Vorobiev Nikolay *v* Lush John Frederick Peters and others
[2011] SGHC 55

Case Number	: Suit No 720 of 2009 (Registrar's Appeal No. 19 of 2010/B)
Decision Date	: 11 March 2011
Tribunal/Court	: High Court
Coram	: Kan Ting Chiu J
Counsel Name(s)	: Manoj Sandrasegara, Tan Mei Yen, Sheryl Wei, Noraisah Ruslan (Drew & Napier LLC) for the plaintiff; Koh Swee Yen, Sim Hui Shan (Wong Partnership) for the defendants.
Parties	: Vorobiev Nikolay — Lush John Frederick Peters and others

Conflict of Laws – Natural Forum – Forum nonconveniens

11 March 2011 Judgment reserved.

Kan Ting Chiu J:

1 In this action, the plaintiff, Nikolay Vorobiev, had sued the defendants, John Frederick Peters Lush ("Lush"), Francois Ostinelli ("Ostinelli") and Alexander Novoselov ("Novoselov") for fraudulent/negligent misrepresentation and conspiracy. The immediate issue at hand is whether this action should be stayed on the ground that Singapore is not the appropriate forum because Switzerland is the more appropriate forum. An assistant registrar had made a stay order, and the plaintiff had appealed against the order.

Background of the action

2 Petroval SA ("PSA"), a company incorporated under the laws of Switzerland, was part of the Yukos Group, and had been described as being solely owned by Yukos International UK B.V. PSA had a representative office in Singapore which managed and marketed PSA's oil products in the Far East. In 2004, the representative office was upgraded into Petroval Pte Ltd ("Petroval Singapore"), a company incorporated in Singapore. The plaintiff, a permanent resident of Singapore was appointed to be its first director with more directors appointed subsequently.

3 The first defendant, Lush, was formerly the General Manager of PSA and is a director of Petroval Singapore since 19 September 2005. The second defendant, Ostinelli, was formerly the Chief Financial Officer of PSA and is a director of Petroval Singapore since 19 September 2005. The third defendant, Novoselov, was formerly an employee of PSA and later a director of Petroval Singapore from 19 September 2005 to 17 October 2008. One Artem Zakharov ("Zakharov") was a former employee of PSA. Zakharov had died in July 2008.

4 The plaintiff's case was that, in February 2006, Zakharov informed him that the majority shareholder of Petroval Singapore might be selling its stake in Petroval Singapore, and that the plaintiff *might be offered* a stake in Petroval Singapore. In March 2008, *an offer was made* to the plaintiff in Geneva by the defendants to buy a stake in Petroval Singapore [note: 1]. The plaintiff accepted the offer and acquired a 20% shareholding in Petroval Singapore by acquiring a 20% stake in Stainby Overseas Ltd ("Stainby") which held all the shares of Petroval Singapore. For the 20% shareholding of Stainby (and through that a 20% shareholding of Petroval Singapore), the plaintiff

paid US$3,810,000 and received through his nominees 20% of the shares of Stainby.

5 Subsequent to the purchase of the 20% interest in Petroval Singapore through Stainby, the plaintiff made two loans to Petroval Singapore. In May/June 2006, the defendants, the plaintiff and Zakharov agreed to make a loan of US$10m to Petroval Singapore, and the plaintiff paid his 20% share of the US$10m loan, amounting to US$2m ("the first loan").

6 In September 2006, the defendants, the plaintiff and Zakharov agreed to make a further loan of US$5m to Petroval Singapore, and the plaintiff paid his 20% share of the further loan amounting to US$1m ("the second loan"). These two loans extended by the plaintiff have not been repaid.

7 The plaintiff sued the defendants in connection with the US$3,810,000 payment for the Petroval Singapore shares and the US$3m he lent to Petroval Singapore. The plaintiff's action is founded on fraudulent/negligent misrepresentation and conspiracy. The claim in misrepresentation was that the defendants had misrepresented that they had the authority of the beneficial owners of the Petroval Singapore shares to deal with the shares, and that they were authorised by the beneficial owners of the Petroval Singapore shares to offer 20% of the shares to the plaintiff for US$3,810,000. The plaintiff's case was that the defendants had made these representations with the intention that he would act on them, and that he did rely on and act on them [note: 2].

8 The conspiracy claim was based on the same facts as the claim on misrepresentation, *ie*, that they had, wrongly and dishonestly and with the intent to injure the plaintiff, conspired and agreed to make the representations to induce the plaintiff to make payments of the US$3,810,000 and US$3m.

9 The plaintiff claimed that he had subsequently found out that the representations were false. In June 2006, the defendants informed him that PSA had claimed that the defendants were holding the PSA shares on trust for PSA, and that PSA had accused the defendants of having acted in breach of trust by dealing with them.

10 In December 2007, PSA commenced proceedings in the British Virgin Islands ("the BVI proceedings") against the defendants, Stainby and others over the Petroval Singapore shares. These proceedings have been stayed on the ground of *forum non conveniens*. In February 2008, PSA commenced proceedings in Singapore in Suit No 103 of 2008 ("the Singapore Proceedings") against the defendants and others in respect of the same shares. In the Singapore Proceedings, PSA asserted that Lush and Ostinelli had executed Letters of Confirmation acknowledging that they held the first two subscriber shares in Petroval Singapore on trust for PSA [note: 3]. However, PSA and the defendants came to a settlement and the action against the defendants was discontinued, but the terms of the settlement were not disclosed. The plaintiff was not a party in the Singapore Proceedings.

The law on *forum non conveniens*

11 The law on *forum non conveniens* is set out in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*"). The law, commonly referred to as the *Spiliada* principles, has been discussed in a host of local decisions, and it is sufficient to refer to the Court of Appeal's decision in *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 where it explained at [26]:

> The gist of these principles is that, under the doctrine of *forum non conveniens*, a stay will only be granted where the court is satisfied that there is some other available and more appropriate forum for the trial of the action. The burden of establishing this rests on the defendant and it is not enough just to show that Singapore is not the natural or appropriate forum. The defendant

must also establish that there is another available forum which is clearly or distinctly more appropriate than Singapore. The natural forum is one with which the action has the most real and substantial connection. In this regard, the factors which the court will take into consideration include not only factors affecting convenience or expense (such as the availability of witnesses) but also other factors such as the law governing the transaction and the places where the parties respectively reside or carry on business. If the court concludes, at this stage of the inquiry ("stage one of the *Spiliada* test"), that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay. If, at this stage, it concludes that there is some other available forum which *prima facie* is clearly more appropriate for the trial of the action, it will ordinarily grant a stay, unless there are circumstances by reason of which justice requires that a stay should nevertheless be refused. In this connection, the court will consider all the circumstances of the case. For this second stage inquiry ("stage two of the *Spiliada* test"), the legal burden is on the plaintiff to establish the existence of those special circumstances.

The first defendant's application and the connecting factors

12 The first defendant applied for the plaintiff's action to be stayed on the ground of *forum non conveniens* in that Switzerland is a more appropriate forum than Singapore. The first defendant submitted that there was a multitude of factors that connected the dispute to Switzerland.

Connecting factors to Switzerland identified by the first defendant

Domicile

All the defendants are domiciled in Switzerland.

Place of business

Petroval Singapore carried on a larger part of its day-to-day business in Switzerland.

Location of witnesses

The potential witnesses are either located in Switzerland, Europe, or the United States of America.

Compellability of witnesses

Foreign witnesses cannot be compelled to give evidence in Singapore.

Documents

The documents in the defendants' possession are primarily in Switzerland.

Costs and expenses

As most of the witnesses and documents are located in Switzerland, proceedings in Switzerland would be more cost effective than proceedings in Singapore.

Enforceability of judgment

The defendants being domiciled in Switzerland have assets in Switzerland to meet any judgment

which the plaintiff may obtain.

Place of alleged wrong/choice of law

Almost all the events and acts giving rise to the plaintiff's claims took place in Switzerland. If the alleged torts had taken place substantially in Switzerland, Swiss law governs the claims.

Place of damage

The loans were transferred to bank accounts of Petroval Singapore in Geneva.

Jurisdiction in which the wrongdoing occurred/choice of law

The fraudulent/negligent misrepresentations and conspiracy primarily took place in Geneva.

Effect of foreign proceedings

Criminal proceedings were instituted in Switzerland against Lush, Ostinelli, Novoselov and Zakharov for breach of trust and dishonest management in respect of PSA, which concluded with the finding that no criminal charges were to be preferred against them.

The plaintiff's objection to the application

13 The plaintiff opposed the application and contended that Singapore is the natural and proper forum as there are stronger factors which connect the action to Singapore.

Connecting factors to Singapore identified by the plaintiff

Location of documents in Singapore

Three classes of documents in Singapore which can be significant in the determination whether the defendants held the Petroval Singapore shares in trust for PSA: firstly, the corporate secretariat documents in the possession of Petroval Singapore's corporate secretaries, DrewCorp Services Pte Ltd ("DrewCorp"), secondly, documents and correspondence in the possession of Petroval Singapore, and thirdly, the pleadings and affidavits in the Singapore Proceedings.

The Singapore Proceedings

The defendants in the present action are also the defendants in the Singapore Proceedings, and the central issue in both proceedings is whether the shares of Petroval Singapore are held on trust for PSA. If the present action is transferred to Switzerland, there is a risk of inconsistent decisions on the trust issue in Singapore and in Switzerland. (This factor should probably come within stage two rather than stage one of the *Spiliada* test, but in either case, its significance is limited because the Singapore Proceedings were discontinued.)

Singapore law governs the Plaintiff's claims

The applicable law to determine the law of tort is *lex fori*. The tort of fraudulent misrepresentation and negligent misrepresentation is committed when the representation is relied on. As the majority of the representations were received and relied on in Singapore, it would follow that the conspiracy by unlawful means took place in Singapore.

Review of the connecting factors

14 The connecting factors relied on by the opposing parties have to be evaluated. The review should not be a counting exercise. While a factor may connect to one jurisdiction or the other, the nature of a factor and its effect on the full and fair determination and disposal of the dispute carry greater weight than the sum of the factors.

15 Of the factors identified by the first defendant, the compellability of witnesses could be a strong factor if the intended witnesses would not attend court without compulsion, and if Swiss law is the law governing the alleged wrongdoings, that is also a strong connecting factor. The domicile of the defendants and the place of Petroval Singapore's day-to-day business are less important because the issues do not involve the personal law or the law of domicile of the defendants, and have nothing to do with the day-to-day business of Petroval Singapore. Similarly, the Swiss criminal hearing is not a material consideration because they had concluded with no finding of wrongdoings. The other factors were likewise insubstantial.

16 Turning to the plaintiff's Singapore-connecting factors, if the law governing the alleged wrongdoings is Singapore law, that is a strong connecting factor. The location of the documents in Singapore can be a significant factor if the documents will shed light on the beneficial ownership of the Petroval Singapore shares the plaintiff purchased. However, it is pertinent to note that in the Singapore Proceedings, PSA had asserted that Lush and Ostinelli had executed Letters of Confirmation only in relation to the first subscriber shares, but not the other Petroval Singapore shares.

17 Both parties recognised that the law governing the wrongdoings is a major factor in deciding whether Switzerland or Singapore is the more appropriate forum, but they disagreed over which is the governing law. The first defendant contended that it is the law of Switzerland, and the plaintiff submitted that it is Singapore law. The underlying facts are not in dispute. The plaintiff had alleged that, in February 2006, Zakharov informed him that the majority shareholder of Petroval Singapore might offer to sell to him a stake in those shares and that, in March 2008, the offer was made to him in Geneva and he accepted the offer. [note: 4] The plaintiff did not identify the place where the information was given in February 2006. As he was contending that Singapore is the appropriate forum for the action, he would have stated that the information given in February 2006 was given in Singapore if that was the case. As matters stand, the only known location is Geneva, where the offer was made and accepted.

18 The plaintiff submitted that "(t)he courts have accepted that the tort of fraudulent misrepresentation and negligent misrepresentation is committed when the representation is communicated to the plaintiff and when the representation is relied on" [note: 5], citing *inter alia*, *Diamond v Bank of London and Montreal Ltd* [1979] 2 WLR 228 ("*Diamond*").

19 In *Diamond* the English Court of Appeal had to decide on the jurisdiction which governed the tort of fraudulent misrepresentation on an aborted sale of sugar negotiated between a London commodity broker acting for the buyer and American brokers acting for the sellers. Lord Denning MR held at p 234:

> ... In the case of fraudulent misrepresentation it seems to me that the tort is committed at the place where the representation is received and acted upon; and not the place from which it was sent. Logically, it seems to me, the same applies to a negligent misrepresentation by telephone or by telex. *It is committed where it is received and acted upon*.

[emphasis added]

and Stephenson LJ held at pp 236-7 that:

> The choice between the plaintiff and the defendants in this case depends on the nature of the tort of deceit or fraudulent misrepresentation and the correct analysis of the different stages by which the tort is complete and the cause of action is founded upon it. It begins with the statement issuing from the defendant by word of mouth or through recording by telex or in writing. That statement is then received, believed and acted upon by the plaintiff to his resulting damage and loss. All these different stages may be divided from each other in time and space. If A speaks his representation to B in the same room, there is no appreciable change of time or space until B comes, perhaps later, to act upon the representation. If A writes his representation to B on the other side of the world, the appreciable changes begin at the beginning, and what begins on one date and in one place takes effect at a later date and in another place. But it is settled law that A's misrepresentation, however fraudulent and morally wrong, does not become tortuous until B not merely receives it but acts upon it: ... Although A's part of the tort is committed when and where he speaks or telexes or writes the misrepresentation, B's part is needed to complete the tort by acting upon the representation, and *the tort is committed, in my judgment, when and where he does so act*.
>
> [emphasis added]

20 On that basis, the tort of misrepresentation took place when the plaintiff relied on the representations and accepted the offer in Geneva, and the applicable law is Swiss law.

21 The conspiracy allegation is essentially the misrepresentation allegation from the perspective that the defendants had agreed to make those misrepresentations. [note: 6] When it comes to the conspiracy allegation, the law is laid out in Halsbury's Laws of Singapore, Vol 18 (LexisNexis, 2009 Reissue) at para 240.688:

> In order to make out a case of conspiracy the plaintiff must establish (1) an agreement between two or more persons, (2) an agreement for the purpose of injuring the plaintiff, and (3) that acts done in execution of that agreement resulted in damage to the plaintiff.

22 There is no information on where the conspiracy was hatched and no suggestion that the defendants were present together in Singapore before or when the offer was made. As the defendants are domiciled in Switzerland, if they had agreed to make the false representations to the plaintiff to induce him to buy the Petroval Singapore shares, it was most likely that they did that in Switzerland. In any event the plaintiff had not alleged that the agreement was made in Singapore.

23 After the place of the alleged torts of misrepresentation and conspiracy is established to be Switzerland, the law governing the torts has to be determined. As the plaintiff had pointed out in its submissions [note: 7], the law applicable to determine the law of the tort is the *lex fori, ie*, the law applicable will be determined by the law of Singapore. By the law of Singapore, in deciding the law applicable for a tort, the "substance of the tort" test is used. It was explained by Belinda Ang Saw Ean J in *Wing Hak Man and another v Bio-Treat Technology Ltd and others* [2009] 1 SLR(R) 446 at [26] that:

> ... The test requires the court, in deciding where the alleged conspiracy took place, to "look back over the series of events" constituting the elements of the tort and ask where in substance did the cause of action arise.

As I have found that the misrepresentation and conspiracy took place in Switzerland, the applicable law for both causes of action is the law of Switzerland.

24 The accepted thinking is that all things being equal, it is preferable that a dispute be determined by a court applying its own law rather than a court applying a foreign law because a court would be more familiar with the former than the latter. The Court of Appeal has ruled in *Rickshaw Investments Ltd and another v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 at [43] and in *JIO Minerals FZC and others v Mineral Enterprises Ltd* [2011] 1 SLR 391 ("*JIO Minerals*") at [96] that the mere fact of the application of a foreign governing law may be accorded due weight in the absence of evidence of the content of the foreign law.

25 It is also settled law that the place of the tort is *prima facie* the natural forum – see *JIO Minerals* at [106]. On this basis, Switzerland would be regarded as the natural forum in the normal case, and there was nothing to displace the rule.

26 In view of these findings, Switzerland is a more appropriate forum for the determination of the dispute than Singapore. The applicant has fulfilled the *Spiliada* stage one requirement.

27 That leads to stage two of the test – whether justice requires that a stay should nevertheless be refused. The plaintiff argued that there is a risk of substantial injustice if the proceedings were stayed in favour of Switzerland. The plaintiff made three points in support [note: 8] :

(a) Risk of inconsistent decisions on the same trust issue in the event that the Singapore Proceedings continue;

(b) The plaintiff is unable to have documents in the possession of PSA and Petroval Singapore admitted in evidence; and

(c) The plaintiff should be allowed access to the pleadings and affidavits filed in the Singapore Proceedings, and if the plaintiff's action is stayed, he may not be able to have access to those papers.

28 On ground (a), PSA had filed Notices of Discontinuance of its claims against Lush, Ostinelli and Novoselov. Furthermore, no step has been taken by any party in the proceedings for more than a year, and the whole action is deemed to be discontinued under O 22 r 2(6) of the Rules of Court (Cap 322, R5, 2006 Rev Ed). In the circumstances, there will be no decision, and no likelihood of inconsistent decisions.

29 Grounds (b) and (c) arise out of the same concern. They are that if the plaintiff has to commence proceedings in Switzerland, he would not be able to compel witnesses from DrewCorp and Petroval Singapore to produce documents in connection with the trust issue and produce cause papers of the Singapore Proceedings in their possession in Switzerland. The plaintiff made these submissions in general terms, without identifying any documents known or believed to be in the possession of DrewCorp and Petroval Singapore which are relevant to the issue.

30 In respect to the cause papers of the Singapore Proceedings, the plaintiff's submissions

proceeded on the basis that he will not have access to the cause papers in the Singapore Proceedings if he were to bring his action in Switzerland. That may not be the case because all three defendants in the present proceedings were defendants in the Singapore Proceedings, and they would have the cause papers in their possession. That being the case, the plaintiff may be able to compel them to produce the cause papers; that would be possible under our Rules of Court, and the plaintiff has not stated that he will not be able to do that in Switzerland.

31 The examination did not support the submission that substantial injustice would result if the matter is heard in Switzerland, and the stay application is not defeated by the second *Spiliada* test.

32 In the circumstances, the plaintiff's appeal is dismissed with costs.

[note: 1] Statement of Claim, paras 34 and 35

[note: 2] Statement of Claim, paras 53–59

[note: 3] Statement of Claim in Suit No.103 of 2008, para 5.4.2

[note: 4] See [4] *supra*

[note: 5] Plaintiff's/Appellant's Written Submissions, page 47 para 78

[note: 6] See [7] and [8] *supra*

[note: 7] Appellant's Written Submissions, para 93

[note: 8] Plaintiff's/Appellant's Written Submissions, para 143