

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
VIRGIN ISLANDS
COMMERCIAL DIVISION**

CLAIM NO: BVIHCM (COM) 65 of 2012

In the matter of

Nasbulk Limited

And in the matter of

The British Virgin Islands Business Companies Act 2004

And in the matter of

The Insolvency Act 2003

Applicants:

Gao Chunhe

Respondents:

- (1) Nanjing Ocean (BVI) Co. Limited**
- (2) Mou Ling**
- (3) Xu Chuanguang**
- (4) Nasbulk Limited**

Appearances: Mr Jonathan Ward for the Applicant, Nanjing Ocean (BVI) Co. Ltd
Miss Rosalind Nicholson and Mr Richard Evans for the Respondent, Gao Chunhe

2013: 23 April, 1 May

JUDGMENT

(Claim brought by Chinese national for relief under section 184I, Business Companies Act, 2004 ('section 184I') – first and fourth defendants served in BVI as of right – first defendant seeking stay of proceedings on *forum non conveniens* grounds – first defendant relying on connections with PRC and with certain PRC jurisdiction and choice of law clauses in agreements entered into by the claimant – whether another available forum – application of the *Spiliada* principles to claims under section 184I considered)

- [1] This is an application made by the first defendant, Nanjing Ocean (BVI) Co. Ltd ('Nanjing'), for a stay of these proceedings on the grounds that the People's Republic of China ('PRC') is clearly or distinctly the most appropriate forum.
- [2] The proceedings are brought under section 184I of the Business Companies Act, 2004 ('section 184I'). The nominal Claimant is a Chinese national called Gao Chunhe ('Mr Gao'). He is the registered owner of 30% of the issued shares in the fourth Defendant

('Nasbulk'). Nasbulk is a BVI registered company. The other 70% of Nasbulk's shares are held by Nanjing. Each of Nanjing and Nasbulk has been served here as of right. By agreement between the parties, the proceedings against Nasbulk have been stayed to abide the outcome of Nanjing's application. I describe Mr Gao as the nominal Claimant because in a Memorandum dated 13 February 2009, a translation of which is in evidence, Mr Gao is described as the nominal investor into Nasbulk for Mr Hu Quingchun ('Mr Hu'). The Memorandum is signed by Mr Hu, who alone gives evidence in opposition to the present application. It is plain that the party in interest in these proceedings is Mr Hu.

- [3] The statement of claim, issued on 5 July 2012, asserts, and it is not in dispute, that Nanjing holds its shares in Nasbulk on behalf of its parent, a PRC entity referred to as Nasco PRC. The pleading alleges an arrangement reached in late 2008/early 2009 between Mou Ling ('Mr Mou') the intended second Defendant to the proceedings, on the one hand, and Mr Hu, on the other, pursuant to which Nasco PRC and Mr Hu would enter into a joint venture between themselves for the carrying on of a shipping business. The venture was to be carried on through two companies, one, to be incorporated in Singapore, to be the management company and the other, to be incorporated in the BVI, to be the ship operating company, both to be managed by Mr Hu from Singapore. In the events which have happened, the Singaporean company is Nasco Singapore Pte Ltd ('Nasco Singapore') and the BVI company is Nasbulk.
- [4] The terms of the arrangement are said to have been reflected in a series of agreements and memoranda dated, respectively, 6 and 19 December 2008. The pleading alleges that these agreements were entered into between a company called Nanjing Yuanyang Shipping Co., Ltd, defined in the statement of claim as 'Nasco HK'¹ and Mr Hu.
- [5] The first, a joint venture or joint investment agreement, is dated 6 December 2008 and appears to have been made between a PRC company (presumably Nasco PRC) and Mr Hu. It provides for the setting up of Nasco (Singapore) with Nasbulk to act as the operating company. It makes provision for the management and control of the joint venture and provides that any unresolved matters are to be resolved through negotiation, failing which, the parties agree to apply PRC laws and submit to the jurisdiction of the place where the contract was entered into, stated to have been Nanjing, PRC.
- [6] The second, dated 19 December 2008 is said to have been entered into between 'Nanyuan Shipping Co Ltd (Chinese)' and Mr Hu. It provides that the parties are to engage an incorporation agent for the purposes of setting up the Singapore and BVI

¹ this appears to have been an error. There does not seem in the event to have been any Hong Kong registered company involved in these arrangements and it is plain that the original Joint Venture Agreement was entered into between Nasco PRC and Mr Hu. A draft memorandum and articles for Nasco Singapore does, however, refer to an entity described as 'Nasco (Hong Kong) Co Ltd'

companies and for the constitutional documents of each to be in a form signed or initialed by the parties. Chinese laws are to apply to this agreement.

- [7] The third document relied on in paragraph 5 of the statement of claim is an outline memorandum and articles of association for each of the proposed Singaporean and BVI joint venture companies. Clause 42 of the outline provides (among other things) that performance and dispute resolution under the articles of association shall be governed by PRC laws and/or the laws of (in Nasbulk's case) the BVI.
- [8] The pleading asserts that (presumably after 19 December 2008, although no date is given) Mr Hu invited Mr Gao, his father in law, to invest in Nasbulk and that this was accepted by Mr Mou. Mr Gao agreed to do so, it is said, on condition that Mr Hu would be permitted to manage Nasbulk's day to day affairs and that he should be one of two signatories on Nasbulk's bank account.
- [9] It is pleaded that Nasbulk was incorporated here in the BVI on 2 January 2009 and Nasco Singapore² in Singapore three days later. Nanjing was incorporated on 17 January 2009 and the shares in Nasbulk were then allotted in the proportions which I have already mentioned. A management agreement was entered into between Nasco Singapore and Nasbulk on 10 January 2010 under which Nasbulk agreed to pay Nasco Singapore a management fee of \$70,000³ a month.
- [10] It is then pleaded that in April 2011 Mr Mou and another asked Mr Hu to arrange for Nasco Singapore to enter into time charters in respect of two vessels owned, indirectly, by Nasco PRC. Nasbulk's bank account is said to have been 'lent' to Nasco Singapore for the purpose of receiving hire due (indirectly) to Nasco PRC under the charterparties and freight payable to Nasco Singapore under sub-charters entered into by that company.⁴ In the second half of 2011, it is said, the market turned so that the venture became unprofitable for Nasco Singapore with the result that some \$750,000 was lost from Nasbulk's 'lent' bank account for which it has not been reimbursed. So, it is pleaded, Nasco PRC has benefited at the expense of Nasbulk. In addition, until May 2012, Nasbulk continued paying Nasco Singapore the monthly \$70,000 under the management agreement. Nasbulk's business operations are said to have terminated in April 2012. In June 2012 Mr Hu is said to have discovered that Nasco PRC had instructed the sub-charterer of one of the two vessels to pay hire direct to Nasco Singapore, but 'proposed' that the bunker expenses of the vessel would continue to be paid out of Nasbulk's 'lent' bank account. Whether those instructions and proposals have been put into effect is not pleaded.

² Mr Hu has a 30% interest in Nasco Singapore

³ the identity of the currency is not stated

⁴ Mr Mou exhibits to his affidavit parts of two time charter parties which appear to be incomplete and only one of which has a signature page but which specify Nasbulk, rather than Nasco Singapore, as the charterer

- [11] The statement of claim alleges that Mr Mou has failed to prevent continued use of Nasbulk's bank account in the manner which I have described and expresses the fear that it will continue to be used as hitherto to the detriment of Nasbulk. It is further alleged that Mr Hu has been removed as general manager of Nasco Singapore and as a signatory to its bank account and a Mr Lu appointed in his stead. It is feared, so it is pleaded, that Nanjing will take similar steps and remove Mr Hu as joint signatory of Nasbulk's bank account so that it may continue to use it, so it is said, for the benefit of Nasco PRC. Similar steps are said to have been taken in relation to another company where there had been a joint venture arrangement. Despite Mr Hu's opposition, a Mr Xu has been appointed as an additional director of Nasbulk.
- [12] The statement of claim concludes that Nasbulk has ceased to carry on business and that the purposes for which it was incorporated are incapable of being fulfilled. The events which have happened are said to engage section 184I and Mr Gao asks that his shares be bought out; alternatively, that Nasbulk be wound up; in the further alternative, Mr Gao asks for permission to bring a derivative claim for an account or for breach of fiduciary duty. The identity of the proposed defendant to any such proceedings is not specified. There are other heads of relief which I do not need to set out.
- [13] I should add that on 4 January 2012 a Supplementary Agreement was entered into between 'Nasco' and Mr Hu whereby it was agreed, among other things, that matters not otherwise specifically provided for should be resolved through negotiations, failing which the parties agreed to apply Chinese law and further agreed to the jurisdiction of the place where the contract was signed, being Nanjing.
- [14] According to the well known authorities on so-called *forum conveniens* stays, the first question for the Court is whether factors exist in this case which point in the direction of another forum. Such factors will include questions of convenience and expense but factors such as the law governing the matter and the places where the parties reside or carry on business will assist the Court in deciding what is the natural forum, being that with which the claim has most real or substantial connection.
- [15] The various joint venture documents which I have mentioned above were made in Mandarin and executed in the PRC. I understand that those in Mr Mou's camp do not speak English and would need to give evidence through an interpreter, although Mr Hu speaks and writes fluent English. Each of the individuals involved is, as I understand, a Chinese national, although Mr Hu appears to be resident in Singapore, where he swore his evidence on the application and which he gave as his address for the purposes of the 2008 Joint Venture Agreement. The underlying business with which the present dispute is concerned is – or has been – managed from Singapore and I have seen no evidence that Nasbulk itself has any particular connection with the PRC. Apart from the place of

its incorporation, its closest connection appears to be with Singapore. It is obvious that attendance at trial here will involve expense and so will the provision of interpreters.

[16] The Joint Venture Agreement of 6 December 2008 provided for unresolved matters to be resolved under the laws of the PRC and contained a non-exclusive submission to the jurisdiction of Nanjing. Chinese law applied to the memorandum of 19 December 2008. The 'General Outline' of 19 December 2008 envisaged that Nasbulk's articles of association would contain provision for dispute resolution to take place under PRC or BVI law, although no such provision seems to have found its way into the Articles of Association as adopted. A Memorandum of 13 February 2009 dealing with the incorporation of Nasbulk was expressed to be governed by the law of the PRC and of the BVI.⁵ The Supplementary Agreement of 4 January 2012 provided for matters which had not been specifically dealt with to be dealt with under Chinese law and contained what in my judgment is a non exclusive submission to the jurisdiction of Nanjing – i.e. to the jurisdiction of the Courts of the PRC.

[17] It seems to me that these are powerful pointers to a desire between the signatories to these agreements, of which Mr Hu is one, for dispute resolution to take place in the PRC. Subject to what I have to say later, it seems to me that the 'natural' forum, on the basis of this evidence, for the resolution of disputes between them arising out of the joint venture agreements is the Court system of the PRC. On instructions, Mr Ward offered an undertaking that the parties whom he represents (Nanjing and Nasbulk) would submit to the jurisdiction of the Court of the PRC for the purposes of the resolution of the issues between Mr Hu and Mr Mou. On the **Spiliada**⁶ line of authority, that means that the PRC Court system is available to Mr Hu (or Mr Gao, to the extent that he has any interest in the matter which is not identical to that of Mr Hu).

[18] The difficulty, for present purposes, with the **Spiliada**, which is the source of modern learning on *forum non conveniens*, and with the authorities which follow it, is that they are decided in the context (almost invariably)⁷ of straightforward contractual or tortious claims, in respect of which, while there may be procedural benefits and disadvantages as between different jurisdictions, there is no fundamental structural difference between them for the purposes of dealing with such claims. In the present case, what is being invoked is a specific remedy given by the legislature here to members of companies which are incorporated here and which is not, as such, available otherwise than in this jurisdiction. It seems to me that this feature puts this case outside the **Spiliada** line of authority. Lord Goff, in the **Spiliada**, was giving guidance as to the nature of the inquiry

⁵ the Memorandum refers to the laws of the place of registration, but that must have been a reference to the laws of the BVI

⁶ **Spiliada Maritime Corporation v Cansulex Ltd** [1987] 1 AC 460

⁷ an exception is **Re Harrods (Buenos Aires) Ltd** [1992] Ch 72, which, for other reasons, is no longer good law in England

and as to the tests to be applied in conducting it, in a case where the parties would, for all practical purposes, obtain the same judicial 'deal' (if I can be excused for using that expression) wherever it was tried. Hence the stress on expense, language, etc, rather than cause of action. Lord Goff was not considering a case of this sort, where a remedy unknown to the common law (or, so far as I am aware, to civilian law) has been made available exclusively for the benefit of the members of BVI incorporated companies and exclusively with - in this jurisdiction.

[19] I accept that if I had evidence (which I do not) that on the allegations presently advanced by Mr Hu there is available to him in the Courts of the PRC a remedy which for all practical purposes is identical to that offered to a successful claimant in this jurisdiction by section 184I, then there might be a case for considering the grant of a stay. In my judgment, however, it would still be a very serious matter for this Court to drive away a claimant who wished to make a case under a provision of a BVI statute which had been enacted for his potential benefit. To the extent that the inquiry is relevant at all in a case of this sort, it seems to me impossible on the present facts to reach the conclusion that any jurisdiction other than the BVI is clearly or distinctively the most appropriate forum for a trial of this section 184I claim.

[20] Mr Ward submits that the facts arising in this case are a part only of the web of arrangements which bound the parties and that if it is tried here without the overall background being properly explored and considered there is a danger that the wrong decision could be reached. The answer to that, it seems to me, is that it will be for the parties and their advisers to ensure that at trial the Court has before it all the evidence needed for a proper resolution of the disputed claim.

Conclusion

[21] For the reasons given above, this application fails.



Commercial Court Judge
1 May 2013