

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1998] SGHC 328

Suit 1878/1997

Between

Lam Soon (Thailand) Co Ltd
Whang Tar Choung
Whang Tar Liang

... Plaintiff

And

Transpac Capital Pte Ltd

... Defendant

GROUND S OF DECISION

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**Lam Soon (Thailand) Co Ltd and Others v Transpac Capital
Pte Ltd**

[1998] SGHC 328

Suit 1878/1997
Amarjeet Singh JC
30 September 1998

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Judgment :

2 GROUNDS OF JUDGMENT

3

4 Narrative

5 1. The Respondents [Plaintiffs] being dissatisfied with my decision on
appeal which set aside an order of the Asst Registrar requiring service out of
jurisdiction of the Writ of Summons on the Appellants [1st Defendants], now in
turn, appeal against such order.

6 2. The Respondents are Transpec Capital Pte Ltd an investment company

incorporated in Singapore providing finance and venture capital.

7 2. The Appellants Lam Soon (Thailand) Co Ltd are a company incorporated

in Thailand and are in the business of refining palm and edible oils into various products, manufacturing and sale of liquid detergent products.

8 3. The 2nd and 3rd Defendants ('the guarantors') were at all material times the Directors of the 1st Defendants. They are not concerned in these satellite proceedings.

9 4. The Respondents' action against the Appellants and the guarantors is for payment to them of the balance of monies owed to them in the sum of

S\$924,660.98 as follows:

10 5. Pursuant to an *Ex-Parte* application the Respondents obtained leave to serve out of jurisdiction, to wit, Thailand, a sealed copy of the Writ of

Summons. In the meantime the 2nd and 3rd Defendants were served within the jurisdiction and filed their respective Appearances and joint Defence.

11 6. The grounds on which the Appellants sought the discharge or setting aside of the order granting leave to serve the Writ out of the jurisdiction were as

follows:

(i) The Respondents failed to satisfy the mandatory requirements of

Order 11 (2)(a) of the Rules of the Supreme Court requiring grounds supporting the

application.(ii) The Respondents did not make full and frank disclosure in their *ex-parte*

application to the Court and(iii) The Respondents have failed to show a serious question to be

tried on the merits.

12 alternatively, Thailand is the appropriate forum for the trial of the claims pleaded in the Statement of Claim or one or more of them.

Decision7. Order 11(2)(a), amongst other things, states:‘An application for the grant of leave under Rule 1 must be made

by an *ex-parte* Summons-in-Chambers supported by an Affidavit in *Form 12* stating:(a) the grounds on which the application is made.’

13 x x x

14 Form 12 requires facts to be stated in support of the application.

15 7.1 It was the contention of Counsel for the Appellants that having regard to the Respondents' Counsel's Affidavit dated 14 November 1997 to support

his application for leave to obtain an order to serve the Writ out of jurisdiction, the

Respondent's Counsel failed to furnish the grounds of his application as can easily

be discerned from paragraph 9 of his Affidavit and this was fatal to his application and

as such the order obtained ought not to have been and should be set aside.

16 7.2 In support of their application to obtain an order to serve the

Writ out of jurisdiction, the Respondents' Solicitors stated in their Affidavit:

"9. The Plaintiffs' claim is to recover **damages** in respect of, inter alia, **the breach of a Loan Agreement**, being an agreement which by its terms is governed by the laws of Singapore. A copy of the agreement is annexed hereto and marked "DKR-2". 10. I verily believe that the Plaintiffs have a good cause of action

against, inter alia, the 1st Defendants in respect of the claim
set out in the
Statement of Claim." (emphasis added)

17 8. I am satisfied, amongst other things, the Respondents' Counsel
has failed to meet an important condition prescribed by O.11(2) i.e. the
Respondents have
failed to furnish the grounds on which the application for service out of
jurisdiction was
made.

18 8.1 Paragraph 9 of the Respondents' solicitors' Affidavit
filed on behalf of the Respondent was in substance a bare paragraph when they
should have
shown by some grounds that they have a good arguable case for the various
claims made in
the action. This they did not do.

19 8.2 The Statement of Claim in fact contradicts the application for
leave to serve out of jurisdiction. The Statement of Claim pleads breach of a
Divestment

Agreement in paragraph 12 as follows:

"12. In breach of the *Divestment Agreement*, the First Defendants have failed to pay to the Plaintiffs the monies particularised here which is now due and owing by the First Defendants to the Plaintiffs."

20 The application for leave to serve out of jurisdiction however has a different complexion as it describes the claim as being for *damages* for breach of the *Loan Agreement*.

21 8.3 Although a copy of the *Loan Agreement* is annexed to the Respondents' solicitors' Affidavit purportedly supporting the application for service out of jurisdiction, nevertheless the *Divestment Agreement* referred to as

such by the Respondents and constituted by a document dated 4 September 1995 is not. The

submission of Counsel for the Respondent was that the terms of the *Divestment Agreement*

were set out substantially in the Statement of Claim and as the application and

Affidavit

were in reference to the Writ of Summons which included the Statement of Claim, it was not

necessary to exhibit the *Divestment Agreement* in the Affidavit supporting the

application or repeat its terms therein since a cross-reference could be made to the

Statement of Claim. Whilst this might be so, the Respondents' case essentially was

that they were entitled to bring proceedings in Singapore because the *Loan Agreement*

continued to govern the parties' legal relations and stipulated by its paragraph 22:

(i) that the agreement's governing law was Singapore; (ii) that each party submitted to the jurisdiction of Singapore in

relation to any proceedings "arising out of or in connection with" the said

agreement.

22 8.4 However, the *divestment* was a two stage step in which the

Respondents by letters dated 8 June 1995, 15 June 1995 and 23 June 1995 first effectively

converted a substantial portion of the loan of \$14,000,000/- into equity for themselves

and then by a letter 4 September 1995 (which the Respondents refer to as the *Divestment*

Agreement) immediately thereafter sold their equity at an agreed price to other

shareholders. By this device, the Respondents substantially had their loan repaid through

the said conversion. At the same time paragraph 5 of the *Divestment Agreement*

clearly stated that it **supercedes** the *Loan Agreement* **which shall cease to**

be operative with immediate effect. The Respondents' Counsel's submission

that the *Loan Agreement* continued to govern the legal relations between the parties

appeared to have hardly any merit in view of the clear words of paragraph 5 of the

Divestment Agreement. Paragraph 3 of the *Divestment Agreement* also expressly

provided that the unconverted loan i.e. portion of the loan remaining outstanding

amounting to approximately Bht 79 million would be paid on 30 December 1995. The

Appellants' case was that the balance of the loan outstanding was to be exact, Bht

79,257,445.93 (US\$3,147,947.41cts) and this was settled by the Appellants on or about 28

December 1995 by telegraphic transfer remittance (T.T.) to the Respondents' bank

account pursuant to the *Divestment Agreement* (as supported by the transfer document, Exhibit "YWC-6" attached to the 1st Affidavit of Yong Weng

Chye, M.D. of the 1st Appellants). The Appellants drew my attention to the fact

that this repayment of the balance of Bht 79,257,445.93 closely matched the

Respondents' claim in their Statement of Claim which was expressed as "Bht

79,300,000" and was to be paid by 30 December 1995. Being the only amount of the

balance of the loan that was due it was duly paid on 28 December 1996.

23 9. On the basis of the above evidence as well as a letter of demand

drawn to my attention by Counsel for the Appellants dated 23 May 1997 written
by the

Respondents' solicitors to Whang Tar Liang one of the two guarantors which
admits

that the principal sum of \$14,000,000/- had been **repaid in full** by the
Appellants I

was satisfied that it had been so paid. In stating therefore and claiming that the

Appellants had failed to pay the 'remaining portion of the unconverted loan' the

Respondents were wrongly and unjustly claiming the said sum when none
remained due and

owing. It appeared to me that the outstanding balance of \$464,448.17 (plus
interest) which

the Respondents were purportedly claiming against the Appellants as
'remaining

portion of the unconverted loan' was actually described by them to be balance
of a *commitment*

fee due from both the guarantors as stated by the Respondents in their

solicitors' letter sent to Whang Tar Liang one of the said guarantors. As I saw it,

under the *Loan Agreement* only the guarantors and not the Appellants are liable to

the *commitment fees*. The Respondents cannot now treat the Appellants and the

guarantors as one debtor having regard to the documents. Further, under cl.1(1) of the *Loan*

Agreement, the loan was an interest-free loan. In any case, since the loan was repaid,

there was no good arguable case of further interest to be paid arising. During submission

when Appellants' Counsel informed Respondents' solicitors that the *commitment*

fee had nothing to do with the Appellants, his reply was:

"But I am also claiming it here against 1st Defendants

because when *divestment* took place, the 1st Defendants
agreed to pay

interest on full outstanding sum."

24 without substantiating his reply. If the sum of \$464,448.77 was interest claimable on the approximately Bht 79,000,000 purported to be outstanding, no reason was stated by the Respondents as to why they were then claiming interest as well on the interest due as can be seen from the Respondents' claim. The Respondents' solicitors had as I stated earlier failed to show a good arguable case not just a case that could be argued.

25 10. The Respondents in applying for leave *ex parte* to serve a Writ out of jurisdiction was under a heavy duty to make a full and frank disclosure of

material facts failing which any order granted is liable to be set aside: ***Transniko***

Pte Ltd v Communication Technology Sdn Bhd [1996] 1SLR 580; ***Trafalgar Tours***

Ltd v Henry [1990] 2 Lloyds Rep 298. In the former case, the applicant had not disclosed that some contracts which were relied on were made in Malaysia and

in the latter

case there was a failure to exhibit certain documents and a failure to disclose
that there

had been delay in commencing action resulting in the applicant's order obtained
for

service out of the jurisdiction being not allowed to stand. In this case, the
Respondents

failed to disclose:

(i) the letter of 4 September 1995 referred to as the Divestment

Agreement which in fact contradicts the claim made by the
them;(ii) the fact that the unconverted loan had been fully paid
and(iii) their letter of 23 May 1997 confirming 'the principal sum
of

S\$14,000,000 has been repaid in full by the Appellants.

26 All these facts and documents are critically important and show that

they rebut the Respondents' claim. The non-disclosure of these matters, in my

opinion, whether innocent or otherwise amounts to a misrepresentation by the
Respondents

of their claim when leave was sought from the Asst Registrar for service out of
the

jurisdiction.

27 10.1 Such non-disclosure also extends to the third head of the
Respondents' Statement of Claim i.e. the purported unpaid dividends which I
shall now

deal with.

28 10.2 The Respondents claimed unpaid dividends of Bht 7.098 million.
The

Respondents rely on the letter dated 23 August 1995 from the Respondents to the

Appellants' Managing Director Yong Weng Chye which states the proportion of the

dividend and the amount payable to the Respondents.

29 11. The Appellants' case is that assuming there is an arguable
case for payment, the issue of whether the dividends are payable is one of Thai
law. The

claim is neither a claim under the *Loan Agreement* (which ceased to exist on the *Divestment*

Agreement superceding it) nor under any investment agreement. It also does not form

part of the *Divestment Agreement* dated 4 September 1995.

30 11.1 No particulars of whether the Appellants had profits available for

distribution or whether there was in fact a declaration of payment of dividends had been

pleaded nor any evidence produced of such a declaration in the Respondents'

solicitors' supporting Affidavit for the service of the Writ out of jurisdiction. The

letter of 23 August 1995 was not even mentioned by the Respondents in their Statement of

Claim or their Affidavit supporting the Application. I further considered the fact that

the Respondents were not even shareholders of the Appellants at the material time as per

the minutes of the EGM held on 17 July 1995 (1st Affidavit of Yong Weng Chye

filed on 21 April 1998 pgs.46-49).

31 11.2 Again no facts were disclosed in the Affidavit supporting the application as to whether the *Divestment Agreement* had been concluded in Singapore or Thailand.

32 11.3 In the circumstances, under this head of claim, the Respondents have also failed to produce a good, arguable case that in the circumstances, Singapore is the *forum conveniens*.

33 12. Whilst a Court does not try such a case upon Affidavit evidence, I had to reach a tentative or provisional conclusion that the Respondents were right in permitting the order obtained by them for service out of jurisdiction to stand. I could not for the reasons I have given reach such a conclusion at all. Accordingly, I allowed

the appeal with costs discharging the Asst Registrar's order for service of the
Writ

out of the jurisdiction.

34 Dated this 30th day of September 1998

35 AMARJEET SINGH

36 JUDICIAL COMMISSIONER

Amarjeet Singh JC

Philip Jeyaretnam assisted by Albert Leong (Helen Yeo & Partners)
for the appellants/1st defendants
Devinder K Rai Harry Elias & Partners) for the respondents/plaintiffs
