Sim Hok Khun @ Hadi Gunawan *v* Henry Budi Harsono @ Sim Hok Kiong
[2012] SGHCR 1

Case Number : Suit No 8 of 2012/T (Summons No 642 of 2012/Q)

Decision Date : 11 April 2012

Tribunal/Court : High Court

Coram : Jordan Tan AR

Counsel Name(s) : Vinodh Coomaraswamy SC, Terence Seah and Christine Ong (Shook Lin & Bok LLP) for the plaintiff; Lin Shumin, Cavinder Bull SC, Lim Gerui, Lee Xin Jie (Drew & Napier LLC) for the defendant.

Parties : Sim Hok Khun @ Hadi Gunawan — Henry Budi Harsono @ Sim Hok Kiong

Civil Procedure

11 April 2012 Judgment reserved.

Jordan Tan AR:

Introduction

1 The plaintiff and the defendant are the third and seventh brothers respectively in a family of seven brothers and three sisters. The plaintiff brought this suit against the defendant for breach of trust, seeking a declaration that, *inter alia*, the defendant held various shares in Jardine Matheson Holdings Limited ("the Jardine shares"), a company listed on the Singapore stock exchange (and previously listed on the Hong Kong stock exchange but was delisted), on trust for him and seeking an account of the shares.

2 The defendant applied for a stay of the proceedings on the ground of *forum non conveniens*, arguing that Hong Kong was clearly a more appropriate forum for the trial of the action. This is so, the defendant argued, because the reason for refusal to account for the proceeds of the Jardine shares, which have since been sold, is that there is a serious question as to whether the shares were part of what the defendant refers to as the "Sim Family Trust Fund" ("the Trust") to which the defendant and his brothers are beneficiaries.

3 Having raised this issue of whether the shares are part of the Trust and stating that this is likely to form part of the defence in Singapore should the action proceed, the defendant's counsel, Ms Lin Shumin proceeded to set out the connecting factors to Hong Kong under Stage One of the test laid down in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*"). The plaintiff's counsel, Mr Vinodh Coomaraswamy SC, dealt with these arguments but also raised a preliminary objection to the application on the ground that the defendant was precluded from making this stay application because he had applied for and obtained, albeit by consent, an extension of time to file his defence.

4 I deal with this preliminary objection first before addressing the substance of the application.

Is the defendant precluded from obtaining a stay having obtained an extension of time to file a defence?

5 The writ of summons was filed on 4 January 2012 and the defendant entered an appearance on 11 January 2012. On 20 January 2012, the defendant filed Summons 324 of 2012 ("Sums 324/2012") for an extension of time to file his defence. The plaintiff consented and the consent order was recorded before an Assistant Registrar on 25 January 2012. Mr Coomaraswamy made the following argument:

> [W]here a defendant served in Singapore as of right intends to seek to stay the action on grounds of *forum non conveniens*, he must make that application **before taking any step other than filing an appearance** , especially as here where the step which the defendant took is available only to a defendant who intends to defend the action on the merits in Singapore. [emphasis in original]

6 In making this argument, Mr Coomaraswamy referred to *Yeoh Poh San and another v Won Siok Wan* [2002] 2 SLR(R) 233 ("*Yeoh Poh San*") in which the court stated at [14]:

> The very reason why a defendant is required to apply for a stay of proceedings before taking any step other than filing an appearance is because such an other step may be construed as submission to the court's jurisdiction.

7 Mr Coomaraswamy was quick to clarify that although *Yeoh Poh San* was concerned with a different application (one under O 12 r 7(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed Sing) for stay of proceedings for want of jurisdiction and thus raised a separate issue of whether there was submission by the defendant to the jurisdiction of the court), by way of analogical reasoning, in an application for stay of proceedings on the ground of *forum non conveniens* under O 12 r 7(2), the defendant should not take steps which suggested that he had intended to defend the action as in doing so he had conceded that this matter ought to proceed to trial in Singapore. O 18 r 2 concerning the timelines for service of a defence provided as follows:

> A defendant who enters an appearance in, *and intends to defend*, an action must, unless the Court gives leave to the contrary, serve a defence on the plaintiff before the expiration of 14 days after the time limited for appearing or after the statement of claim is served on him, whichever is the later. [emphasis added]

Mr Coomaraswamy argued that in seeking leave for more time to file the defence, the defendant had evinced an intention to defend the action.

8 I reject this argument. An application for a stay on the ground of *forum non conveniens* is different from an application for a stay for want of jurisdiction. The latter application is defeated where the applicant has submitted to the jurisdiction of the court as in so doing, the court has jurisdiction over the applicant. An application for a stay on the ground of *forum non conveniens* is quite different. In making such an application, the applicant is not arguing that the court has no jurisdiction but that the court should decline to exercise its jurisdiction (see Adrian Briggs, *Civil Jurisdiction and Judgments* (LLP, 4th Ed, 2005) at para 4.35).

9 The analogy drawn was thus erroneous. While the taking of a step in the proceedings apart from the entering of an appearance may be fatal to an application for a stay for want of jurisdiction under O 12 r 7(1) because it demonstrated submission to jurisdiction, it did not have the same effect where an application for a stay on the ground of *forum non conveniens* under O 12 r 7(2) was concerned. On this very point, the Court of Appeal in *Chan Chin Cheung v Chan Fatt Cheung and others* [2010] 1 SLR 1192 ("*Chan Chin Cheung*") made it clear (at [22]) that even in a case where a defence has been filed, the defendant is still entitled to apply for a stay under O 12 r 7(2) although

he would be disentitled from doing so under O 12 r 7(1).

10 Furthermore, it could hardly be said that the defendant evinced an intention to defend the action when one scrutinises the words of O 12 r 7(2). That provision reads as follows:

> A defendant who wishes to contend that the Court should not assume jurisdiction over the action on 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]

11 Previously, O 12 r 7(2) contained no such time restriction on the making of an application under that provision. It was amended by Rules of Court (Amendment No 2) Rules 2004 ostensibly to bring the position for such applications in line with that under O 12 r 7(1). Order 12 rule 7(2) was further amended by Rules of Court (Amendment) Rules 2005 to replace "within the time limited for *filing* a defence" [emphasis added] with "within the time limited for *serving* a defence" [emphasis added] to correct what was probably a drafting error and to make consistent the language of O 12 r 7(2) with that of O 12 r 7(1).

12 The timelines for the making of a stay application are thus pegged to the timelines for the filing of a defence. Mr Coomaraswamy suggested that this meant 14 days and not to any extended period granted by the court for the filing of a defence. He further suggested that to obtain an extension of time to make an application under O 12 r 7(2), the defendant needed to specify this in his application. I reject both arguments. Where the time limitation in O 12 r 7(2) does not spell out a definite period of time (for instance, 14 days) but refers to a deadline for the occurrence of an event (the serving of a defence), where the court exercises its powers to grant an extension of time for the latter under O 3 r 4, the corresponding limitation in the former must also be so extended. The Court of Appeal had in fact pronounced in *Chan Chin Cheung* at [16] that the time limit set in O 12 r 7(2) may be extended, even where the application for extension is made *after* the time limit had passed.

13 For these reasons, I rejected the plaintiff's preliminary objection.

Whether the action should be stayed applying the *Spiliada test*

14 I will not rehearse the requirements of the *Spiliada* test as that has been set out in numerous decisions of the Singapore courts (see for instance, *Jio Minerals FZC and others v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [38] and *Murakami Takako (executrix of the estate of Takashi Murakami Suroso, deceased) v Wiryadi Louise Maria and others* at [2009] 1 SLR(R) 508 at [26]).

15 The defendant listed the following factors amongst others as the connecting factors suggesting that Hong Kong is clearly the more appropriate forum in which to adjudicate the matter:

(a) The plaintiff managed the Trust and the family company, Simsons Enterprises (H.K.) Ltd in Hong Kong.

(b) The various agreements evidencing the Trust were executed in Hong Kong.

(c) The plaintiff instructed the defendant to sell the Jardine shares while the plaintiff was in Hong Kong.

(d) The Jardine shares were sold from a Hong Kong custody account and the sale proceeds are currently held in Hong Kong.

(e) The Trust dispute and the dispute over the Jardine shares were dealt with in correspondence between the parties' Hong Kong lawyers. The letter of demand for the Jardine shares was issued by the plaintiff in Hong Kong.

(f) The defendant and his fourth and sixth brothers have initiated proceedings in Hong Kong in HCA 441 of 2012 ("HCA 441/2012") concerning a dispute over the Trust assets.

(g) The Hong Kong action was likely to proceed whether the Singapore proceedings continue or not because it concerned many other assets apart from the Jardine shares.

(h) The plaintiff is a Hong Kong citizen.

(i) The defendant and his fourth brother are parties to the Hong Kong action.

(j) Material non-party witnesses to the Trust dispute such as the defendant's fifth brother and the widow of the defendant's second brother are based in Hong Kong.

(k) The critical documentary evidence originates in Hong Kong and it was in Hong Kong that the events surrounding the creation of the Trust and subsequent disputes took place.

(l) The governing law for the Trust dispute and the dispute over the Jardine shares is Hong Kong law.

16 The plaintiff's counter-argument was a simple one. The defendant had failed to show the connection of the dispute over the Jardine shares with which this action is concerned to the dispute over the Trust assets. When queried on this point, Mr Coomaraswamy stated that the defendant had to demonstrate a connection between the two disputes on a balance of probabilities. He analogised it to the requirement for an applicant to show that a witness is relevant before asking the court to consider the availability of such a witness as a factor under the Stage One analysis of the *Spiliada* test.

17 In making these arguments, Mr Coomaraswamy argued that the defendant in his various supporting affidavits was unable to state as his position that the Jardine shares were part of the Trust but only took a tentative position. Mr Coomaraswamy also referred to a Bought Note which evidenced the purchase of the Jardine shares in the name of the plaintiff.

18 Furthermore, he argued that the *lex causae* in the present case is the *lex situs*, Singapore law, as the cause of action, a trust claim, may be regarded as being proprietary in nature. This was a factor pointing to Singapore as the more appropriate forum.

19 Finally, he argued that the Hong Kong action was unrelated to the present proceedings as the indorsement of claim on the writ filed in Hong Kong did not refer to the Jardine shares and could not be interpreted to contain a claim for those shares.

20 First, I rejected Mr Coomaraswamy's argument that the defendant had to show on a balance of probabilities the connection between the Jardine shares dispute and the Trust dispute. Mr Coomaraswamy was, in essence, asking the court to evaluate the merits of the defence. This is so as Mr Coomaraswamy was asking the court to evaluate the evidence surrounding the purchase of the Jardine shares and to consider whether that evidence demonstrated that the purchase of those shares was funded by the Trust assets so as to determine if the defence was contrived. When questioned on this point, Mr Coomaraswamy suggested that although the court should generally

abstain from evaluating the merits of the defence, the court should not be precluded from determining whether the defence was contrived. Otherwise, he argued, defendants could spin connections to foreign jurisdictions where none really existed.

21 I did not accept this argument. In weighing the connecting factors under Stage One of the *Spiliada* test, the issue of whether there was a viable defence to the claim was not a relevant consideration as the court should not be required to go into the merits (see [27]-[28] of *The "Rainbow Joy"* [2005] 3 SLR(R) 719). Although Mr Coomaraswamy's argument was more nuanced than that advanced in *The "Rainbow Joy"* in that he was not asking me to refuse to grant the stay because the defendant had no defence but that the defence was contrived to create connecting factors to Hong Kong, if I accepted his argument, *in substance*, I would have to undertake the same exercise and evaluate the merits of the defence.

22 Applying the approach laid out in *The "Rainbow Joy"*, I could not disregard the defendant's purported defence and thus the connecting factors it established to Hong Kong. The defendant's purported defence, that the Jardine shares were purchased with moneys from the Trust or constituted part of the assets of the Trust, raised the following general connecting factors which I accepted as demonstrating that Hong Kong was the clearly more appropriate forum for the trial of this action:

(a) The various agreements evidencing the Trust which are subject to fierce dispute were executed in Hong Kong.

(b) The Trust concerned various Hong Kong assets and was managed in Hong Kong.

(c) The critical documentary evidence for the purposes of the Trust dispute originated from Hong Kong and it was in Hong Kong that the events surrounding the creation of the Trust and subsequent disputes took place.

23 As for the parallel proceedings in Hong Kong, the risk of concurrent proceedings leading to conflicting judgments (although falling short of a *lis alibi pendens*) is a factor which would support the grant of a stay (see *Chan Chin Cheung* at [45]). Mr Coomaraswamy had argued that based on the indorsement of claim on the writ in HCA 441/2012, the claim in that action did not overlap with the dispute over the Jardine shares in this action. On this point, I agreed with Ms Lin that the second prayer of that indorsement of claim would cover that dispute. The second prayer reads as follows:

[The plaintiffs claim:]

2. an account of all assets, funds and/or *shares (and their proceeds)* in which the Plaintiffs have beneficial interests and all necessary inquiries, directions and orders to enable the Plaintiffs to trace and recover such assets, funds and shares thereof as the Court deems fit; [emphasis added]

The possibility of conflicting judgments is a factor militating for a stay. Furthermore, as the scope of HCA 441/2012 includes claims concerning all other Trust assets, it is very likely that those proceedings will proceed regardless of whether the Singapore proceedings continue. This is yet another factor militating for a stay (see in this regard, *The "Reecon Wolf"* [2012] SGHC 22 at [47]).

24 With regard to choice of law, I do not agree with Mr Coomaraswamy that the *lex causae* is the *lex situs*. The general rule at common law is that the law of the trust is the law chosen by the settlor or, in the absence of any such choice, by the law with which the trust is most closely connected

(see *Dicey and Morris on The Conflict of Laws* (Sweet & Maxwell, 14th Ed, 2006) ("*The Conflict of Laws*") at p 1302). For a trust of immovable property, the *situs* of the property is given considerable weight. But where movables are concerned, especially intangible movables such as shares in the present case, the *situs* may deserve little weight (see *The Conflict of Laws* at p 1312). In this case, it must be noted that the Jardine shares were previously traded on the Hong Kong stock exchange but the company was delisted and then listed on the Singapore stock exchange. On the plaintiff's own case, it is for this reason that the plaintiff, being a Hong Kong citizen, transferred the shares to the defendant, a Singapore Permanent Resident for convenience in dealing with the shares. The shares continued to be held in a custody account in Hong Kong with Coutts & Co Ltd. For these reasons, the *situs* and the location of the trustee, in my view, were incidental links to the creation of the trust and were of little weight in determining the choice of law. In my view, the law of the trust was Hong Kong law for Hong Kong was more closely connected with the settlor who was also the beneficiary of the trust and who had created this trust for administrative convenience.

25 On balance, I found that under the Stage One analysis of the *Spiliada* test, the above factors pointed to Hong Kong as a clearly more appropriate forum for the trial of this action. There were other factors raised but I found them to either be neutral or of less weight as compared to the factors I have addressed above. With regard to the Stage Two analysis, I find there to be no special circumstances to justify a refusal to grant a stay.

26 I therefore grant the defendant's application to stay this action on the ground of *forum non conveniens*.

27 I will hear the parties on costs.