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HCA 2686/2004

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO. 2686 OF 2004**

BETWEEN

**EMPEROR (CHINA CONCEPT) Plaintiff
INVESTMENTS LIMITED**

and

**SBI E-2 CAPITAL SECURITIES LIMITED 1st Defendant
RAYMOND JOOK 2nd Defendant**

Before : Deputy High Court Judge Saunders in Chambers
Date of Hearing : 9 January 2006
Date of Decision : 9 January 2006
Date of Reasons for Decision: 10 January 2006

REASONS FOR DECISION

A 1. I heard argument in this matter yesterday, when I dismissed the A
B appeal with reasons to follow. These I now give. B

C 2. On 24 November 2004, Mr Jook, who is employed by SBI, sent C
D an e-mail, using his employer's e-mail system, to a Mr Yeap, in Singapore. D
E Emperor learned of the e-mail, and considered that it was defamatory of E
F them. On 25 November 2004, Emperor issued a writ, with a general F
G endorsement, alleging defamation by SBI and Mr Jook. Unspecified G
H damages, including exemplary damages, and an injunction were sought by H
I way of relief. A statement of claim was filed on 9 March 2005. I

J 3. On 23 March 2005, SBI applied to stay the proceedings on the J
K grounds of *forum non conveniens*, asserting that the proper forum was K
L Singapore. An identical application was made by Mr Jook on the same day. L
M In support of the applications affidavits were filed by SBI and Mr Jook M
asserting that the only recipient of the e-mail was Mr Yeap in Singapore, and
that the e-mail was not sent to any other person or body in Hong Kong or
Macau.

N 4. In an affidavit in response, Vanessa Fan, managing director of N
O Emperor asserted: O

P "The e-mail was distributed in Hong Kong to (among others) P
Q China Everbright Securities (Hong Kong) Ltd, which faxed to the Q
Plaintiff the copy of the e-mail, a copy of which is exhibit "VF-1".

R Ms Fan did not, in that affidavit, condescend to particulars as to the R
S circumstances in which China Everbright, or any others, apparently received S
T a copy of the e-mail. Despite a request for particulars as to those T
U circumstances, none were supplied by Emperor. This matter came on for U
V

hearing before Yam J on 24 August 2005. The judge generously gave Emperor time to file an affidavit containing appropriate particulars. An affidavit has been filed, but sensibly Mr Houghton did not rely on it as it took the matter no further. Ms Fan asserted that she had no knowledge as to how the e-mail came into the possession of China Everbright. There is no explanation as to whether inquiries were made of China Everbright, nor why they have not made, or been asked to make, an affidavit setting out the circumstances in which they received the e-mail. There is thus no evidential basis whatsoever to suggest that either SBI or Mr Jook were responsible for any re-publication in Hong Kong or Macau or elsewhere.

5. In her first affidavit Ms Fan asserted to being told of rumours in the market to the same effect as the e-mail. The circumstances of the rumours were referred to in her second affidavit, but that took those circumstances no further. Having regard to the fact that the e-mail followed a publication in the China Morning Post of factual information referred to in the e-mail, it is not at all surprising that there were rumours in the market. However, again, there is no suggestion in the affidavit that those rumours were in any way attributable to either SBI or Mr Jook.

6. Emperor is a Hong Kong company. Its business and corporate headquarters are in Hong Kong. SBI is a Hong Kong company. Mr Jook lives in Hong Kong. The only evidence establishing publication of the e-mail is that it was published in Singapore.

7. The matter came before the Master on 15 July 2005, and an order was made staying the proceedings on the ground of *forum non conveniens*. From that decision Emperor now appeal.

8. The starting point for any consideration of *forum non conveniens* is the judgement of Lord Goff in *Spilada Maritime Corporation v Cansulex Ltd* [1987] 460 at 476-478, the principles in which have been applied in Hong Kong since *The Adhiguna Meranti* [1987] HKLR 904, CA. These are the principles that I apply.

9. The law is equally clear that the jurisdiction in which a tort has been committed is prima facie the natural forum for the determination of the dispute: *The Albaforth* [1984] 21 Ll. R 91, see also *Berezovsky v Forbes* [2000] 1 WLR 1004. It is right that the decisions in those cases were decisions in relation to issues of service out of the jurisdiction, and matter of discretion, whereas in the present case Emperor issue their writ as of right. I am satisfied that that is not a sufficient point of distinction.

10. *Spilada* and *The Albaforth* have been reviewed recently in *Berezovsky*. There, Lord Steyn drew attention to the general nature of the propositions in *Spilada*, and the practical issues considered in *The Albaforth*. Commenting that in *Berezovsky* counsel accepted that he could not object to a proposition that the place where in substance the tort arises is a weighty factor pointing to the jurisdiction being the appropriate one, the House of Lords upheld the principle of law that the jurisdiction in which a tort is committed is prima facie the natural forum for the determination of the dispute.

11. I am also assisted in this matter by the decision in *Rambas Marketing Co LLC v Chow* [2001] 3 HKC 250, where Mr Recorder Ma, (as he then was), set out the three essential stages of the inquiry in *forum non conveniens* cases. They are:

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1. Is it shown that Hong Kong is not only not the natural or appropriate forum for the trial, but that there is another available forum which is clearly or distinctly more appropriate than Hong Kong?
2. If the answer to 1 is yes, will a trial in this forum deprive the plaintiff of any legitimate personal or juridical advantages?
3. If the answer to 2 is yes, the court has to balance the advantages of 1 against the disadvantages of 2.

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12. It is equally well-established law that the publication of a defamation occurs at the place where the statement is seen or received by another person: *Gatley on Libel and Slander* 10th Ed § 6.1 and *Bata v Bata* [1948] WN 366. In relation to publication by input into a computer, it is the place where a person downloads the material which constitutes publication, not the place where the material was input into the computer: *Dow Jones & Co Inc v Gutnick* [2002] HCA 56.

13. *Berezovsky* is a case concerning defamation. It is not without significance in relation to the present case that the following passage appears in the headnote to the report of the decision of the Court of Appeal, ([1999] EMLR 278), which decision was upheld by the House of Lords:

“Where there was no complaint of substance that a tort had been committed in England, either because the publication had only an insignificant English circulation or because the plaintiff had no connection with, or reputation to protect in, this country, the plaintiff would fail to establish that English jurisdiction satisfied the *Spilada* test.”

14. There is no evidence of publication of the allegedly offending words in Hong Kong by either SBI or Mr Jook. The only evidence of publication is that there was a publication in Singapore. The assertions in the statement of claim that:

“4.1 The e-mail was published via the Internet to Mr Jook’s primary addresses in Hong Kong, Macau and elsewhere (“publication”).

4.2 The e-mail was also re-published to persons to whom the e-mail was on-forwarded (electronically or otherwise) by the primary addressees (“re-publication”).”

are quite without any evidential basis whatsoever, except in so far as the expression “elsewhere” necessarily includes Singapore. It is right that the burden is on the defendants as the applicant for a stay. They discharge that burden by pointing to the statement of claim and showing that the e-mail was published only in Singapore. As to re-publication there is no allegation of any act against them in Hong Kong.

15. Emperor have had every opportunity to substantiate publication in Hong Kong or elsewhere other than Singapore, or re-publication by either of the defendants, and have failed to do so. Singapore is consequently, prima facie, the natural forum for the determination of the dispute.

16. I am satisfied that the answer to the stage 1 question is: Yes.

17. Mr Houghton did not assert as to the deprivation of any particular personal or juridical advantage that Emperor may suffer as a result of the trial taking place in Singapore. The suggestion was vaguely made that there was nothing to show that the Singapore Court would have jurisdiction

A in the matter. I take judicial notice of the fact that the Singapore courts have
B jurisdiction in defamation and the discretion to issue injunctions. Mr
C Houghton suggested there was nothing to show that the courts in Singapore
D might exercise a discretion in favour of Emperor. It is sufficient that I am
E satisfied that the discretion exists. How the courts in Singapore exercise that
discretion is entirely a matter for them.

F 18. I am satisfied that the answer to the stage 2 questions is: No.

G 19. It is accordingly not necessary to proceed to the stage 3
H question.

I 20. I have however, viewed the matter broadly with a view to doing
J substantial justice for Emperor. Singapore being another available forum
K which prima facie is clearly more appropriate for the trial of the action, a stay
L will ordinarily be granted unless there are circumstances, by reason of which,
justice requires that a stay should nevertheless not be granted.

M 21. I have listened carefully to everything said on the part of
N Emperor, and I am satisfied that there are no special circumstances by reason
O of which justice requires that the trial should nevertheless take place in Hong
Kong.

P 22. The judgement of the Master was plainly correct. The appeal is
Q dismissed.

R 23. Mr Houghton did not oppose an application by both defendants
S for costs to be taxed on a party and party basis if not agreed. Costs are so
T ordered.

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John Saunders
Deputy High Court Judge

Mr. Anthony Houghton, instructed by Messrs Fred Kan & Co, for the Plaintiff

Mr. Lawrence Ng, instructed by Messrs Mallesons Stephen Jacques, for the 1st Defendant.

Mr. Allen Wong, of Messrs Hastings, for the 2nd Defendant.