Sun Jin Engineering Pte Ltd *v* Hwang Jae Woo
[2010] SGHC 111

Case Number : Suit No 379 of 2009 (Registrar's Appeal No 340 of 2009)

Decision Date : 13 April 2010

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : A Rajandran (A. Rajandran) for the plaintiff; Haresh Kamdar (KhattarWong) for the defendant.

Parties : Sun Jin Engineering Pte Ltd — Hwang Jae Woo

Civil Procedure

13 April 2010

Woo Bih Li J:

Introduction

1 This appeal was in respect of the decision of an Assistant Registrar ("AR") on 4 September 2009 to stay proceedings in an action commenced by the plaintiff, Sun Jin Engineering Pte Ltd ("SJE"), a Singapore company, against the defendant, Hwang Jae Woo ("Hwang"), on the ground of *forum non conveniens*. I dismissed SJE's appeal and now give the grounds for my decision.

Background

2 One Seung Yong Chung ("Seung") alleged that he was the majority shareholder of SJE and substantive shareholder of Sun Jin Engineering (M) Sdn Bhd ("SJM"), a company incorporated in Malaysia, and under SJE's control. SJM was the main contractor of two building projects in the Maldives ("the projects"). It was SJE's case that Hwang was one of its employees seconded to SJM for the purpose of the projects.

3 SJE claimed that Hwang had acted in breach of his duty to it and caused it loss. As such, it instituted an action in Singapore to recoup those losses, which were as follows:

(a) a payment of US$20,470.59 to a fictitious company, which was authorized by Hwang;

(b) a payment of US$175,000 as alleged commission to one Ahmed Shahid ("Shahid"), which was authorized by Hwang in breach of his authority;

(c) a payment of US$101,982.37, of which $75,000 was a bonus to SJE's former employee, Son Chang Ju ("Son"), which was authorized by Hwang. The balance was for Son's arrears for salary and compensation for termination of services.

In addition to the above, SJE also sought to recover US$50,000 allegedly lent to Hwang. SJE also mentioned a sum of US$500,000 that the Maldivian courts had ordered SJM to pay to Hwang in Maldivian Suit No 733/MC/2008 ("the profit suit"), but this was not the subject of SJE's Singapore proceedings. It was mentioned as background information in order to set the context of a number of

disputes involving Hwang.

4 Hwang applied, inter alia, to stay the Singapore proceedings in favour of the Maldives. He accepted that the stay application did not extend to the alleged loan of US$50,000, which should be dealt with by the Singapore court. On the other hand, SJE accepted that it would not pursue its claim for the US$20,470.59 in Singapore. Therefore, the stay application ultimately only involved the payments Hwang had authorised to Shahid and Son.

5 The issues in this appeal were:

(a) whether Hwang was precluded from applying for a stay on the grounds of *forum non conveniens* by reason of his delay in making the application and, if not

(b) whether a stay should be granted.

Whether Hwang was precluded from applying for a stay

6 The first issue called for my consideration of steps taken by both parties in the Singapore proceedings. The chronology of events was as follows:

(a) The writ was served on Hwang personally in Singapore on 5 May 2009;

(b) Hwang's appearance was filed on 7 May 2009;

(c) Hwang's defence was due on 27 May 2009;

(d) On 27 May 2009, Hwang's solicitors wrote to SJE's solicitors, seeking a two week extension for the filing of his defence and to consider any necessary applications to be made;

(e) On 2 June 2009, SJE's solicitors faxed and posted a letter to Hwang's solicitors, giving them 48 hours' notice to file the defence. However, Hwang's solicitors claimed that they received the hard copy only on 3 June 2009 and not the fax of 2 June 2009;

(f) On 4 June 2009, Hwang's solicitors wrote seeking a further extension of time till the next day to file the defence. They added that their client would be taking out an application to strike out parts of the claim and/or for the action to be stayed in favour of litigation in the Maldives on the ground of *forum non conveniens*. On that basis, they asked whether Hwang would be allowed to withhold filing the defence pending the final disposition of the intended applications;

(g) On the same day, *ie*, 4 June 2009, Hwang's solicitors wrote a further fax confirming SJE's solicitors' oral agreement to extend time for the filing of the defence to Friday, 5 June 2009;

(h) Hwang's defence was filed on 8 June 2009;

(i) SJE filed its reply on 22 June 2009;

(j) Hwang filed his amended defence on 6 July 2009; and finally

(k) Hwang only filed his stay application on 31 July 2009, which was one month and three weeks after the extended deadline to file the defence, *ie* 5 June 2009.

In the same application, he invoked the Court's jurisdiction to strike out the action pursuant to O 18

r 19 of the Rules of Court (Cap 322, 2006 Rev Ed)("Rules").

7 In the course of argument, SJE raised a preliminary point [note: 1], namely whether Hwang's application for a stay on the ground of *forum non conveniens* should be allowed in light of O 12 r 7(2) of the Rules because the application for a stay of proceedings was filed late.

8 O 12 r 7(2) of the Rules provide as follows:

> A defendant who wishes to contend that the Court should not assume jurisdiction over the action on the ground that Singapore is not the proper forum for the dispute shall enter an appearance *and, within the time limited for serving a defence, apply to Court for an order staying the proceedings*. [emphasis added]

9 Order 12 Rule 7(2) was considered in *Chan Chin Cheung v Chan Fatt Cheung and others* [2009] SGCA 62 ("*Chan*"). There, the Court of Appeal ("CA") held that while the filing of a defence might disentitle a defendant from contesting the court's jurisdiction, this step did not preclude a defendant from applying for a stay on the ground of *forum non conveniens*. In that case, the appellant commenced three suits in Malaysia against the trustees of an estate for breach of their duties. Subsequently, the appellant began an action in Singapore against the respondent for defamation, and the respondents filed their defence, claiming justification. The appellant applied in the Malaysian courts to stay the first of the three Malaysian suits pending the disposal of the Singapore action. That application was dismissed and the respondents then sought to stay the Singapore proceedings pending the outcome of the Malaysian proceedings. The issue which then arose and which was relevant to this case before me was whether the respondents, having taken steps in the Singapore proceedings, were barred from seeking a stay on the ground of *forum non conveniens*.

10 In *Chan*, the CA held at [22] that although the respondents' application for a stay was made late and only after it had taken steps in the proceedings by filing their defence, this did not bar them from applying for a stay *per se*. The test was whether there was any prejudice to the appellant which could not be compensated by costs. Since there was none, the late application did not in itself preclude the stay application. On the facts there, the CA upheld the decision of the High Court to grant a stay of the Singapore action.

11 Applying the decision in *Chan* to the present case, Hwang was not precluded from applying for a stay although he had taken steps in the proceedings by filing and amending his defence and even though his application for a stay of proceedings included an alternative prayer to strike out the action. There was no prejudice to SJE which could not be compensated by costs.

12 However, I would add that I have reservations about the decision of the CA in *Chan*. The CA had referred to the case of *The "Tokai Maru"* 1998 2 SLR(R) 646 ("*Tokai Maru*") and noted that a party should not be precluded from presenting his case unless there was prejudice which could not be compensated by costs. However, *Tokai Maru* was not a case in which a defendant had filed his stay application late. In that case, the party was filing an affidavit of evidence-in-chief late and the court was loath to preclude that party from presenting its case.

13 In resisting an application for a stay of proceedings, a plaintiff is not seeking to preclude a defendant from presenting his case. On the contrary, the plaintiff is suggesting that the defendant should do so but that he should do so *in Singapore*.

14 Furthermore, the purpose of O 12 r 7(2) is to ensure that a defendant files his application for a

stay as soon as possible and before taking a step in the proceedings, usually by filing the defence. It is expressly stated in O 12 r 7(2) that a defendant should apply for a stay within the time limited for serving a defence. It implicitly recognises that the filing of a defence is incongruous with the application for a stay. The rationale for the application for a stay is that the merits of the dispute should be litigated elsewhere; a defence addresses the merits of the dispute. Therefore, once a stay application is filed and served, it should be combined with an alternative prayer for an extension of time to file the defence pending the outcome of the final resolution of the stay application, including resolution by way of appeal. Furthermore, a plaintiff should refrain from insisting that the defendant file his defence once the stay application is served. I have mentioned this procedure before. If it is really necessary to file a protective defence to avoid judgment in default of defence then the defence should specifically state that it is filed without prejudice to the stay application.

15 If the test is merely one of prejudice, it may lead to unsatisfactory results. For example, a defence may well trigger a slew of applications including summary judgment, further and better particulars or discovery. Should any or all of these steps be undertaken only for the plaintiff to subsequently encounter an application for a stay? I do not think so.

16 In my view, the threshold for granting an extension of time should not primarily or solely be whether the plaintiff has suffered prejudice which cannot be compensated by costs. This places an unfair burden on the plaintiff to show good reasons why a defendant should not be allowed to make his application for a stay late. The burden should be on the party who is making the late application to adduce good reasons to show why he should be allowed to make his application although he is out of time.

17 The main reason for the delay in the present case was that Hwang's solicitors were trying to get a copy of the Shahid judgment and were unable to get a legal opinion from a Maldivian lawyer due t o parliament elections in May 2009. The wait for a copy of the Shahid judgment was an unacceptable reason as Hwang nevertheless eventually filed the stay application without the judgment attached. It was obtained thereafter. The second part of the explanation was similarly unconvincing as Hwang's solicitors managed to meet with a Maldivian lawyer during a trip to the Maldives from 23 to 26 May 2009.

18 It appeared to me that the reality was that Hwang's solicitors did not realise that the stay application had to be filed as soon as possible and before filing the defence. Had they realised this and if there were genuine reasons why they could not do so promptly, then they should have applied for an extension of time to file the stay application as well as to defer the filing of the defence pending the outcome of the stay application.

19 I wish to make another observation. The application to strike out the action should not have been filed together with the stay application unless Hwang did not intend to appeal an unsuccessful application for a stay. If the court refused the application for a stay of proceedings and proceeded with the application for striking out which then proved unsuccessful, a question would arise as to whether Hwang could still appeal on the unsuccessful stay application after having already asked the court to rule on the application to strike out. If the test remained one of prejudice then arguably he could still appeal for a stay even if he was unsuccessful in a strike out application. In my view, that would not be the correct position.

20 Thus, an application for a stay of proceedings should be exhausted first and through all avenues of appeal before taking another step in the proceedings - whether it be to file a defence or to apply for an order to strike the action out.

Whether the stay should be granted on the ground of *forum non conveniens*

Whether the stay should be granted on the ground of *forum non conveniens*

21 It is trite law that the most appropriate forum is that with which the dispute has the most real and substantial connection, *ie*, the place "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 Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460 ("*Spiliada*"), at 476.

22 In *PT Hutan Domas Raya v Yue Xiu Enterprises (Holdings) Ltd* [2001] 1 SLR(R) 104 ("*PT Hutan*"), Chao Hick Tin JA ("Chao JA") explained that the test should be applied in the following manner, at [16]:

> … The first stage is for the court to determine whether, *prima facie*, there is some other available forum, having competent jurisdiction, which is more appropriate for the trial of the action. The legal burden of showing that rests on the defendant. In determining that issue the court will look to see what factors there are which point in the direction of another forum as being the forum with which the action has the most real and substantial connection, *eg* availability of witnesses, the convenience or expenses of having a trial in a particular forum, the law governing the transaction and the places where the parties reside or carry on business. Unless there is clearly another more appropriate available forum, a stay will ordinarily be refused. If the court concludes that there is such a more appropriate forum, it will ordinarily grant a stay unless, in the words of Lord Goff, 'there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions' ... [In the second stage,] all circumstances must be taken into account, including those taken into account in determining the question of the more appropriate forum. However, in this stage of the inquiry the burden shifts to the plaintiff.

First stage of the Spiliada test

23 In determining the factors relevant at the first stage, the CA in *Good Earth Agricultural Co Ltd v Novus International Pte Ltd* [2008] 2 SLR(R) 711 held as follows at [10] :

> The main factors that are relevant at the first stage of the *Spiliada* test ("Stage 1") include the following:
>
> (a) general connecting factors;
>
> (b) the jurisdiction in which the tort (or breach of contract) occurred; and
>
> (c) the choice of law (whether the choice of law in the contract was exclusive and if not, which law should be applied in the claims)

24 SJE's case was that Hwang failed to discharge the burden of proving that the Maldives was clearly and distinctly a more appropriate forum than Singapore.

The Employment Contract

25 Hwang's employment contract should be the first general connecting factor to be considered. While SJE contended that its employment of Hwang was a factor connecting its claims to Singapore, Hwang claimed that he was in fact SJM's employee and not SJE's employee.

26 In a letter dated 15 August 2006, Seung appointed Hwang as acting director "for all projects

sited at the Maldives". The circumstances under which this letter was issued were unclear as the letter was apparently back-dated and SJE had no projects in the Maldives.

27 There was also a second letter dated 15 August 2006, under which SJM's executive director, Mr Mohd Al Johari ("Johari"), appointed Hwang as acting director "for all projects sited in the Maldives". Hwang also referred to a resolution of SJM's Board of Directors dated 3 May 2007, which stated that SJM would pay him 30% profit or US$500,000 if he was removed from his position as project manager before the completion of the project. These documents appeared to suggest that Hwang was employed by SJM. SJE, however, disputed their authenticity.

28 Much was made by the parties as to whether SJE or SJM was Hwang's employer.

29 SJE relied on, *inter alia*, the fact that on 23 November 2006 it had applied for an employment pass for Hwang to work in Singapore and had supported Hwang in his application for permanent residence for himself and his family in Singapore. SJE paid Hwang's salary and contributed to his Central Provident Fund account after he became a permanent resident. The salary was paid through SJE's bank account with Hong Kong and Shanghai Bank Limited in Male, the Maldives, or deposited through Hwang's bank account in Singapore.

30 On the other hand, Hwang pointed to the work permit for him to work in the Maldives. This was issued for SJM and not SJE. When Hwang's employment was terminated, SJM placed an advertisement in a local newspaper in the Maldives to announce that he ceased to have any authority or discretion whatsoever to act on SJM's behalf. Hwang worked in the Maldives. He also relied on the fact that, in the profit suit, the Maldivian Court had found that SJM was Hwang's employer.

31 It seemed to me that the Maldivian Court had relied on documents issued in the Maldives and Hwang's work there to the exclusion of documents issued in Singapore to conclude that Hwang's employer was SJM and not SJE. Yet both sets of documents could be considered together and it was not necessary to consider one set to the exclusion of the other. When considered together, my tentative view was that Hwang was employed by SJE but seconded by them to work for SJM in the Maldives. In this respect, Hwang owed a duty to both SJE and SJM to act honestly and diligently. However, as he was seconded to work for SJM, he was authorised to act on its behalf. It was not open to SJM to avoid all obligations accepted by Hwang on its behalf just because SJE was Hwang's employer. The actions of Hwang on behalf of SJM bound SJM provided Hwang acted within his authority and honestly. That would be the law in Singapore.

32 It is interesting to note also that in a profile of a company known as "Creative Management and Engineering Pte Ltd" ("Creative"), Hwang was referred to as a project director of SJE (not SJM) for projects in the Maldives. Creative is Hwang's company in Singapore which was apparently established after his services in the Maldives were terminated by SJM.

33 Nonetheless, the emphasis placed by each side on the identity of Hwang's employer was out of proportion to its significance in the stay application. This was only one of the connecting factors. The identity of Hwang's employer may be more determinative for the purposes of the striking out action, but that was not the application I was deciding.

34 Another connecting factor was that Hwang was working for SJM in the Maldives. Hwang relied on *Koh Kay Yew v Inno-Pacific Holdings Pte Ltd* [1997] 2 SLR(R) 148 ("*Koh Kay Yew*"), to support his assertion that the Maldives was the natural forum for the resolution of the disputes. In that case, a Singapore company which hired a Singaporean resident in California to provide it with business services terminated his employment without notice. The employee sued the employer in California.

The employer's attempt to stay the proceedings in California on the ground of *forum non conveniens* was dismissed by the California courts. The applicant then applied to the Singapore courts for a declaration that Singapore was the natural and proper forum for the determination of the matter and for an injunction to restrain the respondent from taking any further steps in the Californian action. The CA considered the terms of the employment contract to ascertain whether the contract was more closely connected with Singapore or the United States. The fact that the employee was paid $10,000 per month and that the employer contributed CPF pointed to Singapore. On the other hand, the contract was made in and was to be performed in the US; the applicable law was Californian law; and the employment was terminated in the US. Furthermore, the California courts could exercise personal jurisdiction over the applicants. It was thus held that the more appropriate forum was California and the employer's application was dismissed.

35 Admittedly, the present case was not exactly the same as *Koh Kay Yew*. Unlike *Koh Kay Yew*, where the employment contract was made in the US, the employment contract between the plaintiff and the defendant was allegedly made in Singapore and the plaintiff claimed that Singapore law governed the contract. All the same, Hwang had performed his contract in the Maldives, the alleged breaches were committed there, and his employment was terminated there. My tentative view was that Maldivian law was probably the governing law of the disputes in question.

Availability of witnesses

36 SJE argued that as the issue in this case concerned the authority of Hwang, the only material witnesses were SJE's managing director, Seung, SJM's executive director, Johari, and Hwang. Seung was resident in Singapore, Johari in Malaysia, and Hwang was a permanent resident of Singapore. However, Hwang claimed that he had other relevant witnesses in the Maldives.

37 With regard to SJE's claim of US$175,000.00 which concerned the alleged commission to Shahid, Hwang argued that Shahid was a key witness who could testify that Seung had negotiated directly with the latter, and that Chung had agreed to pay Shahid US$175,000 for his services. In view of this, SJE's contention that the evidence of Shahid would be irrelevant to the question of whether Hwang could authorize the payment to him was not tenable. I also accepted Hwang's assertion that the testimony of Shahid would be relevant in order to elucidate the circumstances surrounding the letter of payment, as well as the type of services he performed for SJM. Hence, I was of the view that Shahid was a key witness in SJE's claim of US$175,000.

38 With regard to SJE's claim for US$101,982.37, of which $75,000 was a bonus to Son, SJE also argued that this was authorized by Hwang in breach of his authority. I was informed by counsel that Son was working in the Maldives but was resident in Singapore. It appeared to be common ground that Son was prepared to give his evidence in either the Maldives or Singapore. However, Hwang alleged that Shahid was present at a meeting between Seung and Hwang when Son's bonus was discussed and Seung had agreed to the same. One Ibrahim Gahir ("Gahir") was allegedly also present. Both Shahid and Gahir were residents of the Maldives and were not prepared to come to Singapore to assist Hwang although SJE suggested that these witnesses were a contrived strategy to support the stay application. Apparently, Gahir is, according to SJE, Shahid's brother-in-law. Be that as it may, I could not say at this stage that the Maldivian witnesses required by Hwang were contrived.

39 Hwang asserted that the Maldives was the more appropriate forum for the dispute because his Maldivian witnesses were unwilling to assist him in the Singapore proceedings but were compellable in the Maldives to give evidence. This was based on the opinion of Hussein Siraj, Hwang's expert on Maldivian law. In contrast, Aishath Azima Shakoor ("Aishath"), SJE's expert on Maldivian law stated that witnesses were not compellable by the Maldivian Courts. She added that the Civil Court of the

Maldives would not reject any request from the Singapore High Court to facilitate the taking of evidence of a willing witness via video linkage. However, this was inapplicable as Hwang alleged that the Maldivian witnesses were unwilling witnesses. As a result of these two conflicting opinions, the position on compellability of witnesses in the Maldives was not entirely clear to me. Even if they were not compellable, I was of the view that Hwang had a better chance of obtaining the assistance of the Maldivian witnesses if the case was heard in the Maldives.

40 Thus, the need for the evidence of witnesses in the Maldives for both claims was another reason in favour of staying proceedings in the Maldives.

Conclusion on the first stage

41 On balance, Hwang had succeeded in proving that there were more connecting factors with the Maldives than with Singapore and the Maldives was the more appropriate forum for the litigation in question. SJE had to prove that despite this, the action should not be stayed. This involved a consideration of the 2nd stage of the *Spiliada* test.

The 2nd Stage of Spiliada

42 The 2nd stage of *Spiliada* involved considering all factors when determining which forum is more appropriate. In *Peters Roger May v Pinder Lillian Gek Lian* [2006] 2 SLR(R) 381, V K Rajah J observed at [20]:

> … A court has to take into account an entire multitude of factors in balancing the competing interests. The weightage accorded to a particular factor varies in different cases and the ultimate appraisal ought to reflect the exigencies dictated by the factual matrix. Copious citations of precedents and *dicta* are usually of little assistance and may in reality serve to cloud rather than elucidate the applicable principles…. [emphasis in original]

43 Moreover, in *PT Hutan*, Chao JA aptly stated at [17] that the ultimate question remains the same, which is "where should the case be suitably tried having regard to the interest of the parties and the ends of justice".

No available forum in the Maldives

44 SJE asserted that there was no available forum in the Maldives to resolve its claims and that it would have been unfairly prejudiced if the action was stayed. Aishath, opined that as Hwang was employed under a contract governed by the laws of Singapore (which she assumed to be the case), "such a contract of employment was not enforceable in the Courts of the Maldives". However, Aishath's concern appeared to be contradicted by SJE's other expert, Shaaheen Hameed ("Hameed"), who stated that:

> Therefore, even if the present case is filed in the Maldivian Courts, it is most likely that the Maldivian Courts will ignore the applicability of Singapore law.

45 This statement suggested that Maldivian law, instead of Singapore law would be applied and not that SJE had no recourse in the Maldives. Aishath appeared to have accepted this in her last opinion of 4 April 2010.

Unfair prejudice due to prior rulings of Maldivian Court

46 SJE alleged that in the profit suit, the Maldivian Court had already ruled that Hwang was employed by SJM. Thus, it contended that its case would not get off the ground as it would be unfairly prejudiced by this prior ruling and had no standing to sue Hwang in the Maldives.

47 On the other hand, Hwang wanted the benefit of the court ruling. The fact that there was a ruling which appeared to favour Hwang, regarding the point of who his employer was, seemed in my view to be a neutral factor. SJE wanted to avoid that ruling and Hwang wanted to rely on it.

48 In any event, SJE was not yet a party to proceedings in the Maldives and it would be open to another Maldivian court to take a different view.

49 More importantly, it should be a simple matter for SJM to be added as a co-plaintiff in a Maldivian suit. Indeed, in the Singapore proceedings, SJE made it clear that it might add SJM as a co-plaintiff. There was no suggestion that this could not be done in the Maldives.

Law in the Maldives not as developed

50 SJE also asserted that Singapore was the more appropriate forum as the law was more developed here. This was based on Aishath's opinion that causes of action based on the law of tort, trust and agency are not available in the Maldivian courts, though she accepted that contract law for breach of employment would be available. Furthermore, Hameed stated that he was unaware of judicial precedents establishing fiduciary duties of directors in the Maldives.

51 In my view, a plaintiff cannot argue that a forum is appropriate simply because it offers it more causes of action. This would lead to plaintiffs engaging in forum shopping to find the jurisdiction with the causes of action most advantageous to them. As for judicial precedents, it is for the Maldivian courts to develop their precedents and jurisprudence. In addition, the importance of international comity cannot be overlooked. In *The Hung Vuong-2* [2000] 2 SLR(R) 11, Chao JA stated at [27] that it is not for the courts in Singapore to pass judgment on the competence or independence of the judiciary of another country and that comity between nations would be gravely undermined if such a wholly invidious pursuit is embarked upon.

52 It was also important to note that for all the allegations about the lack of development of the law in the Maldives, SJE did not suggest that there would be no recourse in the Maldives whatsoever against Hwang if SJE (or SJM) managed to establish that Hwang acted without authority by authorizing the payments in question.

Conclusion

53 For the reasons stated above, the appeal was dismissed with costs.

[note: 1] Plaintiff's submissions dated 13 January 2010 at paras 3-5