IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 200

Suit No 252 of 2016
(Summons No 2020 of 2016)

Between

(1) SKP Pradiksi (North) Sdn Berhad
(2) SKP Senabangun (South) Sdn Berhad

… *Plaintiffs*

And

(1) Trisuryo Garuda Nusa Pte Ltd

… *Defendant*

GROUNDS OF DECISION

[Civil procedure] — [Stay of proceedings]

[Conflict of laws] — [Choice of jurisdiction]

SKP Pradiksi (North) Sdn Bhd and another
v
Trisuryo Garuda Nusa Pte Ltd

[2016] SGHC 200

High Court — Suit No 252 of 2016 (Summons No 2020 of 2016)
Chua Lee Ming JC
9 June 2016

22 September 2016

Chua Lee Ming JC

Introduction

1 The first plaintiff, SKP Pradiksi (North) Sdn Berhad ("1st plaintiff"), and the second plaintiff, SKP Senabangun (South) Sdn Berhad ("2nd plaintiff"), are investment holding companies incorporated in Malaysia. The defendant, Trisuryo Garuda Nusa Pte Ltd, is an investment holding company incorporated in Singapore.

2 In this action, the plaintiffs claimed that the defendant held 5,200 shares in PT Pradiksi Gunatama ("PTPG") on trust for the 1st plaintiff and 3,200 shares in PT Senabangun Anekapertiwi ("PTSA") on trust for the 2nd plaintiff. PTPG and PTSA are Indonesian companies and the shares in question represented 32% of the shareholdings in PTPG and PTSA respectively.

3 The defendant applied to stay the present proceedings on the ground that Singapore is not the proper forum for this matter. I dismissed the application with costs. I subsequently granted the defendant's application for leave to appeal against my decision and the defendant has filed its appeal pursuant to the leave granted.

The facts

4 The following facts were not disputed:

(a) PTPG and PTSA are engaged in the business of oil palm plantation development in Indonesia. In 2012, PTPG and PTSA encountered some problems concerning its business in Indonesia, including certain issues with the local authorities. One Darren Chen Jia Fu @ Suryo Tan ("Suryo Tan") agreed to help resolve these problems.

(b) It was agreed that Suryo Tan should have a direct equity stake in, and be appointed as Commissioner of, PTPG and PTSA because it was necessary to demonstrate his official capacity to act for the companies.

(c) The plaintiffs and/or its associates incorporated the defendant on 12 November 2012 as a special purpose vehicle to hold these Shares. Suryo Tan did not fund the incorporation of the defendant.[1]

(d) The initial shareholders of the defendant were Suryo Tan (99%) and his wife's cousin, Hendra Ade Putra (1%).[2] The current shareholders of the defendant are Suryo Tan (1%) and his wife, Christina Suryo (99%). The initial directors of the defendant were Suryo Tan and one Florence Tan Suk Phern ("Florence Tan").[3] Florence Tan was a director of Corporate Finedge Solutions Pte Ltd, a

Singapore corporate secretarial firm.[4] On 1 February 2013, each of the 1st and 2nd plaintiffs entered into a Shares Sale Purchase Deed ("the PSPG Deed" and "the PTSA Deed" respectively) with the defendant in respect of the transfers of 5,2000 shares in PTPG ("the 5,200 PTPG Shares") and 3,200 shares in PTSA ("the 3,200 PTSA Shares") to the defendant.[5] The 5,200 PTPG Shares and 3,200 PTSA Shares will be referred to collectively as "the Shares", and the PTPG Deed and the PTSA Deed will be referred to collectively as "the Deeds".

(e) All the necessary formalities relating to the transfer of the Shares to the defendant were carried out, including registration of ownership of the Shares in the defendant's name with the Ministry of Law and Human Rights of the Republic of Indonesia.

(f) On 17 December 2015, Suryo Tan removed Florence Tan as a director of the defendant.[6]

(g) The defendant has refused to return the Shares to the plaintiffs.

The parties' respective cases

5 The plaintiffs claimed as follows:

(a) The defendant held the 5,200 PTPG Shares and the 3,200 PTSA Shares on trust for the 1st and 2nd plaintiffs respectively.

(b) The trust was evidenced by two documents:

(i) An email dated 5 November 2011 ("the November 2011 email") which referred to the need for a trust deed; the email was copied to Suryo Tan.[7] The email referred to an entity called "OMC" which was a reference to Orchard Multicorp Capita Pte

Ltd. The parties had initially intended to use OMC to hold the Shares but eventually they decided to incorporate a new company for this purpose (*ie*, the defendant).[8]

(ii) A letter dated 20 November 2012 ("the Letter") in which Florence Tan confirmed that the defendant held the 5,200 PTPG Shares and the 3,200 PTSA Shares on trust for the 1st and 2nd plaintiffs respectively.[9]

(c) Subsequently, the Deeds were executed in order to effect the transfer of the Shares in accordance with Indonesian law.

(d) The defendant did not furnish any consideration for the Shares and has not produced any evidence of any such payment.

6 The defendant denied holding the Shares on trust and alleged as follows:

(a) In addition to the reason stated at [4(b)] above, the Shares were also meant as compensation for Suryo Tan's assistance in resolving PTPG's and PTSA's problems in Indonesia.[10]

(b) It paid IDR1m per share for each of the transfers of the 5,200 PTPG Shares and the 3,200 PTSA Shares, as stated in the Deeds.

(c) Suryo Tan was not aware of the Letter until April 2016 and he did not authorise the issuance of the Letter.[11] No copy of the Letter has been found in the corporate records of the defendant and the defendant has not been able to confirm the authenticity of the Letter.[12]

(d) The plaintiffs commenced this action because the control of the Shares was key to resolving disputes in Indonesia among the management and shareholders of PTPG and PTSA.[13]

7 At the hearing of the stay application before me, the defendant submitted that the present action should be stayed because:

(a) it was commenced in breach of exclusive jurisdiction clauses in the Deeds which provided for all disputes regarding the Deeds to be heard in the District Court of South Jakarta; and/or

(b) in any event, Indonesia was the proper forum for the resolution of the present dispute.

The jurisdiction clauses in the Deeds

8 It was common ground that where an exclusive jurisdiction clause which confers jurisdiction on a foreign court applies, an action commenced in Singapore ought to be stayed unless the plaintiff can show strong cause for not doing so: *Singapore Civil Procedure 2016* vol 1 (Foo Chee Hock JC gen ed) (Sweet & Maxwell, 2016) ("*Singapore Civil Procedure*") at para 11/1/13.

Whether the present claim fell within the scope of the jurisdiction clauses

9 Both the Deeds contained similar jurisdiction clauses, the translations of which read as follows:[14]

> Article 6 – Regarding this deed and all consequences as well as implementation hereof, the parties hereto selected the common and permanent domicile with the Registrar's office of the District Court of South Jakarta in Jakarta.

10 The plaintiffs argued that the jurisdiction clauses in the Deeds were irrelevant because the present action was based on a trust agreement, the terms

of which were contained in the Letter. However, I agreed with the defendant that the plaintiffs' claim was an assertion of ownership which challenged the defendant's rights of ownership over the Shares. The Deeds transferred ownership of the Shares to the defendant without interference from any other parties claiming to have (in the PTPG Deed) a "pre-emptive right or joint right" or (in the PTSA Deed) a "higher right or joint right" to the Shares.[15] Accordingly, in my view, the present action fell within the scope of the jurisdiction clauses in the Deeds.

Whether the clauses were exclusive jurisdiction clauses

11 The test is whether the clauses in question obliged the plaintiffs to litigate in the District Court of South Jakarta: *Singapore Civil Procedure* at para 11/1/13. The defendant's expert opined that under Indonesian laws, the effect of Article 6 in each of the Deeds was that the disputing parties may only submit any dispute arising out of or in relation to the Deeds to the exclusive jurisdiction of the District Court of South Jakarta unless the parties agree otherwise.[16]

12 As the plaintiffs did not produce any expert opinion to the contrary, I accepted the defendant's expert's opinion that the jurisdiction clauses in the Deeds conferred exclusive jurisdiction on the District Court of South Jakarta.

Whether there was any strong cause not to grant a stay

13 The factors in determining whether there is strong cause include the following:

(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 Singapore and foreign courts.

(b) Whether the law of the foreign court applies and, if so, whether it differs from the Singapore law in any material respects.

(c) With what country either party is connected and, if so, how closely.

(d) Whether the defendant genuinely desires trial in the foreign country, or is 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 here;

(iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

(See, *Golden Shore Transportation Pte Ltd v UCO Bank and another appeal* [2004] 1 SLR(R) 6 at [33], applying *Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd* [1977–1978] SLR(R) 112)

14 In the present case, the plaintiffs are Malaysian companies whilst the defendant is a Singapore company and PTPG and PTSA are Indonesian companies. Suryo Tan is a Singapore citizen although he is apparently based primarily in Jakarta. Other than the Letter and the November 2011 email, the

evidence of the trust appeared to be oral. In my view, these factors were at best neutral.

15 The plaintiffs' main argument was that the concept of trusts is not fully recognized under Indonesian law and that the plaintiffs will have no effective avenue to seek recourse against the defendant in Indonesia. The plaintiffs' expert opined as follows:[17]

> The concept of "trust" or beneficial ownership for shares in a company is not fully recognized in both the [Indonesian Civil Code] and the Company Law. Article 33 of the Investment Law states as follows:
>
> "*Domestic capital investors and foreign capital investors conducting capital investment in the form of a limited liability company shall be prohibited from entering into an agreement and/or statement which stipulates that the share ownership in the limited liability company is for and on behalf of another party*."
>
> Article 33 provides a prohibition for beneficial ownership of shares in both domestic and foreign capital investment companies. In essence, any agreement or statement that is made for the purpose of domestic of foreign capital investment which facilitates beneficial ownership may not be enforceable by the Indonesian court.
>
> [emphasis in original]

16 The plaintiffs submitted therefore that they have a juridical advantage in Singapore which would be lost if they were compelled to sue in Indonesia.

17 The defendant's expert stated as follows:[18]

> I also do not agree that the concept of trust or beneficial ownership in the Indonesian law context is not fully recognized. In my view, whether or not Article 33 of the Indonesian Investment Law applies to the arrangement between the parties and whether or not it falls within the prohibition under Article 33 is very much dependent on the facts of the case, including in particular the agreements contained in the [Deeds]. In this regard, I am of the view that any claims or disputes relating to the ownership of the

> Indonesia shares including the application of Article 33 of the Indonesian Investment Law can and should be dealt with by the Indonesian Court. In fact, the issue of Article 33 of the Indonesian Investment Law strengthens the reasons why it is the Indonesian court, in this regards South Jakarta District Court, that should adjudicate the dispute on this share ownership issue.

18 At the hearing of the stay application, the defendant submitted that its expert did not say that a trust claim will fail in Indonesia and that it therefore followed that the plaintiffs would not be precluded from advancing their case in Indonesia. I disagreed with the defendant. The defendant's expert's opinion did not expressly deal with whether the plaintiffs could bring their trust claim in Indonesia. His focus was on whether the dispute in question should be dealt with by the Indonesian Court. In my view, that was the wrong question for him to focus on. The question whether this action should be stayed in favour of the District Court of South Jakarta was a question which I had to decide based on Singapore law, not Indonesian law. Further, the defendant's expert did not explain why he disagreed with the plaintiffs' expert's statement that the concept of trust or beneficial ownership is not fully recognized under Indonesian law.

19 In fact, it seemed to me that the defendant's expert implicitly agreed that Article 33 of the Indonesian Investment Law (Law No 25 of 2007) ("Article 33") could prohibit the plaintiffs' trust claim. He simply chose not to express any view on whether the plaintiffs' trust claim would fall within the scope of Article 33. The only view that he expressed on Article 33 was that whether an arrangement was prohibited under Article 33 depended on the facts; with respect, that view was not helpful.

20 In my view, it seemed unlikely that a trust claim would be recognized under Indonesian law. Further, the trust arrangement which formed the

substance of the plaintiffs' claim appeared to be prohibited under Article 33. I concluded therefore that it was questionable whether the plaintiffs would be able to bring their trust claim in Indonesia.

21 There remained the question of the law governing the alleged trust. The plaintiffs' case that they would be prejudiced if they had to sue in Indonesia would fall away if Indonesian law governed the trust. The proper law of the trust is the law chosen by the trustee, or in the absence of such choice, the system of law to which the trust has the closest connection: *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2016 Reissue) ("*Halsbury's Laws* vol 6(2)") at para 75.330.

22 It was not disputed that there was no express choice of law. The plaintiffs submitted that Singapore law was the implied choice of law as well as the law with the closest connection to the trust. In my view, it was clearly arguable that Singapore law governed the trust for the following reasons:

(a) The defendant was incorporated as a special purpose vehicle for the specific purpose of holding the Shares on trust for the plaintiffs. Hence, it may be inferred that the law of the place of incorporation of the defendant (*ie*, Singapore) was intended as the governing law of the trust: *Halsbury's Laws* vol 6(2) at para 75.332.

(b) The express creation of the trust pointed towards the governing law being that of a jurisdiction that recognized and gave effect to trusts. The use of terminology peculiar to a particular legal system or a form known only to the legal system may be an indication of implied choice of law: *Halsbury's Laws* vol 6(2) at para 75.332.

(c) The Letter was issued in Singapore.

23 In my opinion, the plaintiffs had shown sufficient strong cause against the grant of a stay. If the plaintiffs had to sue in Indonesia, they would be prejudiced by the fact that the trust claim was not likely to be recognized under Indonesian law. Compelling the plaintiffs to bring their trust claim in Indonesia where it was not likely to be recognized was no different from compelling a plaintiff to sue in a foreign court where he would be faced with a time bar which was not applicable in Singapore. If the latter can constitute strong cause (see [13(e)(iii)] above), there is no reason why the former cannot.

24 In the final analysis, I could not see how granting a stay in these circumstances would bring about a just result or meet the ends of justice. It also seemed to me that the defendant could not be acting in good faith in submitting that the trust claim should be brought in Indonesia, knowing as it must that the trust claim was not likely to be recognized under Indonesian law.

25 The defendant also submitted that a stay should be granted because a judgment of a Singapore court is not enforceable in Indonesia whereas a judgment of an Indonesian court can be enforced in Singapore. In my view, the question of enforcement does not arise. If the plaintiffs succeed before a Singapore court, the defendant would be required to take the necessary steps to transfer the Shares to the plaintiffs or pay damages. The question of enforcement in Indonesia would arise only if the defendant and its directors choose to disobey the order made by the Singapore court. The defendant's submission was therefore premised upon the defendant and its directors deciding to disobey an order made by the Singapore court. In my judgment, such a submission was unmeritorious. The mere registration of the transfer of the Shares to the plaintiffs would not involve any enforcement of a judgment of a Singapore court; neither would it contravene Article 33 since the mere

registration of the transfer would not raise any question of trust or beneficial interests.

26 Further and in any event, on balance, the prejudice to the plaintiffs was clearly greater if I were to grant a stay in this case. There would be no Indonesian judgment to talk about unless the plaintiffs' trust claim was recognized under Indonesian law in the first place.

27 Finally, the defendant submitted that if a stay was not given, they would be prejudiced by having to face the risk of inconsistent judgments because the disputes between the shareholders of PTPG and PTSA had resulted in litigation in Indonesia. The defendant did not explain what the issues in the shareholders' litigation in Indonesia were or how they were related to the issues in the present action. In any event, as discussed earlier, I disagreed with the defendant that the plaintiffs could bring their claims before the District Court of South Jakarta.

Whether Indonesia was the proper forum

28 The guiding principles in determining the question of *forum non conveniens* are well settled:

> (a) A stay will only be granted if there is some other available and more appropriate forum for the trial of the action. The burden of establishing this rests on the defendant. It is not enough just to show that Singapore is not the natural or appropriate forum. The defendant must also establish that there is another available forum which is clearly or distinctly more appropriate than Singapore.

(b) The natural forum is one with which the action has the most real and substantial connection. The facts to consider include not only factors affecting convenience or expense (*eg*, the availability of witnesses) but also other factors such as the law governing the transaction and the places where the parties respectively reside or carry on business.

(c) If at this stage – commonly referred to as stage one of the test laid down in *Spiliada Maritime Corporation v Consulex Ltd* [1987] AC 460 ("the *Spiliada* test") – the court concludes that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay.

(d) If the court concludes that there is some other available forum which *prima facie* is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless be refused. For this second stage (commonly referred to as stage two of the *Spiliada* test), the legal burden is on the plaintiff to establish the existence of those special circumstances.

(See, *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 at [26])

29 The defendant relied on the same submissions that it made in connection with the exclusive jurisdiction clause.

30 In my view, Indonesia was neither an available nor an appropriate forum since it did not seem likely that the plaintiffs' trust claim would be recognized in Indonesia. As the defendant did not pass stage one of the *Spiliada* test, a stay ought not to be granted.

Postscript - the defendant's application for leave to appeal

31 During the hearing of the stay application before me, the defendant's case focused on the submission that the plaintiffs would not be prejudiced by litigating in Indonesia because they would not be precluded from advancing their trust claim in Indonesia.

32 However, in its application for leave to appeal, the defendant's focus changed. In summary, the defendant first accepted that Indonesian law does not contain the concept of trust and that the trust alleged by the plaintiffs would be barred in Indonesia as a consequence of Article 33. The defendant then submitted that a stay should be granted because the Singapore legal system should not be permitted to be used to circumvent the laws of a friendly foreign state.

33 It seemed to me that there was no reason why a trust over the Shares could not be enforced in a Singapore court if the trust was governed by Singapore law. Unless Indonesian law governed the trust, the prohibition in Article 33 of the Indonesian Investment Law would not apply when determining whether the Shares were held on trust. In this present action, the question whether the defendant held the Shares on trust for the plaintiffs is an issue between the plaintiffs and the defendant; it does not require the Company or any third parties in Indonesia to recognize the trust. If the plaintiffs succeed before a Singapore court and the defendant takes the necessary steps to transfer the Shares to the plaintiffs, the mere registration of the transfer of the Shares by the defendant to the plaintiffs would not engage Article 33.

34 Nevertheless, I granted leave to appeal because I agreed with the defendant that the question how a Singapore court should view trust

arrangements involving trust property situated in a foreign jurisdiction which either does not recognize trusts or which expressly prohibits trusts is one which would benefit from a decision by the Court of Appeal. It is well-established that one of the principles upon which leave to appeal ought to be given is where it raises a question of importance upon which further argument and a decision of the Court of Appeal would be to the public advantage: *Singapore Civil Procedure* at para 57/16/13.

35 As observed by the English Court of Appeal in *Akers and others v Samba Financial Group* [2015] 2 WLR 1281 ("*Akers*") at [34] and [35], there must be large numbers of trusts established under the laws of common law jurisdictions that comprise registered shares in civil law countries amongst their assets; yet, questions as to the effect of such arrangements have seemingly never been fully addressed before.

36 *Akers* was cited by the defendant in support of its application for leave to appeal. Interestingly, *Akers* concerned an action brought in England by the liquidators of SICL, a Cayman company, to void a disposition of shares in Saudi Arabian banks by one Al-Sanea to the defendant. The liquidators claimed that Al-Sanea held the shares on trust for SICL. The defendant applied to stay the proceedings on the ground of *forum non conveniens*, arguing that Saudi Arabian law (under which trusts were unlawful) applied to the trust and that the Saudi Arabian courts were therefore the more appropriate forum. The Court of Appeal held that it was arguable that the trust was governed by Cayman Islands law and decided against a stay of the action. The Supreme Court gave the defendant leave to appeal and the case is presently pending the Supreme Court's decision. I should add that *Akers* also concerned the application of the Hague Convention on the Law Applicable to Trusts and on their Recognition.

37 I was referred to *Akers* only in connection with the defendant's application for leave to appeal. It was not cited during the hearing of the defendant's application to stay these proceedings. As a result, I did not have the advantage of full arguments on *Akers* in connection with the stay application. I will therefore say no more about it.

Conclusion

38 I dismissed the defendant's application to stay these proceedings in favour of litigation in Indonesia. In my judgment, the fact that the plaintiffs' trust claim was not likely to be recognized in Indonesia constituted strong cause to not grant a stay of these proceedings. It also meant that Indonesia was neither an available nor an appropriate forum.

Chua Lee Ming
Judicial Commissioner

Ling Daw Hoang Philip and Yap Jie Han (Wong Tan & Molly Lim LLC) for the plaintiffs;
Chew Ming Hsien Rebecca and Chew Xiang (Rajah & Tann Singapore LLP) for the defendant.

---

1 Defendant's Bundle of Affidavits ("DBAffvs"), Tab 5 at para 20.
2 DBAffvs, Tab 5 at para 1 and p 62.
3 DBAffvs, Tab 5 at p 84.
4 DBAffvs, Tab 5 at para 18.
5 DBAffvs, Tab 1at pp 60–68 and pp 69–78.
6 DBAffvs, Tab 5 at para 35.
7 DBAffvs, Tab 6 at p 9.

[8] DBAffvs, Tab 6 at paras 10–11.
[9] DBAffvs, Tab 2 at p 12.
[10] DBAffvs, Tab 5 at para 15.
[11] DBAffvs, Tab 1 at para 19.
[12] DBAffvs, Tab8 at paras 5 and 7(b).
[13] DBAffvs, Tab 5 at para 33.
[14] DBAffvs, Tab 1 at pp 66–67 and 76–77.
[15] Article 2c in each Deed – see DBAffvs, Tab 1 at pp 65 and 75.
[16] DBAffvs, Tab 4 at para 27 on pp 13–14.
[17] DBAffvs, Tab 3 at para 5.1 on p 10.
[18] DBAffvs, Tab 4 at para 44 on p 17.