

Staying proceedings in the British Virgin Islands on *forum non conveniens* grounds

UPDATE

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The decision of the Eastern Caribbean Court of Appeal in *Anjie Investments Limited v Cheng* (Appeal No. BVIHCMAP2016/0003, 24 November 2016) serves as a useful reminder of the principles that will be applied by a British Virgin Islands (BVI) Court in exercising its discretion to stay proceedings on *forum non conveniens* grounds.

Background

Anjie Investments Limited was an appeal against a refusal by the BVI Commercial Court to stay a claim on *forum non conveniens* grounds having found that the BVI was the most appropriate forum for the trial of the claim.

The claim was brought by Mr and Ms Cheng against Anjie Investments Limited (**AIL**) in relation to the ownership of shares in Tian Li Holdings Limited (the **Company**). Both AIL and the Company were BVI incorporated companies. The Company held shares in another valuable foreign company called Smartpay.

The Chens together held the entire issued share capital in the Company. Their case was that five individuals based in Hong Kong had represented to them that further investment in Smartpay was desirable. Those individuals claimed to know a wealthy individual in the People's Republic of China (**PRC**) who would be willing to assist. However, for cultural reasons, this wealthy individual would only deal with PRC citizens whom he knew and trusted and who were principals with control of the Company. It was therefore represented to the Chens that it would be necessary to sign a number of documents including a share purchase agreement, stock transfer forms and resolutions, which could be shown to the individual to demonstrate that PRC citizens were effectively in control of the Company.

The Chens further alleged that it was represented to them that there was no intention of actually acting on the documents or putting them into legal effect until such time as they had approved any deal that could be achieved with the wealthy individual.

The Chens alleged that, in reliance upon the representations, they executed a number of documents including two sale and purchase agreements (**SPAs**) for the sale of their shares in the Company to AIL, Shareholder Agreements (**SHAs**) and a transfer of shares from the Chens to AIL. Importantly the SPAs contained jurisdiction clauses under which the parties agreed to submit to the non-exclusive jurisdiction of the Courts of Hong Kong, and the SHAs contained *forum non conveniens* waiver clauses (**FNC waiver clauses**).¹ Legal title to the Company's shares was transferred to AIL following execution of the documents.

¹ Generally speaking, the effect of a FNC waiver clause is that the parties agree not to argue that there is some other more suitable court in which the claim should be heard, than the Court chosen by the parties.

The Chens' case was put on two alternative bases. Their primary case was that the documents were not intended to create legal relations (without more), and were of no legal effect; nor was there any consideration for the transfer. Alternatively, that they were induced to enter into the documents based upon fraudulent misrepresentations, namely that the wealthy Chinese individual did not exist, and it was always intended to act upon the documents without further reference to them.

The starting point

As Gonsalves JA [Ag.] (with whom the rest of the Court agreed) recognised, the starting point in any forum dispute is the speech of Lord Goff of Chieveley in the House of Lords decision in *Spiliada Maritime Corp v Cansulex Ltd, The Spiliada* [1987] AC 460. The principles enunciated by Lord Goff were summarised by Gordon JA in the Eastern Caribbean Court of Appeal decision in *IPOC International Growth Fund Limited v LV Finance Group Limited & Ors* (Civil Appeal Nos. 20 of 2003 & 1 of 2004, 19 September 2005) as follows:

- The starting point, or basic principle, is that a stay on the grounds of *forum non conveniens* will only be granted where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action. In this context, appropriate means more suitable for the interests of all of the parties and the ends of justice.
- The burden of proof is on the defendant who seeks the stay to persuade the court to exercise its discretion in favour of a stay. Once the defendant has discharged that burden, the burden shifts to the claimant to show any special circumstances by reason of which justice requires that the trial should nevertheless take place in the BVI. Lord Goff opined that there was no presumption, or extra weight in the balance, in favour of a claimant where the claimant has founded jurisdiction as of right in this jurisdiction, save that 'where there can be pointers to a number of different jurisdictions' there is no reason why the court of this jurisdiction should not refuse a stay. In other words, the burden on the defendant is two-fold: firstly, to show that there is an alternate available jurisdiction, and, secondly, to show that that alternate jurisdiction is clearly or distinctly more appropriate than the BVI.
- When considering whether to grant a stay or not, the court will look to what is the 'natural forum' as was described by Lord Keith of Kinkel in *The Abidin Daver*² 'that with which the action has the most real and substantial connection'. In this connection the court will be mindful of the availability of witnesses, the likely languages that they speak, the law governing the transactions or to which the fructification of the transactions might be subject, in the case of actions in tort where it is alleged that the tort took place and the places where the parties reside and carry on business. The list of factors is by no means meant to be exhaustive but rather indicative of the kinds of considerations a court should have in exercising its discretion.
- If the court determines that there is some other available and *prima facie* more appropriate forum then ordinarily a stay will be granted unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. Such a circumstance might be that the claimant will not obtain justice in the appropriate forum. Lord Diplock in *The Abidin Daver* made it very clear that the burden of proof to establish such a circumstance was on the claimant and that cogent and objective evidence is a requirement.

The right of an appeal court to interfere with a lower court's decision

The Court of Appeal recognised that forum disputes are pre-eminently matters to be resolved by a trial judge. Accordingly an appellate court should refrain from interfering unless satisfied that the trial judge has made a significant error of principle or a significant error in the considerations taken or not taken into account. The burden therefore was on AIL to convince the Court of Appeal that errors in principle were made and that the trial judge, in concluding that the BVI was the most appropriate forum, was plainly wrong.

The jurisdiction and FNC waiver clauses

AIL submitted that a Hong Kong jurisdiction clause and a FNC waiver clause would ordinarily all but guarantee a stay of proceedings brought in the non-contractual forum (here the BVI), as there is a long line

² [1984] AC 398.

of authority to the effect that a contractual bargain contained in such clauses can only be displaced by 'very strong or exceptional' circumstances which were unforeseeable and unforeseen at the time of contracting. The Chens' approach in the court below had been to challenge the validity of the agreements that contained the jurisdiction and FNC waiver clauses. It was agreed that AIL was therefore required to demonstrate that it had the better of the argument as to the validity of the underlying contractual documentation.

The trial judge had concluded that neither party had the better of the argument. Whilst recognising that AIL's case was supported by fully executed documents which were unquestionably signed by the Chens, and the fact that there were no contemporaneous documents to support the Chens' contention that the documents were not intended to be used without their consent, the trial judge had been troubled by AIL's failure to engage in evidence with the Chens' assertion that no consideration has been paid for the shares (the documents referred to 'fair value' having been paid).

The Court of Appeal recognised that a defendant, in challenging jurisdiction, may have no obligation to advance a positive case to support its denial of any involvement in alleged wrongdoing. However, it held that, if a defendant is reticent about a particular issue in his case, he can have no complaint if the court does not take into account what points he may make, or evidence he may call at trial. In this case, the judge had been fully entitled to take into account AIL's failure to engage with the Chens' assertion that no consideration had been paid for the shares. He had therefore not fallen into error in concluding that neither party had the better of the argument on the validity issue.

The place where the wrong was committed

The trial judge had found that the wrong had been committed in the BVI on the basis that the Chens had been deprived of their shares in the Company as a result of changes made to the Company's register of members (and register of directors) in the BVI. The Court of Appeal accepted that this amounted to a mischaracterisation of, or a failure to properly identify, the essential and underlying wrong that would engage a court in a trial of the claim, resulting in an error of law. The primary wrong had been the fraudulent misrepresentations alleged to have been made in Hong Kong, and accordingly, Hong Kong would *prima facie* be the appropriate forum. The changes made to the registers in the BVI had been 'resultant or mechanical only'.

Location of the wrongdoer

It followed that the trial judge had been wrong to conclude that the alleged wrong had been committed by a person in the BVI, namely AIL. Consistent with the finding that the wrong was the tort of fraudulent misrepresentation, the alleged wrongdoers were the five individuals based in Hong Kong.

The importance of the fact that the dispute concerned shares in a BVI company

The trial judge had identified the fact that the dispute concerned shares in a BVI company as being one of a number of BVI connecting factors. In contrast, the Court of Appeal held that:

'The shares being in a BVI company is at best a 'paper' connection but certainly not a connection of any value ... the fact that the shares were in a BVI company should not have been considered to be a connecting factor and the judge's conclusion in this regard was wrong.'

The location of witnesses

The trial judge had acknowledged that the Chens and the principals of AIL all resided in Hong Kong or the PRC, and that any other witnesses on either side would come from either of those jurisdictions. He also recognised that many of the witnesses spoke either Mandarin or Cantonese as their native language, although some also spoke English. He nevertheless concluded:

'As regards the inconvenience and cost related to having these witnesses come to BVI for a trial, this is certainly a consideration, but one which must not be overstated.'

The Court of Appeal took a different view. It held that:

'The location of the witnesses was not simply a factor but was a core factor and its importance was not to be diluted by a consideration that BVI incorporators should expect to have to travel to the BVI to attend court proceedings.'

Jurisdiction as of right

The trial judge had described the fact that the claim was brought against a BVI company subject of the BVI Court's personal jurisdiction as being the 'weightiest factor' in his finding that the BVI was the most appropriate forum for the trial of the claim.

As regards this issue, the Court of Appeal held:

'The [Chens] having established jurisdiction as of right gave them no extra benefit, added no extra weight, but simply placed the burden on [AIL] to demonstrate that there was another available forum which was clearly more distinctly appropriate than the BVI. The judge therefore erred in attributing the weight that he did to this factor.'

The determination of the Appeal

The Court of Appeal accordingly concluded that the trial judge had been plainly wrong in arriving at the conclusion that the BVI was the most appropriate forum. It therefore ordered a stay of the claim on grounds of *forum non conveniens* on the basis that Hong Kong was the most appropriate forum for the trial of the claim.

Conclusion

Although each case will ultimately turn on its own facts, this decision emphasises that the court will only refuse to order a stay in a dispute that involves a non-exclusive jurisdiction clause combined with a FNC waiver clause in favour of the parties' agreed jurisdiction where there are very strong or exceptional circumstances which were unforeseeable and unforeseen at the time of contracting.

When considering the appropriate forum for a tort claim, the place of commission of the alleged tort is a relevant starting point and will *prima facie* be the appropriate forum.

The location of witnesses is also a core factor when considering the appropriate forum for the trial of a claim.

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