

SUPREME COURT OF SINGAPORE

31 July 2019

Case summary

Singapore International Commercial Court Originating Summons No 3 of 2019

BXY and others v BXX and others [2019] SGHC(I) 11

Background

1 The plaintiffs, Thai and Cambodian nationals, owned through a company and/or managed a business in Cambodia. In 2015 it was agreed that the business would be acquired by the first defendant, an Australian company. The transaction was structured as a transfer of the business to a new company incorporated by the second and third plaintiffs; and then a transfer of the shares in the new company to the second defendant, a wholly owned subsidiary of the first defendant, as the first defendant's nominee.

2 The parties to the share sale agreement ("the SSA") were the second and third plaintiffs as vendors and the first defendant as purchaser. The second defendant was not a party. The SSA contained a choice of law clause in favour of the laws of Singapore and an arbitration clause providing for settlement of disputes by arbitration in accordance with the Arbitration Rules of the Singapore International Arbitration Centre.

3 Some days before completion of the purchase, which took place on 1 July 2015, the first defendant provided a letter of designation addressed to the second and third plaintiffs, dated 22 June 2015 ("Letter"). This Letter contained a declaration that the first defendant nominated the second defendant to be the registered owner of the sale shares, and "vest[ed] unto [the second defendant] all of our rights, title and interest in, under and/or pursuant to [the SSA]" ("the words of vesting"). The Letter was endorsed by the second defendant, as well as the second and third plaintiffs.

4 In 2018, the first and second defendants commenced arbitration proceedings against the second and third plaintiffs, alleging breaches of the non-compete and non-solicitation provisions in the SSA as well as other associated wrongs.

5 The plaintiffs asserted that the first defendant was not a proper party to the arbitration because it had vested its rights, title and interest under the SSA in the second defendant, and was therefore no longer a party to the arbitration agreement. They applied to the Tribunal for an order that the first defendant be struck out as a party on the ground that it had assigned all its rights and obligations to the second defendant. On 8 January 2019, the Tribunal issued its decision as Directions (2), dismissing the application.

6 The plaintiffs then brought an application in the Singapore High Court on 22 February 2019 to "reverse" the decision of the arbitral tribunal on the question of jurisdiction. The proceedings were subsequently transferred to the Singapore International Commercial Court.

The Court's decision

Whether the Tribunal had jurisdiction to hear and determine the first defendant's claims

7 The Court decided that the words of vesting did not amount to an assignment. The words of vesting were readily open to be understood as vesting in the second defendant the first defendant's rights, title and interest in the sale shares under the SSA.

8 The purpose of the Letter was to nominate the second defendant as transferee of the shares, and nothing in the SSA required or contemplated the assignment of the first defendant's rights as purchaser under the SSA to its subsidiary (at [34]–[35]). The first defendant remained subject to its obligations under the SSA, and it would make little sense for the first defendant to purport to assign its rights away while its obligations remained. The first defendant also had rights under the SSA which had to subsist in it until completion (at [36]–[37]).

9 The endorsement of the second and third plaintiffs on the Letter, while stating agreement to its terms, referred only to transfer of the shares of the first defendant. The endorsement of the second defendant likewise only contained an acknowledgement and acceptance of its nomination as transferee of the shares, and did not contain an acknowledgement or acceptance of an assignment of the first defendant's rights under the SSA more broadly (at [36]–[38]).

10 Although the SSA provided for the possibility of the agreement being assigned to a wholly owned subsidiary of the first defendant, this did not mean that there had, on the facts of this case, been such an assignment (at [40]–[42]).

Whether the application was brought within time

11 Under Article 16(3) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") and s 10(3) of the International Arbitration Act ("IAA"), a party may, within 30 days after having received notice of a tribunal's ruling on its jurisdiction, apply to the Singapore High Court to appeal against the ruling. This time stipulation of 30 days is repeated at O 69A r 2(3) of the Rules of Court (at [45]).

12 The Directions (2) email was sent on 8 January 2019. The application was brought on 22 February 2019. The plaintiffs alleged that they did not receive the Tribunal's email containing Directions (2). However, there was a history of successful emailing between the Tribunal and the parties, and the Directions (2) email responded in a chain to an email by the plaintiffs providing their submission in reply. The Court considered that the plaintiffs did not provide direct and persuasive evidence that the Directions (2) email had not been received, and found that it was received on 8 January 2019. The application was therefore not brought within time (at [44]–[66]).

Whether there was power to extend time

13 The Court further found that there was no power to extend time. Neither the Model Law nor the IAA permitted an extension of the 30 days in Article 16(3) or in s 10(3). Clause 7 in Schedule 1 to the Supreme Court of Judicature Act ("SCJA") also could not be used to grant an extension of time, as the 30 day time stipulation was "relating to limitation" within the proviso in the clause. As the court derives its jurisdiction to hear a jurisdictional matter from Article

16(3) or s 10(3), once the time has passed, the application may no longer be made (**[72]**–**[88]**).

14 The plaintiffs could not rely on the inherent power of the court to seek an extension as the court may not exercise any power in respect of a matter over which it does not have jurisdiction (**[89]**–**[90]**).

15 The Originating Summons was dismissed. The plaintiffs were ordered to pay the defendants' costs, but with liberty to apply for different or further orders as to costs, such liberty being exercisable within 14 days.

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.