

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 320

Suit No 1268 of 2016
(Registrar's Appeal No 110 of 2017)

Between

Borneo Ventures Pte Ltd

... Plaintiff

And

Ong Han Nam

... Defendant

GROUND OF DECISION

[Civil Procedure] — [Stay of proceedings] — [Limited stay pending outcome of foreign proceedings]

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Borneo Ventures Pte Ltd

v

Ong Han Nam

[2017] SGHC 320

High Court — Suit No 1268 of 2016 (Registrar's Appeal No 110 of 2017)
Lai Siu Chiu SJ
17 May 2017

15 December 2017

Lai Siu Chiu SJ:

Introduction

1 This case came up for hearing before this court by way of a Registrar's Appeal No 110 of 2017 ("the Appeal"). Ong Han Nam ("the Defendant") had filed an application in Summons No 6145 of 2016 ("the Stay Application") for a stay of proceedings in Suit No 1268 of 2016 ("the Suit") commenced by Borneo Ventures Pte Ltd ("the Plaintiff"), pending the final outcome of a suit that was then ongoing in the High Court of Sabah and Sarawak at Kota Kinabalu, in the State of Sabah, Malaysia ("the Malaysian Suit").

2 The Stay Application was heard and granted by an Assistant Registrar ("the AR") on 7 April 2017. The AR ordered a limited stay of all proceedings in this Suit against the Defendant until 31 July 2017 and awarded costs to the

Defendant. The date 31 July 2017 was chosen by the AR as the trial of the Malaysian Suit had been fixed to take place between 19 and 22 June 2017.¹

3 For completeness, I note that, by way of the Defendant’s affidavit dated 29 June 2017, which was after the decision in this Appeal had been rendered, this court was informed that the hearing of the Malaysian Suit was not concluded on 22 June 2017 and had been adjourned to 10 July 2017 at the juncture when the last witness of the Defendant, Ms Wong Lee Ken (“Wong”), was in the witness stand.² On 11 July 2017, this court was further updated that the Malaysian Suit had concluded on 10 July 2017 and that the decision in that suit was likely to be rendered in September 2017.³

4 After the AR gave his decision, the Plaintiff filed the Appeal which this court heard and allowed. As the Defendant has appealed (after obtaining leave of court) against this court’s decision in Civil Appeal No 140 of 2017, I now set out the grounds for allowing the Appeal.

The facts

5 The facts set out hereinafter are extracted from:

- (a) the three affidavits filed by the Defendant;
- (b) an affidavit filed on the Plaintiff’s behalf by Alex Ng Soon Heng (“Ng”), the Group Chief Financial Controller of GSH Corporation Limited (“GSH”), which is the ultimate holding company of the Plaintiff;

¹ Certified Transcripts of HC/SUM 6145/2016 at p 4.

² Ong Han Nam’s Affidavit dated 29 June 2017 (“Ong’s 3rd Affidavit”) at paras 8–12.

³ Certified Transcripts of HC/SUM 2385/2017 at p 2.

(c) an affidavit filed by Goi Seng Hui (“Goi”) the Executive Chairman of GSH;

(d) two affidavits filed by Joyce Blasius (“Blasius”), an associate from the Malaysian law firm acting for the Plaintiff in the Malaysian Suit, *vide*, No bki-22NCvC-21/2-2016 (HC1), which the Plaintiff has taken out against (a) Omega Brilliance Sdn Bhd (“OBSB”) and (b) the Defendant; and

(e) an affidavit filed by Madeline Lee May Ming, a former partner of the Malaysian law firm called Mazlan & Associates who headed her firm’s team that conducted the due diligence exercise on behalf of the Plaintiff for a subscription agreement that formed the basis for the Plaintiff’s claim in the Suit.

6 The Plaintiff is a company incorporated in Singapore and is a wholly owned subsidiary of GSH. The Defendant is a Malaysian and is the sole owner of a British Virgin Islands incorporated company called Eagle Origin Limited (“Eagle”), which in turn owns 22.5% of the shares in a company called The Sutera Harbour Group Sdn Bhd (“SH Group”). Besides Eagle and the SH Group, the Defendant also owns other companies/shares in other companies such as Sutera Harbour Holdings Sdn Bhd (“SHHSB”).

7 Pursuant to a Subscription Agreement dated 30 December 2013 (“the SA”), the Plaintiff acquired 77.5% of the share capital in the SH Group

and thereby became its majority shareholder.⁴ This acquisition under the SA was completed on 26 March 2014.⁵ Clause 12.15(a) of the SA states that the agreement shall be governed by and construed in accordance with the laws of Singapore while sub-clause (b) thereof provides for disputes to be referred to arbitration in Singapore in accordance with the rules of the Singapore International Arbitration Centre.⁶

8 The SH Group is the immediate parent company of a fully integrated resort, Sutera Harbour Resort Sdn Bhd (“SH Resort”), covering approximately 384 acres located at Kota Kinabalu, Sabah. The SH Resort consists, *inter alia*, of two 5-star hotels with extensive convention and banquet facilities, which the Defendant developed from the 1990s until July 2000 when SH Resort was completed and officially opened.⁷

⁴ Ong Han Nam’s Affidavit dated 27 December 2016 (“Ong’s 1st Affidavit”) at para 4.

⁵ Ong’s 1st Affidavit at para 12.

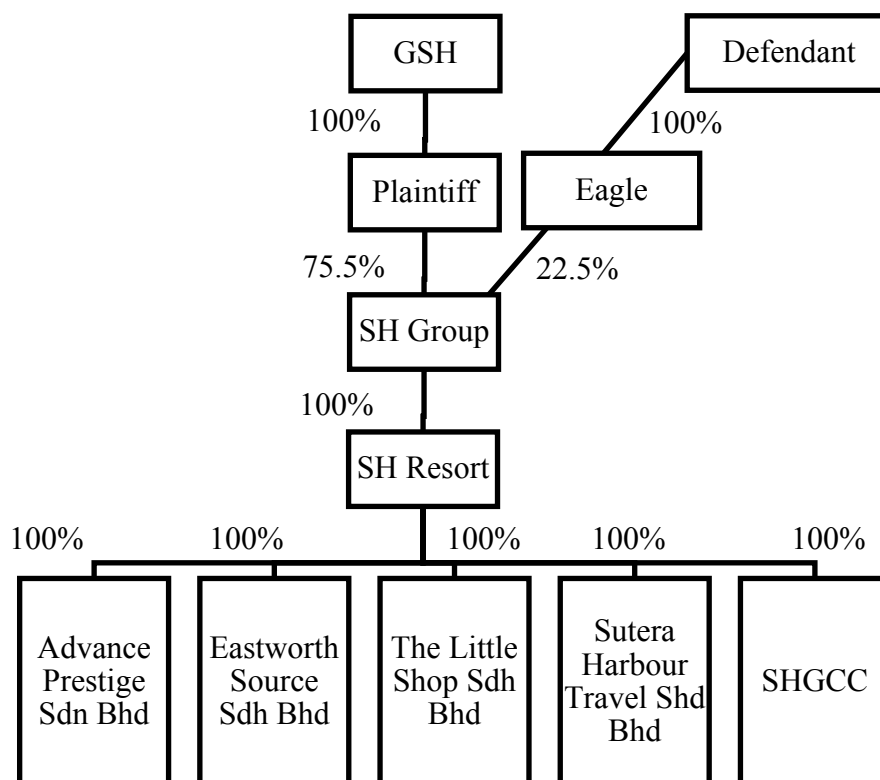
⁶ Ong’s 1st Affidavit at p 48.

⁷ Ong’s 1st Affidavit at para 5.

9 The SH Resort is in turn the parent company of five companies, namely, (i) Advanced Prestige Sdn Bhd; (ii) Eastworth Source Sdn Bhd; (iii) The Little Shop Sdn Bhd; (iv) Sutera Harbour Travel Sdn Bhd; and (v) Sutera Harbour Golf & Country Club (“SHGCC”). The Defendant has been a director of SHGCC since 19 December 1991.⁸ For ease of reference, the court will hereinafter adopt the Plaintiff’s nomenclature and refer to all five companies collectively as “the Sutera Target Group”.

⁸ Ong’s 1st Affidavit at para 5.

10 The corporate structure of the various companies mentioned above, *ex post* the completion of the SA, is best depicted in the chart below:



11 SHGCC owns and has title to a piece of 99 years leasehold state land located at Sembulan District, Kota Kinabalu with an area approximating 95.58 hectares or 238.63 acres (“the Sembulan land”).⁹ In the SA, the Defendant

⁹ Ong’s 1st Affidavit at para 6.

had warranted to the Plaintiff that SHGCC owned the Sembulan land without encumbrances.

12 The Plaintiff alleged that by a sale and purchase agreement signed on 21 March 2014 (“the S&P”) but which was apparently back-dated to 1 March 2014, SHGCC agreed to sell to OBSB a portion of the Sembulan land measuring 1.459 acres (“the Subject land”) for RM1,000 as consideration (“the Transaction”).¹⁰ The S&P was signed by the Defendant on behalf of OBSB.¹¹ According to the 1st affidavit filed by Blasius, OBSB was incorporated in Malaysia on 7 February 2013 and the Defendant became its director on 22 March 2013.¹² There was no resolution passed by SHGCC to approve the S&P or the sale of the Subject land.¹³

13 A power plant known as the co-generation facility (“the Co-Gen facility”) is situated on the Subject land. The Co-Gen facility was developed by Profound Heritage Sdn Bhd (“PHSB”) at a cost of RM155m between 1997 and 1999, with financing from, *inter alia*, Bank Islam (L) Ltd (“the Bank”).¹⁴ PHSB was owned and controlled by the Defendant until it was wound up by an order of court in Malaysia on or around 11 January 2012.¹⁵ The Co-Gen facility was operated by PHSB and supplied/supplies electricity to the SH Resort.¹⁶

¹⁰ Statement of Claim (“SOC”) at para 6; Certified Transcript of HC/RA 110/2017 (“NE”) at p 5; Blasius’s 1st Affidavit at para 11.2.

¹¹ Joyce Blasius’s Affidavit dated 8 March 2017 (“Blasius’s 1st Affidavit”) at para 4.3.

¹² Blasius’s 1st Affidavit at Exhibit JB-1 p 4.

¹³ Blasius’s 1st Affidavit at para 4.5.

¹⁴ Defence and Counterclaim (“D&CC”) at para 10(5).

¹⁵ Ong’s 1st Affidavit at para 6; D&CC at para 10(14).

¹⁶ Ong’s 1st Affidavit at para 6.

14 Since 2002, tenancy agreements had been entered into between SHGCC and PHSB on an annual basis for the rental of the Subject land.¹⁷ On 1 December 2012, the liquidators of PHSB entered into a one year tenancy with SHGCC to rent the Subject land at RM5,558 per month.¹⁸

15 After PHSB was wound up, the Defendant purportedly entered into negotiations with the Bank and reached an agreement to settle the outstanding debt owed by PHSB to the Bank. Under the settlement terms, PHSB would make payment of approximately RM33.6m to the Bank to discharge the charge which the Bank held over PHSB’s plant and machinery and all other securities.¹⁹ The settlement sum of RM33.6m was paid to the Bank on or about 29 March 2013.²⁰

16 On 12 July 2013, OBSB (represented by the Defendant) and the liquidators of PHSB executed an asset sale agreement (“the ASA”) for the sale of PHSB’s plant and machinery to OBSB for RM33.6m. Under cl 2.2.4 of the ASA, the Subject land was expressly excluded from the sale but the Co-Gen facility was included.

17 Prior to completion of the SA on 26 March 2014 (see [7] above), the Defendant issued a disclosure letter dated 18 March 2014 (which was wrongly dated 18 March 2013) to the Plaintiff (“the Disclosure Letter”) where no mention was made of the S&P or the Transaction.²¹ The Plaintiff only found out about the S&P more than a year later, when a tax review was conducted on

¹⁷ D&CC at para 10(11).

¹⁸ Ong’s 1st Affidavit at pp 87–92.

¹⁹ D&CC at para 10(15).

²⁰ D&CC at para 10(16).

²¹ SOC at para 7.

SHGCC's accounts by its auditors.²² The relevant paragraphs from the Disclosure Letter addressed to both the Plaintiff and TYJ Group Pte Ltd read as follows:²³

3 This Disclosure letter forms an integral part of the transactions effected by or under the [SA]. Each item disclosed (or deemed disclosed) in this Disclosure Letter shall be deemed to be a disclosure in respect of all warranties notwithstanding that an item disclosed may be disclosed by reference to a particular paragraph or paragraphs, or clause or clauses in the [SA].

[...]

6 Without limiting the generality of the disclosures referred to above, [the Plaintiff], SHHSB, [SH Resort] and [the Defendant] also wish to make specific disclosures against the Warranties and these are set out in the schedule attached hereto. Each item disclosed shall, however, be deemed to be a disclosure in respect of the Warranties and shall not be limited to the paragraph or clause which is referred to in the schedule.

18 On 29 February 2016, SHGCC commenced the Malaysian Suit against OBSB and the Defendant as the first and second defendants respectively. SHGCC's claims, *inter alia*, were (i) for the Defendant's breach of the fiduciary duties that he owed to SHGCC as its director; (ii) that the S&P is null and void and has no legal effect; (iii) for an order that OBSB remove all its installations and structures on the Subject land; (iv) for damages in the alternative, and (v) double rent from OBSB for occupation of the Subject land.

19 The Defendant alleged that on 24 August 2016, the Plaintiff's Singapore solicitors sent a letter of demand to his Singapore solicitors making the same claims against him as in the Malaysian Suit.²⁴ In response, the Defendant's

²² SOC at para 9.

²³ Alex Ng Soon Heng's Affidavit dated 1 February 2017 ("Ng's 1st Affidavit") at para 23 and p 240–245.

solicitors denied the Plaintiff's allegations, adding that any attempt by the Plaintiff to refer the matter to arbitration would only result in multiplicity of actions and proceedings on substantially the same subject matter and involving the same parties as in the Malaysian Suit.²⁵

20 The Plaintiff commenced arbitration proceedings against the Defendant by a notice of arbitration dated 3 October 2016, to which the Defendant filed a response on 17 October 2016.²⁶ Ng deposed in his affidavit that to avoid paying the high costs involved in the arbitration proceedings, the Defendant proposed to the Plaintiff that the dispute be brought to court instead. The Plaintiff agreed, and the arbitration proceedings were terminated by consent on 30 November 2016. On the same day, the Plaintiff filed this Suit.²⁷

21 On 27 December 2016, the Defendant filed the Stay Application praying, *inter alia*, for the following order:

That all proceedings in this action against the Defendant be stayed pending the final decision of the ongoing [Malaysian Suit] initiated by [SHGCC] against [OBSB] as the 1st Defendant and the Defendant as the 2nd Defendant.

22 In support of the Stay Application, the Defendant filed an affidavit ("the Defendant's 1st affidavit") wherein he exhibited the writ and pleadings that had been filed in the Malaysian Suit.

²⁴ Ong's 1st Affidavit at para 23.

²⁵ Ong's 1st Affidavit at para 24.

²⁶ Ong's 1st Affidavit at para 25.

²⁷ Ng's 1st Affidavit at paras 6–7.

The Malaysian Suit

23 In the statement of claim (“the SHGCC SOC”) in the Malaysian Suit, SHGCC alleged that the Defendant was the *alter ego* as well as the directing mind and will of OBSB. The SHGCC SOC pleaded that PHSB was granted a licence (before its liquidation on 11 January 2012) under the relevant Electricity Act 1990 to generate electricity for sale and distribution.²⁸

24 The SHGCC SOC then referred to the tenancy agreement between SHGCC and PHSB over the Subject land for which PHSB paid monthly rent to SHGCC. The tenancy agreement was terminated on 30 November 2013 and was not extended or renewed. Pursuant to ASA, PHSB sold the plant and machinery located on the Subject land to OBSB. However the Subject land itself was expressly excluded from the sale.²⁹

25 By the S&P (which SHGCC contended was actually signed on 24 March 2014 but backdated to 1 March 2014), the Subject land was purportedly sold by SHGCC to OBSB for a consideration of RM1,000 even though its market value exceeded RM250,000.³⁰ The S&P was signed by two directors of SHGCC, Foo Kia Inn (“Foo”) and Zarazilah bin Mohd Ali, on the instructions and direction of the Defendant.³¹ The Defendant himself signed the S&P on behalf of OBSB as its director together with Wong, another director of OBSB who was concurrently the Chief Financial Officer of SHGCC at the material time.

²⁸ Ong’s 1st Affidavit at p 154.

²⁹ Ong’s 1st Affidavit at pp 154–155.

³⁰ Ong’s 1st Affidavit at p 156.

³¹ Ong’s 1st Affidavit at pp 155–156.

26 SHGCC alleged it only discovered the S&P and the Transaction in August/September 2015 during a tax review exercise carried out by SHGCC's tax consultants.³² On or about 25 September 2015, SHGCC returned to OBSB the sum of RM1,000 paid for the Transaction.³³

27 As the SA was only completed on 26 March 2014, SHGCC alleged that the Defendant took expedited steps to cause the sale and disposal of the Subject land by way of the S&P/the Transaction.³⁴

28 Consequently, SHGCC alleged that the Defendant had breached the fiduciary duties he owed to SHGCC as well as his duties as trustee of the assets of SHGCC. It was alleged that the Defendant owed obligations as a trustee in respect of the assets of the Plaintiff, in particular the Subject land. SHGCC further alleged that in causing SHGCC to enter into the S&P and in permitting OBSB to remain in possession of the Subject land, the Defendant had acted *mala fide* and against the interests of SHGCC.

29 The SHGCC SOC claimed, *inter alia*, against the Defendant and OBSB:³⁵

- (a) a declaration that the S&P purportedly dated 1 March 2014 was null and void and of no legal effect;
- (b) a declaration that SHGCC was entitled absolutely to the Subject land;

³² Ong's 1st Affidavit at p 155.

³³ Ong's 1st Affidavit at p 157.

³⁴ Ong's 1st Affidavit at p 156.

³⁵ Ong's 1st Affidavit at p 160.

- (c) damages including aggravated and exemplary damages.

30 In his Defence and Counterclaim in the Malaysian Suit, the Defendant, inter alia, averred that there was a common expectation or assurance shared between SHGCC and PHSB (and with OBSB after July 2012), ever since the development of the Co-Gen facility on the Subject land, that the Subject land was to be a separate parcel of land from the Sembulan land, and that it would be owned and occupied by the developer of the Co-Gen facility.³⁶

31 The Defendant alleged that in reasonable reliance on the common expectation or assurance, PHSB (and since 2012, OBSB) had planned and carried out various actions which included developing the Subject land to house, and constructing, the Co-Gen facility at a cost of approximately RM155m (“the construction loan”).³⁷

32 The Defendant averred that in order to obtain the construction loan from the Bank, he was required to and did give an undertaking to the Bank that he would execute a charge over the Subject land upon subdivision of the Sembulan land. From 1999 onwards, the Defendant averred that PHSB was able to generate sufficient electricity to supply the SH Resort.³⁸ After PHSB was wound up on 11 January 2012, the Defendant negotiated with the Bank to come to a settlement regarding the construction loan and to buy over the assets of PHSB including the Co-Gen facility.³⁹

³⁶ Ong’s 1st Affidavit at pp 166–167.

³⁷ Ong’s 1st Affidavit at pp 168–169.

³⁸ Ong’s 1st Affidavit at p 169.

³⁹ Ong’s 1st Affidavit at p 170.

33 The Defendant claimed that prior to the execution of the SA, he had informed Goi (who represented the incoming investors including the Plaintiff) on multiple occasions, that the Co-Gen facility and the Subject land upon which it was sited was not part of the deal.⁴⁰ This was denied by Goi in his affidavit.⁴¹ The Defendant also alleged that the investors' representatives had also conducted a due diligence exercise between October and December 2013.⁴²

34 The Defendant contended that OBSB and PHSB would suffer a detriment should SHGCC renege upon or dishonour the common expectation or assurance relied upon by the companies, as they would have developed the Subject land thereby incurring the requisite expenditure, expertise, and time over the years without the benefit of a registered leasehold ownership over the Subject land.⁴³ He averred that it was unconscionable for SHGCC to resile from or dishonour the common expectation or assurance.

35 Thus, in the Malaysian Suit, the Defendant counterclaimed against SHGCC, *inter alia*, for:⁴⁴

- (a) a declaration that SHGCC was estopped from denying OBSB's proprietary interest in the Subject land;
- (b) an order that SHGCC be directed to transfer the whole interest in the Subject land to OBSB and deliver up the issued document of title

⁴⁰ Ong's 1st Affidavit at p 173.

⁴¹ Goh Seng Hui's Affidavit dated 14 February 2017.

⁴² Ong's 1st Affidavit at p 175.

⁴³ Ong's 1st Affidavit at pp 172–173.

⁴⁴ Ong's 1st Affidavit at p 177.

with OBSB as the registered leaseholder of all the interest in the Subject land free from encumbrances.

This Suit

36 The basis of the Plaintiff's statement of claim was the SA. The Plaintiff alleged, *inter alia*, that in view of the Defendant's interests in both SHGCC and OBSB, and the fact that the consideration of RM1,000 paid by OBSB to SHGCC in the Transaction was significantly less than the market value of the Subject land, the sale was transacted at a gross undervalue and the Transaction had clearly not been contracted on an arm's length basis.⁴⁵ Consequently, the Defendant breached some of the warranties that he had given to the Plaintiff in the SA, including cll 11.1 and 18.2 of Schedule 2 of the SA and cl 4 of the SA.⁴⁶

37 Clause 11.1 of Schedule 2 states:⁴⁷

Contracts between the Companies and Vendors

Save as disclosed in the Disclosure Letter, there are no existing contracts, arrangements, understandings or engagements to which any of the companies in the Sutera Target Group or [SH Group] are a party and in which SHHSB, [SH Group] or [the Defendant] and/or any person connected to any of them is directly or indirectly interested.

38 Clause 18.2 of Schedule 2 states:⁴⁸

The relevant companies within the Sutera Target Group (as identified in Schedule 4) (the "Relevant Land Owners") has good

⁴⁵ SOC at para 13.

⁴⁶ SOC at para 13.

⁴⁷ Ong's 1st Affidavit at p 62.

⁴⁸ Ong's 1st Affidavit at p 70.

marketable title to the Land and is the beneficial and legal owner in sole possession of the Land from all encumbrances.

39 The relevant portion of Schedule 4 states:⁴⁹

... [SHGCC] is the sole legal and beneficial owner of the parcel of land under 99 years lease of state land situated at Sembulan, District of Kota Kinabalu, Sabah held under Title No. 017544875 (expiring on 31 December 2091) with a total area measuring approximately 95.58 hectares (238.63 acres).

40 By reason of the Defendant's breach of the above and other warranties in the SA, the Plaintiff alleged that the Defendant had also breached cl 6.1 of the SA which reads as follows:⁵⁰

[The SH Group], SHHSB, [SH Resort] and [the Defendant] hereby jointly and severally represent and warrant with [the Plaintiff] in terms of the representations and warranties more particularly set out in Clauses 6.4 and in Schedule 2 hereto (such representations and warranties collectively referred to as "Warranties"), which representations and warranties shall form part of this Agreement and [SH Group], SHHSB, [SH Resort] and [the Defendant] each further represents and warrants that the Warranties shall be fulfilled, true and accurate at the date of this Agreement, and shall continue to be fulfilled, true and accurate at each of the Completion of the [SH Resort] Acquisition, Proposed Capitalisations and Proposed JVA Loan (as the case may be) in all respects as if they had been given afresh on such date.

41 Further, under cl 8.1 of the SA, the Defendant was liable to indemnify the Plaintiff for any losses suffered as a result of the Defendant's breaches of the warranties in the SA.⁵¹ The relevant sections of cl 8.1 states:⁵²

[The SH Group], [SHHSB], [SH Resort] and [the Defendant] hereby jointly and severally and irrevocably covenant to keep

⁴⁹ Ong's 1st Affidavit at p 75.

⁵⁰ Ong's 1st Affidavit at pp 33–34.

⁵¹ SOC at para 16.

⁵² Ong's 1st Affidavit at pp 38–39.

the [Plaintiff] fully and effectively indemnified against all actions, claims, costs, damages, deficiencies, demands, expenses, liabilities and losses (including all legal costs incurred on a full indemnity basis) that may be suffered incurred or sustained by the [Plaintiff] in consequence of or in connection with:

(a) any breach or inaccuracies of any of the Warranties;

(b) [...]

(c) without prejudice to the generality of the foregoing, against any depletion of the assets of the [SH Group] and/or any entity of the Sutera Target Group resulting from any claim or demand made against [SH Group] and/or any entity of the Sutera Target Group in respect of any liability (including contingent liability) for which no provision has been made in the accounts of [SH Group] and/or any entity of the Sutera Target Group (as the case may be) or which has not been disclosed in writing to [the Plaintiff] as at the date of this Agreement; and/or

(d) [...]

[...]

42 The Plaintiff alleged that despite the expiry of the tenancy agreement between PHSB and SHGCC, OBSB continues to occupy the Subject land and did not remove the structures and installations erected thereon. Despite demands made to OBSB to enter into a fresh tenancy agreement or to vacate the Subject land, OBSB did neither. Neither had OBSB paid the monthly rent of RM5,558 for October and November 2013. OBSB was therefore liable to SHGCC for unpaid rent and double rent for holding over the Subject land.⁵³

43 To date, the Transaction has not been completed because the Subject land has not been subdivided and legal title remains with SHGCC.⁵⁴

⁵³ SOC at para 22.

⁵⁴ Ong's 1st Affidavit at para 28.

44 In the present Suit, the Plaintiff claimed against the Defendant:

- (a) a mandatory injunction that the Defendant restrain OBSB from completing the Transaction and/or from enforcing the S&P;
- (b) a mandatory injunction that the Defendant procure OBSB to discharge/terminate the S&P forthwith;
- (c) an order that the Defendant indemnifies the Plaintiff for all losses suffered by the Plaintiff as a result of the Defendant's breaches of the warranties; and
- (d) further or in the alternative, damages.

The hearing before the AR

45 In granting the limited Stay Application, the AR indicated he wanted to avoid a potential "conflicting judgment" between this Suit and the Malaysian Suit. The AR was of the view that a limited stay of this Suit until the Malaysian Suit was tried was advisable for case management and other reasons.

46 Before the AR, counsel for the Defendant argued that there was an overlap of at least one issue between the Malaysian Suit and this Suit, namely, whether SHGCC beneficially owns the Subject land.⁵⁵ Counsel for the Plaintiff, on the other hand, submitted that facts relating to that issue were "historical facts" which were irrelevant to the Singapore proceedings. She argued that SHGCC had conceded that the beneficial ownership had been transferred to OBSB and the Defendant. The relief sought in the Malaysian Suit was for the S&P to be declared null and void from the date of the judgment and not void *ab*

⁵⁵ Certified Transcripts of HC/SUM 6145/2016 at p 2.

initio.⁵⁶ The mere fact of the sale of the Subject land was sufficient to constitute a breach of the SA in this Suit because of the warranties that had been provided by the Defendant.⁵⁷

47 The AR disagreed with the Plaintiff’s interpretation. Taking a holistic view of the statement of claim in the Malaysian Suit, the AR opined that it was open to SHGCC to argue that the beneficial ownership of the Subject land had never been transferred to OBSB and the Defendant.⁵⁸ He noted that, in any event, the Plaintiff had conceded that even if it had no effect on liability, the Malaysian Suit would have an effect on the quantum of damages to be awarded in this Suit.⁵⁹

48 The AR noted that there was no application for the bifurcation of liability and damages in this Suit. That meant that our courts would have to determine all relevant issues at trial and that all pre-trial processes, including discovery and the filing of affidavits, would have to cater to the determination of damages. He felt that it would be “problematic” if the result of the Malaysian Suit was not first known.⁶⁰

49 Consequently, the AR felt that in order to (i) avoid multiplicity of proceedings, and (ii) ensure that work done on discovery and other preparations leading up to this Suit may not be wasted, he would and did grant a limited stay of this Suit as the Malaysian Suit was then slightly two months away. A wait of

⁵⁶ Certified Transcripts of HC/SUM 6145/2016 at p 2.

⁵⁷ Certified Transcripts of HC/SUM 6145/2016 at pp 2–3.

⁵⁸ Certified Transcripts of HC/SUM 6145/2016 at p 3.

⁵⁹ Certified Transcripts of HC/SUM 6145/2016 at p 3.

⁶⁰ Certified Transcripts of HC/SUM 6145/2016 at p 3.

two months was, to him, worthwhile in order to help avoid conflicting judgments.⁶¹

The Appeal

50 In allowing the Appeal, this court made the following orders:⁶²

- (a) the AR's order below was varied in that the stay would only be until Friday, 30 June 2017. The Defendant was to file his defence and counterclaim (if any) by Monday, 3 July 2017; and
- (b) the Plaintiff's claim would be bifurcated with the first stage limited to liability.

The arguments

51 Before me, Ms Teh submitted that the differences between the Malaysian Suit and this Suit were such that there would be no multiplicity or overlap of proceedings, or any risk of conflicting judgments.⁶³ Consequently, even a limited or temporary stay was not warranted.

52 In this regard, Ms Teh relied on Ng's affidavit which had set out the differences between the two suits. Further, Ms Teh drew the court's attention to the following (non-exhaustive) differences between the two suits:

- (a) Save for the Defendant, the parties in the two suits were different.

⁶¹ Certified Transcripts of HC/SUM 6145/2016 at p 3.

⁶² NE at p 10.

⁶³ NE at p 4; Plaintiff's Rebuttal Submissions at p 4.

(b) SHGCC in the Malaysian Suit was suing the Defendant as its director for breach of his fiduciary duties in procuring SHGCC to enter into the S&P backdated to 1 March 2014. In this Suit, the Plaintiff was suing the Defendant as a contracting party to the SA dated 30 December 2013.

(c) The issues in the two suits were different. The dispute on ownership of the Subject land was central to the Malaysian Suit, whereas in this Suit, the Plaintiff's claim was based on the Defendant's breaches of various warranties under the SA.

(d) The Plaintiff's cause of action in this Suit based on breaches of warranty was not dependent on the findings of any disputed facts in the Malaysian Suit. The mere existence of the S&P was clear breach of the warranty in cl 11.1 of Schedule 2 (set out at [37] above) as it was not mentioned in the Disclosure Letter. The Defendant was also in breach of Schedule 4 (see [39] above), and was liable to indemnify the Plaintiff for the losses that it had suffered in his disposal of the Subject land, pursuant to cl 8.1(a) of the SA (see [41] above).

53 The Defendant's 1st affidavit, on the other hand, deposed to similarities in the two suits. He pointed out that while the Malaysian Suit focused on the breach of directors' duties with regards to the S&P and this Suit focused on the breach of warranties under the SA, both causes of action ultimately related to the same underlying matter, namely, the rightful ownership and possession of the Subject land.⁶⁴

⁶⁴ NE at p 6; Defendant's Submissions at p 24.

54 The Defendant argued that if the two suits proceeded concurrently, they may result in conflicting reliefs.⁶⁵ Although the reliefs sought in the two suits were not entirely the same, they were substantially interconnected and would have had an effect on one another. If the Malaysian court granted the declaratory relief sought by SHGCC and ruled that the S&P is null and void and hence SHGCC is absolutely entitled to the Subject land, the mandatory injunction sought in this Suit (see [44] above) would become redundant. Similarly, if the mandatory injunction sought by the Plaintiff in this Suit is granted by our courts, the Defendant's defence in the Malaysian Suit would also be substantially compromised. Likewise, if the reliefs sought by him and OBSB in their counterclaim in the Malaysian Suit are granted, the Defendant deposed that the declaratory reliefs sought by the Plaintiff in this Suit would have been substantially affected or rendered otiose.

The decision

55 Both sides cited a recent case from the Singapore International Commercial Courts ("SICC") in support of their opposite positions. In *BNP Paribas Wealth Management v Jacob Agam and another* [2017] 3 SLR 27 ("*Jacob Agam*"), the Singapore branch of the plaintiff bank sued the defendants in Singapore in November 2015 for approximately €30m on two personal guarantees which the defendants had provided for facilities totalling €61.7m under various facility agreements extended by the plaintiff to the Agam group of companies. The bank's branch in France had in January 2016 brought foreclosure proceedings against two of the Agam group of companies, namely, SCI Ruth Agam ("*Ruth Agam*") and Det Internationale Ejendoms-OG Udviklingsselskab ApS ("*Det Internationale*"). The defendants responded by

⁶⁵ NE at p 7.

bringing a counter-action in the Paris court, *Tribune de Grande Instance of Paris*, seeking a declaration that the facility agreements and the personal guarantees were invalid and “non-existent” under French law.

56 In *Jacob Agam*, the defendants applied for a limited or temporary stay of the Singapore proceedings pending the disposal of the foreclosure proceedings in France and their counter-action. The defendants’ application was dismissed. In arriving at its decision, the SICC laid down, *inter alia*, the following guidelines for a limited stay of proceedings:

(a) The grant of a limited or temporary stay of proceedings is a discretionary exercise of the court’s management powers. This discretion is triggered when there is a multiplicity of proceedings. In exercising these powers, the court is entitled to consider all the circumstances of the case. The underlying concern is the need to ensure the efficient and fair resolution of the dispute as a whole. Also, a consideration of private international law factors such as the principles of *forum non conveniens* and international comity is germane, although the former doctrine does not strictly need to be applied due to the temporary nature of the stay which preserves the plaintiff’s right to prosecute his claim in Singapore (*Jacob Agam* at [35]–[36]).

(b) The risk of conflicting judgments is not by itself a sufficient reason for the grant of a limited stay of proceedings and the court, in exercising its discretion, need to consider all the circumstances of the case (*Jacob Agam* at [46]).

57 Besides *Jacob Agam*, there are a number of local decisions that dealt with the issue of a limited or temporary stay of proceedings. The more recent

cases include the Court of Appeal's decisions in *Chan Chin Cheung v Chan Fatt Cheung and others* [2010] 1 SLR 1192 and *Virsagi Management (S) Pte Ltd v Welltech Construction Pte Ltd and another appeal* [2013] 4 SLR 1097 ("*Virsagi Management*"), as well as the High Court decision in *Ram Parshotam Mittal v Portcullis Trustnet (Singapore) Pte Ltd and others* [2014] 3 SLR 1337.

58 The relevant considerations gleaned in all the above cases were (i) the need for proper case management, (ii) the avoidance of multiplicity of proceedings in different jurisdictions, and (iii) whether there would be conflicting judgments on the same issues being litigated in different jurisdictions.

(i) The need for proper case management

59 Was there a need for proper case management here? The answer was in the affirmative and was reflected in the orders made by this court. Whatever the outcome of the Malaysian Suit, it would be known by the time this Suit came on for trial before our courts. There should therefore be no wastage of time in terms of case management, since our courts, based on the comity of nations, would take cognisance of the Malaysian court's findings on any issue that would be relevant to this Suit.

(ii) Multiplicity of proceedings

60 In the light of the differences between the identities of the plaintiffs, the causes of action, and the issues in the two suits as highlighted by the Plaintiff (see [52] above), it seemed to this court that there would be little danger of a multiplicity of proceedings arising. The differences in the two suits, contrary to

the assertions made in the Defendant’s 2nd affidavit, were not “artificial and technical distinctions”.⁶⁶ I should point out that in *Virsagi Management*, the Court of Appeal in dismissing the defendant’s appeal against the High Court’s refusal to grant a stay held that there was insufficient similarity between the Singapore and the Bangladesh proceedings even though the reliefs sought were similar. *A fortiori*, in our case there was even less similarity in the suits given that there were no similarities in the causes of action pleaded in the Malaysian Suit and this Suit, and the main reliefs sought were different.

(iii) Is there a risk of conflicting judgments?

61 The next issue was whether there was a risk of conflicting judgments if the Stay Application was not granted. In my view, the answer was in the negative. Should SHGCC succeed in the Malaysian Suit and be granted the declaratory reliefs that it had sought (and damages, if allowed), the Plaintiff here would be able to rely on the Malaysian judgment as proof of the Defendant’s breach of the various warranties in the SA. However, if SHGCC’s claim in the Malaysian Suit was dismissed but the Defendant succeeded in his counterclaim, the Plaintiff would not be precluded from proving its claim in this Suit by use of other evidence. Such other evidence may include the Defendant’s failure to make mention of the S&P in the Disclosure Letter (see [17] above).

62 If the Plaintiff succeeds in this Suit on liability, the Defendant would be liable for damages for his breach of the warranties in the SA. Assessment would be done at a later stage as this court had bifurcated the trial to determine liability first.⁶⁷ Should the Plaintiff fail in this Suit, however, it would have no effect on

⁶⁶ Ong Han Nam’s Affidavit dated 22 February 2017 at paras 10–11.

⁶⁷ NE at p 10.

the outcome of the Malaysian Suit, regardless of who succeeded there, as that decision would have already been rendered.

63 In any event, even if there was a risk of conflicting judgments, that was, contrary to what the AR appeared to have thought, not in itself a sufficient reason to grant a limited stay of proceedings (see *Jacob Agam* at [46]).

64 Consequently, this court adopted a practical and commonsensical approach by making the orders that it did (see [50] above).

Conclusion

65 For the foregoing reasons, this court allowed the Appeal.

66 On that premise, orders for costs below were reversed to be costs in the cause and not in favour of the Defendant. Costs of the appeal were fixed at S\$10,000 also to be in the cause.

Lai Siu Chiu
Senior Judge

Teh Guek Ngor Engeline, Yeo Yian Hui Mark and Huen Huimin
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