

SUPREME COURT OF SINGAPORE

24 May 2019

Case summary

Bachmeer Capital Limited v Ong Chih Ching and others [2019] SGHC(I) 07
Suit No 2 of 2017

Decision of the High Court (Vivian Ramsey IJ):

Outcome: The Singapore International Commercial Court dismisses claims and counterclaims in respect of a joint venture to build a winter theme park in Shanghai.

Facts

1 The plaintiff and the fourth defendant (“KOPSG”) were 49:51 shareholders in the seventh defendant (“KOPHK”), which in turn wholly owned the eighth defendant (“Bodi”). The plaintiff and Bodi were controlled by the second and third defendants in counterclaim (“Ms Wang” and “Mdm Hu”), who were Chinese nationals, whereas KOPSG was controlled by the first and second defendants (“Ms Ong” and “Ms Suparman”), who were Singaporean. Together with the third defendant (“Mr Shport”), a Russian national, the parties agreed to collaborate by way of a joint venture, which eventually became an agreement to develop an integrated winter resort in Qing Pu, Shanghai (“Project Winterland”) by acting through Bodi. Disputes arose as to, *inter alia*, Ms Wang and Mdm Hu’s management of Bodi’s finances and their entitlement to be paid a salary for their efforts in acquiring land in Qing Pu for Project Winterland. Eventually, the joint venture was terminated in May 2015, and the defendants began pursuing another Winter Land Project with a different partner (“SLJZ”) in Lin Gang, Shanghai.

2 The plaintiff claims that KOPSG, Mr Shport, Ms Ong and Ms Suparman owed fiduciary duties to the plaintiff because the joint venture was a partnership. On the plaintiff’s case, the defendants had engaged SLJZ before the termination of the joint venture, and had wanted to pursue the other Winter Land Project with SLJZ to the exclusion of the plaintiff. Thus, the defendants sought to engineer the termination of the joint venture by various means, including sending accusatory emails to Ms Wang and Mdm Hu, and demanding the payment of funds into Bodi. The plaintiff further claims that the defendants had used the materials developed for Project Winterland in Qing Pu in the Winter Land Project that was pursued in Lin Gang after the termination of the joint venture, and that this was contrary to the terms of the joint venture termination agreement.

3 The defendants on the other hand argue that the termination of the joint venture was as a result of various disputes between the parties, including justifiable concerns over Ms Wang and Mdm Hu’s management of Bodi’s finances and the delay in acquiring the Qing Pu land. They also say that apart from an introductory meeting with SLJZ when Project Winterland in Qing Pu was still ongoing, there was no further communication until after the termination of the joint venture on 13 May 2015. Further, Ms Ong and KOPSG counterclaim against the plaintiff, Ms Wang, Mdm Hu for defamation in relation to four letters which were sent out to various parties after the termination of the joint venture, in which allegations of dishonesty and misappropriation of intellectual property were made.

Decision

4 The governing law of the joint venture is Chinese law. Even though there was no express choice of law and the circumstances of the transaction in this case do not lead to any inference that the parties intended a particular governing law to apply, Chinese law had the closest and most real connection to the transaction, in terms of the nationalities of Ms Wang and Mdm Hu, the place of incorporation of Bodi and the location of the real estate projects to be developed under the joint venture (at [91]–[94]).

5 Since the joint venture does not come within the Chinese Partnership Enterprise Law, the source of any fiduciary duties would have to arise under more general principles. In the circumstances of the case, the parties had a duty to act honestly and in good faith but did not otherwise owe fiduciary duties to the plaintiff (at [102]–[107]).

6 Ms Wang’s conduct in asking Mr Shport to pay capital contribution to the joint venture directly to her personal bank account does not reflect well on her, and was the first sign of concern by Ms Ong and Ms Suparman at the way Ms Wang acted in relation to financial matters. However, the defendants are incorrect to overplay its effect on the relationship between the parties (at [128]).

7 On the evidence, Mdm Hu has only made personal loans of RMB1.2m to KOPHK. Ms Wang’s assertion in September 2014 that some RMB4.8m was owing reflects a degree of inaccuracy in the way that Ms Wang dealt with financial matters relating to the joint venture (at [132]).

8 The sum of US\$2m which was promised to Ms Wang and Mdm Hu was not payment for the plaintiff accepting a 49% shareholding in KOPHK, but was a payment for the plaintiff’s services which would not be paid out but be treated as the plaintiff’s contribution to its 49% shareholding in KOPHK (at [148]).

9 In the months before the termination of the joint venture, there was still uncertainty surrounding the acquisition of the Qing Pu land and various challenges that had been presented in relation to the changing of planning parameters. In May 2015, these continuing concerns related to the timing of future steps necessary for the acquisition of the land, and the uncertainty is reflected in the cancelled signing of the framework agreement in May 2015 (at [170], [175]).

10 The use of the “Green Book”, a record of off-balance sheet expenses at Bodi, was initiated by Ms Wang and Mdm Hu. Although Ms Ong told them to cease the practice in October 2014, it was only in January 2015 that matters seemed to have caused considerable concern to Ms Ong, who then issued a directive that caused the practice to cease. The adoption of the Green Book practice meant that many expenses had no clear record of what the sums had been used for, and the false entries in the general ledger to cover sums transferred to the Green Book formed the basis of the correspondence over doubtful expenses in April and May 2015 (at [182], [187], [193], [194]).

11 Apart from the first introductory meeting in January 2015, there were no communications between the defendants and SLJZ until 14 May 2015, and the possibility of pursuing the Winter Land Project in Lin Gang was only discussed seriously on 19 May 2015. Mr Shport only became aware of this possibility on 25 May 2015 (at [238], [261]).

12 There were justifiable concerns over doubtful expenses relating to supposed landscaping, training, uniform, travel and motoring expenses incurred by Bodi, as the widespread use of false invoices and the Green Book method of accounting meant that monies were spent in ways which could not be properly verified. The defendants' concern over Ms Wang and Mdm Hu's handling of Bodi's finances came to a head when further injection of funds into Bodi became necessary in late April and May 2015, and these concerns were present when Ms Ong sent an email to Ms Wang on 4 May 2015. Thus, the 4 May 2015 email cannot be characterised as an act of bad faith or as being motivated by collateral motive (at **[301]**, **[302]**, **[317]**).

13 The joint venture was terminated on 13 May 2015 as there was an agreement between the parties to do so during the meeting on that day, even though the precise way in which all the consequential matters were to be dealt with were only finalised and documented by way of a written termination agreement on 20 May 2015 (at **[371]**–**[374]**).

14 Given that there was no communication between the defendants and SLJZ prior to the termination of the joint venture on 13 May 2015, the plaintiff's explanation of the defendants' motive in engineering the termination of the joint venture falls away. The evidence shows a deteriorating relationship between the parties from April 2015 onwards as a result of Bodi's finances and the defendants' justified concerns over Bodi's accounting practices, as well as the continued unavailability of the Qing Pu land leading to a lack of progress of Project Winterland. These matters were part of the background to the events in May 2015. There is nothing to show that the defendants engineered a termination of the joint venture for a collateral purpose or motive, and thus no breach of the obligation of good faith and no basis to set aside the termination agreement (at **[383]**–**[387]**, **[397]**, **[402]**).

15 Clauses 8 and 9 of the termination agreement must be interpreted having regard to the relevant background knowledge of the parties at that time. Clause 8, properly interpreted, is not engaged if any of the shareholders proceeded with Project Winterland or a similar project on land other than the Qing Pu land, and thus the plaintiff does not have a claim under that clause in respect of the Winter Land Project subsequently carried out in Lin Gang. The plaintiff's claim under Clause 9 must equally fail as it does not come within its pleaded case, and in any case there was no substantial use of the materials designed for Project Winterland in Qing Pu (at **[417]**, **[422]**, **[426]**, **[436]**, **[437]**).

16 In relation to the defamation counterclaim, there was no evidence to show that the letters were actually published in Singapore or in China. In any event, in view of the double actionability rule, the claims should be actionable in China. The letters contain statements which lack a factual basis, but the requirement under Chinese law of publication to an unspecified group is not satisfied. Further, the letters were complaints to authorities which do not amount to actionable defamation under Chinese law (at **[460]**, **[465]**, **[478]**, **[506]**).

This summary is provided to assist in the understanding of the Court's grounds of decision. It is not intended to be a substitute for the reasons of the Court. All numbers in bold font and square brackets refer to the corresponding paragraph numbers in the Court's grounds of decision.