Kuala Lumpur City Securities Sdn Bhd v Boston Asset Management Pte Ltd (formerly known as Universal Network Education Pte Ltd) and Another
[2006] SGHC 99

Case Number : Suit 490/2005, RA 365/2005

Decision Date : 06 June 2006

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Siraj Omar (Tan Kok Quan Partnership) for the plaintiff; Zaheer Merchant and Sophine Chin (Madhavan Partnership) and Vincent John (Andrew Yap & Company) for the first and second defendants

Parties : Kuala Lumpur City Securities Sdn Bhd — Boston Asset Management Pte Ltd (formerly known as Universal Network Education Pte Ltd); Tan Hong Liat Ronald

Civil Procedure – Judgments and orders – Default judgment – Plaintiff obtaining judgment against first and second defendants in default of appearance and in default of defence respectively – Whether judgments should be set aside – Whether judgment against second defendant regularly obtained – Whether first and second defendants' defence having real prospect of success

Civil Procedure – Stay of proceedings – Defendants applying for stay of proceedings brought by plaintiff – Defendants alleging that Malaysia the natural forum – Whether documents giving rise to dispute governed by exclusive jurisdiction clause – Whether sufficient grounds for granting stay shown

6 June 2006

Lai Siu Chiu J:

1 Boston Asset Management Pte Ltd and Tan Hong Liat Ronald, the first and second defendants respectively, appealed in Registrar's Appeal No 365 of 2005 ("the Appeal") against the decision of the assistant registrar, in dismissing their application in Summons in Chambers No 5037 of 2005 ("the Application").

2 The Application was made against Kuala Lumpur City Securities Sdn Bhd, the plaintiff, for, *inter alia*, the following orders:

(a) for the plaintiff to file (and serve) an affidavit furnishing documents evidencing the outstanding purchases, contra losses and interest bills in a sub-account of the trading account (including the sub-account) referred to at para 10(a) of the writ of summons, upon which the plaintiff claimed RM6,614,039.92 from the defendants, and a copy of the trading account agreement dated 6 August 2003;

(b) that the Application and any subsequent documents filed in respect thereto not to be considered a step taken by the defendants in the proceedings which would prejudice or affect the defendants' application for a stay of proceedings;

(c) that the judgment entered in default of appearance against the first defendant on 5 August 2005 be set aside on the ground that it was irregular; alternatively, that it be set aside on the merits;

(d) that the first defendant be granted leave to file an appearance to the action within eight days;

(e) that all further proceedings against the first and/or second defendants be stayed pursuant to cl 12 of an agreement in writing between the plaintiff and the second defendant contained in a letter of guarantee and indemnity dated 15 October 2003 by which it was agreed that the guarantee and indemnity shall be governed and construed in all respects in accordance with the laws of Malaysia;

(f) alternatively, that all further proceedings in this action be stayed on the ground that Singapore is not the proper forum for the trial of the plaintiff's action; and

(g) that there be a stay of execution on the judgment.

3 I dismissed the Appeal with costs when it came up for hearing before me. The defendants have now appealed against my decision (in Civil Appeal No 23 of 2006).

The facts

4 The plaintiff is a Malaysian securities firm based in Kuala Lumpur. The first defendant is a company incorporated in Singapore and is an asset management agent. The second defendant is a fund manager by occupation and was at all material times the Chief Executive Officer and a director of the first defendant.

5 In the later half of 2003, one Joanne Hiew ("Joanne") (who was a dealer's representative with another securities company called Avenue Securities in Kuala Lumpur) approached the plaintiff and said she wanted to introduce Dutanamic Sdn Bhd ("Dutanamic") to the plaintiff as a client. Joanne had indicated she intended to join the plaintiff's services but did not do so eventually. Joanne explained that the account to be opened was to enable Dutanamic to trade in shares of Fountainview Development Sdn Bhd ("Fountainview") which company was effectively controlled and managed by one Dato' Chin Chan Leong ("Chin") and his wife. Subsequently, Joanne introduced Chin to the plaintiff's Chief Operating Officer, Roy Winston George ("George"). George agreed to the opening of a trading account by Dutanamic.

6 A business associate had introduced Joanne and Chin to the first defendant in the second quarter of 2003. The second defendant informed Chin of the services he and the first defendant could offer, *viz* management of clean funds from high net worth individuals and from qualified corporations and institutions, subject to the regulations of Singapore.

7 Subsequently, Joanne inquired of the second defendant whether he would be interested to open an account with the plaintiff so that her clients (including Dutanamic) could buy and sell shares in Malaysia under the first defendant's name. Using the first defendant to trade would enable Joanne to receive commission indirectly, from rebates given to clients such as the first defendant, whereas, if her clients traded with securities firms other than Avenue Securities, she would not receive any commission. Joanne assured the second defendant there would be no risks involved as more than enough shares and funds would be placed with the first defendant for trading in Malaysian securities. For such services, Joanne offered to pay the first defendant 30% of the rebates received from the securities firms. The second defendant agreed.

8 On or about 6 August 2003, the first defendant entered into an agreement with the plaintiff whereby the plaintiff agreed to open a trading account ("the BAM trading account") for the first defendant to enable the latter to trade in stock, shares and securities listed on any exchange approved by the plaintiff. The terms and conditions for the BAM trading account were set out in the plaintiff's account opening form, which the second defendant also executed on 6 August 2003.

9 On 15 October 2003, the second defendant executed a letter of guarantee and indemnity ("the Guarantee and Indemnity"). He guaranteed (as principal debtor and not surety) the due performance and observance by the first defendant of the terms and conditions of the BAM trading account. The second defendant further guaranteed to pay the plaintiff on demand in full all moneys which were due and owing by the first defendant on the BAM trading account. The second defendant claimed he signed the Guarantee and Indemnity relying on Joanne's representation that it was only procedural as part of the documentation required before clients could start to buy and sell shares under the BAM trading account.

10 At Joanne's request, a trading account for Dutanamic ("the Dutanamic account") was opened with the plaintiff on or about 21 November 2003. Trades under the Dutanamic account were carried out between 1 December 2003 and 28 January 2004.

11 Joanne, however, wanted to change the mode of trading by Dutanamic. Under the rules of the Kuala Lumpur Stock Exchange ("the KLSE") applicable to retail clients, the plaintiff was required to charge Dutanamic a specified brokerage fee. However, if trading on the Dutanamic account was carried out through certain institutions like the first defendant, then the specified brokerage did not apply. Instead, the client could negotiate with the plaintiff on the amount of brokerage payable. This led to the opening of a sub-account for Dutanamic ("the Dutanamic sub-account") under the BAM trading account on 19 January 2004 following the instructions of the first defendant in its letter dated 1 December 2003, signed by the second defendant. Shortly after the Dutanamic sub-account was opened, trading on the Dutanamic account ceased.

12 At the same time as the opening of the Dutanamic sub-account, Dutanamic opened a margin trading account with the plaintiff ("Dutanamic's margin account") for which the plaintiff received a guarantee and indemnity from Chin dated 14 November 2003 ("Chin's first guarantee").

13 All contract notes and monthly statements in relation to trades carried out under the BAM trading account (including those under the Dutanamic sub-account) were sent to the first defendant's address in Singapore at 100 Beach Road #22-19A, Shaw Tower, Singapore 189702. This was acknowledged by the second defendant in his affidavit[note: 1] filed in support of the application.

14 The second defendant, however, claimed that the purpose of sending monthly statements of the BAM trading account to the first defendant was only to determine the rebates payable by Joanne to the first defendant. Indeed, rebates (totalling RM2,209,200.48) were paid by the plaintiff to the first defendant, of which RM1,504,157.58 was in respect of the BAM trading account. According to the affidavit of George (filed on 18 November 2005 to resist the application), the second defendant would contact the plaintiff's finance department at the beginning of every month and request a list of handling charges from its staff. The plaintiff's staff would fax to the second defendant a document called "brokerage performance report download" which set out all the relevant details under the BAM trading account for the previous month and pay the first defendant accordingly. Payment would be made in accordance with the standing instructions given by the first defendant.

15 The second defendant contended that in relation to the Dutanamic sub-account, neither he nor the first defendant gave the plaintiff any instructions on trades or placed any orders for trading. Further, he never paid for any of the trades under the Dutanamic sub-account; it was a matter between the plaintiff and Dutanamic.

16 Besides Dutanamic, at least six other sub-accounts were opened under the BAM trading account on the instructions of the second defendant to the plaintiff. The contracts and monthly

statements of these sub-accounts were also sent to the first defendant's Singapore address. Trades under these other sub-accounts were not the subject of complaint by the defendants.

17 On 24 March 2005, Chin provided a second guarantee ("Chin's second guarantee") to the plaintiff in relation to the Dutanamic sub-account. The plaintiff wanted to reduce its exposure and wind down its trading on Fountainview shares but Joanne repeatedly requested the plaintiff to delay its decision. The plaintiff agreed to allow trading in Fountainview shares to continue, provided additional security was furnished; hence the need for Chin's second guarantee. This was a prudent step as the price of Fountainview shares fell from RM4.88 to RM0.87 (a drop of 82%) in four trading days between 28 April 2005 and 4 May 2005. From a high of RM5.15 on 26 October 2004, the share price fell to RM0.32 on 10 November 2005.

18 Not unexpectedly, the volatility in the price of Fountainview shares caused substantial losses to be incurred on the Dutanamic sub-account. According to George, several meetings were held with the second defendant where he pressed for a settlement proposal of the sums owed on the Dutanamic sub-account.

19 On 9 May 2005, the plaintiff wrote to the first defendant to advise that it owed RM6,551,683.26 ("the outstanding sum") as at 8 May 2005 for outstanding purchases, contra losses and interest charges on the Dutanamic sub-account, and demanded payment within seven days. Notice was also given that further interest at 12% per annum would be charged on the outstanding sum until full payment was received by the plaintiff.

20 In its reply (signed by the second defendant as its Chief Executive Officer) to the plaintiff dated 12 May 2005, the first defendant stated:

> [P]lease be informed that we are in discussion with our client to resolve the matter and shall advise you in due course.
>
> Meanwhile, if it is appropriate, please transfer all assets held in the sub-account for Dutanamic Sdn Bhd to the client's own account with you with immediate effect.

21 When nothing concrete materialised from the first defendant's above letter, George told the second defendant at a meeting on 15 June 2005 that the plaintiff would have no option but to sue the first and second defendants under the BAM trading account and the Guarantee and Indemnity respectively. This produced an immediate response from the first defendant by its letter on the same day (signed again by the second defendant) which said:

> **RE: SUB-ACCOUNT FOR DUTANAMIC SDN BHD**
>
> Further to our meeting today, this is to advise that we will settle the contra losses of the above sub-account according to the following schedule:
>
> By 31 August 2005 RM 800,000
>
> By 30 November 2005 RM2,800,000
>
> By 31 March 2006 RM3,018,343
>
> This schedule will be superceded [*sic*] by any settlement of my client directly with your company.

22 In his first affidavit filed in support of the application, the second defendant alleged[note: 2]

that George threatened to sue him and the first defendant unless he provided George with a letter stating he would settle all amounts claimed by the plaintiff.

23 The instalments proposed by the first defendant were never made. Letters of demand were addressed to both defendants by the plaintiff's solicitors on 14 June 2005. It drew a reply on 21 June 2005 from the defendants' solicitors which said, *inter alia*:

> We have our clients' instructions that they are in contact with your clients currently and are in the process of working out an amicable and suitable resolution of this matter.
>
> Meanwhile, we would appreciate it if you could hold your hands in this matter pending further instructions from our clients.

24 The plaintiff did not hold its hand. Instead, on 11 July 2005, the plaintiff commenced this suit against both defendants claiming the outstanding sum. On 9 August 2005, the plaintiff separately instituted proceedings against Chin for a similar claim in the Kuala Lumpur High Court, based on Chin's second guarantee.

The chronology of events in these proceedings

25 The writ of summons was served on the first defendant's registered office on 26 July 2005. No appearance was entered to the writ, and on 5 August 2005, judgment under O 13 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) ("the Rules") was entered against the first defendant in the principal sum of RM6,614,039.92 with interest and costs on an indemnity basis.

26 Service of the writ on the second defendant was effected by substituted service on 29 August 2005, pursuant to an order of court for substituted service obtained on 19 August 2005.

27 The second defendant entered an appearance to the writ on 2 September 2005. Pursuant to O 18 r 2 of the Rules, he was required to file his defence by 19 September 2005.

28 On 12 September 2005, counsel for the plaintiff and for the second defendant attended a pre-trial conference ("PTC") before the Assistant Registrar Daphne Hong ("AR Hong"). What transpired before AR Hong was disputed.

29 After the PTC, counsel for the second defendant wrote to the plaintiff's solicitors to say that AR Hong had directed that his client's defence be filed by 26 September 2005, thereby effectively granting an extension of seven days from the expiry date of 19 September 2005. On 13 September 2005, the plaintiff's solicitors refuted the claim and reiterated that the defence was due on 19 September 2005 and offered to write (and did write) to court for clarification.

30 On 19 September 2005, the second defendant's solicitors filed an application in Summons in Chambers No 4803 of 2005 ("the extension application") seeking an extension of time until 10 October 2005 to file an application for a stay of proceedings and an extension of time until 15 November 2005 to file his defence. The extension application was fixed for hearing on 3 October 2005.

31 On 20 September 2005, the plaintiff's solicitors wrote to the second defendant's solicitors giving them the requisite 48 hours' notice under r 70(1) of the Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2000 Rev Ed) to file the second defendant's defence.

32 On 21 September 2005, the parties attended before the duty registrar where the second

defendant's solicitor sought an urgent hearing date for the extension application. The duty registrar fixed the hearing on 28 September 2005. The second defendant's solicitor also applied orally for an interim injunction to restrain the plaintiff from entering default judgment against his client; the application was denied.

33 On 27 September 2005, the plaintiff applied and obtained default judgment against the second defendant under O 19 of the Rules.

34 On 28 September 2005, at the hearing of the extension application, the second defendant was granted an extension by Assistant Registrar ("AR Low") until noon of 30 September 2005 to file the Application. This was followed immediately by a request from the second defendant's solicitors to the plaintiff's solicitors for further time until 3 October 2005 in which to make the Application. The plaintiff's solicitors agreed.

35 On 29 September 2005, the second defendant's solicitors wrote to the plaintiff's solicitors again to request a further extension of time until 7 October 2005 to make the Application. The reason given was that the solicitors were unable to obtain the relevant information and documents from Malaysia in time for the filing of the same. The request was rejected.

36 The second defendant's solicitors then applied to AR Low for further arguments in respect of the extension application; the request was denied.

37 The Application was filed on 3 October 2005. On 4 October 2005, the second defendant's solicitors wrote to court and reiterated that AR Hong had granted their client an extension of time until 26 September 2005 to file his defence.

38 On 10 October 2005, the parties appeared at a PTC before AR Hong. She confirmed she had not made any direction extending time under the Rules for the second defendant to file his defence.

39 The Application was heard on 7 and 13 December 2005 by AR Low. She dismissed the prayers for setting aside of the judgments in default of appearance and in default of defence against the first and second defendants respectively. Neither did she grant the prayers for stay of proceedings or stay of execution on the judgments; hence the appeal.

The Appeal

40 I dismissed the Appeal and affirmed the decision of AR Low below because the arguments raised on the defendants' behalf and the facts set out in the second defendant's affidavit did not warrant the exercise of the court's decision either to set aside the default judgments, or to stay the proceedings, or to stay execution on the judgments.

41 I shall now set out my reasons in relation to the various issues canvassed at the Appeal. For this purpose, I had considered George's affidavit, the second defendant's many affidavits, the two affidavits filed by his solicitor, Vincent John ("John"), and that filed by Chin in support of the defendants.

The setting aside of the judgments

42 Neither defendant contended that the judgment obtained against the first defendant was irregular. As was held by Belinda Ang Saw Ean J recently in *Australian Timber Products Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2005] 1 SLR 168 (at [26] applying the

Court of Appeal decision in *Abdul Gaffer v Chua Kwang Yong* [1995] 1 SLR 484), to set aside a judgment regularly obtained, the burden is on the defendant to satisfy the court that it has a defence on the merits which has a real prospect of success and carries some degree of conviction. The burden was therefore on the first defendant to set aside the plaintiff's judgment dated 5 August 2005.

43 The second defendant had asserted that the judgment in default of defence obtained against him on 27 September 2005 was procedurally irregular. In regard to the factual matrix, I am prepared to accept the contention of counsel for the second defendant – that it was counsel for the plaintiff who mistakenly informed AR Hong on 12 September 2005 that the defence was due on 26 September 2005 instead of on 19 September 2005. However, I noted that counsel for the plaintiff corrected his mistake and did advise the second defendant's solicitors on 13 September 2005 that the deadline for filing of the defence was 19 September 2005.

44 The giving of the requisite 48 hours' notice on 20 September 2005 under r 70(1) of the Legal Profession (Professional Conduct) Rules by the plaintiff's solicitors was in keeping with its stand that the defence was due on 19, and not 26, September 2005. Consequently, the second defendant's solicitors cannot complain they were misled by the mistake in deadline made by the plaintiff's solicitors. It was unfortunate that AR Hong's confirmation that she had not granted an extension was only made known on 10 October 2005, well after the event.

45 What is more relevant is whether the plaintiff was precluded from applying for the default judgment because its solicitors were aware that the second defendant intended to apply for a stay of proceedings. It was argued by counsel for the second defendant that the plaintiff was indeed so precluded, relying on *Yeoh Poh San v Won Siok Wan* [2002] 4 SLR 91 ("*Yeoh*'s case") and *Samsung Corp v Chinese Chamber Realty Pte Ltd* [2004] 1 SLR 382 ("*Samsung*'s case").

46 It was my view that *Yeoh*'s case had no application at all as can be seen from the following extract from the judgment (at [27]):

> [T]here is prejudice to the defendant. The point is that *while a defendant is seeking to stay the proceedings, whether by way of original application or an appeal*, the defendant should not be required to meet the plaintiff's claim on the merits. [emphasis added]

47 There was no application pending, let alone an appeal pending, at the time the plaintiff notified the second defendant's solicitors that the defence was due on 19 September 2005. Counsel for the plaintiff had rightly pointed out that if the second defendant's argument was accepted, all that a defendant has to do to gain extra time for the filing of his defence is to say that he intends to apply for a stay of proceedings – that is clearly insufficient.

48 My view was reinforced by *Samsung*'s case where the Court of Appeal held (at [24]) that while a stay application *is pending*, no O 14 application should be made.

49 I would add that the second defendant's solicitors were well aware on 13 September 2005 that the defence was due six days thence. Yet they took no steps until after close of business (at 6.54pm), on 19 September 2005 itself, to file the extension application, by which time the defence should have been filed. No reasons or explanations were offered for the delay save for para 14 of John's second affidavit (filed on 3 October 2005) where he deposed:

> On 19 September 2005, as I did not have sufficient documents to file the application to set aside the Judgment in default entered against the [first defendant] and the stay of proceedings

> application, I filed an application for an extension of time to file the application for stay of proceedings by 10 October 2005 and the 2nd Defendant's Defence by 15 November 2005. I indicated 15 November 2005 for the filing of the Defence so that there is ample time to obtain an urgent date for the application for the stay of proceedings to be heard before 15 November 2005.

John did not explain why he took no action between 13 and 19 September 2005 (before close of business hours) nor did he elaborate on why the documents he had were insufficient. In the plaintiff's submissions, it was pointed out that the second defendant did not explain what additional information or documents he obtained between July 2005 (when the writ was filed) and 3 October 2005 that enabled him to file the Application.

50 Prudence dictates that an application for extension of time should be filed *before* the defence is due so that the defendant can take immediate remedial steps should his application fail. Not surprisingly, the plaintiff's solicitors served the 48 hours' notice on the following day.

51 On 20 September 2005, the second defendant's solicitors, in serving the extension application and supporting affidavit on the plaintiff's solicitors, had written as follows:

> Pending the reply of the Court to your recent written request for clarification on the due date of the 2nd Defendant's Defence, we have, on our client's instructions, filed his application for extensions of time to file his application for a stay of proceedings and to file his Defence. …
>
> Please revert on an urgent basis with your clients' position on the said application and let us know if you want us to obtain an urgent date for the hearing of the said application.

It is telling that the second defendant's solicitors even had to inquire of the plaintiff's solicitors whether an urgent hearing date was warranted when the need was so obvious.

52 Counsel for the plaintiff was not in Singapore on 20 September 2005. It was only on the following day that the plaintiff's solicitors responded to say that they were not prepared to hold their hands but wished to be heard at the hearing before the duty registrar for an urgent date for the hearing of the extension application.

53 When I asked John what he did when he was told the plaintiff's solicitors refused to stay their hands, he replied:[note: 3]

> I didn't do anything. I only wrote to Plaintiffs' solicitors on 20/9/05 to say I would apply for our clients' SIC 4803/2005 to be brought forward. I only knew on 21/9/05 that Plaintiffs' counsel was overseas and he wanted to be present when I saw the Duty Registrar, which he did.

54 The chronology of events referred to in [25] to [37] above and elaborated on in [49] to [51] above clearly showed that the second defendant failed to provide any extenuating circumstances that warranted the court's exercise of its discretion to set aside the judgment even if it could be said (which I do not agree) that the plaintiff's solicitors had failed to act properly. Consequently, I turn to consider whether the defendants had raised an arguable defence on the merits.

55 I had in [20] to [21] above referred to the two letters dated 12 May 2005 and 15 June 2005 written to the plaintiff by the first defendant and signed by the second defendant. The second defendant attempted to strike out the reference in the affidavit of George to the two letters and to expunge the documents from George's exhibit.[note: 4] His application, on the basis that the documents were privileged and were written on a "without prejudice" basis, was dismissed on

7 December 2005 in Summon in Chambers No 6130 of 2005. Instead, at the same hearing, the plaintiff succeeded in its application (Summons in Chambers No 6149 of 2005) to strike out from the second defendant's affidavit filed on 2 December 2005 paras 26 and 27 where he had referred to a "without prejudice" letter from the plaintiff dated 15 July 2005.

56 What then did the documents show? First, there was the first defendant's letter dated 1 December 2003 addressed to the plaintiff where the second defendant wrote:

> We refer to the agreement between ourselves dated 15 October 2003 ("the Agreement').
>
> Pursuant thereto, please be instructed to open and operate the following additional sub account as stated below:
>
> DUTANAMIC SDN BHD
>
> We declare and agree that the undertakings, terms and conditions as set out in the Agreement continue to be valid and binding.

57 In his first affidavit, the second defendant deposed that Joanne sent him some draft "verbiage" to open the sub-account for Dutanamics. She advised him to send the "verbiage" to her using the first defendant's letterhead which he did, by way of the above letter. The second defendant justified his action by the fact that Chin had executed a letter of guarantee and indemnity releasing both defendants from all liabilities pertaining to the Dutanamic sub-account. That was indeed the tenor of Chin's affidavit.

58 The second defendant's statement, however, defied belief. He was not a simpleton or layman but a sophisticated fund manager who, in his own words, used the first defendant to "manage funds from high net worth individuals and from qualified corporations and institutions". I cannot imagine that anyone in his position would have signed "verbiage" without knowing the implications of his actions. The instructions contained in the first defendant's letter dated 1 December 2003 were crystal clear; they were not mere "verbiage".

59 The second defendant admitted that the first defendant received contract notes by post from the plaintiff but claimed their purpose was only to enable him to calculate the rebates payable by the plaintiff to him and Joanne. It was equally naïve of the second defendant to expect the court to believe his explanation. The rebates ran into millions of ringgit, according to George. Surely the consideration for such fees must be the risks both defendants undertook in assuming responsibility for the Dutanamic sub-account under the BAM trading account.

60 It was all very well for the second defendant to allege that Joanne made various representations to him which led him to believe there was no risk to himself personally when he signed the Guarantee and Indemnity. That was a matter between him and Joanne and/or Chin; it did not concern the plaintiff for whom Joanne did not work. The plaintiff could not be liable for Joanne's actions. It was pertinent to note that there was no reference to Chin in the Guarantee and Indemnity. If an experienced fund manager like the second defendant was foolish enough to sign the Guarantee and Indemnity thinking it was only procedural and for convenience, he did not deserve the court's sympathy. Guarantees and indemnities are common commercial documents that would not be unfamiliar to someone in the second defendant's occupation. I found it hard to believe his claim that he did not expect the plaintiff to rely on such documents.

61 Even if I am wrong on the enforceability of the Guarantee and Indemnity and that Chin's first

and second guarantees did absolve the defendants from liability, the first defendant's two letters to the plaintiff dated 12 May 2005 and 15 June 2005 (see [55] above) are telling, since they implicitly acknowledged liability. There was neither protest that the first defendant was only an agent for Chin nor any disclaimer of liability from either defendant.

62 The second defendant sought to explain away the letter dated 15 June 2005 (see [21] above) by alleging that he received a threat from George that unless he came up with a settlement proposal, the defendants would be sued. Even if that were true (George's version was different), the law is clear. It is reflected in the following extract from *Chitty on Contracts*, vol 1 (Sweet & Maxwell, 29th Ed, 2004) at para 7-041:

> **Threat to institute legal proceedings**. Since recourse to law is the remedy for redress provided by the law itself, it is obvious that prima facie a threat to enforce one's legal rights by instituting civil proceedings cannot be an unlawful or wrongful threat.

The stay application

6 3 The defendants had contended that Malaysia was the more appropriate forum for the plaintiff's claim. In the absence of any exclusive jurisdiction clause in the terms and conditions governing the BAM trading account, the first defendant's application for a stay can only be based on the doctrine of *forum non conveniens*.

64 The defendants contended that Malaysia was the proper forum because the plaintiff is a Malaysian entity, the debt was owed in Malaysian ringgit, the shares traded were Malaysian shares quoted on the KLSE whilst Chin is a Malaysian whose passport, having been impounded by the Malaysian authorities (after he was charged with manipulating Fountainview shares), meant he could not come to Singapore to testify. Joanne was also a crucial witness and her passport was similarly impounded. Counsel cited *The Rainbow Joy* [2005] 3 SLR 719 and *Q & M Enterprises Sdn Bhd v Poh Kiat* [2005] 4 SLR 494 to support the defendants' arguments.

65 The plaintiff, on the other hand, asserted that Singapore was the more appropriate forum because the first defendant is a Singapore company with neither assets nor presence in Malaysia. Any judgment obtained against both defendants would have to be enforced in Singapore.

66 The test for *forum non conveniens* was spelt out by Lord Goff of Chieveley in the House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 and approved and adopted by the Court of Appeal in *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR 776.

67 Lord Goff had held (at 476):

> The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.
>
> … in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay … Furthermore, if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country …

68 As the first defendant had failed to discharge the burden of raising an arguable defence which warranted the setting aside of the default judgment properly obtained by the plaintiff, there was no necessity to even consider the test propounded by Lord Goff.

69 In the case of the second defendant, there was indeed an exclusive jurisdiction clause under the Guarantee and Indemnity. Clause 12 therein states:

> This Guarantee and Indemnity shall be governed and construed in all respects in accordance with the laws of Malaysia and the parties hereto submit to the jurisdiction of the Courts of Malaysia in all matters connected with or arising under this Guarantee and Indemnity.

70 The plaintiff submitted, however, that notwithstanding cl 12, there were good grounds for allowing the present proceedings to continue in Singapore. These were:

(a) the defendants had no arguable defence to the plaintiff's claims;

(b) although Malaysian law applied to the Guarantee and Indemnity, the defendants had not argued that it differed from Singapore law in any material respect;

(c) neither defendant had any assets in or connection with Malaysia; and

(d) if, as the defendants claimed, they did not have any (or most) of the relevant information or documents in Malaysia, the cost of producing such documents to the Singapore courts would be borne by the plaintiff; the defendants would suffer no prejudice.

I have already dealt with ground (a) at [55] to [60] above whilst ground (c) was not challenged by the defendants.

71 The second defendant had exhibited to his third affidavit[note: 5] a legal opinion dated 1 December 2005 ("the legal opinion") by a Malaysian lawyer from the firm of M/s Vinod Kamalanathan & Associates ("the law firm") to support his contention that Malaysian law applied. Prior thereto, the second defendant had, in his second affidavit filed on 5 December 2005, paraphrased the legal opinion of the law firm. This was objected to by counsel for the plaintiff before AR Low on 7 December 2005, as a result of which the legal opinion was exhibited in the second defendant's third affidavit filed on 9 December 2005.

72 Counsel for the defendants argued that in the absence of a contrary opinion from the plaintiff, the views expressed in the legal opinion must be deemed to be unchallenged.

73 Counsel for the plaintiff disagreed. He pointed out that to prove that a particular foreign law was different from Singapore law, the burden was on the defendants to prove it by an expert. The law firm's legal opinion did not suffice.

74 Having reviewed the legal opinion, I agreed with the plaintiff's objections. The law firm did not set out its brief. It merely referred to a meeting which two lawyers in the law firm had with the second defendant and his Singapore counsel. No information was provided on the *curriculum vitae* or qualifications of the author of the legal opinion. The legal opinion contained various sub-headings (fraud, misrepresentation, breach of KLSE rules) that were apparently extracted from the affidavits of the second defendant and/or of Chin and many suppositions. Above all (as was rightly pointed out by counsel for the plaintiff), there was no mention of the issue of agency, which was central to the second defendant's defence.

75 Consequently, I disregarded the legal opinion of the law firm. In the absence of a proper legal opinion from an expert in Malaysian law, I was entitled to and did assume that the law on guarantees and indemnities in Malaysia was no different from Singapore law.

The defence of agency

76 Another prong of attack by the second defendant centred on his claim that he was a mere agent of Chin. The difficulty with this defence was that the first and second defendants could not produce any documentation which even suggested that the plaintiff accepted they were acting for Chin in the Dutanamic sub-account.

77 In the course of arguments, counsel for the defendants conceded that the plaintiff could sue either the undisclosed principal (Chin) or the named agent, *viz* the first defendant. This is clearly stated in *Boustead and Reynolds on Agency* (Sweet & Maxwell, 17th Ed, 2001) at para 9-012:

> **Undisclosed principal**. Where the principal is undisclosed at the time of contracting, the contract is made with the agent, and he is personally liable and entitled on it. The principal also may intervene to sue, and may be sued, but the latter only subject to the general rule that nothing must prejudice the right of the third party to sue the agent if he so wishes.

78 Counsel then pointed to para 14 of Chin's affidavit to say that the dispute on the facts called for further investigations and therefore a trial. Paragraph 14 of Chin's affidavit states:

> At all material times, the Plaintiffs are and were aware of the following material facts:-
>
> (a) The 1st and 2nd Defendants were only involved in the opening of the Trading Account [the Dutanamic sub-account];
>
> (b) Pursuant to an agreement between the Plaintiffs and me, the Plaintiffs agreed not to get the 1st and 2nd Defendants involved in the matter and not to bring any claims against the 1st and 2nd Defendants under the Agreement or Guarantee and in any circumstances based on the guarantee that I had given.

79 Chin's second guarantee was the basis for Chin's contention that the plaintiff had agreed to release the defendants from liability. However, this was not borne out by the wording of Chin's second guarantee. There was no reference therein to releasing either defendant from liability under the Dutanamic sub-account. In so far as Chin's first guarantee was concerned, that was given to secure liabilities under Dutanamic's margin account (see [12] above) and had no relevance to the BAM trading account.

80 The defendants' argument that Chin's second guarantee released them from liability also overlooked an important fact – Chin's second guarantee was dated 24 March 2005. Therefore, even if their contention that the document discharged them from liability is correct, the release would arguably relate to liabilities incurred on the Dutanamic sub-account *after* that date, not for losses incurred prior to 24 March 2005. The issue of past consideration would have to be addressed.

81 Moreover, both Chin's second guarantee and the Guarantee and Indemnity contained cl 9 which states:

> The Guarantor(s) hereby jointly and severally further agree, undertake and covenant with KL City

[the plaintiff] that:

> (a) after the moneys hereby guaranteed have been demanded from the Guarantor(s) it shall be lawful for KL City at any time to continue to allow the use by the Client of any existing account or accounts or to open any new account or accounts with the Client and no money thereafter paid into such account or accounts shall be appropriated in discharge of any moneys hereby guaranteed unless expressly directed by the person paying to be so appropriated;
>
> (b) all sums payable by the Guarantor(s) under this Guarantee and Indemnity shall be paid in full without set-off or counter-claim condition or qualification of any nature whatsoever;
>
> (c) any written statement from KL City as to the amount due and owing by the Client shall be accepted by the Guarantor(s) as conclusive evidence that the amount thereby appearing is due from the client to KL City and payable on demand to KL City by the Guarantor(s);
>
> …

82 Clause 9(a) gave the plaintiff the discretion to allow trading on the Dutanamic sub-account to continue despite the accumulated losses whilst sub-clause (c) effectively put paid to the complaint of the second defendant and to his counsel's argument, that the defendants and Chin did not know how the plaintiff arrived at the outstanding sum. Under cl 9, the plaintiff could choose to (a) sue the first defendant, (b) sue the second defendant on the Guarantee and Indemnity, (c) sue Chin on Chin's second guarantee, or (d) sue all three parties jointly and severally.

Conclusion

83 Notwithstanding the many arguments raised on their behalf, it was clear to me that the defendants had raised no arguable defence on the merits which warranted that the default judgments obtained against them by the plaintiff be set aside. It served no purpose therefore to stay the proceedings against them. As such, I dismissed the Appeal with costs.

[note: 1] At para 56.

[note: 2] At para 59.

[note: 3] At p 12 of the notes of arguments.

[note: 4] RG-8.

[note: 5] In THLR-18 filed on 9 December 2005.