IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 234

Suit No 7 of 2017
(Summons No 416 of 2017 and
Summons No 1366 of 2017)

Between

Sinco Technologies Pte Ltd

… *Plaintiff*

And

(1) Singapore Chi Cheng Pte Ltd

(2) Chang Tsuei-Yun

… *Defendants*

GROUNDS OF DECISION

[Conflict of laws] — [Natural forum] — [*Forum non conveniens*]
[Conflict of laws] — [Natural forum] — [Stay of proceedings]

Sinco Technologies Pte Ltd
v
Singapore Chi Cheng Pte Ltd and another

[2017] SGHC 234

High Court – Suit No 7 of 2017 (Summons Nos 416 and 1366 of 2017)
Lai Siu Chiu SJ
12 July 2017

27 September 2017

Lai Siu Chiu SJ:

Introduction

1 Sinco Technologies Pte Ltd ("the plaintiff") is a company incorporated in Singapore on 2 November 1995 and is in the business of manufacturing plastics, rubber and silicon engineering components.

2 Singapore Chi Cheng Pte Ltd ("the first defendant") is a private exempt company and was incorporated on 23 April 1997 as an investment company by Taiwan Chi Cheng Enterprise Co Ltd ("TCC") which is listed on the Taiwan Stock Exchange.[1] TCC was the sole shareholder of the first defendant until 30 December 2016 when TCC sold its interest to Finno Technology (Hong Kong) Company Ltd.

[1] Statement of Claim (Amendment No 1) at paras 2-3.

3 The first defendant owns 96.91% in a company called Zhuhai Chi Cheng Technology Co Ltd ("ZCC") which carries on business in Zhuhai, China, in precision metal stamping and manufacturing accessory components for communications equipment, electronics, computers, cameras and related peripherals. ZCC also owns prime land, factories, plants, other buildings and private residences in Zhuhai. Besides the first defendant, ZCC's other shareholders are Zhuhai Guanyao Paper Packaging Co. Ltd ("Zhuhai Guanyao Paper") and Kunshan LitaXiang Machinery & Equipment Co. Ltd ("Kunshan LitaXiang"). The shareholdings of Zhuhai Guanyao Paper and Kunshan LitaXiang in ZCC are 2.93% and 0.16% respectively.[2]

4 ZCC also holds 75% of the shares in a Chinese company called Kunshan Chi Cheng Technology Co Ltd ("KCC") which is located at Kunshan. TCC owns 15% of the remaining shares in KCC while the balance 10% shares are held by Hong Kong Chi Cheng Limited.[3]

5 The court was informed that on 20 March 2017, the first defendant together with the other two shareholders of ZCC namely Guanyao Paper and Kunshan LitaXiang had commenced proceedings against the plaintiff in Zhuhai for this dispute.

6 The plaintiff commenced this Suit No 7 of 2017 ("the Suit") on 3 May 2017 alleging fraudulent or negligent misrepresentation on the part of the first defendant that induced the plaintiff to enter into a letter of intent on 1 August 2016 ("the LOI"). The plaintiff also claimed unjust enrichment against the defendants in the sum of US$3m. The Suit was also filed against Chang Tsuei-

[2] Leon Chen's affidavit dated 7 February 2017 at paras 6-8.

[3] Leon Chen's affidavit dated 7 February 2017 at para 10.

Yun ("the second defendant") who is a director of the first defendant, the vice chairman of TCC, the legal representative of ZCC as well as a majority shareholder of TCC. The plaintiff alleged that the second defendant is the prime mover and ultimate controller of the Chi Cheng group of companies and is responsible for the business and management of the companies in the group.[4]

7 Shortly after the plaintiff's commencement of the Suit, the first defendant applied in Summons No. 416 of 2017 ("the first defendant's application") for a stay of proceedings on the ground of *forum non conveniens.* The second defendant followed suit and filed Summons No. 1366 of 2017 ("the second defendant's application") applying for a similar stay of the Suit. (Henceforth, the two defendants' applications will be referred to jointly as "the defendants' applications").

8 Both summonses came up for hearing before this court. At the conclusion of the hearing, I granted the defendants' applications (with a stay of six months until 12 January 2018) and further ordered (in regard to the first defendant's application) that the plaintiff commence proceedings afresh in Zhuhai which claim should be tried together with the first defendant's claim against the plaintiff there. The plaintiff is dissatisfied with my decision and has filed Notices of Appeal in CA Nos.133 and 134 of 2017 respectively against my granting of the defendants' applications. Consequently, I now set out the grounds for my decision.

The facts

9 The facts set out below are extracted from the pleadings as well as from the affidavits filed by the parties.

[4] Statement of Claim (Amendment No 1) at para 3.

10 Around April 2016, the shareholders of ZCC decided to divest their shares in ZCC which was in financial difficulties. The plaintiff expressed an interest in acquiring the shares because ZCC held an anodising licence in China. Securing the licence would enable the plaintiff to expand some of its own manufacturing processes in China (according to the affidavit filed by the plaintiff's Chief Operations Officer ["COO"] Jonathan Chee ["Chee"]).

11 According to Chee, the plaintiff would have faced difficulties if it were to transfer the anodising licence to itself from ZCC. He thought the best way to do the transfer was to acquire the owner of the licence, namely the first defendant. Chee was reassured by the fact that ZCC's majority shareholder was the first defendant, a Singapore registered company which held substantial and real assets including receivables of more than S$5m, fixed deposits of more than S$1m and cash or cash equivalent close to S$17,000. Additionally, Chee noted that the first defendant had a viable business as it provides manufacturing and repair services for industrial and commercial electronic products.[5]

12 The plaintiff's interest in acquiring ZCC was conveyed by Chee to one Joey Hsu who was previously with ZCC. Chee then contacted Chen Pao Shun ("Leon Chen"), the chief financial officer of ZCC.[6]

13 On or about 4 May 2016 ("the 4 May meeting"), the plaintiff's representatives, namely its chief executive officer Bryan Lim, Chee and its financial controller Poh Leong Wee Terence ("Terence"), met the second defendant, Leon Chen and ZCC's general manager Sam Tung ("Tung") at ZCC's office at Zhuhai. The plaintiff's representatives expressed interest in

[5] Jonathan Chee Sze Chiang's affidavit dated 21 April 2017 at paras 20-21.

[6] Leon Chen's affidavit dated 7 February 2017 at para 13.

purchasing the first defendant's shares in ZCC. The second defendant informed them that the sale and purchase transaction, including negotiations, would be handled by a lawyer, Lu Dongbiao ("Bill Lu"), from the Zhuhai law firm called Guangdong Jiatong Law Firm ("Guangdong Jiatong").[7] Guangdong Jiatong was the custodian trustee of ZCC's assets while Bill Lu held a power of attorney granted by the first defendant, TCC and ZCC.

14 Soon after the 4 May meeting, the plaintiff conducted extensive due diligence on ZCC in China from May to July 2016.[8] This included a visit by Terence and other representatives of the plaintiff to ZCC's premises. The plaintiff also engaged a firm of valuers, Dongguan Hualian Asset Appraisal, as well as a team from the Hong Kong branch of DBS Bank's mergers and acquisition division. Legal due diligence for the plaintiff was conducted by a Zhuhai law firm Dentons Law Office LLP ("Dentons") and one Xue Peng ("Xue") in particular.

15 Leon Chen asserted that it was made known to the plaintiff in the course of its due diligence exercise that ZCC faced financial and legal problems.[9] The financial problems included the company's main banker, Bank of Communications (Zhuhai Branch) ("the Bank"), recalling the loans it had extended to ZCC and suing for their repayment. Another problem involved the sale transaction by ZCC of its shares in KCC (at [4]) to two individuals namely Li Jiong and Madam Luo Feng (collectively "the buyers"). The sale price of KCC's shares to the buyers was around RMB170,000,000 of which

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[7] Leon Chen's affidavit dated 7 February 2017 at para 14.

[8] Jonathan Chee Sze Chiang's affidavit dated 21 April 2017 at para 28; Leon Chen's affidavit dated 7 February 2017 at para 18.

[9] Leon Chen's affidavit dated 7 February 2017 at para 19.

RMB132,500,000 was then outstanding. The sale was effected pursuant to an Equity Transfer Agreement dated 19 October 2015 ("the ET Agreement"). The balance of RMB132,500,000 was booked as an account receivable in the books of ZCC. Henceforth the sum of RMB132,500,000 will be referred to as the "Account Receivable".

16 The Bank sued ZCC because KCC had furnished a corporate guarantee to the Bank as part of the securities given by ZCC for the Bank's loans. As a result, the buyers suspended their instalment payments of the Account Receivable.[10]

17 By email, Leon Chen furnished to the plaintiff through DBS Hong Kong a list of all the legal suits faced by ZCC. He claimed that the plaintiff and Dentons expressly informed him and Bill Lu that the legal issues involving KCC would not affect the intended acquisition of the ZCC shares.[11]

18 On or about 25 July 2016, the plaintiff informed the first defendant by email that it was ready to pay a deposit of RMB20m (equivalent to US$3m) for the purchase of ZCC shares, subject to certain terms and conditions. In a telephone exchange between Xue and Bill Lu, the former informed the latter that the deposit would be paid into a joint account and the monies would not be used until after the completion of the sale and purchase transaction. [12]

19 On 27 July 2016, Bill Lu informed the plaintiff by email that it had to pay US$3m to ZCC by 28 July 2016 as earnest money before ZCC would allow

[10] Leon Chen's affidavit dated 7 February 2017 at para 19.

[11] Leon Chen's affidavit dated 7 February 2017 at para 21.

[12] Jonathan Chee Sze Chiang's affidavit dated 21 April 2017 at para 32; Leon Chen's affidavit dated 7 February 2017 at para 22.

the plaintiff to continue its negotiations and due diligence on ZCC. Further, ZCC would be at liberty to use the US$3m (which was not to be placed in a joint account) and the plaintiff had to complete its evaluation and make an offer price for ZCC shares by 5 August 2016.[13]

20 The plaintiff did not pay by 28 July 2016 the US$3m that was requested. Instead, on that day, Xue emailed Leon Chen a draft letter of intent ("the draft LOI") in respect of the plaintiff's intended purchase of ZCC's shares. The draft LOI did not contain a clause on the issue of earnest money.

21 On 29 July 2016, the second defendant emailed Chee to say the ZCC shareholders did not agree to the draft LOI. She referred to Leon Chen's email of 27 July 2016 (at [19]) and added that since no earnest money was paid by 28 July 2016 as ZCC stipulated, the latter's shareholders would be accepting offers from other interested buyers. She added that if the plaintiff was still interested in purchasing ZCC's shares, it would have to pay US$500,000 (or its equivalent in RMB) as earnest money to Guangdong Jiatong by that day. The plaintiff would also have to sign a share transfer agreement providing for a purchase price of not less than US$10m and pay a deposit of US$3m by 5 August 2016.[14]

22 On 1 August 2016, Chee, Xue and the plaintiff's accountant attended at the offices of Guangdong Jiatong and met Bill Lu and Leon Chen ("the 1 August meeting"). The plaintiff offered US$8m for the shares in ZCC with an immediate deposit of US$3m. In exchange, the plaintiff requested that ZCC's shareholders return forthwith all earnest monies received from other potential buyers and deal solely with the plaintiff.[15]

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[13] Leon Chen's affidavit dated 7 February 2017 at para 23.

[14] Leon Chen's affidavit dated 7 February 2017 at paras 25-26.

23 At the 1 August meeting, Bill Lu prepared a letter of intent for acquisition of shares in ZCC. On Xue's advice, the plaintiff made amendments to the document. After the amendments were completed, the finalised version of the document was engrossed and the parties signed the LOI.[16] Clause 7 of the LOI states:

> The place for the performance of this Letter of Intent shall be Zhuhai.

24 At the 1 August meeting, Xue handed to Chee and to the plaintiff's accountant the due diligence report. During the ensuing discussion, the parties touched on the Account Receivable due from the buyers. Bill Lu apparently told Xue that once the plaintiff settled the debt due to the Bank from ZCC, the buyers would have no basis to refuse to pay the Account Receivable for their shares in KCC.[17]

25 The plaintiff's version of the discussion at the 1 August meeting formed the *gravamen* of its case in the Suit. In the plaintiff's statement of claim (Amendment No 1) (at [9]), it was alleged that at that meeting, Leon Chen and Bill Lu made the following representations on behalf of the ZCC shareholders:[18]

> (a) From the date of the signing of the ET Agreement (at [14]) until 1 August 2016, the value of KCC's land and plant had increased in value by around RMB5-6m, which exceeded the agreed penalty of RMB3m under the ET Agreement;

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[15] Leon Chen's affidavit dated 7 February 2017 at para 27.

[16] Jonathan Chee Sze Chiang's affidavit dated 21 April 2017 at para 40.

[17] Jonathan Chee Sze Chiang's affidavit dated 21 April 2017 at para 35.

[18] Statement of Claim (Amendment No 1) at para 9.

(b) The buyers would definitely continue to pay to ZCC the rest of the purchase price under the ET Agreement; and

(c) The Account Receivable was definitely recoverable from the buyers.

(Hereinafter the above allegations will be referred to collectively as "the Representations"). The plaintiff alleged that it relied on the Representations and was thereby induced to enter into the LOI and pay the deposit of US$3m on or about 4 August 2016.[19]

26 On 16 August 2016, the plaintiff alleged it was informed by Leon Chen and Bill Lu that the buyers had threatened proceedings against ZCC for alleged breach of the ET Agreement and were demanding compensation equivalent to 20% of their purchase price namely around RMB34m.[20]

27 The plaintiff further alleged that between 16 August and 14 September 2016, Leon Chen and Bill Lu made further representations to the plaintiff on behalf of the ZCC shareholders as follows:[21]

(a) The buyers would not commence proceedings against ZCC;

(b) The Account Receivable was recoverable; and

(c) A guarantee for (a) and (b) would be provided in the share purchase agreement.

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[19] Statement of Claim (Amendment No 1) at para 13.

[20] Statement of Claim (Amendment No 1) at para 15.

[21] Statement of Claim (Amendment No 1) at para 16.

(Collectively the above allegations will be referred to hereinafter as "the Further Representations").

28 On or around 14 September 2016, the second defendant requested the plaintiff to make an advance payment of US$2.6m to the first defendant. In good faith and relying on the Further Representations, the plaintiff made an advance payment of US$2.6m by cheque crediting the first defendant's Singapore bank account.

29 The defendants' version of the 1 August meeting was as follows:[22]

(a) The plaintiff wanted to sign an agreement immediately and place a deposit of US$3m for the purchase of ZCC shares for which the plaintiff was prepared to pay a total price of US$8m;

(b) In exchange, the plaintiff wanted the ZCC shareholders to deal solely and exclusively with the plaintiff. Chee required Bill Lu to return all earnest money received from other interested buyers;

(c) At the 1 August meeting, Xue submitted Dentons' completed due diligence report to Chee and Terence. The discussion turned to the Account Receivable. Bill Lu opined to Xue that once the plaintiff settled the debt owed to the Bank by ZCC, the buyers would have no basis to refuse to pay the Account Receivable. Xue agreed. Chee then said that upon signing the LOI, ZCC's problems would henceforth be his (the plaintiff's);

[22] Leon Chen's affidavit dated 7 February 2017 at paras 27-32.

(d) At no time whether at the 1 August meeting or otherwise did the ZCC shareholders or their representatives make any of the Representations alleged in the statement of claim or to similar effect;

(e) Neither Bill Lu nor Leon Chen consulted with or took instructions from the second defendant at the 1 August meeting, the reason being that both of them were already authorised by the second defendant to represent ZCC; they only had to report to the second defendant on the outcome of the 1 August meeting;

(f) Bill Lu drafted the LOI on the spot. It was reviewed by Xue who gave his input on the draft including adding Clause 7 (at [23]) providing for Zhuhai to be the place of performance. The first defendant, at the plaintiff's request, was designated the payee of the purchase price, including the deposit of $3m. The plaintiff then signed the LOI.

30 The plaintiff paid the $3m deposit on 4 August 2016 into the first defendant's bank account.[23]

31 On 8 August 2016, ZCC received a letter of demand dated 7 August 2016 addressed to its shareholders from the buyers alleging that the shareholders had failed to disclose KCC's contingent liabilities; the buyers demanded compensation amounting to 20% of their purchase price.[24] On 16 August 2016, Leon Chen forwarded the buyers' letter of demand to the plaintiff via email. His email's subject matter in Mandarin was "Pointing out legal risks".

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[23] Jonathan Chee Sze Chiang's affidavit dated 21 April 2017 at para 45; Leon Chen's affidavit dated 7 February 2017 at para 33.

[24] Leon Chen's affidavit dated 7 February 2017 at para 35.

32 The defendants denied the plaintiff's allegation that they made the Further Representations as set out in [27] above. They contended that the contemporaneous documents told a different story. The defendants claimed that when Leon Chen notified the plaintiff of the buyers' letter of demand, neither the plaintiff nor Dentons raised any concerns or were alarmed over the turn of events. Instead, the plaintiff requested clarification on the ET Agreement and that ZCC grant a power of attorney to Xue and his team at Dentons to act on behalf of ZCC in respect of all law suits, arbitration proceedings and potential claims in which ZCC was involved; ZCC acceded to the request.[25]

33 Between 20 and 24 August 2016, Chee called Leon Chen to say that having consulted Xue, he was not worried about the Account Receivable. Separately, Xue advised Chee on 23 August 2016 that the dispute on the ET Agreement was controllable and that the buyers were trying to take advantage of the misfortunes of ZCC and KCC. This was repeated by Xue in the presence of Chee and the plaintiff's marketing manager to Bill Lu and Leon Chen.[26]

34 On 19 August 2016, Guangdong Jiatong wrote to the plaintiff to say that the plaintiff had yet to provide any funds to ZCC for it to maintain its normal operations. The plaintiff was advised that it was required to sign the final share transfer agreement by 15 September 2016 and to pay within three days thereafter US$2.6m towards the purchase price of ZCC shares. Notwithstanding the outright sale of ZCC shares to the plaintiff, the defendants' case was that it was the plaintiff's request that ZCC continued its operations.[27]

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[25] Leon Chen's affidavit dated 7 February 2017 at para 36.

[26] Leon Chen's affidavit dated 7 February 2017 at para 38.

[27] Leon Chen's affidavit dated 7 February 2017 at para 40.

35 The plaintiff agreed to pay US$2.6m by 15 September 2016 as the defendants requested but asked that the share transfer agreement by signed by 19 September 2016 to accommodate Chee's schedule. The plaintiff paid the US$2.6m requested on or about 14 September 2016.[28]

36 Between 4 August and 18 September 2016, the parties exchanged draft transfer agreements through their solicitors. The first draft was prepared by Dentons and contained clause 11.5 which states:[29]

> **Applicable Law and Dispute Resolution**
>
> 11.5.1 The formation, validity, interpretation and performance of the Agreement shall be governed by the laws and regulations of the People's Republic of China,
>
> 11.5.2 Any dispute arising out of or in connection with this Agreement shall be settled by the parties through amicable negotiations. If the dispute cannot be resolved amicably through negotiations within fifteen (15) days after the dispute has arisen, either party shall have the right to submit it to the South China International Economic and Trade Arbitration Commission for arbitration in accordance with the arbitration rules in force at that time. The place of arbitration shall be Shenzhen. The arbitral award shall be final and legally binding upon the parties.

The above clause remained in all subsequent drafts of the transfer agreement.

37 The defendants pointed out that none of the Representations or Further Representations pleaded in the statement of claim appeared in the draft transfer agreement.[30]

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[28] Leon Chen's affidavit dated 7 February 2017 at para 41.

[29] Leon Chen's affidavit dated 7 February 2017 at para 44, Exhibit CPS-1, pp 146-248.

[30] 1st defendant's submissions at para 35.

38 Eventually, the share transfer agreement fell through as the plaintiff disputed that it was obliged to bear ZCC's daily operating expenses prior to the execution of the share transfer agreement whereas the defendants contended the plaintiff was liable to do so under the LOI with effect from 1 July 2016. By Bill Lu's email dated 30 September 2016, ZCC shareholders indicated they were prepared to compromise on this issue by bearing certain specific expenses incurred by ZCC in the period July to September 2016.[31]

39 It was the defendants' case that the plaintiff unilaterally withdrew from the acquisition of ZCC's shares by Xue's email dated 14 October 2016. The plaintiff sought a refund of the total sum of US$5.6m it had paid.[32]

40 On or about 17 October 2016, the first defendant refunded the plaintiff the sum of US$2.6m but refused to refund the deposit of US$3m. The defendants took the position that the plaintiff was in breach of contract and the defendants had thus forfeited the deposit in accordance with the deposit penalty rule in Chinese law. Hence, the plaintiff's claim for unjust enrichment.

41 In support of the defendants' applications, the defendants relied on an opinion of the plaintiff's Chinese law expert Dong Chungang ("Dong") dated 3 May 2017 ("Dong's opinion").[33] Dong is a partner in a Beijing law firm and is also a member of the New York Bar. Dong's opinion in essence stated:

(a) The LOI is a legally binding contract under PRC law;

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[31] Leon Chen's affidavit dated 7 February 2017 at para 45.

[32] 1st defendant's submissions at para 37.

[33] Dong Chungang's affidavit dated 27 April 2017 at pp 18-45.

(b) The Representations and Further Representations are actionable under People's Republic of China ('PRC") law;

(c) The plaintiff's claim for unjust enrichment is actionable under PRC law; and

(d) The plaintiff would have to pierce the corporate veil under Article 20 of the Company Law of the PRC in order to hold the second defendant personally liable to the plaintiff under PRC law.

The defendants submitted that it was implicit in Dong's opinion that Dong accepted that Chinese law is applicable to the plaintiff's claim.[34]

42 Dong's opinion referred to Article 532 of the Interpretation of the Supreme People's Court Concerning the Application of Civil Procedure Law of the PRC ("Article 532") to support his view that a PRC court may dismiss an action and instruct a plaintiff to file the case in a foreign court which is more convenient to hear the case.[35] Such instances would include (i) the fact that the case does not involve the interests of PRC's citizens, legal persons or other organisations; (ii) the main facts in dispute did not occur within the territory of the PRC and the governing law of the case is not the laws of the PRC.

43 Dong *inter alia* opined that the plaintiff's claim for the return of US$3m was the major dispute and revolved around a transfer of shares in ZCC, a Chinese legal entity and the performance of the LOI. He said that in reality the actual transferees were the three shareholders of ZCC, one of whom, namely the first defendant, was the majority shareholder which is a Singapore company.

[34] 1st defendant's submissions at para 40.

[35] Dong's opinion at para 38.

He opined that the issue of whether the deposit of US$3m should be repaid to the plaintiff is a matter between two Singapore companies, one being the payer and the other the payee of the amount. As the major facts of the case took place in Singapore, Singapore law should apply.[36] Dong pointed to the fact that the share transfer agreement was never signed. Hence, the arbitration clause (cl 11.5) in the drafts of the share transfer agreement (at [36]) was not enforceable.[37]

44 While fraudulent misrepresentation and unjust enrichment are actionable under PRC law, Dong pointed out that PRC courts rely primarily on documentary evidence which must be produced by the claiming party. He added that there is no process of discovery or disclosure under PRC law.[38]

45 Dong's opinion concluded with his view that the PRC courts are *forum non conveniens* to hear this case.

46 The defendants challenged his view as it was inherently contradictory since Dong had already stated that the LOI was binding under PRC law.

47 The defendants also obtained an expert legal opinion from a retired Guangdong judge called Peng Shiquan ("Peng"). The opinion was dated 24 March 2017 ("Peng's opinion") and a supplementary opinion from him was dated 5 June 2017 ("Peng's supplementary opinion"). In Peng's opinion,[39] he stated that Article 23 read with Article 265 of the Civil Procedure Code of the PRC provided that the people's court in the place where the contract is signed

[36] Dong's opinion at paras 40-45.

[37] Dong's opinion at para 57.

[38] Dong's opinion at para 76.

[39] Peng's opinion (Tan Teng Muan's affidavit dated 18 April 2017, Exhibit TTM-2, pp 5-26).

or performed shall have jurisdiction in the case of an action concerning a contract dispute brought against a defendant who has no domicile within the PRC. Hence, it was the defendants' contention that by reason of clause 7 (at [23]) of the LOI, which stated that the place of the performance of the LOI to be Zhuhai, it was implied that the parties had agreed to the exclusive jurisdiction of the Chinese courts.

48 Needless to say, Peng's supplementary opinion took issue with Dong's views. In Peng's supplementary opinion, he pointed out that notwithstanding that there is no common law discovery regime under Chinese law, Article 63 of the Civil Procedure Law of the PRC ("the CP Law") stipulates that other types/forms of evidence receivable by the courts include witness testimony.[40] Moreover, Articles 111 to 113 of the CP Law provides for situations where, if a party who bears the burden of proof has evidence to prove that the opposing party holds relevant evidence, it can apply to the people's court to order the opposing party to produce the relevant evidence.[41]

49 Peng's supplementary opinion also criticised Dong's opinion on the latter's views on Article 532 contending that the plaintiff's claim did not satisfy all the provisions therein so as to warrant a Chinese court to dismiss it in favour of a foreign court.[42] The court will return to Article 532 later (see [61] below).

50 The defendants took the position that even under common law principles, the same conclusion would be reached – that Chinese courts would have exclusive jurisdiction. In this regard, the defendants relied *inter alia* on:

[40] Peng's supplementary opinion (Tan Teng Muan's affidavit dated 7 June 2017, Exhibit TTM-4, pp 5-23) at pp 1-2.

[41] Peng's supplementary opinion at p 3.

[42] Peng's supplementary opinion at pp 5-7.

(a) The "substance" test and the "three stage approach" in *JIO Minerals FZC and Others v Mineral Enterprises Ltd* [2011] 1 SLR 391 ("*JIO Minerals*");

(b) The fact that the place of the tort took place in China as the alleged Representations and Further Representations were made in Zhuhai; and

(c) The negotiations and due diligence leading up to the 1 August meeting all took place in Zhuhai.

51 In arguing against a stay of the Suit, the plaintiff contended that:

(a) The US$3m deposit was paid into the first defendant's bank account in Singapore and it is a Singapore company;

(b) The plaintiff is also a Singapore company;

(c) Although the second defendant is a resident of Taiwan, she has a strong personal connection to Singapore in view of her influence and position as a director of a Singapore-incorporated entity. She owed fiduciary duties to the first defendant under the Companies Act in Singapore;

(d) It was merely fortuitous that the receipt of the Representations and the execution of the LOI took place in a meeting in Zhuhai. The location of the meeting was unimportant and was merely a matter of administrative convenience. Correspondence showed that Leon Chen and other officers of ZCC were willing to travel to Singapore for meetings with the plaintiff. Therefore, an inference should be drawn that

the parties did not ascribe any special significance to Zhuhai as a meeting location;

(e) Although Chee received the Representations on 1 August 2016 in Zhuhai, Chee relied on them in Singapore by communicating with the plaintiff's employees in Singapore and instructing them to pay the US$3m deposit into the first defendant's bank account (citing *UBS AG v Telesto Investments Ltd* [2011] 4 SLR 50 in support);

(f) Upon receiving the Further Representations in Singapore, the plaintiff relied on them and paid the US$2.6m advance payment to the first defendant in Singapore;

(g) Applying the specific rule in *JIO Minerals*, since both the receipt and reliance of the Further Representations took place in Singapore, Singapore is the place of the tort corresponding to the Further Representations;

(h) In an execution list prepared by Leon Chen on or around 21 June 2016, he had provided a payment schedule setting out the instalment payments due from the buyers up until 30 September 2016 for the full sum of RMB132,500.00;

(i) Leon Chen's communications by emails or telephone calls were received in Singapore;

(j) Singapore law governs the plaintiff's claims in misrepresentation and unjust enrichment;

(k) The LOI did not amount to a share transfer agreement as it was merely a document that recorded the parties' agreement to continue negotiations for the plaintiff to purchase the entire shareholding in ZCC. One main purpose of the LOI was to secure payment of a deposit from the plaintiff in order to continue negotiations between the parties and the plaintiff's due diligence exercise. The commercial purpose of the LOI pointed in favour of Singapore;

(l) Little weight should be placed on clause 7 of the LOI and it should be narrowly interpreted as being applicable to only certain clauses in the LOI that pertained to ZCC's operations in China such as clauses 2, 3 and 5.

The decision

52 It is noteworthy that the plaintiff's statement of claim only referred to the LOI and studiously avoided mention of the aborted share transfer agreement. The latter document was never signed but its drafts were relevant for the purpose of determining the parties' intentions in particular on their choice of law and the intended place of arbitration (as reflected in clause 11 at [36] above).

53 Equally noteworthy (as was pointed out by the first defendant) was the fact that the plaintiff's claim based on the LOI was not framed in contract but in tort coupled with a claim for equitable relief. Why was that the case? The first defendant surmised it was a deliberate choice as, had the plaintiff relied on the LOI to frame its claim in breach of contract, it would have had great difficulty in overcoming clause 7 (at [23] which provided for the place of performance to be Zhuhai).

54 The court granted the defendants' applications as it was clear that based on the two-stage test propounded by the House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*") (a case cited by all three parties and which was recently reaffirmed by our Court of Appeal in *Rappo Tania v Accent Delight International Ltd* [2017] 2 SLR 265) ("*Accent Delight*") and the three-pronged approach laid out by our Court of Appeal in *JIO Minerals,* the plaintiff's claim should more appropriately be heard by the Chinese courts in Zhuhai.

55 The two-stage test in *Spiliada* can succinctly be stated as follows:

(a) The court will first determine whether *prima facie*, there is some other available forum that is more appropriate for the case to be tried;

(b) If the court concludes that *prima facie* there is a more appropriate alternative forum, the court will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nonetheless be granted.

The burden of proof in (a) is on the defendant while that in (b) is on the plaintiff.

56 In *JIO Minerals* (cited by all parties), the appellate court applied (at [79]) a three pronged approach to determine the governing law of a contract:

(a) The court considers if the contract expressly states its governing law ("the Express Law");

(b) If the contract is silent, the court proceeds to the second stage and considers whether it can infer the governing law from the intention of the parties ("the Implied Law");

(c) If the court is unable to infer the parties' intentions, it moves to the third stage and determines the law which has the closest and most real connection with the contract ("the Objective Law").

57 Applying *JIO Minerals* here, as the share transfer agreement was never signed, there was no Express Law under the first approach. This court then proceeded to the second approach to determine the Implied Law. In this regard, the court took into account the following factors:

(a) The plaintiff intended to purchase a Chinese company ZCC;

(b) All meetings and/or negotiations leading to and the signing of the LOI (which is in Mandarin) were done in Zhuhai;

(c) The plaintiff's lawyers Dentons are from Zhuhai and so too are the defendants' lawyers Guangdong Jiatong;

(d) Due diligence on ZCC was done in Zhuhai;

(e) The plaintiff appointed a firm of valuers from Zhuhai called Dongguan Hualien Asset Appraisal to value the assets of ZCC and the Hong Kong branch of DBS as its advisers;

(f) The aborted share transfer agreement was drafted in Mandarin and clause 11 therein (at [36]) contemplated that the applicable law would be PRC law with the venue for resolution of disputes by arbitration being Shenzhen;

(g) The alleged Representations and Further Representations by Leon Chen and Bill Lu were made in China;

(h) The key witnesses for the parties who would testify in court proceedings would be Chee, Leon Chen, Bill Lu, Xue and the second defendant. Save for Chee, the other material witnesses are all based in China; and

(i) Other possible witnesses such as the buyers and the plaintiff's valuers are all from China whilst representatives from DBS are from Hong Kong.

58 Against all the above factors pointing to China as the place where all the connecting factors took place and hence PRC law was the applicable law by implication, the plaintiff could only point to one tangible fact connected to Singapore – the US$3m deposit was paid by the plaintiff into the first defendant's bank account in Singapore. That factor was not significant when viewed in the light of all the factors in [57] that pointed overwhelmingly to China as the more appropriate forum for the determination of this dispute. The twelve factors proffered by the plaintiff in [51] above as pointing to Singapore as the more appropriate forum were unconvincing. Moreover, as was pointed out in *Accent Delight* (at [70]), "it is the *quality* of the connecting factors that is crucial in this analysis, rather than the quantity of factors on each side of the scale".

59 As the defendants had crossed the threshold of the first stage of the *Spiliada* test (at [55](a)) in satisfying the court that *prima facie* China was a more appropriate forum, the burden shifted to the plaintiff under the second stage of *Spiliada* (at [55](b)) to convince the court that notwithstanding that China was a more appropriate forum, justice required that a stay should nonetheless not be granted. The plaintiff was unable to satisfy the second stage

of the test in *Spiliada* or the third prong of the approach in *JIO Minerals* and it could not persuade this court that Singapore should be the appropriate jurisdiction for this dispute.

60 The plaintiff had argued that it would be deprived of juridical advantages available in Singapore proceedings in the form of the discovery and witness testimony if a stay was granted in favour of Chinese courts.[43] It was contended that the juridical advantages were of particular importance as the misrepresentations were made verbally by the first defendant to the plaintiff. However, it is noteworthy that the plaintiff's own legal expert Dong had opined (see [41]) that the plaintiff's claims in misrepresentation and unjust enrichment are actionable under PRC law while the supplementary opinion of the defendants' expert Peng stated that the lack of common law discovery under PRC law is mitigated by Article 63 of the CP Law (at [48]) which stipulates that other types/forms of evidence receivable by the Chinese courts include witness testimony. In any case, the appellate court in *Accent Delight* had this to say (at [109]) on the issue of juridical advantage:

> … The fact that a plaintiff would have a "legitimate juridical advantage" if it is allowed to proceed in Singapore is not a decisive factor (see *Brinkerhoff* at [35(f)]). Prof Yeo Tiong Min states in *Halbury's* (at para 75.097) that "differences in procedure and remedies will generally be irrelevant and not having the benefit of the procedures or remedies of the forum will not by itself amount to denial of substantial justice".

61 As was indicated earlier (at [49]), I return now to Article 532. It states:

> Where a foreign-related civil case simultaneously meets all the following conditions, a people's court may rule to reject the lawsuit and instruct the parties to file the lawsuit with a foreign court which is more convenient:

[43] Plaintiff's submissions at para 151.

> (1) the defendant raises a request that the case shall be under the jurisdiction of a foreign court which is more convenient, or raises an objection to the jurisdiction;
>
> (2) there is no agreement on the choice of jurisdiction of a court of the People's Republic of China between the parties involved;
>
> (3) the case is not under the exclusive jurisdiction of a court of the People's Republic of China;
>
> (4) the case does not involve the interests of the State, citizens, legal persons or other organizations of the People's Republic of China;
>
> (5) the major facts over which the case has disputes did not occur within the territory of the People's Republic of China, and the laws of the People's Republic of China are not applicable to the case, as well as there are significant difficulties in the determination of facts and application of laws; and
>
> (6) a foreign court has jurisdiction of the case, and it is more convenient for the foreign court to hear the case.

It cannot be disputed that the requirements in (4) and (5) of Article 532 are not met here as: (i) the case does involve the interests of an organization of the PRC, *ie*, ZCC; (ii) the major facts in the dispute all occurred within the territory of the PRC, and (iii) it is this court's view that by implication, the laws of the PRC are applicable to the case.

62 At this juncture, I will also address one issue that was raised in the first defendant's arguments – that the plaintiff should have but did not join the remaining shareholders of ZCC to the Suit. The plaintiff's answer to this argument was that there was no necessity to do so because:

(a) The other shareholders were not party to the LOI;

(b) There was no evidence that the other shareholders received any portion of the deposit of US$3m; and

(c) According to the first defendant's own evidence (that of Leon Chen in his first affidavit), the second defendant, being the legal representative of the first defendant, had the mandate from ZCC's shareholders to represent them in the intended disposal of their shares to interested buyers. Further, the other two minority shareholders (Zhuhai Guanyao Paper and Kunshan LitaXiang) had given a power of attorney to the first defendant.

63 It is not necessary for this court to determine this issue for the defendants' application as it should more appropriately be decided by the Zhuhai courts under PRC law, although I would have thought that all shareholders of a takeover target should properly be party to proceedings involving a dispute between the seller(s) and the buyer(s).

64 The plaintiff had also submitted that a transfer of the Suit to the Singapore International Commercial Court ("SICC") would be appropriate as the transfer requirements under O 110 r 12(4) of the Rules of Court (Cap 322, R 5 2014 Rev Ed) ("the Rules") were met.[44] The relevant provisions under O 110 r 12(4) of the Rules state:

> (4) Subject to paragraph (3B), a case may be transferred from the High Court to the Court only if the following requirements are met:
>
> (a) the High Court considers that –
>
> (i) the requirements in Rule 7(1)(*a*) and (*c*) are met; and
>
> (ii) …
>
> (iii) it is more appropriate for the case to be heard in the Court;

[44] Plaintiff's submissions at para 90.

(b) either –

(i) a party has, with the consent of all other parties, applied for the transfer in accordance with Rule 13; or

(ii) the High Court, after hearing the parties, orders the transfer on its own motion.

65 Order 110 r 7(1)(a) of the Rules state:

Jurisdiction (O. 110, r. 7)

7.—(1) The Court has the jurisdiction to hear and try an action if —

(a) the claims between the plaintiffs and the defendants named in the originating process when it was first filed are of an international and commercial nature;

…

66 The first defendant's response to the plaintiff's submission was to rely on the following extract from the appellate court's decision in *Accent Delight* (at [124]):

> We would emphasise that the possibility of a transfer to the SICC should not be considered by plaintiffs as a free pass to elude all jurisdictional objections to the adjudication of a dispute in Singapore. Like all arguments on *forum non conveniens,* a submission that the possibility of a transfer to the SICC weighs in favour of an exercise of jurisdiction by the Singapore courts must be grounded in specificity of argument and proof by evidence. A plaintiff must articulate the particular quality or feature of the SICC that would make it more appropriate for the dispute to be heard in Singapore by the SICC, as well as prove that the dispute is of a nature that lends itself to the SICC's capabilities. It is also relevant for the court to consider whether the Transfer Requirements are likely to be satisfied. **If, for example, the plaintiff fails even to show a *prima facie* case that the dispute is of an "international and commercial" nature, we do not think its reliance on the possibility of a transfer to the SICC should be given any weight whatsoever.**
>
> (emphasis in bold)

67 Quite apart from the defendants' objection, this court could not see any "international" flavour in a commercial dispute that involved two Singapore entities and a Taiwanese national. Moreover, there is no judge in the SICC who is familiar with or well versed in Chinese law. Further, the documentation in this case is largely in Chinese.

68 To conclude, the determinant for the defendants' application was whether any of the connecting factors pointed to a jurisdiction "in which the case may be tried more suitably for the interests of all the parties and the ends of justice" (per Lord Goff in *Spiliada* at 476). It was this court's view that in applying the test, the appropriate jurisdiction in this case would be China, not Singapore.

Lai Siu Chiu
Senior Judge

Koh Kia Jeng and Geraldine Yeong Kai Jun (Dentons Rodyk & Davidson LLP) for the plaintiff;
Tan Teng Muan and Loh Li Qin (Mallal & Namazie) for 1st defendant;
Anna Oei Ai Hoea and Deannier Yap (Tan, Oei & Oei LLC) for 2nd defendant.