Tan Kah Hock and Another v Chou Li Chen and Others
[2008] SGHC 82

Case Number : Suit 267/2007, RA 401/2007

Decision Date : 03 June 2008

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : Lee Mun Hooi (Lee Mun Hooi & Co) for the plaintiffs; Kevin Kwek Yiu Wing (Legal Solutions LLC) for the defendants

Parties : Tan Kah Hock; Tan Kah Hong — Chou Li Chen; Assobuild Construction Pte Ltd; Assobuild Private Limited

Civil Procedure

Conflict of Laws

3 June 2008

Lee Seiu Kin J:

1 This is an appeal against the order of the Assistant Registrar on 4 December 2007 in Summons No 4860 of 2007 in which he ordered, *inter alia*, that:

> the Plaintiffs are to elect by 3rd January 2008 to either amend the Australian Proceedings in Federal Court No WAD 180 of 2007 or amend the Singapore Proceedings in Suit No 267 of 2007 to remove all references to the Shareholders' Agreement, including but not limited to any breach of clause 9 of the Shareholders' Agreement.

2 The defendants' original prayer in the summons was under Rules of Court (Cap 322, R5, 2006 Rev Ed) O 12 r 7(2), for a stay of all further proceedings in this suit until the final determination of proceedings in the Federal Court of Australia in WAD 180 of 2007. When it came up before the Assistant Registrar the defendants amended the prayer to the form of the order that was finally given.

3 The plaintiffs and defendants are shareholders in a company incorporated in Western Samoa called Awap Sgt 26 Investment Limited ("the Company"). The plaintiffs, who are brothers, together hold 50% of the company's shares and the other 50% is held by the defendants. The Company, which is registered in Australia as a foreign company under the Corporations Act 2001, owns a 20-storey office building in Perth, Western Australia ("the Property").

4 The plaintiffs' claim in this suit concerns an alleged agreement ("the Agreement") reached on 7 December 2006 in which the first defendant ("Chou"), on behalf of himself and the second and third defendants, agreed to sell their entire shareholdings in the Company to the first and second plaintiffs for the sum of $9 million and A$2.3 million. The plaintiffs pleaded that the defendants were in breach of this agreement and pray for an order of specific performance or damages in lieu thereof. The defendants' position is that although the parties were in negotiation for sale, no final agreement had been reached.

5 One of the matters pleaded by the plaintiffs concerned the sale on 10 April 2007 of all Chou's

shares in the Company to a company called CN 2000 Holdings Limited ("CN 2000") in which he was a minority shareholder. The plaintiffs pleaded that this was a fictitious sale to a "related corporation", to use Chou's own description. The plaintiffs contend that this was done to circumvent enforcement of their rights under the Agreement. The plaintiffs further pleaded that Chou's sale of his shares to CN 2000 was in breach of a shareholders' agreement executed on 30 April 2006 ("the Shareholders' Agreement") by the first and second plaintiffs and Chou. Clause 9 of the Shareholders' Agreement provides that a party may transfer his shares to a non-party only after giving the other parties the right of first refusal. Chou averred that, for a number of reasons, the Shareholders' Agreement was null and void and of no effect. It is clear that from the plaintiffs' point of view, in the event that they succeed in proving that Chou was in breach of the Agreement it might be necessary to prove breach of the Shareholders' Agreement in order to obtain a rescission of the sale of Chou's shares to CN 2000 in order to avail themselves of an order for specific performance.

6 The plaintiffs filed the writ in this action on 26 April 2007. The defendants filed their Defence on 30 May 2007. This was followed by a number of interlocutories including an application by the defendants to strike out the action which was dismissed by the Assistant Registrar on 26 June 2007 and, on appeal, dismissed by the judge on 23 July 2007. Affidavits for discovery were exchanged in August and on 29 August 2007, the Deputy Registrar directed the parties to set down the suit by 21 November 2007.

7 In the meantime, another battle was brewing between the parties in Perth, Western Australia. Deo Silver Pte Ltd ("Deo Silver") is a Singapore incorporated company that is majority-owned by the plaintiffs who are its directors. On 18 September 2007 the plaintiffs, as first and second applicants, and Deo Silver as the third applicant, commenced suit no WAD 180 of 2007 in the Federal Court of Western Australia ("the Australian suit"). In that action the Company was named as the first respondent and Chou, the third respondent. The fourth respondent was CN 2000 and the second respondent was a Hong Kong company, CN (Hong Kong) Limited ("CNHK"). The applicants alleged that the second, third and fourth respondents, who were all directors or shareholders of the Company, had acted oppressively towards them as members of the Company. On this ground they sought relief under s 233(1)(d) of the Corporations Act 2001 for an order that Chou transfers to the plaintiffs all the shares in the Company that are owned by him or by companies controlled by him at the current market value. The applicants pleaded that the oppressive acts were as follows ([26] and [27] of the statement of claim):

> 26 Mr Chou, as secretary and shadow director of [the Company], and CNHK:
>
> (a) failed or refused to recognise and register Deo Silver's appointments to the board of directors of [the Company];
>
> (b) alternatively failed or refused to appoint Deo Silver to the board of directors of [the Company];
>
> (c) alternatively failed or refused to appoint [the first applicant] or [the second applicant] to the board of directors of [the Company],
>
> thereby preventing [the first and second applicants] from participating in the management of [the Company].
>
> 27 Mr Chou and CNHK have refused to allow Deo Silver to participate in the management of [the Company].

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We repeat paragraphs 20 and 26.

Around June 2007 CNHK instructed the manager of the Property, Knight Frank, not to take any instructions from any of the Applicants regarding the Property, or provide any information about the Property to the Applicants.

8 Paragraph 20 of the statement of claim, referred to in [27], provides as follows:

20 Subsequent to the Notice of Appointment, Mr Chou and CNHK failed or refused to recognise Deo Silver's appointment as director.

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By letter dated 9 August 2007 to the Respondents' Singapore lawyers, Deo Silver asserted that it was validly appointed as a director of [the Company], and sought an undertaking from CNHK that it would not act on behalf of [the Company] without Deo Silver's consent. By letter dated 14 August 2007, the Respondents' Singapore lawyers asserted that CNHK was the sole director of [the Company], and that it would not give the undertaking requested in the letter of 9 August 2007 referred to above. By letter dated 24 August 2007, Deo Silver called a meeting of directors to take place on 14 September 2007. By letter dated 28 August 2007 the Respondents' Australian lawyers stated that the Respondents do not recognise the valid appointment of Deo Silver as a director of [the Company], and that on those grounds they do not recognise the notice of meeting was valid.

By letter dated 28 August 2007 to CNHK, Deo Silver called a meeting of Directors to take place on 29 August 2007. By letter dated 28 August 2007, CNHK reiterated its position that it was the sole director of [the Company], and that it will not be attending the meeting called by Deo Silver.

9 The final three substantive paragraphs of the statement of claim plead as follows:

29 By reason of the matters pleaded in paragraphs 26 and 27 herein ("Oppressive Conduct"), Mr Chou and CNHK conducted the affairs of [the Company] in an oppressive and unfairly prejudicial and discriminatory manner against [the first and second applicants], within the meaning of the Corporations Act 2001…

30 But for the Oppressive Conduct, the matters pleaded in paragraphs 28(f) to 28(j) herein would not have occurred.

31 [The first and second applicants] have suffered loss as a result of the Oppressive Conduct, being unfairly prejudiced and being prevented from protecting their shareholding in [the Company].

The matters pleaded in [28(f)] to [28(j)] are as follows:

(f) CNHK failed or refused to authorise the Stage Two Funding or otherwise provide funding for the Stage Two Works.

(g) CNHK's failure or refusal to authorise funding for the Stage Two Works caused Showgold to

be unable the pay the subcontractors.

(h) The subcontractors refused to complete the Stage Two Works until their outstanding invoices were paid, which caused a delay in completion of the Stage Two Works.

(i) The tenant of the Property is likely to claim liquidated damages against [the Company] for the delay in completion of the Stage Two Works.

(j) The delay in completion of the Stage Two Works has resulted in a loss of rental income which [the Company] would otherwise have received from the tenant for the Property.

10 The pleadings complained of in the application before me, *viz* "references to the Shareholders' Agreement, including but not limited to any breach of clause 9 of the Shareholders' Agreement" are found in [21] to [24] of the statement of claim. There the applicants pleaded the execution of the Shareholders' Agreement ([21]), set out some of its terms ([22]), pleaded that Chou had failed or refused to perform those terms ([23] and [24]). Paragraph 23 pertains to the failure to perform terms in the Shareholders' Agreement calling for the appointment of a new accountant and a new secretary for the Company within a specific time and to appoint either the first or second applicant as a director. Those matters are not before the court in the present proceedings. Paragraph 24 is, and it pertains to the allegation that Chou had caused the transfer of his shares in the Company to CN 2000 without giving the first and second applicants (who are the plaintiffs before me) the first right of refusal as required under the Shareholders' Agreement. In its remaining prayers, the applicants asked for a declaration that any transfer of shares from Chou to CN 2000 was invalid and to be set aside and further or in the alternative, an order for Chou to cause the appointment of the first applicant as a director of the Company.

11 On behalf of the defendants, Mr Kwek submitted that there are two proceedings, in Singapore and Australia, in which essentially the same parties are litigating over similar issues. Mr Kwek contended that this is a case of *lis alibi pendens* and that I ought to uphold the order made by the Assistant Registrar and require the plaintiffs to elect to remove references to the Shareholders' Agreement in one of those proceedings to remove the risk of conflicting findings in two jurisdictions and the inconvenience and expense of having to litigate the same issues twice. On behalf of the plaintiffs, Mr Lee argued that the mere fact that similar issues are being litigated in two courts in different jurisdictions will not move the court to make this order. The court will only do so only if this would be vexatious or oppressive on the defendants.

12 Mr Kwek relied on the decision of Sir Nicholas Browne-Wilkinson V-C in *Australian Commercial Research and Development Ltd v ANZ McCaughan Merchant Bank Ltd* [1989] 3 All ER 65 (*Australian Commercial Research)*. The headnote to this case states as follows:

> The plaintiff, a Queensland company, wished to raise extra capital by the placement of shares and in 1987 entered into an agreement with the defendant, an English company carrying on business in London as a merchant bank, and five brokers for the placement of shares in the plaintiff. The defendant and the five brokers were subsidiaries of an Australian banking group carrying on business primarily in Australia. A dispute arose over the performance of the agreement, each side claiming that the other was in breach. On 13 July 1988 the plaintiff issued proceedings in England against the defendant (but not the brokers) claiming repayment of money paid to the defendant in respect of fees. On 6 October 1988 the defendant served a defence and counterclaim claiming entitlement to remuneration by way of a quantum meruit. In the mean time the plaintiff issued proceedings in Queensland against both the defendant and the brokers claiming damages for breach of the agreement. The plaintiff applied for a stay of the counterclaim

in the English action and offered to stay the English claim so as to permit the whole matter to be litigated in Queensland.

Held -- A plaintiff who initiated proceedings against the same defendant in two separate jurisdictions in respect of the same subject matter was required to elect which set of proceedings he wished to pursue, and if he elected to pursue the proceedings abroad the English action would be dismissed and not merely stayed. On the facts, the appropriate forum for the trial of the action was Queensland and the court would therefore give the plaintiff leave to discontinue the English claim and stay the counterclaim.

13 It can be seen that the situation in that case is a unique one and the decision of Sir Nicholas Browne-Wilkinson V-C was on the basis that Queensland was the appropriate forum. Accordingly he stayed the counterclaim and gave leave to the plaintiff to discontinue the claim. In the course of his judgment, the Vice-Chancellor cited the following passage from Dicey and Morris Conflict of Laws (11th edn, 1987) at 395:

The court may be asked to stay an action in England, or to enjoin an action abroad, in two distinct situations: first, where the same plaintiff sues the same defendant in England and abroad and secondly, where the plaintiff in England is defendant abroad, or vice versa. In the first situation it is not likely that the court would allow, except in very unusual circumstances, the continuation of proceedings by the same plaintiff against the same defendant for a similar cause of action in two different jurisdictions. The court would put the plaintiff to his election, and stay the English proceedings or enjoin the foreign proceedings.

14 The present suit is very different from the factual situation in the *Australian Commercial Research*. First of all, the actions here and in Australia are quite different in nature although the background facts overlap. The present suit is for enforcement of the Agreement in which the defendants had undertaken to sell their shares in the Company to the plaintiffs, whereas the Australian suit is brought on the basis of oppressive conduct by the respondents in relation to the management of the Company.

15 Secondly, the only similar issue in the two suits, here and in Australia, is the question of the subsistence of the Shareholders' Agreement. There does not appear to be any controversy over what its terms are, if it subsists; those terms are set out in writing and the defendants have not in any affidavit denied the interpretation of cl 9 relating to first right of refusal.

16 Thirdly, the question of the subsistence of the Shareholders' Agreement is not the primary issue in either proceedings. The suit before me pertains to the enforcement, not of the Shareholders' Agreement, but of the Agreement, in which the plaintiffs claim the defendants had undertaken to sell their entire shareholdings in the Company to them. The issue of the Shareholders' Agreement is relevant only from the point of view of the relief of specific performance, because the shares are now held by CN 2000 due, the plaintiffs say, to a breach by Chou of his undertaking. If the Shareholders' Agreement is not upheld by the court in Singapore, then this may limit the plaintiffs' remedies to damages. But it does not affect the plaintiffs' substantive claim which is based on breach of the Agreement. In the Australian suit, the primary issue is whether there was oppressive conduct on the part of the respondents. The applicants there had, in pleading that the respondents had engaged in oppressive conduct, limited this to the facts pleaded in [26] and [27], and also [20] on account of the particulars in [27]. None of these paragraphs pertain to the Shareholders' Agreement which is pleaded in [21] to [24]. There the Shareholders' Agreement appears to be pleaded so that the remedy of sale at market value may be available as a remedy. In the event that this is not possible, the alternative remedy of damages had been pleaded and is available to the applicants.

17 In the latest edition of Dicey, Morris & Collins: The Conflict of Laws (14th edn, 2006) the editors state at [12-008], p 466:

> Until the decision of the House of Lords in *The Atlantic Star* a defendant who sought a stay of English proceedings had a very heavy burden. In *St Pierre v South American Stores (Gath and Chaves) Ltd* Scott L.J. restated the principles on which the court acted, the effect of which was that a stay would only be granted if the continuance of the action would work an injustice in the sense that it would be "vexatious or oppressive", and if the stay would not cause an injustice to the claimant. In *The Atlantic Star* a majority of the House of Lords held that, although a plaintiff should not lightly be denied the right to sue in an English court, the words "oppressive or vexatious" should, in future, be interpreted more liberally: in considering whether a stay should be granted, the court should take into account the advantage to the plaintiff and any disadvantage to the defendant. In *MacShannon v Rockware Glass Ltd* a differently constituted House of Lords went considerably further when all, except Lord Keith, were in favour of discontinuing the use of the words "oppressive or vexatious" altogether. In this decision Lord Diplock restated the governing principle as being that, in order to justify a stay, two conditions had to be satisfied, one positive and the other negative: (a) the defendant had to satisfy the court that there was another forum to whose jurisdiction he was amenable in which justice could be done between the parties at substantially less inconvenience or expense, and (b) the stay was not to deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court.

18 The cause of action in the Australian suit is only available to the plaintiffs in Australia as the Company falls within the jurisdiction of the Corporations Act 2001. It is not possible for the plaintiffs to commence that action in Singapore. The plaintiffs have commenced the present suit presumably because Chou is resident or has assets here and the second and third defendants are companies registered in Singapore. There are therefore advantages to the plaintiffs in prosecuting the present suit in Singapore whereas they are compelled to prosecute the oppression action in Australia. In both actions the plaintiffs have deemed it necessary to plead the facts pertaining to the Shareholders' Agreement and in my view it is reasonable for them so to do. I am of the opinion that under these circumstances it is not appropriate for the court to exercise its discretion to require the plaintiffs to make the election that the defendants ask for. For these reasons I allowed the appeal and set aside the order below.