IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 272

Suit No 795 of 2018 (Summons No 2835 of 2020)

Between

Sahara Energy International Pte Ltd

… *Plaintiff*

And

(1) Chu Said Thong
(2) Jo Choon Ho

… *Defendants*

And Between

Chu Said Thong

… *Plaintiff in Counterclaim*

And

(1) Sahara Energy International Pte Ltd
(2) Sahara Energy Int'l Pte Ltd Singapore (Geneva Branch)

… *Defendants in Counterclaim*

And Between

Jo Choon Ho

… *Plaintiff in Counterclaim*

And

Sahara Energy International
Pte Ltd

… *Defendant in Counterclaim*

GROUNDS OF DECISION

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v
Chu Said Thong and another

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Lai Siu Chiu SJ
20 July, 3 August 2020

9 December 2020

Lai Siu Chiu SJ:

Introduction

1 The plaintiff in the present action, Sahara Energy International Pte Ltd ("Sahara"), is a Singapore-incorporated company. Sahara sued Chu Said Thong ("Chu") and Jo Choon Ho ("Jo"), a Singaporean and a Korean respectively, as the first and second defendants (collectively, "the Defendants") in Suit No 795 of 2018 ("this Suit") for breach of their employment agreements with Sahara. The services of Chu and Jo were terminated on 9 July 2017. As is evident from its name, Sahara Energy Int'l Pte Ltd Singapore (Geneva Branch) is the Geneva branch of Sahara ("Sahara Geneva") and it is the second defendant in Chu's counterclaim, with Sahara being the first defendant in that counterclaim.

2 Sahara applied by way of Summons No 2835 of 2020 ("the Application") on 9 July 2020 for leave under s 62A of the Evidence Act (Cap

97, 1997 Rev Ed) ("the EA") for their witnesses (a) Valéry Antoine Guillebon ("Guillebon") and (b) Nabil Alami Merrouni ('Nabil") (collectively, "the two witnesses") to give their evidence through video link. Guillebon is the Chief Executive Officer ("CEO") of Sahara Geneva while Nabil is a Senior Trader in Sahara Geneva.

3 I heard and dismissed the Application. Instead, I made the following orders:

(a) Sahara will forthwith apply to the Immigration and Checkpoint Authority of Singapore ("ICA") for permission for the two witnesses to come to Singapore. If they need to be quarantined, they will serve their 14 days' quarantine which should be completed before trial commences on 17 August 2020.

(b) Sahara will be given liberty to apply for video link evidence from Singapore in the event the two witnesses are still in quarantine when trial commences but the court has to be staisfied that Sahara has complied with the court's orders before the court will exercise its discretion to grant video link evidence.

(c) Unless Sahara takes the steps as directed above ("an unless order"), Sahara's claim will be dismissed with costs to the Defendants and judgment will be awarded on the Defendants' counterclaims.

4 Sahara is dissatisfied with my decision and (with leave given by the Court of Appeal after I refused to grant it leave to appeal) has appealed to the Court of Appeal (in Civil Appeal No 164 of 2020) on 7 October 2020. I now furnish the grounds for my decision.

The facts

5 Sahara is a wholesaler in crude petroleum, solid liquid and gaseous fuels and related products. Chu was employed by Sahara as its CEO between 22 May 2017 and 9 July 2018 pursuant to an employment agreement dated 16 May 2017 ("Chu's employment agreement").

6 Jo was employed by Sahara as a Senior Trader between 1 June 2017 and 9 July 2018 pursuant to an employment agreement dated 6 April 2017 and a letter of offer dated on the same day as well (collectively, "Jo's employment agreement").

7 Chu's employment agreement required him to report to Sahara's Executive Director Tope Shonubi ("Shonubi") whilst Jo's employment agreement required him to report to Shonubi, Chu and Jo's team leader (who was also Chu).

8 In Jo's employment agreement (according to Sahara's statement of claim) his duties included:

(a) monitoring day-to-day trading activities;

(b) generating profit and loss statements from marketing and trading of energy/petroleum refined products; and

(c) co-ordinating and working closely with other colleagues in the Singapore office as well as other business units for business optimization and profit maximization.

With regards to item (b), Jo would generate profit and loss statements from his trades in his reports to Chu, Sahara's Risks Manager Paolo Ascerbis

("Ascerbis") and Sahara's Chief Financial Officer Chew Saw Kim ("Ms Chew"). Profit and loss information and market-to-market ("MTM'') valuations are entered by traders in charge of trades into an internal management system called "Nova".

9 According to Sahara, Chu's duties, *inter alia,* included:

(a) overseeing the operation and activities of the staff in Sahara's Singapore office;

(b) evaluating operations and activities of assigned responsibilities and preparing weekly reports for Shonubi, and

(c) reviewing the work of staff involved in activities that support energy supply acquisition and trading.

10 Sahara also listed out the duties the defendants owed to the company including:

(a) to act in the interest of Sahara;

(b) to act honestly and in good faith;

(c) to act with fidelity, trust and confidence; and

(d) to act with due care and reasonable diligence.

11 Sahara alleged that the Defendants had breached the above duties because of losses they caused to Sahara arising out of certain trades which Jo entered into and which Sahara alleged Chu failed to monitor.

12 To elaborate on [10], Jo, on behalf of the Sahara, had entered into a contract with Toyota Tsusho Corporation ("Toyota") on or about 25 September 2017 ("the Toyota Contract") for Toyota to sell and deliver to Sahara, 6 cargo lots of refrigerated commercial propane ("the Product"). Subsequently, Jo contracted, again on behalf of Sahara on or about 10 May 2018, to sell the Product to a Korean company E1 Corporation ("E1"). The sale of the Product was concluded on 17 May 2018 ("the E1 Contract"). Essentially the Toyota and E1 Contracts were back-to-back contracts.

13 Sahara's purchase price under the Toyota Contract depended on the average price of Argus Far East Index ("AFEI") reported in Argus International LPG for the delivery month plus US$1.15 per metric ton. Sahara's sale price under the E1 Contract was to be 83.4% average price of the mean of Platt's quotations for Naptha as published in Platt's Asia Pacific/Arab Gulf Market Scan ("MOPJ") for the delivery month per metric ton.

14 Without going into the technicalities involved and too much detail, Sahara's profits on the Toyota Contract and the E1 Contract depended on the differential between AFEI and MOPJ where a differential higher than 83.4% meant a loss for Sahara while a differential of less than 83.4% meant Sahara made a profit.

15 Jo had apparently hedged Sahara's position on the E1 Contract by buying 300 lots of AFEI/MOPJ on or about 11 May 2018. The MTM valuation showed a loss of $1m a day after the E1 Contract. The spread between AFEI and MOPJ also increased sharply, putting Sahara in a worse position.

16 Sahara alleged that the defendants concealed and or downplayed the losses incurred by Sahara on the Toyota and E1 Contracts as early as May 2018.

Jo had informed Chu on 14 May 2018 that the E1 Contract had incurred a loss of $1,851,281.30. Between 14 May 2018 and 27 June 2018, Sahara's losses at the two Contracts increased to $5.9m. It was only through a telephone call from Chu, Acerbis and Ms Chew to Shonubi around 28 June 2018 that Sahara was made aware of the losses. The overall losses were at least $6m by the first week of July 2018.

17 In the light of the ballooning losses, on 29 June 2018, Ascerbis hedged 40% of the August and September positions. On 2 July 2018, Chu was pressed by Ascerbis to hedge 56% of the October to December 2018 positions.

18 Sahara alleged that Jo then misrepresented to Sahara's management on 27 June 2018, by way of a weekly report to Shonubi, and Sahara believed, that Jo's losses were only $882,000 instead of $6m. Without full and adequate information of the actual loss incurred by Jo, Sahara was not able to mitigate its loss.

19 It was Sahara's case that the Defendants breached the duties under their respective employment agreements. In Chu's case, he failed, *inter alia*, to report Jo's trading activites and performance in relation to the Toyota and E1 Contracts and failed to instruct Jo to hedge more so as to mitigate Sahara's loss.

20 As for Jo, Sahara also alleged he misrepresented to Shonubi on 27 June 2018 that the losses suffered by Sahara were $882,000 instead of at least $6m.

21 Sahara summarily terminated the Defendants' services on 9 July 2018, commenced this Suit and filed its statement of claim shortly thereafter, on 8 August 2018. In the respective defences that they filed, Chu and Jo denied

Sahara's allegations as raised in the statement of claim. Further, the defendants lodged counterclaims against Sahara and Sahara Geneva.

22 In his defence, Chu disputed Sahara's allegations. He alleged that Sahara had no grounds under cl 9.4 of Chu's employment agreement to summarily dismiss him. Chu further alleged he had been defamed by Guillebon's email of 9 July 2018 ("Guillebon's email") that was sent out to all staff in the offices of Sahara and Sahara Geneva in Singapore, Geneva and Dubai. Chu alleged that Guillebon's email contained untrue, scurrilous and defamatory statements that disparaged, damaged and impugned his character and reputation. Consequently, Chu counterclaimed, *inter alia*, for loss of one month's salary (in lieu of notice), loss of annual bonus and damages for injury to his reputation resulting from Guillebon's email.

23 In his defence, Jo also denied he had breached the terms of his employment agreement. Jo disputed Sahara's allegation that he falsified reports, exceeded his stop-loss limit and was unable to meet his targets which acts amounted to gross negligence. He denied making any of the representations alleged by Sahara or that he misconstrued Sahara's trading position as at 27 June 2018. Jo contended that Sahara was not entitled to dismiss him without notice under cl 9.4 of his employment agreement. In fact, by terminating his employment, Jo asserted he was prevented from carrying out further trades to mitigate Sahara's exposure.

24 Like Chu, Jo counterclaimed from Sahara one month's loss of salary (in lieu of notice), salary in lieu of accrued annual leave and loss of employer's CPF contributions.

25 The pleadings were closed on 16 April 2019 with the filing of Further and Better Particulars of the statement of claim by Sahara.

The Application

26 On 5 June 2020, the parties attended before this court for a Pre-trial conference hearing ("PTC"). Upon the court's inquiry, the court was informed by counsel for Sahara that his client only had one witness Guillebon but that Sahara intended to call a second witness, Nabil. Parties requested an extension of time from end March to 26 June 2020 in which to exchange affidavits of evidence in chief ("AEIC"). Counsel for Sahara, Mr Adrian Tan ("Mr Tan"), informed the court:

> Because of Covid-19 situation, we are a little concerned about whether our witnesses can come to Singapore for August trial. Perhaps we can have another JPTC say around 10/7/20 when the situation should be clearer.

27 The parties' request for an extension of time until 26 June 2020 to exchange their AEICs was reflected in a subsequent order of court dated 12 June 2020 ("the 12 June Order of Court"). The witnesses that the parties would call were identified and included Guillebon and Nabil for Sahara. Trial dates (10 days) were also fixed beginning on 17 August 2020 and concluding on 28 August 2020.

28 Despite the timelines stated in the 12 June Order of Court, the AEICs of Guillebone and Nabil were filed on 3 July 2020 instead of 26 June 2020. The late filing of Sahara's AEICs was followed by the filing of the Application on 9 July 2020.

29 In the brief affidavit filed by Sahara's counsel, Mr Tan, in support of the Application ("Tan's supporting affidavit"), he deposed as follows:

(a) Sahara's two witnesses are based in Geneva, Switzerland.

(b) The two witnesses are unable to travel to Singapore to attend the trial in view of restrictions put in place due to the Covid-19 situation. He exhibited the travel advisory issued by the Ministry of Health ("MOH") on 15 June 2020 stating short-term visitors are not allowed to visit Singapore.

(c) The two witnesses are able to give evidence via Zoom, for which administrative and technical facilities and arrangements are made in Geneva, Switzerland. The Defendants would not be unfairly prejudiced in the event the two witnesses are allowed to testify through live video links such as Zoom which has been widely used since the onset of the Covid-19 situation and, has been used by Singapore courts in recent times.

(d) The Defendants will not be unduly prejudiced if the two witnesses are allowed to testify by live video link.

30 The Defendants opposed the Application. Chu's affidivat was filed on 16 July 2020 ("Chu's opposing affidavit") for the first hearing of the Application before this court on 20 July 2020 ("the first hearing") while Jo's affidavit was filed on 3 August 2020 ("Jo's opposing affidavit") after the first hearing and after Sahara, at the court's behest, had filed an affidavit on 29 July 2020 to address certain issues raised by the court and/or counsel for the Defendants.

31 In Chu's opposing affidavit, he pointed out that the two witnesses had not applied for MOH's approval or even tried but simply stated they are "unable to travel to Singapore". Chu asserted that the two witnesses were actually unwilling to travel to Singapore to attend the trial. He pointed out that they had not applied for special prior approval to come to Singapore to attend the trial or indicated that they have even tried.

32 Apparently Chu had checked an online air-ticketing portal called Skyscanner for return flights Geneva to Singapore and there were no lack of flights (339 available return flights according to his search) available on three full service carriers.

33 Chu added that Sahara had not shown to the court that administrative and technical facilities and arrangements had been or will be made in Geneva if leave was granted for the two witnesses to give evidence via video link.

34 Chu pointed out that Tan's supporting affidavit did not indicate whether the Swiss authorities had granted approval for the two witnesses to give their evidence from Switzerland for purposes of a trial under the jurisdiction of the Singapore courts.

35 Chu deposed that Sahara has only ten employees in Singapore and the two resident directors are Nigerians. He said Sahara and its directors are all foreigners who are attemping to give their evidence in absentia.

36 At the first hearing, this court queried Sahara's counsel, Mr Tan, whether Sahara had applied to the MOH for special leave to come to Singapore. Mr Tan said Sahara had not done so and that he would seek his client's instructions on the court's inquiry.

37 Mr Tan added that even if the witnesses are granted special approval, they would nevertheless have to serve 14 days' quarantine upon arrival in Singapore. This would disrupt their schedule as they are senior executives of Sahara. This comment came from the Bar as it was not in Tan's supporting affidavit.

38 Chu's counsel, Mr Lim Soo Peng ("Mr Lim"), raised the issue that under the Swiss criminal code, it is an offence for someone to give evidence in Switzerland for Singapore proceedings unless a waiver is granted by the Swiss courts (for which Sahara had not applied).

39 Jo's counsel, Mr Steven Lam ("Mr Lam"), added that Sahara had not done enough to be granted the Application. He pointed out that Sahara had taken no steps apart from downloading and exhibiting in Tan's supporting affidavit the advisory from MOH. Sahara had done nothing since the PTC on 5 June 2020. Citing the Court of Appeal's decision in *Anil Singh Gurm v JS Yeh & Co and another* [2020] 1 SLR 555 ("*Anil Singh*"), Mr Lam submitted that Sahara had not crossed the legal threshold for leave to be granted for the two witnesses to give evidence from overseas, under s 62A of the EA.

40 Mr Lam also referred to a letter dated 17 July 2020 that Mr Tan had written to the Defendants' counsel stating that Sahara had sought advice from Swiss lawyers but no details were provided on what advice Sahara had sought.

41 In the light of the Defendants' objections as well as their counsel's submissions, Mr Tan requested to adjourn the Application so that he could file a reply affidavit to the Defendants' affidavits to show the advice from Swiss lawyers. The court accordingly adjourned the Application and granted Sahara's request to file a reply affidavit.

42 On 29 July 2020, Sahara filed an affidavit by Jean-Guillaume Latreille De Lavarde ("Lavarde"), who is the head of its legal section. Lavarde exhibited in his affidavit: (a) correspondence that Sahara's solicitors had exchanged with Swiss lawyers as well as (b) correspondence that Sahara had exchanged with the ICA. In regard to the administrative and technical facilities and arrangements, Lavarde deposed that the two witnesses would give their evidence via Zoom facility in Sahara Geneva's office in Geneva using a 360° camera and other cameras to ensure that the two witnesses are alone in the conference room.

43 The correspondence Lavarde exhibited between Sahara's solicitors and their Swiss counterparts pertained to the taking of evidence in Switzerland for this Suit by various options. One option was to obtain waiver of the prohibition against the taking of evidence for use abroad while another option was to take evidence pursuant to the Hague Evidence Convention 1970 (signed by Singapore and Switzerland), of which the process through mutual legal assistance could take between four months to one year.

44 For the second hearing on 3 August 2020 ("the second hearing"), Jo filed a response to Lavarde's affidavit ("Jo's reply affidavit"). Therein, Jo alleged that Sahara had given their Swiss lawyers misleading facts in respect of whether the two witnesses were able to travel to Singapore. Jo pointed out that the administrative and technical facilities and arrrangements lacked details.

45 In Jo's reply affidavit, he complained that throughout the entire proceedings[1], Sahara had ignored the directions and timelines given by the

[1] Jo Choon Ho's affidavit, dated 30 July 2020, at paras 27 to 42.

court. At the PTC on 24 July 2020, the Assistant Registrar ("AR") had directed that Sahara file by 27 July 2020, the reply affidavit for which this court at the first hearing had granted leave to file. Yet, Sahara only filed Lavarde's affidavit on 29 July 2020 even though the exhibited correspondence therein contained were dated 24 July 2020 or earlier. It is to be noted that neither Guillebon nor Nabil filed any affidavit in support of the Application.

46 Despite being directed to do so on at least two occasions *ie,* at the first hearing and by the AR on 24 July 2020, Jo alleged that Sahara had taken no steps to apply for special leave from the relevant authorities for the two witnesses to come to Singapore. He added that in anticipation of the court granting the Application, Sahara had only made half-hearted attempts to seek special approval for the two witnesses to enter Singapore.

47 Jo further referred to the emails from Sahara's solicitors to the Swiss lawyers dated 14 and 15 July 2020 that Lavarde had exhibited in his affidavit. Sahara's solicitors stated therein that Sahara's witnesses are "unable to fly to Singapore to give evidence in person" and "the Swiss-based individuals cannot travel to Singapore to be heard" respectively. Jo took issue with those statements as giving a misleading portrayal that there is a blanket ban against Swiss-based individuals entering Singapore when no attempt had been made to apply for special permission from the Singapore authorities to enter.

48 Jo deposed that applying for permission to enter Singapore is a straightforward process that only required the applicant to write to the relevant authorities.

49 Jo also took issue with the adminstrative arrangements Lavarde had deposed to, pointing out the paucity of details as regards the type of 360° camera

that Lavarde had referred to – there were no particulars as to whether such a camera would capture a video from all sides at the same time. If it did not, that meant that the court could not monitor the room where a witness is giving evidence from, to ascertain if the witness is indeed alone and whether the documents he refers to are marked/unmarked. Jo added that the venue for the two witnesses should be a neutral place instead of Sahara's conference room.

50 If the Application was granted, Jo's preference was for the venue for the video evidence to be at the premises of a Swiss law firm who would be jointly appointed by the Defendants but with the costs borne by Sahara. The appointed Swiss lawyers would inspect the documents relied on by the two witnesses beforehand to ensure that they were unmarked.

51 At the second hearing, Mr Tan told this court, *inter alia*, that:

(a) ICA requires a visitor to Singapore to be quarantined for 14 days (which information he only received on the previous Wednesday 29 July 2020). The application takes time to process and the 14 days' quarantine would be difficult for the two witnesses to complete before trial commenced. The two witnesses had not yet received the requisite permission.

(b) It would be preferable for the two witnesses to testify via video link because:

(i) Guillebon was travelling until 10 August 2020[2] and for him as the CEO of the Sahara Geneva office to be confined to a room for 14 days would affect operations at the head office.

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2 Notes of Argument, 3 August 2020, p3(5) to 3(10)

(ii) In Nabil's case, there is a company policy not to travel due to Covid-19 restrictions put in place.[3]

(c) As a solution to avoiding committing a criminal offence in Switzerland by the taking of video evidence there for use in Singapore, the Swiss lawyers had advised Sahara to apply for a waiver from the Swiss authorities.

(d) If the waiver is not granted, then the two witnesses would go to a neighbouring country (either France or Germany as this court had previously suggested), which is only a short drive away, for such evidence to be taken for the purposes of this Suit.

As pointed out at [45] above, neither Guillebon nor Nabil filed any affidavit(s) to substantiate/support the Application. In other words, the above statements were made from the Bar.

52 At the second hearing, this court took issue with [51(b)(i)] and [51(b)(ii)] above and pointed out to Mr Tan that the statements were contradictory - one of the two reasons cannot be true. If Guillebon was busy travelling, then Sahara could not possibly have adopted a no-travel policy for its staff including Nabil. If it was *vice versa*, then Guillebon could not be travelling, in the light of the Covid-19 pandemic being widespread in Europe. Mr Tan then said he was not aware if Guillebon was travelling within Switzerland itself.[4] I did not accept this unsatisfactory and indeed, disingenuous explanation. Instead, this court pointed out that Switzerland is not a big country.

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3 Notes of Argument, 3 August 2020, p3(10) to 3(11)

4 Notes of Argument, 3 August 2020, p15(14) to 15(15)

53 Mr Tan's statements in [51] and his submissions were roundly criticised by Mr Lim and Mr Lam, counsel for Chu and Jo respectively. In addition to the points the Defendants had raised earlier in [37] to [39] and [45] to [48], the Defendants also questioned Sahara's motives in making the Application so late in the day. They alleged that Sahara dragged its feet in the hope that because the Application was made at the last minute, it would force the court's hand to grant the Application as a matter of urgency.[5]

54 Mr Lam pointed out that trial dates were given in January 2020. Covid-19 circuit breaker measures were lifted on 2 June 2020 followed by the implementation of Phase 2 on 19 June 2020. As far back as 4 May 2020, Sahara had informed the court by letter that it would be calling foreign witnesses and on 27 May 2020 and 5 June 2020, it informed the court of the location of the witnesses.

The court's decision

55 It would be appropriate at this juncture to look at s 62A of the EA under which the Application was made. It states:

> **Evidence through live video or live television links**
>
> **62A.–**(1) Notwithstanding any other provision of this Act, a person may, with leave of the court, give evidence through a live video or live television link in any proceedings, other than proceedings in a criminal matter, if —
>
> (a) the witness is below the age of 18 years;
>
> (b) it is expressly agreed between the parties to the proceedings that evidence may be so given;
>
> (c) the witness is outside Singapore; or
>
> (d) the court is satisfied that it is expedient in the interests of justice to do so.

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5 Notes of Arguments, 3 August 2020, p16(1) to 16(3)

> (2) In considering whether to grant leave for a witness outside Singapore to give evidence by live video or live television link under this section, the court shall have regard to all the circumstances of the case including the following:
>
> (a) *the reasons for the witness being unable to give evidence in Singapore*;
>
> (b) the administrative and technical facilities and arrangements made at the place where the witness is to give his evidence; and
>
> (c) whether any party to the proceedings would be unfairly prejudiced.
>
> …
>
> [emphasis added]

It is be noted that the key word in s 62A(2)(*a*) is that a witness is "unable" to give evidence in Singapore.

56 It would be apposite at this stage to turn to the Court of Appeal case that the Defendants relied on to oppose the Application, namely *Anil Singh* ([39] *supra*). In that case, the plaintiff/appellant was charged with an offence under s 23 of the Residential Property Act (Cap 274, 2009 Rev Ed) ("the RPA"). He had acquired a property as a nominee on behalf of his cousin (Sekhon) in contravention of s 23 of the RPA. The appellant had consulted the first defendant law firm whose solicitor the second defendant had advised him that it was acceptable for him to hold the property on Sekhon's behalf. By the time the appellant was charged, Sekhon had left Singapore for Australia.

57 The appellant sued the defendants for acting negligently as his solicitors in the property transaction. He applied to the court for leave under s 62A(1)(*c*) of the EA for Sekhon to testify from Australia via video link. The High Court dismissed his application, holding that (a) Sekhon was merely unwilling and not unable to testify in person in Singapore and (b) granting leave would be contrary to public policy as it would be tantamount to endorsing Sekhon's attempt to

avoid justice. For purposes of this case, this court is only concerned with reason (a) of the High Court's decision.

58 In allowing the appeal, the Court of Appeal held, *inter alia,* that:

(a) Witnesses would only be "unable" to travel to Singapore for the purposes of s 62A(2)(*a*) if they were prevented from doing so by circumstances outside their control. This included situations involving physical or legal inability or where there were real and substantial threats to the witness's personal safety. These situations were not exhaustive and the question of whether a witness was unable to travel to Singapore was ultimately one that had to be assessed on the facts of each case (at [38]).

(b) Sekhon was not unable to give evidence in Singapore but was merely unwilling to do so (at [39]). Nevertheless, a witness's unwillingness to travel was only one factor for the court's consideration (at [41]).

(c) Sekhon was not a party to the litigation or in control of it and would not stand to gain any tangible benefit from it. The threshold for granting leave to such non-party witnesses should generally be low (at [45]).

(d) The appellant could not compel Sekhon to testify in Singapore, had no control or influence over him, and could only rely on his willingness to testify in [the suit]. Generally, the more control a party had over a witness, the stronger the justification required to displace the expectation that the witness would be present in court to testify. Conversely, the fact that a party had no control over a witness who

refused to travel to Singapore should generally weigh in favour of leave being granted. This was "*subject to the qualification that the party had to have made all reasonable attempts to secure the witness's attendance in Singapore*" [emphasis added] (at [57]).

59 It is to be noted from the above extracts from *Anil Singh* that the applicant under s 62A(2)(*c*) must satisfy the court that it had made all reasonable attempts to secure the attendance of the two witnesses in Singapore. The Court of Appeal added that the court will examine whether a witness is in fact unable to travel to Singapore *based on the reasons given by that witness* (at [38]). As noted earlier (see [45] and [51] above), neither Guillebon nor Nabil filed any affidavit(s) to support the Application while Tan's supporting affidavit was brief and bereft of details.

60 This court as well as the AR on 24 July 2020 had *repeatedly* urged Sahara/its counsel to apply for special permission from the Singapore authorities for the two witnesses to enter Singapore. The chronology of milestones at [54] above showed that Sahara and its counsel did *nothing* concrete in that regard. The lack of action was in fact traceable back to as early as 26 May 2020 because, in a letter to court from Mr Lam, Sahara was informed that the second defendant would oppose any application by Sahara for its witnesses to testify via video link. Yet, Sahara's conduct showed that it simply paid no heed to Jo's objections or to the court's urgings.

61 It was also wrong of Sahara to assume (as Mr Tan intimated) that Sahara's application would cause no prejudice to the Defendants, which is another factor the court should take into account, according to *Anil Singh.* The Defendants both had counterclaims against Sahara arising out of their alleged wrongful dismissals. Their counsel would want to cross-examine Guillebon

vigorously on his termination of the Defendants' employment and the Defendants were anxious to have their counterclaims determined expeditiously by the courts.

62 In the light of Sahara's lackadaisical attitude towards the court's directions coupled with the fact that the two witnesses were clearly *unwilling* and not *unable* to come to Singapore, this court in the exercise of its unfettered discretion under s 62A of the EA, declined to grant the Application.

Lai Siu Chiu
Senior Judge

Tan Wen Cheng Adrian and Low Zhi Yu Janus (August Law Corporation) for the plaintiff;
Lim Soo Peng (Lim Soo Peng & Co LLC) for the first defendant;
Lam Kuet Keng Steven John, Choong Madeline and Ang Jian Xiang (Templars Law LLC) for the second defendant.