Fan Heli *v* Zhang Shujing and others
[2015] SGHC 327

Case Number : Suit No 119 of 2015 (Summons Nos 3443 and 5042 of 2015)

Decision Date : 23 December 2015

Tribunal/Court : High Court

Coram : Aedit Abdullah JC

Counsel Name(s) : Chan Hock Keng, Alma Yong and Ho Wei Jie (WongPartnership LLP) for the plaintiff; Philip Ling and Kam Kai Qi (Wong Tan & Molly Lim) for the first and second defendants.

Parties : Fan Heli — Zhang Shujing — Zou Ping — Sino-Add (Singapore) Pte Ltd — Sino-Trust Shipping Pte Ltd

Civil Procedure – Stay of proceedings

Conflict of Laws – Natural forum

23 December 2015

Aedit Abdullah JC:

Introduction

1 The 1st and 2nd Defendants sought in Summons No 3443 of 2015 a stay of proceedings in Singapore commenced by the Plaintiff on the basis that the People's Republic of China ("the PRC") was the more appropriate forum, or alternatively, that all proceedings be stayed pending the disposal of the PRC proceedings. I declined the application, but granted the 1st and 2nd Defendants' application for leave to appeal in Summons No 5042 of 2015.

Background

2 In February 2015, the Plaintiff began an action for minority oppression under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) against the Defendants. Sino-Add (Singapore) Pte Ltd, the 3rd Defendant, and Sino-Trust Shipping Pte Ltd, the 4th Defendant, were each owned by the Plaintiff, 1st Defendant and 2nd Defendant, in the proportion 25:65:10 respectively. The three of them actually owned 12 companies in Singapore, Hong Kong, the PRC and the British Virgin Islands in the same manner. This group was on occasion referred to by some of the parties as "the Sino-Trust Group". The group was not however a corporate group, as there were no cross-shareholdings among the companies. What was common, however, was shareholding by these three persons.

3 While the Plaintiff, on the one hand, and the 1st and 2nd Defendants initially had at least a working relationship, if not a good one, the relationship between them broke down towards the second quarter of 2014. The Plaintiff thus launched his minority oppression action seeking a buy out or alternatively, the winding up of the 3rd and 4th Defendants.

4 The Plaintiff applied for leave to serve the cause papers out of jurisdiction in March 2015.

5 In the meantime, there were two proceedings commenced by Sino-Trust Corporation against the Plaintiff, alleging misappropriation of corporate funds by the Plaintiff, and the other his unlawful possession of original financial documents belonging to companies that are part of the "Sino-Trust Group". Judgment was given in the latter proceedings by a Dalian first instance court which ruled *inter alia* that: (a) the actual place of business of the all the companies in the group was at the office of Sino-Trust Corporation in Dalian; (b) Sino-Trust was responsible for the management and operation of all the other companies; (c) Sino-Trust had the power to maintain all the financial documents of the other companies; (d) the financial documents held by the Plaintiff were the assets of the companies; and (e) there was nothing to show that the Plaintiff went through the proper process to obtain the documents. The proceedings on misappropriation were not complete by the time of the hearing before me.

The Defendant's Arguments

6 The Defendant argued for a stay to be granted under the principles in *Spiliada Maritime Corporation v Cansulex* [1987] AC 460 ("*Spiliada*"). The following factors relevant to the 1st stage of the *Spiliada* test pointed to the PRC: the residence and place of business of the parties, the location of the events; witnesses would be resident in the PRC; witnesses would likely have limited English skills; the Shareholders Agreements governing the relationship between the Plaintiff, the 1st and 2nd Defendants were made in the PRC and were in Chinese; other proceedings in the Dalian would have a material effect on the claim of oppression.

7 As for the second stage, the Shareholders Agreements, drafted by the Plaintiff himself, specified limits and mechanisms for the exit of the shareholders. The fact that the Plaintiff would not be able to get the same cause of action or relief in the PRC does not mean he could not obtain justice in the PRC.

8 An expert opinion confirmed that in respect of the remedies claimed by the Plaintiff in Singapore, he could obtain the same or similar remedies such as a buy out or winding up. A PRC court would also conclude that Singapore law applies, but even if it were determined that PRC Company Law applied, there are similar reliefs available. The plaintiff would not be deprived of any real juridical advantage.

9 In applying the two-stage test in *Spiliada*, the fact that the plaintiff has a legitimate personal or juridical advantage in proceedings in Singapore is not decisive.

The Plaintiff's arguments

10 It was contended firstly that the primary factors to be considered in the present case was the applicable law to the dispute and the nature of the dispute.

11 It could not be shown in respect of a minority oppression action that another forum is competent to resolve the dispute and is clearly the more appropriate forum as such a minority oppression action is based on a Singapore statute giving specific rights to shareholders, and the company is a Singapore company subject to that statute: *Transtech Electronics Pte Ltd v Choe Jerry and Ors* [1998] 1 SLR(R) 1014 ("*Transtech*"). A similar position was reached in *Re Nasbulk* BVIHCM (COM) 65/2012 at first instance in the British Virgin Islands ("*Nasbulk*"). The East Caribbean Court of Appeal ("ECCA") in *Nasbulk* at the appeal stage, *Nanjing Ocean (BVI) Co Ltd v Gao Chunhe and anor* BVIHCAP 2013/0005 ("*Nanjing Ocean*") reached a different conclusion but should not be followed.

12 In contrast to Singapore, the PRC is not the more appropriate forum. The Shareholders

Agreements were not the basis of the claim, and thus the governing law, the choice of court and the language and execution of the Shareholders Agreements were irrelevant.

13 No equivalent provision to s 216 is available under the PRC Company Law. It is telling that the 1st and 2nd Defendants previously took the position that withdrawal from the group had no basis in the Shareholders Agreements.

14 Contrary to the contentions of the Defendant's expert, the Plaintiff's expert gave the opinion that there was no power for the court to order that the 3rd and 4th Defendants assume any liabilities or to order the winding up of the 3rd and 4th Defendants. The place of the actual oppression was not disputed, and would at most be a neutral factor.

15 There being not a single group, there was no justification to treat them as a single entity. The companies operated independently. The location of witnesses was not crucial, and in any event the geographical location of witnesses is not determinative. The location of documents was also not a strong factor pointing to the PRC. The Dalian proceedings were distinct, and different from the Singapore proceedings. Even if there is a risk of conflicting judgments that is not determinative: *Rickshaw Investments Ltd and anor v Nicolai Baron von Uexkull* [2007] 1 SLR (R) 377 ("*Rickshaw*") at [90].

16 Even if the 1st stage of the *Spiliada* test pointed to the PRC, justice required that a stay be denied. The Plaintiff would be unable to pursue a minority oppression or equivalent action in the PRC, and would not be able to obtain either winding up or a buy-out by the 3rd and 4th Defendants.

The Decision

17 I declined to order the stay sought by the 1st and 2nd Defendants. The fact that the Plaintiff was invoking a statutory action in respect of a dispute within a Singapore company was an important consideration. This matrix supplied factors that went to both the 1st and 2nd stages of the *Spiliada* test.

18 The fact that the claim was in respect of a shareholders' dispute within a Singapore-incorporated company was an important connecting factor that, coupled with the specific claim of a minority oppression action under the Companies Act outweighs any other connecting factor pointing to the PRC.

19 Even if I was wrong on the analysis for the first stage, at the 2nd stage analysis, the question of the specific remedy or juridical advantage available to the plaintiffs would not be available to him in the PRC and it would cause injustice for him to be deprived of it.

20 I should note that the Defendants did not seek to set aside the Plaintiff's service out of the jurisdiction on the basis that Singapore was not the appropriate forum. There would be a difference in burden in respect of a challenge to service out under Order 11 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) as the Plaintiff would have had to show that Singapore was the more appropriate forum, with the Defendants then showing that it would be unjust to allow service out: *Siemens AG v Holdrich Investment Ltd* [2010] 3 SLR 1007. In the end though, nothing turned on this as I was satisfied that in any case Singapore was the appropriate forum.

Analysis

21 The principles enunciated in *Spiliada* have been applied on many occasions locally. In essence, on a stay application, at the 1st stage, the Defendants here would have the burden of showing that the PRC is a more appropriate forum. Thereafter, at the 2nd stage of the *Spiliada* test, the Plaintiff would have to show that it would be unjust to send him to that forum. There appears to be readiness to conflate the two stages into one, namely, whether it is shown that Singapore is the appropriate forum: see *VTB Capital Plc v Nitrite International Corp* [2012] EWCA Civ 808. It may be that there is much to commend a single stage analysis, but I am bound by the two-stage approach laid down in *Brinkerhoff Maritime Drilling Corp and anor v PT Airfast Services Indonesia and anor appeal* [1992] 2 SLR (R) 345 and similar cases.

The 1st Stage of the Spiliada test

22 Singapore was the more appropriate forum in view of the nature of the claim made by the Plaintiff; factors which pointed to the PRC were either neutral or of relatively little weight.

23 In considering this issue, the legal character of the claim asserted by Plaintiff was to be differentiated from the existence or otherwise of a juridical or legitimate advantage. What this meant was that the nature of the dispute raised by the Plaintiff had be analysed in terms of its legal basis, the evidence that would be required, the applicable law, and the relevant parties with standing to defend or which would be affected in legal terms by the determination of the issue. These factors were distinct from those that would go to the question whether there was a juridical or legitimate advantage and if so, whether it would be just to deprive the plaintiff of that.

The nature of the claim

24 The claim made by the Plaintiff was for minority oppression under s 216 of the Companies Act. That provision permitted, among others, a shareholder to apply to the court for an order on the basis that the affairs of the company or the powers of the directors are being exercised in an oppressive manner, or that some act of the company has been done or threatened which unfairly discriminates. The court may then make various orders including prohibiting the act or cancelling a transaction, authorising civil proceedings to be brought in the name of the company, order compulsory purchase of shares, or the winding-up of the company.

25 Aside from the specific remedies, which are potentially relevant in the analysis of the 2nd stage of the *Spiliada* analysis, a claim under s 216 is primarily a claim made by a shareholder in respect of his interest in a Singapore company, concerning allegations in the activity of that company or the decisions of the board of directors of that company. The records, including those that may need to be statutorily filed, would be in Singapore or should at least be accessible in Singapore. The law governing the affairs of the company and the obligations owed by the company, the general duties of the directors and the general obligations of the majority to the minority would be governed by Singapore law. The centre of gravity of such a claim would be in Singapore.

26 It is against this framework that I understand *Transtech* to be decided. The case was cited by the Plaintiff for the proposition that the existence of the statutory action indicated that Singapore was the more appropriate forum. What to my mind mattered was not so much that the action was statutory – in many systems of law most if not all rights are statutory in some way – but rather that the forum's domestic laws had prescribed a framework for assertion of rights in a particular factual scenario, giving legal rights and imposing legal obligations to the various participants in that scenario. Where the scenario pertains, the predisposition would be to regard the forum as the natural forum, and that other *fori* would be inappropriate. In *Transtech*, Prakash J stated, at [19]:

> … [Counsel's] difficulty was, of course, that in order to obtain a stay on the basis of *forum non conveniens*, the applicant must show that there is another forum which is competent to resolve the dispute and which is clearly the more appropriate forum for its resolution. The defendants here could not show that because the action in Singapore is based on a Singapore statute which gives certain rights to an allegedly oppressed minority shareholder and the company in which such oppressive activity is alleged to have taken place is a Singapore company subject to that statute. Further, the defendants in the Singapore action were sued in their capacity as directors of the company and for actions undertaken in such capacity relating to the handling of various business transactions and moneys on behalf of the company and in the course of this business. Even if they could be sued in such a capacity for such actions and for the same relief in New York (a matter on which no submission was made by the defendants), the New York court would not be the most appropriate one to resolve a dispute which involved the meaning and scope of a Singapore statute.

It is evident that the concern was with the rights conferred on the claimant, and the obligations imposed on the other parties. All of these pointed to Singapore and were the more important factors in that case.

27 I did not think that the decision of the ECCA in *Nanjing Ocean* was necessarily an authority against the approach I took. In the first instance decision in *Nasbulk*, Bannister J concluded that the invoking of a statutory remedy precluded any argument that the British Virgin Islands were the more inappropriate forum, in the face of other factors pointing elsewhere, including the PRC. Because of that statutory remedy, Banister J considered that the case before him was not amenable to *Spiliada* analysis, despite the presence of factors which the judge found pointing to the PRC. However, the decision was reversed on appeal, with the ECCA finding that the PRC was the natural forum there. The ECCA differed from Bannister J, applying *Spiliada* fully, and agreed with his earlier conclusion that the PRC was the more appropriate forum.

28 Where I have differed from the ECCA is in terms of the weighing of the various factors; I would note only, with respect, that the ECCA did not seem to have considered the invoking of a statutory claim as containing factors which need to be weighed against the factors pointing to the PRC. I would differ with the ECCA on that score. I have not taken the precise position of Bannister J that s 216 precluded the operation of *Spiliada* principles. Rather, as I have noted above, the nature of the claim carries with it several factors that needed to be weighed against those on the other side.

29 For the same reason, there is also no conflict in principle between my approach and the decision of *In re Harrods (Buenos Aires) Ltd* [1992] Ch 72 ("*Harrods*") in the English Court of Appeal which applied *Spiliada* principles. Where there was a difference was in respect of the 2nd stage, which I will deal with below.

30 Against the weight of these factors pointing to Singapore as the more appropriate forum in a s 216 action, the following factors identified by the Defendants could not cumulatively show that the PRC was the more appropriate forum: (a) the Shareholders Agreements; (b) the nature of the witnesses; (c) the structure of the group; and (d) the PRC proceedings.

The Shareholders Agreements

31 The Shareholders Agreements may govern the position of the shareholders, and may in principle be relevant in action for minority oppression. But in any action for minority oppression, it is conceivable that a shareholder agreement would be just one of several sources of evidence. Oral discussions for instance, and the conduct of parties may be material as well. The existence of the

Shareholders Agreements could not thus be determinative.

The Structure of the Group

32 The Defendants referred to the companies in question as being part of a group. However, as pointed out by the Plaintiff, the companies are not in a formal structure. The Defendants nonetheless maintained that the companies were really a single economic entity. Arguments that groups of companies should be treated as single entity are made occasionally, to allow the separate corporate identities of different companies to be disregarded, especially when the shareholdings are held ultimately held by an individual or group of individuals. Where the separation of identities is used to camouflage fraudulent dealings by the common or ultimate shareholders, the courts would be justified in disregarding the different companies created, which are essentially interposed for ill-ends. However, it sits oddly for the controlling shareholder to establish companies to handle his various businesses, make use of the separate corporate identity, and then ask the court to disregard corporate structures whenever it suits him.

33 So it is in the present case, with the Plaintiff and 1st and 2nd Defendants having direct shareholdings in each company. There being no direct corporate relationship between the different companies, the 1st and 2nd Defendants cannot in these proceedings ask the court to disregard the separate identities of the companies, even if it is true that they treated the companies as a single undivided whole. They cannot invoke that argument simply because that doctrine should only available against those who have used the corporate identity as a façade to hide or disguise dealings; they were after all in the majority, and cannot claim any equivalent sham by a minority shareholder.

The Witnesses

34 The 1st and 2nd Defendants argued that most witnesses would be in the PRC, and conversant primarily in Mandarin. Against that, the Plaintiff argued that it was likely that the presence of witnesses would not be crucial. I was of the view that even if witnesses from the PRC were needed, this could be easily addressed in various ways. Singapore courts are used to having foreign witnesses testifying in languages other than English; where necessary such witnesses can testify from overseas: *Peter Roger May v Pinder Lillian Gek Lian* [2006] 2 SLR (R) 381. The location of documents is even less of an issue in cases generally: *John Reginald Stott Kirkham and Ors v Trane US Inc and Ors* [2009] 4 SLR(R) 428.

Proceedings in the PRC

35 As for the PRC proceedings, I do not find that either would be controlling or even largely relevant to the present proceedings. The proceedings there were concerned with the alleged misappropriation of funds by the Plaintiff and the retention of documents by him. The question of retention of documents was not likely to be material to an oppression action in Singapore or *vice versa*. As for the misappropriation of funds, there is the possibility that there may be some overlap in allegations, but just as possibly, there may not. Additionally, the parties in the PRC proceedings are not the same as those involve Sino-Trust Corporation.

36 In any event, as argued by the Plaintiff, even if an overlap arose, that would not be conclusive. In *Rickshaw*, the Court of Appeal noted at [90]:

> … The danger of conflicting judgments must be weighed against the other factors in the *Spiliada* enquiry and we have seen that, hitherto, the various factors point towards Singapore as being

the most appropriate forum to hear the case. The relevant factors, when considered in their totality, strongly militate against any suggestion that the German courts would be "clearly more appropriate" than the Singapore courts.

Thus, conflicting judgments would just be one factor to be weighed against the others. In the present case, the possibility of conflicting judgments on misappropriation of funds, retention of documents and minority oppression did not seem significant; and even if there were any such conflict, it would not outweigh the significant pointer to Singapore inherent in the nature of the Plaintiff's claim of minority oppression in a Singapore company.

Differences in Law

37 Additionally, I note the evidence of the Plaintiff's expert, which I prefer to that of the Defendant's. The Defendant's expert took the position that the difference with Singapore law was not significant. It may be that at this 1st stage of the *Spiliada* test, the fact that the laws of competing *fori* may not be significantly different would render this factor neutral or of little weight. However, I was not convinced that there was little substantive difference between Singapore and PRC law. The rights and obligations in respect of corporations and shareholding do not seem to be the same. The Plaintiff's expert had noted that PRC Company Law would not be applicable to foreign companies not registered in the PRC: I prefer his evidence that the PRC courts would not apply PRC Company Law to the present dispute. I did not see anything in the Defendant's expert's report that pointed the other way. That being the case, the type of claim made by the Plaintiff could not be brought before the PRC courts, only a contractual dispute, which is of a wholly different nature, could.

38 The Defendants' expert referred to a number of provisions, but several of these do not seem to relate to anything like a minority oppression action, but rather shareholders' rights generally, such as Articles 20 and 33 of the PRC Company Law. Reference was made to Article 182 which permits winding up if there is the threat of heavy losses to shareholders from difficulty in operations or management, but that does not seem connected to the relationship of shareholders *inter se*. While it is not necessary or even expected that PRC law would contain a provision that provides the same type of claim as a minority oppression action, the absence of an equivalent set of provisions giving the same effect would be a factor that points to Singapore being a more appropriate forum to hear such a claim. A forum that does not have a functional equivalent would not in general be an appropriate forum unless for instance the claim was but a sham or a disguise.

39 The Plaintiff took issue with the Defendant's expert's assertion that the PRC courts could apply Singapore law. There was nothing on this in the Plaintiff's expert report, presumably in light of the questions posed to him. However, while expert opinion on foreign law is a matter of fact (at least of a special kind:*King v Brandywine Reinsurance Co* [2005] EWCA 235), I was not convinced that the Defendant's expert was of the view that Singapore company law would be applied. His discussion in his affidavit seemed to be geared towards considering whether PRC Company Law would be applicable to Singapore registered companies if they had a different place of actual business. In any event, even if a PRC court would apply Singapore company law, that does not make the PRC the more appropriate forum. All the various factors would have to be considered and weighed. A dispute about Singapore companies in respect of the relations between the shareholders would seem to be more suited for determination by a Singapore court unless there were significant countervailing measures pointing the other way. I did not see any in the present case.

Conclusion as to the more appropriate forum

40 All in all then, Singapore was the more appropriate forum in view of the nature of the claim

asserted by the Plaintiff; the various other factors in the present case were either neutral or if they pointed to the PRC, did not outweigh those pointing to Singapore.

The 2nd stage of the Spiliada test

41 The unavailability of remedies in the PRC relating to a s 216 action would be significant. I note that the fact that local remedies may not be available abroad would not generally be sufficient to show the loss of a juridical advantage – there must be a substantive element rather than just a difference in quantum or degree: see *Spiliada* and *Goh Suan Huee v Teo Cher Teck* [2010] 1 SLR 367 ("*Goh Suan Hee*").

42 Despite the evidence of the defendants' expert that the same or similar remedies would be available in Chinese proceedings, I accept the Plaintiff's expert's evidence that these would not. There is no directly equivalent provision to s 216. It was pointed out that the precedents cited by the Defendant's expert were not on point and did not show the existence of a minority oppression action. Further, as argued by the Plaintiff, the winding up of the 3rd and 4th Defendants would not be available to a PRC Court in respect of a company law action.

43 The Defendants cited *Harrods* for the proposition that it was not essential that the plaintiff should be able to obtain identical relief in the foreign jurisdiction or that the courses of action which can be pursued should be the same in both jurisdictions. *Harrods* itself is instructive as a stay was granted in England though the claim was for minority oppression in an English incorporated company, with the registered office in London but with its business wholly in Argentina. However, departing from the CA in *Harrods*, I am of the view that the ability to be bought out or to effect a winding up in respect of a dispute concerning the internal relations of the company itself would be a sufficient basis. The ability to be bought out, and the winding up of a Singapore company are material advantages, which the plaintiff should not be deprived of. The participation by a shareholder in a company would be premised on many things, but among the considerations would be the expectation that as a member or shareholder he or she would be entitled to have a voice in the running of the company, or if that does not work out because of the actions or omission of the majority of the shareholders or members, there would be the ability to exit the company by way of a buy-out. Leaving aside the ability to be bought out in the case of oppression or other concerted action by the majority may not achieve substantive justice in respect of a complaining shareholder. That to my mind would affect the achieving of substantive justice, as required by *Spiliada* and *Goh Suan Huee*.

44 It may be argued that a shareholder in a private company cannot really complain if he is stuck with his investment – that is a normal risk that such an investor runs in such a company. But the position where a shareholder suffers oppression would be different – locking-in the shareholder in that situation piles on a disability on top of his being subject to unfair actions by others.

45 Thus even if I was wrong on Singapore being the more appropriate forum, I would have found that the Plaintiff showed grounds in favour of the Court's exercise in favour of Singapore on the 2nd stage of the *Spiliada* test.

Stay in respect of foreign proceedings

46 The Defendants applied alternatively for stay on the grounds that there were foreign proceedings underway. This is recognised as an independent basis separate from stay on *forum non conveniens*. However, in the present case, the same result would arise in view of my conclusions concerning the differences between the local proceedings and those in the PRC.

Leave to appeal

47 I granted leave to appeal in the present case on the Defendants' application, as I concluded that there was an issue of importance that merited determination by the Court of Appeal for the guidance on the law. The increased use of Singapore companies by foreign shareholders not just in connection with businesses in Singapore but regionally and internationally means that disputes similar to the present and *Transtech* will arise more frequently. It will assist the development of Singapore law and business activity for the guidance given by the apex court.

Conclusion

48 For the reasons above, I declined to stay the Plaintiff's claim. Costs of $10,000 and reasonable disbursements were awarded to the Plaintiff.

49 I had noted in my oral remarks that I did not think there was a significant difference in philosophy between the position I had taken and the decisions in *Nasbulk* and *Harrods*. I remain of that view in so far as the broad application of the *Spiliada* principles is concerned. Where I have differed from those decisions was essentially in the characterisation of the nature of a minority oppression claim and its remedies.