2009, she exhibited a redacted copy of her Identity Card. She alleged in five bare

paragraphs that she had strong local roots, all her children were studying here, Singapore was the place she called her home and she was an honourable well respected person in the community with integrity and of substantial means. The Defendants strongly disputed this claim and pointed to her exhibited identity card with the number redacted thereby preventing any checks and queried whether she still had her permanent residency status in Singapore. Because of this submission, at the hearing of an application for security for costs on 21 December 2009, AR Ang ordered the Plaintiff to furnish security unless she gave confirmation on affidavit that (a) she still remained a Singapore Permanent Resident, (b) her Singapore permanent residency status had not been revoked and (c) she was ordinarily resident in Singapore. The Plaintiff filed a further affidavit on 23 December 2009 which repeated some of her earlier statements and additionally confirmed her Permanent Resident status had not been revoked and deposed:

> As deposed in my Affidavit filed herein on 23rd November 2009, **I am therefore ordinarily resident in Singapore**. What is the meaning of "not a foreigner" as I had deposed? What is the meaning of a place being one's home?
>
> [emphasis in the original]

Yet when this matter was argued before AR Ang she asked counsel for the Plaintiff, Ms Tan:

> Ct: Where does the Plaintiff conduct her work?
>
> DC: In Indonesia. She wanted to relocate to Singapore but the plant failed. The Plaintiff's work in Hong Kong is where the shares of Pan Sino are listed and that is purely coincidental.

Despite her claims of having roots here, Singapore being her home and being of substantial means, the Plaintiff lived in rented premises (see para12(a), Plaintiff's Affidavit filed on 23 November 2009). I was therefore left with a question mark in my mind where the Plaintiff resided. The fact that she still had her permanent residency in Singapore did not necessarily mean she spent most of her time here. On her own evidence and her pleaded case her business interests were in Indonesia, Singapore and Hong Kong and her business reputation had been seriously injured in Hong Kong, Indonesia, Germany and Singapore.

9 The Plaintiff contended that the libels were published in Singapore as the three emails at [3(a)-(c)] above were sent to LKS and his email account was with Starhub. I pointed out that it was quite possible, if Mr Lau was in Indonesia or outside Singapore at that time, he could have accessed his email account outside Singapore, in which case the publication would have been outside Singapore. Ms Tan accepted that possibility but said that LKS lived in Singapore. LKS appeared to be a Singapore citizen as he owned landed property of 346.7 square metres at 43 Jalan Anggerek, Singapore. In an affidavit filed on 24 November 2009, Rudi Zulfian, the Chief Executive Director of Pan Sino, said LKS was the Chairman of Pan Sino. I assume that LKS therefore opened and read his emails in Singapore.

10 The Plaintiff then contended that her business reputation had been seriously harmed in Singapore. The Plaintiff relied on *Berezovsky v Michaels* [2000] 1 WLR 1004 where a Russian businessman, who frequently visited England because of business and because of his family who were staying there, sued the defendant publisher, who was in New York, over the publication of an article on the plaintiff alleging he was a prominent Russian businessman who also held a senior post in the Russian government, but was in fact a leader of organised crime and corruption in Russia. The article also named another plaintiff, another Russian businessman, as one of the former's criminal associates. Approximately 785,000 copies of that publication were sold in the USA and Canada, 19,000 copies in England and Wales and about 13 in Russia. On an application to dismiss or stay the actions, the High

Court held that England was not the most appropriate jurisdiction for the trial of the action and stayed the same. On appeal, new evidence was admitted to show that the article was known to executives of financial institutions and it had deterred them from entering into or continuing London-based negotiations with companies with which the plaintiffs were associated. The Court of Appeal allowed the appeal and lifted the stay, holding that England was *prima facie* the appropriate forum for the trial of any substantial complaint arising out of the English circulation of a foreign publication, that the plaintiffs connections with the USA were slight and that a trial in Russia, though the place of their strongest connection, would nevertheless be unsuitable. England was therefore the appropriate jurisdiction. The House of Lords agreed holding that the publication in England of an internationally disseminated libel constituted a separate tort so as to permit the bringing of an action in England in respect of the publication in England; the court had to give regard to the principle that the jurisdiction in which a tort was committed was prima facie the natural forum for the dispute. The plaintiffs had significant connections with, and reputations to protect in, England and accordingly the trial of the actions would proceed in England.

11 The Plaintiff also relied on *Bata v Bata* [1948] WN 366, (1948) 92 Sol Jo 574 where the court accepted that the material part of the cause of action in libel was not the writing but the publication, that being the very essence of actionable defamation. There the defendant wrote a circular letter in Zurich libelling the plaintiff, who was chairman of a company in England, but who personally lived in Ontario, Canada. That circular letter was addressed to the deputy manager and managing director of the company in England. The English court therefore had jurisdiction to hear the case as the libels were published to persons living in England.

12 Ms Tan submitted, *inter alia*, that Singapore was the natural forum because the Plaintiff's reputation had been injured in Singapore. She submitted that the Plaintiff's reputation had suffered badly by the libel. In her submission she went so far as to say that the Singapore cocoa factory had to be closed down as a result of the libels thereby causing the Plaintiff severe financial loss. With respect, I do not find any such evidence on the material before me. Paragraph 7 of the Plaintiff's Affidavit filed on 24 November 2009 stated:

> Singapore is therefore the place where my professional and personal reputation was first badly damaged by the Defendants as I am chiefly based in Singapore. In a cruel attempt to ruin and destroy my business ventures in Singapore, the Defendants published various damaging libels as pleaded herein. Indeed shortly after the vicious libels were published by the said Defendants, our Jurong Town Corporation withdrew their support for the start up of Hesley Cocoa International Pte Ltd exhibited herein marked "MLP-2" in the Jurong [I]ndustrial estate which was intended to be one of the largest cocoa factories in the world….

On perusal, exhibit "MLP-2" appeared to be some coloured brochure describing Hesley Cocoa as a wholly owned subsidiary of Pan Sino and with a picture of some building or buildings in the lower one third of the page. It did not refer at all to JTC let alone withdrawal of its support. In Rudi Zulfian's Affidavit of 23 December 2009, he echoed the above:

> The First Defendant has lied on oath. Hesley Cocoa International Pte Ltd ("our subsidiary") could not continue operations because it became economically impossible for it to do so as the Singapore authorities after receipt of the Defendants' vicious libels against the Plaintiff decided to withdraw their support for the valuable manufacturing project. This was done by the withdrawal of the subsidies originally given to our subsidiary.
>
> …

The withdrawal of support as a result of the vicious libels was not only a sad day for the Plaintiff but for Singapore as we had invested more than S$11 million in infrastructure for the project. The factory had been built already at that juncture. The total investment for the project would have been approximately US$250 million…

13 Nowhere in the Statement of Claim does the Plaintiff say how:

(a) those 3 emails to LKS, (who would hardly be the one to extend copies to the JTC);

(b) the email to Portcullis of BVI (and Mr Mohan Abraham, who from an exhibit appeared to be acting for or connected to some parties involved in the transfer of shares and Portcullis was asking for Mr Abraham's consent to issue an answer to the 2nd Defendant's query);

(c) the letter to Mr Liu of Platinum Securities Ltd in Hong Kong;

(d) the letter to GWB of Germany; and

(e) the letter to Tricor in Hong Kong;

came to the knowledge of the JTC. In fact, a very material fact like the withdrawal of the JTC's support and damages flowing from that withdrawal were not mentioned at all as damages suffered as a result of the alleged libels in the Statement of Claim.

14 There was also no evidence or explanation as to why, after the Plaintiff or Hesley Cocoa or Pan Sino had put in S$11 million into the factory in Singapore and after the factory was already constructed, the JTC would withdraw the support of their subsidies just because of the alleged libels set out in the Statement of Claim. The exhibit "RZ-7" in Rudi Zulfian's Affidavit showed a JTC letter dated 13 September 2006 (referring to the JTC's offer letter dated 3 March 2006, which was accepted on 2 May 2006), which waived the annual rent from 7 June 2006 to 28 February 2007, and stated that the previous payment of S$68,537.54 would be for the period 1 to 31 March 2007. There was nothing about a subsidy or a withdrawal of the same. The second exhibit, "RZ-8" was a Channel News Asia Newsflash of 25 September 2006 of 1657 hours, stating *inter alia*, that Pan Sino was investing US$250 million in a cocoa processing plant in Singapore, and that Pan Sino would pump in US$130 million in the first phase. There was a statement at the end that "The group plans to finance its Singapore operations from listing proceeds derived out of Hong Kong." There were two other newspaper articles which did not add much except that Pan Sino, listed in Hong Kong, was the third largest cocoa trader in Indonesia and the factory in Jurong Industrial Estate would be built in two phase – the first phase would be completed "by the end of next year" which by the date of the newspaper report, *ie*, 26 September 2006, meant December 2007. With these large figures being given to the press, it was difficult to see how (as there was no explanation or documentation) because of the withdrawal of a JTC *subsidy*, the project was no longer feasible or floundered.

15 It was clear from the affidavits filed that the Defendants would run defences like justification and/or qualified privilege. It was also clear the Plaintiff would allege malice, to defeat qualified

privilege, and that the matters alleged were not true.

16 From the authorities, the writing of the libel was not the important factor in deciding where the tort was committed. Its publication determined the place where the tort was committed. Giving the Plaintiff the benefit, 3 of the libels by email to LKS were published in Singapore. But the letters to Mr Liu of Platinum Securities Ltd and to Tricor were published in Hong Kong. The letter to GWB was published in Germany. The letter to Portcullis was published in the BVI and probably in Singapore when it was sent to Mr Mohan Abraham.

17 Pan Sino was listed in Hong Kong and was in liquidation. All its papers would be with the liquidator in Hong Kong. Getting any of those papers brought to Singapore was highly unlikely. Whether the Defendants acted properly as auditors or not was something which would involve the practice of auditors in Hong Kong as well as the professional body in Hong Kong. This would include issues of whether they were over zealous, and whether they acted in accordance with accepted practice of auditors in Hong Kong. These witnesses would be in Hong Kong. The 1st Defendant deposed that there were earlier qualified or adverse auditor's reports before the Defendants were appointed as auditors. Rudi Zulfian denied this. I noted that none of these earlier auditor's reports were exhibited in his two affidavits. The Defendants said they would call the previous auditors as witnesses to prove what they said was true. They too were in Hong Kong. Mr Liu and Platinum Securities Ltd were in Hong Kong, as was Tricor, the share registrar. Complaints had been allegedly lodged with the Securities and Futures Commission in Hong Kong, complaints has been lodged with the Hong Kong Police over the theft of shares. The relevant documentary evidence lay in Hong Kong and it was likely that material and relevant documents were with the liquidator and the authorities in Hong Kong. The material witnesses were in Hong Kong and could be compelled to attend by subpoena. There was no suggestion that the law on defamation was significantly different from Singapore or that procedurally the Plaintiff would suffer any particular or peculiar disadvantages there as a result of a different legal system.

18 As noted above, the Plaintiff had not shown how any of the documents sent to GWB, Mr Liu of Platinum Securities Ltd, Tricor or their contents had been made know generally to people in Singapore. The only one in Singapore was LKS. He was the chairman of Pan Sino and the Plaintiff's landlord and colleague and I cannot see him broadcasting to the JTC or all and sundry the contents of the 3 emails he received, *a fortiori*, if he is more than just her landlord.

19 AR Ang was applying the correct principles, correctly assessed the facts in this case and came to the correct conclusion. With respect, I entirely agree with her. The factors pointed clearly to Hong Kong being clearly and distinctly the more appropriate forum in the interests of all the parties and for the ends of justice. The Plaintiff had not shown any special reasons or circumstances why the court should not grant a stay. For these reasons, I dismissed the appeal with costs and despite the benefit of further argument, I saw no reason to change my mind.