Malaysia Marine ABD Heavy Engineering Sdn Bhd *v* VLK Traders Singapore Pte Ltd [2013] SGHC 253

Case Number	: Originating Summons No 593 of 2013 (Registrar's Appeal No 354 of 2013)
Decision Date	: 22 November 2013
Tribunal/Court	: High Court
Coram	: Tan Siong Thye JC
Counsel Name(s)	: P. Suppiah and Elengovan s/o V Krishnan (P Suppiah & Co) for the plaintiff; Tan Boon Yong Thomas (Haridass Ho & Partners) for the defendant.
Parties	: Malaysia Marine ABD Heavy Engineering Sdn Bhd — VLK Traders Singapore Pte Ltd

Conflict of Laws – Foreign Judgments – Recognition

22 November 2013 Judgment reserved.

Tan Siong Thye JC:

Introduction

1 This is the Plaintiff's appeal against the decision of the Assistant Registrar in Summons No 4086 of 2013 ("SUM 4086") setting aside the registration of a judgment of the High Court of Malaya at Johor Bahru.

Background Facts

2 The Defendant had entered into an informal agreement with the Plaintiff via exchange of e-mail and written correspondence for the repair of two ships, namely, the White Cattleya 10 and the White Cattleya 12. The Plaintiff duly carried out the requested repairs. The total value of the repair works was S$1,1613,500. The Defendant paid the sum of S$873,074, leaving a balance of S$740,426 unpaid.

3 The Plaintiff sued the Defendant in the High Court of Malaya at Johor Bahru for the outstanding sum of S$740,426. The Defendant alleged that it was merely acting as an agent for the ships' owner and that the outstanding sum had been paid to another company, Koumi, which acted as the Plaintiff's agent.

4 On 11 September 2012, the High Court of Malaya at Johor Bahru granted a judgment in default of appearance in Civil Suit No 22NCvC-277-06/2012 ("the Malaysian Judgment"). The Defendant was accordingly liable under the Malaysian Judgment to pay the Plaintiff the sum of S$740,426 and interest at 4% per annum from 16 July 2012 to the date of settlement as well as costs of RM225.

5 On 18 June 2013, the Plaintiff applied to register the Malaysian Judgment as a judgment of the High Court of Singapore pursuant to s 3 of the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) ("the RECJA"). On the basis of an affidavit filed by the Plaintiff's acting Senior Manager, Mr Kishore A/L Kannan, the Singapore High Court (by way of an order of court dated 4 July 2013 ("the Registering Order")) ordered that the Malaysian Judgment be so registered.

6 On 6 August 2013, the Defendant filed SUM 4086 to set aside the Registering Order pursuant to Order 67, Rule 9 of the Rules of Court. SUM 4086 was heard by the learned Assistant Registrar on 9 October 2013. After hearing arguments, the Assistant Registrar allowed the application and set aside the registration on the basis that s 3(2)(b) of the RECJA prohibited the registration of the Malaysian judgement on the ground that the Defendant, "being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court". The Plaintiff was dissatisfied with the Assistant Registrar's decision and filed the present appeal on 21 October 2013.

The Plaintiff's Submissions on Appeal

7 The learned counsel for the Plaintiff appealed on the basis that s 3(2)(b) of RECJA does not apply to this case. According to the learned counsel, s 3(2)(b) of the RECJA does not apply to corporations. He referred me to s 2 of RECJA which defines "judgment debtor" as "the *person* against whom the judgment was given, and includes any *person* whom the judgment is enforceable in the place where it was given". Hence, he submitted that s 3(2)(b) of the RECJA is not applicable where the judgment sought to be registered lies against a company as opposed to a natural person. The learned Plaintiff's counsel also referred me to Black's Law Dictionary, 9th Ed, which defines person as a "human being – also termed natural person". In the circumstances, he submitted that s 3(2)(b) of the RECJA does not apply in the present circumstances. This point was not canvassed before the learned Assistant Registrar.

8 The learned Plaintiff's counsel further submitted that the Defendant cannot invoke s 3(2)(b) for the following reasons:-

(a) The writ and statement of claim in Civil Suit No 22NCvC-277-06/2012 had been lawfully served on the Defendant out of jurisdiction and the Defendant had failed to enter an appearance to defend the action, resulting in a judgment in default of appearance being entered against the Defendant.

(b) The Defendant had agreed to submit to the jurisdiction of the Malaysian court when it brought the two ships to Johor Bahru for repairs. The Defendant must have known that if the repairs were not paid for, the Defendant would be sued in Johor Bahru.

(c) The operative subsection the Defendant should have proceeded on was s 3(2)(c) and not s 3(2)(b) of the RECJA. This was because the former provision refers to "judgment debtor, being a defendant in the proceedings". The reference to "defendant" in s 3(2)(c) is a general and wide term that can include a corporate entity like the Defendant. S 3(2)(b) on the other hand refers to "judgment debtor, being a person", which denotes a natural person. However, s 3(2)(c) did not in fact apply to restrict registration of the Malaysian Judgment as the writ had been properly and duly served on the Defendant.

The Defendant's Submissions on Appeal

9 The learned Defendant's counsel submitted that the Malaysian Judgment cannot be registered as a foreign judgment under the RECJA by virtue of s 3(2)(b). It was submitted that notwithstanding the Defendant being a corporation, s 3(2)(b) is applicable in this case for the following reasons:

(a) It was not disputed that the Defendant neither carried on business nor had a place of business in Malaysia; and

(b) The Defendant did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the Malaysian court.

Decision of this court

10 Singapore law permits foreign judgments to be registered in accordance with the relevant provisions of the law. I agree with the observations of the Singapore High Court in *DHL Global Forwarding (Malaysia) Sdn Bhd v Mactus (Malaysia) Sdn Bhd and others* [2013] SGHC 170 ("*DHL Global*") at [4] that "[t]he court's approach toward registration is a light touch approach. In practice, the default is to permit registration of foreign judgments unless certain formal features are missing." The statutory provisions applicable in this case are the s 3(2) of the RECJA and Order 67, Rule 9 of the Rules of Court. Order 67, Rule 9 of the Rules of Court provides that:

> Where the Court hearing an application to set aside the registration of a judgment registered under the [RECJA] is satisfied that the ***judgment falls within any of the cases in which a judgment may not be ordered to be registered under section 3 (2) of that Act*** or that it is not just or convenient that the judgment should be enforced in Singapore or that there is some other sufficient reason for setting aside the registration, it may order the registration of the judgment to be set aside on such terms as it thinks fit. [emphasis added]

11 The crux of this appeal is whether the present case comes within one of the six instances specified in s 3(2) of the RECJA, which constitute separate (as opposed to cumulative) grounds for resisting registration. If it does, the Malaysian Judgment cannot be registered as a judgment of the High Court of Singapore pursuant to s 3 of the RECJA. S 3(2) of the RECJA reads as follows:

> **Restrictions on registration**
>
> (2) No judgment shall be ordered to be registered under this section if —
>
> (a) the original court acted without jurisdiction;
>
> (b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court;
>
> (c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court;
>
> (d) the judgment was obtained by fraud;
>
> (e) the judgment debtor satisfies the registering court either that an appeal is pending, or that he is entitled and intends to appeal, against the judgment; or
>
> (f) the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the registering court.

"Person"

12 S 3(2)(b) of the RECJA is hotly contested. The learned Plaintiff's counsel submitted that s 3(2)

(b) is not applicable in the instant case as the provision does not apply to a body corporate. In the midst of his submissions, I interrupted the learned counsel and brought his attention to the Interpretation Act (Cap 1, 2002 Rev Ed) ("the Interpretation Act"). He replied that the Interpretation Act, being a general statute, was of little assistance as the interpretation of a specific Act (namely the RECJA) was at issue in this particular instance.

13 I had some difficulty accepting this argument. The RECJA does not define or explain the term "person", and it is clear that the court should look towards the Interpretation Act for assistance in filling this lacuna. The purpose of the Interpretation Act is clearly stated in its preamble, where it is described as:

> An Act to define certain terms and expressions used in written law and to make provision for the construction, interpretation and publication of written law and for matters connected therewith

14 S 2(1) explains the scope of the Interpretation Act, as follows:

> In this Act, and in every written law enacted before or after 28th December 1965, the following words and expressions shall, without prejudice to anything done prior to that date, have the meanings respectively assigned to them unless there is something in the subject or context inconsistent with such construction or unless it is therein otherwise expressly provided…

15 If the RECJA specified a definition of "person", I would have to agree with the learned Plaintiff's counsel that the Interpretation Act would not be applicable. However, as the RECJA does not define "person", it is appropriate to seek guidance from the Interpretation Act which provides that "person" and "party" include "any company or association or body of persons, corporate or unincorporated". In the circumstances "judgment debtor" under s 3(2)(b) of the RECJA should be read to refer to the Defendant, a body corporate.

16 This approach is supported by the *obiter dicta* of the High Court in *United Malayan Banking Corp Bhd v Khoo Boo Hor* [1995] 3 SLR (R) 839 ("*United Malayan Banking*") at [7], where the word "person" in s 3(2)(b) of the RECJA was similarly interpreted in accordance with the definition in s 2(1) of the Interpretation Act.

17 Indeed, a similar view has also been taken by the UK courts in relation to s 9(2)(b) of the UK Administration of Justice Act 1920 ("the UK AJA"), to which s 3(2)(b) of the RECJA is identical and in which it finds its roots: see the Straits Settlement Government Gazette 30 September 1921 at p 1528. In *Sfeir & Co. v National Insurance Company of New Zealand Ltd; Aschkar & Co. v Same; Aschkar Brothers v Same* [1964] Lloyd's Rep 330, the English Queen's Bench Division held, in relation to s 9(2)(b) of the UK AJA (at 337 to 338):

> It is well established by a long line of authorities going back at least as far as *Carron Iron Company Proprietors v. Maclaren, Dawson and Stainton*, (1855) 5 H.L.C. 416, and *Newby v. Van Oppen and Colt's Patent Firearms Manufacturing Company*, (1872) L.R. 7 Q.B. 293, that a foreign corporation can be treated as being present in England for the purpose of serving a writ upon it when the company carries on business in England and provided that the requirements of Order 67, r. 3 (formerly Order 9, r. 8) as to service upon a head officer with some fixed office in England can be complied with: see Dicey's Conflict of Laws, 7th ed. (1958), at p. 178. ***It was admitted that the tests laid down in these authorities as to what constituted carrying on business within this country for the purposes of the common-law rule were applicable to the point I have to determine under Sect. 9 (2) (b) of the [UK AJA] as to whether the [defendant company was] at any material time carrying on business in Ghana.*** [emphasis in the original

in italics; emphasis added in bold italics]

18 Therefore, it is implicit in both Singapore and UK case law that s 3(2)(b) of the RECJA and s 9(2)(b) of the UK AJA are applicable to companies.

19 Having determined that the Defendant is a "judgment debtor" under s 3(2)(b) of the RECJA, the Court has to continue to examine whether the rest of s 3(2)(b) has been established, *viz*., that the Defendant "who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to the jurisdiction of that court".

"[N]either carrying on business nor ordinarily resident within the jurisdiction of the original court"

20 In *United Malayan Banking Corp Bhd v Khoo Boo Hor* [1995] 3 SLR(R) 839 at [9], the Singapore High Court held:

> In relation to corporations, residence or presence has little meaning. The equivalent concept is whether a corporation carries on business in the foreign country so as to render itself amenable to the jurisdiction of the foreign court. In the enforcement of foreign judgments at common law, the concept of "carrying on business" is peculiar to corporations.

The court further observed (at [14]) that "for a corporation to be carrying on business within a jurisdiction, the business must be that of the corporation and not that of the agent who acts for it".

21 In relation to the relevant period for the court to make the above determination, a Malaysian court in *Tunku Abaidah & Anor v Tan Boon Hoe* [1935] MLJ 214 ("*Tunku Abaidah*") stated that the words "being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original Court" "clearly relates to the date on which the proceedings were instituted in the original Court" as opposed to the date that the relevant contract was entered into.

22 On the present facts, the Defendant had not at any time carried on business in Malaysia, whether directly or through an agent acting on its behalf. It did not have any office or place of business in Malaysia, and had never been registered to do business there. On the contrary, the Defendant is incorporated in Singapore with its registered office at 171 Chin Swee Road #10-02, San Centre, Singapore. Indeed, the Plaintiff had accepted in the course of oral arguments before the learned Assistant Registrar that the defendant was "neither carrying on business nor ordinarily resident" in Malaysia.

"[D]id not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court"

23 In *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 1 SLR(R) 1088, the High Court observed that the question in every case is whether the party contesting jurisdiction of the original court "had taken a step in the proceedings which necessarily involved waiving their objection to the jurisdiction". Actions which amount to submission to the jurisdiction of the foreign court include, *inter alia*:

(a) Initiating an action as the plaintiff;

(b) Filing a defence to an action; and

(c) Making a counterclaim, cross-action or claim for set-off.

24 A party may also submit to the jurisdiction of a foreign court by agreement. Once an agreement to submit to the jurisdiction of a foreign court has been established, it does not matter whether the party *in fact* subsequently enters an appearance: *Burswood Nominees Ltd v Liao Eng Kiat* [2004] 2 SLR(R) 436. However, an agreement to submit to the jurisdiction of a foreign court must be express and will not be implied: see *Sun-Line (Management) Ltd v Canpotex Shipping Services Ltd* [1985-1986] SLR(R) 695 ("*Sun-Line*") and *United Overseas Bank Ltd v Tjong Tjui Njuk* [1987] SLR 275. Hence, in *Sun-Line*, the High Court refused to imply such an agreement from an agreement that the contract in question was to be governed by the law of the foreign country. The following, without more, do not amount to submissions to the jurisdiction of a foreign court by agreement:

(a) The fact that the contract in question is made in the foreign country or involves the conduct of business in that country, or the fact that the cause of action arose there;

(b) The existence of a choice of law clause in the contract in question; and

(c) An agreement to submit to the jurisdiction of an *arbitral* tribunal in the foreign jurisdiction.

In short, an inference of submission will be confined to actual agreements between the parties, dealings akin to an agreement (i.e. estoppel) or dealings between the parties in relation to the actual proceedings before the foreign court. This is because what is required is not some vague allegiance to the foreign country but "a clear indication of consent to the exercise by the foreign court of the jurisdiction": *Adams v Cape Industries Plc* [1991] 1 All ER 929 at 955.

25 In this case, the Defendant could not be said to have had voluntarily appeared or otherwise submitted or agreed to submit to the jurisdiction of the High Court of Malaya at Johor Bahru. The Plaintiff contended that the Defendant had submitted to the jurisdiction of the Malaysian court as the contracts for the repair of the two ships were voluntarily made in Malaysia and the money debt arose from the said contracts. The two ships were also repaired at Johor Bahru, Malaysia. Finally, the writ was served on the Defendant who was given an opportunity to be heard by the Malaysian Court. Thus, the Plaintiff submitted that the Defendant had submitted to the jurisdiction of the Malaysian court.

26 However, it is trite law that the mere act of service out of jurisdiction on the Defendant is insufficient to conclude that the Defendant had submitted or agreed to submit to the jurisdiction of the Malaysian court. In *Ho Hong Bank Ltd v Ho Kai Neo & Anor* [1932] MLJ 76, the court stated (correctly, in my opinion) that "sub-s 3(2)(b) which deals with the case of defendants not ordinarily resident or carrying on business within the jurisdiction, disregards the question [of] service because service by itself does not confer jurisdiction. In such cases jurisdiction is only obtained by the defendant submitting or having agreed to submit thereto." Likewise, in *Tunku Abaidah*, the court held that "[t]he mere fact of entering into a contract is not of itself a sufficient agreement to submit [to a jurisdiction] since such an agreement cannot be inferred and must be express*".*

27 In this instant case, there is nothing to suggest that the Defendant had voluntarily appeared or otherwise submitted or agreed to submit to the jurisdiction of the High Court of Malaya at Johor Bahru. The Defendant did not enter an appearance; the Malaysian Judgment was in fact obtained by the Plaintiff in default of appearance. Moreover, the contract for the repair of the ships was informally entered into through an exchange of e-mails and written correspondence. Finally, there is also no express jurisdiction clause amounting to an agreement to submit to the jurisdiction of the Malaysian court.

Relevance of s 3(2)(c) of the RECJA

28 Finally, I think it apposite to deal with one last issue raised by the Plaintiff. It was submitted on behalf of the Plaintiff that s 3(2)(b) of the RECJA was not relevant as it referred only to natural persons. According to the Plaintiff, because the Defendant is a corporate entity, the relevant provision is s 3(2)(c) which refers to a "judgment debtor, being the defendant in the proceedings". To recapitulate, s 3(2)(c) of the RECJA reads as follows:

> [No judgment shall be ordered to be registered under this section if] the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court;

29 In the present case, the Defendant was duly served with the originating process in Civil Suit No 22NCvC-277-06/2012. The Defendant was moreover not ordinarily resident and not carrying on business within the jurisdiction of the Malaysian court. Nor did it agree to submit to the jurisdiction of the court. As such, s 3(2)(c) of the RECJA is not applicable to the facts of this case.

Conclusion

30 For the above reasons, I dismissed the appeal. It is clear that s 3(2)(b) of the RECJA restricts the registration of the Malaysian Judgment in this case. The parties are to submit on the issue of the costs of these proceedings.