Sarawak Timber Industry Development Corp and another *v* Asia Pulp & Paper Co Ltd [2013] SGHCR 09

Case Number : Originating Summons No 1075 of 2012 (Summons No 6372 of 2012)

Decision Date : 27 March 2013

Tribunal/Court : High Court

Coram : Elaine Liew AR

Counsel Name(s) : Wendy Lin and Benjamin Fong (WongPartnership LLP) for the Applicants; Adrian Tan, Raymond Lam, Ho Kheng Lian and Mohan Gopalan (Drew & Napier LLC) for the Respondent.

Parties : Sarawak Timber Industry Development Corp and another — Asia Pulp & Paper Co Ltd

Civil Procedure – Foreign Judgments – Reciprocal Enforcement of Commonwealth Judgments Act

27 March 2013 Judgment reserved

Elaine Liew AR:

Introduction

1 The Applicants, Sarawak Timber Industry Development Corporation and State Financial Secretary Incorporated, took out an application *vide* Originating Summons 1075/2012 ("OS 1075") to register an order of court dated 31 May 2007 obtained in the High Court of Sabah and Sarawak under the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) ("RECJA"). The *ex parte* application was granted on 15 November 2012 ("the Registration Order").

2 The Respondent, Asia Pulp & Paper Company Limited ("APP"), subsequently took out Summons No 6372/2012 ("SUM 6372") to set aside the Registration Order and the costs order made pursuant to it on two grounds: (a) the relevant order of court was not a "judgment" within the definition of s 2(1) of the RECJA; and (b) the Applicants had taken out the registration application after the expiry of the 12 month time limit prescribed in s 3(1) of the RECJA, and there was no good reason for any longer time to be allowed by the Court.

Background facts

Relationship between the Applicants and APP

3 The Applicants, APP and Borneo Pulp Plantation Sdn Bhd were shareholders of Borneo Pulp & Paper Sdn Bhd ("BPP"), a Malaysian company incorporated in 1996.

4 A dispute arose between parties when new shares at the price of RM 1 per share were allotted and issued by BPP to its shareholders sometime in May 2000. The dispute pertained to 117 million shares issued to APP which remain unpaid to date.

The proceedings in Malaysia

5 By way of an order made in Companies (Winding Up) No 28-27-2002 III(I) ("CWU 28-27") in

2002, BPP was ordered to be wound up and one Mr Yew Fooi was appointed as liquidator thereof ("the Liquidator").

(1) The SIC 2003

6 On 5 December 2003, the Liquidator filed a Summons in Chambers application in CWU 28-27 ("SIC 2003"). The SIC 2003 sought leave to make a call on APP for the sum of RM 117m, and in the event of APP's failure to settle the said amount, the Liquidator be at liberty to charge interest at the rate of 4% per annum from the date of judgment to the date of payment.

(2) The Liquidator's Final Report

7 On 25 August 2005, the Liquidator issued his final report in respect of the liquidation of BPP ("the Final Report"). The Final Report included the following pertinent information:

(a) BPP had repaid its creditors in full;

(b) There was a surplus of RM 41,821,029 which would be returned to BPP's contributories, with APP's share in respect of the surplus being RM 25,092,617;

(c) BPP owed APP a sum of RM 75,083,515; and

(d) APP was entitled to a credit sum of RM 100,176,132 from BPP (*ie*, the sum total of items (b) and (c) above).

8 In his Final Report, the Liquidator opined that a setting-off exercise may be conducted between BPP and APP, *viz*, the RM 117m owing from APP to BPP for the unpaid shares may be set off against the sum of RM 100,176,132 which was due from BPP to APP. He was also of the view that the remainder of RM 16,823,868 may then be pursued by the Applicants in their capacities as contributories against APP, in proportion to their respective interests in BPP. The Liquidator took the view that the liquidation process would be shortened through this exercise.

(3) The NOM 2005

9 The Liquidator took out a Notice of Motion in CWU 28-27 on 30 August 2005 ("NOM 2005") for leave to make a call on APP in the sum of RM 117m, with consequential directions that the said sum be subject to a notional set off of RM 100,176,132 and for the Liquidator's right of enforcement of the balance RM 16,823,868 be wholly and absolutely assigned to the Applicants.

10 The NOM 2005 also sought the consequential orders for the Liquidator's release and for books and records of BPP to be destroyed.

(4) The SIC and NOM orders

11 On 31 May 2007, both the SIC 2003 and NOM 2005 came up for hearing before Justice Datuk Clement Skinner who granted the applications. It should be noted that counsel for the Liquidator, APP

and the Applicants were all present at the hearing before Skinner J.

12 The order made in respect of the SIC 2003 ("the SIC order") read:

ORDER

… IT IS ORDERED that leave be granted to [the Liquidator] to make a call on [APP]…for the total amount of RM 117,000,000.00 and that in the event of failure by [APP] to settle the amount of RM 117,000,000.00 within 30 days of the call issued by [the Liquidator], the said Liquidator be at liberty to charge [APP] interest at the rate of 4% per annum from the date of judgment to the date of full payment…

13 The order made pursuant to the NOM 2005 ("the NOM order") was as follows:

ORDER

… IT IS ORDERED that the prayers in the [NOM 2005] are hereby granted *in consequence of* this Honourable Court *granting leave for the [L]iquidator to make a call on [APP] for the sum of RM 117,000,000 under the [SIC 2003]* in this matter as follows:

(1) that leave be and is hereby granted for the [L]iquidator to make a call on the unpaid capital of [BPP] for the sum of RM 117,000,000.00 with consequential directions and/or orders that: -

(a) for the purposes of adjusting BPP's contributories rights, the sum of RM 117,000,000 be set off against a notional sum of RM 100,176,132;

(b) that the rights of enforcement of the balance of RM 16,823,868 be wholly and absolutely assigned to [BPP's] other contributories, Sarawak Timber Industry Development Corporation ("STIDC") and State Financial Secretary Incorporated ("SFS") [*ie*, the Applicants] respectively in the following proportions:-

Contributory	**Amount (RM)**
STIDC	12,641,765
SFS	4,182,103

(2) the liquidation costs and expenses as well as the Liquidator's remuneration…be approved;

(3) that consequent to the directions given on prayers (1) and (2) above, the said Liquidator be released and discharged and/or [BPP] be dissolved; and

(4) that subsequent to the order for release and/or dissolution, the books and records of [BPP] be destroyed within three (3) months from the date of such release and/or dissolution.

…

[emphasis added]

14 Notably, OS 1075 sought to register only paragraph 1 of the NOM order.

The issues raised in SUM 6372

Issue I: Whether paragraph 1 of the NOM order is a "judgment"

The approach in ascertaining the nature of a foreign judgment

15 Section 2(1) of the RECJA defines "judgment" as:

> …*any judgment or order given or made* by a court in any civil proceedings, whether before or after the passing of this Act, *whereby any sum of money is made payable*, and includes an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place… [emphasis added]

Simply put, the judgment of the original court (*ie*, the court by which the judgment was given) has to be in the nature of a "money judgment" for it to qualify for registration under the RECJA.

16 In construing whether paragraph 1 of the NOM order falls under the definition in s 2(1) of the RECJA, Ms Wendy Lin ("Ms Lin"), counsel for the Applicants, referred to the decision of *Poh Soon Kiat v Desert Palace Inc (trading as Caesars Palace)* [2010] 1 SLR 1129 ("*Poh Soon Kiat*") where the Court of Appeal scrutinised the cause papers filed in the foreign proceedings in order to ascertain the true nature of the foreign judgment (at [27]–[28] of *Poh Soon Kiat*). Based on this decision, Ms Lin submitted that the Court is entitled to look beyond paragraph 1 of the NOM order and peruse the relevant materials in CWU 28-27 (including the SIC order and the written judgment by Skinner J) to determine its nature.

17 Counsel for APP, Mr Adrian Tan ("Mr Tan"), initially advocated a restrictive approach in reading paragraph 1 of the NOM order and went so far as to urge the Court to "read [the NOM order] in isolation as it is the only judgment that is registered". However, given the decision of *Poh Soon Kiat*, Mr Tan revised his position and submitted that while the Court is entitled to look into the cause papers filed under CWU 28-27 and the SIC order, the Court should do so with some measure of caution.

18 Although *Poh Soon Kiat* pertained to a common law action for the enforcement of a foreign judgment, I am of the view that the same approach may be employed with regard to registration applications made under the RECJA given that the RECJA was enacted as a facilitative instrument to allow judgments and awards of Commonwealth jurisdictions to be enforced in Singapore. Thus, reference may be made to the relevant materials under CWU 28-27 to ascertain whether paragraph 1 of the NOM order is a "judgment" within the definition of s 2(1) of the RECJA.

Parties' interpretations of the NOM order

19 Parties advanced opposite views in their interpretations of the NOM order. In this regard, APP raised the following arguments:

(a) Paragraph 1 of the NOM order only granted *leave* to the Liquidator to *make a call* on APP and for certain enforcement rights of the Liquidator to be assigned to the Applicants;

(b) The NOM order did not include a payment order against APP (see [24] below);

(c) Until a call was made by the Liquidator, there was no debt payable from APP to the Liquidator or any other party; and

(d) If the call was properly made on APP, it was open to the Applicants to bring an action against APP in Malaysia and to then seek to register in Singapore any such judgment obtained by them.

20 The Applicants' main planks of submissions in resisting the setting aside application were as below:

(a) The SIC order included a payment order against APP in favour of the Applicants, by operation of the SIC and NOM orders ("alleged payment order") (see [24] below);

(b) A holistic reading of the cause papers filed under CWU 28-27, the SIC order, the written judgment of Skinner J, and the NOM order would show the true intention of Skinner J, *viz*, Skinner J did not envisage the need for further steps to be taken by the Applicants after the assignment of the Liquidator's enforcement rights to them; and

(c) Similarly, an analysis of the post-NOM order events, (*eg*, the release of the Liquidator and the destruction of BPP's book and records), would show that Skinner J did not intend the Applicants to commence a separate suit for recovery against APP. Otherwise, parties would run into difficulties in bringing or defending such an action as the main source, *ie*, BPP's books and records, would have been destroyed.

Decision on Issue I

Determination of the nature of the judgment – date of judgment or date of registration

21 It is clear that a contributory's liability to pay for unpaid capital does not become due and payable until a call is made: see Andrew Keay, *McPherson's Law of Company Liquidation*, 2nd Ed at para 10.019. This position is also encapsulated in s 215 of the Companies Act 1965 (Act 125) (Malaysia) which stipulates that "[t]he liability of a contributory shall create a debt accruing from him at the time when his liability commenced but payable at the times when calls are made for enforcing the liability".

22 In the present case, the deponent of the affidavit filed in support of OS 1075 highlighted the fact that subsequent to the NOM order, the Liquidator *did* make a call on APP:

> 19 I am advised and do believe that under Malaysian law, [paragraph 1] of the [NOM order] would be considered to be an order/judgment whereby *the sums of RM 12,641,765 and RM 4,182,103 are payable by APP to STIDC and SFS respectively, upon the Liquidator making the call on APP for the said sum of RM 117,000,000. Such a call was made by the Liquidator on 13 August 2007 and was duly served on APP on 16 August 2007.*
>
> …
>
> 21 Despite the Liquidator having made the call on 13 August 2007 and having served the same on APP on 16 August 2007, and despite APP's failure to set aside the [NOM order] on appeal, APP has to-date, not made any payment to [the Applicants].

22 In the circumstances, I am advised and do believe that paragraph 1 of the [NOM order] can be enforced under the RECJA, as it is an order made by a superior court of Malaysia in civil proceedings, *whereby a sum of money is made payable – in this case, RM 12,641,765 to STDIC and RM 4,182,103 to SFS.*

[emphasis added]

23 It is correct that APP's liability to pay crystallised at the time the call was made. However, it should be noted that the NOM order *preceded* the call. In this connection, I would state that the nature of the judgment *(ie*, whether it is a money judgment or otherwise) should be ascertained as at the date the judgment was made by the original court. I do not think that the intervening event (*ie*, the call) between the making of the NOM order and the filing of OS 1075, transformed the NOM order into a "money judgment". As APP's liability to pay the Applicants did not arise with the making of the NOM order but rather, with the making of the call by the Liquidator, it would appear that the NOM order itself is not a "judgment" for the purposes of registration under the RECJA.

Whether a payment order was built into the SIC order

24 It is therefore unsurprising that Ms Lin sought to persuade the Court that the SIC order contained, in substance, an alleged payment order albeit with some variation from the wordings in Form 48 of the Companies (Winding Up) Rules 1972 (Malaysia) ("Form 48"). Mr Tan conceded that the relevant wordings in Form 48 would have given rise to APP's liability to pay to the Applicants, had it been incorporated in the SIC order and/or the NOM order.

25 The relevant wordings in Form 48 are as below:

It is ordered that leave be given to the (Official Assignee) and liquidator to make a call of $...per share on all the contributories of the said company…

And it is ordered that each such contributory do, on or before the…day…of...,19…, pay to the (Official Assignee and) liquidator of the…company, the amount which will be due from him or her in respect of such call.

[emphasis added]

26 The alleged payment order in the SIC order reads:

It is ordered that leave be granted to [the Liquidator] to make call on [APP] for the amount of RM 117m and that *in the event of failure by [APP] to settle the amount of RM 117m within 30 days of the call issued by [the Liquidator], the said Liquidator is at liberty to charge [APP] interest at the rate of 4% per annum from the date of judgment to the date of payment*…

[emphasis added]

27 A comparison between Form 48 and the alleged payment order would show that they are in fact dissimilar, both in form and in substance. The payment order in Form 48 speaks expressly of the contributory's obligation to pay a certain amount to the liquidator of the company within a specified time frame. In stark contrast, the alleged payment order in the SIC order refers to the Liquidator's right to charge interest in the event of non-payment by APP upon a call being made from the date of judgment to the date of payment. Read in this light, the latter would appear to be more akin to an award of interest on judgment than to a payment order.

28 Even taking Ms Lin's argument at its highest, that the SIC order gave rise to APP's liability to pay by virtue of the alleged payment order, the Applicants would still run into difficulties in demonstrating that the liability is owed to them. Notably, the Liquidator's right to charge interest was not assigned to the Applicants as the NOM order is limited to the assignment of the Liquidator's rights to the Applicants to enforce the balance of RM 16,823,868 (in proportion to their respective interests) and nothing more (see [13] above).

29 I therefore disagree with Ms Lin's submissions that the SIC order included a payment order which gave rise to APP's liability to pay the Applicants.

The alleged "true intention" of the original court

30 As for the Applicants' argument that Skinner J's "true intention" was to negate the need for the Applicants to commence a suit against APP for recovery (see [20] above), I find it untenable as:

(a) The written judgment by Skinner J was confined to addressing the objections raised by APP in respect of the SIC 2003, *viz*, defective service, an alleged bad faith on the part of the Liquidator, and APP's alleged entitlement to a complete set off in respect of the unpaid capital; and

(b) The wordings of the SIC and NOM orders speak for themselves and do not bear out what the Applicants seek to contend. Further, any potential difficulty which might arise from the operation of these two orders (*eg*, the destruction of BPP's books and records) could have been brought to Skinner J's attention as parties were represented at the hearing (at [11] above).

31 As the role of the registering court is largely administrative in nature, I am of the view that it is unsatisfactory to rely on post-judgment events to justify or even rationalise the "intended effect" of the judgment made by the original court. In such situation, the registering court should be slow (or even decline) to engage in such an exercise. I would reiterate that the main function of the registering court is to determine (by applying the *Poh Soon Kiat* approach) whether the judgment in question is one which fulfils the requirements under the relevant provisions of the RECJA and the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC").

32 It is undisputed that the Applicants can enforce the NOM order in Malaysia, see para 9 of the affidavit filed by the Applicants' expert, Mr Leong Wai Hong. Although Ms Lin raised the potential time bar issue faced by the Applicants in Malaysia, this argument is irrelevant to the Court's determination on whether paragraph 1 of the NOM order could be registered under the RECJA.

33 As the Applicants have failed to demonstrate that paragraph 1 of the NOM order (read together with the relevant materials in CWU 28-27) gave rise to APP's liability to pay the Applicants, I find that it is not a "judgment" within the definition of s 2(1) of the RECJA. Therefore, I will set aside my earlier Registration Order and the costs order made pursuant to it.

Issue II: Whether the Applicants should have taken out a formal application for extension of time for OS 1075

34 Given my decision that paragraph 1 of the NOM order is not a "judgment" for the purposes of RECJA, it is not strictly necessary for me to deal with APP's arguments regarding the Applicants' "delay" in applying for registration. However, as Mr Tan argued that s 3(1) of the RECJA prescribed (presumably, implicitly) the need to take out an application for extension of time in the event the time limit of 12 months is exceeded, I will deal with this argument briefly.

Decision on Issue II

35 Section 3(1) of the RECJA states:

> **Registration in Singapore of judgments obtained in superior courts in the United Kingdom**
>
> 3—(1) Where a judgment has been obtained in a superior court of the United Kingdom of Great Britain and Northern Ireland the judgment creditor may apply to the High Court at *any time within 12 months after the date of the judgment, or such longer period as may be allowed by the Court*, to have the judgment registered in the Court, and on any such application the High Court may, if in all the circumstances of the case it thinks it is just and convenient that the judgment should be enforced in Singapore, and subject to this section, order the judgment to be registered accordingly.
>
> [emphasis added]

36 Order 67 of the ROC which sets out the procedure for reciprocal enforcement of foreign or Commonwealth judgments is also silent on whether or when an application for an extension of time should be taken out after the expiry of the 12 month period.

37 In my view, the timeline prescribed for a registration application is, in a way, an open-ended one as it may be for "such longer period as may be allowed by the Court". The lack of stipulated "deadline" in the RECJA and/or the ROC, however, should not be taken as a *carte blanche* for nonchalant applicants to only apply for registration as and when they please.

38 As a matter of good practice, where a registration application is taken out more than 12 months from the date of judgment, the deponent should in the affidavit in support provide reasonable explanation to account for the delay. It is then for the court to decide whether, in the interests of justice, the application should be granted despite the late registration. As noted by the Court of Appeal i*n Westacre Investments Inc v The State-Owned Company Yugoimport SDPR (also known as Jugoimport-SDPR)* [2009] 2 SLR(R) 166 at [24]:

> [W]hen faced with a late RECJA application involving a delay which is not substantial…, it is plainly incumbent on the court to consider all the circumstances of the case – as mandated by s 3(1) of the RECJA – in determining whether it would be just and convenient to enforce the Commonwealth judgment in Singapore.

39 I observe that in OS 1075, the supporting affidavit did provide reasons to explain why the registration application was only taken out almost five years after the NOM order was obtained.

40 Given my views above, I disagree with Mr Tan's submission that under the framework of the RECJA, a formal application to extend time is needed whenever an applicant seeks to register a judgment 12 months after it was made.

Conclusion

41 For the reasons set out above, I allow APP's application and set aside the Registration Order and costs order made in OS 1075.

42 I will now hear parties on costs.