HCA 815/2004

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

ACTION NO. 815 OF 2004

BETWEEN

ANDREW CHEN AUN – LI	Plaintiff
And	
WAH NAM INFRASTRUCTURE INVESTMENT LIMITED (IN VOLUNTARY LIQUIDATION)	Defendant

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Coram : Master J. Wong in Chambers

Dates of Hearing : 18 and 25 November 2004 and 2 December 2004

Date of Handing Down Decision : 2 March 2005

D E C I S I O N

Application

1. There are two applications before me:

   (a) The Plaintiff's summons ("the Summary Judgment Application") dated 5 May 2004 seeking summary judgment

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against the Defendant upon Order 14 rule 1 of the Rules of the High Court ("RHC") and

(b) The Defendant's amended summons ("the Stay Application") dated 19 November 2004 asking for a stay of the proceedings herein under the Inherent Jurisdiction of this Court on the ground that the British Virgin Islands ("BVI") is a clearly or distinctly more appropriate forum than Hong Kong, or alternatively, that this action was commenced in breach of an exclusive jurisdiction agreement between the Plaintiff and the Defendant entered into on or about 15 January 2004.

Background

2. The Defendant was incorporated in BVI on 27 July 1994. It was registered in Hong Kong as an overseas company under Part XI of the Companies Ordinance (Cap. 32) on 21 April 1998. On 25 September 2002, the Defendant went in voluntary liquidation in BVI. Since 30 September 2002, Mr. Roderick John Sutton ("Mr. Sutton") has become the sole liquidator of the Defendant.

3. In the administration of the estate of the Defendant, Mr. Sutton has found that it is solvent. So far, about HK$1.4 million claims have been admitted and paid in full. However, Mr. Sutton refused to accept a proof of debt ("the Proof of Debt") lodged by the Defendant in or about October 2002 for a sum of HK$1,204,000.00 as per a dishonoured cheque issued to the Defendant by the Plaintiff. The sum was represented by:

" Date	Description		Amount
14-Apr-2000	Paid to Siao, Wen & Leung on behalf of WNII [the Defendant]	$	85,390.10
14-Apr-2000	Advance to WNII	$	2,652.40
14-Apr-2000	Deposit to WNII's bank account	$	1,957.50
15-Apr-2000	Deposit to WNII's bank account	$	660,000.00
17-Apr-2000	Deposit to WNII's bank account	$	10,000.00
2-Jun-2000	Deposit to WNII's bank account	$	100,000.00
15-Jun-2000	Deposit to WNII's bank account	$	300,000.00
22-Jun-2000	Deposit to WNII's bank account	$	30,000.00
24-Jul-2000	Deposit to WNII's bank account	$	14,000.00
	TOTAL	$	1,204,000.00

(enclosure to the said Proof of Debt)"

4. By a Notice of Adjudication of Proof of Debt ("Notice of Rejection") dated 20 May 2003, Mr. Sutton rejected the Defendant's claim in full. It was said that:

> "1. The amount claimed by you relates to a loan which you allege was advanced by you to the Company between the period of 14 April 2000 to 24 July 2000. In my letters to you dated 11 October 2002, 23 October 2002, 5 November 2002 and 3 December 2002, I requested that you provide to me bank statements, cheque butts or withdrawal slips to evidence that these funds were drawn on your own account. Despite my reasonable request, you have so far failed to provide this information in support of your claim.
>
> 2. In my letter to you dated 3 December 2002, I required you to submit your proof of debt to me in the form of an Affirmation or Affidavit. You have so far failed to provide to me your proof of debt in this form despite my reasonable request.
>
> 3. In relation to the specific amounts claimed, you have provided to me a receipt in support of a payment to Siao, Wen & Leung on 14 April 2000 in the amount of HK$85,390.10. According to the receipt, these funds were received by Siao, Wen & Leung from Wah Nam Group

> Limited. In the circumstances, there is no evidence to confirm that this is a debt owing to you and the amount is hereby rejected.
>
> 4. In relation to the amount of HK$2,652.40 allegedly paid by you to the Company on 14 April 2000, I can find no evidence that this money was banked to the Company's account or paid to any third party on the account of the Company by you. Accordingly, I have no alternative but to reject this amount.
>
> In my view of the fact that you have failed to provide the necessary supporting evidence and to submit your claim in the form requested, I hereby reject your claim in full."

5. On 19 August 2003, the Plaintiff commenced proceedings HCMP No. 3677/2003 in Hong Kong to apply to reverse the said decision of Mr. Sutton as per the Notice of Rejection.

6. On 3 October 2003, the Defendant issued a summons ("the Dismissal Summons") under Order 12 rule 8 RHC and Inherent Jurisdiction of this Court to apply for, inter alia, dismissal of the action therein on the ground that the Hong Kong Court has no jurisdiction over the matter as the voluntary liquidation of the Defendant, being a BVI company, was commenced in accordance with the laws of BVI.

The Stay Agreement

7. On 15 January 2004, the Dismissal Summons were heard. During an adjournment of the hearing, the parties came to an agreement to stay ("the Stay Agreement") in HCMP No. 3677/2003. The Stay Agreement was drafted by the solicitors of the Defendant. It stated that:

> "1. The proceedings in HCMP 3677/2003 will be stayed forthwith up to and including 30th March 2004.

2. The Respondent's summons dated 3rd October 2003, the Applicant's summons dated 7th January 2004 and the Respondent's summons dated 13th January 2004 be adjourned sine die with liberty to restore upon the lifting of the stay.

3. The costs of the above summonses are to be reserved.

4. The parties will use their best endeavors to negotiate a settlement of the outstanding disputes before 30th March 2003.

5. In the event that no settlement can be reached then the Applicant may, within 14 days from 30th March 2004, seek to pursue its claim either by the issue of a writ against WNII or by the filing of proceedings in BVI. However, this does not imply any acceptance on the part of the liquidator that the Hong Kong Court has jurisdiction to deal with matter arising in the winding up of WNII and is without prejudice to the Respondent's summons dated 3rd October 2003.

6. In the event that the Applicant serves a writ or witnesses proceedings in BVI by 14th April 2004 then the stay of proceedings in HCMP 3677/2003 will remain in force pending the determination of the writ on the BVI proceedings.

7. Following final determination of the writ or the BVI proceedings (including any appeal) the proceedings in HCMP 3677/03 will be discontinued in term as to costs either as agreed in or ordered by the court.

8. Should the Applicant fail to issue a writ or proceedings in BVI by 14th April 2004 then the Respondent may apply to life the stay of proceedings in HCMP 3677/2003."

8. Regrettably, the parties failed to reach any settlement and on 7 April 2004, the Plaintiff commenced the present proceedings against the Defendant. The Plaintiff took out the Summary Judgment Application on 5 May 2004. On 19 May 2004, the Defendant issued a summons for stay which was later amended and filed on 19 November 2004, now described by me as the Stay Application.

9. The substantive argument of the 2 applications came before me on 18 November 2004. Mr. Richard Khaw of Counsel, being instructed by Messrs. Allen & Overy, appeared for the Plaintiff. The Defendant was represented by Mr. Nicholas Cooney upon instructions from Messrs. Alvan Liu & Partners.

Preliminary Matters

10. On 18 November 2004, upon hearing from the parties, I allowed/ordered, inter alia, that

(a) leave be given to the Defendant to amend its summons for stay to add a further ground, namely, the present action was commenced in breach of an exclusive jurisdiction of the Stay Agreement;

(b) the 5th Affirmation of Andrew Chen Aun-Li stood good notwithstanding that it was filed out of time; and

(c) the 3rd Affidavit of Roderick John Sutton be admitted as evidence of the hearing on a de bene esse basis.

11. Now that, after thoughts, I agree to grant leave to the Defendant to rely on the 3rd Affidavit of Roderick John Sutton for the 2 applications before me because:

(a) it appears that the Plaintiff does not suffer from any prejudice of the filing of such evidence, especially when the hearing has

been adjourned part-heard to 25 November and 2 December 2004, and

(b) it is only a hearing before the Master and the parties could take up the matter on appeal before a Judge who will hear the application(s) by way of rehearing. Usually, parties will not be prevented from adducing further affidavit evidence.

12. On the adjourned hearings of 25 November and 2 December 2004, Mr. Adrian Bell of Counsel took up the job of Mr. Cooney for the Defendant.

Ruling

13. Upon careful consideration of the evidence authorities and submissions from the parties, I have come to the conclusion that both the Stay Application and the Summary Judgment Application are to be refused. My reasons appear as follows.

Forum Conveniens

14. The Stay Application is premised on 2 grounds, viz, (a) the BVI is the *form conveniens* and (b) there is an exclusive jurisdiction clause in the Stay Agreement that the dispute shall be resolved in Hong Kong. I heard no submission from Mr. Khaw to pursue the argument on *forum conveniens*. Indeed, Mr. Cooney complained that the exclusive jurisdiction on clause was a recent invention which was inconsistent with the argument of *forum conveniens* because the latter acknowledged that there were alternative forums.

15. It suffices for me to say that *forum conveniens* is a matter to be considered by the court in exercising its discretion in the circumstances of each particular case. The Defendant has not satisfied me the three-stage process described in *The Lanka Muditha* [1991] 1 H.K.L.R. 741 at 744:

> "(I) Is it shown that Hong Kong is not only not the natural and appropriate forum for the trial, but that there is another available forum which is clearly or distinctly more appropriate than Hong Kong …
>
> (II) If the answer to (I) is yes, will a trial at the other forum deprive the plaintiff of any legitimate personal or juridical advantages. The evidential burden here lies on the plaintiff.
>
> (III) If the answer to (II) is yes, a court has to balance the advantages of (I) against the disadvantages of (II) … Deprivation of one or more personal or juridical advantages will not necessarily be fatal to the applicant provided that the court is satisfied that notwithstanding such loss substantial justice will be done in the available appropriate forum … Proof of this … rests upon the applicant for the stay."

Principles of construction

16. It is a pity that this Court is asked to interpret the Stay Agreement, a document reached by the parties with assistance from legal advisers. Mr. Khaw tried his best to persuade me to accept that there was an exclusive jurisdiction clause. Mr. Cooney strong denied that. To start with, I set out the legal position as follows:

(a) To construe the Stay Agreement, the factual matrix or surrounding circumstances in which the agreement is admissible and relevant. It allows the Court to understand how the Stay Agreement should be read with all the background knowledge that would reasonably have been available to the

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parties in the situation in which they were at the time of the agreement. Hence, the voluntary liquidation of the Defendant, the submission of Proof of Debt by the Plaintiff, the Notice of Rejection, the commencement of HCMP No. 3677/2003 and the Dismissal Summons are to be borne in mind. However, the 4th Affirmation of the Plaintiff went too far because it contained the negotiations, the subjective intention of the parties and correspondence marked "without prejudice" (*Yu Man Lap v Good First Investment Ltd* [1999] 1 HKC 622 and *Rush & Tompkins Ltd v Greater London Council and Another* [1989] 1 AC 1280).

(b) The Stay Agreement was drafted by the Defendant's solicitor, any ambiguity is to be construed against the Defendant as per the contra proferentum rule.

(c) Paragraph 11/1/12 of the Hong Kong Civil Procedure 2004 ("HKCP") succinctly summarize a number of important principles:

"**Jurisdiction clauses**

Special consideration also apply where the parties have agreed that a particular court shall have exclusive jurisdiction over the dispute. In such an event the court will ordinarily enforce the agreement, if asked, ……

Although the court has a discretion whether to grant a stay of proceedings brought in breach of an agreement to refer disputes to a foreign court, the discretion should be exercised by granting a stay unless strong cause for not doing so is shown: *The Pioneer Container* [1994] 2 A.C. 324 at 347F. In deciding whether a jurisdiction clause is "exclusive" or "non-exclusive" the test is whether the agreement obliged the plaintiff to litigate in the relevant jurisdiction: *T & K Electronics Ltd v. Tai Ping Insurance*

Co. Ltd [1998] 1 H.K.L.R.D. 172, following *Sohio Supply Co. v. Gatoil (USA) Inc.* [1989] 1 Lloyd's Rep. 331. The defendant has the burden of proving that the parties intended not only to confer jurisdiction on the foreign court but to exclude all other jurisdictions for the resolution of disputes: *Yu Lap Man v. Good First Investment Ltd* [1989] 1 H.K.C. 622, CA ……"

(d) Exclusive Jurisdiction Clause is an important, but not conclusive, factor to consider. It remains a matter within the discretion of the Court to decide whether the proceedings ought to be stayed having regard to all the circumstances of the case.

Exclusive Jurisdiction Clause?

17. Bearing the above principles in mind, I do not find any exclusive jurisdiction clause in the Stay Agreement.

(a) The Stay Agreement is plain and obvious. The parties wished to have some time to try settlement, failing which the Plaintiff might pursue his claim by 2 methods

(1) the issue of a Writ, or

(2) the filing or commencement of proceedings in BVI.

(b) References to the 2 methods can be located in clauses 5, 6 and 8 of the Stay Agreement.

(c) There is no evidence or submission before me that the legal proceedings in Hong Kong and BVI are different. I take it that proceedings in BVI can be commenced by writ, petition, originating summons, etc. Hence, the 2 methods are in

contradiction to each other. It cannot be right for both "writ" and "proceedings" are qualified by "BVI".

(d) The following observations by Mr. Cooney in his skeleton submissions are agreeable by me:

> "11. Moreover, the words are not assertive and do not connote an obligation to litigate in the BVI and only in the BVI. Clause 5 uses the word "may".
>
> 12. It is illogical for the parties to have agreed that BVI would have exclusive jurisdiction and yet maintain the proceedings in Hong Kong in HCMP 3677/03 with liberty to restore upon the lifting of the stay and with liberty to D to apply to lift the stay. See: clauses 2 and 8.
>
> 13. It is noteworthy that D only reserved its right to challenge the jurisdiction of Hong Kong courts in respect of HCMP 3677/03, the appeal against the Liquidators' decision in respect of the matter of the winding up. There was no attempt to reserve such a right in respect of other claims outside of the winding up. [Clause 5]
>
> 14. There was no attempt to indicate that the institution of proceedings in some other jurisdiction was not permitted."

Discretion

18. I now turn to the Court's discretion. The *'El Amria'* [1981] 2 Lloyds Rep 119 at page 123 and 124 states the principles in this way.

> "(1) Where plaintiffs sue in English in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.
>
> (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.
>
> (3) The burden of proving such strong cause is on the plaintiffs.
>
> (4) In exercising its discretion the Court should take into account all the circumstances of the particular case.

> (5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded:
>
> (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and Foreign Courts.
>
> (b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects.
>
> (c) With what country either party is connected, and how closely.
>
> (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.
>
> (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial."

19. Applying the principles to the present dispute, the Plaintiff has satisfied his burden of proving strong cause for not granting a stay. The following factors are noted.

(a) The claim herein is based on the dishonoured cheque. The Plaintiff is not challenging the Notice of Rejection issued by the Plaintiff in a voluntary winding up governed by BVI law. The cheque was issued, presented and dishonoured in Hong Kong. The evidence of the dispute is situated or more readily available in Hong Kong.

(b) Hong Kong law, procedural and substantive, is to be applied in the proceedings.

(c) Both parties are connected with Hong Kong. The Plaintiff was and is a Hong Kong resident. Save that the incorporation was done in the BVI, the Defendant carried on its business and maintained the subject bank account in Hong Kong.

(d) There is no doubt that the Plaintiff wants to resolve the parties' disputes in Hong Kong while the Defendant prefers BVI. Unfortunately, I do not consider that I could come to any conclusion as to whether the Defendant is only seeking procedural advantages upon the evidence before me. Such factor remains neutral.

(e) The Plaintiff would be prejudiced by having to sue in BVI Court because he (i) elected to submit the Proof of Debt with the Defendant who rejected the same, and (ii) the appeal to the Notice of Rejection had expired in BVI.

Summary Judgment Application

20. By now, they should not be any dispute for the applicable law in relation to application for summary judgment. The underlying policy of summary procedure is to prevent the defendant from delaying the plaintiff from obtaining judgment in a case in which the defendant clearly has no defence. Factually, is what the defendant says believable in light of undisputed or indisputable circumstances? The Court is entitled to have regard to the commercial reality as well as to the contemporaneous documents. However, mini-trial on affidavit evidence shall not be embarked. Bare assertion is insufficient and the defendant must condescend upon particulars. Legally, if what the defendant says is believable, does it

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amount to an arguable defence in law? After all, the burden lies on the defendant to show triable issue or some other reason to be a trial.

21. In an action on dishonoured cheque, one should be reminded that bills of exchange are treated as cash except in exceptional circumstances. The usual defences available to such an action are fraud, illegality, lack of consideration and misrepresentation. Useful guidelines can be located under paragraph 14/4/19 HKCP at page 170-171.

22. The Defendant is to be granted with unconditional leave to defend because:

(a) There are triable issues to be ventilated at the trial of the proceedings:

(i) <u>Total failure of consideration</u>

Upon investigation by Mr. Sutton, it has been revealed that the underlying transactions of the cheque are far from straightforward. In short, it started with personal loans from the Plaintiff to a director of the Defendant Mr. Chan Pak To William ("Mr. Chan") in about 1999 and 2000 in the sum of HK$1,204,000.00. In April 2000, the parent company of the Defendant ("WNG") was in financial difficulty and facing a winding-up petition. The Plaintiff demanded repayment from Mr. Chan who agreed but asked the Plaintiff to further make it a loan to WNG. The Plaintiff denied at first but eventually agreed to lend the repaid money to the Defendant. However, it is now revealed that Mr. Chan was no longer a director of

WNG or the Defendant when the subject transaction was done between April and July 2000. No board resolution from the Defendant approving the loan is located. The subject cheque may not have the necessary consideration to support it.

(ii) Illegality

Investigation of Mr. Sutton further make known that at the material time a Mareva Injector was granted against WNG and its subsidiaries including the Defendant from dissipation of assets. In HCA 12439/1999, in her ruling on 17 December 1999, the Hon. Beeson J commented that

> "...... I am also satisfied that in this case there has been shown a real risk that the defendant company's [WNG's] assets have been dealt with in the past in such a way as to make the court believe that they are likely to be dissipated in future.
>
> The defendant appears to be at the mercy of Mr William CHAN who as controlling shareholder, albeit on a 16 per cent holding, has been treating the defendants' assets and management as being within his exclusive control and that no effective control has been exerted on him by the board of the defendants.
>
> There is evidence which relates to the sale of the defendant company's toll bridge, which suggests that there is a real risk that if the Mareva injunction is not granted at this stage that the defendants' assets will be further dissipated under the direction of William CHAN so as to avoid the effect of any future judgments.
>
> There is also the likelihood that because of his position of controlling shareholder that he will be able to direct and route assets away from the company so that they cannot be found. Details of the transactions looked at, albeit not in their entirely in the Deloitte's report, indicate his willingness to avoid the usual conventional forms of company accounting.

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> In the exercise of my discretion therefore I grant the injunction ……"

On the evidence before me, it appears that the subject loan was used to fund the litigation(s) of WNG. Any repayment of the loan is a breach of the injunction order. Did the Plaintiff know the Injunction order? By paragraph 11(a) of the 5th Affirmation of Andrew Chen Aun-Li, it was said that:

> "I would like to point out at the outset that at all material times when I lent monies to the Defendant, the Mareva Injunction was not in my mind. I am of course aware of the Mareva Injunction now, but I cannot recall whether I was aware of the Mareva Injunction at the material time or subsequently thereafter. In any event, I was not concerned about any injunction and, even if I had been made known of the Mareva Injunction, I would not have known about its details or effect."

Further, although the Defendant attempts to argue that the loan and the repayment leaves the liability and asset of the Defendant intact, and therefore is not a breach of the Injunction order, such matter is clearly not appropriate to be resolved in Order 14 application. Further, it remains doubtful if the loan transaction could be made to circumvent the Injunction order or the winding up proceedings of WNG. The dispute should be clarified at trial.

(b) I agree with Mr. Khaw that the Defendant has satisfied me that there are some other reasons to be a trial. I do not think we should restrict the Court's discretion to the facts of *Miles v Bull* [1968] 3 All ER 632. It is only one example. In our case, the difficulties faced by Mr. Sutton should be noted. He is only the

liquidator who needs to perform his duty properly. One should not criticize him severely for his change of defence, even if it is the case. It is also inappropriate to attack him personally without sufficient evidence. The underlying loan transactions, the injunction, the winding up, the voluntary liquidation, the Proof of Debt, the Notice of Rejection, HCMP 3677/03, the Stay Agreement all makes the present proceedings unfit to be resolved under O.14 RHC.

Costs and other directions

23. I do not have the benefit of hearing submissions on costs from the parties. Both parties have lost in their own application, but successfully defended for that of the opponent. Assistance from all Counsel is of much assistance to me. I will therefore make the following costs orders nisi:

(a) Costs of the Summary Judgment Application, together with all costs reserved, costs of adjournment reserved and certificate for counsel for hearings before me on 18 and 25 November 2004 and 2 December 2004, be costs in the cause;

(b) Costs of the Stay Application, together with all costs reserved, costs of adjournment reserved, and certificate for counsel for hearings before me on 18 and 25 November 2004 and 2 December 2004, be costs in the cause.

I further direct that:

(c) Leave be granted to the Defendant to file and serve its Defence and Counterclaim, if any, within 14 days from today.

(d) Leave be also granted to the Plaintiff to file and serve his Reply and Defence to Counterclaim within 14 days thereafter.

(Jack Wong)

Master

Mr. Nicholas Cooney instructed by Messrs. Alvan Liu & Partners for Plaintiff on 18 November 2004.

Mr. Adrian Bell instructed by Messrs. Alvan Liu & Partners for Plaintiff on 25 November 2004 and 2 December 2005.

Mr. Richard Khaw instructed by Messrs. Allen & Overy for Defendant.