

Univel Development Company (Suing as a firm)

AND

Wong Thiam Meng

**(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 2 of 2006)**

Cons, P.; Power and Mortimer, J.JA.

Date of Handing Down Judgment: 6th December, 2006.

Leave under Order 6 Rule 6 (1) required to issue writ for service abroad. The claim in the writ must be for a claim under Order 11 Rule 1. The writ for which leave was granted under order 11 Rule 1 (h) made no claim in tort. Submissions that conversion can relate to a credit in a bank account or for breach of trust rejected.

Mr Siva Sankaran and Mr Robin Cheok (M/S Cheok Sankaran Halim) for the Appellant.

Mr Daljit Singh Sandhu (M/S Sandhu & Co.) for the Respondent.

Mortimer, J.A.:

Background

The Plaintiff is a Brunei company. Lee Hon Keung (Michael Lee) is a registered proprietor of the Plaintiff and has been since the firm was established in August 1993. His sister Lee Pik Nyuk became a registered proprietor on 30 July 2003, two weeks before the issue of the Writ in this matter.

Michael Lee and his sister are related to the Defendant. The Defendant has had a business relationship with Michael Lee for some years.

Although the Defendant was resident in Brunei until early 1998, he is not a Brunei citizen and he is now resident abroad in Malaysia and has been since before the start of these proceedings.

By a writ dated 16 August 2003 the Plaintiff took proceedings against the Defendant concerning a transfer of B\$9.5m from its bank account held at HSBC from January 1998 to May 1998.

Leave to issue the Writ and the Rules

As the Defendant was resident abroad, it was necessary for the Plaintiff to obtain leave before issuing the writ, notice of which was to be served abroad.

RSC Order 6 Rule 6(1) provides:

“No Writ notice of which is to be served out of the jurisdiction shall be issued without the leave of the Court.”

Leave of the Court is required because its jurisdiction is territorial. In the absence of leave its jurisdiction does not extend over persons living abroad who must be served abroad with the proceedings.

The Court may grant leave in the limited circumstances set out in RSC Order 11 Rule 1. For the purposes of this Appeal, the relevant part is Order 11 Rule 1(h) which provides:

- “1. service of a notice of Writ out of the jurisdiction is permissible with the leave of the Court in the following cases, that is to say –*
- (a) ...*
- (h) If the action begun by the Writ is founded on a tort committed within the jurisdiction;”*

Order 11 Rule 4(1) lays down the procedure:

- “(1) An application for the grant of leave ... must be supported by an Affidavit ... stating the grounds on which the application is made and that in the Deponent’s belief the Plaintiff has a good cause of action, and showing in what place or country the Defendant is, or probably may be found.*
- (2) No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order.”*

The Order for Leave

The circumstances in which leave to issue the writ and serve it out of the jurisdiction was applied for and granted in this case are not clear. From the documents before us, it seems that the writ was issued on 16 August 2003 but leave was not granted until 4 September 2003. The Registrar’s order provides that, *“Leave is hereby granted to abridge time to apply and to issue and serve out of jurisdiction, the Writ of Summons...”*

As the writ had already been issued there was no time which required abridging so this Order may not be effective. However, it suffices to say that if we hold for the appellant on the central issue of this appeal, we shall make such an order as will cure any irregularity at the leave stage. Nevertheless we must make it clear that as the

granting of leave goes to the jurisdiction of the Court, the requirements in the Rules should be meticulously followed.

Subsequent Proceedings

We approach the appeal therefore on the basis that the Registrar gave the necessary leave to issue the writ on 4 September 2003.

Following its issue between September 2003 and October 2004, there were a number of further ex-parte interlocutory proceedings concerning service and substituted service abroad which we can leave aside for the time being.

By 21 October 2004 however, the Defendant had become aware of the proceedings and he applied for and obtained an Order for Conditional Appearance. Shortly thereafter he applied to the Court to set aside the leave to issue the writ granted on 4 September 2003, to set aside the writ itself and for other orders associated with service.

His application was heard on 6 April 2005. The Registrar refused the application to set aside the leave and the writ. It is with this order that we are concerned. The Defendant appealed the Registrar's order to the Judge in Chambers. On 9 April 2005 Barnett J heard the appeal and held that the writ did not comply with RSC Order 11 Rule 1. He set aside both the leave and the writ.

This Appeal

The Plaintiff appeals against the judge's Order. The central issue in the appeal is whether the claim in the writ issued on 16 August 2003 was in tort under RSC Order 11 Rule 1(h) so that it was "*proper for service out of the jurisdiction*" and therefore one in respect of which it was open to the court to grant the necessary leave.

On this point the appeal turns.

In order to found the necessary jurisdiction, it must be clear from the endorsement on the writ that the claim against the Defendant is for a tort committed within the jurisdiction. It is not sufficient simply to allege this in the accompanying affidavit. Mr Sankaran who appears with Mr Robin Cheok for the Appellant Plaintiff accepts this proposition.

We agree and add that in circumstances where leave has been given under Order 6 Rule 6 (1) the scope of the writ cannot be extended by the later service of pleadings or by allegations in later affidavits. No leave has been sought to issue a concurrent writ making further claims for service abroad. The case stands or falls on the claim in this writ.

The Endorsement on the Writ

We turn to consider the precise words of the endorsement to the writ. The relevant parts we quote in full:-

Endorsement of claim

The Plaintiff's claim against the Defendant is for the following:

1. An account of the Plaintiff's bank account number 006-122188-001 at the HSBC from January 1998 to May 1998;
2. An Order for all necessary and proper enquiries and Directions for the taking of such account;
3. An Order for the payment by the Defendant to the Plaintiff of the amount found to be due to the Plaintiff on the taking of such account;
4. An Order that the sum of Brunei Dollars nine million and one hundred thousand (B\$9,100,000.00) only be returned to the Plaintiff;
5. An Order that it be traced and disclosed by the Defendant or anyone else the signatories and holders of the HSBC account number 006-088868-020 to which the said sum of Brunei Dollars nine million and one hundred thousand (B\$9,100,000.00) only was paid into.

Were it necessary to consider the accompanying Affidavit of Mr Robin Cheok, the only possibly relevant passage is paragraph 3 which reads:

3. I verily believe that the Plaintiff has a good cause of action against the above named intended Defendant, who was entrusted with the conduct, inter alia, of an account of the Plaintiff's bank account number 006-088868-020 at the HSBC from January 1998 to May 1998. The Plaintiff has recently discovered that the sum of Brunei Dollars nine million and one hundred thousand (B\$9,100,000.00) was transferred into another account in HSBC without the Plaintiff's knowledge and consent.

The Appellant's Submissions

Mr Sankaran contends that the tort of conversion of B\$9.1m is clearly disclosed in the endorsement on the writ and therefore the judge was in error.

We note in passing that when he appeared before Barnett J he was pressed to say what tort was the subject of the claim in the writ. He was given time to consider his answer. Having thought about the matter Mr Sankaran abandoned his reliance upon conversion. In spite of opposition from Mr Sandhu for the Respondent Defendant, we allowed Mr Sankaran to resile from his earlier stance and pursue the argument before this Court. Our reason was that counsel cannot concede a pure point of law.

In summary, Mr Sankaran's point is that the law has developed so that it is now possible not only for the tort of conversion to be committed in relation to a chattel, and therefore to currency, but also it is possible in law to convert a sum standing to a person's credit with a bank. This is on the basis that an account with a bank is now to be regarded as the equivalent of cash. We are invited so to find.

This is a bold argument for which he was unable to cite any authority. Indeed such a finding would be a radical departure from recognised common law principles. We

have been made aware of no legal basis or sound argument upon which we could accept this submission. We have no difficulty in rejecting it.

However, he was followed by Mr Cheek who made an even bolder submission. He invited the Court to extend the recognised categories of tort at common law to include breaches of trust. We are invited to hold therefore that the claim in the writ amounts to the tort of breach of trust for removing money from the bank account. On this basis we are invited to say that the judge was in error and to restore the Registrar's order granting leave. Mr Cheek also was unable to cite any authority in support of his proposition.

.It was an argument borne of desperation. It is sufficient to say that in relation to this submission also there is no possible basis of law upon which it would be open to this court to make such a finding. We decline to do so.

Conclusion

As can readily be seen from the contents of the writ, there is no claim founded on the tort of conversion or indeed any other tort. The claim is for the remedy of an account without specifying even the basis upon which an account is claimed. The arguments that a claim is made in tort must fail. In so far as the Registrar held that the application for leave came within Order 11 Rule 1 (h) he was in error. The judge rightly allowed the appeal on the point.

For these reasons we dismiss the appeal with the consequence that the Judge's Order setting aside the leave to issue the writ and the writ itself with the notice of writ is affirmed.

In these circumstances, the other issues raised in this appeal concerning service do not arise.

Costs

We make an Order Nisi that the appellant pay the costs of the Appeal and below to be taxed if not agreed. The order will become absolute at 10.30 this morning, unless application to vary be made before then.