IN THE APPELLATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC(A) 40

Civil Appeal No 59 of 2022

Between

Ee Hoong Liang

… *Appellant*

And

1. Panircelvan s/o Kaliannan
2. Teo Khim Ho
3. Koh Hwee Ben Erin
4. Ng Yim Har
5. Chang Mun Kum Christina
6. Tan Hock Seng
7. Roger Teo Kok Wei
8. Tong Lay Yeen Giovanna
9. Koh Thong Juay
10. Tong Siew Geok

… *Respondents*

In the matter of Suit No 858 of 2021

Between

1. Panircelvan s/o Kaliannan
2. Teo Khim Ho
3. Koh Hwee Ben Erin
4. Ng Yim Har
5. Chang Mun Kum Christina
6. Tan Hock Seng
7. Roger Teo Kok Wei
8. Tong Lay Yeen Giovanna
9. Koh Thong Juay

10. Tong Siew Geok

… *Plaintiffs*

And

Ee Hoong Liang

… *Defendant*

EX TEMPORE **JUDGMENT**

[Civil Procedure — Foreign judgments]

Version No 1: 30 Nov 2022 (17:05 hrs)

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Ee Hoong Liang
v
Panircelvan s/o Kaliannan and others

[2022] SGHC(A) 40

General Division of the High Court (Appellate Division) — Civil Appeal No 59 of 2022
Belinda Ang Saw Ean JCA and Kannan Ramesh JAD
30 November 2022

30 November 2022

Kannan Ramesh JAD (delivering the judgment of the court *ex tempore*):

1 AD/CA 59/2022 concerns a judgment ("the US Judgment") obtained against the Appellant in proceedings in the US ("the US proceedings") brought by the Respondents. The Respondents commenced the US proceedings in the North Dakota District Court (the "US District Court") to recover losses arising from their investments with North Dakota Developments LLC ("NDD"), a company incorporated in North Dakota. The Appellant allegedly acted as an agent for the sale and marketing of the investments by NDD. The Respondents filed a Motion for Summary Judgment (the "Summary Judgment Motion") in the US proceedings. The US District Court allowed the Summary Judgment Motion and granted the US Judgment, ordering the Appellant to pay a sum of US$852,638.81 and interest to the Respondents.

2 Thereafter, the Respondents commenced a common law action in the General Division of the High Court to enforce the US Judgment and pursuant thereto, filed an application for summary judgment. The Assistant Registrar allowed the application in respect of the outstanding sum under the US Judgment. The Appellant's appeal before the Judge below was dismissed. The Judge issued his Grounds of Decision in *Panircelvan s/o Kaliannan and others v Ee Hoong Liang* [2022] SGHC 190 ("the GD"). The appeal before us seeks to set aside the summary judgment on two substantive grounds. Both relate to whether the US Judgment should be recognised and enforced here. The grounds are:

(a) **Fraud**: the Appellant contends that the US Judgment was tainted by fraud as a result of non-disclosure by the Respondents in the US proceedings of settlement payouts they received ("the Settlement Payouts") pursuant to a class action suit ("the Class Action Suit") commenced, *inter alios,* by the Appellant and Respondents in the US against NDD's attorneys, Pearce & Durick.

(b) **Breach of natural justice**: the Appellant contends that the US Court of Appeal for the Eighth Circuit ("the US Court of Appeal"), on appeal from the US District Court, failed to consider evidence that the Appellant purportedly raised in dismissing the appeal.

3 We do not find the grounds raised by the Appellant meritorious and dismiss the appeal in its entirety. We address the grounds in turn. But before we do that, a primary question arises in relation to the first ground raised by the Appellant. And that is whether the Appellant has demonstrated that disclosure of the Settlement Payouts in the US proceedings was necessary. We consider that question first.

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The Primary Question

4 The Appellant contends that there was non-disclosure of the Settlement Payouts in the US proceedings, and that such non-disclosure was dishonest. If disclosed, credit would have been given in the US proceedings for the Settlement Payouts resulting in judgment for a lesser sum than that awarded in the US Judgment.

5 The Respondents accept that the Settlement Payouts were not disclosed in the US proceedings. However, they contend that there was no need for disclosure as the causes of action and damages/loss in the Class Action Suit and the US proceedings were different. Consequently, under the applicable law of the claim which was North Dakota law, the Respondents was entitled to the full sum awarded in the US Judgment.

6 The Judge was of the view that the Respondents did not adduce any evidence to explain their failure to disclose the Settlement Payouts. He observed that counsel for the Respondents was only able to refer to the assertion in the 1st affidavit of the 1st Respondent filed in the application for summary judgment that the US Judgment was based on all amounts that the Respondents were entitled to under the law applicable to the US proceedings *ie* North Dakota law (see [18] of the GD). Accordingly, the Judge proceeded on the assumption that there was dishonest intention behind the non-disclosure, as stated in [19] of the GD.

7 We have reservations with the Judge's view that the Respondents had failed to provide any evidence to explain their non-disclosure. The Judge's view assumes that proving fraud is the Respondents' burden. We respectfully do not agree. This is a burden of the Appellant, as the party alleging fraud by reason of the non-disclosure of the Settlement Payouts in the US proceedings. In order to

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discharge this burden and show cause in the application for summary judgment, the Appellant must first show that disclosure of the Settlement Payouts was required in the US proceedings. This turns on whether the causes of action and loss/damages in the Class Action Suit and the US proceedings were the same or similar, thereby necessitating disclosure. Thus, the Appellant ought to have adduced expert evidence on North Dakota law in the application for summary judgment that points to this. Counsel for the Appellant accepted during oral submissions that this was not done. Merely asserting that there was dishonesty because the Settlement Payouts were not disclosed in the US proceedings is insufficient as it assumes the very fact that the Appellant must establish *ie*, that disclosure was required in the first place.

8 Accordingly, the correct view is that the Appellant has failed to discharge his burden of showing dishonesty. It was therefore not necessary for the Judge to have proceeded on the assumption that there was dishonesty because of the Respondents' failure to adduce evidence to explain their non-disclosure of the Settlement Payouts in the US proceedings. It follows from this that the second requirement that the fraud was material to the outcome in the US proceedings did not arise. Materiality would again turn on whether the Settlement Payouts were relevant to the claim in the US proceedings. The first ground raised by the Appellant therefore fails *in limine* on this basis alone.

Fraud

9 As the Appellant has made submissions on the basis that the non-disclosure was dishonest and material at length and the Respondents have duly replied with the same degree of rigor, we shall despite our decision on the primary question, proceed to consider them. The Appellant's submissions turn on whether the dishonesty is properly characterised as either intrinsic or

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extrinsic fraud. If either basis is properly established on the facts, the US Judgment should not be recognised and enforced here.

10 The salient authorities on the recognition and enforcement of foreign judgments where fraud is alleged are the judgments of the Court of Appeal in *Hong Pian Tee v Les Placements Germain Gauthier Inc* [2002] 1 SLR(R) 515 ("*Hong Pian Tee*") and *Ong Ham Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 ("*Borneo Ventures*"). These authorities recognise the dichotomy between intrinsic and extrinsic fraud. However, notwithstanding these authorities, the Appellant argues that this court should follow the judgment of the Court of Appeal in *Façade Solution Pte Ltd v Mero Asia Pacific Pte Ltd* [2020] 2 SLR 1125 ("*Façade"*). We therefore first address the relevance of the decision in *Façade.*

11 We are of the view that *Façade* is not relevant for the purpose of the appeal. *Façade* concerned the setting aside of a domestic judgment, an adjudication award under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed), and not the enforcement of a foreign judgment by a common law action, which is what this appeal is about. A common law action on a foreign judgment raises question of *recognition and enforcement.* Comity is a pertinent consideration in this context: see *Hong Pian Tee* at [30]. As noted in *Hong Pian Tee* at [28], "the enforcement forum is not an appellate tribunal *vis-à-vis* the foreign judgment." Thus, where the alleged fraud relates to the merits *ie, intrinsic fraud,* the grounds upon which enforcement is not permissible are circumscribed. Such considerations do not apply in relation to the setting aside of a *domestic judgment* as the court has original, supervisory or appellate jurisdiction, as the case be, over the judgment in question.

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12 On the other hand, where the fraud relates to the jurisdiction of the foreign court *ie, extrinsic fraud*, the considerations are quite different. In such a situation, there is no question of the enforcement court sitting in an appellate capacity over the foreign judgment as the foreign court was not properly seised of jurisdiction by reason of the fraud.

13 The other authorities cited by the Appellant, for instance, *Takhar v Gracefield Developments Ltd* and others [2019] UKSC 13 are also of no assistance as they similarly deal with the enforcement of a domestic judgment.

14 Accordingly, the relevant authorities for the purpose of the appeal are *Hong Pian Tee* and *Borneo Ventures.*

Intrinsic or extrinsic fraud

15 Much of the debate in the appeal turns on whether the fraud was intrinsic or extrinsic. If the fraud *ie* the non-disclosure of the Settlement Payouts was intrinsic, the Appellant must show that evidence concerning the fraud could not have come to light with reasonable diligence on his part. On the other hand, if the fraud was extrinsic, this requirement does not arise. The Appellant contends that the fraud is extrinsic.

16 It is evident that the fraud is intrinsic. The non-disclosure of the Settlement Payouts does not go to the jurisdiction of the US District Court. Instead, it goes to the merits as the Appellant's argument is that the US Judgment should have been entered for a lesser sum than that awarded to take into account the Settlement Payouts. Extrinsic fraud would typically apply to bribery of solicitors, collusion and perjury during the discovery process, typifying situations where the counterparty did not have an opportunity to examine and challenge the fact that is alleged to be fraudulent. On the other

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hand, intrinsic fraud applies where such opportunity exists, for example, where false statements are made at trial: see *Borneo Ventures* at [49].

17 The Appellant latches on to the fact that there was no trial here – as the US Judgment was obtained following the Summary Judgment Motion – to argue that this is a case of extrinsic fraud. The Appellant analogises the Summary Judgment Motion to a default judgment citing, *inter alia*, *Eleven Gesellschaft Zur Entwicklung Und Vermarktung Von Netzwerktechonologien MBH v Boxsentry Pte Ltd* [2014] SGHC 210 ("*Boxsentry*") in support. In *Boxsentry*, the court found that the failure to disclose background facts in a default judgment application in proceedings in Germany was extrinsic rather than intrinsic fraud because of the lack of contest. However, unlike the default judgment application in *Boxsentry*, the Summary Judgment Motion was an application that *could have been contested* by the Appellant. It is this fact that is key. A contest need not always manifest itself in the shape of a trial. The Appellant had the opportunity to contest the Summary Judgment Motion and challenge the amount claimed but chose not to do so. If he had done so, the non-disclosure of the Settlement Payouts would have come to light and considered by the US District Court. Thus, *Boxsentry* does not support the Appellant's contention that this is a case of extrinsic fraud.

18 The Appellant also submits that the Respondents were well aware that he did not respond to the US proceedings for close to one year prior to the Summary Judgment Motion. This made the Summary Judgment Motion akin to a default judgment application. The analogy that the Appellant draws is clearly and wholly inappropriate. That aside, it must be pointed out that after the receipt of the Summary Judgment Motion and the supplement to the Motion, the Appellant wrote to the US District Court twice to ask for an extension of time to file his response. He was asked by the court to file a Motion for an Extension

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of Time, and he intimated by email to the US District Court on 2 October 2018 that he would do so within three weeks. However, no motion was filed. More than two months later, the US Judgment was entered. Thus, it is evident that while the Appellant initially intended to contest the Summary Judgment Motion, he subsequently failed to do so. The failure was of his own making.

19 Thus, the appeal concerns intrinsic fraud. This raises the question of whether the non-disclosure of the Settlement Payouts could have come to light if the Appellant had exercised reasonable diligence. We turn to this issue next.

Reasonable diligence

20 The Judge found that the Appellant knew that the Respondents:

(a) were party to the Class Action Suit (the GD at [47(a)]); and

(b) would have received Settlement Payouts thereunder, though he might not have known the specific amounts (the GD at [47(c)]).

21 On appeal, these findings are accepted by the Appellant. The primary point made by the Appellant is that it was not apparent from the claim in the US proceedings whether the Respondents had set off the Settlement Payouts. This was because the claim was not properly particularised. The Appellant only discovered that the Respondents did not set off when the action below was commenced.

22 The Appellant's submission is without merit for two reasons. First, the test is not whether the Appellant had actual knowledge of the non-disclosure. Instead, it is whether he could have uncovered the non-disclosure with reasonable diligence. As the Appellant knew that the Settlement Payouts had been received by the Respondents, had he properly engaged in the US

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proceedings, he would have been able to uncover the non-disclosure. He chose not to do so after his Motion to Dismiss the Claim filed in the US proceedings was denied. If he had continued to participate in the US proceedings, he would have been able to uncover the non-disclosure.

23 Second, there is no real difference in the manner in which the claim was presented in the US proceedings from that in the Statement of Claim (Amendment No. 1) in the action below. Counsel for the Appellant accepted this during oral submissions. The Statement of Claim (Amendment No. 1) similarly does not plead a set-off. Thus, it is not readily apparent how the Appellant was able to realise the non-disclosure in the action below, and yet was not able to do so in the US proceedings.

24 It is therefore clear that the non-disclosure of the Settlement Payouts in the US proceedings could have been uncovered with reasonable diligence.

25 For the reasons above, the first ground of appeal is without merit. We turn to the second ground concerning an alleged breach of natural justice.

Breach of Natural Justice

26 The essence of the complaint is that the US Court of Appeal failed to consider key issues and evidence that the Appellant had raised. The information that was allegedly disregarded by the US Court of Appeal was contained in the Appellant's Answer, which appears to be similar to a Defence, and the Motion to Dismiss the Claim. The US Court of Appeal was of the opinion that the US District Court was correct in not relying on these documents because they were unsworn. The US Court of Appeal accepted that the US District Court was correct in relying on the Deemed Admissions of the Appellant. The Deemed Admissions were a result of a Request for Admissions that the Respondents'

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US solicitors had served on the Appellant on 26 January 2018, to which he had not responded. The Appellant asserts that he did not receive the Request for Admissions. Apart from the fact that this is not credible as the Request for Admissions was sent to the same SingNet Email Address which the Appellant had used to communicate with the US District Court, two further points are pertinent. First, the Appellant did not assert before the US Court of Appeal or the US Supreme Court (see below at [31]) that he did not receive the Request for Admissions and therefore it was incorrect for the court to rely on the Deemed Admissions. Second, and more importantly, the Request for Admissions and the Deemed Admissions were part of the papers filed in support of the Summary Judgment Motion and both were sent together to the same SingNet Email Address. There is no dispute that those papers were received by the Appellant. As such, the Appellant could have taken issue with the Deemed Admissions if he had challenged the Summary Judgment Motion. He chose not to do so.

27 To address the point that the relevant documents were not sworn, the Appellant points to the fact that he had subsequently filed sworn declarations that contained the same information. He asserts that the sworn declarations were before the US Court of Appeal.

28 However, it is unclear whether the sworn declarations were indeed before the US Court of Appeal. The sworn declarations were filed in support of the Appellant's Motion for Relief in the US District Court. The Motion was filed following the grant of the US Judgment to essentially seek a stay of enforcement, and was subsequently dismissed. There was no appeal from the dismissal. Thus, it does not seem that the sworn declarations were part of the papers before the US Court of Appeal in the appeal from the US District Court's decision to award the US Judgment.

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29 That aside, the more fundamental issue with the Appellant's argument is its challenge on the merits of the US Court of Appeal's decision to dismiss the appeal. The Appellant relies on cases concerning the setting aside of arbitral awards for breach of natural justice. Such reliance is misplaced. A court determining a challenge to an arbitral award does so in exercise of supervisory jurisdiction conferred by relevant statutes. On the other hand, in a common law action on a foreign judgment, the enforcement court does not exercise supervisory jurisdiction over the judgment of the foreign court.

30 Ultimately, where recognition and enforcement of a foreign judgment is resisted on the grounds of natural justice, the key question is whether due process was accorded to the Appellant in the US proceedings. As noted by the Court of Appeal in *Paulus Tannos v Heince Tombak Simanjuntak and others and another appeal* [2020] SGCA 85, natural justice and due process concerns whether the Appellant was given notice of and the opportunity to be heard in the US proceedings. There is no question that was indeed the case.

31 The Appellant's true complaint is that the US Court of Appeal should have had regard to the sworn declarations in determining the appeal. The US Court of Appeal saw it differently. To take issue with that decision is to mount a challenge on the merits. This is impermissible. We should add that the Appellant had also filed a petition to the US Supreme Court for an order for *certiorari* to quash the decision of the US Court of Appeal. The petition was dismissed by the US Supreme Court. If there were indeed due process issues, that would surely have been raised before the US Supreme Court. Indeed, the point about the US Court of Appeal's refusal to consider the sworn declarations and reliance on the Deemed Admissions were raised in the petition. That the US Supreme Court dismissed the petition speaks to there being no breach of natural justice on the part of the US Court of Appeal.

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32 Accordingly, there is also no merit in the second ground of appeal raised by the Appellant.

Conclusion

33 We therefore dismiss the appeal in its entirety. The Respondents submit costs of $25,000 and reasonable disbursements in the event the appeal is dismissed, while the Appellant submits costs of $18,000 and reasonable disbursements as regards the appeal if it is allowed. We award costs of the appeal to the Respondents fixed at $25,000 all in.

34 The usual consequential orders apply.

Belinda Ang Saw Ean
Justice of the Court of Appeal

Kannan Ramesh
Judge of the Appellate Division

Tan Shangwei and Dorcas Ong (WongPartnership LLP) for the Appellant;
Sim Chong and Senthil Dayalan (Sim Chong LLC) for the Respondents.

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