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Bachmeer Capital Limited
v
Ong Chih Ching and others

[2018] SGHC(I) 01

Singapore International Commercial Court — Suit No 2 of 2017 (Summons No 2 of 2018)
Vivian Ramsey IJ
29 January 2018

Evidence — Witnesses — Attendance — Giving evidence by video link

13 February 2018

Vivian Ramsey IJ:

Introduction

1 This decision deals with an application to hear the evidence of two witnesses by video link.

2 By Summons No 2 of 2018 dated 19 January 2018, the 1st, 2nd, 4th, 5th, and 6th defendants by original action (“the KOP Defendants”) applied for leave for two factual witnesses to give their oral evidence by way of live video link from Shanghai, China. The relevant witnesses were Yang Xiao Ming (“Chairman Yang”) and Lee Chee Kiat (“Mr Lee”).

3 The application was supported by the fifth affidavit of Russell Lee Pynn (“Mr Pynn”), an investment executive of the fourth defendant by original

action.¹ The plaintiff by original action, Bachmeer Capital Limited (“the Plaintiff”), objected to the evidence being given by video link and filed the third affidavit of Wang Xuan setting out the basis of their objection. In reply, the KOP Defendants filed the first affidavit of Andrew Lee, their solicitor.

4 On 27 January 2018, I determined the application in respect of Mr Lee’s evidence without a hearing, dismissing that application. I adjourned the application in respect of Chairman Yang’s evidence until the first day of the trial, 29 January 2018. Having heard further argument, I adjourned the application and gave leave for the KOP Defendants to file a further affidavit from Chairman Yang dealing with an issue relating to the retention of his passport by the relevant Chinese authorities.

5 The KOP Defendants served the second affidavit of Chairman Yang and the sixth affidavit of Mr Pynn on 1 February 2018. Having given the Plaintiff the opportunity to make further submissions, I then ruled on 2 February 2018 that Chairman Yang should give oral evidence by live video link from Shanghai, China during the trial. I indicated that I would give my reasons in due course. Mr Lee came to Singapore and gave his evidence in person on 6 February 2018 and Chairman Yang gave his evidence by live video link on 7 February 2018. I now set out my reasons for dismissing the application in respect of Mr Lee and granting the application in respect of Chairman Yang.

The law

6 Section 62A of the Evidence Act (Cap 97, 1997 Rev Ed) allows evidence to be given by video link if the court so orders. It provides:

¹ Fifth affidavit of Russell Lee Pynn, 19 January 2018, para 1.

Evidence through live video or live television links

62A.—(1) Notwithstanding any other provision of this Act, a person may, with leave of the court, give evidence through a live video or live television link in any proceedings, other than proceedings in a criminal matter, if —

- (a) the witness is below the age of 16 years;
- (b) it is expressly agreed between the parties to the proceedings that evidence may be so given;
- (c) the witness is outside Singapore; or
- (d) the court is satisfied that it is expedient in the interests of justice to do so.

(2) In considering whether to grant leave for a witness outside Singapore to give evidence by live video or live television link under this section, the court shall have regard to all the circumstances of the case including the following:

- (a) the reasons for the witness being unable to give evidence in Singapore;
- (b) the administrative and technical facilities and arrangements made at the place where the witness is to give his evidence; and
- (c) whether any party to the proceedings would be unfairly prejudiced.

(3) The court may, in granting leave under subsection (1), make an order on all or any of the following matters:

- (a) the persons who may be present at the place where the witness is giving evidence;
- (b) that a person be excluded from the place while the witness is giving evidence;
- (c) the persons in the courtroom who must be able to be heard, or seen and heard, by the witness and by the persons with the witness;
- (d) the persons in the courtroom who must not be able to be heard, or seen and heard, by the witness and by the persons with the witness;
- (e) the persons in the courtroom who must be able to see and hear the witness and the persons with the witness;
- (f) the stages in the proceedings during which a specified part of the order is to have effect;

(g) the method of operation of the live video or live television link system including compliance with such minimum technical standards as may be determined by the Chief Justice; and

(h) any other order the court considers necessary in the interests of justice.

(4) The court may revoke, suspend or vary an order made under this section if –

(a) the live video or live television link system stops working and it would cause unreasonable delay to wait until a working system becomes available;

(b) it is necessary for the court to do so to comply with its duty to ensure that the proceedings are conducted fairly to the parties thereto;

(c) it is necessary for the court to do so, so that the witness can identify a person or a thing or so that the witness can participate in or view a demonstration or an experiment;

(d) it is necessary for the court to do so because part of the proceedings is being heard outside a courtroom; or

(e) there has been a material change in the circumstances after the court has made an order.

(5) The court shall not make an order under this section, or include a particular provision in such an order, if to do so would be inconsistent with the court's duty to ensure that the proceedings are conducted fairly to the parties to the proceedings.

...

7 Order 109 r 6 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) allows the court to give relevant directions. It provides:

Directions for and conduct of hearing (O. 109, r. 6)

6.—(1) Despite Rules 2(1) and (6), 3(1), 4(1) and (7) and 5(1), the directions which the Court may give under Rule 2(7)(a), 3(3)(a), 4(8)(a) or 5(3)(a) include directions on one or more of the following matters:

...

(f) subject to section 62A of the Evidence Act (Cap. 97),
the giving of evidence through a live video or live
television link;

...

8 The approach to applications to give evidence by live video link under s 62A of the Evidence Act was considered by the Court of Appeal in *Sonica Industries Ltd v Fu Yu Manufacturing Ltd* [1999] 3 SLR(R) 119. In that case, the witnesses were outside Singapore, satisfying the requirement under s 62A(1)(c) of the Evidence Act. The Court of Appeal then considered the relevant matters under s 62(2) to determine whether to grant leave. It assessed the relevance of the evidence of the two witnesses and, in particular, the efforts which had been made to secure the attendance of one witness, who was located in California. The Court of Appeal held that the witness in California could give relevant evidence, that the plaintiffs had no control over the witness and could only rely on his willingness to help them, and that the plaintiffs had made the necessary attempts to secure the witnesses presence in Singapore for the purpose of the trial but without any success. The Court of Appeal therefore granted the application in respect of that witness whilst declining the application in respect of another witness whose evidence was not material to the issues but related merely to credibility.

9 Following the requirements of s 62A of the Evidence Act and the approach of the Court of Appeal, in deciding whether to give leave for evidence to be given by video link, I had to have regard to all the circumstances of the case, including the reasons for the witness being unable to give evidence in Singapore. I also had to consider whether the evidence of the witnesses in this case were material to the issues at hand and the efforts taken to secure their presence in Singapore.

The present case

Quality of the video link

10 As a preliminary point, one consideration common to whether both factual witnesses would be allowed to give evidence by video link was the quality of the video link. The KOP Defendants first raised the possibility of an application for evidence to be given by live video link at the pre-trial Case Management Conference held on 15 December 2017. I gave directions that any application should be made by 19 January 2018 and indicated the need to ensure that the video link between the court and the place where it was proposed the witness would give evidence was of sufficient quality.

11 This led to liaison between the solicitors for the KOP Defendants and the court IT staff, who subsequently tested the video link to the International Financial Centre in Shanghai. The quality of the transmission when Shanghai dialled into Singapore was poor. As a result, arrangements were made for the court IT staff to dial into the video conferencing facility in Shanghai to resolve the connection issue which arose out of the technical limitations of the codec being used.

12 I was therefore satisfied that there was in place a video link of sufficient quality between the court in Singapore and the potential location of the witness in Shanghai. I was also satisfied that the necessary administrative arrangements would be in place, including the presence of solicitors for both parties, access to documents, and the presence of a local interpreter. The requirements of s 62A(2)(b) were therefore met.

13 In the event, the preparation work carried out by the IT staff was reflected in the good quality video link which was in place when Chairman

Yang eventually testified by video link at trial. Although a court interpreter in Singapore carried out the interpretation, it was necessary to have a local interpreter to translate documents in Shanghai and I administered the necessary oath so that she was able to provide those interpretation services.

14 Whilst the administrative and technical facilities and arrangements in Shanghai were satisfactory, this did not mean that leave to give evidence by video link would necessarily be granted. I still needed to consider the reasons for the witnesses being unable to give evidence in Singapore, whether the evidence of the witnesses was relevant, and whether sufficient steps had been taken to secure their presence in Singapore, when balanced with any prejudice suffered by the party cross-examining the witnesses and by the party not being able to adduce evidence from the witness. I now turn to address the application in respect of each witness in turn.

Mr Lee

15 The evidence of Mr Lee was of importance. He is a Singapore citizen based in Shanghai and currently Chairman of Raffles Medical Group there. He made the initial introduction in January 2015 between the first defendant, Ong Chih Ching (“Ms Ong”) and the second defendant, Leny Suparman (“Ms Suparman”), and Chairman Yang of the Shanghai Lu Jia Zui Group (“the LJZ Group”). Mr Lee was also involved in subsequent discussions between them. One of the central issues in this case was the extent to which Ms Ong and Ms Suparman of the KOP Defendants had discussed the possibility of constructing the Winterland project on an alternative site in Shanghai in conjunction with the LJZ Group, prior to the termination of the arrangements with the Plaintiff to construct the project on another site in Shanghai. Mr Lee’s evidence therefore related to an important issue.

16 In relation to Mr Lee's evidence, My Pynn stated in his fifth affidavit that Mr Lee was not an employee of the KOP Defendants and did not travel to Singapore often. He would therefore have to spend three days away from his work at the Raffles Hospital in Shanghai to give evidence.² It was therefore proposed that, for convenience and to save time and costs, he should be permitted to give evidence from Shanghai.

17 In international cases it is frequently the case that witnesses are not located in the place where the hearing takes place. Witnesses therefore have to take time to travel to and from the hearing, as well as take time to give evidence. But it is possible to minimise the time the witnesses have to spend in order to give evidence and therefore minimise any inconvenience by timetabling witnesses, as the parties did in this case.

18 Whilst many meetings in the business world now take place by video conference, as did many of the Case Management Conferences in this case, courts and international tribunals still attach importance to being able to see and assess the demeanour of the witness as part of the assessment of the credibility of the witness's evidence. Equally, there is a degree of disadvantage for a party in carrying out cross-examination of a witness by video link, compared to the witness being present in court. Although video links allow the witness to be seen and heard, there is still a degree of detachment between the court and the witness where evidence is given by video link, which is not there when the witness is present in the court. Whilst that is not of such concern where the witness's evidence does not go to a central issue, it is preferable for the court to have the

² Fifth affidavit of Russell Lee Pynn, 19 January 2018, para 15.

witness physically present where the evidence is of importance to a central issue.

19 In this case, there was no suggestion that Mr Lee was unable to attend to give evidence and his affidavit of evidence-in-chief had been sworn in Singapore. Whilst it might have been inconvenient for Mr Lee to travel from Shanghai to Singapore to give evidence, the same could be said for witnesses in many international cases. But that was the only reason given by the KOP Defendants for Mr Lee's inability to give evidence personally, under s 62A(2)(a) of the Evidence Act. This alone was not sufficient, especially when considered against the fact that it is important that a witness give important evidence in person so that the proceedings are conducted fairly.

20 In the event, Mr Lee travelled to Singapore and gave evidence at the end of a day and was able to fly back to Shanghai that evening. His attendance at the hearing was justified.

Chairman Yang

21 Chairman Yang retired as chairman of the LJZ Group in June 2015, completely relinquishing his responsibilities in November 2015. In his fifth affidavit, Mr Pynn referred to the fact that passports of former government officials and senior office bearers of state owned enterprises such as the LJZ Group are held by the respective Communist Party Organising Departments for a period after their retirement and that permission is required for travel on a case-by-case basis.³ Mr Pynn was unable to exhibit a copy of the relevant regulations but said that Chairman Yang's passport was currently still being

³ Fifth affidavit of Russell Lee Pynn, 19 January 2018, paras 7–9.

held by the Communist Party Organising Department and although he had enquired about the proposed trip to Singapore to give evidence he had been informed that it would not be allowed. In addition, Mr Pynn said he understood that Chairman Yang had a pre-existing medical condition that impeded his travel to Singapore and would be providing a medical certificate.⁴

22 Subsequently in his first affidavit Mr Andrew Lee exhibited a medical certificate from Dr Chong Kiang at Raffles Medical, Shanghai so that Chairman Yang suffered from Parkinson's disease and mobility issues.⁵ He also exhibited the relevant Chinese government notice relating to the limitations on travel abroad for people in Chairman Yang's position.⁶

23 Following the directions given on 29 January 2018, Mr Pynn provided a sixth affidavit in which he set out the steps which were being taken in relation to Chairman Yang and exhibited a letter from the Consul-General of the Republic of Singapore in Shanghai confirming difficulties with obtaining permission from the relevant Chinese authorities for Chairman Yang to attend.⁷ In addition, Chairman Yang explained the steps that he had taken and that it was not possible for him to produce written documentation from the relevant Chinese authorities.

⁴ Fifth affidavit of Russell Lee Pynn, 19 January 2018, paras 11–14.

⁵ First affidavit of Andrew Lee, 24 January 2018, p 6.

⁶ First affidavit of Andrew Lee, 24 January 2018, pp 8–13.

⁷ Sixth affidavit of Russell Lee Pynn, 31 January 2018, pp 9–10.

24 In the light of the reasons put forward for Chairman Yang being unable to give evidence in Singapore, I came to the conclusion that permission should be granted for him to give evidence by video link. Whilst his medical condition, in itself, would have needed further evidence before it would have been sufficient to justify him giving evidence by video link, the fact that he was unable to obtain his passport and permission to travel to Singapore was clearly sufficient.

25 Although the party cross-examining Chairman Yang would suffer a degree of prejudice compared to a situation where Chairman Yang appeared in person (which was relevant under s 62A of the Evidence Act), the alternative was that Chairman Yang would not be able to give evidence. This alternative was clearly unsatisfactory given that Chairman Yang's evidence went to the important issue of whether the LJZ Group had contact with the KOP Defendants between January 2015, when they first met, and May 2015, when the arrangement between the parties was terminated. Although there were the usual limitations compared to Chairman Yang being physically present in court, they did not outweigh the ability of the court to have live evidence from Chairman Yang. I therefore considered it appropriate to grant permission for Chairman Yang to give evidence by video link. I was satisfied that his ability to give evidence by video link meant that no party was unfairly prejudiced.

Conclusion

26 For the above reasons, I allowed the application in respect of Chairman Yang but not in respect of Mr Lee. Costs of this application are reserved until the conclusion of the trial.

Vivian Ramsey
International Judge

Foo Maw Shen, Chu Hua Yi, Ng Sook Zhen, and Michelle Lee Ying Ying (Dentons Rodyk & Davidson LLP) for the plaintiff by original action and the 1st defendant in counterclaim;
Jimmy Yim SC, Chia Voon Jiet, Andrew Lee, and Dierdre Grace Morgan (Drew & Napier LLC) for the 1st, 2nd, 4th, 5th & 6th defendants by original action and the plaintiffs in counterclaim;
Abraham Vergis & Lim Mingguan (Providence Law Asia LLC) for the 3rd defendant by original action;
7th and 8th defendants by original action and 4th and 5th defendants in counterclaim unrepresented and absent.
